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Practicing Law While Breaking the Confines of Implicit Bias in and Outside the Courtroom (CLE)

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UNCONSCIOUS BIAS:
WHAT IS IT?
WHAT CAN WE DO
ABOUT IT?

MAY 17, 2014:
PRESENTED BY THE ABA YLD
PUBLIC EDUCATION
COMMITTEE

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Psychologists at Harvard, the University of Virginia and the University of Washington created "Project Implicit" to develop Hidden Bias Tests — called Implicit Association Tests, or IATs, in the academic world — to measure unconscious bias.

Unconscious beliefs and attitudes have been found to be associated with language and certain behaviors such as eye contact, blinking rates and smiles.
In 1995 social psychologists Anthony Greenwald and Mahzarin Banaji proposed the idea that social behavior may not always be under a person’s conscious control. They argued that much of our behavior is driven by stereotypes that operate automatically and therefore, unconsciously. In 1997 they developed the Implicit Association Test (IAT), a computer-based test that measures people’s unconscious attitudes. Since then over 200 studies have been published using the IAT. Overall, the IAT has been shown to be both reliable and valid at detecting an individual’s level of implicit bias.
A preference, of which we are not aware, that influences our common and everyday decisions and impressions typically resulting in subtle, unintentional and unconscious discrimination.

An implicit bias is a positive or negative mental attitude towards a person, thing, or group that a person holds at an unconscious level. In contrast, an explicit bias is an attitude that somebody is consciously aware of having. Research has found that our implicit and explicit biases often diverge. For example, a person may consciously express a neutral or positive opinion about a social group that they unconsciously hold a negative opinion about.
“The fact is everyone has unconscious bias. It influences common, everyday decisions. It’s how we’re wired as human beings – we favor people like ourselves, who have similar interests, life experiences, etc. The downside to this reality is simple – by favoring others, we’re giving advantage to some and unintentionally disfavoring others.”

“Bias is not about being good or bad. It’s about being human.”
- Verna A. Myers, Esq. *Moving Diversity Forward* (ABA 2011)

“Even the most well-meaning person unwittingly allows unconscious thoughts and feelings to influence seemingly objective decisions.”
Unconscious Bias: What Does It Have to Do With Practicing Law?

*Understanding unconscious bias is the new paradigm in diversity and inclusion efforts!*

• In the 21st century, it is actually “bias for” or “preference for” people who are like us (affinity bias) causing more disparities in opportunities than overt discrimination.


• Explains why discrimination persists, even though research shows that people oppose discrimination.

• Explains how people can genuinely believe in equality, while simultaneously engaging in behavior that favors the dominant group.
Unconscious Bias: What Does It Have to Do With Practicing Law?

In its August 1, 2013, decision (decision in your materials) in *Washington v. Saintcalle*, the Court asserted that the *Batson* procedures for challenging race discrimination in jury selection were not “robust enough,” since “a growing body of evidence shows that racial discrimination remains rampant in jury selection.”

The *Batson* procedures come from *Batson v. Kentucky*, a U.S. Supreme Court case that established what evidence is required for a trial judge to be able to draw an inference that discrimination has occurred in jury selection procedures.
UNCONSCIOUS BIAS:  
WHAT DOES IT HAVE TO DO WITH DIVERSITY?

• It is the subtle and often unconscious bias that permeates workplaces today, as compared to the more traditional forms of discrimination that involve overt and explicit discrimination and prejudice.

• Even when law firms improve their hiring of a more diverse lawyer workforce, they continue to struggle with retention because the overall levels of inclusion at law firms have not caught up with law firms’ commitment to diversity.

• The biggest challenge to the success of diversity programs is unconscious bias which is hindering inclusion efforts.

_Minority Corporate Counsel Association (“MCCA”)  Sustaining Pathways to Diversity: The Next Steps in Understanding and Increasing Diversity & Inclusion in Large Law Firms (2009)_
MLB umpires called more strikes favoring pitchers in their same racial/ethnic group (i.e. hispanic umpire favored hispanic pitcher, white umpire favored white pitcher…)

However, since most MLB home plate umpires were white (89%), this ultimately gave white pitchers (70%) higher performance stats.

Minority pitchers adjusted their pitches when facing umpires of a different race by throwing safer pitches that were easier for batters to hit thereby reduced the pitcher’s performance.
Your biases can be based on a number factors.

We are not just talking about race!
1. Develop guidelines that offer concrete strategies on how to correct for implicit bias.
2. Institute formal protocols or develop decision-support tools for guidance.
3. Conduct an organizational overview.
4. Implement peer-review.
5. Follow equal-opportunity and affirmative action (EOAA) hiring practices.
6. Bar associations can implement the tools provided by the ABA to educate others about implicit bias.
WHAT CAN THE INDIVIDUAL DO?

1. Allow for more time on cases in which implicit bias may be a concern.
   2. Clear your mind and focus on the task at hand.
3. Seek greater contact with counter-stereotypic role models.
   4. Practice making counter-stereotypic associations.
5. Educate yourself and others.
   6. Use the ABA’s toolbox.
The ABA Section of Litigation has developed a Toolbox for use in exploring implicit bias and approaches to “debiasing.” Some of the materials are the Section’s own; others are taken from additional sources.

The Toolbox is designed to be used for group presentation. It offers introductory materials for the presenter, a quick reading list for possible use pre-session, a PowerPoint presentation with a set of PowerPoint instructions and the Facilitator Instruction Manual for the facilitator, and post-session evaluation materials. For some parts of the program, video materials are offered. The self-guided presentation and the Toolbox as a whole are works in progress, and we welcome all comments, suggestions, and contributions to enrich the materials and make them as widely useful as possible.
IMPLICIT BIAS: INSIDE & OUTSIDE THE COURTROOM
MAY 17, 2014
PRESENTED BY THE ABA YLD PUBLIC EDUCATION COMMITTEE
What Lawyers Can Learn from Baseball

Lawyers can learn a lot from baseball—not only how to select and recruit undervalued players, as highlighted in the recent Hollywood blockbuster movie Moneyball, but also how pervasive unconscious bias arises in the workplace.

In modern times, it is actually “bias for” or “preference for” people causing more disparities in opportunities than overt bias and discrimination. This type of bias—called “affinity bias”—was the subject of a recent study of Major League Baseball (MLB) home plate umpires.

An economist at Southern Methodist University and other researchers analyzed 3.5 million pitches from 2004 to 2008 and found MLB umpires called slightly more strikes favoring pitchers in their same racial/ethnic group. This affinity bias was apparent not just when the umpire and pitcher were white but also when the umpire and pitcher were non-white and of the same racial/ethnic group, i.e. Hispanic umpire and Hispanic pitcher. However, since most MLB home plate umpires are white (89%), this ultimately gave white pitchers (70%) higher performance statistics overall.

The study also found minority pitchers were further disadvantaged because they adjusted their pitches when facing an umpire of a different race. They threw safer pitches, which were easier for batters to hit and reduced the pitchers’ performance.

“As in many other fields, racial/ethnic preferences work in all directions—most people give preference to members of their own group. In MLB, as in so many other fields of endeavor, power belongs disproportionately to members of the majority—White—group,” said the study authors.

Notably, the baseball research determined this umpire racial bias is mostly unconscious. The effect of affinity bias was eliminated when umpires were working in ballparks where their calls were monitored by QuestTec, a computer/camera pitch-monitoring system (now used in all ballparks, but during those four years it was used in only one-third of ballparks). Umpires similarly adjusted their calls in non-QuestTec parks when they knew they would face scrutiny, such as in high-profile moments and high-attendance games.

Affinity bias creates inequities not only in baseball but everywhere, including the legal workplace.

Bias & The Legal Profession

The fact is everyone has unconscious bias. It influences common, everyday decisions. It’s how we’re wired as human beings—we favor people like ourselves, who have similar interests, life experiences, etc. The downside to this reality is simple—by favoring others, we’re giving advantage to some and unintentionally disfavoring others.

Similar to baseball umpires, senior lawyers need to be much more aware of the impact of their decisions and actions, especially when sharing opportunities. Leaders, managers, and supervisors should ask themselves: to whom do I give those plum assignments, allow to first or second chair, and put on that pitch team (no pun intended)?

It is those opportunities that will help an attorney develop skills and build networks—those intangibles that are absolutely essential for success and, ultimately, advancement.

Forward-thinking leaders of law firms and legal departments will glean insight from this baseball research and become aware of their own unconscious preferences. They’ll also build accountability systems to monitor who is benefitting from formal and informal opportunities and have the courage and integrity to ask “who is being left out?” in order to give all attorneys the opportunities to become “A-players.”

Additional Resources:

- To test your own unconscious bias, take a free, anonymous online Implicit Association Test by the Project Implicit, a consortium of researchers led by Harvard University available at [implicit.harvard.edu/implicit/](http://implicit.harvard.edu/implicit/).

Considerable attention has been given to the Implicit Association Test (IAT), which finds that most people have an implicit and unconscious bias against members of traditionally disadvantaged groups. Implicit bias poses a special challenge for antidiscrimination law because it suggests the possibility that people are treating others differently even when they are unaware that they are doing so. Some aspects of current law operate, whether intentionally or not, as controls on implicit bias; it is possible to imagine other efforts in that vein. An underlying suggestion is that implicit bias might be controlled through a general strategy of “debiasing through law.”

INTRODUCTION

Consider two pairs of problems:

1A. A regulatory agency is deciding whether to impose new restrictions on cloning mammals for use as food. Most people within the agency believe that the issue is an exceedingly difficult one, but in the end they support the restrictions on the basis of a study suggesting that cloned mammals are likely to prove unhealthy for human consumption. The study turns out to be based on palpable errors.

1B. A regulatory agency is deciding whether to impose new restrictions on cloning mammals for use as food. Most people within the agency believe that the issue is an exceedingly difficult one, but in the end they support the restrictions on the basis of a “gut feeling” that cloned mammals are likely to be unhealthy to eat. It turns out that the “gut feeling,” spurred
by a widely publicized event appearing to establish serious risk, is impossible to support by reference to evidence.

2A. An employer is deciding whether to promote Jones or Smith to a supervisory position at its firm. Jones is white; Smith is African-American. The employer thinks that both employees are excellent, but it chooses Jones on the ground that employees and customers will be “more comfortable” with a white employee in the supervisory position.

2B. An employer is deciding whether to promote Jones or Smith to a supervisory position at its firm. Jones is white; Smith is African-American. The employer thinks that both employees are excellent, but it chooses Jones on the basis of a “gut feeling” that Jones would be better for the job. The employer is not able to explain the basis for this gut feeling; it simply thinks that “Jones is a better fit.” The employer did not consciously think about racial issues in making this decision; but, in fact, Smith would have been chosen if both candidates had been white.

In case 1A, the agency is violating standard principles of administrative law. Its decision lacks a “rational connection between facts and judgment” and, thus, is most unlikely to survive judicial review. In case 1B, the agency is in at least equal difficulty; administrative choices must receive support from relevant scientific evidence.

The second pair of cases is analytically parallel. Case 2A involves a conscious and deliberative judgment that clearly runs afoul of antidiscrimination law. Case 2B might well seem equally troublesome. But in fact it is not at all clear that Smith would be able to prevail in case 2B, at least if there is no general pattern of race-based decisionmaking by the employer. Smith will face a burden of proof that will be hard to surmount on the facts as stated. And note that these conclusions apply even if the employer is (parallel to cases 1A and 1B) a government rather than a private actor; the administrative law and antidiscrimination law regimes treat “gut feelings” in quite different ways.

Case 2B is far from unrealistic in today’s world, as the present Symposium makes clear. A growing body of evidence, summarized by Anthony Greenwald and Linda Hamilton Krieger, suggests that the real world is probably full of such cases of “implicit,” or unconscious, bias.

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This is likely to be true not only with respect to race, but also with respect to many other traits.6

Much evidence of these forms of implicit bias comes from the Implicit Association Test (IAT), which has been taken by large and diverse populations on the Internet and elsewhere.7 The IAT asks individuals to perform the seemingly straightforward task of categorizing a series of words or pictures into groups. Two of the groups are racial or other categories, such as “black” and “white,” and two of the groups are the categories “pleasant” and “unpleasant.” In the version of the IAT designed to test for implicit racial bias, respondents are 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); in a separate round of the test, respondents are 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 African-Americans is defined as faster responses when the “black” and “unpleasant” categories are paired than when the “black” and “pleasant” categories are paired. The IAT is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with white faces and names than with African-American faces and names—and that the same pattern will be found for other traditionally disadvantaged groups.

In fact, implicit bias as measured by the IAT has proven to be extremely widespread. Most people tend to prefer white to African-American, young to old, and heterosexual to gay.8 Strikingly, members of traditionally disadvantaged groups tend to show the same set of preferences. The only major exception is that African-Americans themselves are divided in their preferences; about equal proportions show an implicit preference for African-Americans and whites.9 Note, however, that unlike whites, African-Americans taken as a whole do not show an implicit preference for members of their own group.10

It might not be so disturbing to find implicit bias in experimental settings if the results did not predict actual behavior, and in fact the relation-

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6. See id. at 957-58.
8. See Greenwald & Krieger, supra note 5, at 955-58; Greenwald, McGhee & Schwartz, supra note 7, at 1474; Nosek, Banaji & Greenwald, supra note 7, at 105.
10. See id. at 956, 959-60.
ship between IAT scores and behavior remains an active area of research.\textsuperscript{11} But we know enough to know that some of the time, those who demonstrate implicit bias also manifest this bias in various forms of actual behavior. For example, there is strong evidence that scores on the IAT and similar tests are correlated with third parties’ ratings of the degree of general friendliness individuals show to members of another race.\textsuperscript{12} More particularly, “larger IAT effect scores predicted greater speaking time, more smiling, [and] more extemporaneous social comments” in interactions with whites as compared to African-Americans.\textsuperscript{13} And it is reasonable to speculate that such uneasy interactions are associated with biased behavior. In the employment context in particular, even informal differences in treatment may have significant effects on employment outcomes, particularly in today’s fluid workplaces.\textsuperscript{14} If this is so, then the importance to legal policy is clear. If people are treated differently, and worse, because of their race or another protected trait, then the principle of antidiscrimination has been violated, even if the source of the differential treatment is implicit rather than conscious bias.\textsuperscript{15}

It should not be controversial to suggest that in formulating and interpreting legal rules, legislatures and courts should pay close attention to the best available evidence about people’s actual behavior—an approach this Symposium terms “behavioral realism.”\textsuperscript{16} Indeed, the influence of economic analysis of law stems largely from its careful emphasis on the behavioral effects of legal rules. The need to attend to good evidence, applied to the domain of civil rights, animates the work in this Symposium. In much the same spirit, work in behavioral law and economics has argued in favor of incorporating psychological insights about people’s actual behav-


\textsuperscript{13} McConnell & Leibold, supra note 12, at 439.


ior across a range of domains. We believe that there are productive links among all behavioral approaches to law, and one of the goals of our discussion below is to call attention to some of those links. We devote special attention to the promise of “debiasing” actors through legal strategies that are designed to counteract biases of various sorts across a variety of domains.

Our discussion below comes in three parts. Part I explores two systems of cognitive operations—roughly, “intuitive” and “deliberative”—with the suggestion that the distinction between the two helps to illuminate legal responses to a wide range of behavioral problems, including those raised by the IAT. Part II investigates the possibility of using the law to “debias” people in order to reduce implicit bias; we develop several illustrations of such debiasing, as well as relating the general approach of debiasing both to work that follows in this Symposium and to work elsewhere in the legal literature. Part III investigates some of the normative issues that are raised when regulators attempt to respond, through “debiasing” or otherwise, to implicit bias.

I

System I and System II

Implicit bias of the sort manifested on the IAT has not generally been grouped with the “heuristics and biases” uncovered by research in cognitive psychology and behavioral economics. Thus far, the reception within law of the two areas of research has been largely independent. But we believe that legal responses to implicit bias are illuminatingly analyzed in terms that bring such bias in direct contact with cognitive psychology and behavioral economics. Most important, implicit bias—like many of the heuristics and biases emphasized elsewhere—tends to have an automatic character, in a way that bears importantly on its relationship to legal prohibitions.

In cognitive psychology and behavioral economics, much attention has been devoted to heuristics, which are mental shortcuts or rules of thumb that function well in many settings but lead to systematic errors in


others. Consider, for instance, the well-known study involving people’s judgments about a thirty-one-year-old woman, Linda, who was concerned with issues of social justice and discrimination in college. People tend to say that Linda was more likely to be a “feminist bank teller” than to be a “bank teller.” This judgment is patently illogical, for a superset cannot be smaller than a set within it. The source of the mistake is the representativeness heuristic, by which events are seen to be more likely if they “look like” certain causes. In the case of Linda, the use of the representativeness heuristic leads to a mistake of elementary logic—the conclusion that characteristics X and Y are more likely to be present than characteristic X.

Research in cognitive psychology emphasizes that heuristics of this kind frequently work through a process of “attribute substitution,” in which people answer a hard question by substituting an easier one. For instance, people might resolve a question of probability not by investigating statistics, but by asking whether a relevant incident comes easily to mind. The same process is familiar in many contexts. Confronted with a difficult problem in constitutional law, people might respond by asking about the views of trusted specialists—as, for example, through the use of (say) the “Justice Scalia heuristic,” by which some people might answer the difficult problem by following the views of Justice Scalia.

Often, of course, people deliberately choose to use a heuristic, believing that it will enable them to reach accurate results. But some of the most important heuristics have been connected to “dual process” approaches, which have recently received considerable attention in the psychology literature. According to such approaches, people employ two cognitive systems. System I is rapid, intuitive, and error-prone; System II is more deliberative, calculative, slower, and often more likely to be error-free. Much heuristic-based thinking is rooted in System I, but it may be overridden, under certain conditions, by System II. Thus, for example, some people might make a rapid, intuitive judgment that a large German shepherd is likely to be vicious, but this judgment might be overcome after the dog’s owner assures them that the dog is actually quite friendly. Most peo-

19. For general discussion of heuristics, see Daniel Kahneman & Shane Frederick, Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in Heuristics and Biases, supra note 18, at 49-50.
20. See id. at 62 (discussing the study).
21. See id. at 49-50.
22. See id. at 53.
25. A qualification is that a bad deliberative process might, of course, produce more errors than rapid intuitions.
26. See Kahneman & Frederick, supra note 19, at 51.
ple would be reluctant to drink from a glass recently occupied by a cockroach; but it is possible (though far from certain) that they would be willing to do so after considering a reliable assurance that, because the cockroach had been sterilized by heat, the glass was not contaminated. In a context of greater relevance to law, heuristic-driven fears about eating cloned animals or genetically modified food might be overcome on the basis of careful studies suggesting that the risk of harm is quite low. Judgments about potentially harmful events are often founded in System I, and System II sometimes supplies a corrective. In other cases, however, responses within the System I domain itself may supply correctives, as discussed at some length in Parts II and III below.

We believe that the problem of implicit bias is best understood in light of existing analyses of System I processes. Implicit bias is largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly, in the relevant tests, that people have no time to deliberate. It is for this reason that people are often surprised to find that they show implicit bias. Indeed, many people say in good faith that they are fully committed to an antidiscrimination principle with respect to the very trait against which they show a bias. When people exhibit bias toward African-Americans, System II may of course be involved, as in case 2A above, but in a great many cases System I is the culprit. In case 2B above, the employer has no conscious awareness of the role race played in its decision to hire Jones over Smith; in fact, the employer might regard its decision as a “mistake,” either factually or morally, if it were aware of the role race played.

In responding to implicit bias understood in this way, the legal system could emphasize System II; perhaps the law could produce or encourage a System II override of the System I impulse. But it is also possible that interventions within the domain of System I itself would be more efficacious—although also more normatively charged. We explore these possibilities in the next two Parts.

28. See id.
30. See, e.g., Greenwald, McGhee & Schwartz, supra note 7, at 1474-75.
II

ANTIDISCRIMINATION LAW AND “DEBIASING”

From the standpoint of a legal system that seeks to forbid differential treatment based on race and other protected traits, implicit bias presents obvious difficulties. In many cases entirely unaware of their bias and how it shapes their behavior, people will frequently fail to override their System I inclinations. Ordinary antidiscrimination law will often face grave difficulties in ferreting out implicit bias even when this bias produces unequal treatment.32

Of course, antidiscrimination law has long forbidden various forms of differential treatment on the basis of race and other protected traits. If, for example, a state official treats someone worse because of race, there might well be a violation of the Constitution as well as antidiscrimination statutes. Some of the hardest cases present problems of proof: if there is no “smoking gun,” how can bias be established? There are also vexing conceptual questions—explored below by Richard Banks, Jennifer Eberhardt, and Lee Ross.33 What, exactly, does the category of unlawful “discrimination” include?34 However the hardest questions are resolved, it seems clear that when System I is producing differential treatment, the legal system will often encounter unusually serious difficulties.

The parallels described above between implicit bias and the heuristics and biases emphasized by cognitive psychology and behavioral economics help to illuminate the primary approaches the law can adopt in response to unequal treatment stemming from implicit bias. In the domain of heuristics and biases, the law has now-familiar methods with which to respond.35 In the context of “hindsight bias,” for example, the law protects against error by broadly restricting adjudicators’ ability to reconsider decisions from the

32. See sources cited infra note 45.

33. See Banks, Eberhardt & Ross, supra note 15, at 1178-89.


Likewise, in the area of consumer behavior, many people believe that consumers show unrealistic optimism in evaluating potential product dangers, and the law may respond by imposing a range of restrictions on their choices. These approaches attempt to insulate outcomes from the problems created by heuristics and biases, which themselves are taken as a given. Such insulating strategies are readily imaginable in the antidiscrimination law domain, as explored in Part II.A below.

Social scientists have also focused substantial attention on the possibility of debiasing in response to heuristics and biases. The law might engage in such debiasing as well, seeking to reduce people’s level of bias rather than to insulate outcomes from its effects. If, for instance, consumers suffer from unrealistic optimism, then regulators might respond not by banning certain transactions or otherwise restricting consumer choice but instead by working directly on the underlying mistake. They might, for example, enlist the availability heuristic, according to which people estimate the likelihood of events based on how easily they can imagine or recall examples of such events. Drawing on availability, regulators might then offer concrete examples of harm in order to help consumers understand risks more accurately. In the domain of smoking, an emphasis on specific instances of harm does appear to increase people’s estimates of the likelihood of harm. Attention to strategies for what we have elsewhere termed “debiasing through law” can help both to understand and to improve the legal system. Note that many of these strategies—including the example just given of harnessing the availability heuristic—reflect System I rather than System II responses to System I problems. Debiasing strategies may also be applied in the domain of antidiscrimination law. We offer a series of illustrations—as well as relating the general approach of debiasing to work in this Symposium and elsewhere in the legal literature—in Parts II.B. and II.C below.

A. Insulation

When people show bias on the basis of race or another protected trait, the most conventional legal response is to attempt to insulate outcomes

37. See, e.g., Jolls & Sunstein, supra note 35, at 207-08.
38. The seminal work is Baruch Fischhoff, Debiasing, in Judgment Under Uncertainty, supra note 18, at 422.
39. See Jolls & Sunstein, supra note 35, at 200-01.
40. See id. at 209-16.
from the effects of such bias. Because, for instance, certain forms of employment behavior are unlawful under Title VII of the Civil Rights Act of 1964, people will face monetary and other liability for engaging in such behavior. The desire to avoid such liability should, on the traditional view, deter the prohibited behavior. The point is particularly obvious with respect to consciously biased behavior of the sort at issue in case 2A above. There is no question that such behavior is squarely prohibited by antidiscrimination law, and—because the behavior is conscious—actors can be expected to respond to legal incentives not to engage in it, at least if people care enough about complying with the law (or at least if the penalties are stiff enough for those who are deterred only by actual sanctions). With respect to conscious bias, existing law attempts not to “debias” people—by reducing their conscious bias on the basis of race or another protected trait (although this may be a longer-term effect of the law)—but to insulate outcomes from the effects of such bias.

A central problem in today’s world, however, is the possibility that many people act on the basis of implicit bias. In response, legal rules might seek to reduce the likelihood that implicit bias will produce differential outcomes; but it would be quite difficult to conclude that current antidiscrimination law adequately achieves this goal. As Linda Hamilton

44. Linda Hamilton Krieger nicely summarizes this effect of existing antidiscrimination law: [On the traditional view], if an employee’s protected group status is playing a role in an employer’s decisionmaking process, the employer will be aware of that role . . . . Equipped with conscious self-awareness, well-intentioned employers become capable of complying with the law’s proscriptive injunction not to discriminate. They will monitor their decisionmaking processes and prevent prohibited factors from affecting their judgments. Krieger, supra note 4, at 1167.
45. The scholarly literature critiquing existing antidiscrimination law, both constitutional and statutory, for its general failure to address the problem of implicit bias is voluminous. See, e.g., Samuel R. Bagenstos, The Structural Turn and the Limits of Antidiscrimination Law, 94 Calif. L. Rev. 1, 3 (2006) (“Unconscious bias, interacting with today’s ‘boundaryless workplace,’ generates inequalities that our current antidiscrimination law is not well equipped to solve.”) (citation omitted); Barbara J. Flagg, Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking, 104 Yale L.J. 2009, 2018-30 (1995) (concluding that existing 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); Barbara J. Flagg, “Was Blind, But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 958 (1993) (stating that existing Equal Protection Clause doctrine “perfectly reflects” whites’ failure to “scrutinize the whiteness of facially neutral norms”) [hereinafter Flagg, White Race Consciousness]; Green, supra note 14, at 111 (“[E]xisting Title VII doctrine . . . is ill-equipped to address the forms of discrimination that derive from organizational structure and institutional practice in the modern workplace.”); Krieger, supra note 4, at 1164 (arguing that the way in which 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); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 323 (1987) (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”); R.A.
Krieger and Susan Fiske illustrate in their contribution to this Symposium, recent trends in antidiscrimination law seem to leave much implicitly biased behavior unpolicied in the employment context.46 Krieger and Fiske suggest, for instance, that most courts have now made explicit that any facially neutral basis for an employer’s decision will, if honestly although mistakenly or foolishly held, suffice to defeat a claim of intentional discrimination under Title VII.47 As Krieger and Fiske powerfully demonstrate, an “honest” concern about an employee may very often be both “honest” and (unbeknownst to the decisionmaker) entirely a product of the employee’s status as an African-American worker.48

It is important not to overstate the point. In discrete corners of existing antidiscrimination law and policy, it is possible to find promising attempts to insulate outcomes from the effects of implicit bias. Consider, for example, the affirmative action plans seen at all levels of government.49 Such plans can illuminatingly be understood—in light of the analysis of Jerry Kang and Mahzarin Banaji in this Symposium50—as attempts by the state to correct for implicit bias, and thus to break the connection between such bias and outcomes.51 If assessments of merit are inappropriately


47. See id. at 1034-36.
48. See id. at 1036-38.
51. Ann McGinley and Michael Selmi have also discussed the problem of implicit bias and noted that affirmative action is a way to ensure that employment opportunities of protected groups do not suffer as a result of such bias. See Ann C. McGinley, The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision
clouded by implicit bias, then a preference for those harmed by the biased assessments can help prevent the implicit bias from being translated into final outcomes. If implicit bias typically leads an African-American employee to be incorrectly evaluated as worse than a white counterpart, an appropriately tailored affirmative action plan can counteract this mistake. And, likewise, antidiscrimination law’s framework for assessing the legality of affirmative action plans can be understood as enabling employers, educational institutions, and other organizations to use such plans to break the connection between implicit bias and outcomes.

B. “Direct Debiasing”

In addition to the “insulating” strategies discussed in Part II.A, it is often possible for government to target implicit bias more directly. If decisionmakers, wholly without their intent and indeed to their great chagrin, are acting on the basis of race or another protected trait, the law may be able to help them to correct their unintended actions. Debiasing solutions reflect this approach, and we now turn to those solutions. Below we develop several illustrations of debiasing through antidiscrimination law, as well as relating the general approach of debiasing through this body of law to work by others in this Symposium and elsewhere in the legal literature.

In the most obvious form of debiasing, antidiscrimination law or policy either does or could act directly to reduce the level of people’s implicit bias. Consider four examples of such “direct debiasing.”

1. Prohibiting Consciously Biased Decisionmaking

The central focus of existing antidiscrimination law is on prohibiting consciously biased decisionmaking—a focus that has produced intense criticism from those interested in implicit bias. Thus, it is easy to overlook the way in which existing antidiscrimination law, despite its focus on conscious bias, nonetheless has some effect on the level of implicit bias. A key causal path here is that the prohibition on consciously biased decisionmaking in workplaces, educational institutions, and membership organizations naturally tends to increase population diversity in these entities, and population diversity in turn has a significant effect on the level of implicit bias. Put differently, while the prohibition on consciously bi-

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52. Kang and Banaji, however, ultimately limit their discussion to specific forms of (what is conventionally regarded as) affirmative action. See Kang & Banaji, supra note 15, at 1067.
53. See, e.g., Johnson, 480 U.S. at 626-42 (framework under Title VII); Grutter, 539 U.S. at 322-43 (framework under the Constitution).
54. See sources cited supra note 45.
55. See Jolls, supra note 45.
ased behavior prompts a System II response to the System II phenomenon of conscious bias, it also yields a System I response to the System I phenomenon of implicit bias.

A significant body of social science evidence supports the conclusion that the presence of population diversity in an environment tends to reduce the level of implicit bias. In one particularly striking study, the simple fact of administration of an in-person IAT by an African-American rather than a white experimenter significantly reduced the measured level of implicit bias. Put differently, people’s speed in characterizing black-unpleasant and white-pleasant pairs was closer to their speed in characterizing black-pleasant and white-unpleasant pairs when the African-American experimenter was present. Another study found that white test subjects paired with an African-American partner exhibited less implicit bias as measured by the IAT than white test subjects paired with a white partner; the same study found that within pairs involving an African-American partner, participants who were told they were to evaluate the African-American partner exhibited more implicit racial bias on the IAT than participants who were told they would be evaluated by the African-American partner.

The effects of population diversity in the environment on the level of implicit bias may stem from the availability heuristic discussed in Part I; people often tend to assess probabilities based on whether a relevant incidence comes easily to mind. The effects of diversity may also reflect a more general role for the “affect heuristic,” by which decisions are formed by reference to rapid, intuitive, affective judgments.

It follows from these findings that simply by increasing the level of population diversity in workplaces, educational institutions, and other organizations, existing antidiscrimination law tends to reduce the level of implicit bias in these environments. It bears emphasis in this connection that antidiscrimination law’s clear rejection of explicit quotas counters the risk that this law might paradoxically increase implicit bias by means of


57. See Lowery, Hardin & Sinclair, supra note 56, at 844-45, 846-47.

58. See Richeson & Ambady, supra note 56, at 181, table 1.


60. See Jolls, supra note 45.
overly heavy-handed diversity initiatives. A closely related point is important: existing antidiscrimination law’s effects on implicit bias through increased population diversity may be greatest in cases in which people’s initial levels of implicit bias represent errors in judgment as opposed to statistically accurate perceptions. As discussed in Part I above, implicit bias, like the heuristics and biases emphasized in cognitive psychology and behavioral economics, may often reflect a genuine factual error; but of course this may not always be the case. If implicit bias corresponds to statistically accurate perceptions about the group in question, then the effects of population diversity may be muted by conflicting signals corresponding to the statistical reality.

2. Prohibiting Hostile Environments

Existing antidiscrimination law’s prohibition on “hostile environments” is also likely to reduce the level of implicit bias in workplaces, educational institutions, and other organizations, here through its effect on the physical and sensory environment. Again, what is generally viewed as a System II response to a System II problem is also a System I response to a System I problem.

Both evidence and common sense suggest that the presence of stereotypic images of a particular group tends to increase implicit bias. A particularly striking study, outside the direct context of measures of implicit bias, found that 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 interview had meaningful recall of the content of the interview. Mechanisms such as the availability and affect heuristics may again be in play.

61. See, e.g., 42 U.S.C. § 2000e-2(j) (2000) (“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 the ways in which some types of explicit preferential treatment of particular groups can increase bias against these groups, see Linda Hamilton Krieger, Civil Rights Perestroika: Intergroup Relations after Affirmative Action, 86 Calif. L. Rev. 1251, 1263-70 (1998).

62. See Jolls, supra note 45.


65. See supra note 59 and accompanying text.
Under current antidiscrimination law, hostile environments featuring negative or demeaning depictions of protected groups (including, but not limited to, depictions in posters and other visual media) are generally unlawful in workplaces, educational institutions, and membership organizations. In this way, current law governing sexual and racial harassment almost certainly produces some effect on the level of implicit bias in these institutions. Compared to an environment in which such demeaning depictions were not unlawful, the current framework is likely to have a debiasing effect.

The prohibition on hostile environments may be felt throughout the organization, not merely by those directly targeted by the behavior. The law does not simply protect an immediate victim or set of victims from behavior deemed to be unlawful; instead the law tends to shape and affect the level of implicit bias of all those present. Of course, the law does not target people’s beliefs as such; the point is that in proscribing certain conduct it undoubtedly has an effect on the level of implicit bias.

3. The Requirements for Employers Seeking to Avoid Vicarious Liability

A third example of a direct debiasing mechanism involves potential reforms of the existing doctrine governing employers’ vicarious liability for Title VII violations. At present that doctrine allows employers to defend against such liability on the basis of actions such as policy manuals or training videos disseminated in the workplace.

Just as there are biasing effects (described just above) from negative imagery in the physical environment, there is strong evidence of debiasing effects from favorable portraiture or imagery—for instance, photographs of Tiger Woods—in the physical environment. People show significantly less bias on the IAT directly after being exposed to Woods’s picture—and also when tested again twenty-four hours after exposure to the picture. Thus, in the real world, if portraiture in the workplace or elsewhere consistently reflects positive exemplars, it is likely—though certainly not guaran-

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67. See Jolls, supra note 45.

68. See id.


71. See id.
teed\textsuperscript{72}—that those present will show less implicit bias, with likely mechanisms once more being the availability and affect heuristics.\textsuperscript{73}

Note that in contrast to the experimental setting, positive exemplars in the workplace or elsewhere would be a recurrent rather than fleeting aspect of the individual’s environment. And, parallel to the point above, the manner in which the display of positive exemplars occurs is important; if it is too heavy-handed, implicit bias may not decrease at all (and could even increase).\textsuperscript{74}

In light of the available evidence, it may make a good deal of sense to treat an employer’s positive effort to portray diversity as an express factor weighing against vicarious employer liability under Title VII. This approach would be parallel to the way that, under current Title VII doctrine, employers regularly defend against such liability on the basis of actions such as manuals or training videos disseminated in the workplace.\textsuperscript{75} Our basic suggestion is that the existing Title VII approach to employers’ vicarious liability might be extended beyond the discrete mechanisms (manuals, handbooks, videos, internet instructional programs) contemplated by present law—at least if doing so is consistent with the First Amendment (a question beyond the scope of the present discussion). While many of the mechanisms contemplated by present law governing vicarious liability are distinctly System II in character, the evidence suggests the important role of System I mechanisms in reducing implicit bias. The display of positive exemplars in the workplace may do far more to reduce implicit bias than yet another mandatory training session on workplace diversity.

4. Affirmative Action Policy

Existing affirmative action policy can also be understood as a form of direct debiasing. We have already noted that at all levels of government, officials have chosen to adopt affirmative action plans.\textsuperscript{76} Because population diversity helps to reduce implicit bias through mechanisms including availability and affect (as described above), these government affirmative action plans may operate as a form of direct debiasing.\textsuperscript{77}

To be sure, government affirmative action may fail to debias people—and might even increase implicit bias depending on a given plan’s specific contours. Krieger, while noting how affirmative action may reduce bias,\textsuperscript{78}

\textsuperscript{72} See Greenwald & Krieger, \textit{supra} note 5, at 964 (raising caution about longer term effects of positive imagery).

\textsuperscript{73} See \textit{supra} note 59 and accompanying text.

\textsuperscript{74} See \textit{supra} note 61 and accompanying text.

\textsuperscript{75} See sources cited \textit{supra} note 69.

\textsuperscript{76} See \textit{supra} note 49 and accompanying text.


\textsuperscript{78} See Krieger, \textit{supra} note 61, at 1275-76.
has explored the possible negative effects of affirmative action on the level of bias with reference to the existing social science literature, and the question of whether and when such negative effects will occur is obviously a crucial one. From the standpoint of reducing implicit bias, the good news is that the empirical studies discussed above highlight the potential of increased diversity to reduce implicit bias, while the evidence discussed by Krieger provides many insights on the specific types of affirmative action plans that do and do not appear to have negative effects on the level of bias.

Our analysis of affirmative action here differs from the insulating analysis of affirmative action discussed in Part II.A above. In the conception here, government affirmative action does not act to insulate outcomes from the effects of implicit bias but, instead, acts directly to reduce such bias. Of course, a government affirmative action plan may have both types of effects simultaneously.

* * *

Let us offer a concluding comment about all of the methods of direct debiasing explored in this section. Uniting all of these methods is the general idea that government does or might act against implicit bias using System I rather than System II mechanisms. The direct debiasing approaches described here thus mark a substantial departure from alternative efforts focused on “deliberate ‘mental correction’ that takes group status squarely into account.” We discuss normative issues arising out of this System I-System II difference in Part III below.

C. “Indirect Debiasing”

We now turn to mechanisms for what we call “indirect debiasing”—mechanisms that receive sustained and insightful treatment in this Symposium in the work by Linda Hamilton Krieger and Susan Fiske and the work by Jerry Kang and Mahzarin Banaji. Under indirect debiasing mechanisms, law prohibits or permits certain behavior and, as an indirect result of the prohibition or permission, creates incentives (or avoids disincentives) for regulated actors to adopt a debiasing approach. Indirect measures differ

79. See id. at 1263-70.
80. See id.
81. Analyses of affirmative action and implicit bias in the existing legal literature have often not been specific about which sort of mechanism—“insulating” or “debiasing” in our terms—produces the effect of an affirmative action plan; both mechanisms may be contemplated. See, e.g., Michael J. Yelnosky, The Prevention Justification for Affirmative Action, 64 Ohio St. L.J. 1385 (2003); cf. Cynthia L. Estlund, Working Together: The Workplace, Civil Society, and the Law, 89 Geo. L.J. 1, 7, 26-29, 77-94 (2000) (discussing how population diversity from affirmative action may reduce various forms of bias including conscious bias, but expressing pessimism about the possibility of altering implicit bias).
82. See Krieger, supra note 61, at 1279.
from direct measures in that it is no longer necessarily the case that in conforming to the specific dictates of law or policy, an actor will take steps that tend to reduce implicit bias. We consider two examples of indirect debiasing mechanisms below.

1. A Prohibition on Implicitly Biased Behavior

Many scholars suggest that existing antidiscrimination law does little to police implicitly biased behavior. A variety of proposed reforms, including those proposed by Krieger and Fiske in this Symposium, would broaden the reach of antidiscrimination law in addressing that behavior. It is obvious that if antidiscrimination law were to proscribe implicitly biased behavior in an effective manner, the law would encourage employers to adopt mechanisms to reduce implicit bias. (Obviously, the greater the translation of implicit bias to implicitly biased behavior, the greater the incentive for employers.) Following the discussion above, such mechanisms could include population diversity in the organization (Parts II.B.1 and II.B.4) and careful attention to depictions of protected groups in the physical environment (Parts II.B.2 and II.B.3). The discussion above described how those steps tend to reduce the level of implicit bias.

Alternatively, effective prohibition of implicitly biased behavior could encourage employers to adopt general decisionmaking structures or processes that reduce the intensity and frequency of implicit bias, implicitly biased behavior, or both. In the words of one commentator, steps may include “creating interdependence among in-group and out-group members, providing structure and guidance for appraisal and evaluation, and making decisionmakers accountable for their decisions.” It is unclear whether the mechanisms in play here will be predominantly System I or System II in nature. In a related vein, Susan Sturm has recounted how major accounting firm offices came to recognize and address sex-based disparities in assignments through the simple step of having the office managing partners list the nature and quantity of assignments to employees by sex. (They were very surprised by the simple fact that there were significant disparities in assignments by sex.)

It is reasonable to suppose that steps such as these would reduce the underlying level of implicit bias as well as implicitly biased behavior; if so, then the law’s inducement of employers to adopt such steps is an illustrative approach.

84. See sources cited supra note 45.
85. See, e.g., Flagg, White Race Consciousness, supra note 45, at 991-1017; Krieger, supra note 4, at 1186-1217, 1241-44; Krieger & Fiske, supra note 16, at 1056-61; Lawrence, supra note 45, at 355-81; Poirier, supra note 31, at 478-91; Saujani, supra note 45, at 413-18.
86. Green, supra note 14, at 147. Green also notes, consistent with the previous paragraph, that employers might seek to construct “heterogeneous work and decisionmaking groups.” See id.
tion of indirect debiasing. But such steps may in some cases simply insulate outcomes from the effects of an underlying level of implicit bias, in which case they are insulating rather than debiasing approaches within our framework.

We do not take a position here on the relative effectiveness of the many diverse means by which decisionmakers might seek to reduce implicit bias, implicitly biased behavior, or both in response to effective prohibition of implicitly biased behavior. It is uncertain whether approaches centered in System II would do much to reduce the phenomena; so too the potential limits on some of the System I approaches were explored in Part II.B above. Here we simply highlight the likelihood that much-discussed reform efforts with respect to policing implicitly biased behavior would produce responses that, in turn, would tend to reduce the level of implicit bias.

2. The Legal Treatment of Affirmative Action Plans

A second example of an indirect debiasing mechanism is the legal treatment of affirmative action plans. We have emphasized that government might engage in direct debiasing through the adoption of such plans. It follows that in tolerating such plans (whether imposed by public or by private actors), the law is engaging in a form of indirect debiasing; that is, regulated actors are permitted to take steps that, in turn, tend to reduce implicit bias.

Kang and Banaji argue in this Symposium that a proper interpretation of the Equal Protection Clause and Title VII would allow employers to engage in affirmative action in order to produce a diverse workforce and thereby reduce implicit bias.88 Importantly, Kang and Banaji explain that these forms of affirmative action are distinct from the “role model” arguments that have met with very mixed reception in the courts; in the debiasing approach, the emphasis is on the attitudes and behavior of those outside, rather than within, the traditionally underrepresented group.89

To clarify, the emphasis in the present discussion is on creating legal structures within which actors may choose to adopt debiasing mechanisms; by contrast, our discussion in Part II.B.4 above involved the affirmative choice by the state to adopt such mechanisms itself. In our terminology, the state engages in direct debiasing when it chooses to adopt an affirmative action plan that directly reduces implicit bias. By contrast, the state can be said to engage in indirect debiasing when it enables actors (including government itself) to adopt such affirmative action plans. In one case, the legal

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88. See Kang & Banaji, supra note 15, at 1111-15. For an initial discussion of the idea that legal policy in the form of government affirmative action reduces implicit bias through increased population diversity, see Jolls & Sunstein, supra note 76.

89. See Kang & Banaji, supra note 15, at 1110.
policy itself debiases, while in the other case the legal policy provides a space in which regulated actors may adopt debiasing mechanisms. Of course, insofar as government affirmative action plans are concerned, both types of debiasing will be in play.

D. Summary

In a variety of ways, existing law and policy seek to respond to the problem of implicit bias; imaginable reforms could do far more. Some strategies focus on insulating outcomes from the effects of implicit bias, which itself is taken largely as a given. But many actual and imaginable legal approaches instead act to reduce implicit bias. Such effects occur directly when the law requires steps that tend to reduce implicit bias (Part II.B). They occur indirectly when the law encourages or enables regulated actors to craft steps that, in turn, reduce implicit bias (Part II.C). Table 1 provides a summary of these alternative approaches.

Note that while our focus throughout is on the law’s role in debiasing in response to implicit bias, private individuals may act, apart from law, in an effort to debias themselves. Such steps represent nonlegal alternatives to the problem of implicit bias. For purposes of legal scholarship, however, the central question, and the question emphasized in Table 1, is the role of law in combating implicit bias.

90. See id. at 1108.
<table>
<thead>
<tr>
<th>Type of Law</th>
<th>Insulating Mechanisms: Law or policy insulates outcomes from the effects of implicit bias</th>
<th>Direct Debiasing Mechanisms: Specific legal or policy dictates directly reduce implicit bias</th>
<th>Indirect Debiasing Mechanisms: Law encourages or enables regulated actors to take steps that reduce implicit bias</th>
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<tbody>
<tr>
<td>1) Existing government affirmative action policies’ overriding of “merit” evaluations that will tend to be implicitly biased (Part II.A)</td>
<td>1) Existing antidiscrimination law’s prohibition on consciously biased behavior and resulting positive effect on workplace, educational, or other diversity (Part II.B.1)</td>
<td>1) Existing antidiscrimination law’s prohibition on implicitly biased behavior (to the extent such a prohibition exists) or extension of existing antidiscrimination law’s prohibitions to cover implicitly biased behavior (Part II.C.1)</td>
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<tr>
<td>2) Antidiscrimination law’s framework for assessing the legality of affirmative action policies; these policies may override “merit” evaluations that will tend to be implicitly biased (Part II.A)</td>
<td>2) Existing antidiscrimination law’s prohibition on hostile workplace, educational, or other environments (Part II.B.2)</td>
<td>2) Antidiscrimination law’s framework for assessing the legality of affirmative action policies; these policies may encourage employers to adopt diversity-oriented hiring practices that reduce implicit bias (Part II.C.2)</td>
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Table 1 (cont.): Debiasing and Other Legal Responses to Implicit Bias

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3) Extension of existing antidiscrimination law to require employers seeking to avoid vicarious liability to foster diversity in the physical environment (Part II.B.3)

4) Existing state affirmative action policies’ positive effect on workplace, educational, or other diversity (Part II.B.4)

E. Debiasing of Whom?

In the various debiasing interventions discussed above, the presumed targets of the debiasing were actors at risk of displaying implicit bias or implicitly biased behavior toward members of a protected group. But the contribution of Gary Blasi and John Jost to this Symposium illustrates that such behavior is only one part of a complete analysis. As Blasi and Jost describe, those who are victims of implicitly biased behavior may often accept and even justify, rather than object to, such behavior—a manifestation of the broader phenomenon of “system justification.”91 In our view, Blasi and Jost should be understood to be supplementing a great deal of work that explores the general possibility of “adaptive preferences”—preferences that have adapted to existing injustice.92

In the employment context, for example, George Akerlof and Robert Dickens argue that employees may fail to confront the real magnitude of occupational risks, simply because it is so distressing to do so. Speaking in broader terms, Amartya Sen has long emphasized that “deprived people . . . may even adjust their desires and expectations to what they unambitiously see as feasible.” Describing the hierarchical nature of pre-Revolutionary America, historian Gordon Wood writes that those “in lowly stations . . . developed what was called a ‘down look,’” and “knew their place and willingly walked while gentlefolk rode; and as yet they seldom expressed any burning desire to change places with their betters.” In Wood’s account, it is impossible to “comprehend the distinctiveness of that premodern world until we appreciate the extent to which many ordinary people still accepted their own lowliness.” If Blasi and Jost are right, then the modern world is not entirely different from its premodern counterpart.

In addition to the general evidence that they muster, the results of the IAT itself provide some support for system justification. As we noted above, a significant number of African-Americans show the same implicit racial bias on the IAT as whites.

In this light, an important potential benefit of the debiasing approaches described above is that they may reduce levels of implicit bias in victims as well as perpetrators of implicitly biased behavior. If, for example, population diversity reduces implicit bias among those present—whatever their particular group—then such diversity should not only reduce implicitly biased behavior by perpetrators, but also increase resistance to such behavior by victims. Likewise, if avoiding sexually explicit visual displays in the workplace reduces levels of implicit sex stereotyping among women as well as men, then avoiding such displays may affect women’s, as well as men’s, behavior. Debiasing victims is undoubtedly a massive issue for law and policy. Our suggestion here is that many efforts to debias perpetrators help simultaneously to counteract the problem that Blasi and Jost explore in this Symposium.

### III

**Normative Questions**

The central emphasis of Part II was the way in which antidiscrimination law and policy either does or could act to reduce implicit bias. While the analysis thus far has been purely descriptive, these sorts of debiasing

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96. Id. at 30.
97. See supra note 9 and accompanying text.
strategies raise important normative questions. Consideration of those questions turns out to be importantly assisted by the parallels from Part I between implicit bias and the heuristics and biases emphasized in cognitive psychology and behavioral economics.

A. Thought Control?

No doubt the most obvious normative question raised by legal attempts to reduce people’s implicit bias is whether such debiasing strategies amount to objectionable government “thought control.” Like the other contributors to this Symposium, we believe that implicit bias is a serious problem and that it is exceedingly important for the law to attempt to address implicitly biased behavior. Often, as noted above, the most plausible responses to the problem of implicit bias will be legal steps that reduce such bias. But any use of the law to this end raises immediate normative questions. Is it appropriate for government to seek to shape how people think about their coworkers, fellow students, or other colleagues?

In many domains, some government control over what people think is simply unavoidable. Illustrations from current law, outside of the antidiscrimination context, are easily imagined. Whenever the government is so much as presenting information to people in response to factual misjudgments, government is making decisions about the manner of presentation, and these choices inevitably will affect how its citizens perceive the world around them. But in the domain of civil rights addressed in this Symposium, it may be difficult to disentangle factual mistakes in judgment—where changing what people think is common and frequently unobjectionable in a wide range of domains—from genuine preferences and values with which government may have no business engaging. While government, on this view, may be entitled to discourage conduct based on such preferences and values, it might well seem illegitimate for it to seek to alter the preferences and values themselves.

We emphasize two main points here. First, it is plainly unobjectionable for government to act in response to factual errors; if people are simply mistaken as a matter of fact in associating a particular trait or attribute with members of one race, attempts at government correction do not raise especially profound issues. Information campaigns, either for risk regulation or for antidiscrimination law, are not objectionable in principle. Public defenses of such campaigns may readily be made without affront to the “publicity condition,” under which government must be able to make

98. See Jolls & Sunstein, supra note 35, at 232.
99. See id.
100. For discussion in the context of risky consumer products, see id.
full disclosure of its actions to the citizenry.101 And, our discussion in Part I suggested how implicit bias may sometimes be akin to a factual error. If implicit bias leads people to make such errors in assessing others, then government may legitimately seek to correct those errors.

Second, it is equally unobjectionable for government to ban biased behavior—whether consciously biased or implicitly biased—even if one effect of the ban is to alter people’s values and preferences. Of course, this suggestion does not mean that government may use the force of law to target beliefs rather than behavior—even if the beliefs are targeted as a way of preventing behavior. Suppose, for example, that a workplace features demeaning pictures and jokes that are likely to increase both implicit bias and implicitly biased behavior against female employees or students. Suppose then that regulators attempt to eliminate those pictures and jokes because of their likely negative effects; perhaps regulators are aware that relevant conditions will likely activate System I in a way that has concrete effects on women in the workplace. It is not unreasonable to see a problem with regulating speech (posters and jokes) on the ground that it is likely to lead to biased behavior.

There is, however, another possibility, rooted most obviously in our discussion of hostile environment liability in Part II.B.2 above. In some circumstances, workplace practices (such as posters and jokes) that are likely to produce biased behavior are themselves independently a form of unlawful discrimination. Suppose, for example, that demeaning pictures and jokes are pervasive in a certain workplace, in a way that creates a hostile environment for women. As described above, the pictures and jokes are then directly targeted as unlawful under existing antidiscrimination law. If there were a compelling concern with government “thought control” under this law, one would naturally expect successful challenges to it under the First Amendment, but in fact the standard view is that the legal prohibition here is consistent with First Amendment principles.102 As this example illustrates, the law tolerates some government prohibitions on discriminatory behavior, even when they relate directly to speech, despite their potential effects on people’s values and preferences.

We do not mean in this space to settle all of the dimensions of the “thought control” objection to government efforts to reduce implicit bias. But this much is clear. The normative problems are least severe when government is counteracting either factual mistakes or forms of discriminatory behavior such as hostile work environments; and if efforts to combat such


forms of biased behavior also reduce implicit bias, no one should complain in light of existing law.

One final point. Many people are both surprised and embarrassed to find that they show implicit bias, and their bias conflicts with their explicit judgments and their moral commitments.\footnote{See supra note 30 and accompanying text.} As we have suggested, it is likely to be the case that some people engage in biased behavior inadvertently or despite their own ideals. Such people want, in a sense, to be debiased, but their own conscious efforts are at most a partial help. Many normative objections to debiasing strategies, as forms of objectionable government meddling, are weakened to the extent that such strategies help people to remove implicit bias that they themselves reject on principle.

\subsection*{B. Heterogeneous Actors}

Without more, the “thought control” concerns discussed above might, for some, argue in favor of insulating over debiasing strategies when insulating approaches—which do not seek to alter people’s underlying level of bias—are feasible. However, insulating approaches lack a key advantage of debiasing strategies; debiasing often has the virtue of avoiding significant effects on those who do not exhibit bias in the first place.\footnote{See Jolls & Sunstein, supra note 35, at 226, 228-30.}

Recall our earlier illustration of consumer optimism bias: government, believing that consumers often underestimate the likelihood of injury from risky products, restricts consumer choice in a variety of ways.\footnote{See supra note 37 and accompanying text.} Such restrictions introduce new distortions in outcomes for those who did not err in the first instance, as products are banned, more expensive, or otherwise less available to them. By contrast, debiasing techniques may affect those who are biased without much affecting those who are not.\footnote{See Jolls & Sunstein, supra note 35, at 228-30.} So too in the context of antidiscrimination law: debiasing approaches target implicit bias for reduction and thus are unlikely to affect those who initially do not show implicit bias.\footnote{We noted above, for instance, that substantial numbers of African-Americans do not show significant levels of implicit bias. See supra note 9 and accompanying text.}

To illustrate the basic point here, return to the alternative analyses of government affirmative action plans in Part II above. One analysis emphasizes insulation. On this account, affirmative action plans may protect outcomes from the effects of implicit bias—itself taken as a given—by granting discrete preferences to members of a particular group.\footnote{See supra notes 50-53 and accompanying text.} Here, as applied to a particular decisionmaker who in fact harbors no implicit bias, the government’s action will introduce a distortion in, rather than a corrective to, decisionmaking; depending on the nature of the affirmative action
plan the alteration may be significant. If a given decisionmaker evaluates an African-American in a wholly unbiased fashion but the candidate nonetheless receives a thumb on the scale under an affirmative action plan, then the plan causes, rather than insulates against, race-based decisionmaking.

The analysis differs with respect to the debiasing account of affirmative action. On this account, affirmative action, by increasing population diversity, may reduce implicit bias—but there is no reason to think the increased population diversity will significantly alter the views of those who did not show implicit bias in the first place. The perceptions of a decisionmaker who already has no trouble envisioning African-Americans in authority roles are unlikely to move substantially in response to increased population diversity in the organization. Of course empirical testing would be important to verify this conjecture, but debiasing solutions at least hold out the possibility of leaving unaffected or less affected the decisionmaking of those who were not biased in the first instance. The use of a System I response to a System I problem may be able to leave relatively untouched those not exhibiting the System I problem in the first instance.

The system justification notion discussed above provides another example of the potential advantage of debiasing approaches. Consider the suggestion of Blasi and Jost that, as a result of system justification tendencies, victims of biased behavior will often not mount legal challenges to such behavior. If so, one could imagine responding with policies greatly lowering the legal barriers to bringing such challenges. But such steps would naturally tend to affect the frequency of legal challenges even outside the set of cases in which system justification was depressing legal challenges in the first instance. Again, debiasing strategies may avoid such distortions in the behavior of those not exhibiting bias in the first instance.

IV

Conclusion

Antidiscrimination law, no less than any other area of law, should be based on a realistic understanding of human behavior. If consumers underreact to certain risks, the law should take their underreactions into account. And if individuals act on the basis of implicit bias against African-Americans or other groups, without awareness that they are doing so, the law should respond, if only because similarly situated people are not being treated similarly. As in risk-related behavior, so too with implicitly biased behavior.
behavior: System I, involving rapid, intuitive responses, is often responsible for people's behavior, and it can lead them badly astray.

We have suggested the importance of distinguishing between two responses to implicit bias. Sometimes the legal system does and should pursue a strategy of insulation—for example, by protecting consumers against their own mistakes or by banning or otherwise limiting the effects of implicitly biased behavior. But sometimes the legal system does and should attempt to debias those who suffer from consumer error—or who might treat people in a biased manner. In many domains, debiasing strategies provide a preferable and less intrusive solution. In the context of antidiscrimination law, implicit bias presents a particularly severe challenge; we have suggested that several existing doctrines now operate to reduce that bias, either directly or indirectly, and that these existing doctrines do not on that account run into convincing normative objections.

It is now clear that implicit bias is widespread, and it is increasingly apparent that actual behavior is often affected by it, in violation of the principles that underlie antidiscrimination law. The question for the future, illuminatingly explored by the contributors to this Symposium, is how the law might better deal with that problem.
Strategies to Reduce the Influence of Implicit Bias*

Compared to the science on the existence of implicit bias and its potential influence on behavior, the science on ways to mitigate implicit bias is relatively young and often does not address specific applied contexts such as judicial decision making. Yet, it is important for strategies to be concrete and applicable to an individual’s work to be effective; instructions to simply avoid biased outcomes or respond in an egalitarian manner are too vague to be helpful (Dasgupta, 2009). To address this gap in concrete strategies applicable to court audiences, the authors reviewed the science on general strategies to address implicit bias and considered their potential relevance for judges and court professionals. They also convened a small group discussion with judges and judicial educators (referred to as the Judicial Focus Group) to discuss potential strategies. This document summarizes the results of these efforts. Part 1 identifies and describes conditions that exacerbate the effects of implicit bias on decisions and actions. Part 2 identifies and describes seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions. Part 2 provides a brief summary of empirical findings that support the seven strategies and offers concrete suggestions, both research-based and extrapolated from existing research, to implement each strategy. Some of the suggestions in Part 2 focus on individual actions to minimize the influence of implicit bias, and others focus on organizational efforts to (a) eliminate situational or systemic factors that may engender implicit bias and (b) promote a more egalitarian court culture. The authors provide the tables as a resource for addressing implicit bias with the understanding that the information should be reviewed and revised as new research and lessons from the field expand current knowledge.

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The following conditions increase the likelihood that implicit bias may influence one’s thoughts and actions.

**Risk factor: Certain emotional states**

Certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly (e.g., DeSteno, Dasgupta, Bartlett, & Cajdric, 2004; Dasgupta, DeSteno, Williams, & Hunsinger, 2009). Happiness may also produce more stereotypic judgments, though this can be consciously controlled if the person is motivated to do so (Bodenhausen, Kramer, & Susser, 1994).

**Risk factor: Ambiguity**

When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely. Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever information is most easily accessible—including stereotypes (e.g., Dovidio & Gaertner, 2000; Johnson, Whitestone, Jackson, & Gatto, 1995).
**Risk factor: Salient social categories**

A decision maker may be more likely to think in terms of race and use racial stereotypes because race often is a salient, i.e., easily-accessible, attribute (Macrae, Bodenhausen, & Milne, 1995; Mitchell, Nosek, & Banaji, 2003). However, when decision makers become conscious of the potential for prejudice, they often attempt to correct for it; in these cases, judges, court staff, and jurors would be less likely to exhibit bias (Sommers & Ellsworth, 2001).

**Risk factor: Low-effort cognitive processing**

When individuals engage in low-effort information processing, they rely on stereotypes and produce more stereotype-consistent judgments than when engaged in more deliberative, effortful processing (Bodenhausen, 1990). As a result, low-effort decision makers tend to develop inferences or expectations about a person early on in the information-gathering process. These expectations then guide subsequent information processing: Attention and subsequent recall are biased in favor of stereotype-confirming evidence and produce biased judgment (Bodenhausen & Wyer, 1985; Darley & Gross, 1983). Expectations can also affect social interaction between the decision maker (e.g., judge) and the stereotyped target (e.g., defendant), causing the decision maker to behave in ways that inadvertently elicit stereotype-confirming behavior from the other person (Word, Zanna, & Cooper, 1973).
Risk factor: Distracted or pressured decision-making circumstances

Tiring (e.g., long hours, fatigue), stressful (e.g., heavy, backlogged, or very diverse caseloads; loud construction noise; threats to physical safety; popular or political pressure about a particular decision; emergency or crisis situations), or otherwise distracting circumstances can adversely affect judicial performance (e.g., Eells & Showalter, 1994; Hartley & Adams, 1974; Keinan, 1987). Specifically, situations that involve time pressure (e.g., van Knippenberg, Dijksterhuis, & Vermeulen, 1999), that force a decision maker to form complex judgments relatively quickly (e.g., Bodenhausen & Lichtenstein, 1987), or in which the decision maker is distracted and cannot fully attend to incoming information (e.g., Gilbert & Hixon, 1991; Sherman, Lee, Bessennof, & Frost, 1998) all limit the ability to fully process case information. Decision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes – recalling facts in ways biased by stereotypes and making more stereotypic judgments – than decision makers whose cognitive abilities are not similarly constrained.

Risk factor: Lack of feedback

When organizations fail to provide feedback that holds decision makers accountable for their judgments and actions, individuals are less likely to remain vigilant for possible bias in their own decision-making processes (Neuberg & Fiske, 1987; Tetlock, 1983).
Part 2. Combating Implicit Bias in the Courts: Seeking Change

The following strategies show promise in reducing the effects of implicit bias on behavior.

Strategy 1: Raise awareness of implicit bias

Individuals can only work to correct for sources of bias that they are aware exist (Wilson & Brekke, 1994). Simply knowing about implicit bias and its potentially harmful effects on judgment and behavior may prompt individuals to pursue corrective action (cf. Green, Carney, Pallin, Ngo, Raymond, Iezzoni, & Banaji, 2007). Although awareness of implicit bias in and of itself is not sufficient to ensure that effective debiasing efforts take place (Kim, 2003), it is a crucial starting point that may prompt individuals to seek out and implement the types of strategies listed throughout this document.

What can the individual do?

1. **Seek out information on implicit bias.** Judges and court staff could attend implicit bias training sessions. Those who choose to participate in these sessions should ensure that they fully understand what implicit bias is and how it manifests in everyday decisions and behavior by asking questions, taking the IAT, and/or reading about the scientific literature as a follow-up to the seminar.
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What can the organization do?

1. **Provide training on implicit bias.** Courts could develop an implicit bias training program that presents participants not only with information about what implicit bias is and how it works, but that also includes information on specific, concrete strategies participants could use in their professional work to mitigate the effects of implicit bias. Judicial educators could present information about some of the other strategies listed in this report, or they could engage participants in a critical thinking activity designed to help them develop and/or tailor their own strategies. The Judicial Focus Group (JFG) thought that this type of training would be more effective if the program contained the following:

a. **A facilitator judge to help conduct the training or sit on the panel.** If the court conducts a training program or hosts a panel on implicit bias as part of a symposium on judicial ethics, the JFG indicated that judges would add credibility to the session. Judges typically respond well when one of “their own” speaks out in support of an issue or position. The judge’s presence could help make the session less threatening to participating judges and could help couch the discussion in terms of what can be done to make better decisions.

b. **Many diverse examples of implicit bias in professional judgment and behavior.** The JFG felt that training should provide illustrative examples of implicit bias that span several professional disciplines (e.g., NBA officials, medical treatment decisions, hiring decisions) to show how pervasive the phenomenon is.
c. **Experiential learning techniques.** The JFG suggested that small group exercises and other experiential learning techniques could help make information more personally relevant, which could provide a valuable frame of reference for those who are expected to resist the idea of implicit bias. Brain teaser exercises may be used to introduce the topic and demonstrate its broad application beyond race to gender, class, age, weight, and other stigmatized social categories.

Note: The JFG also encouraged a focus on implicit bias training for judges before they take the bench by making this training a component of new judge orientation. This way, future implicit bias training and requirements will simply be a part of “business as usual” and will incur less resistance.

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**Strategy 2: Seek to identify and consciously acknowledge real group and individual differences**

The popular “color blind” approach to egalitarianism (i.e., avoiding or ignoring race; lack of awareness of and sensitivity to differences between social groups) fails as an implicit bias intervention strategy. “Color blindness” actually produces greater implicit bias than strategies that acknowledge race (Apfelbaum, Sommers, & Norton, 2008). Cultivating greater awareness of and sensitivity to group and individual differences appears to be a more effective tactic: Training seminars that acknowledge and promote an appreciation of group differences and multi-cultural viewpoints can help reduce implicit bias (Rudman, Ashmore, & Gary, 2001; Richeson & Nussbaum, 2004).

Diversity training seminars can serve as a starting point from which court culture itself can change. When respected court leadership actively supports the multiculturalism approach, those egalitarian goals can influence others (Aarts,
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Gollwitzer, & Hassin, 2004). Moreover, when an individual (e.g., new employee) discovers that peers in the court community are more egalitarian, the individual’s beliefs become less implicitly biased (Sechrist & Stangor, 2001). Thus, a system-wide effort to cultivate a workplace environment that supports egalitarian norms is important in reducing individual-level implicit bias. Note, however, that mandatory training or other imposed pressure to comply with egalitarian standards may elicit hostility and resistance from some types of individuals, failing to reduce implicit bias (Plant & Devine, 2001).

In addition to considering and acknowledging group differences, individuals should purposely compare and individuate stigmatized group members. By defining individuals in multiple ways other than in terms of race, implicit bias may be reduced (e.g., Dijkic, Langer, & Stapleton, 2008; Lebrecht, Pierce, Tarr, & Tanaka, 2009; Corcoran, Hundhammer, & Mussweiler, 2009).

What can the individual do?

1. **Seek out and elect to participate in diversity training seminars.** Judges and court staff could seek out and participate in diversity training seminars that promote an appreciation of group differences and multicultural viewpoints. Exposure to the multiculturalism approach, particularly routine exposure, will help individuals develop the greater social awareness needed to overcome implicit biases.

2. **Seek out the company of other professionals who demonstrate egalitarian goals.** Surrounding oneself with others who are committed to greater egalitarianism will help positively influence one’s own implicit beliefs and behaviors in the long run.
3. **Invest extra effort into identifying the unique attributes of stigmatized group members.** Judges and court staff could think about how the stigmatized group members they encounter are *different* from others—particularly from other members of the same social/racial group. This type of individuating exercise will help reduce one’s reliance on social or racial stereotypes when evaluating or interacting with another person.

### What can the organization do?

1. **Provide routine diversity training.** Offer educational credits for voluntary judicial participation in elective diversity or multiculturalism seminars. Levinson (2007) also suggests that this could be a valuable process for jurors. Recruit a judge to help conduct the training or sit on the panel. In this training, lead by example. Any highly esteemed judge could serve as a role model in this context to promote egalitarian goals.

2. **Target leadership in the jurisdiction first.** Egalitarian behavior demonstrated by judicial leaders can serve to encourage greater adherence to egalitarian goals throughout the court community. The Judicial Focus Group argued that systemic change only occurs with buy-in from leadership—an essential step toward improved egalitarianism.

Note: See Strategy 7 for more suggestions on what an organization can do to cultivate more egalitarian norms in the court community.
Strategy 3: Routinely check thought processes and decisions for possible bias

Individuals interested in minimizing the impact of implicit bias on their own judgment and behaviors should actively engage in more thoughtful, deliberative information processing. When sufficient effort is exerted to limit the effects of implicit biases on judgment, attempts to consciously control implicit bias can be successful (Payne, 2005; Stewart & Payne, 2008).

To do this, however, individuals must possess a certain degree of self-awareness. They must be mindful of their decision-making processes rather than just the results of decision making (Seamone, 2006) to eliminate distractions, to minimize emotional decision making, and to objectively and deliberatively consider the facts at hand instead of relying on schemas, stereotypes, and/or intuition (see risk factors in Part 1).

Instructions on how to correct for implicit bias may be effective at mitigating the influence of implicit bias on judgment if the instructions implement research-based techniques. Instructions should detail a clear, specific, concrete strategy that individuals can use to debias judgment instead of, for example, simply warning individuals to protect their decisions from implicit bias (e.g., Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003). For example, instructions could help mitigate implicit bias by asking judges or jurors to engage in mental perspective-taking exercises (i.e., imagine themselves in the other person’s shoes; Galinsky & Moskowitz, 2000).

As discussed in Strategy 2, however, some seemingly intuitive strategies for counteracting bias can, in actuality, produce some unintended negative consequences. Instructions to simply suppress existing stereotypes (e.g., adopt the “color blindness” approach) have been known to produce a “rebound effect” that
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may increase implicit bias (Macrae, Bodenhausen, Milne, & Jetten, 1994). Others also perceive individuals instructed to implement the “color blindness” approach as more biased (Apfelbaum, Sommers, & Norton, 2008). For these reasons, decision makers should apply tested intervention techniques that are supported by empirical research rather than relying on intuitive guesses about how to mitigate implicit bias.

What can the individual do?

1. **Use decision-support tools.** Legal scholars have proposed several decision-support tools to promote greater deliberative (as opposed to intuitive) thinking (Guthrie, Rachlinski, & Wistrich, 2007). These tools, while untested, would primarily serve as vehicles for research-based decision-making approaches and self-checking exercises that demonstrably mitigate the impact of implicit bias. The Judicial Focus Group (JFG) also supported the use of such tools, which include:

   a. **Note-taking.** Judges and jurors should take notes as the case progresses so that they are not forced to rely on memory (which is easily biased; see Part 1 and Levinson, 2007) when reviewing the evidence and forming a decision.

   b. **Articulate your reasoning process** (e.g., opinion writing). By prompting decision makers to document the reasoning behind a decision in some way before announcing it, judges and jurors may review their reasoning processes with a critical eye for implicit bias before publicly committing to a decision. Techniques or tools that help decision makers think through their decision more clearly and ensure that it is based on sound reasoning before committing to it publicly will protect them from rationalizing decisions post hoc (also see Strategy 6 on instituting feedback mechanisms). Sharing this reasoning up front with the public can also positively affect public perceptions of fairness.
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c. **Checklists or bench cards.** The JFG suggested the use of checklists or bench cards that list some “best practice” questions or exercises (e.g., perspective-taking, cloaking). These tools could prompt decision makers to more systematically reflect on and scrutinize the reasoning behind any decision for traces of possible bias. Note that this strategy should be used only after the decision maker has received implicit bias and diversity training, and should be offered for voluntary use. If untrained judges rely on these tools, their efforts to correct for bias may be sporadic and restricted to isolated cases. If resistant judges are compelled to use these tools, checklists as a forced procedure could backfire and actually increase biases in these types of individuals.

**What can the organization do?**

1. **Develop guidelines that offer concrete strategies on how to correct for implicit bias.** Courts could develop and present guidelines to decision makers on how to check for and correct for implicit bias. These guidelines should specify an explicit, concrete strategy for doing so that has been empirically shown to reduce the effects of implicit bias on judgment and behavior. Some research-based strategies could include instructions that walk people through a perspective-taking exercise (Galinsky & Moskowitz, 2000) or a cloaking exercise (i.e., checking decisions for bias by imagining how one would evaluate the stigmatized group member if he or she belonged to a different, non-stigmatized social group), or that direct people to adopt specific implementation intentions to control for potential bias in specific instances (e.g., if-then plans such as *if*: encounter a stigmatized group member, *then*: think counter-stereotypic thoughts; see Mendoza, Gollwitzer, & Amodio, 2010). It should NOT instruct a person to ignore or suppress stereotypes and/or implicit biases or offer any other intervention technique that is not supported by empirical literature on implicit bias.
2. **Institute formal protocols or develop decision-support tools for guidance.** Courts could establish “best practice” protocols or self-checking procedures (e.g., perspective-taking, cloaking; see above) to help judges identify and override implicit bias. The judiciary could also develop protocols to help minimize situational ambiguity (see Part 1 for more on situational ambiguity and Strategy 5 for further discussion about strategies that may be used to reduce ambiguity).

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**Strategy 4: Identify distractions and sources of stress in the decision-making environment and remove or reduce them**

Decision makers need enough time and cognitive resources to thoroughly process case information to avoid relying on intuitive reasoning processes that can result in biased judgments (see Part 1).

**What can the individual do?**

1. **Allow for more time on cases in which implicit bias may be a concern.** The Judicial Focus Group (JFG) suggested that judges prepare more in advance of hearings in which disadvantaged group members are involved (as attorneys, defendants/litigants, victims, key witnesses). If possible, judges could slow down their decision-making process by spending more time reviewing the facts of the case before committing to a decision. If implicit bias is suspected, judges could reconvene and review case material outside of the court environment to reduce time pressure.

2. **Clear your mind and focus on the task at hand.** Judges should become adept at putting distractions aside and focusing completely on the case and evidence at hand. Meditation courses may help judges develop or refine these skills (Kang & Banaji, 2006; Seamone, 2006).
What can the organization do?

1. **Conduct an organizational review.** An organizational review could help the court determine whether and how the court fosters bias. Part of this review should include a critical assessment of the burden on judges and other decision makers. Some stressors that could adversely affect judicial performance include time pressure (as a result of heavy caseloads, complex cases, or dockets with a broad array of case types), fatigue (as a result of long hours, threats to physical safety, or other emergency or crisis situations), and distractions (as a result of multi-tasking, overburdened workloads, or even loud construction noise that day). Courts could modify procedures to allow judges sufficient time to consider each case by, for example, reorganizing the court calendar to reduce the typical caseload for each judge, minimizing the necessity for spur-of-the-moment decisions, or permitting the judge to issue tentative decisions or reconvene if further deliberation is necessary (e.g., see Guthrie, Rachlinski, & Wistrich, 2007).

**Strategy 5: Identify sources of ambiguity in the decision-making context and establish more concrete standards before engaging in the decision-making process**

Situational ambiguity may arise for cases in which the formal criteria for judgment are somewhat vague (e.g., laws, procedures that involve some degree of discretion on behalf of the decision maker). These especially include (but are not limited to) cases that involve the interpretation of newly established laws or case types that are unfamiliar or less familiar to the decision maker. In these cases, decision makers should preemptively commit to specific decision-making criteria (e.g., the importance of various types of evidence to the decision) before hearing a case or reviewing evidence to minimize the opportunity for implicit
bias (Uhlmann & Cohen, 2005). Establishing this structure before entering the decision-making context will help prevent constructing criteria after the fact in ways biased by implicit stereotypes but rationalized by specific types of evidence (e.g., placing greater weight on stereotype-consistent evidence in a case against a black defendant than one would in a case against a white defendant).

What can the individual do?

1. **Preemptively commit to more specific decision-making criteria.** Before entering into a decision-making context characterized by ambiguity or that permits greater discretion, judges and jurors could establish their own informal structure or follow suggested protocol (if instituted) to help create more objective structure in the decision-making process. Commit to these decision-making criteria before reviewing case-specific information to minimize the impact of implicit bias on the reasoning process.

What can the organization do?

1. **Institute formal protocol to help decision makers.** The court could establish and institute formal protocols that decision makers could follow to help them identify sources of ambiguity and that offer suggestions on how to reduce these types of ambiguity in the decision-making context.

2. **Specialization.** The Judicial Focus Group (JFG) discussed the possibility that case decisions by judges with special expertise in that particular area of law may be less prone to implicit bias than decisions made by judges without such expertise. They reasoned that without familiarity, there is greater ambiguity and uncertainty in decision making. However, the JFG also discussed how this could be a double-edged sword: Specialist judges may be
on autopilot with familiar case types and may not be engaged in the kind of deliberative thinking that helps reduce the impact of implicit bias on judgment. To prevent “autopilot” stereotyping, specialist judges in particular should commit to thinking deliberatively (see Strategy 3 for some suggestions on how to check decisions and thought processes for possible bias).

**Strategy 6: Institute feedback mechanisms**

Providing egalitarian consensus information (i.e., information that others in the court hold egalitarian beliefs rather than adhere to stereotypic beliefs) and other feedback mechanisms can be powerful tools in promoting more egalitarian attitudes and behavior in the court community (Sechrist & Stangor, 2001). To encourage individual effort in addressing personal implicit biases, court administration may opt to provide judges and other court professionals with relevant performance feedback. As part of this process, court administration should consider the type of judicial decision-making data currently available or easily obtained that would offer judges meaningful but nontargeting feedback on demonstrated biases. Transparent feedback from regular or intermittent peer reviews that raise personal awareness of biases could prompt those with egalitarian motives to do more to prevent implicit bias in future decisions and actions (e.g., Son Hing, Li, & Zanna, 2002). This feedback should include concrete suggestions on how to improve performance (cf. Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003) and could also involve recognition of those individuals who display exceptional fairness as positive reinforcement.
Feedback tends to work best when it (a) comes from a legitimate, respected authority, (b) addresses the person’s decision-making process rather than simply the decision outcome, and (c) when provided before the person commits to a decision rather than afterwards, when he or she has already committed to a particular course of action (see Lerner & Tetlock, 1999, for a review). Note, however, that feedback mechanisms which apply coercive pressure to comply with egalitarian standards can elicit hostility from some types of individuals and fail to mitigate implicit bias (e.g., Plant & Devine, 2001). By inciting hostility, these imposed standards may even be counterproductive to egalitarian goals, generating backlash in the form of increased explicit and implicit prejudice (Legault, Gutsell, & Inzlicht, 2011).

What can the individual do?

1. **Actively seek feedback from others.** Judges can seek out their own informal “checks and balances” by organizing or participating in sentencing round tables, or by consulting with a skilled mentor or senior judge for objective feedback on how to handle a challenging case or difficult situation.

2. **Actively seek feedback from others regarding past performance.** With an open mind, judges and court staff could talk to colleagues, supervisors, or others to request performance feedback. This information could be helpful in determining whether a person’s current efforts to control or reduce implicit bias are effective or could be improved.

3. **Articulate your reasoning process.** To ensure sound reasoning in every case, judges could choose to document or articulate the underlying logic of their decisions. Not only does this exercise afford judges the opportunity to critically review their decision-making processes in each case, but taking it a step further—making this reasoning transparent in court—can have positive effects on public perceptions of fairness (see Articulate your reasoning process in Strategy 3, above).
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What can the organization do?

1. **Adopt a peer-review process.** Judges could benefit from additional feedback about possible bias in their judicial performance. The court could arrange to have judges observe and provide feedback to one another on a rotating schedule. Guthrie, Rachlinski, and Wistrich (2007) offered a more formal approach: Every 2-3 years, an experienced team of reviewers (comprised of peer judges) could visit the court and for each judge at that court, the team would review the transcripts, rulings, and other material for a few past cases. The team would then provide each judge with performance feedback and suggestions, if necessary, for improvement. The team should be trained to deliver this feedback in a constructive, non-threatening way.

2. **Develop a bench-bar committee.** The Judicial Focus Group (JFG) also suggested that courts develop a bench-bar committee, which could oversee an informal internal grievance process that receives anonymous complaints about judicial performance in the area of racial and ethnic fairness. Similar to the peer review process mentioned above, this committee (or a select group of trained peer or mentor judges) could review a sample of past cases or observe workplace behavior and offer feedback and guidance to the judge.

3. **Hold sentencing round tables.** The JFG suggested that judges convene a sentencing round table to review hypothetical cases involving implicit bias. Prior to the round table, the judges review the hypothetical cases and arrive prepared to discuss the sentencing decision they would issue in each case. When they convene, all judges reveal their decisions and discuss their reasoning frankly and candidly. This process can help judges think more deliberatively about the possibility of implicit biases entering their decisions and offers a forum for judges to obtain feedback from peers.
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Strategy 7: Increase exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes

Increased contact with counter-stereotypes—specifically, increased exposure to stigmatized group members that contradict the social stereotype—can help individuals negate stereotypes, affirm counter-stereotypes, and “unlearn” the associations that underlie implicit bias. “Exposure” can include imagining counter-stereotypes (Blair, Ma, & Lenton, 2001), incidentally observing counter-stereotypes in the environment (Dasgupta & Greenwald, 2001; Olson & Fazio, 2006), engaging with counter-stereotypic role models (Dasgupta & Asgari, 2004; Dasgupta & Rivera, 2008) or extensive practice making counter-stereotypic associations (Kawakami, Dovidio, Moll, Hermsen, & Russin, 2000).

For individuals who seek greater contact with counter-stereotypic individuals, such contact is more effective when the counter-stereotype is of at least equal status in the workplace (see Pettigrew & Tropp, 2006). Moreover, positive and meaningful interactions work best: Cooperation is one of the most powerful forms of debiasing contact (e.g., Sherif, Harvey, White, Hood & Sherif, 1961).

In addition to greater contact with counter-stereotypes, this strategy also involves decreased exposure to stereotypes. Certain environmental cues can automatically trigger stereotype activation and implicit bias. Images and language that are a part of any signage, pamphlets, brochures, instructional manuals, background music, or any other verbal or visual communications in the court may inadvertently activate implicit biases because they convey stereotypic information (see Devine, 1989; Rudman & Lee, 2002; Anderson,
Benjamin, & Bartholow, 1998; for examples of how such communications can prime stereotypic actions and judgments; see also Kang & Banaji, 2006). Identifying these communications and removing them or replacing them with non-stereotypic or counter-stereotypic information can help decrease the amount of daily exposure court employees and other legal professionals have with the types of social stereotypes that underlie implicit bias.

**What can the individual do?**

1. **Imagine counter-stereotypes or seek out images of admired exemplars.** To reduce the impact of implicit bias on judgment, judges and court staff could imagine or view images of admired or counter-stereotypic exemplars of the stereotyped social group (e.g., Martin Luther King, Jr.) before entering a decision-making scenario that could activate these social stereotypes. To accomplish this, researchers on implicit bias have suggested that people hang photos or program screen savers and desktop images of role models or others that challenge traditional racial stereotypes.

2. **Seek greater contact with counter-stereotypic role models.** Individuals who are motivated to become more egalitarian could also spend more time in the presence of people who are counter-stereotypic role models to reinforce counter-stereotypic associations in the brain and make traditional stereotypes less accessible for use.

3. **Practice making counter-stereotypic associations.** Individuals who are motivated to change their automatic reactions should practice making positive associations with minority groups, affirming counter-stereotypes, and negating stereotypes. Implicit biases may be “automatic,” but corrective and debiasing strategies can also become automated with motivation and practice.
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What can the organization do?

1. **Conduct an organizational review.** An organizational review could help the court determine whether and how the court fosters bias. Part of this review should include an assessment of court communications (visual and auditory) to identify all communications in the courthouse that convey stereotypic information. Change these communications to convey egalitarian norms and present examples of counter-stereotypes. These positive cues can serve as subtle reminders to judges and court staff that reinforce a culture of equality.

2. **Follow equal-opportunity and affirmative action (EOAA) hiring practices.** Members of stigmatized groups, when fairly represented in valued, authoritative roles (Richeson & Ambady, 2003), offer opportunities to foster positive intergroup relations and present other judges with readily accessible counter-stereotypes that they can draw upon to reduce implicit bias.

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1 For more information on the empirical research supporting Tables 1 and 2, see Appendix G, Tables G-3 and G-4, in Casey, Warren, Cheesman, and Elek (2012).
References


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Proven Strategies for Addressing Unconscious Bias in the Workplace
Exploring Unconscious Bias

by Howard Ross, Founder & Chief Learning Officer, Cook Ross, Inc.

Consider this: Less than 15% of American men are over six foot tall, yet almost 60% of corporate CEOs are over six foot tall. Less than 4% of American men are over six foot, two inches tall, yet more than 36% of corporate CEOs are over six foot, two inches tall.¹ Why does this happen? Clearly corporate boards of directors do not, when conducting a CEO search, send out a message to “get us a tall guy,” and yet the numbers speak for themselves. In fact, when corrected for age and gender, an inch of height is worth approximately $789 per year in salary!² Similar patterns are true for Generals and Admirals in the Military, and even for Presidents of the United States. The last elected President whose height was below average was William McKinley in 1896, and he was “ridiculed in the press as ‘a little boy.’”³

It seems not only unfair, but patently absurd to choose a CEO because of height, just like it is unfair and absurd to give employees lower performance evaluations solely because they are overweight. Or to prescribe medical procedures to people more often because of their race. Or to treat the same people different ways because of their clothing. Or even to call on boys more often than girls when they raise their hands in school. And yet, all of these things continuously happen, and they are but a small sampling of the hundreds of ways we make decisions every day in favor of one group, and to the detriment of others, without even realizing we’re doing it.

¹ Malcolm Gladwell discusses this phenomenon in his book, Blink, based on research conducted by Timothy Judge and Daniel Cable.

Testing Your Own Unconscious Bias

The most effective tool available for testing one’s own unconscious bias is the Implicit Association Test (IAT), created and maintained by Project Implicit, a consortium made up of researchers from Harvard University, the University of Virginia, and the University of Washington. The IAT was created more than 10 years ago and has now been used by millions of people in over 20 countries. Researchers at these three schools, as well as others, have used the test to study many aspects of organizational and social performance, ranging from healthcare decisions to the operations of the criminal justice system. To take the IAT, without charge, go to https://implicit.harvard.edu/implicit/.
Lately, the concept of unconscious bias or “hidden bias” has come into the forefront of our work as diversity advocates because the dynamics of diversity are changing as we enter the 21st Century. Our tradition paradigm has generally assumed that patterns of discriminatory behavior in organizations are conscious; that people who know better do the right thing, and those who don’t cause bias. As a result, we have developed a “good person/bad person” paradigm of diversity: a belief that good people are not biased, but inclusive, and that bad people are the biased ones.

One of the core drivers behind the work of diversity and inclusion professionals, almost since the inception of the first corporate diversity efforts, has been to find the “bad people” and fix them; to eradicate bias. There is good reason for this. If we are going to create a just and equitable society, and if we are going to create organizations in which everybody can have access to their fair measure of success, it clearly is not consistent for some people to be discriminated against based on their identification with a particular group. Also, clear examples of conscious bias and discrimination still exist, whether in broader societal examples like the recent incidents in Jena, Louisiana, or in more specific organizational examples.

Driven by this desire to combat inequities, we have worked hard through societal measures, like civil and human rights initiatives, to reduce or eliminate bias. We have put a lot of attention on who “gets” diversity, without realizing that to a degree our approach has been self-serving and even arrogant. “If they were as (wise, noble, righteous, good, etc.) as us, then they would ‘get it’ like we do!” Usually this is based on the notion that people make choices to discriminate due to underlying negative feelings toward some groups or feelings of superiority about their own. There is no doubt that this is often true. But what if, more times than not, people make choices that discriminate against one group and in favor of another, without even realizing that they are doing it, and, perhaps even more strikingly, against their own conscious belief that they are being unbiased in their decision-making? What if we can make these kinds of unconscious decisions even about people like ourselves?

The problem with the good person/bad person paradigm is two-fold: it virtually assures that both on a collective and individual basis we will never “do diversity right” because every human being has bias of one kind or another. Secondly, it demonstrates a lack of understanding of a reality: human beings, at some level, need bias to survive. So, are we biased? Of course. Virtually every one of us is biased toward something, somebody, or some group.

The concept of the unconscious was, of course, Freud’s primary gift to the science of the mind, and, while it is not the purpose of this paper to delve too deeply into the esoteric, this concept drove the development of modern psychology. Yet, as behavioral psychology moved into the forefront during the 50’s, 60’s, and 70’s, the study of the unconscious became de-emphasized. Recent research, driven largely by our ability to now manage huge quantities of data, and new exploratory techniques have given us an ability to not only observe the unconscious, but also to track and quantify its impact.

We now have a vast body of research, conducted at some of our finest institutions of learning – Harvard, Yale, the University of Washington, the University of Virginia, MIT, Tufts, and the University of Illinois, among others – that is showing us the same thing: unconscious or hidden beliefs – attitudes and biases beyond our regular perceptions of ourselves and others – underlie a great deal of our patterns of behavior about diversity.

The Necessary Purpose of Bias

Let’s begin our exploration here by trying to understand the purpose of bias. We go out in the world every day and make decisions about what is safe or not, what is appropriate or not, and so on. This automatic decision making is what psychologist Joseph LeDoux has suggested is an unconscious “danger detector” that determines whether or not something or someone is safe before we can even begin to consciously make a determination.⁴ When the object, animal, or person is assessed to be dangerous, a “fight or flight” fear response occurs.

On a conscious level, we may correct a mistake in this “danger detector” when we notice it. But often, we simply begin to generate reasons to explain why it was accurate to begin with. We are generally convinced that our decisions are “rational,” but in reality most human decisions are made emotionally, and we then collect or generate the facts to justify them. When we see something or someone that “feels” dangerous, we have already launched into action subconsciously before we have even started “thinking.” Our sense of comfort or discomfort has already been engaged.

From a survival standpoint this is not a negative trait. It is a necessary one. We have all heard the axiom, “it is better to be safe than sorry,” and to a large degree this is true. If you sense something coming at your head, you duck. And if later you find out it was only a shadow of a bird flying by the window, better to have ducked and not needed to than to ignore the shadow and later find out it was a heavy object!

Where people are concerned, these decisions are hard-wired into us. At earlier times in our history, determining who, or what, was coming up the path may have been a life or death decision. If it was a hostile animal, or a hostile tribe member, you might die. Our minds evolved to make these decisions very quickly, often before we even “thought about it.”

Our fundamental way of looking at and encountering the world is driven by this “hard-wired” pattern of making unconscious decisions about others based on what feels safe, likeable, valuable, and competent. Freud knew that the unconscious was far vaster and more powerful than the conscious. He described it as an iceberg: far more under the surface than above. Yet, recent research indicates that even Freud may have underestimated the unconscious. As Timothy Wilson, a University of Virginia psychologist who has studied the subject extensively has written: “According to the modern perspective, Freud’s view of the unconscious was far too limited. When he said that consciousness is the tip of the mental iceberg, he was short of the mark by quite a bit – it may be more the size of a snowball on top of that iceberg.”

Scientists estimate that we are exposed to as many as 11 million pieces of information at any one time, but our brains can only functionally deal with about 40. So how do we filter out the rest? How is it that we can walk down a busy street in New York City with a virtual ocean of stimulus in front of us and still look for a specific person or thing? How can we have a conversation with a friend in the middle of thousands of people at a rock concert? We do it by developing a perceptual lens that filters out certain things and lets others in, depending upon certain perceptions, interpretations, preferences and, yes, biases that we have adapted throughout our life.

We can see this in some very mundane ways: if you or your partner was pregnant, did you notice how many more pregnant women you saw all of a sudden? If you were looking for a new car, how often did you suddenly start to see that car in commercials and on the street? Our perceptive lens enables us to see certain things and miss others, depending on the focus of our unconscious. It filters the evidence that we collect, generally supporting our already held points-of-view and disproving points of view with which we disagree.

As a result of these pre-established filters, we see things, hear things, and interpret them differently than other people might. Or we might not even see them at all! In fact, our interpretations may be so far off that we have to question, how do we know what is real anyway?

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5 Wilson, Timothy, Strangers to Ourselves
The Diversity of Language: An Introduction

The language of diversity makes people uncomfortable. Words like discrimination, oppression, dominance, subordination, heterosexism, racism or male privilege often cause negative reactions. When people speak these words, others begin to focus on what it means for them. It is easier to become defensive, argue the meaning or ignore these interactions than it is to learn how the language of diversity affects others and impacts all aspects of our lives. And, if we can’t talk productively about something, then we can’t do anything about it.

American English is saturated with “the language of oppression,” which is perpetuated by a lack of awareness and understanding of language as an instrument of oppression. For any change to occur we must find a way to deal with the pain and discomfort caused by certain terms and concepts. This is no easy task since the discomfort is rooted in our long history of discriminatory attitudes and practices. We need to recognize that the words that carry a charge present an opportunity for learning and change. Heterosexism isn’t a word that accuses “heterosexual” people of being bad, just as “disadvantaged” doesn’t refer to someone who is helpless. Used responsibly, these and other words can help us to understand issues and respond in a way that causes positive change for everyone.

Since we have all learned the terminology of oppression simultaneously with learning the English language, we cannot unlearn it without making a conscious effort. The Diversity Factor Language Guide, from which this introduction is excerpted, is an aid in the unlearning process. While not definitive, it represents what we have learned about communicating the dynamics of oppression. It focuses on the meaning and impact of group identities, including race, gender, ethnicity, sexual orientation and ableness. To support those interested in relearning, here are some general principles:

- Notice your defensiveness and accept the discomfort of unlearning and relearning. To be competent in this arena is the same as learning to be competent in anything else. It requires a desire to know, motivation to become informed, opportunities to practice and the willingness to correct your mistakes.

- The best way to check the appropriateness of a term is to ask a member of the group being referred to while remembering that no one individual represents the entire group.

- People often collude in oppressing others by failing to challenge negative terminology about their own group and by using such terminology when speaking about others.

- Not everyone in a particular identity group, or everyone at a particular time, will agree on the use of specific terms or expressions. For example, many people of color prefer to be called Hispanic. Others identify with Latino/a. Still others prefer to be called by their national origin, e.g., Cuban, Mexican, Colombian, etc.

- All speakers of a language are influenced by the dynamics of dominant and subordinated group membership. If you are a white, heterosexual man, your experience of language will be different from a black woman or a gay Asian man.

- Humor is a familiar and treacherous trap. It is next to impossible to gauge what might offend someone or for others to know your intent.

- Speaking and writing appropriately is, in the main, easy. Consider: “Would I want someone to use a similar expression about me?”

- Negative language used within a given identity group about itself and its own members is very different from the same language used by people outside the group—though such usage is also often objectionable to group members.

While the language of oppression is still with us, new words continue to emerge that are more accurate and descriptive, and allow us to be more successful in ameliorating oppression and more productive in our interactions with each other. People who apply their learning place themselves in a position to affect change in the world. If humankind can relearn the language of diversity, then we can relearn how to respect and treat each other with honor, dignity and love.

Excerpt from The Diversity Factor Language Guide (Fifth Edition, 2006)
http://www.eyca.com/diversity/languageguide.html
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Seven Steps to Identify and Address Unconscious Bias

1. Recognize that you have biases.
2. Identify what those biases are.
3. Dissect your biases.
4. Decide which of your biases you will address first.
5. Look for common interest groups.
7. Be mindful of bias kick back.

Exercise of the Unconscious

Look at the picture below of the two tables and see if you can determine which of the tops is bigger. Or are they the same size, the same shape?

You probably would say: “Obviously they are not the same shape. The one on the left is clearly narrower and longer than the one on the right.” Or is it?

Now take a piece of paper and either cut out or trace the table top on the left. Then lay your cutout or tracing over the top of the table top on the right. Which is bigger? That’s right, they are both identical.

This picture was created by Roger Shepard, an Oxford and Stanford University professor. We all have seen some of these kinds of illusions over the years, in Readers Digest or e-mail exchanges, and we often refer to them as optical illusions. We would be more accurate describing them as cognitive illusions, because the illusory experience is not created by our eyes, but by our brain. As Shepard says:

“Because we are generally unaware that we are imposing a perceptual interpretation on the stimulus, we are generally unaware that our experience has an illusory aspect. The illusory aspect may only strike us after we are informed, for example, that the sizes or shapes of lines or areas that appear very unequal are, in fact identical in the picture.”

When we look at the picture, having no reason to assume that there is an illusion at play, we don’t even consider that we might be seeing something different than what is obviously right in front of us. The problem is that it is not what is right in front of us at all.

7 Ibid, p. 46
The bottom line? We make assumptions and determinations about what is real every moment of every day. We sort out those 11 million pieces of information, we see what we see, and we believe that what we see is real. Only occasionally do we realize how subjective those determinations are, and how much they are impacted not by what is in front of us, but by what we interpret is in front of us, seen through our own lens on the world.

The challenge is that even knowing that we are inherently biased, we may not be able to help ourselves. According to Shepard,

“Because the inferences about orientation, depth, and length are provided automatically by (our) underlying machinery, any knowledge or understanding of the illusion we may gain at the intellectual level remains virtually powerless to diminish the magnitude of the illusion.”

Our perception, in other words, is so deeply buried in our “underlying machinery,” our unconscious, that even knowing that it is there makes it difficult, or impossible, to see its impact on our thinking and on what we see as real.

The Deep Impact of Unconscious Bias in the Workplace

Now, if all of this is about a silly illusion about a table, then who really cares? But what if it determines whether or not you will hire the most qualified candidate for a job? Or give an employee a fair performance review? Or hire the right CEO?

Where diversity is concerned, unconscious bias creates hundreds of seemingly irrational circumstances every day in which people make choices that seem to make no sense and be driven only by overt prejudice, even when they are not. Of course, there are still some cases where people are consciously hateful, hurtful, and biased. These people still need to be watched for and addressed. But it is important to recognize that the concept of unconscious bias does not only apply to “them.” It applies to all of us.

Each one of us has some groups with which we consciously feel uncomfortable, even as we castigate others for feeling uncomfortable with our own groups. These conscious patterns of discrimination are problematic, but, again, they pale in comparison to the unconscious patterns that impact us every day. Unconscious perceptions govern many of the most important decisions we make and have a profound effect on the lives of many people in many ways.

Dr. M. Elizabeth Holmes, Executive Vice President & Chief Learning Officer, Roosevelt Thomas Consulting & Training, from “Getting Conscious About Managing Diversity”
SPECIAL CASE STUDY

Chubb

Chubb has built its solid reputation on one simple principle, “Never compromise integrity.” This principle captures the spirit of Chubb, and the property, casualty and specialty insurance provider applies this same standard in its approach to diversity and inclusion within its organization.

According to Chubb, companies that perceive diversity as exclusively a moral imperative or societal goal are missing the larger point. Workforce diversity should be viewed as a competitive advantage and a business imperative, and only when companies approach diversity and inclusion in this way can they achieve a fully diverse and inclusive workforce.

The company believes that diversity is all about finding and developing the best talent, creating an inclusive work environment and achieving outstanding business results. Talent comes in many packages. The packages vary by race, age, gender, ethnicity, color, sexual orientation and disability. Diversity, for Chubb, is about recognizing, respecting and valuing these differences. But the company also appreciates that diversity is also about things that are not so tangible. Diversity is about differences in thinking styles, religious beliefs, education, socioeconomic status, and geographic location, among many variables.

In a true effort to create an environment where all employees can realize their fullest potential and in which the company can benefit from the competitive advantage diversity provides, Chubb offers trainings on various aspects of diversity, including how to recognize and address unconscious bias.

The first step in tackling workplace bias is to provide an open channel of communication for employees. Kathy Marvel, who serves as the company’s Chief Diversity Officer, shares that Chubb provides easy access to employee relations personnel via a dedicated phone line called “Voice of the Employee.” Callers can confidentially discuss issues that may require further investigation.

“In our leadership training program called the ‘Leadership Development Seminar,’ we have included a section on biases,” Marvel explains. “This training allows participants to identify biases that they may hold and their impact on effective leadership.”

During the past 18 months, Chubb has also piloted several versions of bias awareness training for its management teams. Additionally, “we have paired the bias awareness training with performance management training to help provide guidance on objectively linking performance with business goals, while managing the challenges we may face due to unconscious biases we may have,” Marvel states. “The combined performance management / bias awareness session seems to be most effective, and we are determining how best to move forward with that format.”

According to Marvel, any organization seeking to address unconscious bias discussions or training from within must do so carefully. “It may be misconstrued that an organization that is conducting bias training has uncovered biases in their practices, and this may make organizations reluctant to proceed with valuable training that may change behaviors. Each organization must assess that risk with their general counsel.”

While the company has been participating in training, Marvel cautions that understanding and accepting one’s biases is not an overnight process, nor a comfortable one. “Providing both team dialogue and personal reflection time is crucial for successful implementation,” Marvel says.
The Résumé Study

A number of studies point directly to how unconscious decisions impact business decisions. Researchers at MIT and the University of Chicago have discovered that even names can unconsciously impact people’s decision-making. The résumés had a key distinction in them: some were mailed out with names that were determined to be “typically white,” others with names that were “typically black.” Every company was sent four résumés: one of each race that was considered an “average” résumé and one of each race that was considered “highly skilled.”

Pre-interviews with company human resources employees had established that most of the companies were aggressively seeking diversity, a fact that seems more likely to have them lean toward somebody with a name that suggests a black candidate. And yet, the results indicated something else was occurring. Résumés with “typically white” names received 50 percent more callbacks than those with “typically black” names. There was another striking difference. While the highly skilled “typically white” named candidates received more callbacks than the average ones, there was virtually no difference between the numbers of callbacks received by highly skilled versus average “typically black” named candidates. Even more strikingly, average “typically white” named candidates received more callbacks than highly skilled “typically black” named candidates!

The Affinity Bias Example

Unconscious patterns can play out in ways that are so subtle they are hard to spot. Imagine, for example, that you are conducting an interview with two people, we’ll call them Sally and John. John reminds you of yourself when you were younger, or of someone you know and like. You have that sense of familiarity or “chemistry.” You instantly like him, and though you are not aware of why, your mind generates justifications. (“He seems like a straightforward kind of guy. I like the way he ‘holds’ himself.”) You ask him the first interview question and he hems and haws a bit. After all, it’s an interview. He’s nervous. Because you feel an affinity toward him, you pick up on his nervousness. You want to put him at ease. You say, “John, I know it’s an interview, but there’s nothing to be nervous about. Take a breath and let me ask the question again.” John nails it this time and he’s off and running to a great interview. The whole interaction took four seconds, yet it made a world of difference.

Then you sit down with Sally. There is nothing negative about her, just no real connection. It is a very “business-like” interaction. You ask her the first question and she’s a little nervous too, but this time you don’t pick up on it. This interview moves forward, but not quite as well as John’s. The next day a co-worker asks you how the interviews went, and you respond: “John was great…open, easy to talk to. I think he’ll be great with staff and clients.” And your reply about Sally? “She’s okay, I guess.” Your perceptions about the interviews constitute your reality. You probably don’t even remember the four-second interaction that changed John’s entire interview. In fact, if somebody asks you, you would swear you conducted the interviews exactly the same way with the same questions. Your own role in influencing the outcomes was completely invisible to you, driven by your background of comfort with John.

9 Bertrand, Marianne and Mullainathan, Sendhil, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, University of Chicago Graduate School of Business, NBER and CEPR; MIT and NBER, 2004
10 Bertrand, Marianne and Mullainathan, Sendhil, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, University of Chicago Graduate School of Business, NBER and CEPR; MIT and NBER, 2004
Micro-Affirmations and Unconscious Bias

Mary P. Rowe, Ph.D., Adjunct Professor of Negotiation and Conflict Management at the Massachusetts Institute of Technology (MIT) Sloan School of Management.

Micro-affirmations – apparently small acts, which are often ephemeral and hard-to-see, events that are public and private, often unconscious but very effective, which occur wherever people wish to help others to succeed.

What Are Micro-Affirmations?

Micro-affirmations are tiny acts of opening doors to opportunity, gestures of inclusion and caring, and graceful acts of listening. Micro-affirmations lie in the practice of generosity, in consistently giving credit to others – in providing comfort and support when others are in distress, when there has been a failure at the bench, or an idea that did not work out, or a public attack. Micro-affirmations include the myriad details of fair, specific, timely, consistent and clear feedback that help a person build on strength and correct weakness.

I have come to believe that teaching and training about micro-affirmations may help an organization in several different ways:

The first effect is obvious – appropriately affirming the work of another person is likely both to help that person do well, and to help him or her to enjoy doing well.

The second effect is that consistent, appropriate affirmation of others can spread from one person to another – potentially raising morale and productivity. It helps everyone, men and women, people of color and Caucasians. It appears to be particularly helpful for department heads, and anyone who is senior to another person, to “model” affirming behavior.

The third effect is subtle, and deals with the point that it may be hard for a person to “catch” himself or herself unconsciously behaving inequitably. I may not always be able to “catch myself” behaving in a way that I do not wish to behave. But if I try always to affirm others in an appropriate and consistent way, I have a good chance of blocking behavior of mine that I want to prevent. Many micro-inequities are not conscious – but affirming others can become a conscious as well as unconscious practice that prevents unconscious slights.

Implications for Action

• Managers can and should pay attention to “small things.”

• The principles of appreciative inquiry are relevant to micro-affirmations: “leading” rather than “pushing;” building on strength and success, rather than first identifying faults and weakness.

• Small things are especially important with respect to feelings. (Managers must be impartial about facts but it is often appropriate and helpful to affirm peoples’ feelings.) As it happens, it is relatively easy for most people to practice and teach how to affirm feelings. This is important because the “mechanics” of affirmation are not trivial in human affairs – attitudes may follow behavior just as behavior may follow attitudes.

• Whenever a question is brought to us about how to change offensive behavior – our own behavior or that of another – we can teach the principles of changing behavior, and explore options about how to do it.

Excerpted with permission from an article by Mary Rowe: Micro-affirmations & Micro-inequities, Rowe, M. Journal of the International Ombudsman Association, Volume 1, Number 1, March 2008.
Now, imagine that same dynamic occurring in the way you:

- recruit people
- make hiring decisions
- conduct your initial orientation interview
- mentor employees (or not!)
- make job assignments
- give people training opportunities
- listen to people's ideas and suggestions
- make promotional choices
- give performance reviews
- decide organizational policy
- conduct marketing campaigns
- choose board members
- treat customers

…and literally hundreds of other choices, and you can see that we have an issue that dramatically impacts our organizations. And almost all of it can be invisible to us.

**Unconscious Self-Perception and Performance**

While it’s clear that unconscious beliefs impact the way we perceive others, unconscious beliefs also impact how we view of ourselves and, as a result, our work performance. In a 1995 study by three psychology professors, a group of Asian-American female undergraduates were asked to fill out a brief questionnaire, then complete a math test. The women were split into three groups. The first group was given a “female identity salient” questionnaire designed to activate the gender identity of the tester. The second group’s questionnaire was designed to activate the Asian cultural identity of the tester. And the third group was a control group whose questionnaire had no conscious focus.

Based on these different questionnaires, participants in the group that answered the “Asian salient” questionnaire performed at the highest level, 54%, while the control group averaged 49% and the “female identity salient” group had only 42%. The positive stereotypes about Asians in math seem to have had an “encouraging” impact on the first group, while the negative stereotypes about women and math may have had a suppressing impact on the group that was focused on their gender identity.

**“Confirmational” behavior**

We make decisions largely in a way that is designed to confirm beliefs that we already have. This phenomenon of “confirmational behavior” occurs unconsciously in both positive and negative ways.

Our thoughts and decisions are constantly influenced by widely held stereotypes. Imagine, for example, that you have an ingrained unconscious belief that “young Hispanic men are lazy” (as untrue as that stereotype might be). How do you manage a young Hispanic man who reports to you? What actions are you likely to take? Isn't it likely that you will have a tendency to micro-manage him? Are you more or less likely to invest in developing him? Are you more or less likely to put him on high level assignments? Are you more or less likely to introduce him to significant players in the organization? When he makes a mistake, are you more or less likely to accept his explanation?

The answers are apparent. As a result of your stereotype and consequent actions, the employee would become frustrated, perhaps even angry. He would become resigned and lose motivation. He might leave, but, then again, having experienced the same kind of treatment in other places, he might believe that this is “just the way it is” and stay while “going through the motions” on his job. In other words, he would behave in a way that appears “lazy” to you, further confirming your erroneous stereotype.
On the other hand, take “John” from the interview mentioned earlier. For some reason, you believe in him. He reminds you of yourself when you were younger. How do you treat him? You show a deep interest in his career. You introduce him to all of the “right” people. You make sure he gets key job assignments for upward mobility. If people express concerns about him, you say: “Don’t worry. He’s a good kid. I’ll talk to him.” Not because you are helping him, but because you really see him as more competent. The impact? John flourishes. In fact, two years later the announcement comes out: John has been appointed a director, the youngest person ever to get such an appointment. And your response? “Boy, am I a good judge of talent, or what?”

Our patterns of belief and their impact are so deeply ingrained, and so concealed in our unconscious, it becomes difficult for us to fully understand their impact on our decision-making. Our minds automatically justify our decisions, blinding us to the true source, or beliefs, behind our decisions. Ultimately, we believe our decisions are consistent with our conscious beliefs, when in fact, our unconscious is running the show.

The Organizational Unconscious

Unconscious behavior is not just individual; it influences organizational culture as well. This explains why so often our best attempts at creating corporate culture change with diversity efforts seem to fall frustratingly short; to not deliver on the promise they intended.

Organizational culture is more or less an enduring collection of basic assumptions and ways of interpreting things that a given organization has invented, discovered, or developed in learning to cope with its internal and external influences. Unconscious organizational patterns, or “norms” of behavior, exert an enormous influence over organizational decisions, choices, and behaviors. These deep-seated company characteristics often are the reason that our efforts to change organizational behavior fail. Despite our best conscious efforts, the “organizational unconscious” perpetuates the status quo and keeps old patterns, values, and behavioral norms firmly rooted.

“Flexible work” arrangements are one area in which the conflict between our conscious choices and the “organizational unconscious” is coming to a head. Flexible work arrangements — alternative arrangements or schedules that deviate from the traditional working day and/or week — are often established to allow employees, especially parents, to meet personal or family needs. In principle the policy makes business sense and may even draw a lot of corporate and employee support. Turnover among young, talented parents can cause an organization to lose some of its best employees and cost hundreds of thousands, or even millions, of dollars in replacement costs. Thus, many organizations have a flexible work policy clearly articulated in the employee manual.

-Time and again, the research shows that interviews are poor predictors of job performance because we tend to hire people we think are similar to us rather than those who are objectively going to do a good job. -Ori Brafman, quoted in “Overcoming the ‘Sway’ in Professional Life”. The New York Times. July 15, 2008. 

For Weyerhaeuser, one of the world’s largest forest products companies, ensuring an environment that is truly diverse and inclusive is a top priority. So when the company made the important decision to look into combating unconscious bias within its corporate walls, the move made perfect sense.

“What we are trying to do here is build a more diverse and inclusive culture at Weyerhaeuser,” states Effenus Henderson, the company’s Chief Diversity Officer.

In Henderson’s view, unconscious bias can and will show up in many areas of the workplace. Unconscious bias can show up in hiring, promotions or even in daily interactions around the office.

A critical part of addressing unconscious bias is in first recognizing and acknowledging that it exists. “You have to be able to recognize the kinds of issues or situations where people feel disrespected and devalued and look for those subtleties that other people might not always look for,” explains Henderson.

Weyerhaeuser’s managers are expected to encourage women, minorities, veterans, and individuals with disabilities to apply for positions for which they are qualified. Further, the company’s leaders are expected to maintain a work environment that supports the success of all employees. Each member of the company’s senior management team, for example, develops an action plan based on his or her individual diversity leadership assessment and is held accountable for follow through.

Weyerhaeuser understands that creating a company that is truly diverse and inclusive takes time and requires discipline, high expectations and accountability. The company takes great pains to ensure that it continues to improve upon its reputation for being an employer of choice. It is for this very reason that Weyerhaeuser diligently works to ensure bias is proactively addressed within the organization.

“I think it is important to recognize that bias exists, and you must coach leaders in a way that will allow them to recognize it,” asserts Henderson. “This will help them build inclusive behaviors that help recognize things that exist in all of us that can at times get in the way of being inclusive and respectful of others.”

In addition to some of the blatant ways that bias manifests itself, there are many subtle ways in which unconscious bias appears. Unconscious bias, Henderson points out, can show up in generational differences within the workplace. Younger workers may make assumptions about older workers, and vice versa, leading to unconscious, yet impactful, attitudes and actions. The same goes for assumptions across – and within – racial and ethnic groups, as well as management levels.

“We did a survey amongst our company employees to see what they thought about [unconscious bias] and how they thought it showed up, and the feedback we got back from them was that employees felt that managers who didn’t mention diversity did not have an interest in the topic or a stake in the topic,” Henderson shares. “At Weyerhaeuser, we know that there is no easy framework for this, but what we have tried to do is create a culture within our organization where people feel included and where our management team is held accountable when we fall short of this.”
However, when employees actually take advantage of flexible work policies, they can often be viewed by others – including coworkers, bosses, and company leadership – as a “less committed,” “less valuable,” or “less desirable” member of the team. The “official rules” say that flexible work arrangements are acceptable, but in actuality a conflict exists. While the organization consciously acknowledges that offering flexible work arrangements is the “right” thing to do and may even help increase retention and employee satisfaction, the organizational unconscious believes differently. Unconsciously, the organization’s culture of fear and mistrust pervades: fear that the company will ultimately lose productivity and revenue through flexible work arrangements, and mistrust that employees are misusing the policy and “cutting corners” in terms of time requirements.

Conflicts such as this can leave employees frustrated by the feeling that their leaders and the company as a whole are disingenuous in their statements, when in actuality the leaders may not see the conflict themselves.

How to Deal With Unconscious Bias
in the Workplace … For Better or For Worse

Given the enormous impact of unconscious patterns on both our individual behavior and on organizational behavior, the question becomes, “How do we begin to see the organizational unconscious, and what can we do about it?” How do we engage in a seemingly contradictory path…consciously becoming aware of and addressing something that is, by nature, concealed?

There are a number of strategies that will help us create workplace cultures in which employees can actively “unconceal” perceptions and patterns that have been hidden. According to the Level Playing Field Institute, a San Francisco based nonprofit which studies, identifies and removes hidden biases from the classroom to the board room, there are steps each of us can take to mitigate our hidden bias.

“Each one of us has some groups with which we consciously feel uncomfortable, even as we castigate others for feeling uncomfortable with our own groups. These conscious patterns of discrimination are problematic, but, again, they pale in comparison to the unconscious patterns that impact us every day. Unconscious perceptions govern many of the most important decisions we make and have a profound effect on the lives of many people in many ways. ...Unconscious patterns can play out in ways that are so subtle they are hard to spot.”

Howard Ross
Founder & Chief Learning Officer of Cook Ross Inc., a diversity training and change management firm based in Silver Spring, Md.
IN FOCUS

Corporate Leavers Survey Findings

The Corporate Leavers Survey, a national study conducted by the Level Playing Field Institute in 2007, shows that each year more than 2 million professionals and managers voluntarily leave their jobs solely due to unfairness, costing U.S. employers $64 billion in turnover annually. Among the findings were:

• Persons of color are more than three times more likely to leave solely due to unfairness in the workplace than heterosexual, Caucasian men.

• Respondents who said unfairness was the only reason for leaving their job were most likely to cite the following specific forms of unfair conduct: (1) being asked to attend more recruiting or community related events than others because of one’s race, gender, religion or sexual orientation, (2) being passed over for a promotion due to one’s personal characteristics, (3) being publicly humiliated and (4) being compared to a terrorist in a joking or serious manner.

• 24% percent who experienced unfairness said their experience “strongly” discouraged them from recommending their employer to other potential employees. Similarly, 13% said their experience “strongly” discouraged them from recommending their employer’s products or services to others.

• Respondents to the survey also expressed differing opinions on which actions their employers could have taken to convince them to stay. Fair compensation was the most important factor for heterosexual Caucasian men and women, while almost half (43 percent) of gays and lesbians would have been “much more likely” to stay if they were offered better benefits. More than one-third of people of color (34 percent) indicated they would have likely stayed if their employer had better management who recognized their abilities.

For more information about the Corporate Leaver Survey and the Level Playing Field Institute, please visit www.corporateleavers.org, www.lpfi.org or email info@lpfi.org.

Level Playing Field Institute Presents:

How to Make it Safer to Talk About Race, Age & Gender in the Workplace

Intercontinental Hotel
888 Howard Street, San Francisco
Thursday, September 4, 2008
12:00p – 1:30p

For more information, contact Martha Kim at martha@lpfi.org or by phone at (415) 946-3027.
The unconscious is playing a political role this year, for the evidence is overwhelming that most Americans have unconscious biases both against blacks and against women in executive roles. Experiments have shown that the brain categorizes people by race in less than 100 milliseconds (one-tenth of a second), about 50 milliseconds before determining sex. And evolutionary psychologists believe we’re hard-wired to be suspicious of people outside our own group, to save our ancestors from blithely greeting enemy tribes of cave men. In contrast, there’s no hard-wired hostility toward women, though men may have a hard-wired desire to control and impregnate them. Yet racism may also be easier to override than sexism. For example, one experiment found it easy for whites to admire African-American doctors; they just mentally categorized them as “doctors” rather than as “blacks.” Meanwhile, whites categorize black doctors whom they dislike as “blacks.” ...The challenge for women competing in politics or business is less misogyny than unconscious sexism: Americans don’t hate women, but they do frequently stereotype them as warm and friendly, creating a mismatch with the stereotype we hold of leaders as tough and strong. ...Many experiments have found that women have trouble being perceived as both nice and competent.


Top 10 Ways to Combat Hidden Bias

1. Recognize that as human beings, our brains make mistakes without us even knowing it. The new science of “unconscious bias” applies to how we perceive other people. We’re all biased and becoming aware of our own biases will help us mitigate them in the workplace.

2. Reframe the conversation to focus on fair treatment and respect, and away from discrimination and “protected classes”. Review every aspect of the employment life cycle for hidden bias – screening resumes, interviews, onboarding, assignment process, mentoring programs, performance evaluation, identifying high performers, promotion and termination.

3. Ensure that anonymous employee surveys are conducted company-wide to first understand what specific issues of hidden bias and unfairness might exist at your workplace. Each department or location may have different issues.

4. Conduct anonymous surveys with former employees to understand what were the issues they faced, what steps could be taken for them to consider coming back, whether they encourage or discourage prospective employees from applying for positions at your company and whether they encourage or discourage prospective customers/clients from using your company’s products or services.

5. Offer customized training based upon survey results of current and former employees that includes examples of hidden bias, forms of unfairness that are hurtful and demotivating, and positive methods to discuss these issues.

6. Offer an anonymous, third-party complaint channel such as an ombudsperson; since most of the behaviors that employees perceive as unfair are not covered by current laws – e.g. bullying, very subtle bias – existing formal complaint channels simply don’t work.

7. Initiate a resume study within your industry, company and/or department to see whether resumes with roughly equivalent education and experience are weighted equally, when the names are obviously gender or race or culturally distinct.

8. Launch a resume study within your company and/or department to reassign points based on earned accomplishments vs. accidents of birth – e.g. take points off for someone who had an unpaid internship, add points for someone who put him/herself through college.

9. Support projects that encourage positive images of persons of color, GLBT and women. Distribute stories and pictures widely that portray stereotype-busting images – posters, newsletters, annual reports, speaker series, podcasts. Many studies show that the mere positive image of specific groups of people can combat our hidden bias.

10. Identify, support and collaborate with effective programs that increase diversity in the pipeline. Reward employees who volunteer with these groups, create internships and other bridges, and celebrate the stories of those who successfully overcome obstacles.

Many companies also choose to undergo an organizational diversity audit. Most organizational audits assess the conscious layers of organizational behavior. What do people think, believe, and see about what’s going on in the organization?
What Does All of This Mean?

An awareness of unconscious bias requires us to fundamentally rethink the way we approach diversity work on a number of different levels. We have focused a great deal of attention on trying to find ways for people, especially those in the dominant groups, to “get” diversity. The challenge is that “getting it,” on a conscious level, may have little or no impact on our unconscious beliefs and, more importantly, behavior. Our knowledge of unconscious bias makes several things abundantly clear:

• The limiting patterns of unconscious behavior are not restricted to any one group. All of us have them, and those of us who are diversity professionals particularly have to focus on our own assumptions and biases if we expect to have the moral authority to guide others in acknowledging and confronting theirs.

• A person who behaves in a non-exclusive or even discriminatory way does not have to have negative intent. When we approach people who view themselves as good individuals trying to do the right thing as if they “should have known better,” we are likely to be met with resistance. If we approach them with an assumption of innocence in intent, but with an emphasis on the impact of their behavior, we are more likely to reach them effectively and garner their willing attention.

• Finally, we should not rely on any sense of subjective determinations of attitude, either individually or collectively, to determine whether our organizations are functioning in inclusive ways. Our conscious attitudes may have little to do with our success in producing results. We have to create objective measurements that give us individual and collective feedback on our performance if we are to create organizations that are truly inclusive.

Formal audits and evaluations also assess people’s sense of how the culture is operating outside of their personal experience and look at indicators (metrics) that might identify how intentions and values are really expressed, thereby revealing the patterns of the organizational unconscious.

An understanding of unconscious bias is an invitation to a new level of engagement about diversity issues. It requires awareness, introspection, authenticity, humility, and compassion. And most of all, it requires communication and a willingness to act.
About Cook Ross, Inc.

Cook Ross, Inc. is a nationally recognized, woman-owned consulting firm founded in 1989. For nearly 20 years, Cook Ross, Inc. has provided diversity and cultural competency solutions through its training, consulting products and services to hundreds of organizations across 47 of the 50 United States, and 10 countries outside of the U.S.

We view diversity as a powerful resource that can be globally acknowledged and managed to create unprecedented learning and growth as well as an issue of legal compliance and awareness. We believe that attention to diversity, if done well, can improve productivity, morale, work satisfaction, creativity, internal and external communication, leadership, satisfaction in the communities that are being served, and profitability.

Our methodology is built around a transformative approach to Diversity and Inclusion Consulting – Re-Inventing Diversity for the 21st Century©. This approach creates sustainable change in organizations by replacing race-based, US-centric, ‘us vs. them’ diversity training with a systems model that explores globalism, cultural intelligence and cultural flexibility, inherent human tendency toward bias, and unconscious organizational patterns that exist which impact the way employees, vendors, and customers from different cultures, ages, and backgrounds all relate to each other.

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Diversity Best Practices

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ABSTRACT

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: What, if anything, should we do about implicit bias in the courtroom? The author team comprises legal academics, scientists, researchers, and even a sitting federal judge who seek to answer this question in accordance with behavioral realism. The Article first provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications that distinguish between explicit, implicit, and structural forms of bias. Next, the Article applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. This application involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed. Finally, the Article examines various concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury.

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INTRODUCTION

The problems of overt discrimination have received enormous attention from lawyers, judges, academics, and policymakers. While explicit sexism, racism, and other forms of bias persist, they have become less prominent and public over the past century. But explicit bias and overt discrimination are only part of the problem. Also important, and likely more pervasive, are questions surrounding implicit bias—attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.

How prevalent and significant are these implicit, unintentional biases? To answer these questions, people have historically relied on their gut instincts and personal experiences, which did not produce much consensus. Over the past two decades, however, social cognitive psychologists have discovered novel ways to measure the existence and impact of implicit biases—without relying on mere common sense. Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects. These fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law’s fundamental understandings of discrimination and fairness.

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: What, if anything, should we do about implicit bias in the courtroom? In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls? In what circumstances are these risks most acute? Are there practical ways to reduce the effects of implicit biases? To what extent can awareness of these biases mitigate their impact? What other debiasing strategies might work? In other words, in what way—if at all—should the courts respond to a better model of human decisionmaking that the mind sciences are providing?

We are a team of legal academics, scientists, researchers, and a sitting federal judge1 who seek to answer these difficult questions in accordance with behavioral realism.2 Our general goal is to educate those in the legal profession who are

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1. Judge Mark W. Bennett, a coauthor of this article, is a United States District Court Judge in the Northern District of Iowa.

2. Behavioral realism is a school of thought that asks the law to account for more accurate models of human cognition and behavior. See, e.g., Jerry Kang & Kristin Lane, Seeing Through Colorblindness: Implicit
unfamiliar with implicit bias and its consequences. To do so, we provide a current summary of the underlying science, contextualized to criminal and civil litigation processes that lead up to and crescendo in the courtroom. This involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms. We seek to be useful to legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it. While we aim to provide useful and realistic strategies for those judges already persuaded that implicit bias is a legitimate concern, we also hope to provoke those who know less about it, or are more skeptical of its relevance, to consider these issues thoughtfully.

We are obviously not a random sample of researchers and practitioners; thus, we cannot claim any representative status. That said, the author team represents a broad array of experience, expertise, methodology, and viewpoints. In authoring this paper, the team engaged in careful deliberations across topics of both consensus and dissensus.3 We did not entirely agree on how to frame questions in this field or how to answer them. That said, we stand collectively behind what we have written. We also believe the final work product reveals the benefits of such cross-disciplinary and cross-professional collaboration.

Part I provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications. Often the science can seem too abstract, especially to nonprofessional scientists. As a corrective, Part II applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. Part III

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3. This paper arose out of the second symposium of PULSE: Program on Understanding Law, Science, and Evidence at UCLA School of Law, on March 3–4, 2011. We brought together leading scientists (including Anthony Greenwald, the inventor of the Implicit Association Test), federal and state judges, applied researchers, and legal academics to explore the state of the science regarding implicit bias research and to examine the various institutional responses to date. The Symposium also raised possibilities and complications, ranging from the theoretical to practical, from the legal to the scientific. After a day of public presentations, the author team met in a full-day closed session to craft the outlines of this paper. Judge Michael Linfield of the Los Angeles Superior Court and Jeff Rachlinski, Professor of Law at Cornell Law School, participated in the symposium but could not join the author team. Their absence should not be viewed as either agreement or disagreement with the contents of the Article.
examines different intervention strategies to counter the implicit biases of key players in the justice system, such as the judge and jury.

I. IMPLICIT BIASES

A. Empirical Introduction

Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational. We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race. For example, we have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments—even if those anchors are objectively wrong. We exhibit an endowment effect, with irrational attachments to arbitrary initial distributions of property, rights, and grants of other entitlements. We suffer from hindsight bias and believe that what turns out to be the case today should have been easily foreseen yesterday. The list of empirically revealed biases goes on and on. Indeed, many legal academics have become so familiar with such heuristics and biases that they refer to them in their analyses as casually as they refer to economic concepts such as transaction costs.

One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races. An attitude is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative. A stereotype is an association between a concept (again, in this case a social group) and a trait. Although interconnected, attitudes and stereotypes

8. In both common and expert usage, sometimes the word “prejudice” is used to describe a negative attitude, especially when it is strong in magnitude.
9. If the association is nearly perfect, in that almost every member of the social group has that trait, then we think of the trait less as a stereotype and more as a defining attribute. Typically, when we use the word “stereotype,” the correlation between social group and trait is far from perfect. See Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 CALIF. L. REV. 945, 949 (2006).
should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.

The conventional wisdom has been that these social cognitions—attitudes and stereotypes about social groups—are explicit, in the sense that they are both consciously accessible through introspection and endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC), have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

How have mind scientists discovered such findings on matters so latent or implicit? They have done so by innovating new techniques that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported. Some of these measures involve subliminal priming and other treatments that are not consciously detected within an experimental setting. Other instruments use reaction time differences between two types of tasks—one that seems consistent with some bias, the other inconsistent—as in the Implicit Association Test (IAT).

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The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit one response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that the same key is used for both White and harmless item; a different key is used for both African American and weapon. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly. Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people's responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.

Through the IAT, social psychologists from hundreds of laboratories have collected enormous amounts of data on reaction-time measures of “implicit biases,” a term we use to denote implicit attitudes and implicit stereotypes. According to these measures, implicit bias is pervasive (widely held), large in magnitude (as compared to standardized measures of explicit bias), dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are

13. This D score, which ranges from –2.0 to 2.0, is a standardized score, which is computed by dividing the IAT effect as measured in milliseconds by the standard deviations of the participants' latencies pooled across schema-consistent and -inconsistent conditions. See, e.g., Anthony Greenwald et al., Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003). If an individual’s IAT D score is divided by its standard deviation of the population that has taken the test, the result is interpretable as the commonly used effect size measure, Cohen’s d.
15. Cohen’s d is a standardized unit of the size of a statistical effect. By convention, social scientists mark 0.20, 0.50, and 0.80 as small, medium, and large effect sizes. The IAT effect, as measured in Cohen’s d, on various stereotypes and attitudes range from medium to large. See Kang & Lane, supra note 2, at 474 n.35 (discussing data from Project Implicit). Moreover, the effect sizes of implicit bias against social groups are frequently larger than the effect sizes produced by explicit bias measures. See id. at 474–75 tbl.1.
Implicit Bias in the Courtroom

separate mental constructs),\(^\text{17}\) and predicts certain kinds of real-world behavior.\(^\text{18}\) What policymakers are now keen to understand are the size and scope of these behavioral effects and how to counter them—by altering the implicit biases themselves and by implementing strategies to attenuate their effects.

Useful and current summaries of the scientific evidence can be found in both the legal and psychological literatures. For example, in the last volume of this law review, Jerry Kang and Kristin Lane provided a summary of the evidence demonstrating that we are not perceptually, cognitively, or behaviorally colorblind.\(^\text{19}\) Justin Levinson and Danielle Young have summarized studies focusing on jury decisionmaking.\(^\text{20}\) In the psychology journals, John Jost and colleagues responded to sharp criticism\(^\text{21}\) that the IAT studies lacked real-world consequences by providing a qualitative review of the literature, including ten studies that no manager should ignore.\(^\text{22}\) Further, they explained how the findings are entirely consistent with the major tenets of twentieth century social cognitive psychology.\(^\text{23}\)

In a quantitative review, Anthony Greenwald conducted a meta-analysis of IAT studies—which synthesizes all the relevant scientific findings—and found that implicit attitudes as measured by the IAT predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, substantially better than explicit bias measures.\(^\text{24}\)

Instead of duplicating these summaries, we offer research findings that are specific to implicit bias leading up to and in the courtroom. To do so, we chart


\(?\text{18}\) See Kang & Lane, supra note 2, at 481–90 (discussing evidence of biased behavior in perceiving smiles, responding to threats, screening resumes, and body language).


\(?\text{23}\) See id.

\(?\text{24}\) See Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test. III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20 (2009). Implicit attitude scores predicted behavior in this domain at an average correlation of r=0.24, whereas explicit attitude scores had correlations at an average of r=0.12. See id. at 24 tbl.3.
out two case trajectories—one criminal, the other civil. That synthesis appears in Part II.

B. Theoretical Clarification

But before we leave our introduction to implicit bias, we seek to make some theoretical clarifications on the relationships between explicit biases, implicit biases, and structural processes that are all involved in producing unfairness in the courtroom. We do so because the legal literature has flagged this as an important issue. In addition, a competent diagnosis of unfairness in the courtroom requires disentangling these various processes. For instance, if the end is to counter discrimination caused by, say, explicit bias, it may be ineffective to adopt means that are better tailored to respond to implicit bias, and vice versa.

We start by clarifying terms. To repeat, explicit biases are attitudes and stereotypes that are consciously accessible through introspection and endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate.

Above, we used the labels "explicit" and "implicit" as adjectives to describe mental constructs—attitudes and stereotypes. Readers should recognize that these adjectives can also apply to research procedures or instruments. An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. No instrument perfectly measures a mental construct. In fact, one can often easily conceal one’s explicit bias as measured through an explicit instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not to be candid about the beliefs or attitudes at issue.

By contrast, an implicit instrument does not depend on the respondent’s conscious knowledge of the mental constructs that the researcher is inferring from the measure. An example is a reaction-time measure, such as the IAT. This does not necessarily mean that the respondent is unaware that the IAT is measuring bias.

It also does not mean that the respondent is actually unaware that he or she has implicit biases, for example because she has taken an IAT before or is generally aware of the research literature. To repeat, no instrument perfectly measures any mental construct, and this remains true for implicit instruments. One might, for instance, try to conceal implicit bias measured through an implicit instrument, but such faking is often much harder than faking explicit bias measured by an explicit instrument.26

Finally, besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called “structural.” Other names include “institutional” or “societal.” These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.27 In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Because thinking through biases with respect to human beings evokes so much potential emotional resistance, sometimes it is easier to apply them to something less fraught than gender, race, religion, and the like. So, consider a vegetarian’s biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are explicit biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of concealed bias (explicit bias that is hidden to manage impressions).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an *implicit* bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for $10 or a cheeseburger for $3. Unfortunately, she has only $5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of *structural* bias in favor of meat.

We disentangle these various mechanisms—explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces—because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms—explicit bias, implicit bias, and structural forces—are not mutually exclusive. To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest

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that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.29

II. TWO TRAJECTORIES

A. The Criminal Path

Consider, for example, some of the crucial milestones in a criminal case flowing to trial. First, on the basis of a crime report, the police investigate particular neighborhoods and persons of interest and ultimately arrest a suspect. Second, the prosecutor decides to charge the suspect with a particular crime. Third, the judge makes decisions about bail and pretrial detention. Fourth, the defendant decides whether to accept a plea bargain after consulting his defense attorney, often a public defender or court-appointed private counsel. Fifth, if the case goes to trial, the judge manages the proceedings while the jury decides whether the defendant is guilty. Finally, if convicted, the defendant must be sentenced. At each of these stages,30 implicit biases can have an important impact. To maintain a manageable scope of analysis, we focus on the police encounter, charge and plea bargain, trial, and sentencing.

1. Police Encounter

Blackness and criminality. If we implicitly associate certain groups, such as African Americans, with certain attributes, such as criminality, then it should not be surprising that police may behave in a manner consistent with those implicit stereotypes. In other words, biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning.31 These biases could contribute to the substantial racial disparities that have been widely documented in policing.32


30. The number of stages is somewhat arbitrary. We could have listed more stages in a finer-grained timeline or vice versa.


32. See, e.g., Dianna Hunt, Ticket to Trouble/Wheels of Injustice/Certain Areas Are Ticket Traps for Minorities, HOUS. CHRON., May 14, 1995, at A1 (analyzing sixteen million Texas driving records and finding that minority drivers straying into White neighborhoods in Texas's major urban areas were twice as likely as Whites to get traffic violations); Sam Vincent Meddis & Mike Snider, Drug War "Focused" on Blacks, USA TODAY, Dec. 20, 1990, at 1A (reporting findings from a 1989 USA...
Since the mid–twentieth century, social scientists have uncovered empirical evidence of negative attitudes toward African Americans as well as stereotypes about their being violent and criminal.33 Those biases persist today, as measured by not only explicit but also implicit instruments.34

For example, Jennifer Eberhardt, Philip Goff, Valerie Purdie, and Paul Davies have demonstrated a bidirectional activation between Blackness and criminality.35 When participants are subliminally primed36 with a Black male face (as opposed to a White male face, or no prime at all), they are quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static.37 In other words, by implicitly thinking Black, they more quickly saw a weapon.

Interestingly, the phenomenon also happens in reverse. When subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces.38 Researchers found this result not only in a student population, which is often criticized for being unrepresentative of the real world, but also among police officers.39 The research suggests both that

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34. In a seminal paper, Patricia Devine demonstrated that being subliminally primed with stereotypically “Black” words prompted participants to evaluate ambiguous behavior as more hostile. See Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). The priming words included “Negroes, lazy, Blacks, blues, rhythm, Africa, stereotype, ghetto, welfare, basketball, unemployed, and plantation.” Id. at 10. Those who received a heavy dose of priming (80 percent stereotypical words) interpreted a person’s actions as more hostile than those who received a milder dose (20 percent). Id. at 11–12; see also John A. Bargh et al., Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996).
36. The photograph flashed for only thirty milliseconds. Id. at 879.
37. See id. at 879–80. There was a 21 percent drop in perceptual threshold between White face primes and Black face primes. This was measured by counting the number of frames (out of a total of 41) that were required before the participant recognized the outlines of the weapon in both conditions. There was a 8.8 frame difference between the two conditions. Id. at 881.
38. Visual attendance was measured via a dot-probe paradigm, which requires participants to indicate on which side of the screen a dot flashes. The idea is that if a respondent is already looking at one face (for example, the Black photograph), he or she will see a dot flash near the Black photograph faster. See id. at 881 (describing dot-paradigm as the gold standard in visual attention measures).
39. See id. at 885–87 (describing methods, procedures, and results of Study 4, which involved sixty-one police officers who were 76 percent White, 86 percent male, and who had an average age of forty-two).
the idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness. How these findings translate into actual police work is, of course, still speculative. At a minimum, however, they suggest the possibility that officers have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention.

Even if this is the case, one might respond that extra visual attention by the police is not too burdensome. But who among us enjoys driving with a police cruiser on his or her tail? Moreover, the increased visual attention did not promote accuracy; instead, it warped the officers’ perceptual memories. The subliminal prime of weapons led police officers not only to look more at Black faces but also to remember them in a biased way, as having more stereotypically African American features. Thus, they “were more likely to falsely identify a face that was more stereotypically Black than the target when they were primed with crime than when they were not primed.”

We underscore a point that is so obvious that it is easy to miss. The primes in these studies were all flashed subliminally. Thus, the behavioral differences in visually attending to Black faces and in remembering them more stereotypically were all triggered implicitly, without the participants’ conscious awareness.

*Shooter bias.* The implicit association between Blackness and weapons has also been found through other instruments, including other priming tasks and the IAT. One of the tests available on Project Implicit specifically examines the implicit stereotype between African Americans (as compared to European Americans) and weapons (as compared to harmless items). That association has been found to be strong, widespread, and dissociated from explicit self-reports.

Skeptics can reasonably ask why we should care about minor differentials between schema-consistent and -inconsistent pairings that are often no more than a half second. But it is worth remembering that a half second may be all

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41. Eberhardt et al., supra note 35, at 887.
42. See B. Keith Payne, Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). The study deployed a priming paradigm, in which a photograph of a Black or White face was flashed to participants for two hundred milliseconds. Immediately thereafter, participants were shown pictures of guns or tools. Id. at 184. When primed by the Black face, participants identified guns faster. Id. at 185.
43. For N=85,742 participants, the average IAT D score was 0.37; Cohen’s $d=1.00$. By contrast, the self-reported association (that is, the explicit stereotype measure) was Cohen’s $d=0.31$. See Nosek et al., supra note 12, at 11 tbl.2.
the time a police officer has to decide whether to shoot. In the policing context, that half second might mean the difference between life and death.

Joshua Correll developed a shooter paradigm video game in which participants are confronted with photographs of individuals (targets) holding an object, superimposed on various city landscapes. If the object is a weapon, the participant is instructed to press a key to shoot. If the object is harmless (for example, a wallet), the participant must press a different key to holster the weapon. Correll found that participants were quicker to shoot when the target was Black as compared to White. Also, under time pressure, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets, and failed to shoot more armed White targets (misses) than armed Black targets. Interestingly, the shooter bias effect was not correlated with measures of explicit personal stereotypes. Correll also found comparable amounts of shooter bias in African American participants. This suggests that negative attitudes toward African Americans are not what drive the phenomenon.

The shooter bias experiments have also been run on actual police officers, with mixed results. In one study, police officers showed the same bias in favor of shooting unarmed Blacks more often than unarmed Whites that student and civilian populations demonstrated. In another study, however, although police officers showed a similar speed bias, they did not show any racial bias in the

45. Id. at 1317.
46. Id. at 1319. For qualifications about how the researchers discarded outliers, see Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1493 n.16 (2005). Subsequent studies have confirmed Correll’s general findings. See, e.g., Anthony G. Greenwald et al., Targets of Discrimination: Effects of Race on Responses to Weapons Holders, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (finding similar results).
47. Correll et al., supra note 44, at 1323. The scales used were the Modern Racism Scale, the Discrimination and Diversity Scale, the Motivation to Control Prejudiced Responding Scale, and some questions from the Right-Wing Authoritarianism Scale and the Personal Need for Structure Scale for good measure. Id. at 1321. These are survey instruments that are commonly used in social psychological research. Shooter bias was, however, correlated with measures of societal stereotypes—the stereotypes that other people supposedly held. Id. at 1323.
48. See id. at 1324.
49. On explicit attitude instruments, African Americans show on average substantial in-group preference (over Whites). On implicit attitude instruments, such as the IAT, African Americans bell curve around zero, which means that they show no preference on average. See Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site, 6 GROUP DYNAMICS: THEORY RES. & PRACTICE 101, 105–06 (2002).
most important criterion of accuracy. In other words, there was no higher error rate of shooting unarmed Blacks as compared to Whites.51

Finally, in a study that directly linked implicit stereotypes (with weapons) as measured by the IAT and shooter bias, Jack Glaser and Eric Knowles found that “[i]ndividuals possessing a relatively strong stereotype linking Blacks and weapons [one standard deviation above the mean IAT] clearly show the Shooter Bias.”52 By contrast, recall that Correll found no such correlation with explicit stereotypes. These findings are consistent with the implicit stereotype story. Of course, it may also be true that participants were simply downplaying or concealing their explicit bias, which could help explain why no correlation was found.

In sum, we have evidence that suggests that implicit biases could well influence various aspects of policing. A fairly broad set of research findings shows that implicit biases (as measured by implicit instruments) alter and affect numerous behaviors that police regularly engage in—visual surveillance, recall, and even armed response.53 It should go without saying that explicit biases, which often undergird unspoken policies of racial profiling, also play an enormous role in the differential policing of people of color. It also should go without saying that various structural forces that produce racially segregated, predominantly minority neighborhoods that have higher poverty and crime rates also have a huge impact on racialized policing. Nevertheless, we repeat these points so that readers internalize the idea that implicit, explicit, and structural processes should not be deemed mutually exclusive.

2. Charge and Plea Bargain

Journalistic investigations have uncovered some statistical evidence that racial minorities are treated worse than Whites in prosecutors’ charging decisions.54

53. For discussions in the law reviews, with some treatment of implicit biases, see Alex Geisinger, Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications, 86 OR. L. REV. 657, 667–73 (2007) (providing a cognitive model based on automatic categorization in accordance with behavioral realism).
54. For example, in San Jose, a newspaper investigation concluded that out of the almost seven hundred thousand criminal cases reported, “at virtually every stage of pre-trial negotiation, whites are more successful than non-whites.” Ruth Marcus, Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions, WASH. POST, May 12, 1992, at A4. San Francisco Public Defender Jeff Brown commented on racial stereotyping: “It’s a feeling, You’ve got a nice
Of course, there might be some legitimate reason for those disparities if, for example, minorities and Whites are not similarly situated on average. One way to examine whether the merits drive the disparate results is to control for everything except some irrelevant attribute, such as race. In several studies, researchers used regression analyses to conclude that race was indeed independently correlated with the severity of the prosecutor’s charge.

For example, in a 1985 study of charging decisions by prosecutors in Los Angeles, researchers found prosecutors more likely to press charges against Black than White defendants, and determined that these charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge, or use of a weapon.55 Two studies also in the late 1980s, one in Florida and the other in Indiana, found charging discrepancies based on the race of the victim.56 At the federal level, a U.S. Sentencing Commission report found that prosecutors were more apt to offer White defendants generous plea bargains with sentences below the prescribed guidelines than to offer them to Black or Latino defendants.57

While these studies are suggestive, other studies find no disparate treatment.58 Moreover, this kind of statistical evidence does not definitively tell us that biases

58. See, e.g., Jeremy D. Ball, Is It a Prosecutor’s World? Determinants of Count Bargaining Decisions, 22 J. CONTEMP. CRIM. JUST. 241 (2006) (finding no correlation between race and the willingness of prosecutors to reduce charges in order to obtain guilty pleas but acknowledging that the study did not include evaluation of the original arrest report); Cyndy Caravelis et al., Race, Ethnicity, Threat, and the Designation of Career Offenders, 2011 JUST. Q. 1 (showing that in some counties, Blacks and Latinos are more likely than Whites with similar profiles to be prosecuted as career offenders, but in other counties with different demographics, Blacks and Latinos have a lesser likelihood of such prosecution).
generally or implicit biases specifically produce discriminatory charging decisions or plea offers by prosecutors, or a discriminatory willingness to accept worse plea bargains on the part of defense attorneys. The best way to get evidence on such hypotheses would be to measure the implicit biases of prosecutors and defense attorneys and investigate the extent to which those biases predict different treatment of cases otherwise identical on the merits.

Unfortunately, we have very little data on this front. Indeed, we have no studies, as of yet, that look at prosecutors’ and defense attorneys’ implicit biases and attempt to correlate them with those individuals’ charging practices or plea bargains. Nor do we know as much as we would like about their implicit biases more generally. But on that score, we do know something. Start with defense attorneys. One might think that defense attorneys, repeatedly put into the role of interacting with what is often a disproportionately minority clientele, and often ideologically committed to racial equality, might have materially different implicit biases from the general population. But Ted Eisenberg and Sheri Lynn Johnson found evidence to the contrary: Even capital punishment defense attorneys show negative implicit attitudes toward African Americans. Their implicit attitudes toward Blacks roughly mirrored those of the population at large.

What about prosecutors? To our knowledge, no one has measured specifically the implicit biases held by prosecutors. That said, there is no reason to


60. See Theodore Eisenberg & Sheri Lynn Johnson, Implicit Racial Attitudes of Death Penalty Lawyers, 53 DEPAUL L. REV. 1539, 1545–55 (2004). The researchers used a paper-pencil IAT that measured attitudes about Blacks and Whites. Id. at 1543–45. The defense attorneys displayed biases that were comparable to the rest of the population. Id. at 1553. The findings by Moskowitz and colleagues, supra note 59, sit in some tension with findings by Eisenberg and Johnson. It is possible that defense attorneys are not chronic egalitarians and/or that the specific practice of criminal defense work exacerbates implicit biases even among chronic egalitarians.

61. In some contexts, prosecutors have resisted revealing information potentially related to their biases. For example, in United States v. Armstrong, 517 U.S. 456 (1996), defendants filed a motion to dismiss the indictment for selective prosecution, arguing that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses. Id. at 460–61. The claim foundered when the U.S. Attorney’s Office resisted the defendants’ discovery motion concerning criteria for prosecutorial decisions and the U.S. Supreme Court upheld the U.S. Attorney’s Office’s refusal to provide discovery. Id. at 459–62. The Court held that, prior to being entitled even to discovery, defendants claiming selective prosecution cases based on race must produce credible evidence that “similarly situated individuals of a different race were not prosecuted.” Id. at 465.
presume attorney exceptionalism in terms of implicit biases. And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune. If this is right, there is plenty of reason to be concerned about how these biases might play out in practice.

As we explain in greater detail below, the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments. They exercise tremendous discretion to decide whether, against whom, and at what level of severity to charge a particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence—all with little judicial oversight. Other psychological theories—such as confirmation bias, social judgeability theory, and shifting standards, which we discuss below—reinforce our hypothesis that prosecutorial decisionmaking indeed risks being influenced by implicit bias.

3. Trial

a. Jury

If the case goes to the jury, what do we know about how implicit biases might influence the factfinder’s decisionmaking? There is a long line of research on racial discrimination by jurors, mostly in the criminal context. Notwithstanding some mixed findings, the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race (“racial outgroups”). For example, White jurors will treat Black defendants worse than they treat comparable White defendants. The best and most recent meta-analysis of laboratory juror studies was performed by Tara Mitchell and colleagues, who found that the fact that a juror was of a different race than the defendant influenced

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62. Several of the authors have conducted training sessions with attorneys in which we ran the IAT in the days leading up to the training. The results of these IATs have shown that attorneys harbor biases that are similar to those harbored by the rest of the population. One recent study of a related population, law students, confirmed that they too harbor implicit gender biases. See Justin D. Levinson & Danielle Young, Implicit Gender Bias in the Legal Profession: An Empirical Study, 18 DUKE J. GENDER L. & POL’Y 1, 28–31 (2010).


64. See infra Part II.B.
both verdicts and sentencing. The magnitude of the effect sizes were measured conservatively and found to be small (Cohen’s $d=0.092$ for verdicts, $d=0.185$ for sentencing).

But effects deemed “small” by social scientists may nonetheless have huge consequences for the individual, the social category he belongs to, and the entire society. For example, if White juries rendered guilty verdicts in exactly 80 percent of their decisions, then an effect size of Cohen’s $d=0.095$ would mean that the rate of conviction for Black defendants will be 83.8 percent, compared to 76.2 percent for White defendants. Put another way, in one hundred otherwise identical trials, eight more Black than White defendants would be found guilty.

One might assume that juror bias against racial outgroups would be greater when the case is somehow racially charged or inflamed, as opposed to those instances when race does not explicitly figure in the crime. Interestingly, many experiments have demonstrated just the opposite. Sam Sommers and Phoebe Ellsworth explain the counterintuitive phenomenon in this way: When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their decisions.

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65. Tara L. Mitchell et al., Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment, 29 LAW & HUM. BEHAV. 621, 627–28 (2005). The meta-analysis processed thirty-four juror verdict studies (with 7397 participants) and sixteen juror sentencing studies (with 3141 participants). Id. at 625. All studies involved experimental manipulation of the defendant’s race. Multirace participant samples were separated out in order to maintain the study’s definition of racial bias as a juror’s differential treatment of a defendant who belonged to a racial outgroup. See id.
66. Studies that reported nonsignificant results ($p>0.05$) for which effect sizes could not be calculated were given effect sizes of 0.00. Id.
67. Id. at 629.
69. This translation between effect size $d$ values and outcomes was described by Robert Rosenthal & Donald B. Rubin, A Simple, General Purpose Display of Magnitude of Experimental Effect, 74 J. EDUC. PSYCHOL. 166 (1982).
decisionmaking. These findings are more consistent with an implicit bias than a concealed explicit bias explanation.\textsuperscript{71}

So far, we know that race effects have been demonstrated in juror studies (sometimes in counterintuitive ways), but admittedly little is known about “the precise psychological processes through which the influence of race occurs in the legal context.”\textsuperscript{72} Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors. Leading scholars from the juror bias field have expressly raised the possibility that the psychological mechanisms might be “unintentional and even non-conscious processes.”\textsuperscript{73}

Some recent juror studies by Justin Levinson and Danielle Young have tried to disentangle the psychological mechanisms of juror bias by using the IAT and other methods. In one mock juror study, Levinson and Young had participants view five photographs of a crime scene, including a surveillance camera photo that featured a masked gunman whose hand and forearm were visible. For half the participants, that arm was dark skinned; for the other half, that arm was lighter skinned.\textsuperscript{74} The participants were then provided twenty different pieces of trial evidence. The evidence was designed to produce an ambiguous case regarding whether the defendant was indeed the culprit. Participants were asked to rate how much the presented evidence tended to indicate the defendant’s guilt or innocence and to decide whether the defendant was guilty or not, using both a scale of guilty or not guilty and a likelihood scale of zero to one hundred.\textsuperscript{75}

The study found that the subtle manipulation of the skin color altered how jurors evaluated the evidence presented and also how they answered the crucial question “How guilty is the defendant?” The guilt mean score was M=66.97 for

\begin{footnotesize}
\begin{enumerate}
\item See Samuel R. Sommers & Phoebe C. Ellsworth, \textit{White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom}, 7 PSYCHOL. PUB. POLY & L. 201, 255 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, \textit{Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions}, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000). That said, one could still hold to an explicit bias story in the following way: The juror has a negative attitude or stereotype that he is consciously aware of and endorses. But he knows it is not socially acceptable so he conceals it. When a case is racially charged, racial bias is more salient, so other jurors will be on the lookout for bias. Accordingly, the juror conceals it even more, all the way up to making sure that his behavior is completely race neutral. This explicit bias story is not mutually exclusive with the implicit bias story we are telling.
\item \textit{Id.} at 175.
\item Levinson & Young, supra note 20, at 332–33 (describing experimental procedures).
\item \textit{Id.} at 334.
\end{enumerate}
\end{footnotesize}
dark skin and $M=56.37$ for light skin, with 100 being “definitely guilty.” Measures of explicit bias, including the Modern Racism Scale and feeling thermometers, showed no statistically significant correlation with the participants’ weighing of the evidence or assessment of guilt. More revealing, participants were asked to recall the race of the masked robber (which was a proxy for the light or dark skin), but many could not recall it. Moreover, their recollections did not correlate with their judgments of guilt. Taken together, these findings suggest that implicit bias—not explicit, concealed bias, or even any degree of conscious focus on race—was influencing how jurors assessed the evidence in the case.

In fact, there is even clearer evidence that implicit bias was at work. Levinson, Huajian Cai, and Young also constructed a new IAT, the Guilty–Not Guilty IAT, to test implicit stereotypes of African Americans as guilty (not innocent). They gave the participants this new IAT and the general race attitude IAT. They found that participants showed an implicit negative attitude toward Blacks as well as a small implicit stereotype between Black and guilty. More important than the bias itself is whether it predicts judgment. On the one hand, regression analysis demonstrated that a measure of evidence evaluation was a function of both the implicit attitude and the implicit stereotype. On the other hand, the IAT scores did not predict what is arguably more important: guilty verdicts or judgments of guilt on a more granular scale (from zero to one hundred). In sum, a subtle change...
in skin color changed judgments of evidence and guilt; implicit biases measured by the IAT predicted how respondents evaluated identical pieces of information.

We have a long line of juror research, as synthesized through a meta-analysis, revealing that jurors of one race treat defendants of another race worse with respect to verdict and sentencing. According to some experiments, that difference might take place more often in experimental settings when the case is not racially charged, which suggests that participants who seek to be fair will endeavor to correct for potential bias when the threat of potential race bias is obvious. Finally, some recent work reveals that certain IATs can predict racial discrimination in the evaluation of evidence by mock jurors. Unfortunately, because of the incredible difficulties in research design, we do not have studies that evaluate implicit bias in real criminal trials. Accordingly, the existing body of research, while strongly suggestive, provides inferential rather than direct support that implicit bias accounts for some of the race effects on conviction and sentencing.

b. Judge

Obviously, the judge plays a crucial role in various aspects of the trial, exercising important discretion in setting bail, deciding motions, conducting and deciding what can be asked during jury selection, ruling on the admissibility of evidence, presiding over the trial, and rendering verdicts in some cases. Again, as with the lawyers, there is no inherent reason to think that judges are immune from implicit biases. The extant empirical evidence supports this assumption. Judge Bennett, a former civil rights lawyer, shares his unnerving discovery of his own disappointing IAT results in Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL’Y REV. 149, 150 (2010). Jeff Rachlinski and his coauthors are the only researchers who have measured the implicit biases of actual trial court judges. They have given the race attitude IAT to judges from three different judicial districts. Consistent with the general population, the White judges showed strong implicit attitudes favoring Whites over Blacks.

84. See Ian Ayres & Joel Waldfogel, A Market Test for Race Discrimination in Bail Setting, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).
85. See Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1210 (2009). White judges (N=85) showed an IAT effect $M=216$ ms (with a standard deviation of 201 ms). 87.1 percent of them were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. Black judges (N=43) showed a small bias $M=26$ ms (with a standard deviation of 208 ms). Only 44.2 percent of Black judges were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. See id.
Rachlinski and colleagues investigated whether these biases predicted behavioral differences by giving judges three different vignettes and asking for their views on various questions, ranging from the likelihood of defendant recidivism to the recommended verdict and confidence level. Two of these vignettes revealed nothing about race, although some of the judges were subliminally primed with words designed to trigger the social category African American. The third vignette explicitly identified the defendant (and victim) as White or Black and did not use subliminal primes. After collecting the responses, Rachlinski et al. analyzed whether judges treated White or Black defendants differently and whether the IAT could predict any such difference.

They found mixed results. In the two subliminal priming vignettes, judges did not respond differently on average as a function of the primes. In other words, the primes did not prompt them to be harsher on defendants across the board as prior priming studies with nonjudge populations had found. That said, the researchers found a marginally statistically significant interaction with IAT scores: Judges who had a greater degree of implicit bias against Blacks (and relative preference for Whites) were harsher on defendants (who were never racially identified) when they had been primed (with the Black words). By contrast, those judges who had implicit attitudes in favor of Blacks were less harsh on defendants when they received the prime.

In the third vignette, a battery case that explicitly identified the defendant as one race and the victim as the other, the White judges showed equal likelihood of convicting the defendant, whether identified as White or Black. By contrast, Black judges were much more likely to convict the defendant if he was identified as White as compared to Black. When the researchers probed more deeply to see what, if anything, the IAT could predict, they did not find the sort of interaction that they found in the other two vignettes—in other words, judges with strong implicit biases in favor of Whites did not treat the Black defendant more harshly.

Noticing the difference between White and Black judge responses in the third vignette study, the researchers probed still deeper and found a three-way interaction between a judge’s race, a judge’s IAT score, and a defendant’s race. No effect was found for White judges; the core finding concerned, instead, Black

88. See Rachlinski et al., supra note 86, at 1215. An ordered logit regression was performed between the judge’s disposition against the priming condition, IAT score, and their interaction. The interaction term was marginally significant at p=0.07. See id. at 1214–15 n.94.
89. This third vignette did not use any subliminal primes.
90. See id. at 1202 n.41.
judges. Those Black judges with a stronger Black preference on the IAT were less likely to convict the Black defendant (as compared to the White defendant); correlativey, those Black judges with a White preference on the IAT were more likely to convict the Black defendant.91

It is hard to make simple sense of such complex findings, which may have been caused in part by the fact that the judges quickly sniffed out the purpose of the study—to detect racial discrimination.92 Given the high motivation not to perform race discrimination under research scrutiny, one could imagine that White judges might make sure to correct for any potential unfairness. By contrast, Black judges may have felt less need to signal racial fairness, which might explain why Black judges showed different behaviors as a function of implicit bias whereas White judges did not.

Put another way, data show that when the race of the defendant is explicitly identified to judges in the context of a psychology study (that is, the third vignette), judges are strongly motivated to be fair, which prompts a different response from White judges (who may think to themselves “whatever else, make sure not to treat the Black defendants worse”) than Black judges (who may think “give the benefit of the doubt to Black defendants”). However, when race is not explicitly identified but implicitly primed (vignettes one and two), perhaps the judges’ motivation to be accurate and fair is not on full alert. Notwithstanding all the complexity, this study provides some suggestive evidence that implicit attitudes may be influencing judges’ behavior.

4. Sentencing

There is evidence that African Americans are treated worse than similarly situated Whites in sentencing. For example, federal Black defendants were sentenced to 12 percent longer sentences under the Sentencing Reform Act of 1984,93 and Black defendants are subject disproportionately to the death penalty.94

91. Id. at 1220 n.114.
92. See id. at 1223.
94. See U.S. GEN. ACCOUNTING OFFICE, GAO GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding killers of White victims receive the death penalty more often than killers of Black victims); David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview,
Of course, it is possible that there is some good reason for that difference, based on the merits. One way to check is to run experimental studies holding everything constant except for race.

_Probation officers._ In one study, Sandra Graham and Brian Lowery subliminally primed police officers and juvenile probation officers with words related to African Americans, such as “Harlem” or “dreadlocks.” This subliminal priming led the officers to recommend harsher sentencing decisions.95 As we noted above, Rachlinski et al. found no such effect on the judges they tested using a similar but not identical method.96 But, at least in this study, an effect was found with police and probation officers. Given that this was a subliminal prime, the merits could not have justified the different evaluations.

_Afrocentric features._ Irene Blair, Charles Judd, and Kristine Chapleau took photographs from a database of criminals convicted in Florida97 and asked participants to judge how Afrocentric both White and Black inmates looked on a scale of one to nine.98 The goal was to see if race, facial features, or both correlated with actual sentencing. Using multiple regression analysis, the researchers found that after controlling for the seriousness of the primary and additional offenses, the race of the defendant showed no statistical significance.99 In other words, White and Black defendants were sentenced without discrimination based on race. According to the

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95. See Graham & Lowery, supra note 87.
96. Priming studies are quite sensitive to details. For example, the more subliminal a prime is (in time duration and in frequency), the less the prime tends to stick (the smaller the effects and the faster it dissipates). Rachlinski et al. identified some differences between their experimental procedure and that of Graham and Lowery’s. See Rachlinski et al., supra note 86, at 1213 n.88. Interestingly, in the Rachlinski study, for judges from the eastern conference (seventy judges), a programming error made their subliminal primes last only sixty-four milliseconds. By contrast, for the western conference (forty-five judges), the prime lasted 153 milliseconds, which was close to the duration used by Graham and Lowery (150 milliseconds). See id. at 1206 (providing numerical count of judges’ prime); id. at 1213 n.84 (identifying the programming error). Graham and Lowery wrote that they selected the priming durations through extensive pilot testing “to arrive at a presentation time that would allow the primes to be detectable but not identifiable.” Graham & Lowery, supra note 87, at 489. It is possible that the truncated priming duration for the eastern conference judges contributed to the different findings between Rachlinski et al. and Graham and Lowery.
98. _Id._ at 676. Afrocentric meant full lips, broad nose, relatively darker skin color, and curly hair. It is what participants socially understood to look African without any explicit instruction or definition. _See id._ at 674 n.1.
99. _Id._ at 676.
researchers, this is a success story based on various sentencing reforms specifically adopted by Florida mostly to decrease sentencing discretion.\textsuperscript{100}

However, when the researchers added Afrocentricity of facial features into their regressions, they found a curious correlation. Within each race, either Black or White, the more Afrocentric the defendant looked, the harsher his punishment.\textsuperscript{101} How much so? If you picked a defendant who was one standard deviation above the mean in Afrocentric features and compared him to another defendant of the same race who was one standard deviation below the mean, there would be a sentence difference of seven to eight months between them, holding constant any difference in their actual crime.\textsuperscript{102}

Again, if the research provides complex findings, we must grapple with a complex story. On the one hand, we have good news: Black and White defendants were, overall, sentenced comparably. On the other hand, we have bad news: Within each race, the more stereotypically Black the defendant looked, the harsher the punishment. What might make sense of such results? According to the researchers, perhaps implicit bias was responsible.\textsuperscript{103} If judges are motivated to avoid racial discrimination, they may be on guard regarding the dangers of treating similarly situated Blacks worse than Whites. On alert to this potential bias, the judges prevent it from causing any discriminatory behavior. By contrast, judges have no conscious awareness that Afrocentric features might be triggering stereotypes of criminality and violence that could influence their judgment. Without such awareness, they could not explicitly control or correct for the potential bias.\textsuperscript{104} If this explanation is correct, we have further evidence that discrimination is being driven in part by implicit biases and not solely by explicit-but-concealed biases.

\textsuperscript{100} \textit{Id. at 677.}  
\textsuperscript{101} \textit{Id. at 676–77.}  Jennifer Eberhardt and her colleagues reached consistent findings when she used the same Florida photograph dataset to examine how Black defendants were sentenced to death. After performing a median split on how stereotypical the defendant looked, the top half were sentenced to death 57.5 percent of the time compared to the bottom half, which were sentenced to death only 24.4 percent of the time. \textit{See} Jennifer L. Eberhardt et al., \textit{Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes}, 17 PSYCHOL. SCI. 383, 384 (2006). Interestingly, this effect was not observed when the victim was Black. \textit{See id. at 385.}  
\textsuperscript{102} \textit{See} Blair et al., \textit{supra} note 97, at 677–78.  
\textsuperscript{103} \textit{See id. at 678} (hypothesizing that “perhaps an equally pernicious and less controllable process [is] at work”).  
\textsuperscript{104} \textit{See id. at 677.}
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gives us reason to think that implicit biases—attitudes and beliefs that we are not directly aware of and may not endorse—could influence how defendants are treated and judged. Wherever possible, in our description of the studies, we have tried to provide the magnitude of these effects. But knowing precisely how much work they really do is difficult. If we seek an estimate, reflective of an entire body of research and not any single study, one answer comes from the Greenwald meta-analysis, which found that the IAT (the most widely used, but not the only measure of implicit bias) could predict 5.6 percent of the variation of the behavior in Black–White behavioral domains.105

Should that be deemed a lot or a little? In answering this question, we should be mindful of the collective impact of such biases, integrated over time (per person) and over persons (across all defendants).106 For a single defendant, these biases may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect.

To get a more concrete sense, Anthony Greenwald has produced a simulation that models cumulating racial disparities through five sequential stages of criminal justice—arrest, arraignment, plea bargain, trial, and sentence. It supposes that the probability of arrest having committed the offense is 0.50, that the probability of conviction at trial is 0.75, and that the effect size of implicit bias is r=0.1 at each stage. Under this simulation, for a crime with a mean sentence of 5 years, and with a standard deviation of 2 years, Black criminals can expect a sentence of 2.44 years whereas White criminals can expect just 1.40 years.107 To appreciate the full social impact, we must next aggregate this sort of disparity a second time over all defendants subject to racial bias, out of an approximate annual

105. See Greenwald et al., supra note 24, at 24 tbl.3 (showing that correlation between race attitude IAT (Black/White) and behavior in the meta-analysis is 0.236, which when squared equals 0.056, the percentage of variance explained).


107. The simulation is available at Simulation: Cumulating Racial Disparities Through 5 Sequential Stages of Criminal Justice, http://faculty.washington.edu/agg/UCLA_PULSE.simulation.xlsx (last visited May 15, 2012). If in the simulation the effect size of race discrimination at each step is increased from r=0.1 to r=0.2, which is less than the average effect size of race discrimination effects found in the 2009 meta-analysis, see supra note 105, the ratio of expected years of sentence would increase to 3.11 years (Black) to 1.01 years (White).
total of 20.7 million state criminal cases and 70 thousand federal criminal cases. And, as Robert Abelson has demonstrated, even small percentages of variance explained might amount to huge impacts.

B. The Civil Path

Now, we switch from the criminal to the civil path and focus on the trajectory of an individual bringing suit in a federal employment discrimination case—and on how implicit bias might affect this process. First, the plaintiff, who is a member of a protected class, believes that her employer has discriminated against her in some legally cognizable way. Second, after exhausting necessary administrative remedies, the plaintiff sues in federal court. Third, the defendant tries to terminate the case before trial via a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6). Fourth, should that fail, the defendant moves for summary judgment under FRCP 56. Finally, should that motion also fail, the jury renders a verdict after trial. Again, at each of these

109. See Rachlinski et al., supra note 86, at 1202.
110. See Robert P. Abelson, A Variance Explanation Paradox: When a Little Is a Lot, 97 PSYCHOL. BULL. 129, 132 (1985) (explaining that the batting average of a 0.320 hitter or a 0.220 hitter predicts only 1.4 percent of the variance explained for a single at-bat producing either a hit or no-hit). Some discussion of this appears in Kang & Lane, supra note 2, at 489.
111. We acknowledge that Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), made it much more difficult to certify large classes in employment discrimination cases. See id. at 2553–54 (holding that statistical evidence of gender disparities combined with a sociologist's analysis that Wal-Mart's corporate culture made it vulnerable to gender bias was inadequate to show that members of the putative class had a common claim for purposes of class certification under FED. R. CIV. P. 23(b)).
112. For example, in a Title VII cause of action for disparate treatment, the plaintiff must demonstrate an adverse employment action "because of" the plaintiff's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). By contrast, in a Title VII cause of action for disparate impact, the plaintiff challenges facially neutral policies that produce a disparate impact on protected populations. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). We recognize that employment discrimination law is far more complex than presented here, with different elements for different state and federal causes of action.
113. The U.S. Equal Employment Opportunity Commission (EEOC) process is critical in practical terms because the failure to file a claim with the EEOC within the quite short statute of limitations (either 180 or 300 days depending on whether the jurisdiction has a state or local fair employment agency) or to timely file suit after resorting to the EEOC results in an automatic dismissal of the claim. However, neither EEOC inaction nor an adverse determination preclude private suit. See 2 CHARLES SULLIVAN & LAUREN WALTER, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 12.03[B], at 672 (4th ed. 2012).
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stages, implicit biases could potentially influence the outcome. To maintain a manageable scope of analysis, we focus on employer discrimination, pretrial adjudication, and jury verdict.

1. Employer Discrimination

For many, the most interesting question is whether implicit bias helped cause the employer to discriminate against the plaintiff. There are good reasons to think that some negative employment actions are indeed caused by implicit biases in what tort scholars call a “but-for” sense. This but-for causation may be legally sufficient since Title VII and most state antidiscrimination statutes require only a showing that the plaintiff was treated less favorably "because of" a protected characteristic, such as race or sex. But our objective here is not to engage the doctrinal and philosophical questions of whether existing antidiscrimination laws do or should recognize implicit bias-actuated discrimination. We also do not address what sorts of evidence should be deemed admissible when plaintiffs attempt to make such a case at trial. Although those questions are critically important, our

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114. As explained when we introduced the Criminal Path, the number of stages identified is somewhat arbitrary. We could have listed more or fewer stages.

115. Section 703(a) of Title VII of the 1964 Civil Rights Act states that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).


118. For example, there is considerable disagreement on whether an expert should be allowed to testify that a particular case is an instance of implicit bias. This issue is part of a much larger debate regarding scientists’ ability to make reasonable inferences about an individual case from group data. John Monahan and Laurens Walker first pointed out that scientific evidence often comes to court at two different levels of generality, one general and one specific. See Laurens Walker & John Monahan, Social Frameworks: A New Use of Social Science in Law, 73 VA. L. REV. 559 (1987). For instance, in a case involving the accuracy of an eyewitness identification, the general question might concern whether eyewitness identifications that are cross-racial are less reliable than same-race identifications; the specific question in the case would involve whether the cross-racial identification in this case was accurate. Interested in social science evidence, Monahan and Walker referred to this as “social framework” evidence, though their fundamental insight regarding frameworks applies to all scientific evidence. In the context of implicit biases, then, general research amply demonstrates the phenomenon in the population. However, in the courtroom, the issue typically concerns whether a particular decision or action was a product of implicit bias.

As a scientific matter, knowing that a phenomenon exists in a population does not necessarily mean that a scientist can reliably say that it was manifest in a particular case. This has led to a debate as to
task is more limited—to give an empirical account of how implicit bias may potentially influence a civil litigation trajectory.

Our belief that implicit bias causes some employment discrimination is based on the following evidence. First, tester studies in the field—which involve sending identical applicants or applications except for some trait, such as race or gender—have generally uncovered discrimination. According to a summary by Mark Bendick and Ana Nunes, there have been “several dozen testing studies” in the past two decades, in multiple countries, focusing on discrimination against various demographic groups (including women, the elderly, and racial minorities).119 These studies consistently reveal typical “net rates of discrimination” that range from 20–40 percent.120 In other words, in 20–40 percent of cases, employers treat subordinated groups (for example, racial minorities) worse than privileged groups (for example, Whites) even though the testers were carefully controlled to be identically qualified.

Second, although tester studies do not distinguish between explicit versus implicit bias, various laboratory experiments have found implicit bias correlations with discriminatory evaluations. For example, Laurie Rudman and Peter Glick demonstrated that in certain job conditions, participants treated a self-promoting and competent woman, whom the researchers termed “agentic,” worse than an

whether experts should be limited to testifying only to the general phenomenon or should be allowed to opine on whether a particular case is an instance of the general phenomenon. This is a complicated issue and scholars have weighed in on both sides. For opposition to the use of expert testimony that a specific case is an instance of implicit bias, see Faigman, Dasgupta & Ridgeway, supra note 19, at 1394 (“The research . . . does not demonstrate that an expert can validly determine whether implicit bias caused a specific employment decision.”); and John Monahan, Laurens Walker & Gregory Mitchell, Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks,” 94 VA. L. REV. 1715, 1719 (2008) (“Testimony in which the expert witness explicitly linked general research findings on gender discrimination to specific factual conclusions . . . exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by both the original and revised proposal of what constitutes ‘social framework’ evidence.”). For advancement of allowing expert testimony that a particular case is an instance of some general phenomenon, see Susan T. Fiske & Eugene Borgida, Standards for Using Social Psychological Evidence in Employment Discrimination Proceedings, 83 TEMPLE L. REV. 867, 876 (2011) (“Qualified social scientists who provide general, relevant knowledge and apply ordinary scientific reasoning may offer informal opinion about the individual case, but probabilistically.”).

In the end, lawyers may be able to work around this dispute by using an expert to provide social framework evidence that identifies particular attributes that exacerbate biased decisionmaking, then immediately calling up another witness who is personally familiar with the defendant’s work environment and asking that witness whether each of those particular attributes exists.

120. Id. (manuscript at 15).
equally agentic man. When the job description explicitly required the employee to be cooperative and to work well with others, participants rated the agentic female less hirable than the equally agentic male. Probing deeper, the researchers identified that the participants penalized the female candidate for lack of social skills, not incompetence. Explicit bias measures did not correlate with the rankings; however, an implicit gender stereotype (associating women as more communal than agentic) did correlate negatively with the ratings for social skills. In other words, the higher the implicit gender stereotype, the lower the social skills evaluation.

Third, field experiments have provided further confirmation under real-world conditions. The studies by Marianne Bertrand and Sendhil Mullainathan demonstrating discrimination in callbacks because of the names on comparable resumes have received substantial attention in the popular press as well as in law reviews. These studies found that for equally qualified—indeed, otherwise identical candidates, firms called back “Emily” more often than “Lakisha.” Less attention has been paid to Dan-Olof Rooth’s extensions of this work, which found similar callback discrimination but also found correlations between implicit stereotypes and the discriminatory behavior. Rooth has found these correlations

121. Laurie A. Rudman & Peter Glick, Prescriptive Gender Stereotypes and Backlash Toward Agentic Women, 57 J. SOC. ISSUES 743, 757 (2001). Agentic qualities were signaled by a life philosophy essay and canned answers to a videotaped interview that emphasized self-promotion and competence. See id. at 748. Agentic candidates were contrasted with candidates whom the researchers labeled “androgynous”—they also demonstrated the characteristics of interdependence and cooperation. Id.
122. The difference was \( M=2.84 \) versus \( M=3.52 \) on a 5 point scale (\( p<0.05 \)). See id. at 753. No gender bias was shown when the job description was ostensibly masculine and did not call for cooperative behavior. Also, job candidates that were engineered to be androgynous—in other words, to show both agentic and cooperative traits—were treated the same regardless of gender. See id.
123. See id. at 753–54.
124. The agentic stereotype was captured by word stimuli such as “independent,” “autonomous,” and “competitive.” The communal stereotype was captured by words such as “communal,” “cooperative,” and “kinship.” See id. at 750.
125. See id. at 756 (\( r=0.49, p<0.001 \)). For further description of the study in the law reviews, see Kang, supra note 46, at 1517–18.
127. Id. at 992.
128. Dan-Olof Rooth, Automatic Associations and Discrimination in Hiring: Real World Evidence, 17 LABOUR ECON. 523 (2010) (finding that implicit stereotypes, as measured by the IAT, predicted differential callbacks of Swedish-named versus Arab-Muslim-named resumes). An increase of one standard deviation in implicit stereotype produced almost a 12 percent decrease in the probability that an Arab/Muslim candidate received an interview. See id.
with not only implicit stereotypes about ethnic groups (Swedes versus Arab-Muslims) but also implicit stereotypes about the obese.\textsuperscript{129}

Because implicit bias in the courtroom is our focus, we will not attempt to offer a comprehensive summary of the scientific research as applied to the implicit bias in the workplace.\textsuperscript{130} We do, however, wish briefly to highlight lines of research—variously called “constructed criteria,” “shifting standards,” or “casuistry”—that emphasize the malleability of merit. We focus on this work because it has received relatively little coverage in the legal literature and may help explain how complex decisionmaking with multiple motivations occurs in the real world.\textsuperscript{131} Moreover, this phenomenon may influence not only the defendant (accused of discrimination) but also the jurors who are tasked to judge the merits of the plaintiff’s case.

Broadly speaking, this research demonstrates that people frequently engage in motivated reasoning\textsuperscript{132} in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like—a decision that may well be influenced by implicit factors—and then justify that choice by molding our merit standards accordingly.

We can make this point more concrete. In one experiment, Eric Luis Uhlmann and Geoffrey Cohen asked participants to evaluate two finalists for police chief—one male, the other female.\textsuperscript{133} One candidate’s profile signaled book smart, the other’s profile signaled streetwise, and the experimental design varied which profile attached to the woman and which to the man. Regardless of which attributes the male candidate featured, participants favored the male candidate and articulated their hiring criteria accordingly. For example, education (book

\textsuperscript{129} Jens Agerström & Dan-Olof Rooth, The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination, 96 J. APPLIED PSYCHOL. 790 (2011) (finding that hiring managers (N=153) holding more negative IAT-measured automatic stereotypes about the obese were less likely to invite an obese applicant for an interview).

\textsuperscript{130} Thankfully, many of these studies have already been imported into the legal literature. For a review of the science, see Kang & Lane, \textit{supra} note 2, at 484–85 (discussing evidence of racial bias in how actual managers sort resumes and of correlations between implicit biases, as measured by the IAT, and differential callback rates).

\textsuperscript{131} One recent exception is Rich, \textit{supra} note 25.

\textsuperscript{132} For discussion of motivated reasoning in organizational contexts, see Sung Hui Kim, The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper, 74 FORDHAM L. REV. 983, 1029–34 (2005). Motivated reasoning is “the process through which we assimilate information in a self-serving manner.” \textit{Id.} at 1029.

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smart) was considered more important when the man had it. Surprisingly, even the attribute of being family oriented and having children was deemed more important when the man had it.

Michael Norton, Joseph Vandello, and John Darley have made similar findings, again in the domain of gender. Participants were put in the role of manager of a construction company who had to hire a high-level employee. One candidate’s profile signaled more education; the other’s profile signaled more experience. Participants ranked these candidates (and three other filler candidates), and then explained their decisionmaking by writing down “what was most important in determining [their] decision.”

In the control condition, the profiles were given with just initials (not full names) and thus the test subjects could not assess their gender. In this condition, participants preferred the higher educated candidate 76 percent of the time. In the two experimental conditions, the profiles were given names that signaled gender, with the man having higher education in one condition and the woman having higher education in the other. When the man had higher education, the participants preferred him 75 percent of the time. In sharp contrast, when the woman had higher education, only 43 percent of the participants preferred her.

The discrimination itself is not as interesting as how the discrimination was justified. In the control condition and the man-has-more-education condition, the participants ranked education as more important than experience about half the time (48 percent and 50 percent). By contrast, in the woman-has-more-education condition, only 22 percent ranked education as more important than experience. In other words, what counted as merit was redefined, in real time, to justify hiring the man.

Was this weighting done consciously, as part of a strategy to manipulate merit in order to provide a cover story for decisionmaking caused and motivated by explicit bias? Or, was merit refactored in a more automatic, unconscious, dissonance-reducing rationalization, which would be more consistent with an implicit bias story? Norton and colleagues probed this causation question in another series of

134. See id. (M=8.27 with education versus M=7.07 without education, on a 11 point scale; p=0.006; d=1.02).
135. See id. (M=6.21 with family traits versus 5.08 without family traits; p=0.05; d=0.86).
137. Id. at 820.
138. Id. at 821.
139. Id.
140. Id.
141. Id.
experiments, in the context of race and college admissions. In a prior study, they had found that Princeton undergraduate students shifted merit criteria—the relative importance of GPA versus the number of AP classes taken—to select the Black applicant over the White applicant who shared the same cumulative SAT score. To see whether this casuistry was explicit and strategic or implicit and automatic, they ran another experiment in which participants merely rated admissions criteria in the abstract without selecting a candidate for admission.

Participants were simply told that they were participating in a study examining the criteria most important to college admissions decisions. They were given two sample resumes to familiarize themselves with potential criteria. Both resumes had equivalent cumulative SAT scores, but differed on GPA (4.0 versus 3.6) versus number of AP classes taken (9 versus 6). Both resumes also disclosed the applicant’s race. In one condition, the White candidate had the higher GPA (and fewer AP classes); in the other condition, the African American candidate had the higher GPA (and fewer AP classes). After reviewing the samples, the participants had to rank order eight criteria in importance, including GPA, number of AP classes, SAT scores, athletic participation, and so forth.

In the condition with the Black candidate having the higher GPA, 77 percent of the participants ranked GPA higher in importance than number of AP classes taken. By contrast, when the White candidate had the higher GPA, only 63 percent of the participants ranked GPA higher than AP classes. This change in the weighting happened even though the participants did not expect that they were going to make an admissions choice or to justify that choice. Thus, these differences could not be readily explained in purely strategic terms, as methods for justifying a subsequent decision. According to the authors,

[...]

these results suggest not only that it is possible for people to reweight criteria deliberately to justify choices but also that decisions made under such social constraints can impact information processing even prior to making a choice. This suggests that the bias we observed is not simply post hoc and strategic but occurs as an organic part of making decisions when social category information is present.

143. Id. at 44.
144. See id.
145. Id. at 46–47. This does not, however, fully establish that these differences were the result of implicit views rather than explicit ones. Even if test subjects did not expect to have to make admissions determinations, they might consciously select criteria that they believed favored one group over another.
The ways that human decisionmakers may subtly adjust criteria in real time to modify their judgments of merit has significance for thinking about the ways that implicit bias may potentially influence employment decisions. In effect, bias can influence decisions in ways contrary to the standard and seemingly commonsensical model. The conventional legal model describes behavior as a product of discrete and identifiable motives. This research suggests, however, that implicit motivations might influence behavior and that we then rationalize those decisions after the fact. Hence, some employment decisions might be motivated by implicit bias but rationalized post hoc based on nonbiased criteria. This process of reasoning from behavior to motives, as opposed to the folk-psychology assumption that the arrow of direction is from motives to behavior, is, in fact, consistent with a large body of contemporary psychological research.146

2. Pretrial Adjudication: 12(b)(6)

As soon as a plaintiff files the complaint, the defendant will try to dismiss as many of the claims in the complaint as possible. Before recent changes in pleading, a motion to dismiss a complaint under FRCP 8 and FRCP 12(b)(6) was decided under the relatively lax standard of Conley v. Gibson.147 Under Conley, all factual allegations made in the complaint were assumed to be true. As such, the court’s task was simply to ask whether “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim.”148

Starting with Bell Atlantic Corp. v. Twombly,149 which addressed complex antitrust claims of parallel conduct, and further developed in Ashcroft v. Iqbal,150 which addressed civil rights actions based on racial and religious discrimination post-9/11, the U.S. Supreme Court abandoned the Conley standard. First, district courts must now throw out factual allegations made in the complaint if they are merely conclusory.151 Second, courts must decide on the plausibility of the claim based on the information before them.152 In Iqbal, the Supreme Court held that

146. See generally TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).
148. Id. at 45–46.
151. Id. at 1951.
152. Id. at 1950–52.
because of an “obvious alternative explanation”\footnote{Id. (quoting Twombly, 550 U.S. 544) (internal quotation marks omitted).} of earnest national security response, purposeful racial or religious “discrimination is not a plausible conclusion.”\footnote{Id. at 1952.}

How are courts supposed to decide what is “Twom-bal”\footnote{See In re Iowa Ready-Mix Concrete Antitrust Litig., No. C 10-4038-MWB, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (referring to a Twombly-Iqbal motion as “Twom-bal”).} plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information? According to the Court, “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”\footnote{Iqbal, 129 S. Ct. at 1940.}

And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.\footnote{These schemas also reflect cultural cognitions. See generally Donald Braman, Cultural Cognition and the Reasonable Person, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837 (2009).}

Moreover, consider what the directive to rely on common sense means in light of social judgeability theory.\footnote{See Vincent Y. Yzerbyt et al., Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes, 66 J. PERSONALITY & SOC. PSYCHOL. 48 (1994).} According to this theory, there are social rules that tell us when it is appropriate to judge someone. For example, suppose your fourth grade child told you that a new kid, Hannah, has enrolled in school and that she receives free lunches. Your child then asks you whether you think she is smart. You will probably decline to answer since you do not feel entitled to make that judgment. Without more probative information, you feel that you would only be crudely stereotyping her abilities based on her socioeconomic status. But what if the next day you volunteered in the classroom and spent twelve minutes observing
Hannah interacting with a teacher trying to solve problems? Would you then feel that you had enough individuating information to come to some judgment?

This is precisely what John Darley and Paget Gross tested in a seminal experiment in 1983. When participants only received economic status information, they declined to evaluate Hannah’s intelligence as a function of her economic class. However, when they saw a twelve-minute videotape of the child answering a battery of questions, participants felt credentialed to judge the girl, and they did so in a way that was consistent with stereotypes. What they did not realize was that the individuating information in the videotape was purposefully designed to be ambiguous. So participants who were told that Hannah was rich interpreted the video as confirmation that she was smart. By contrast, participants who were told that Hannah was poor interpreted the same video as confirmation that she was not so bright.

Vincent Yzerbyt and colleagues, who call this phenomenon “social judgeability,” have produced further evidence of this effect. If researchers told you that a person is either an archivist or a comedian and then asked you twenty questions about this person regarding their degree of extroversion with the options of “True,” “False,” or “I don’t know,” how might you answer? What if, in addition, they manufactured an illusion that you were given individuating information—information about the specific individual and not just the category he or she belongs to—even though you actually did not receive any such information? This is precisely what Yzerbyt and colleagues did in the lab.

They found that those operating under the illusion of individuating information were more confident in their answers in that they marked fewer questions with “I don’t know.” They also found that those operating under the illusion gave more stereotype-consistent answers. In other words, the illusion of being informed made the target judgeable. Because the participants, in fact, had received no such individuating information, they tended to judge the person in accordance with their schemas about archivists and comedians. Interestingly, “in the debriefings,

161. See Yzerbyt et al., supra note 158.
162. This illusion was created by having participants go through a listening exercise, in which they were told to focus only on one speaker (coming through one ear of a headset) and ignore the other (coming through the other). They were later told that the speaker that they were told to ignore had in fact provided relevant individuating information. The truth was, however, that no such information had been given. See id. at 50.
163. See id. at 51 (M=5.07 versus 10.13; p<0.003).
164. See id. (M=9.97 versus 6.30, out of 1 to 20 point range; p<0.006).
subjects reported that they did not judge the target on the basis of a stereotype; they were persuaded that they had described a real person qua person.\textsuperscript{165} Again, it is possible that they were concealing their explicitly embraced bias about archivists and comedians from probing researchers, but we think that it is more probable that implicit bias explains these results.

Social judgeability theory connects back to \textit{Iqbal} in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under \textit{Conley}, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under \textit{Iqbal}, judges have been explicitly green-lighted to judge the plausibility of the plaintiff’s claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge’s schemas. Just as Yzerbyt’s illusion of individuating information entitled participants to judge in the laboratory, the express command of the Supreme Court may entitle judges to judge in the courtroom when they lack any well-developed basis to do so.

There are no field studies to test whether biases, explicit or implicit, influence how actual judges decide motions to dismiss actual cases. It is not clear that researchers could ever collect such information. All that we have are some preliminary data about dismissal rates before and after \textit{Iqbal} that are consistent with our analysis. Again, since \textit{Iqbal} made dismissals easier, we should see an increase in dismissal rates across the board.\textsuperscript{166} More relevant to our hypothesis is whether certain types of cases experienced differential changes in dismissal rates. For instance, we would expect \textit{Iqbal} to generate greater increases in dismissal rates for race discrimination claims than, say, contract claims. There are a number of potential reasons for this: One reason is that judges are likely to have stronger biases that plaintiffs in the former type of case have less valid claims than those in the latter. Another reason is that we might expect some kinds of cases

\textsuperscript{165} Id.

\textsuperscript{166} In the first empirical study of \textit{Iqbal}, Hatamyar sampled 444 cases under \textit{Conley} (from May 2005 to May 2007) and 173 cases under \textit{Iqbal} (from May 2009 to August 2009). See Patricia W. Hatamyar, \textit{The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?}, 59 AM. U. L. REV. 553, 597 (2010). She found that the general rate of complaint dismissal rose from 46 percent to 56 percent. See id. at 602 tbl.2. However, this finding was not statistically significant under a Pearson chi-squared distribution test examining the different dismissal rates for \textit{Conley}, \textit{Twombly}, and \textit{Iqbal} for three results: grant, mixed, and deny.
to raise more significant concerns about asymmetric information than do others. In contracts disputes, both parties may have good information about most of the relevant facts even prior to discovery. In employment discrimination cases, plaintiffs may have good hunches about how they have been discriminated against, but prior to discovery they may not have access to the broad array of information in the employer’s possession that may be necessary to turn the hunch into something a judge finds plausible. Moreover, these two reasons potentially interact: the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge’s assessment in the absence of a well-developed evidentiary record.

Notwithstanding the lack of field studies on these issues, there is some evidentiary support for these differential changes in dismissal rates. For example, Patricia Hatamayr sorted a sample of cases before and after Iqbal into six major categories: contracts, torts, civil rights, labor, intellectual property, and all other statutory cases. She found that in contract cases, the rate of dismissal did not change much from Conley (32 percent) to Iqbal (32 percent). By contrast, for Title VII cases, the rate of dismissal increased from 42 percent to 53 percent. Victor Quintanilla has collected more granular data by counting not Title VII cases generally but federal employment discrimination cases filed specifically by Black plaintiffs both before and after Iqbal. He found an even larger jump. Under the Conley regime, courts granted only 20.5 percent of the motions to dismiss such cases. By contrast, under the Iqbal regime, courts granted 54.6 percent of them. These data lend themselves to multiple interpretations and suffer from various confounds. So at this point, we can make only modest claims. We merely suggest that the dismissal rate data are consistent with our hypothesis that Iqbal’s plausibility standard poses a risk of increasing the impact of implicit biases at the 12(b)(6) stage.

If, notwithstanding the plausibility-based pleading requirements, the case gets past the motion to dismiss, then discovery will take place, after which defendants will seek summary judgment under FRCP 56. On the one hand, this procedural posture is less subject to implicit biases than the motion to dismiss because more individuating information will have surfaced through discovery. On the

167. See id. at 591–93.
168. See id. at 630 tbl.D.
169. See id.
171. See id. at 36 tbl.1 (p<0.000).
other hand, the judge still has to make a judgment call on whether any “genuine dispute as to any material fact”172 remains. Similar decisionmaking dynamics are likely to be in play as we saw in the pleading stage, for a significant quantum of discretion remains. Certainly the empirical evidence that demonstrates how poorly employment discrimination claims fare on summary judgment is not inconsistent with this view, though, to be sure, myriad other explanations of these differences are possible (including, for example, doctrinal obstacles to reaching a jury).173

3. Jury Verdict

If the case gets to trial, the parties will introduce evidence on the merits of the claim. Sometimes the evidence will be physical objects, such as documents, emails, photographs, voice recordings, evaluation forms, and the like. The rest of it will be witness or expert testimony, teased out and challenged by lawyers on both sides. Is there any reason to think that jurors might interpret the evidence in line with their biases? In the criminal trajectory, we already learned of juror bias via meta-analyses as well as correlations with implicit biases. Unfortunately, we lack comparable studies in the civil context. What we offer are two sets of related arguments and evidence that speak to the issue: motivation to shift standards and performer preference.

a. Motivation to Shift Standards

Above, we discussed the potential malleability of merit determinations when judgments permit discretion and reviewed how employer defendants might shift standards and reweight criteria when evaluating applicants and employees. Here, we want to recognize that a parallel phenomenon may affect juror decisionmaking. Suppose that a particular juror is White and that he identifies strongly with his Whiteness. Suppose further that the defendant is White and is being sued by a racial minority. The accusation of illegal and immoral behavior threatens the

172. FED. R. CIV. P. 56(a).
status of the juror’s racial ingroup. Anca Miron, Nyla Branscombe, and Monica Biernat have demonstrated that this threat to the ingroup can motivate people to shift standards in a direction that shields the ingroup from ethical responsibility.\textsuperscript{174}

Miron and colleagues asked White undergraduates at the University of Kansas to state how strongly they identified with America.\textsuperscript{175} Then they were asked various questions about America’s relationship to slavery and its aftermath. These questions clumped into three categories (or constructs): judgments of harm done to Blacks,\textsuperscript{176} standards of injustice,\textsuperscript{177} and collective guilt.\textsuperscript{178} Having measured these various constructs, the researchers looked for relationships among them. Their hypothesis was that the greater the self-identification with America, the higher the standards would be before being willing to call America racist or otherwise morally blameworthy (that is, the participants would set higher confirmatory standards). They found that White students who strongly identified as American set higher standards for injustice (that is, they wanted more evidence before calling America unjust);\textsuperscript{179} they thought less harm was done by slavery;\textsuperscript{180} and, as a result, they felt less collective guilt compared to other White students who identified less with America.\textsuperscript{181} In other words, their attitudes toward America were correlated with the quantum of evidence they required to reach a judgment that America had been unjust.

In a subsequent study, Miron et al. tried to find evidence of causation, not merely correlation. They did so by experimentally manipulating national identification by asking participants to recount situations in which they felt similar to other Americans (evoking greater identification with fellow Americans) or different from other Americans (evoking less identification with fellow Americans).\textsuperscript{182}

\textsuperscript{174} Anca M. Miron, Nyla R. Branscombe & Monica Biernat, \textit{Motivated Shifting of Justice Standards}, 36 PERSONALITY SOC. PSYCHOL. BULL. 768, 769 (2010).
\textsuperscript{175} The participants were all American citizens. The question asked was, “I feel strong ties with other Americans.” \textit{Id.} at 771.
\textsuperscript{176} A representative question was, “How much damage did Americans cause to Africans?” on a “very little” (1) to “very much” (7) Likert scale. \textit{Id.} at 770.
\textsuperscript{177} “Please indicate what percentage of Americans would have had to be involved in causing harm to Africans for you to consider the past United States a racist nation” on a scale of 0–10 percent, 10–25 percent, up to 90–100 percent. \textit{Id.} at 771.
\textsuperscript{178} “I feel guilty for my nation’s harmful past actions toward African Americans” on a “strongly disagree” (1) to “strongly agree” (9) Likert scale. \textit{Id.}
\textsuperscript{179} See \textit{id.} at 772 tbl.1 \text{(}r=0.26, p<0.05\text{)}.
\textsuperscript{180} See \textit{id.} \text{(}r=0.23, p<0.05\text{)}.
\textsuperscript{181} See \textit{id.} \text{(}r=0.21, p<0.05\text{). Using structural equation modeling, the researchers found that standards of injustice fully mediated the relationship between group identification and judgments of harm; also, judgments of harm fully mediated the effect of standards on collective guilt. \textit{See id.} at 772–73.
\textsuperscript{182} The manipulation was successful. \textit{See id.} at 773 \text{(}p<0.05, d=0.54\text{).}
Those who were experimentally made to feel less identification with America subsequently reported very different standards of justice and collective guilt compared to others made to feel more identification with America. Specifically, participants in the low identification condition set lower standards for calling something unjust, they evaluated slavery’s harms as higher, and they felt more collective guilt. By contrast, participants in the high identification condition set higher standards for calling something unjust (that is, they required more evidence), they evaluated slavery’s harms as less severe, and they felt less guilt.183 In other words, by experimentally manipulating how much people identified with their ingroup (in this case, American), researchers could shift the justice standard that participants deployed to judge their own ingroup for harming the outgroup.

Evidentiary standards for jurors are specifically articulated (for example, “preponderance of the evidence”) but substantively vague. The question is how a juror operationalizes that standard—just how much evidence does she require for believing that this standard has been met? These studies show how our assessments of evidence—of how much is enough—are themselves potentially malleable. One potential source of malleability is, according to this research, a desire (most likely implicit) to protect one’s ingroup status. If a juror strongly identifies with the defendant employer as part of the same ingroup—racially or otherwise—the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff. In other words, jurors who implicitly perceive an ingroup threat may require more evidence to be convinced of the defendant’s harmful behavior than they would in an otherwise identical case that did not relate to their own ingroup. Ingroup threat is simply an example of this phenomenon; the point is that implicit biases may influence jurors by affecting how they implement ambiguous decision criteria regarding both the quantum of proof and how they make inferences from ambiguous pieces of information.

b. Performer Preference

Jurors will often receive evidence and interpretive cues from performers at trial, by which we mean the cast of characters in the courtroom who jurors see, such as the judge, lawyers, parties, and witnesses. These various performers are playing roles of one sort or another. And, it turns out that people tend to have stereotypes about the ideal employee or worker that vary depending on the segment of the labor

183. In standards for injustice, $M=2.60$ versus 3.39; on judgments of harm, $M=5.82$ versus 5.42; on collective guilt, $M=6.33$ versus 4.60. All differences were statistically significant at $p=0.05$ or less. See id
market. For example, in high-level professional jobs and leadership roles, the supposedly ideal employee is often a White man.\textsuperscript{184} When the actual performer does not fit the ideal type, people may evaluate the performance more negatively.

One study by Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran, and Gary Blasi found just such performer preference with respect to lawyers, as a function of race.\textsuperscript{185} Kang and colleagues measured the explicit and implicit beliefs about the ideal lawyer held by jury-eligible participants from Los Angeles. The researchers were especially curious whether participants had implicit stereotypes linking the ideal litigator with particular racial groups (White versus Asian American). In addition to measuring their biases, the researchers had participants evaluate two depositions, which they heard via headphones and simultaneously read on screen. At the beginning of each deposition, participants were shown for five seconds a picture of the litigator conducting the deposition on a computer screen accompanied by his name. The race of the litigator was varied by name and photograph. Also, the deposition transcript identified who was speaking, which meant that participants repeatedly saw the attorneys’ last names.\textsuperscript{186}

The study discovered the existence of a moderately strong implicit stereotype associating litigators with Whiteness (IAT D=0.45);\textsuperscript{187} this stereotype correlated with more favorable evaluations of the White lawyer (ingroup favoritism since 91\% of the participants were White) in terms of his competence (r=0.32, p<0.01), likeability (r=0.31, p<0.01), and hireability (r=0.26, p<0.05).\textsuperscript{188} These results were confirmed through hierarchical regressions. To appreciate the magnitude of the effect sizes, imagine a juror who has no explicit stereotype but a large implicit stereotype (IAT D=1) that the ideal litigator is White. On a 7-point scale, this juror would favor a White lawyer over an identical Asian American.


186. See id. at 892–99 (describing method and procedure, and identifying attorney names as “William Cole” or “Sung Chang”).

187. See id. at 900. They also found strong negative implicit attitudes against Asian Americans (IAT D=0.62). See id.

188. Id. at 901 tbl.3.}
lucrative $6.01 to $5.65 in terms of competence, $5.57 to $5.27 in terms of likability, and $5.65 to $4.92 in terms of hireability.\footnote{These figures were calculated using the regression equations in \textit{id. at 902 n.25, 904 n.27.}}

This study provides some evidence that potential jurors’ implicit stereotypes cause racial discrimination in judging attorney performance of basic depositions. What does this have to do with how juries might decide employment discrimination cases? Of course, minority defendants do not necessarily hire minority attorneys. That said, it is possible that minorities do hire minority attorneys at somewhat higher rates than nonminorities. But even more important, we hypothesize that similar processes might take place with how jurors evaluate not only attorneys but also both parties and witnesses, as they perform their various roles at trial. To be sure, this study does not speak directly to credibility assessments, likely to be of special import at trial, but it does at least suggest that implicit stereotypes may affect judgment of performances in the courtroom.

We concede that our claims about implicit bias influencing jury decisionmaking in civil cases are somewhat speculative and not well quantified. Moreover, in the real world, certain institutional processes may make both explicit and implicit biases less likely to translate into behavior. For example, jurors must deliberate with other jurors, and sometimes the jury features significant demographic diversity, which seems to deepen certain types of deliberation.\footnote{See infra text accompanying notes 241–245.} Jurors also feel accountable\footnote{See, e.g., Jennifer S. Lerner & Philip E. Tetlock, \textit{Accounting for the Effects of Accountability}, 125 PSYCHOL. BULL. 255, 267–70 (1999).} to the judge, who reminds them to adhere to the law and the merits. That said, for reasons already discussed, it seems implausible to think that current practices within the courtroom somehow magically burn away all jury biases, especially implicit biases of which jurors and judges are unaware. That is why we seek improvements based on the best understanding of how people actually behave.

Thus far, we have canvassed much of the available evidence describing how implicit bias may influence decisionmaking processes in both criminal and civil cases. On the one hand, the research findings are substantial and robust. On the other hand, they provide only imperfect knowledge, especially about what is actually happening in the real world. Notwithstanding this provisional and limited knowledge, we strongly believe that these studies, in aggregate, suggest that implicit bias in the trial process is a problem worth worrying about. What, then, can be done? Based on what we know, how might we intervene to improve the trial process and potentially vaccinate decisionmakers against, or at least reduce, the influence of implicit bias?
III. INTERVENTIONS

Before we turn explicitly to interventions, we reiterate that there are many causes of unfairness in the courtroom, and our focus on implicit bias is not meant to deny other causes. In Part II, we laid out the empirical case for why we believe that implicit biases influence both criminal and civil case trajectories. We now identify interventions that build on an overlapping scientific and political consensus. If there are cost-effective interventions that are likely to decrease the impact of implicit bias in the courtroom, we believe they should be adopted at least as forms of experimentation.

We are mindful of potential costs, including implementation and even overcorrection costs. But we are hopeful that these costs can be safely minimized. Moreover, the potential benefits of these improvements are both substantive and expressive. Substantively, the improvements may increase actual fairness by decreasing the impact of implicit biases; expressively, they may increase the appearance of fairness by signaling the judiciary’s thoughtful attempts to go beyond cosmetic compliance.192 Effort is not always sufficient, but it ought to count for something.

A. Decrease the Implicit Bias

If implicit bias causes unfairness, one intervention strategy is to decrease the implicit bias itself. It would be delightful if explicit refutation would suffice. But abstract, global self-commands to “Be fair!” do not much change implicit social cognitions. How then might we alter implicit attitudes or stereotypes about various social groups?2193 One potentially effective strategy is to expose ourselves to countertypical associations. In rough terms, if we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.

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193. For analysis of the nature versus nurture debate regarding implicit biases, see Jerry Kang, Bits of Bias, in IMPLICIT RACIAL BIAS ACROSS THE LAW 132 (Justin D. Levinson & Robert J. Smith eds., 2012).
These exposures can come through direct contact with countertypical people. For example, Nilanjana Dasgupta and Shaki Asgari tracked the implicit gender stereotypes held by female subjects both before and after a year of attending college.\textsuperscript{194} One group of women attended a year of coed college; the other group attended a single-sex college. At the start of their college careers, the two groups had comparable amounts of implicit stereotypes against women. However, one year later, those who attended the women’s college on average expressed no gender bias, whereas the average bias of those who attended the coed school increased.\textsuperscript{195} By carefully examining differences in the two universities’ environments, the researchers learned that it was exposure to countertypical women in the role of professors and university administrators that altered the implicit gender stereotypes of female college students.\textsuperscript{196}

Nilanjana Dasgupta and Luis Rivera also found correlations between participants’ self-reported numbers of gay friends and their negative implicit attitudes toward gays.\textsuperscript{197} Such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom (staff and law clerks), our residential neighborhoods, and friendship circles. That said, any serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political. Moreover, these interventions might produce only modest results. For instance, Rachlinski et al. found that judges from an eastern district that featured approximately half White judges and half Black judges had “only slightly smaller” implicit biases than the judges of a western jurisdiction, which contained only two Black judges (out of forty-five total district court judges, thirty-six of them being White).\textsuperscript{198} In addition, debiasing exposures would have to compete against the other daily real-life exposures in the courtroom that rebias. For instance, Joshua Correll found that police officers who worked in areas with high minority demographics and violent crime showed more shooter bias.\textsuperscript{199}

If increasing direct contact with a diverse but countertypical population is not readily feasible, what about vicarious contact, which is mediated by images,\textsuperscript{194} See Nilanjana Dasgupta & Shaki Asgari, Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649–54 (2004).
\textsuperscript{195} See id. at 651.
\textsuperscript{196} See id. at 651–53.
\textsuperscript{198} See Rachlinski et al., supra note 86, at 1227.
\textsuperscript{199} See Correll et al., supra note 51, at 1014 (“We tentatively suggest that these environments may reinforce cultural stereotypes, linking Black people to the concept of violence.”).
videos, simulations, or even imagination and which does not require direct face-to-face contact.\textsuperscript{200} Actually, the earliest studies on the malleability of implicit bias pursued just these strategies. For instance, Nilanjana Dasgupta and Anthony Greenwald showed that participants who were exposed vicariously to countertypical exemplars in a history questionnaire (for example, Black figures to whom we tend to have positive attitudes, such as Martin Luther King Jr., and White figures to whom we tend to have negative attitudes, such as Charles Manson) showed a substantial decrease in negative implicit attitudes toward African Americans.\textsuperscript{201} These findings are consistent with work done by Irene Blair, who has demonstrated that brief mental visualization exercises can also change scores on the IAT.\textsuperscript{202}

In addition to exposing people to famous countertypical exemplars, implicit biases may be decreased by juxtaposing ordinary people with countertypical settings. For instance, Bernard Wittenbrink, Charles Judd, and Bernadette Park examined the effects of watching videos of African Americans situated either at a convivial outdoor barbecue or at a gang-related incident.\textsuperscript{203} Situating African Americans in a positive setting produced lower implicit bias scores.\textsuperscript{204}

There are, to be sure, questions about whether this evidence directly translates into possible improvements for the courtroom.\textsuperscript{205} But even granting numerous caveats, might it not be valuable to engage in some experimentation? In chambers and the courtroom buildings, photographs, posters, screen savers, pamphlets, and decorations ought to be used that bring to mind countertypical exemplars or associations for participants in the trial process. Since judges and jurors are differently situated, we can expect both different effects and implementation strategies. For example, judges would be exposed to such vicarious displays regularly as a feature of their workplace environment. By contrast, jurors would be exposed only


\textsuperscript{201}. Nilanjana Dasgupta & Anthony G. Greenwald, \textit{On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals}, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001). The IAT effect changed nearly 50 percent as compared to the control (IAT effect \(M=78\) ms versus 174 ms, \(p<0.01\)) and remained for over twenty-four hours.


\textsuperscript{204}. \textit{Id.} at 819.

\textsuperscript{205}. How long does the intervention last? How immediate does it have to be? How much were the studies able to ensure focus on the positive countertypical stimulus as opposed to in a courtroom where these positives would be amidst the myriad distractions of trial?
during their typically brief visit to the court.\textsuperscript{206} Especially for jurors, then, the goal is not anything as ambitious as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.\textsuperscript{207}

To repeat, we recognize the limitations of our recommendation. Recent research has found much smaller debiasing effects from vicarious exposure than originally estimated.\textsuperscript{208} Moreover, such exposures must compete against the flood of typical, schema-consistent exposures we are bombarded with from mass media. That said, we see little costs to these strategies even if they appear cosmetic. There is no evidence, for example, that these exposures will be so powerful that they will overcorrect and produce net bias against Whites.

B. Break the Link Between Bias and Behavior

Even if we cannot remove the bias, perhaps we can alter decisionmaking processes so that these biases are less likely to translate into behavior. In order to keep this Article’s scope manageable, we focus on the two key players in the courtroom: judges and jurors.\textsuperscript{209}

1. Judges

   a. Doubt One’s Objectivity

   Most judges view themselves as objective and especially talented at fair decisionmaking. For instance, Rachlinski et al. found in one survey that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in “avoid[ing] racial prejudice in decisionmaking”\textsuperscript{210} relative to other judges attending the same conference. That is, obviously, mathematically impossible.

\textsuperscript{206} See Kang, supra note 46, at 1537 (raising the possibility of “debiasing booths” in lobbies for waiting jurors).
\textsuperscript{208} See Jennifer A. Joy-Gaba & Brian A. Nosek, The Surprisingly Limited Malleability of Implicit Racial Evaluations, 41 SOC. PSYCHOL. 137, 141 (2010) (finding an effect size that was approximately 70 percent smaller than the original Dasgupta and Greenwald findings, see supra note 201).
\textsuperscript{209} Other important players obviously include staff, lawyers, and police. For a discussion of the training literature on the police and shooter bias, see Adam Benforado, Quick on the Draw: Implicit Bias and the Second Amendment, 89 OR. L. REV. 1, 46–48 (2010).
\textsuperscript{210} See Rachlinski et al., supra note 86, at 1225.
(One is reminded of Lake Wobegon, where all of the children are above average.) In another survey, 97.2 percent of those administrative agency judges surveyed put themselves in the top half in terms of avoiding bias, again impossible.\footnote{See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice, 58 DUKE L.J. 1477, 1519 (2009).} Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases. In one study, they had participants choose either the candidate profile labeled “Gary” or the candidate profile labeled “Lisa” for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organization skills but weak interpersonal skills.\footnote{See Eric Luis Uhlmann & Geoffrey L. Cohen, “I Think It, Therefore It’s True”: Effects of Self-Perceived Objectivity on Hiring Discrimination, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007).} Half the participants were primed to view themselves as objective.\footnote{This was done simply by asking participants to rate their own objectivity. Over 88 percent of the participants rated themselves as above average in objectivity. See id. at 209. The participants were drawn from a lay sample (not just college students).} The other half were left alone as control.

Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations.\footnote{See id. at 210–11 (M=3.24 for male candidate versus 4.05 for female candidate, p=0.21).} But those who were manipulated to think of themselves as objective evaluated the male candidate higher (M=5.06 versus 3.75, p=0.039, d=0.76).\footnote{See id. at 211.} Interestingly, this was not due to a malleability of merit effect, in which the participants reweighted the importance of either organizational skills or interpersonal skills in order to favor the man. Instead, the discrimination was caused by straight-out disparate evaluation, in which the Gary profile was rated as more interpersonally skilled than the Lisa profile by those primed to think themselves objective (M=3.12 versus 1.94, p=0.023, d=0.86).\footnote{Interestingly, the gender of the participants mattered. Female participants did not show the objectivity priming effect. See id.} In short, thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe.

But is such a suggestion based on wishful thinking? Is there any evidence that education and reminders can actually help? There is some suggestive evidence from Emily Pronin, who has carefully studied the bias blindspot—the belief that...
that others are biased but we ourselves are not. In one study, Emily Pronin and Matthew Kugler had a control group of Princeton students read an article from *Nature* about environmental pollution. By contrast, the treatment group read an article allegedly published in *Science* that described various nonconscious influences on attitudes and behaviors. After reading an article, the participants were asked about their own objectivity as compared to their university peers. Those in the control group revealed the predictable bias blindspot and thought that they suffered from less bias than their peers. By contrast, those in the treatment group did not believe that they were more objective than their peers; moreover, their more modest self-assessments differed from those of the more confident control group. These results suggest that learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.

### b. Increase Motivation

Tightly connected to doubting one’s objectivity is the strategy of increasing one’s motivation to be fair. Social psychologists generally agree that motivation is an important determinant of checking biased behavior. Specific to implicit bias, Nilanjana Dasgupta and Luis Rivera found that participants who were consciously motivated to be egalitarian did not allow their antigay implicit attitudes to translate into biased behavior toward a gay person. By contrast, for those lacking such motivation, strong antigay implicit attitudes predicted more biased behavior.

A powerful way to increase judicial motivation is for judges to gain actual scientific knowledge about implicit social cognitions. In other words, judges should be internally persuaded that a genuine problem exists. This education and

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219. *See* id. at 575 (M=5.29 where 6 represented the same amount of bias as peers).

220. *See* id. For the treatment group, their self-evaluation of objectivity was M=5.88, not statistically significantly different from the score of 6, which, as noted previously, meant having the same amount of bias as peers. Also, the self-reported objectivity of the treatment group (M=5.88) differed from the control group (M=5.29) in a statistically significant way, *p*=0.01. *See* id.

221. For a review, see Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 *Soc. & Personality Psychol. Compass* 211 (2009).


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awareness can be done through self-study as well as more official judicial education. Such education is already taking place, although mostly in an ad hoc fashion.\textsuperscript{224} The most organized intervention has come through the National Center for State Courts (NCSC). The NCSC organized a three-state pilot project in California, Minnesota, and North Dakota to teach judges and court staff about implicit bias.\textsuperscript{225} It used a combination of written materials, videos, resource websites, Implicit Association Tests, and online lectures from subject-matter experts to provide the knowledge. Questionnaires completed before and after each educational intervention provided an indication of program effectiveness.

Although increased knowledge of the underlying science is a basic objective of an implicit bias program, the goal is not to send judges back to college for a crash course in Implicit Psychology 101. Rather, it is to persuade judges, on the merits, to recognize implicit bias as a potential problem, which in turn should increase motivation to adopt sensible countermeasures. Did the NCSC projects increase recognition of the problem and encourage the right sorts of behavioral changes? The only evidence we have is limited: voluntary self-reports subject to obvious selection biases.

For example, in California, judicial training emphasized a documentary on the neuroscience of bias.\textsuperscript{226} Before and after watching the documentary, participants were asked to what extent they thought “a judge’s decisions and court staff’s interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups.”\textsuperscript{227} Before viewing the documentary, approximately 16 percent chose “rarely-never,” 55 percent chose “occasionally,” and 30 percent chose “most-all.” After viewing the documentary, 1 percent chose “rarely-never,” 20 percent chose “occasionally,” and 79 percent chose “most-all.”\textsuperscript{228}

Relatedly, participants were asked whether they thought implicit bias could have an impact on behavior even if a person lacked explicit bias. Before viewing the documentary, approximately 9 percent chose “rarely-never,” 45 percent chose “occasionally,” and 45 percent chose “most-all.” After viewing the documentary, 1 percent chose “rarely-never,” 14 percent chose “occasionally,” and 84 percent

\textsuperscript{224} Several of the authors of this Article have spoken to judges on the topic of implicit bias.
\textsuperscript{227} See Casey et al., supra note 225, at 12 fig.2.
\textsuperscript{228} See id.
chose “most-all.” These statistics provide some evidence that the California documentary increased awareness of the problem of implicit bias. The qualitative data, in the form of write-in comments support this interpretation.

What about the adoption of behavioral countermeasures? Because no specific reforms were recommended at the time of training, there was no attempt to measure behavioral changes. All that we have are self-reports that speak to the issue. For instance, participants were asked to agree or disagree with the statement, “I will apply the course content to my work.” In California, 90 percent (N=60) reported that they agreed or strongly agreed. In North Dakota (N=32), 97 percent reported that they agreed or strongly agreed. Three months later, there was a follow-up survey given to the North Dakota participants, but only fourteen participants replied. In that survey, 77 percent of those who responded stated that they had made efforts to reduce the potential impact of implicit bias. In sum, the findings across all three pilot programs suggest that education programs can increase motivation and encourage judges to engage in some behavioral modifications. Given the limitations of the data (for example, pilot projects with small numbers of participants, self-reports, self-selection, and limited follow-up results), additional research is needed to confirm these promising but preliminary results.

From our collective experience, we also recommend the following tactics. First, training should commence early, starting with new-judge orientation when individuals are likely to be most receptive. Second, training should not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias. Instead, trainers can start the conversation with other types of decisionmaking errors and cognitive biases, such as anchoring, or less-threatening biases, such as the widespread preference for the youth over the elderly that IATs reveal. Third, judges should be encouraged to take the IAT or other measures of implicit

229. Id. at 12 fig.3.
230. Comments included: “raising my awareness of prevalence of implicit bias,” “enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same,” and “greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested.” See CASEY ET AL., supra note 225, at 11.
231. See id. at 10.
232. See id. at 18. Minnesota answered a slightly different question: 81 percent gave the program’s applicability a medium high to high rating.
233. See id. at 20. The strategies that were identified included: “concerted effort to be aware of bias,” “I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination,” “Simply trying to think things through more thoroughly,” “Reading and learning more about other cultures,” and “I have made mental notes to myself on the bench to be more aware of the implicit bias and I’ve re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part.”
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bias. Numerous personal accounts have reported how the discomfiting act of taking the IAT alone motivates action. And researchers are currently studying the specific behavioral and social cognitive changes that take place through such self-discovery. That said, we do not recommend that such tests be mandatory because the feeling of resentment and coercion is likely to counter the benefits of increased self-knowledge. Moreover, judges should never be expected to disclose their personal results.

c. Improve Conditions of Decisionmaking

Implicit biases function automatically. One way to counter them is to engage in effortful, deliberative processing. But when decisionmakers are short on time or under cognitive load, they lack the resources necessary to engage in such deliberation. Accordingly, we encourage judges to take special care when they must respond quickly and to try to avoid making snap judgments whenever possible. We recognize that judges are under enormous pressures to clear ever-growing dockets. That said, it is precisely under such work conditions that judges need to be especially on guard against their biases.

There is also evidence that certain elevated emotional states, either positive or negative, can prompt more biased decisionmaking. For example, a state of happiness seems to increase stereotypic thinking, which can be countered when individuals are held accountable for their judgments. Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases.

234. There are also ways to deploy more automatic countermeasures. In other words, one can teach one’s mind to respond not reflectively but reflexively, by automatically triggering goal-directed behavior through internalization of certain if-then responses. These countermeasures function implicitly and even under conditions of cognitive load. See generally Saaid A. Mendoza et al., Reducing the Expression of Implicit Stereotypes: Reflective Control Through Implementation Intentions, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 514–15, 520 (2010); Monteith et al., supra note 221, at 218–21 (discussing bottom-up correction versus top-down).


236. See Nilanjana Dasgupta et al., Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice, 9 EMOTION 585 (2009). The researchers found that implicit bias against gays and lesbians could be increased more by making participants feel disgust than by making participants feel anger. See id. at 588. Conversely, they found that implicit bias against Arabs could be increased more by making participants feel angry rather than disgusted. See id. at 589; see also David DeSteno et al., Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes, 15 PSYCHOL. SCI. 319 (2004).
In sum, judges should try to achieve the conditions of decisionmaking that allow them to be mindful and deliberative and thus avoid huge emotional swings.

d. Count

Finally, we encourage judges and judicial institutions to count. Increasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias. But, how can the behavior of trial court judges be held accountable if biased decisionmaking is itself difficult to detect? If judges do not seek out the information that could help them see their own potential biases, those biases become more difficult to correct. Just as trying to lose or gain weight without a scale is challenging, judges should engage in more quantified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions. Judges need to count.

The comparison we want to draw is with professional umpires and referees. Statistical analyses by behavioral economists have discovered various biases, including ingroup racial biases, in the decisionmaking of professional sports judges. Joseph Price and Justin Wolfers found racial ingroup biases in National Basketball Association (NBA) referees’ foul calling;237 Christopher Parsons and colleagues found ingroup racial bias in Major League Baseball (MLB) umpires’ strike calling.238 These discoveries were only possible because professional sports leagues count performance, including referee performance, in a remarkably granular and comprehensive manner.

Although NBA referees and MLB umpires make more instantaneous calls than judges, judges do regularly make quick judgments on motions, objections, and the like. In these contexts, judges often cannot slow down. So, it makes sense

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237. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. ECON. 1859, 1885 (2010) (“We find that players have up to 4% fewer fouls called against them and score up to 2½% more points on nights in which their race matches that of the refereeing crew. Player statistics that one might think are unaffected by referee behavior [for example, free throw shooting] are uncorrelated with referee race. The bias in foul-calling is large enough so that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew assigned to the game.”).

238. Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1433 (2011) (“Pitches are slightly more likely to be called strikes when the umpire shares the race/ethnicity of the starting pitcher, an effect that is observable only when umpires' behavior is not well monitored. The evidence also suggests that this bias has substantial effects on pitchers' measured performance and games' outcomes. The link between the small and large effects arises, at least in part, because pitchers alter their behavior in potentially discriminatory situations in ways that ordinarily would disadvantage themselves (such as throwing pitches directly over the plate.”).
to count their performances in domains such as bail, probable cause, and preliminary hearings.

We recognize that such counting may be difficult for individual judges who lack both the quantitative training and the resources to track their own performance statistics. That said, even amateur, basic counting, with data collection methods never intended to make it into a peer-reviewed journal, might reveal surprising outcomes. Of course, the most useful information will require an institutional commitment to counting across multiple judges and will make use of appropriately sophisticated methodologies. The basic objective is to create a negative feedback loop in which individual judges and the judiciary writ large are given the corrective information necessary to know how they are doing and to be motivated to make changes if they find evidence of biased performances. It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.

2. Jurors

a. Jury Selection and Composition

Individual screen. One obvious way to break the link between bias and unfair decisions is to keep biased persons off the jury. Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand. This is, of course, precisely one of the purposes of voir dire, although the interrogation process was designed to ferret out concealed explicit bias, not implicit bias.

One might reasonably ask whether potential jurors should be individually screened for implicit bias via some instrument such as the IAT. But the leading scientists in implicit social cognition recommend against using the test as an individually diagnostic measure. One reason is that although the IAT has enough test-retest reliability to provide useful research information about human beings generally, its reliability is sometimes below what we would like for individual assessments. Moreover, real-word diagnosticity for individuals raises many more issues than just test-retest reliability. Finally, those with implicit biases need not

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239. The test-retest reliability between a person’s IAT scores at two different times has been found to be 0.50. For further discussion, see Kang & Lane, supra note 2, at 477–78. Readers should understand that “the IAT’s properties approximately resemble those of sphygmomanometer blood pressure (BP) measures that are used to assess hypertension.” See Anthony G. Greenwald & N. Sriram, No Measure Is Perfect, but Some Measures Can Be Quite Useful: Response to Two Comments on the Brief Implicit Association Test, 57 EXPERIMENTAL PSYCHOL. 238, 240 (2010).
be regarded as incapable of breaking the causal chain from implicit bias to judgment. Accordingly, we maintain this scientifically conservative approach and recommend against using the IAT for individual juror selection.240

**Jury diversity.** Consider what a White juror wrote to Judge Janet Bond Arterton about jury deliberations during a civil rights complaint filed by Black plaintiffs:

During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about “those people” rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). **Had just one African-American been sitting in that room, the content of discussion would have been quite different.** And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.

I pass these thoughts onto you in the hope that the jury system can some day be improved.241

This anecdote suggests that a second-best strategy to striking potential jurors with high implicit bias is to increase the demographic diversity of juries242 to get a broader distribution of biases, some of which might cancel each other out. This is akin to a diversification strategy for an investment portfolio. Moreover, in a more diverse jury, people’s willingness to express explicit biases might be muted, and the very existence of diversity might even affect the operation of implicit biases as well.

In support of this approach, Sam Sommers has confirmed that racial diversity in the jury alters deliberations. In a mock jury experiment, he compared the deliberation content of all-White juries with that of racially diverse juries.243 Racially diverse juries processed information in a way that most judges and lawyers would consider desirable: They had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer

240. For legal commentary in agreement, see, for example, Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 856–57 (2012). Roberts suggests using the IAT during orientation as an educational tool for jurors instead. *Id.* at 863–66.


243. The juries labeled “diverse” featured four White and two Black jurors.
uncorrected statements, and greater discussion of race-related topics.244 In addition to these information-based benefits, Sommers found interesting predeliberation effects: Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.245

Given these benefits,246 we are skeptical about peremptory challenges, which private parties deploy to decrease racial diversity in precisely those cases in which diversity is likely to matter most.247 Accordingly, we agree with the recommendation by various commentators, including Judge Mark Bennett, to curtail substantially the use of peremptory challenges.248 In addition, we encourage consideration of restoring a 12-member jury size as “the most effective approach” to maintain juror representativeness.249

b. Jury Education About Implicit Bias

In our discussion of judge bias, we recommended that judges become skeptical of their own objectivity and learn about implicit social cognition to become motivated to check against implicit bias. The same principle applies to jurors, who must be educated and instructed to do the same in the course of their jury service. This education should take place early and often. For example, Judge

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245. See Sommers, supra note 242, at 87.

246. Other benefits include promoting public confidence in the judicial system. See id. at 82–88 (summarizing theoretical and empirical literature).


Bennett spends approximately twenty-five minutes discussing implicit bias during jury selection.250

At the conclusion of jury selection, Judge Bennett asks each potential juror to take a pledge, which covers various matters including a pledge against bias:

I pledge ***:

I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.251

He also gives a specific jury instruction on implicit biases before opening statements:

Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common

250. Judge Bennett starts with a clip from What Would You Do?, an ABC show that uses hidden cameras to capture bystanders' reactions to a variety of staged situations. This episode—a brilliant demonstration of bias—opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear. What Would You Do? (ABC television broadcast May 7, 2010), available at http://www.youtube.com/watch?v=gc7f60GuNRg.

251. Mark W. Bennett, Jury Pledge Against Implicit Bias (2012) (unpublished manuscript) (on file with authors). In addition, Judge Bennett has a framed poster prominently displayed in the jury room that repeats the language in the pledge.
sense, and these instructions. Our system of justice is counting on you
to render a fair decision based on the evidence, not on biases.252

Juror research suggests that jurors respond differently to instructions
depending on the persuasiveness of each instruction’s rationale. For example, jurors
seem to comply more with an instruction to ignore inadmissible evidence when
the reason for inadmissibility is potential unreliability, not procedural irregu-
larity.253 Accordingly, the implicit bias instructions to jurors should be couched in
accurate, evidence-based, and scientific terms. As with the judges, the juror’s
education and instruction should not put them on the defensive, which might
make them less receptive. Notice how Judge Bennett’s instruction emphasizes the
near universality of implicit biases, including in the judge himself, which decreases
the likelihood of insult, resentment, or backlash from the jurors.

To date, no empirical investigation has tested a system like Judge
Bennett’s—although we believe there are good reasons to hypothesize about its
benefits. For instance, Regina Schuller, Veronica Kazoleas, and Kerry Kawakami
demonstrated that a particular type of reflective voir dire, which required indi-
viduals to answer an open-ended question about the possibility of racial bias,

252. Id. In all criminal cases, Judge Bennett also instructs on explicit biases using an instruction that is
borrowed from a statutory requirement in federal death penalty cases:
You must follow certain rules while conducting your deliberations and returning
your verdict:

   * * *

Reach your verdict without discrimination. In reaching your verdict, you must not
consider the defendant’s race, color, religious beliefs, national origin, or sex. You are
not to return a verdict for or against the defendant unless you would return the same
verdict without regard to his race, color, religious beliefs, national origin, or sex. To
emphasize the importance of this requirement, the verdict form contains a certifi-
cation statement. Each of you should carefully read that statement, then sign your
name in the appropriate place in the signature block, if the statement accurately reflects
how you reached your verdict.

The certification statement, contained in a final section labeled “Certification” on the Verdict
Form, states the following:

   By signing below, each juror certifies that consideration of the race, color, religious
   beliefs, national origin, or sex of the defendant was not involved in reaching his or her
   individual decision, and that the individual juror would have returned the same
   verdict for or against the defendant on the charged offense regardless of the race, color,
   religious beliefs, national origin, or sex of the defendant.

   This certification is also shown to all potential jurors in jury selection, and each is asked if they will
   be able to sign it.

253. See, e.g., Saul M. Kassin & Samuel R. Sommers, Inadmissible Testimony, Instructions to Disregard, and
the Jury: Substantive Versus Procedural Considerations, 23 PERSONALITY & SOC. PSYCHOL. BULL.
1046 (1997) (finding evidence that mock jurors responded differently to wiretap evidence that was ruled
inadmissible either because it was illegally obtained or unreliable).
appeared successful at removing juror racial bias in assessments of guilt.\textsuperscript{254} That said, no experiment has yet been done on whether jury instructions specifically targeted at implicit bias are effective in real-world settings. Research on this specific question is in development.

We also recognize the possibility that such instructions could lead to juror complacency or moral credentialing, in which jurors believe themselves to be properly immunized or educated about bias and thus think themselves to be more objective than they really are. And, as we have learned, believing oneself to be objective is a prime threat to objectivity. Despite these limitations, we believe that implicit bias education and instruction of the jury is likely to do more good than harm, though we look forward to further research that can help us assess this hypothesis.

c. Encourage Category-Conscious Strategies

\textit{Foreground social categories.} Many jurors reasonably believe that in order to be fair, they should be as colorblind (or gender-blind, and so forth.) as possible. In other words, they should try to avoid seeing race, thinking about race, or talking about race whenever possible. But the juror research by Sam Sommers demonstrated that White jurors showed race bias in adjudicating the merits of a battery case (between White and Black people) unless they perceived the case to be somehow racially charged. In other words, until and unless White jurors felt there was a specific threat to racial fairness, they showed racial bias.\textsuperscript{255}

What this seems to suggest is that whenever a social category bias might be at issue, judges should recommend that jurors feel free to expressly raise and foreground any such biases in their discussions. Instead of thinking it appropriate to repress race, gender, or sexual orientation as irrelevant to understanding the case, judges should make jurors comfortable with the legitimacy of raising such issues. This may produce greater confrontation among the jurors within deliberation, and evidence suggests that it is precisely this greater degree of discussion, and even confrontation, that can potentially decrease the amount of biased decisionmaking.\textsuperscript{256}

This recommendation—to be conscious of race, gender, and other social categories—may seem to contradict some of the jury instructions that we noted

\textsuperscript{254} Regina A. Schuller, Veronika Kazoleas & Kerry Kawakami, \textit{The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom}, 33 LAW & HUM. BEHAV. 320 (2009).

\textsuperscript{255} See supra notes 70–71.

above approvingly. But a command that the race (and other social categories) of the defendant should not influence the juror’s verdict is entirely consistent with instructions to recognize explicitly that race can have just this impact—unless countermeasures are taken. In other words, in order to make jurors behave in a colorblind manner, we can explicitly foreground the possibility of racial bias.

Engage in perspective shifting. Another strategy is to recommend that jurors try shifting perspectives into the position of the outgroup party, either plaintiff or defendant. Andrew Todd, Galen Bohenhausen, Jennifer Richardson, and Adam Galinsky have recently demonstrated that actively contemplating others’ psychological experiences weakens the automatic expression of racial biases. In a series of experiments, the researchers used various interventions to make participants engage in more perspective shifting. For instance, in one experiment, before seeing a five-minute video of a Black man being treated worse than an identically situated White man, participants were asked to imagine “what they might be thinking, feeling, and experiencing if they were Glen [the Black man], looking at the world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary.” By contrast, the control group was told to remain objective and emotionally detached. In other variations, perspective taking was triggered by requiring participants to write an essay imagining a day in the life of a young Black male.

These perspective-taking interventions substantially decreased implicit bias in the form of negative attitudes, as measured by both a variant of the standard IAT (the personalized IAT) and the standard race attitude IAT. More important, these changes in implicit bias, as measured by reaction time instruments,

257. See Bennett, supra note 252 (“[Y]ou must not consider the defendant’s race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.”).
258. Although said in a different context, Justice Blackmun’s insight seems appropriate here: “In order to get beyond racism we must first take account of race.” Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).
261. See id. at 1030.
262. Experiment one involved the five-minute video. Those in the perspective-shifting condition showed a bias of $M=0.43$, whereas those in the control showed a bias of $M=0.80$. Experiment two involved the essay, in which participants in the perspective-taking condition showed $M=0.01$ versus $M=0.49$. See id. at 1031. Experiment three used the standard IAT. See id. at 1033.
also correlated with behavioral changes. For example, the researchers found that those in the perspective-taking condition chose to sit closer to a Black interviewer, and physical closeness has long been understood as positive body language, which is reciprocated. Moreover, Black experimenters rated their interaction with White participants who were put in the perspective-taking condition more positively.

CONCLUSION

Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

Confronted with a robust research basis suggesting the widespread effects of bias on decisionmaking, we are therefore forced to choose. Should we seek to be behaviorally realistic, recognize our all-too-human frailties, and design procedures and systems to decrease the impact of bias in the courtroom? Or should we ignore inconvenient facts, stick our heads in the sand, and hope they somehow go away? Even with imperfect information and tentative understandings, we choose the first option. We recognize that our suggestions are starting points, that they may not all work, and that, even as a whole, they may not be sufficient. But we do think they are worth a try. We hope that judges and other stakeholders in the justice system agree.

263. *See id.* at 1035.

264. *See id.* at 1037.
Implicit Bias and Immigration Courts

FATMA E. MAROUF*

ABSTRACT

This Article highlights the importance of implicit bias in immigration adjudication. After tracing the evolution of prejudice in our immigration laws from explicit “old-fashioned” prejudice to more subtle forms of “modern” and “aversive” prejudice, the Article argues that the specific conditions under which immigration judges decide cases render them especially prone to the influence of implicit bias. Specifically, it examines how factors such as immigration judges’ lack of independence, limited opportunity for deliberate thinking, low motivation, and the low risk of judicial review all allow implicit bias to drive decisionmaking. The Article then recommends certain reforms, both simple and complex, to help reduce such bias in immigration adjudication.

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INTRODUCTION

During the past two decades there has been a surge of research on implicit bias within the fields of social psychology, cognitive science, and neuroscience. Implicit bias is largely automatic and occurs below the level of conscious awareness. Legal scholars have examined the relevance of implicit bias to areas such as employment discrimination, legislative efforts, and legal decision making. Yet its relevance to immigration law remains largely unexplored. This Article represents an initial step toward examining the role of implicit bias within immigration courts and the Board of Immigration Appeals (“BIA” or “Board”), which comprise the administrative levels of immigration adjudication within the Executive Office for Immigration Review.
While all judges have biases by virtue of being human, the specific conditions under which immigration judges (“IJs”) decide cases render them especially prone to undue influence by implicit bias. This Article argues that comprehensive immigration reform must address these conditions in order to provide a basic platform for just adjudication of immigration cases. Creating the conditions for careful, conscious examination of complex immigration cases is necessary to improve the quality of immigration decisions at the administrative level, which Judge Posner, in particular has repeatedly ecorated as “arbitrary, unreasoned, irrational, inconsistent, and uninformed.”

Part I traces the evolution of prejudice in our immigration laws from explicit “old-fashioned” prejudice to more subtle forms of “modern” and “aversive” prejudice, providing examples of these various attitudes in both immigration policy and adjudication of individual immigration cases. Part II delves deeper into the issue of implicit bias, examining how our current structure for adjudicating immigration cases allows such bias to flourish with few cognitive safeguards. Specifically, it examines how IJs’ lack of independence, limited opportunity for deliberate thinking, low motivation, complex caseload, and the low risk of review all allow implicit bias to drive decisionmaking. This section also examines similar factors that promote implicit decisionmaking by the BIA. Part III explores how certain reforms, both simple and complex, may reduce implicit bias by both IJs and the BIA. The Article concludes that implicit bias plays a critical role in shaping administrative immigration adjudication and therefore, EOIR reform should be a fundamental feature of any sound comprehensive immigration reform bill.

I. From “Old-Fashioned” to “Modern” and “Aversive” Prejudice in U.S. Immigration Law

U.S. immigration laws mirror the “dramatic change in the nature of prejudice and discrimination” that characterizes the last century.  

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Psychologists use the term “old-fashioned prejudice” to describe “non-egalitarian beliefs, such as the endorsement of negative stereotypes, support for segregation and open discrimination, and belief in the inferiority of particular social groups.” The early history of U.S. immigration law is replete with examples of open and blatant old-fashioned racism, such as: the Naturalization Act of 1790, which limited U.S. citizenship to free whites; the exclusion of Chinese immigrants and other “Asians” during the late 19th to mid-20th century; the deportation of hundreds of thousands of Mexicans, many of whom were U.S. citizens, during the 1930s; and the National Quota system, which remained in place until 1965. Indeed, the unflinchingly racist remarks of Supreme Court justices in *Chae Chan Ping v. United States* (the *Chinese Exclusion Case*) shock the modern conscience.

Although old-fashioned prejudice rarely appears in contemporary legal opinions, especially at the appellate level, it occasionally still rears its head in immigration courts. For example, appellate court judges have rebuked IJs for “laun[ching] into a diatribe against Chinese immigrants lying on the witness stand, spanning twelve pages of transcript,” telling an asylum applicant, “the whole world does not revolve around you and the other Indonesians that just want to live here because they enjoy the United States,” or, without any explanation, labeling asylum applicants

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10 *An Act to Establish an Uniform Rule of Naturalization*, ch. 3 § 1, 1 Stat. 103 (1790) (repealed by Act of Jan. 29, 1795, ch. 20 § 1, 1 Stat. 414).
14 See *Chae Chan Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581, 595-96 (1889). For more thorough discussion of explicit racial discrimination in U.S. immigration history, see *BILL ONG HENG, DEFINING AMERICA THROUGH IMMIGRATION POLICY* 1-8 (2004) (arguing that anti-immigrant sentiments in the United States are a reaction to Mexican and other non-European immigration); LÓPEZ, *supra* note 11, at 1-2 (describing how “the individuals who petitioned for naturalization forced the courts into a case-by-case struggle to define who was a ‘white person,’” because naturalization was initially restricted to free whites).
15 Huang v. Gonzales, 453 F.3d 142, 149 (2d Cir. 2006).
16 Sukwanputra v. Gonzales, 434 F.3d 627, 638 (3d Cir. 2006).
“as religious ‘zealots’ whose exercise of religion was ‘offensive to a majority.’”17 Thankfully, such comments remain the exception rather than the rule.

The type of explicit prejudice more common today is “modern” prejudice, which is much more subtle than the old-fashioned kind, due to changing social norms regarding acceptable beliefs and behaviors.18 “According to the theory of modern prejudice, negativity is only expressed overtly when it can be justified on non-prejudicial grounds, as this allows for the maintenance of an egalitarian and non-prejudiced self-image.”19 Denying the existence of discrimination is the hallmark of modern prejudice.20 Individuals with modern prejudice still espouse discriminatory beliefs but consider them “empirical facts” rather than forms of prejudice.21

A similar concept to “modern prejudice” is “aversive prejudice.” While the term “modern prejudice” is often used to describe those who are politically conservative, the corollary of “aversive prejudice” characterizes “those who are politically liberal and openly endorse non-prejudiced views, but whose unconscious negative feelings and beliefs get expressed in subtle, indirect, and often rationalizable ways.”22 These negative feelings

17 Floroiu v. Gonzales, 481 F.3d 970, 974 (7th Cir. 2007); accord Todorovic v. U.S. Att’y Gen., 621 F.3d 1311, 1326 (11th Cir. 2010) (finding that “the IJ relied on impermissible stereotypes about gay people as a substitute for substantial evidence”); Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1050 (9th Cir. 2005) (holding that the IJ’s personal conjecture about domestic violence was indicative of bias and stereotypical assumption).

18 Brochu et al., supra note 9, at 29. Surprisingly, the concepts of “modern,” “aversive,” and “implicit” prejudice developed relatively independently, so they have not been well-integrated. The relationship between modern prejudice and aversive prejudice, in particular, remains unclear because it “has rarely been the subject of extensive theoretical or empirical investigations.” Bertram Gawronski et al., Understanding the Relations Between Different Forms of Racial Prejudice: A Cognitive Consistency Perspective, 34 PERSONALITY & SOC. PSYCHOL. BULL. 648, 649 (2008) (proposing a theoretical framework for integrating several concepts of contemporary research on racial prejudice).

19 Brochu et al., supra note 9, at 29.

20 Id. The concept of modern racism includes four related beliefs:

(1) Discrimination is a thing of the past because blacks now have the freedom to compete in the marketplace and to enjoy those things they can afford. (2) Black are pushing too hard, too fast and into places where they are not wanted. (3) These tactics and demands are unfair. (4) Therefore, recent gains are undeserved and the prestige granting institutions of society are giving blacks more attention and the concomitant status than they deserve.


21 Gawronski et al., supra note 18, at 649.

22 Pearson et al., supra note 8, at 317. “Support for the aversive racism framework has been obtained across a broad range of experimental paradigms and participant populations,
“do not reflect open antipathy, but rather consist of more avoidant reactions of discomfort, anxiety, or fear.”23 Thus, those with aversive prejudice have egalitarian explicit (conscious) attitudes but negative implicit (unconscious) attitudes.24

A few examples of modern or aversive prejudice in U.S. immigration law include: the exclusion of all homosexuals from the United States, ostensibly on health-related grounds, until 1990;25 the ban preventing all HIV-positive aliens from traveling or immigrating to the United States (also ostensibly a public health measure), which was finally lifted in January 2010;26 and the detention of hundreds of Arabs, Muslims, and South Asians as suspected “terrorists” under the U.S.A. Patriot Act after the events of 9/11.27 In each of these cases, the measures targeting a particular group could be rationalized in a non-prejudicial way.

Even “positive” reforms that appear to reduce discrimination could have subtle underlying discriminatory motives or implications. For example, when lawmakers eliminated the overtly discriminatory National Quota system in 1965 and replaced it with an immigration system based largely on family relationships, they anticipated that this new system would largely maintain the racial and ethnic composition of the United States.28 Similarly, per-country ceilings have disparate racial impacts on

including emergency and nonemergency helping behavior inside and outside of the laboratory, selection decisions in employment and college admission, interpersonal judgments, and policy and legal decisions.” Id. at 318.

23 Id. at 317.

24 Id. While the majority of whites in the United States appear non-prejudiced on explicit measures of prejudice, such as a self-reports, a similar percentage reveal racial biases when tested with implicit measures, such as the Implicit Association Test (“IAT”). Id.


28 See David Reimers, Still the Golden Door: The Third World Comes to America 72-73 (2d ed. 1992); see also Kevin R. Johnson, The “Huddled Masses” Myth: Immigration and Civil Rights 93-106 (2004) (arguing that legal interpretation and actual implementation of immigration laws have involved strong racial bias); Eithne Luibhéid, Entry Denied: Controlling Sexuality at the Border xxi-xxii (2002) (challenging the idea that just because “explicitly discriminatory provisions based on race, ethnicity, and sexual orientation have been stricken from immigration law, immigration control is now implemented fairly”); Lina
immigration. Race also informs many of the current debates on immigration in somewhat covert ways. “[R]acialized images are clearly engaged in distinguishing the deserving from the undeserving,” and Mexicans need not be specifically named in such discussions, as they are tacitly understood to be the undeserving (and criminal) “illegals.” While immigrants to the United States are more diverse today than ever before, this diversity is “masked by discourse that racializes immigration legislation as policy concerned only with Mexican immigration.”

In addition to influencing discourse on immigration policy, modern or aversive prejudice influences administrative immigration adjudications, albeit in ways that are harder to pin down than old-fashioned prejudice. Unlike blatant prejudice, which manifests as antipathy and hate, in legal judgments aversive prejudice involves the use of cognitive rationalizing processes. Therefore, as aversive racists embrace egalitarian values, they generally act appropriately in social situations where “discrimination would be obvious to others and to themselves.” However:

[Their] non-conscious feelings and beliefs... will produce discrimination in situations in which normative structure is weak, when the guidelines for appropriate behavior are unclear, when the basis for social judgment is vague, or when one’s actions can be justified or rationalized based on some factor other

Notes:


30 Newton, supra note 28, at 145. “The racialized imagery of immigration restriction assuages: it communicates that the freeloaders, the threats, the people unwilling to conform to standards and values prized in the polity are being denied entry or access on arrival.” Id. at 153.

31 Id. at 145-46. Newton contends that the criminality associated with crossing the border in violation of the law “when combined with attributes of laziness, welfare usage, and female childbearing, forges an image of the Mexican illegal that is race-based.” Id. at 145-46. The absence of images of unauthorized immigrants from other countries further affirms that illegal aliens are Mexicans.

32 Id. at 153.

33 Pearson et al., supra note 8, at 318.

34 Id.
than race.\textsuperscript{35}

The informality of immigration court—where the rules of evidence do not apply, forty percent of respondents are unrepresented by counsel, and overloaded, burned out judges are allowed to play an inquisitorial role—creates a setting with weak normative structures and vague guidelines for appropriate behavior, leading to discrimination.\textsuperscript{36}

While the Supreme Court has held that “expressions of impatience, dissatisfaction, annoyance, and even anger” do not amount to bias,\textsuperscript{37} numerous appellate courts have found bias by immigration judges in precisely these types of situations, suggesting that they sense an underlying prejudice that undermines the fairness of the proceedings.\textsuperscript{38} For example, federal judges have found bias where the IJ spoke in an “argumentative, sarcastic, and sometimes arguably insulting manner”\textsuperscript{39} engaged in “bullying” until the petitioner was “ground to bits,”\textsuperscript{40} appeared “unseemly, ‘intemperate,’ and even ‘mocking’”\textsuperscript{41} or took on the role of “a prosecutor anxious to pick holes in the petitioner’s story.”\textsuperscript{42} While one may be inclined to dismiss such IJs as just “a few bad seeds,” their hostile attitudes reflect an anxiety about immigration and an underlying prejudice toward potential immigrants that is actually quite widespread.\textsuperscript{43}

In the vigorous debates about comprehensive immigration reform, we do not hear many expressions of old-fashioned prejudice, but some of the deepest concerns regarding a legalization program that would potentially grant “amnesty” to millions of undocumented people reflect forms of

\textsuperscript{35} Id.
\textsuperscript{36} See infra Part II.
\textsuperscript{37} Liteky v. United States, 510 U.S. 540, 555-56 (1994). The social psychological studies discussed in this Article regarding modern and implicit forms of prejudice present good reasons to think critically about Liteky’s holding.
\textsuperscript{38} The way in which implicit bias affects behavior is “complex and, therefore, . . . difficult to study.” David M. Amodio & Saaid A. Mendoza, Implicit Intergroup Bias: Cognitive, Affective and Motivational Underpinnings, in HANDBOOK OF IMPLICIT SOCIAL COGNITION, supra note 1, at 353, 361 (“More research is needed to determine the situations in which implicit bias may be expressed as discomfort versus hostility.”).
\textsuperscript{39} Elias v. Gonzales, 490 F.3d 444, 451 (6th Cir. 2007).
\textsuperscript{40} Cham v. Att’y Gen., 445 F.3d 683, 686 (3d Cir. 2006).
\textsuperscript{41} Castilho de Oliveira v. Holder, 564 F.3d 892, 900 n.4 (7th Cir. 2009) (quoting Apouviepseakoda v. Gonzales, 475 F.3d 881, 886 (7th Cir. 2007)) (recalling “similar behavior by [Immigration] Judge Brathos in other cases”).
\textsuperscript{42} Rivera v. Ashcroft, 394 F.3d 1129, 1135 (9th Cir. 2005) (quoting Li v. Ashcroft, 378 F.3d 959, 967 (9th Cir. 2004) (Noonan J., dissenting)).
modern or aversive prejudice.\textsuperscript{44} Indeed, the fear of “opening the floodgates” and allowing millions of people, mostly Latinos, to immigrate to the United States echoes the fear noted by the Supreme Court in \textit{Chae Chan Ping} regarding the “great danger that at no distant day [a] portion of our country would be overrun by [Chinese].”\textsuperscript{45} While economics is certainly a relevant factor in formulating immigration policy, subtle forms of prejudice often underlie public responses to economic arguments. A recent study shows that “news about the cost of immigration boosts white opposition far more when Latino immigrants, rather than European immigrants, are featured.”\textsuperscript{46} Thus, the level of support for immigration depends on the racial identity of the prospective immigrants.\textsuperscript{47} The study further found that race influences opinions about immigration because racial or ethnic cues trigger intense emotional reactions, especially anxiety related to perceived threats, which in turn trigger changes in opinion that are independent of changes in beliefs about the severity of immigration problems.\textsuperscript{48} These results confirm the importance of understanding the role of prejudice, whether subtle or overt, in immigration adjudication.

\textsuperscript{44} NEWTON, supra note 28, at 2 (“The desire to avoid appearing anti-immigrant and, perhaps inadvertently, appearing racist, reflects the constraints lawmakers feel when embarking on immigration reform in a post-Civil Rights era.”). Newton identifies various themes that emerge in congressional discussions around immigration reform, such as keeping out “the unauthorized, the invaders—the bad kinds of immigrants” and contrasting them with the “good immigrants who ‘founded this nation,’” which “privileg[es] . . . the European immigrant experience.” Id.; see also LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 6 (2008) (“Debates over immigration reform provide ample opportunities for the Latino Threat Narrative to become invoked. In addition, immigration reform legislation is an exercise in inclusion and exclusion when it comes to defining who is legitimately able to join the community of citizens.”). Signs of aversive prejudice also appeared during the 1980s in discussions of the legalization program that was passed under the Immigration Reform and Control Act of 1986 (“IRCA”). See HING, supra note 14, at 182 (“The ambivalence over amnesty reflected the policy makers’ desire to keep out undocumented Mexicans and not demonstrate any sign of approval for those already here.”); JOSEPH NEVINS, OPERATION GATEKEEPER AND BEYOND: THE WAR ON “ILLEGALS” AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY 104 (2010) (“The perceived failure of IRCA to address the issue of unauthorized boundary crossing from Mexico sufficiently helped to fuel a resurgence of anti-immigration sentiment (again, with a focus on ‘illegal’ immigration).”). Nevins describes the construction of the U.S.-Mexico boundary “as a physical divide . . . intermixed with the making of the associated . . . social boundaries that help to define and make distinctions between ‘us’ and ‘them’—social categories heavily imbued with hierarchical concepts and practices vis-à-vis race, class, gender, nation, and geographical origins.” Id. at 193.

\textsuperscript{45} Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889).

\textsuperscript{46} Ted Brader et al., What Triggers Public Opposition to Immigration? Anxiety, Group Cues, and Immigration Threat, 52 AM. J. POL. SCI. 959, 959 (2008).

\textsuperscript{47} Id.

\textsuperscript{48} Id.
II. Implicit Bias in Administrative Immigration Adjudications

In today’s society, many individuals may hesitate to express even modern forms of prejudice, much less old-fashioned prejudice.49 While most research on modern and old-fashioned prejudice assessed attitudes using traditional explicit measures, such as self-reports, “[t]he past two decades have seen the development of a new, alternative approach to attitude assessment,” using implicit measures.50 These implicit measures not only avoid unwanted influences that muddy explicit measures, like “the desire to appear socially appropriate,” but also “reveal unique components of attitudes that lie outside conscious awareness and control.”51

Consequently, implicit attitudes may diverge from self-reports in revealing ways. For example, a study found that although participants reported that whites and African Americans both have strong ties to American culture, measures of their implicit attitudes revealed that they associated whites more than African Americans, with the concept of “American.”52 Numerous studies show only weak correlations between explicit and implicit bias toward certain social groups, as these are “qualitatively different types of attitudes that are each subject to numerous influences—some shared and some unique.”53 A recent meta-analysis of 122 research studies, involving a total of 14,900 subjects, showed that in the domains of stereotyping and prejudice, implicit bias Implicit Association Test (“IAT”) scores actually predict behavior better than explicit self-reports.54 At least one study has specifically confirmed the link between implicit bias and behavior (i.e. judgments) among trial judges.55 Moreover,

50 Id.
51 Id. (citing Mahzarin Banaji, Implicit Attitudes Can Be Measures, in THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117, 117-150 (Henry L. Roediger III et al. eds., 2001)).
53 Edlund & Heider, supra note 49, at 81.
55 See, e.g., Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1222 (2009) (showing, through a study involving 133 trial judges, that implicit biases can influence judicial decisionmaking but that such biases can also be overcome). For evidence of the link between implicit bias and behavior in the medical context, see Alexander R. Green et al., Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients, 22 J. GEN. INTERNAL MED. 1231, 1231, 1235 (2007) (finding that physicians with higher IAT scores were more likely to offer appropriate treatment to white patients than to black patients diagnosed with the same condition but that doctors who
“evidence is growing that explicit decisions can indeed be shaped by automatic biases.” Such evidence underscores the importance of taking implicit bias seriously when analyzing how prejudice influences the way that judges make decisions.

The two primary techniques used to measure implicit bias are evaluative priming and IAT. In an evaluative priming procedure, participants are briefly exposed to a subliminal or supraliminal prime (e.g. photographs of African American or Caucasian faces), and then asked to make decisions about whether certain words are negative or positive. The “response times on the task (i.e., faster responses to negative words after a black prime) can be used as a measure of implicit bias.” The second technique involves the IAT, a computer-based test that requires users to categorize rapidly the pairings of concepts, such as “white” and “black,” with either positive or negative attributes, such as “hardworking” or “lazy.” Stronger, easier mental associations between the concept and the attribute lead to faster response times, while weaker, more difficult associations lead to slower response times. Thus, if it takes longer for a user to categorize the pairing of “black” with “hardworking” than “white” with “hardworking,” the slower response time signals the presence of implicit bias against blacks. By measuring response times and error rates related to such pairings, the IAT measures implicit attitudes.

Studies using the IAT have replicated the existence of implicit attitudes towards many marginalized groups, including, but not limited to, racial and ethnic minorities, Muslims, women, and homosexuals. Since such

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57 Edlund & Heider, supra note 49, at 79-80. For an explanation of IAT, see infra text accompanying notes 61-62.
58 Edlund & Heider, supra note 49, at 79.
60 See Edlund & Heider, supra note 49, at 80.
61 See id.
62 See id.
63 See, e.g., Bethany Albertson, Religious Appeals and Implicit Attitudes, 32 POL. PSYCHOL. 109 (2010) (testing a theory that Christian religious appeals made by politicians would impact the implicit attitudes of people who identify as Christian); Bertram Gawronski et al., Implicit Bias in Impression Formation: Associations Influence the Construal of Individualizing Information, 33 EUR. J. SOC. PSYCHOL. 573 (2003) (studying implicit biases toward German and Turkish individuals); William A. Jellison et al., Implicit and Explicit Measures of Sexual Orientation Attitudes: Ingroup Preferences and Related Behaviors and Beliefs Among Gay and Straight Men, 30 PERSONALITY & SOC. PSYCHOL. BULL. 629 (2004) (researching implicit attitudes of related to sexual preferences); Brian A. Nosek et al., Pervasiveness and Correlates of Implicit Attitudes and Stereotypes, 18 EUR. REV. SOC. PSYCHOL. 36 (2007) (using a web-based format to study implicit
marginalized groups routinely appear before immigration judges, especially in asylum cases, it is surprising that the role of implicit bias in immigration court has not yet been scrutinized. The following sections outline some of the factors that likely contribute to implicit bias by immigration judges and the BIA, providing a basic framework for further exploration.

A. Factors That Contribute to Implicit Bias in Immigration Court

There are several reasons why implicit bias is especially likely to influence decisionmaking in the immigration context. The following sections discuss various relevant factors providing a general overview.

1. Lack of Independence and Inquisitorial Adjudication

Judges tend to display the same types of implicit bias found in the general American population, despite their professional commitment to fairness and objectivity.64 Their implicit bias, however, does not necessarily impact their judgments.65 When judges are highly motivated to avoid making biased judgments, they can compensate for their implicit biases in their decisionmaking, adhering more closely to the norm of impartiality set forth in the Judicial Code of Conduct.66 Among all judges, however, IJs have the weakest structural and professional norms to remain impartial and independent. Unlike federal judges who derive their authority from Article III of the Constitution and have the highest degree of independence through lifetime appointments, IJs are career civil servants within the Department of Justice.67 They have even less independence than Administrative Law Judges (“ALJs”), who derive their power through congressional legislation and have a substantial degree of judicial

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64 See Rachlinski et al, supra note 55, at 1221-22 (“The proportion of white judges in our study who revealed automatic associations of white with good and black with bad was, if anything, slightly higher than the proportion found in the online surveys of white Americans.”). The study also notes that “[w]hite capital defense attorneys, another group which might be expected to have strong professional commitments to the norm of racial equality, exhibit the same automatic preference for whites as the general population.” Id. (footnotes omitted).

65 Id.

66 Id. at 1222-23; see also MODEL CODE OF JUDICIAL CONDUCT CANON 2 (2007) (“A judge shall perform the duties of judicial office impartially, competently, and diligently.”).

independence under the Administrative Procedure Act.68

IJs’ role as attorneys in the Department of Justice lies at the heart of the critique that they lack true independence.69 They belong to the same agency that represents the government in removal cases before the federal courts of appeal.70 Moreover, the majority of IJs previously worked in positions that were adversarial to immigrants, primarily as trial attorneys in the Department of Homeland Security.71 One study found that IJs who previously worked in positions adversarial to immigrants were significantly less likely to grant asylum than IJs who had not held such positions and that the grant rates dropped even lower for IJs who had held adversarial positions for over a decade.72 The controversy over political appointments and reassignments of IJs by the Attorney General casts an even darker shadow over their independence as adjudicators.73

68 See Administrative Procedure Act of 1946, 5 U.S.C. § 554(d) (2006) (requiring the separation of adjudicatory personnel from investigative and enforcement personnel and prohibiting ALJs from privately consulting anyone on any “fact in issue” in the proceeding); § 557(d)(1) (prohibiting ex parte communications); 5 U.S.C. § 7521(a) (2006) (providing that ALJs can be suspended or removed only for good cause and after a hearing); see also Elizabeth Legomsky, Allocating Power Within Agencies, 120 YALE L.J. 1032, 1068 (2011) (“ALJs . . . are fairly independent of the agencies in which they sit.”).


70 See Benson, supra note 69, at 415, 422.

71 See Benedetto, supra note 69, at 472 (referring to the former office of immigration review as Immigration and Naturalization Service).


73 See Legomsky, Deportation and the War on Independence, supra note 69, at 379, 389. According to a 2008 report by the Department of Justice Inspector General and Office of Professional Responsibility, the Bush Administration engaged in a systemic campaign to pack the Immigration Courts with “good Republicans” who were “completely on the team,” appointing as IJs only individuals who had been “screened for their political or ideological affiliations.” U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 110-11, 116 (2008), available at http://www.justice.gov/oig/special/s0807/final.pdf. While it is possible that specialization itself may politicize the bench, such explicit political appointments to the immigration courts clearly compromises their independence, especially since those IJs remain on the bench today. Cf. Jeffrey J. Rachlinski et al., Inside the Bankruptcy Judge’s Mind, 86 B.U.L. REV. 1227, 1230-31 (finding a correlation between bankruptcy judges’ political views and the outcome of some of their cases, suggesting that “one potential downside of specialization” is that it “might politicize the bench”).
IJJs’ lack of genuine independence becomes even more troubling in light of their inquisitorial role. The Immigration and Nationality Act allows IJs to interrogate, examine, and cross-examine witnesses.\textsuperscript{74} Given that roughly 57-65% of respondents in immigration proceedings have been unrepresented during the past five years,\textsuperscript{75} the inquisitorial role of IJs can contribute to the appearance of a one-party system and make it even easier for IJs to abuse their authority. These concerns about the neutrality of IJs are particularly striking when one considers that respondents in removal proceedings do not have any of the protections against bias that characterize criminal trials, such as voir dire and peremptory strikes, although deportation is akin to criminal punishment in its severity.\textsuperscript{76} The lack of genuine independence of IJs, coupled with their inquisitorial role, creates a situation where “the guidelines for appropriate behavior are unclear,” which allows implicit bias to go unchecked and contributes to discrimination in deciding cases.\textsuperscript{77}

The absence of structural and professional norms to encourage independence among IJs makes it easier for implicit bias to influence their behavior.\textsuperscript{78} Moving EOIR outside the Department of Justice would help ensure a greater separation between adjudication and enforcement, while adopting a judicial code of conduct and annual performance evaluations (by someone outside the Department of Justice) represent basic first steps to promote impartiality and protect against biased decisionmaking.\textsuperscript{79}

2. Limited Opportunity to Engage in Deliberate Thinking

In situations where an individual’s implicit and explicit attitudes differ, the implicit attitude serves as the “default,” and the explicit attitude “only overrides the implicit attitude if the individual has the cognitive capacity available to do so.”\textsuperscript{780} The conditions under which immigration judges currently operate reduce their cognitive capacity, making it more likely that implicit biases will drive their decisions. Specifically, their extraordinarily high caseload means that they have little time to think

\textsuperscript{76} Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).
\textsuperscript{77} Pearson et al., supra note 8, at 318.
\textsuperscript{78} Cf. Rachlinski et al, supra note 55, at 1222-23.
\textsuperscript{80} Kipling D. Williams & Cassandra L. Govan, Reacting to Ostracism: Retaliation or Reconciliation?, in THE SOCIAL PSYCHOLOGY OF INCLUSION AND EXCLUSION 47, 56 (Dominic Abrams et al. eds., 2005) (citing Timothy D. Wilson et al., A Model of Dual Attitudes, 107 PSYCHOL. REV. 101 (2000)).
before issuing oral decisions into a tape recorder, and they are often overwhelmed and exhausted. Studies have shown that stereotypes have a stronger impact on judgments when they are made under time pressure.81 Indeed, “systematic changes of cognitive process” occur when people make decisions under time pressure.82 We tend to consider fewer kinds of information, use the information in a more shallow way, give more weight to negative information, and make more variable, less accurate judgments.83 Moreover, “when people are tired, distracted, or rushed, they are more likely to respond based on automatic impulses than when they are energetic, focused, and unhurried.”84 The evidence below shows that IJs are operating under atrocious circumstances for conscious, deliberative decisionmaking.

First, IJs have an enormous caseload, handling an average of 1300 removal cases per year, which far exceeds the volume of cases heard by other types of judges.85 This actually represents a significant improvement

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81 See, e.g., Randall A. Gordon & Kris S. Anderson, Perceptions of Race-Stereotypic and Race-Nonstereotypic Crimes: The Impact of Response-Time Instructions on Attributions and Judgments, 16 BASIC & APPLIED SOC. PSYCHOL. 455 (1995) (showing that the race-to-crime stereotype matching effects on punishment and severity indicators emerged only when decisions were made quickly); B. Keith Payne, Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001) (finding greater stereotype bias in weapon misidentifications when participants responded under time pressure than when they responded at their own pace); Ad van Knippenberg et al., Judgement and Memory of a Criminal Act: The Effects of Stereotypes and Cognitive Load, 29 EUR. J. SOC. PSYCHOL. 191 (1999) (showing a more general effect of negative stereotypes on legal case decisions only when participants were under time pressure); cf. Roger Giner-Sorolla et al., Validity Beliefs and Ideology Can Influence Legal Case Judgments Differently, 26 LAW & HUM. BEHAV. 507 (2002) (measuring the impact of validity beliefs and feminist ideology in simulated individual juror decisions in a sex-discrimination case, and finding “validity beliefs had a direct, heuristic impact on judgment only under time pressure,” while ideology had a more pervasive influence on the decisionmaking process).

82 Anne Edland & Ola Svenson, Judgment and Decision Making Under Time Pressure: Studies and Findings, in TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING 27, 37 (Ola Svenson & A. John Maule eds., 1993); see also Dan Zakay, The Impact of Time Perception Processes on Decision Making under Time Stress, in TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING, supra, at 59, 67 (“[D]ecision making under time stress is actually decision making with limited resources. The noxious impact of limited resources on cognitive performance in various domains is well documented . . .”).

83 Edland & Svenson, supra note 82, at 28-29, 36.

84 Payne & Gawronski, supra note 1, at 10 (citing Russel H. Fazio & Tamara Towles-Schwen, The MODE Model of Attitude-Behavior Processes, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 97-116 (Shelly Chaiken & Yaacov Trope eds., 1999); accord Fritz Strack & Roland Deutsch, Reflective and Impulsive Determinants of Social Behavior, 8 PERSONALITY & SOC. PSYCHOL. REV. 220 (2004)).

85 See Legomsky, Restructuring Immigration Adjudication, supra note 69, at 1651-52 (articulating that 214 IJs handle roughly 280,000 removal proceedings per year).
over recent years. According to the Government Accountability Office, the number of immigration judges increased by only 3% while the courts’ caseload increased by 39% during the years 2000 to 2005.\textsuperscript{86} The average number of cases per IJ increased from 1852 in 2000 to 2505 in 2005, and the number of completed cases increased by 37% during that period.\textsuperscript{87} In some locations, the caseload per judge was much higher.\textsuperscript{88} Immigration courts nationwide responded to the increasing caseload by setting a series of deadlines for completing cases.\textsuperscript{89} Starting in fiscal year 2003, the courts aimed to complete all cases older than three years by December 31, 2005.\textsuperscript{90} EOIR has also established target timeframes for various types of cases.\textsuperscript{91} Since EOIR and the Office of the Chief Immigration Judge (“OCIJ”) evaluate the performance of immigration courts based in part on their success in meeting such case completion goals, the emphasis often remains on quantity rather than quality of decisions.\textsuperscript{92} While some recent reforms do aim to improve quality,\textsuperscript{93} IJs remain under intense pressure to make decisions quickly.\textsuperscript{94}

Even in complex asylum cases, where testimony can take many hours and is often presented over several hearing dates, spaced months or years apart, IJs generally do not have time to review and analyze the evidence as a whole before rendering a decision.\textsuperscript{95} According to another report by the U.S. Government Accountability Office, “[e]ighty-two percent of [IJs surveyed] reported time limitations as ‘moderately or very challenging’ aspects of asylum adjudications and 77 percent [described] managing their

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\textsuperscript{87} Id. at 4.
\textsuperscript{88} For example, the immigration courts in Harlington and San Antonio, Texas each had an average of over 8000 cases per judge in 2005. Id. at 13.
\textsuperscript{89} Id. at 14.
\textsuperscript{90} Id. at 4, 14-15. The courts did not meet their ambitious case completion goals. Id. at 15.
\textsuperscript{91} See id. at 21 tbl.3. For example, the target timeframe for an expedited defensive asylum case is 180 days, while the target timeframe for non-detained individuals with other types of applications for relief is 240 days. Id.
\textsuperscript{92} See GAO REPORT, supra note 86, at 20-22.
\textsuperscript{93} “In January 2006, the Attorney General requested a comprehensive review of the immigration courts, to include the quality of work . . . .” Id. at 29. In August 2006, after completion of the review, the Attorney General implemented a number of reforms, including performance evaluations for immigration judges. Id.
\textsuperscript{94} See Legomsky, Restructuring Immigration Adjudication, supra note 69, at 1654-56.
\end{flushleft}
caseload [as] ‘moderately or very challenging.’”96 To make matters worse, IJs generally give their decision orally as soon as the testimony is completed.97 The use of oral decisions in such complex cases itself interferes with a deliberate, individualized, and analytically sophisticated approach, encouraging instead the use of generic and formulaic responses to factually and legally complex claims.96

In addition, IJs have very limited support staff, sharing one law clerk for every four judges and lacking adequate administrative support.99 The lack of support staff means that IJs often do not have time to conduct thorough legal research or stay abreast of rapidly evolving case law. Moreover, since most respondents are unrepresented, IJs usually do not have the benefit of legal briefs in analyzing challenging or novel questions of law. All of these factors present structural impediments to deliberate and thoughtful decisionmaking.

A 2007 survey of stress and burnout among IJs confirms that they feel deprived of the opportunity to think deliberately about the difficult issues before them.100 The web-based survey conducted by Stuart Lustig, M.D., M.P.H., and his colleagues used two measures, the Secondary Traumatic Stress Scale (“STSS”) and the Copenhagen Burnout Inventory (“CBI”), to assess levels of stress and burnout among IJs.101 The most commonly reported issue pertained to “the amount of work and the paucity of time in which to complete it.”102 Typical responses from IJs stressed the lack of time for deliberation before reaching a decision, confirming such factors as the pressure to complete cases, the extemporaneous nature of oral decisions, and denial of access to transcripts that would allow them to review testimony before making a decision.103 As one IJ aptly stated,

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98 See Chris Guthrie et al., Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1, 37 (2007) (“[T]he discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions. The process of writing might challenge the judge to assess a decision more carefully, logically, and deductively.” (footnotes omitted)).
99 See Legomsky, Restructuring Immigration Adjudication, supra note 69, at 1652.
100 Lustig et al., supra note 97, at 64-65.
101 Id. at 59.
102 Id. at 64.
103 For example, IJs made the following statements:

  * “In those cases where I would like more time to consider all the facts and weigh what I have heard I rarely have much time to do so simply because of the
“[f]here is not enough time to think.”104 Under such circumstances, one cannot expect explicit attitudes to override implicit ones.105 Implicit attitudes surface when individuals are under time pressure and a heavy cognitive load—conditions that clearly apply to IJs.106 Reducing IJs’ caseload and giving them more time to assess each case is therefore critical to creating opportunities for them to control implicit bias through “active, conscious control.”110

3. Law Motivation Resulting From High Levels of Stress and Burnout

Low motivation, regardless of the cause, affects the manner in which we make decisions. “When individuals are depleted or under cognitive load, they are likely to set a lower criterion for decision validity; as a result, they may be satisfied with a decision that is largely based on the implications of their automatic reactions rather than more extensive deliberation.”108 Conversely, “[i]f they are internally driven or otherwise motivated to suppress their own biases, people can make judgments free

| pressure to complete cases.” Id. |
| “We are told to keep producing—to get the cases done, without regard to the fact that we have insufficient support staff, insufficient time to deliberate and to complete cases, and outdated equipment.” Id. |
| “The cases require judges . . . to rule promptly at the end of the hearing in the form of a lengthy, detailed and extemporaneous oral decision with little or no time to reflect or to deliberate.” Id. at 65. |
| “We are denied transcripts and must decide complex cases, yet we are expected to render oral decisions on the spot.” Id. |
| “I feel demeaned by being unable to control my own work life as a professional, to be prevented from making the crucial judgment calls on how to decide a case—on the spot or after calm deliberation and research.” Id. at 72. |

104 Id. at 66 (emphasis added).
105 See supra notes 80-84 and accompanying text.
106 See Williams & Govan, supra note 80, at 56 (citing Wilson et al., supra note 80).
107 Rachlinski et al., supra note 55, at 1225 (“Judges who, due to time pressure or other distractions, do not actively engage in an effort to control the ‘bigot in the brain’ are apt to behave just as the judges in our study in which we subliminally primed with race-related words”).
108 Bodenhausen & Todd, supra note 56, at 285-86; see also Mario B. Ferreira et al., Automatic and Controlled Components of Judgment and Decision Making, 91 J. PERSONALITY & SOC. PSYCHOL. 797, 806 (2006) (showing that decisions made under a load were more likely to be made based on a salient simple heuristic, since cognitive load interfered with propositional reasoning but not automatic reasoning).
from biases, even implicit ones."\textsuperscript{109}

The aforementioned survey of stress and burnout among IJs revealed common feelings of low self-esteem and demoralization (sometimes in response to scathing criticism by appellate judges and the public), as well as widespread psychological issues, such as depression and excessive stress.\textsuperscript{110} Roughly half of the judges who responded to the survey reported challenges to esteem, including lack of respect and understanding, criticism, and intense scrutiny by appellate court judges.\textsuperscript{111} On the one hand, fear of criticism and judicial scrutiny may help reduce prejudice if it pushes IJs to issue more careful and thoughtful decisions. Studies show that when fear of invalidity is high, judgments are likely to reflect a wider range of considerations than just strong attitudinal associations.\textsuperscript{112} On the other hand, if the challenges to esteem are so great that IJs feel personally threatened, as some clearly do,\textsuperscript{113} then the judges are likely to show higher levels of implicit prejudice.\textsuperscript{114} Studies also indicate that individuals who feel ostracized, rejected, and excluded—like the IJs who see themselves as targets of circuit court criticism—show more implicit prejudice.\textsuperscript{115}

\textsuperscript{109} Rachlinski et al., supra note 55, at 1202 (footnotes omitted); see also Jack Glaser & Eric D. Knowles, Implicit Motivation to Control Prejudice, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 170-71 (2008) (finding that individuals who are highly motivated to control prejudice can avoid the "shooter bias," which describes how white targets are more likely to shoot a black target pulling something out of his pocket); Green et al., supra note 55 (finding "that implicit bias can be recognized and modulated to counteract its effect on treatment decisions [by physicians].")

\textsuperscript{110} See Lustig et al., supra note 97, at 71-72.

\textsuperscript{111} Id.


\textsuperscript{113} See Lustig et al., supra note 97, at 71. For example, one IJ stated, "I am demoralized by being made the 'whipping boy' by the press and public, when it is the system we are forced to follow that contributes so greatly to errors I may make." Id. Another IJ noted, "[o]ur last annual meeting spent far too much time telling us how awful we were." Id. Yet another reported feeling "intimidated and humiliated by the federal courts." Id.

\textsuperscript{114} Studies show higher levels of implicit bias under conditions of personal threat. See Bertram Gawronski & Rajees Sritharan, Formation, Change, and Contextualization of Mental Associations: Determinants and Principles of Variations in Implicit Measures, in HANDBOOK OF IMPLICIT SOCIAL COGNITION, supra note 1, at 216, 231; Cynthia M. Frantz et al., A Threat in the Computer: The Race Implicit Association Test as a Stereotype Threat Experience, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1611 (2004) (obtaining higher scores of implicit bias when the task purported to measure racism as opposed to cultural stereotypes); Laurie A. Rudman et al., Implicit Self-Esteem Compensation: Automatic Threat Defense, 93 J. PERSONALITY & SOC. PSYCHOL. 798, 798-813 (2007) (finding higher levels of implicit prejudice under conditions of personal threat).

\textsuperscript{115} In one study, researchers examined ostracism and included individuals’ implicit and explicit attitudes towards Aboriginal and White Australians. While ostracized individuals
Moreover, low motivation, especially when coupled with a limited
time to engage in deliberate thinking, often corresponds to higher
levels of implicit bias.116 Lustig’s survey of IJs reveals shockingly high
levels of burnout and low motivation. Overall, the responses received from
fifty-nine IJs demonstrated “significant symptoms of secondary traumatic
stress.”117 Many IJs “reported that the work was emotionally draining,”118
often leading to dissatisfaction with their jobs.119 The study linked
to self-esteem to higher burnout scores.120 Burnout “includes a
decreased sense of personal and/or professional accomplishment,
emotional exhaustion, and depersonalization (e.g. distancing oneself
from the job, cynicism and loss of compassion) all of which can potentially affect
the outcome for applicants whose fates rest in judges’ hands.”121 Indeed,
“[j]udges reported more burnout than any other group of professionals to
whom the CBI had been administered, including prison wardens and
physicians in busy hospitals.”122 As further evidence of low motivation, “IJs
appear to retire from service at the earliest possible date.”123

This evidence of high burnout and low motivation adds to the
likelihood that implicit attitudes, rather than explicit ones, will drive
decisionmaking among IJs. The culture of apathy in immigration court is
incompatible with a strong motivation to be egalitarian, which helps
control automatic biases.124 Burnout conflicts with creativity, a trait that

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“were equally prosocial in their responses to the explicit measures (old fashioned and modern
prejudice), . . . there was a significant difference in the IAT results, suggesting that ostracised
participants were showing more implicit prejudice towards Aboriginals than included
participants.” Williams & Govan, supra note 80, at 58.

116 Vincent Yzerbyt & Stephanie Demoulin, Intergroup Relations, in 2 HANDBOOK OF SOCIAL
PSYCHOLOGY 1024, 1110 (Susan T. Fiske et al. eds., 5th ed. 2010) (“Individuals with the
combination of high internal motivation and low external motivation to control prejudice,
primaquently because they are both highly internalized and autonomous, exhibit
generally low levels of implicit bias.”); Bodenhausen & Todd, supra note 56, at 284 (“Some
dual-process models incorporate the idea that automatic reactions are likely to bias
subsequent cognitive elaboration and deliberation, particularly when there is limited
motivation for accuracy or objectivity.”); see also John F. Dovidio et al., The Nature of
Contemporary Racial Prejudice: Insight from Implicit and Explicit Measures of Attitudes, in
ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 165, 179-180 (Richard E. Petty et al.
eds., 2009) (reviewing the literature on how people’s motivation and resources for controlling
bias can moderate the relation between implicit and explicit discrimination).

117 See Lustig et al., supra note 97, at 57.
118 Id. at 74 (emphasis omitted).
119 Id. at 75.
120 Id. at 79.
121 Id. at 59.
122 Id. at 60.
123 Lustig et al., supra note 97, at 80.
124 Pearson et al., supra note 8, at 328-29.
reduces the activation of stereotypes,\textsuperscript{125} while the struggle to maintain self-esteem can enhance the activation of stereotypes.\textsuperscript{126} The combination of these factors, therefore, makes IJs highly susceptible to basing decisions on implicit bias.

4. Legally and Factually Complex Nature of Cases

The nature of the cases that IJs adjudicate also increases the likelihood that implicit attitudes will influence their decisions. To begin with, removal and asylum proceedings involve highly complex legal rules that are constantly evolving.\textsuperscript{127} The factual inquiries in such cases also tend to be quite complicated.\textsuperscript{128} Where the complexity of decisionmaking increases, people tend to rely more on intuitive cognitive shortcuts (known as “heuristics”), adopting strategies that are “likely to ease processing of complex information.”\textsuperscript{129} While these shortcuts are often useful, they can also lead to “severe and systematic errors.”\textsuperscript{130} Even judges make these errors.\textsuperscript{131} In fact, “[r]esearchers have consistently found that intuitive judgment and decisionmaking is inferior to formal methods.”\textsuperscript{132} Not only does reliance on intuitive judgments lead to considering irrelevant information and underemphasizing important information, but “the quality of judgments and decisions decrease as task complexity increases.”\textsuperscript{133}

Implicit attitudes especially influence one of the most challenging

\textsuperscript{125} Id. at 329 (explaining that creativity “conflicts with the energy-saving and simplifying features of stereotyping”).

\textsuperscript{126} Id.

\textsuperscript{127} See, e.g., Ardestani v. INS, 502 U.S. 129, 140 (1991) (Blackmun, J., dissenting) (“[T]he legal rules surrounding deportation and asylum proceedings are very complex.”); Escobar-Grijalva v. INS, 206 F.3d 1331, 1335 (9th Cir. 2000) (describing immigration laws as “a labyrinth almost as impenetrable as the Internal Revenue Code”); Reyes-Palacios v. INS, 836 F.2d 1154, 1155 (9th Cir. 1988) (“The importance of counsel, particularly in asylum cases where the law is complex and developing, can neither be overemphasized nor ignored.”).

\textsuperscript{128} See, e.g., Castro v. Holder, 597 F.3d 93, 106 (2d Cir. 2010) (noting that the court has “on several occasions remanded cases in which the agency denied an application for asylum based on its failure to properly engage in the ‘complex and contextual factual inquiry’ that such claims often require” (quoting Zhang v. Gonzales, 426 F.3d 540, 548 (2d Cir. 2005))).

\textsuperscript{129} Dan Milech & Melissa Finucane, Decision Support and Behavioral Decision Theory, in IMPLICIT AND EXPLICIT MENTAL PROCESSES 291, 293 (Kim Kirsner et al. eds., 1998).

\textsuperscript{130} Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIAS 3 (Daniel Kahneman et al. eds., 2001).

\textsuperscript{131} See Chris Guthrie et al., Inside the Judicial Mind, 86 CORNELL L. REV. 777, 784 (2001) (“[U]nder certain circumstances judges rely on heuristics that can lead to systematically erroneous judgments”).

\textsuperscript{132} Milech & Finucane, supra note 129, at 293.

\textsuperscript{133} Id.
aspects of asylum cases: credibility assessments. Determining the credibility of an asylum applicant is a critical but notoriously difficult task.\textsuperscript{134} Credibility assessments include evaluations of nonverbal cues, such as demeanor, which often occur implicitly.\textsuperscript{135} For example, studies show that implicit attitudes lead individuals to read unfriendliness or hostility into the facial expressions of blacks but not whites.\textsuperscript{136} Moreover, studies indicate that implicit bias leads to more negative evaluations of ambiguous actions by racial and ethnic minorities.\textsuperscript{137} One experiment found that implicit attitudes toward Turks led subjects to rate their behavior more negatively than that of Germans when these groups were portrayed in ambiguous situations.\textsuperscript{138} Even the complete absence of details, rather than ambiguous ones, contributes to negative implicit attitudes. A study found that when details are absent, people simply rely on negative stereotypes to fill in the gaps.\textsuperscript{139} Such studies clearly raise concerns about how IJs respond

\textsuperscript{134} See Solomon v. Gonzales, 454 F.3d 1160, 1164 (10th Cir. 2006) (“The courts of appeals have frequently noted the inherent problems with credibility determinations in asylum cases.”). In Solomon, the Tenth Circuit explained:

Asylum applicants rarely speak English, and their testimony is plagued with the uncertainties of translation and cultural misunderstanding. They are generally unfamiliar with American procedures and wary of lawyers and officials; often they are not well served even by their own legal counsel. Their escape from persecution sometimes entailed acts of deceit and prevarication, or even bribery or forgery, which complicates evaluation of their veracity in immigration proceedings. Moreover, because of their troubled relations with their native countries, purported refugees often have difficulty in obtaining documentation to back up their claims.

\textsuperscript{135} Id.; see also Michael Kagan, \textit{Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations}, 17 GEO. IMMIGR. L.J. 367, 367-68 (2003) (discussing how credibility assessments are “frequently based on personal judgment that is inconsistent from one adjudicator to the next” and proposing a framework for analyzing testimony “to give credibility findings a more reliable, reviewable, and objective basis”).

\textsuperscript{136} Under the REAL ID Act, an IJ may base a credibility determination on the applicant’s demeanor, candor, responsiveness, the inherent plausibility of the story, the consistency of the applicant’s statements, and any inaccuracies in those statements. \textit{See} REAL ID Act of 2005 \textsuperscript{137} § 101(a)(3), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).


\textsuperscript{139} Bertram Gawronski et al., \textit{Implicit Bias in Impression Formation: Associations Influence the Construal of Individualizing Information}, 33 EUR. J. SOC. PSYCHOL. 573, 581 (2003); cf. Glaser \& Knowles, \textit{supra} note 109, at 168-69 (finding that most white adults are more likely to “shoot” a black target who pulls an object out of his pocket, even if the object is his wallet).

to ambiguous actions in evaluating credibility. The huge disparities among IJs in grant rates for asylum cases, which often turn on credibility, may result at least in part from different levels of implicit bias.140

The fear of fraud in asylum cases can also lead an IJ to overestimate its prevalence and skew his judgment of credibility of a certain claim. The availability heuristic describes how we estimate the frequency of an event based on how easily we can recall instances of that event occurring in the past.141 Thus, if an IJ has observed fraud in a number of asylum cases from a particular country, the availability heuristic may lead him or her to believe that fraud is more rampant than it really is, which may then influence assessments of both credibility and the likelihood of future harm in specific cases. Over 80% of IJs surveyed report that fraud and credibility assessments are “moderately or very challenging” aspects of adjudicating asylum cases.142 These concerns about fraud are not unfounded, as various reports confirm serious issues with fraud in asylum cases, which have caused the United States and other receiving countries to take dramatic actions, such as criminal prosecutions and suspensions of certain benefits for those found guilty of fraud.143 At the same time, however, such fears of fraud may contribute to both explicit and implicit bias by leading IJs to doubt that certain groups actually face any discrimination, a belief that would validate negative affective reactions toward members of those groups and provide the basis for negative evaluative judgments.144 Rejecting the proposition that a particular group is disadvantaged represents one way that people, including IJs, “can still base their judgments on their negative affective reactions even when they have strong egalitarian-related, non-prejudicial goals,” thereby maintaining “cognitive consistency” in their belief systems and avoiding uncomfortable feelings of “cognitive dissonance.”145 In this way, the prevalence of fraud may itself be

140 For evidence of such disparities, see Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication, 60 STAN. L. REV. 295, 325-49 (2007).
141 Tversky & Kahneman, supra note 130, at 11 (“Availability is a useful clue for assessing frequency or probability, because instances of large classes are usually reached better and faster than instances of less frequent classes.”).
142 GAO REPORT ON U.S. ASYLUM SYSTEM, supra note 96, at 8.
144 Gawronski et al., supra note 18, at 652, 655, 658.
145 Id. at 660.
Finally, IJs are especially susceptible to the influence of implicit biases because administrative and judicial review is so limited in immigration cases. In 2010, only 8% of respondents appealed decisions by immigration judges to the BIA, and about 25% of BIA decisions were appealed to the federal court, which means that the chance of an IJ’s decision being reviewed by a federal judge was just 2%. Thus, in the vast majority of cases, what happens in immigration court stays in immigration court, and no one ever sees the transcript. When cases are appealed, the BIA provides notoriously weak review, often issuing a summary “affirmance without opinion” under its “streamlined” procedures. Researchers have shown that a decisionmaker’s “degree of deliberation will vary as a function of the individual’s desired level of decision confidence.” In short, “[w]hen this criterion is low (i.e., when little deliberation is considered necessary), the likelihood of automatic biases dictating the final decision should be greater, compared with when the criterion is high and a wider array of information ends up being considered.” Accordingly, if IJs faced a greater prospect of judicial review, they would “set a higher threshold for decision confidence and as a result [would be] more likely to consider a broader range of information, some of which is likely to contradict the judgment implied by their implicit associations.”

146 EXEC. OFFICE FOR IMMIGRATION REVIEW, supra note 75, at XI fig.31.

147 Compare Legomsky, Restructuring Immigration Adjudication, supra note 69, at 1658 (noting that 8890 petitions for review of BIA decisions were filed with the circuit courts), with EXEC. OFFICE FOR IMMIGRATION REVIEW, supra note 75, at S1 fig.25 (stating that the BIA completed about 33,102 cases in 2009). The percent of BIA decisions appealed to the federal courts increased from a historical 5% (before 2002) to approximately 30% in 2005, after the Attorney General issued a regulation that expanded the BIA’s streamlining procedures. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FACT SHEET: BIA RESTRUCTURING AND STREAMLINING PROCEDURES 2 (2006), available at http://www.justice.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf. The change was felt acutely in the Ninth Circuit, where the number of immigration appeals rose from 2670 before implementation of the reform regulation to 6583 in fiscal year 2005. Id. The Ninth Circuit reports that the number of BIA appeals has steadily declined since 2005. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 2009 ANNUAL REPORT 40 (2009), available at http://www.ce9.uscourts.gov/publications/AnnualReport2009.pdf. BIA appeals to the Ninth Circuit numbered 3280 in 2009, down almost 25% from the year before. Id.

148 8 C.F.R. § 1003.1(e)(4) (2010); see Hassan v. Gonzales, 403 F.3d 429, 433 (6th Cir. 2005); Tsegay v. Ashcroft, 386 F.3d 1347, 1351-52 (10th Cir. 2004).

149 Bodenhausen & Todd, supra note 56, at 285.

150 Id.

151 Id.
influential in IJs decisionmaking.\textsuperscript{152}

B. \textit{Factors That Contribute to Implicit Bias by the Board of Immigration Appeals}

Many of the same factors noted above also apply to the Board of Immigration Appeals. This section, however, emphasizes those factors that are unique to the BIA. To begin with, the BIA has an even higher case load than IJs, as it had thirteen regular members and five temporary members in 2010,\textsuperscript{153} who decided over 33,000 appeals (down from over 41,000 in 2006), which is an average of over 1800 cases per BIA member each year.\textsuperscript{154} Consequently, the BIA has even more limited time than IJs to devote to deliberation. The streamlined procedure, mentioned above, whereby one member of the BIA simply “affirms without opinions” the decision of the IJ, makes it especially easy for BIA members to avoid conscious deliberation, because they do not need to articulate their reasoning, engage in any explicit legal analysis, or persuade any of their peers.\textsuperscript{155} Since studies have long shown that “we have relatively little awareness of \textit{how} we’re doing \textit{what} we’re doing”\textsuperscript{156} and often rely on erroneous intuitive theories that highlight the importance of irrelevant factors,\textsuperscript{157} the danger of allowing legal decisions to be made without explanation should not be underrated. This danger is especially acute in immigration cases, where the result may be deportation, a consequence so severe that the Supreme Court has recognized it as “the equivalent of banishment or exile.”\textsuperscript{158}

The paucity of BIA precedents further contributes to reliance on

\textsuperscript{152} See \textit{id.}; see also Schuette & Fazio, supra note 112 (showing that implicit associations play a greater role when fear of invalidity is low, whereas judgments reflect a wider range of considerations when fear of invalidity is high).


\textsuperscript{154} Exec. Office for Immigration Review, supra note 75, at S1 fig.25; see also Legomsky, Restructuring Immigration Adjudication, supra note 69, at 1654 (citing similar figures from 2008).

\textsuperscript{155} See supra note 148 and accompanying text.


\textsuperscript{157} Id.

\textsuperscript{158} Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).
cognitive shortcuts. If the BIA issued more precedent decisions, individual Board members would have less leeway in deciding individual cases and would be more likely to engage in deliberate analysis, drawing on the legal standards set forth in prior cases and comparing relevant fact patterns. The American Bar Association’s proposals for reforming the immigration court system specifically mention that the BIA’s remarkable rate of adjudication “has come at a substantial cost, including . . . the lack of precedent guidance coming from the Board.”\textsuperscript{159}

Last, the range of issues subject to judicial review was greatly limited by Congress through the 1996 reforms and the REAL ID Act of 2005.\textsuperscript{160} For example, federal courts have been stripped of jurisdiction over discretionary determinations and cases involving a removal order based on the commission of an aggravated felony, with the exception of constitutional claims and questions of law.\textsuperscript{161} The limited nature of judicial review contributes to the BIA’s low-quality decisions with poorly articulated reasons. The doctrine of deference to agency determinations further constrains what the federal courts of appeal are able or willing to do,\textsuperscript{162} although certain circuit court judges seem to be compensating for the BIA’s shortcomings by applying a less deferential standard of review than one might expect.\textsuperscript{163} The combination of all these factors creates a situation that actually discourages detailed deliberation on the part of the BIA and


\textsuperscript{162} See Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . . .”).

\textsuperscript{163} See Cox, supra note 7, at 1672 (describing how Judge Posner’s immigration opinions “exhibit extremely searching review” and “treat immigration authorities with great skepticism,” instead of showing traditional administrative deference). Some scholars have made persuasive legal arguments against kneejerk deference, especially in asylum cases where the definition of a refugee is based on an international treaty. See, e.g., Bassina Farbentblum, Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron, 60 DUKE L. J. 1059 (2011) (arguing that the doctrine of deference should not be applied where the agency opinion is in contrast with international law).
allows implicit biases to flourish unchecked by explicit cognitive processes.

C. Reforms to Reduce Implicit Bias in Administrative Adjudication

Immigration reform could ameliorate some of the problems noted above (such as the limited opportunity for deliberate thinking and low motivation) simply by allocating more resources to immigration courts and the BIA, thereby increasing their capacity to engage in more conscious decisionmaking. The Comprehensive Immigration Reform Act of 2010 proposed by Senator Robert Menendez (D-NJ) and Senator Patrick Leahy (D-VT) attempts to do this by increasing the number of IJs and support staff over a five-year period.\footnote{Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. § 107 (a)(2) (2010).} While commendable, this proposal does not go far enough to remedy the structural barriers to more deliberate decisionmaking. The Act proposes increasing the number of IJs by twenty each year for fiscal years 2011 to 2015 and increasing the support staff for IJs by eighty each year during the same time period.\footnote{Id.} Since there are currently 262 immigration judges, including the 23 new hires in 2010,\footnote{News Release, U.S. Dep’t of Justice, Exec. Office of Immigration Review, The Executive Office for Immigration Review Swears in 23 New Immigration Judges, Judge Corps Reaches 262 Serving in 59 Immigration Courts (Nov. 8, 2010), available at http://www.justice.gov/eoir/press/2010/IJInvestiture11052010.pdf.} this would bring the total to 362 IJs by the end of 2015. If the number of completed immigration court cases remained roughly the same (around 287,207 in 2010),\footnote{EXEC. OFFICE FOR IMMIGRATION REVIEW, supra note 75, at B7 fig.3.} the increase in IJs would reduce the case load to about 793 cases per year per judge, which would allow more time for deliberation and possibly lead to higher quality decisions.

The proposed reforms, however, not only increase the number of IJs but also substantially increase the number of Immigration and Customs Enforcement (“ICE”) and Customs and Border Protection (“CBP”) personnel, which will lead to more people being placed in removal proceedings.\footnote{See S. 3932 §§ 101, 102, 106. Specifically, section 101 of the Act requires that ICE have a total force of 6410 agents to investigate violations of criminal law and 185 worksite enforcement officers before any Lawful Prospective Immigrants are allowed to adjust their status, and section 106 would add roughly 800 to 1000 full-time active duty ICE investigators each year for fiscal years 2011-2012. Id. §§ 101, 106. Moreover, section 101 provides that CBP must have a total of 21,000 agents trained, hired, and reporting for duty prior to the adjustment of any LPIs, and section 102 requires DHS to hire, train, and assign to duty 5000 additional CBP officers by September 30, 2013. Id. §§ 101-02.} A 44\% increase in newly filed cases occurred between 2000 and 2005, which the Executive Office for Immigration Review attributed to “several factors, including enhanced border and interior enforcement
actions and changes in immigration laws and regulations.”169 One can expect a similar surge in removal proceedings to occur again if additional resources are devoted to border enforcement.

While a legalization program might arguably reduce the number of immigration court cases by creating new ways for people to legalize their status through USCIS and terminating certain removal proceedings, this argument has serious weaknesses. To begin with, the majority of individuals removed from the United States are now people with criminal convictions, due to the Obama Administration’s policy of focusing on this population.170 Since all but the most minor convictions will render aliens ineligible for Lawful Prospective Immigrant (“LPI”) and Blue Card status, this group would remain in removal proceedings before immigration judges.171

In fiscal year 2010, half of the 392,000 people removed from the United States were convicted criminals.172 This represents a significant increase from prior years, as approximately 33% of aliens removed in 2009, and 29% of those removed in 2008, had criminal convictions.173 Indeed, the percentage of convicted criminals removed in 2010 is significantly higher than in any year during the past decade.174 Moreover, the absolute number of convicted criminals removed from the United States steadily increased from 72,061 in 2000 to 128,345 in 2009, and then jumped dramatically to

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169 GAO REPORT, supra note 86, at 4. The number of newly filed cases increased from 252,000 in 2000 to 363,000 in 2005. Id. In 2010, the total number of matters received by the immigration courts totaled 392,888. EXEC. OFFICE FOR IMMIGRATION REVIEW, supra note 75, at B7 fig.3.


173 In 2009, a total of 393,289 aliens were removed, 128,345 (33%) of whom had criminal convictions. U.S. DEP’T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS 103 (Aug. 2010), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf. In 2008, a total of 358,886 aliens were removed, 105,103 (29%) of whom had criminal convictions. Id.

174 In 2007, a total of 319,382 aliens were removed, 102,394 (32%) of whom had criminal convictions. Id. at 100. In 2006, 280,974 were removed, 98,490 (35%) of whom had criminal convictions. Id. In 2005, a total of 246,431 aliens were removed, 92,221 (37%) of whom had criminal convictions. Id. In 2004, a total of 240,665 aliens were removed, 92,380 (38%) of whom had criminal convictions. Id. In 2003, a total of 211,098 aliens were removed, 83,731 (40%) of whom had criminal convictions. Id. at 97. In 2002, a total of 165,168 aliens were removed, 73,429 (44%) of whom had criminal convictions. Id. In 2001, 189,026 aliens were removed, 73,298 (39%) of whom had criminal convictions. Id. In 2000, a total of 188,467 aliens were removed, 72,061 (38%) of whom had criminal convictions. Id.
195,772 in 2010.\textsuperscript{175} Secretary of Homeland Security Janet Napolitano stated that this represented a 70\% increase in criminal proceedings since 2008.\textsuperscript{176} Since the Obama Administration intends to pursue the policy of focusing its removal efforts on criminals, immigration courts can predictably expect more cases each year involving convicted aliens who will not be eligible for new immigration benefits under the proposed Act. Moreover, the proposed Comprehensive Immigration Reform Act also increases the number of ICE officers focused on criminal investigations, which will compound the number of aliens with convictions placed in removal proceedings.\textsuperscript{177} Given these trends, one cannot count on a legalization program to counter the rising tide of removal.

Another weakness in the argument that a legalization program will reduce the caseload of IJs is that it overlooks the ways in which such a program might directly contribute to individuals being placed in removal proceedings. Individuals who apply for legalization and are denied by USCIS may end up in removal proceedings. While the proposed Act, like the 1986 amnesty under IRCA, includes confidentiality provisions designed to alleviate concerns that information provided in the applications would be used to prosecute or deport applicants, there are exceptions to these provisions, including cases involving misrepresentation or fraud.\textsuperscript{178}

In light of these issues, the Act’s provisions for increasing the number of IJs, BIA staff attorneys, and support staff do not appear adequate to ensure time for conscious, deliberate consideration of cases and to improve motivation and morale among immigration adjudicators.

Even if increasing EOIR’s capacity along the proposed lines succeeds in reducing workloads, stress, and burnout, it is not the optimal approach to reducing implicit bias within EOIR, as it would not address the lack of independence or low risk of judicial review. Actually restructuring the immigration court system as an Article I court with a single level of review by an Article III court along the lines proposed by Stephen Legomsky\textsuperscript{179} would have a much more profound effect. This proposed structural reform would increase the independence of IJs by removing them from the Department of Justice, improve their sense of esteem and their pride in

\begin{footnotesize}
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\item\textsuperscript{175} See Raisa Camargo, Criminal Deportations Reach Record High; Deportations up 70 Percent Since Obama Took Office, LATIN AM. NEWS DISPATCH, \url{http://latindispatch.com/2010/10/12/criminal-deportations-reach-record-high-deportations-up-70-percent-since-obama-took-office} (last visited Apr. 8, 2011).
\item\textsuperscript{176} Id.
\item\textsuperscript{177} See supra note 168 and accompanying text.
\item\textsuperscript{178} See Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. § 504(d) (2010).
\item\textsuperscript{179} See generally Legomsky, Restructuring Immigration Adjudication, supra note 69, at 1678-87.
\end{itemize}
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their place within the judiciary, set a higher standard for decisionmaking, eliminate problems with the BIA, and expand the scope of judicial review, as issues currently reviewed by the BIA would be reviewed by federal judges, all of which would help reduce implicit bias for the reasons discussed above. Thus, structural reform of the immigration adjudication process should play an integral role in discussions of comprehensive immigration reform.

If eliminating the BIA proves too problematic, restoring review by three-member panels in all cases, disposing of the “affirmative without opinion” procedure, applying a more searching standard of review to findings of facts (e.g. de novo rather than clearly erroneous), and increasing the BIA’s diversity by appointing more female members and people of color could help reduce implicit bias.180 The gender balance of the BIA, in particular, merits closer examination in exploring ways to reduce implicit bias, since female IJs grant asylum at a rate that is 44% higher than their male colleagues.181 A balanced, three-member panel that issues written opinions would help check the impact of implicit bias on behavior, encouraging individual panel members to explicitly override their implicit biases by conferring with each other and articulating their reasoning.182

While these reforms would not change the complexity of immigration cases or the challenging nature of credibility assessments, they would change the context in which such decisions are made. The strong normative structure and clear guidelines for appropriate conduct associated with an Article I court would help reduce the influence of implicit bias on all types of decisions by IJs, as would review by a balanced, three-member panel of the BIA.183 The federal courts of appeal, Congress, or the Department of Justice could also establish more clear and consistent rules for making credibility determinations that would help reduce the influence of implicit bias in this area.184 In addition, IJs should receive trainings about the ways that implicit bias can cloud their judgments, especially their credibility assessments, so that they at least become aware of potential pitfalls, such as biased interpretations of facial expressions or ambiguous behavior. Adopting clear codes of conduct and conducting

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180 Cf. Rachlinsky et al, supra note 55, at 1231 (exploring how altering courtroom practices could reduce unconscious bias by trial judges).
181 See Ramji-Nogales et al., supra note 72, at 342-43.
182 See Guthrie et al., supra note 98, at 8-9 (2007) (proposing a “dual-process model of judging” whereby “judges make initial intuitive judgments” that they “might (or might not) override with deliberation”).
183 See supra text accompanying notes 34-35.
184 See Kagan, supra note 134, at 399-403 (proposing a framework for analyzing credibility in a more objective, reliable and reviewable manner); cf. Guthrie et al., supra note 131, at 828-29 (recommending judges and legislators to craft legal rules that minimize the adverse effects that cognitive illusions on judgments”).
annual performance evaluations of IJs and the BIA could also help reduce bias.

In sum, increasing the number of IJs and support staff is a necessary first step that would be even more effective when coupled with restructuring the immigration court system, but these reforms alone may not be sufficient to reduce the impact of implicit bias on immigration adjudication. “Even with greater resources, judges will still resort to cognitive shortcuts.” Judges must become aware of the impact of implicit bias in order to question the soundness of their decisions and make the effort to render more impartial judgments. Reforms such as “exposing judges to stereotype-incongruent models, providing testing and training, auditing judicial decisions, and altering courtroom practices” could all help reduce implicit bias. Further exploration of such reforms, specifically in the context of immigration adjudication, is necessary in order to provide individuals facing deportation, potentially to a country where they face persecution, a fair and impartial hearing.

CONCLUSION

This Article examined the role of implicit bias in immigration court and the BIA, highlighting various factors that contribute to its influence over administrative decisionmaking. The discussion sets forth a roadmap for further analysis, raising the importance of implicit bias in a new context that legal scholars have not yet analyzed.

In addition, the Article suggested some ways that immigration reform can help reduce implicit bias. These strategies range from relatively simple measures such as: increasing the number and resources of IJs to allow time for thoughtful deliberation, conducting regular evaluations of their performance, and providing them with trainings to make them more aware of the impact of implicit bias, to more complex reforms, such as: restructuring the entire immigration court system or even just the BIA’s procedures and creating rules that make challenging issues such as credibility determinations more objective and reliable. Such reforms can cumulatively have a powerful impact on how implicit attitudes influence immigration adjudication.

While our government no longer uses the colorful language quoted by the Supreme Court in the Chinese Exclusion Case regarding how the country “has no room outside of its prisons or almshouses for depraved and incorrigible criminals or hopelessly dependent paupers who may have

185 Guthrie et al., supra note 131, at 820.
186 See id.
187 Rachlinsky et al., supra note 55, at 1226.
become a pest or burden, or both, to their own country,” such anti-
foreigner sentiments unfortunately still influence how judges make
decisions. We cannot, therefore, hope to tackle the complex issue of
comprehensive immigration reform without first deepening our
understanding of how both explicit and implicit forms of prejudice shape
the way that judges respond to immigrants. This Article represents an
initial effort to analyze some of these challenging issues from a legal
perspective, but further interdisciplinary research would help elucidate the
ways that various legal reforms can promote more conscious and
egalitarian adjudication.

188 Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 609 (1889).
Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test

Justin D. Levinson, * Huajian Cai, ** and Danielle Young***

I. INTRODUCTION

Legal scholarship on racial discrimination has turned to the science of implicit social cognition to explain how the human mind automatically manifests biases against disfavored social groups. ¹ Much of this discourse on implicit bias focuses on the potential for massive, but hard to detect discrimination in the employment context. ² Yet, other legal domains where implicit racial bias may lead to persistent racial inequalities remain underexplored, most notably in criminal law. Specifically, a crucial question still needs to be answered: do implicit biases affect jury guilty/not guilty verdicts in racially biased ways?

Despite the broad incorporation of social science knowledge into legal discourse, a critical chasm continues to deter legal scholarship from fully achieving the social cognition-informed perspective it craves. Namely, legal scholarship on implicit bias lacks law-focused science.³ Legal analysts have implicitly assumed

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³ There have been a few empirical studies of implicit bias in the legal setting. See infra Section II-C for an overview of this empirical legal scholarship.
that existing social cognition measures, many of which are carefully developed and rigorously tested (but not developed with the law in mind), are the only options for theory development in the legal context. These tests have been groundbreaking in social psychological scholarship and their introduction into legal scholarship has addressed the need for the law to possess an understanding of the human mind. Yet, the still emerging legal model of the human mind has failed to develop new empirical tests that measure how implicit cognitive processes function not just in society in general, but specifically in legally relevant contexts such as jury decision-making.

Here is one example: a frequently cited psychological measure of implicit bias, the Implicit Association Test (“IAT”), examines people’s implicit associations by measuring response speed in a computerized test. In one of the most famous IATs, study participants are asked to pair together words representing attitudes (Good and Bad) and photos depicting target group members (Black and White) as fast as they can. The results of these studies show that, when measuring response times and error rates, the vast majority of people are faster to pair together Good with White and Bad with Black. These results are considered to be indicative of implicit bias, and are eye-opening when considered in the legal context. Yet might these studies do even more to examine implicit bias in the legal system? For example, why should legal scholars be satisfied to rely on psychological research relating to implicit racial attitudes of “good” and “bad,” (and then engage in heated debate about what it really means in the legal context) when it is possible to

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5 See Banaji, supra note 4, at 123, 136; Greenwald et al., supra note 4, at 1465; Jeffrey J. Rachlinski et al., Does Unconscious Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1198–99 (2009) [hereinafter Trial Judges].

6 See Brian A. Nosek et al., Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website, 6 GROUP DYNAMICS: THEORY RES. & PRAC. 101, 105–06 (2002).

7 See Kang, supra note 1, at 1493 (calling implicit social cognition findings “stunning”).

8 Although legal debates involving the IAT have mostly focused on attitude IATs, these debates are both broad in scope and sophisticated, and focus on everything from the meaning of reaction times (and the particular methods of scoring those reaction times) to issues of predictive validity (the issue of whether the IAT predicts anything meaningful). See Samuel R. Bagenstos, Implicit Bias, “Science,” and Antidiscrimination Law, 1 HARV. L. & POL’Y REV. 477 (2007) [hereinafter “Science” and Antidiscrimination Law]; Adam Benforado & Jon Hanson, Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights, 57 EMORY L.J. 1087 (2008); Gregory Mitchell & Philip E. Tetlock, Facts Do Matter: A Reply to Bagenstos, 37 HOFSTRA L. REV. 737 (2009) [hereinafter Facts Do Matter]; Gregory Mitchell & Philip E. Tetlock, Antidiscrimination Law and the Perils of Mindreading, 67 OHIO ST. L.J. 1023, 1028, 1032–33 (2006) [hereinafter Perils of Mindreading] (arguing that some legal scholars tend to propose legal solutions to the IAT without investigating alternative causes for the IAT’s results).
specifically test implicit associations of well known legally meaningful constructs, such as “guilty” and “not guilty.”

To address the lack of legally-focused empirical studies exploring implicit bias, we developed a new IAT: the Black/White, Guilty/Not Guilty IAT (“Guilty/Not Guilty IAT”). We designed this IAT to examine whether people hold implicit associations between African Americans and criminal guilt, a finding that would call into question criminal law’s presumption of innocence and evoke larger questions of racial justice. Although the debate over racial disparities in the criminal justice system has been raging for decades, scholars have rarely adapted social cognition methodology to examine specifically the role of race in criminal law decision-making. We therefore created and developed the Guilty/Not Guilty IAT, and predicted that people implicitly associate Black and Guilty compared to White and Guilty. Because it is important not just to test implicit associations

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9. Like the debates on the Good-Bad attitude IAT, scholars should critique all law-focused social science.

10. Because the IAT measures implicit associations related to photos of Black males, we cannot always know specifically that IAT results are due to stereotypes of African Americans rather than stereotypes of other Black males. However, social cognition researchers consistently find that using photos of Black males triggers stereotypes of African American males. See, e.g., B. Keith Payne, Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 187 (2001) (finding that showing participants Black faces for 200 milliseconds acted to trigger racial stereotypes associated with African Americans). To confirm that we were testing stereotypes of African American men, in our empirical study we specifically referred to the target group as “African American.”

11. For more on racial disparities in the criminal justice system, see, for example, RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr., & Austin Sarat eds., 2006); Scott Phillips, Racial Disparities in the Capital of Capital Punishment, 45 HOUS. L. REV. 807, 811–12 (2008).

themselves, but to investigate whether they predict meaningful behaviors, we also tested whether responses on the Guilty/Not Guilty IAT predict the way mock jurors evaluate ambiguous trial evidence. The results of our study confirmed our hypotheses: study participants held strong associations between Black and Guilty, relative to White and Guilty, and these implicit associations predicted the way mock jurors evaluated ambiguous evidence. Furthermore, we compared our measure to a frequently administered IAT that tests positive and negative attitudes towards race, the Pleasant/Unpleasant IAT, and found that the Guilty/Not Guilty IAT and the Pleasant/Unpleasant IAT functioned differently, a result that demonstrates the uniqueness of the Guilty/Not Guilty measure.

This Article introduces the Guilty/Not Guilty IAT, details the empirical study we conducted, and argues for the need to increase collaborations to employ social cognition methods to test legal hypotheses. Section II presents an overview of IAT research in the legal context, and notes the limited number of empirical studies that have been employed. Section III sets the stage for our empirical study, first by reviewing the science behind the IAT, and second, by contextualizing the meaning of the Guilty/Not Guilty IAT within the doctrine of the presumption of innocence. Section IV details the empirical study we conducted. The study tested implicit associations within an important legal domain and examined whether these implicit associations matter in legal decision-making. Results of the study showed that participants held implicit associations between Black and Guilty compared to White and Guilty, and that these implicit associations predicted mock-juror evaluations of ambiguous evidence. Section V briefly discusses the implications of the study, and calls for increased empirical collaborations. Section VI concludes.

II. IMPLICIT BIAS AND THE IMPLICIT ASSOCIATION TEST

Legal scholarship on implicit bias has emerged rapidly since 2005. By engaging in a science-based dialogue and by endeavoring to understand the

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14 Work on what many legal scholars have called “unconscious bias” was introduced conceptually in the 1980s by Charles Lawrence as part of an exploration of anti-discrimination law.
complexities of the human mind, this scholarship has opened up new ways of understanding societal inequality. This section sets the stage for our empirical study of implicit racial bias by examining one of the most compelling measures of implicit bias, the IAT.\textsuperscript{15} The section first explains the IAT itself. It then reviews legal scholarship that specifically discusses the IAT. Finally, it considers the few instances of legal scholarship employing empirical methods to run the IAT in legal context.

A. The Science of the IAT

The IAT measures implicit cognitions in a simple and compelling way. It asks participants to categorize information as quickly as possible, and then calculates a participant’s reaction time (in milliseconds) and accuracy in completing the categorization task.\textsuperscript{16} The wisdom behind the IAT holds that statistically significant speed and accuracy-based differences in a person’s ability to categorize different types of information reflect something meaningful in that person’s automatic cognitive processes.


\textsuperscript{15} Because other scholarship has thoroughly reviewed much of the broader work on unconscious and implicit bias, we focus only on scholarship related to the IAT. For reviews, see Kang, supra note 1; Levinson, Forgotten Racial Equality, supra note 1; Justin D. Levinson & Danielle Young, Different Shades of Bias: Skin tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence, 112 W. VA. L. REV. 307 (2010) [hereinafter Different Shades of Bias].

\textsuperscript{16} As psychologists Nilanjana Dasgupta and Anthony Greenwald summarize, “[w]hen highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty,” 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 (2001).
The following is a detailed description of the way the IAT is typically conducted: Study participants, working on computers, press two pre-designated keyboard keys as quickly as possible after seeing certain words or images on the computer monitors. The words and images that participants see are grouped into meaningful categories. These categories require participants to “pair an attitude object (for example, Black or White . . .) with either an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts) . . .”. Participants complete multiple trials of the pairing tasks, such that researchers can measure how participants perform in matching each of the concepts with each other. For example, in one trial of the most well known IATs, participants pair the concepts Good-White together by pressing a designated response key and the concepts Bad-Black together with a different response key. After completion of the trial, participants then pair the opposite concepts with each other, here Good-Black and Bad-White. The computer software that gathers the data measures the number of milliseconds it takes for participants to respond to each task. Scientists can then analyze (by comparing reaction times and error rates using a statistic called “D-prime”) whether participants hold implicit associations between the attitude object and dimension tested. Results of IATs conducted on race consistently show that “white Americans express a strong ‘white preference’ on the IAT.”

As a measure, the IAT is quite flexible. Researchers have created dozens of different kinds of IATs. Some examples include: Gender-Science IAT, Gay-Straight IAT, Obama-McCain IAT, and the Fat-Thin IAT, among many others. The Gender-Science IAT, for example, requires participants to group together Male and Female photos with Science and Liberal Arts words. It is worth noting the flexibility of the IAT to test either evaluative dimension words (such as grouping Male-Female with Good-Bad), or attribute dimension words (such as grouping Male-Female with Career-Family). The IAT we created, the Guilty/Not Guilty IAT, requires participants to group together photos of White and Black faces (attitude-object photos) and Guilty and Not Guilty words (attribute

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17 Levinson, Forgotten Racial Equality, supra note 1, at 355 (citing Banaji, supra note 4 at 117, 123).

18 Because participants may naturally be quicker at responding with one of their hands, participants complete these tasks twice, once for each response key, to eliminate differences based on hand preference. The order of the IAT tasks is also usually randomized to reduce order effects.

19 In our empirical study, we used the software Inquisit, produced by Millisecond Software.


21 Rachlinski et al., Trial Judges, supra note 5, at 1199. See also Levinson, The Complicitous Mind, supra note 14, at 612 (citing Brian Nosek et al., Pervasiveness and Correlates of Implicit Attitudes and Stereotypes, 18 EUR. REV. SOC. PSYCHOL. 36 (2008)).

22 See Project Implicit Website, https://implicit.harvard.edu/implicit (last visited October 30, 2010).
As we will discuss, our empirical study of the IAT tested both the Guilty/Not Guilty IAT and the Pleasant/Unpleasant IAT, \(^23\) an evaluative dimension IAT similar to the Good-Bad IAT.

B. The IAT as a Symbol of Implicit Racial Bias

Legal commentators have often recognized that racial discrimination in America has evolved from intentional and overt to unintentional and covert. \(^24\) Reflecting the change in the way racial bias is practiced and propagated, legal scholarship considering implicit bias has most frequently focused on the ways in which these covert biases manifest in society, such as in hiring and promotion decisions. \(^25\) In addition to explaining how the IAT and other social cognition measures reveal implicit bias in society, this scholarship considers the ways in which the law might react to the changing nature of discrimination. \(^26\) In this subsection, we present a brief review of this legal scholarship. This summary underscores the critical importance of seeking to understand implicit bias in the law and highlights the need for projects that investigate the IAT in legally relevant settings.

Several scholars have relied on the IAT in proposing ways that implicit bias is relevant in the legal setting. In a fascinating project that introduced many legal scholars to the IAT, Jerry Kang relied on the IAT and other social cognition studies to argue that a Federal Communications Commission policy favoring local news may actually serve to propagate implicit bias in society. \(^27\) Kang conducted a detailed review of a variety of compelling social cognition projects, called the results of IATs and other studies “stunning,” and urged that researchers pursue a broad research agenda in investigating implicit bias. \(^28\)

Since Kang’s 2005 project, scholars have considered other ways that the IAT and other measures might reflect inequality in society or the legal system. For


\(^{24}\) See Krieger, * supra* note 1. See also Samuel R. Bagenstos, *Trapped in the Feedback Loop: A Response to Professor Days*, 49 St. Louis U. L.J. 1007, 1009 (2005) (“[T]here is an emerging consensus that implicit or unconscious bias is becoming a more significant contributor to continuing workplace inequalities.”); Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905, 909 (2006); McGinley, * supra* note 2, at 418 (noting that “the nature of discrimination has changed”).

\(^{25}\) Levinson & Young, *Different Shades of Bias, supra* note 15, at 312–15.


\(^{27}\) Kang, * supra* note 1.

\(^{28}\) Kang, * supra* note 1, at 1493, 1536–38.
example, in separate projects, Justin Levinson and Antony Page relied on the IAT and other social cognition studies in examining legal decision-making. Levinson critiqued the ways people misremember information, and argued that judges and jurors may misremember case facts in racially biased ways. Page argued that attorneys might unintentionally rely on implicit biases when using peremptory challenges.

Several scholars have even engaged in interdisciplinary collaborations to increase the scientific sophistication of their analysis and to bolster their claims. Linda Kriege, who famously introduced pre-IAT social cognition research to employment discrimination scholars in the mid 1990s, teamed up with social psychologist Susan Fiske and IAT co-creator Anthony Greenwald in separate projects that further evaluated implicit social cognition in the law. Building on claims made by Krieger before IAT research became mainstream, Krieger and Fiske argued that employment discrimination law must change to account for the changing nature of discrimination. Greenwald and Krieger explained the IAT in great detail, and presented evidence that the IAT serves as a meaningful predictor of behavior. Focusing on the changing nature of the debate over affirmative action, Kang collaborated with another IAT co-creator, Mazharin Banaji. Proposing a new model of affirmative action called “fair measures,” Kang and Banaji relied on the IAT and other social cognition research to argue that implicit biases reflect continuing societal inequality that must be remedied.

All of the studies discussed represent just some of a rapidly growing field; more and more researchers claim that the IAT is a valid indicator that implicit racial bias is present in society and the legal system. Yet the progress in

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29 Levinson, Forgotten Racial Equality, supra note 1.
30 Page, supra note 1, at 160.
31 See Kriege, supra note 1.
33 Krieger & Fiske, supra note 26, at 1027–61. Krieger and Fiske suggested that the law “extract from normative legal reasoning the intuitive social science already there and to subject it to empirical scrutiny.” Id. at 1061.
36 See id. at 1090–1110.
incorporating the IAT into legal scholarship has not been limitless. Scholars have still yet to connect specifically the IAT measure with legal claims and have generally been satisfied to stick to fairly broad statements regarding how implicit bias manifests in the legal setting. Commentators have thus left open the question of whether the IAT itself can demonstrate anything compelling enough to legitimize legal changes. Most have argued that the compelling evidence of hundreds of rigorously tested implicit social cognition studies, including but not limited to the IAT, legitimizes some forms of legal or social change. Yet others have been hesitant to accept the idea that legal change should be predicated on a measure of something that is largely outside of a person’s conscious control. And the debate seems to be heating up still. Notwithstanding this debate, a large number of projects discussing the IAT and implicit bias continue to emerge in legal scholarship.


38 See, e.g., Kang, supra note 1; Kang & Banaji, supra note 35; Krieger & Fiske, supra note 26; Levinson, Forgotten Racial Equality, supra note 1; Page, supra note 1.


The reliance on implicit social cognition research, and the IAT in particular, not only underscores major progress in legal scholarship, but also highlights a gap between implicit social cognition research and legal scholarship. Legal researchers often rely on the IAT for the proposition that people are implicitly biased, and tend to link it to a variety of legal claims. Yet few scholars have examined how the IAT may be used as a measure to test something specific in the legal setting. The next subsection reviews the small number of projects that have empirically examined the IAT in the legal context. These empirical studies highlight the potential of implementing tests such as the IAT in legally relevant contexts.

C. Law-Based Empirical Study of the IAT

Despite the growing familiarity with the IAT in legal scholarship, few research teams have empirically tested the IAT in a legal setting.\(^{42}\) In an early empirical study, Theodore Eisenberg and Sheri Lynn Johnson employed the IAT in a legal setting by testing whether capital defense attorneys displayed implicit racial bias.\(^{43}\) Using a paper and pencil version of the Good/Black/White IAT, the researchers found that the defense attorney participants, whom they expected to resist bias if at all possible, harbored strong implicit bias against African Americans.\(^{44}\) Like other early tests of the IAT, however, the researchers did not test whether these implicit biases predicted the attorneys’ decision-making. Nonetheless, their work demonstrated compelling results among a particularly noteworthy participant population.

In one of the only other law-focused empirical studies employing the IAT, Jeffrey Rachlinski collaborated with Johnson and others to test the ability of the

\(^{42}\) Rachlinski et al., Trial Judges, supra note 5, at 1204. Rachlinski and his colleagues reported two studies in which researchers tested the predictive validity of the IAT in the legal setting. \(Id.\) (citing Robert W. Livingston, When Motivation Isn’t Enough: Evidence of Intentional Deliberative Discrimination Under Conditions of Response Ambiguity 9–10 (2002) (unpublished manuscript) (on file with the Notre Dame Law Review); Arnd Florack et al., Der Einfluss Wahrgenommener Bedrohung auf die Nutzung Automatischer Assoziationen bei der Personenbeurteilung [The Impact of Perceived Threat on the Use of Automatic Associations in Person Judgments], 32 Zeitschrift für Sozialpsychologie 249 (2001)).


\(^{44}\) \(Id.\) at 1545–48.
Good/Bad IAT to predict judicial decision-making. \textsuperscript{45} Rachlinski and his colleagues recruited participants at judicial conferences, thus securing the unique opportunity to test a participant pool of willing judges.\textsuperscript{46} The judge participants took a Good/Bad Black/White IAT, and then completed a task that asked them to make decisions in three hypothetical court scenarios.\textsuperscript{47} In two of these scenarios, the race of the legal actor was ambiguous and was primed through a subliminal procedure.\textsuperscript{48} In the third description, the race of the legal actor, White or Black, was varied.\textsuperscript{49} The results of the study showed that, as in studies of the IAT in other populations, the judge participants displayed an implicit preference for White over Black.\textsuperscript{50} That is, participants were faster to group together photos of White faces with Good words compared to Black faces with Good words. Next, the researchers found that the IAT results predicted responses in some, but not all of the judgment tasks.\textsuperscript{51} Specifically, they found that IAT results predicted racial bias

\textsuperscript{45} See Rachlinski et al., Trial Judges, supra note 5. It is important to note the specific IAT that they employed, as different IATs may have different predictive abilities in various settings. For example, Laurie Rudman and Richard Ashmore tested whether the Good/Bad IAT and Stereotype IAT predicted participants’ economic decisions. See Laurie A. Rudman & Richard D. Ashmore, Discrimination and the Implicit Association Test, 10 GROUP PROCESSES & INTERGROUP REL. 359 (2007). They found that the stereotype IAT, but not the Good/Bad IAT, predicted biases in economic decision-making. Id. at 368.

\textsuperscript{46} The same researchers had previously used this technique to run empirical studies on judges. See Rachlinski et al., Trial Judges, supra note 5, at 1205 (citing Chris Guthrie et al., Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1, 13 (2007); Chris Guthrie et al., Inside the Judicial Mind, 86 CORNELL L. REV. 777, 814–15 (2001); Jeffrey J. Rachlinski et al., Inside the Bankruptcy Judge’s Mind, 86 B.U. L. REV. 1227, 1256–59 (2006); Andrew J. Wistrich et al., Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U. PA. L. REV. 1251, 1323–24 (2005)).

\textsuperscript{47} Rachlinski et al., Trial Judges, supra note 5, at 1207–08.

\textsuperscript{48} Id. at 1212. Rachlinski and his colleagues used a procedure similar to one conducted by Sandra Graham and Brian Lowery. Id. (citing Sandra Graham & Brian S. Lowery, Priming Unconscious Racial Stereotypes About Adolescent Offenders, 28 LAW & HUM. BEHAV. 483, 487–88 (2004)). Graham and Lowery’s methodology was adapted from prior research conducted by Patricia Devine (Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 7, 9, 13 (1989)), as well as John Bargh and Paula Pietromonaco (John A. Bargh & Paula Pietromonaco, Automatic Information Processing and Social Perception: The Influence of Trait Information Presented Outside of Conscious Awareness on Impression Formation, 43 J. PERSONALITY & SOC. PSYCHOL. 437, 439, 445 (1982)). The priming task used by Rachlinski and his colleagues did not specifically prime Black for one group and White for another, but Black for one group and ambiguous for the other. Rachlinski et. al., Trial Judges, supra note 5, at 1213. It is also worth noting that the prime did not refer specifically to anything about the legal stories they used, and was designed more generally to prime all related knowledge structures and stereotypes of African Americans. Thus, it is unclear whether the results should be treated similarly to a situation where the race of the legal actors had been primed.

\textsuperscript{49} Rachlinski et al., Trial Judges, supra note 5, at 1208.

\textsuperscript{50} Id. at 1209–11.

\textsuperscript{51} Id. at 1211–19.
in some cases where the defendant’s race had been subliminally primed, but not in cases where the race of the defendant was explicitly identified.\footnote{Id. at 1219.}

Rachlinski and his colleagues summarized their results as indicating that “judges, like the rest of us, possess implicit biases[,]”\footnote{Id. at 1232.} but noted that “the judges managed, for the most part, to avoid the influence of unconscious biases when they were told of the defendant’s race.”\footnote{Id.} They concluded, that among other things, “[t]he presence of implicit racial bias among judges—even if its impact on actual cases is uncertain—should sound a cautionary note for those involved in the criminal justice system.”\footnote{Id.}

As the reviewed research demonstrates, when examining both non-empirical and empirical applications of the IAT in the legal setting, two themes emerge: first, legal scholars have mostly confined themselves to discussing how existing IATs may or may not affect societal and legal decision-making; and second, the IAT has rarely been evaluated to see if it predicts legal decision-making. We addressed these themes in our empirical study, which tested a new IAT directly within the legal setting and examined whether the IAT results predicted decision-making. The next section explains why we created the Guilty/Not Guilty IAT and considers its importance in light of legal doctrine on the presumption of innocence.

### III. DEVELOPING AN IAT FOR THE LEGAL SETTING

Although empirical research on implicit bias has been prominent in legal scholarship, there are significant opportunities to empirically investigate implicit bias directly within meaningful legal domains. Some fundamental legal principles, such as the presumption of innocence in criminal law, are particularly ripe for empirical testing, first, because they harbor deep legal meaning, and second, because they are formulated in a way that makes them testable.

#### A. A Law-Specific Measure of Bias

Scholars should strive to develop empirical measures that test legal concepts as directly as possible. If one wants to test whether people hold implicit associations between race and criminal guilt, one need not speculate: it is entirely possible to examine just that. This is particularly the case when legal concepts (such as Guilty/Not Guilty) hold deep societal meanings, both implicit and explicit, that are different than the psychological concepts that are regularly tested. Phrased another way, existing psychological measures may not measure the concepts the law cares about most. Although the examination of non-legal concepts (such as
implicit attitudes of good-bad)\textsuperscript{56} can reveal deep societal inequalities and raise questions of racial justice in the law (as scholars have consistently recognized\textsuperscript{57}), it may not always be optimal to generalize social science results to the legal setting when one can test legal concepts themselves\textsuperscript{58}.

Before designing a study, one should critically examine what that study might demonstrate in light of existing scholarship. When considering whether to develop an IAT to test whether people hold implicit associations between Black and Guilty, one should first ask whether existing IATs might already answer this question. At first glance, IATs testing implicit attitudes about race, such as good and bad, pleasant and unpleasant, do not reveal jurors’ or mock jurors’ implicit associations relating to a defendant’s criminal guilt. Yet studies of predictive validity might offer some value here. It is possible to examine whether implicit associations of good and bad, for example, might predict Guilty and Not Guilty decisions. This type of predictive validity study is desirable in that it relies on already validated and widely available IATs to assess predictive validity.\textsuperscript{59} Such a study, including the one conducted by Rachlinski and his colleagues, involves evaluating whether there is a predictive relationship between implicit (good-bad) attitudes about race and jury decision-making.\textsuperscript{60} If such a study convincingly demonstrated a link between implicit attitudes (Black-bad) and jury decision (Guilty), then one might conclude that implicit attitudes predict jury decisions in racially biased ways. Because of this benefit, in addition to creating and testing the Guilty/Not Guilty IAT, we also tested whether the Pleasant/Unpleasant IAT predicted mock juror evaluations of evidence.

Despite the benefits of predictive validity research, from a legal perspective there is a difference between testing predictive validity of implicit attitudes and testing implicit associations regarding specific legal assumptions such as the presumption of innocence. Although testing predictive validity can be eye-opening, a predictive validity study of an attitude-based IAT could not fully examine whether people hold implicit associations between Black and Guilty

\textsuperscript{56} Attitude targets, such as “good” and “bad”, may reflect important societal principles, but attitudes alone rarely have relevance in the legal system. Thus, to the extent that law holds dichotomous constructs with independent meaning, such as Guilty/Not Guilty, the IAT is one proper measure that can be used. Other similar measures include the Go/No-Go Association Task. See Brian A. Nosek & Mahzarin R. Banaji, \textit{The Go/No-Go Association Task}, 19 SOC. COGNITION 625 (2001). This task, conceptually similar to the IAT, allows for researchers to test individual target groups with dichotomous pairs. \textit{Id.} at 627.

\textsuperscript{57} See supra Section II.B and accompanying text.

\textsuperscript{58} It is not always easy to directly test legal concepts using the IAT. Because the IAT was specifically designed to test dichotomous principles, the legal concept of Guilty/Not Guilty fits particularly well into the structure of the test. Other dichotomous legal concepts could similarly be tested using IAT.

\textsuperscript{59} See, e.g., Rachlinski et al., \textit{Trial Judges}, supra note 5; Rudman & Ashmore, \textit{supra} note 45.

\textsuperscript{60} Rachlinski and colleagues have published the only study doing this. See Rachlinski et al., \textit{Trial Judges}, supra note 5. Rachlinski and colleagues cite an unpublished study by Livingston, \textit{supra} note 42, that they describe as linking the IAT to mock jury decisions. \textit{Id.} at 1204.
compared to White and Guilty. Examining these specific implicit associations is particularly compelling in light of the presumption of innocence.

B. The (Implicit) Presumption of Guilt

The most compelling reason for testing implicit associations of guilt is that the law espouses a presumption of innocence, a presumption that may be contradicted by racial cues and the realities of the human mind. The presumption of innocence is a fundamental principle of criminal law.61 According to the United States Supreme Court in *Coffin v. United States*, “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”62

In light of the vast importance of the presumption of innocence, partially underscored by the widespread public understanding that a defendant is “innocent until proven guilty,” it is not surprising that scholars have long questioned whether there is a relationship between racial inequality and the presumption of innocence. In 1883, Frederick Douglas surmised, “The reasonable doubt which is usually interposed to save the life and liberty of a white man charged with crime, seldom has any force or effect when a colored man is accused of crime.”63 More contemporary discussions of racial bias in criminal law underscore the potentially deep connections between racial bias and the presumption of innocence.64 Although none of these projects have empirically tested implicit associations of race and criminal guilt, some scholars have considered that racial disparities in conviction and sentencing may be driven by racial bias.65 Robert Entman and

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64 See id.; KENNEDY, supra note 11. See also Montré D. Carodine, “The Mis-Characterization of the Negro”: A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L.J. 521, 527 (2009) (“When Blacks are unfairly ‘taxed’ in the criminal system with perceived criminality, Whites receive an undeserved ‘credit’ with a perceived innocence or worthiness of redemption.”).

65 See Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403, 408 (1994) (“It is misguided to believe
Kimberly Gross, for example, posited that “black defendants in criminal cases are especially likely to be presumed guilty because they are subject to the stereotypes or heuristics that most whites apply to the category ‘black person.’”66 These scholars all maintain a shared perspective underlying our hypothesis: In a criminal justice system that reveals continuing massive racial disparities,67 it is quite possible that African American defendants may be afforded a weaker presumption of innocence than White defendants. Driven by this research question, we set out to test it empirically.

IV. THE GUILTY/NOT GUILTY IAT: AN EMPIRICAL STUDY

This section details the empirical study we conducted. It first explains the study we designed and then presents the results of the study.

A. Methods and Materials

Participants in the empirical study were sixty-seven jury eligible undergraduate and graduate students at the University of Hawaii who participated in the study for extra course credit.68 After giving informed consent, participants that White folks can discard strongly held negative attitudes about Blacks when Whites act as police, jurors, lawyers, or judges in criminal cases with a Black criminal defendant. . . . Once we admit racial animus into the courtroom, we abandon the presumption of innocence standard that is supposedly central to our jurisprudential traditions.”). Within interdisciplinary scholarship, several projects have investigated whether jurors hold racial biases using mock jury studies. Some scholars have aggregated these studies in order to conduct large scale quantitative or qualitative reviews. See Johnson, supra note 63; Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 MICH. L. REV. 63 (1993); Tara L. Mitchell et al., Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment, 29 LAW & HUM. BEHAV. 621 (2005); Samuel R. Sommers & Phoebe C. Ellsworth, How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research, 78 CHI.-KENT L. REV. 997 (2003).


67 The U.S. Department of Justice Bureau of Justice Statistics reports that more than 6 in 10 inmates in local jails are minorities, including 41% “black.” U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES 1996 1, 3 (1998), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/pj96.pdf. In addition, the Bureau reports that the lifetime likelihood of going to state or federal prison is 18.6% for “blacks” compared to 10% for Hispanics and just 3.4% for “whites.” U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1971–2001 1, 8 (2003), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/pius01.pdf.

68 Data from one participant was excluded because it was incomplete. All but seven of the participants, who were residents of other states, were jury eligible in Hawai‘i. All participants were
began the all-computerized task in a laboratory with two separate cubicles, each containing a Dell desktop computer. Participants completed several measures, including: a (Black/White) Guilty/Not Guilty IAT that we developed, a (Black/White) Pleasant/Unpleasant IAT, the Modern Racism Scale, feeling thermometers, and a robbery evidence evaluation task. Participants completed the robbery evidence evaluation task first, and then completed the remaining tasks, including the IATs, in randomized order. Participants provided demographic information at the end of the study.

Participants completed the two IATs in counterbalanced order. One IAT was the Guilty/Not Guilty IAT measure we developed: a race IAT with the attribute concepts of Guilty and Not Guilty, and target concepts of Black and White. The other IAT, the Pleasant/Unpleasant IAT, was a race IAT with the evaluative concepts of Pleasant and Unpleasant, and target concepts of Black and White. The Modern Racism Scale consists of a series of questions that measure

over 18 years of age and none had been convicted of a felony. Participant ages ranged from 18 to 40, with a mean age of 21.85 (SD=3.95). Twenty-five participants identified themselves as Japanese American, eighteen participants identified themselves as European American, and five participants identified themselves as Chinese American. Other participants identified themselves as Native Hawaiian, Pacific Islander, Korean American, and Latino. Three participants identified themselves as “mixed race,” and five indicated “other.” The likely ethnic diversity of a Hawai`i-based sample, as we found here, is notable. See Levinson, Forgotten Racial Equality, supra note 1, at 396 (noting the uniqueness and diversity of that Hawai`i based sample, and considering the meaning of the study results in light of the diverse sample).

The instructions for the IATs were as follows: “For the next set of tasks you will be shown words one at a time in the middle of the computer screen and asked to sort them into categories. Your task is to sort each item into its correct category as fast as you can by pressing EITHER the ‘D’ key or the ‘K’ key. IMPORTANT: Press the ‘D’ key using your left index finger, or ‘K’ key using your right index finger. The categories associated with the ‘D’ and ‘K’ keys will be shown at the top of each screen. Please pay close attention to these category labels—they change for each sorting task!”

For more on this task, see Levinson & Young, Different Shades of Bias, supra note 15.

Also, within each IAT, the tasks were counterbalanced.

One of the particularly interesting elements of the IAT is the way in which target words are selected for inclusion into the dichotomous categories used in the IAT. In designing the Guilty/Not Guilty IAT, we needed to choose stimuli for Black, White, Guilty, and Not Guilty. Our first goal was to use stimuli that were validated, so as not to reinvent the wheel. For the categories of Black and White, we thus used stimuli used in other IATs. These stimuli consisted of six photographs of faces of White men and women and six photographs of faces of Black men and women. To select target words for the categories Guilty and Not Guilty, we conducted a pre-test to ensure that the terms we selected were most representative of the target concepts. This pre-test asked participants to rank how much various words were associated with the criminal law concepts of Guilty and Not Guilty. Considering mean score and standard deviation, we selected the target words that participants agreed upon most. For Guilty, the target words were: at fault, caught in the act, committed crime, convict, criminal, did it, perpetrator, responsible for crime. For Not Guilty, the target words were: acquitted, blameless, cleared of charges, didn’t do it, did not commit crime, wrongfully accused, guilt free, and innocent.

This is one of the more common IATs that measures implicit attitudes. See Greenwald et al., Measuring Individual Differences, supra note 4, at 1465. For Pleasant, the target words were
self reports regarding racial beliefs. It is one of the favored social cognition measures for evaluating explicit racial preferences.\textsuperscript{74} The Scale asks participants to respond to several statements about Blacks in America.\textsuperscript{75} The feeling thermometer measures, like the Modern Racism Scale, were designed to evaluate explicit racial preferences. The feeling thermometer measures asked: “How warm do you feel towards European Americans,” and “How warm do you feel towards African Americans?” The evidence evaluation task presented participants with the story of an armed robbery. After reading the story, participants then saw a series of crime scene photos, and were primed with either a photo of a dark skinned perpetrator or light skinned perpetrator.\textsuperscript{76} Participants were then presented with a list of individual pieces of evidence, and asked to score each piece of evidence based on whether it tended to indicate that the defendant was guilty or not guilty.\textsuperscript{77} Finally, participants were also asked to decide whether the defendant was guilty or not guilty, both on a dichotomous scale and on a continuous scale.\textsuperscript{78} After completing the study, participants were thanked for their participation and debriefed.

B. Scoring the IAT

Because the IAT is such a complicated measure, social scientists have considered several scoring algorithms regarding the IAT. In calculating the results of our study, we relied on the updated scoring algorithms suggested by Greenwald and his colleagues.\textsuperscript{79} These improved algorithms addressed several challenges that were raised regarding the original IAT scoring algorithm.\textsuperscript{80}

\begin{itemize}
  \item beautiful, lovable, valuable, attractive, and smart. For Unpleasant, the target words were ugly, useful, stupid, hostile, and inferior.
  \item See generally John B. McConahay, Modern Racism, Ambivalence, and the Modern Racism Scale, in PREJUDICE, DISCRIMINATION, AND RACISM 91 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (introducing the Modern Racism Scale).
  \item For example, one statement that participants respond to is: “Discrimination against Blacks is no longer a problem in the United States.”
  \item The photos were identical, with the skin-tone altered using computer software. This skin-tone manipulation was a between-subjects independent variable. Half the participants saw a dark-skinned perpetrator and half the participants saw a light skinned perpetrator. Participants were randomly assigned to the two priming conditions. For more on this element of the study, including a theoretical discussion of evidence evaluation and detailed results, see generally Levinson & Young, Different Shades of Bias, supra note 15.
  \item Some examples of this evidence were: “the defendant was a youth Golden Gloves boxing champ in 2006; the defendant purchased an untraceable handgun three weeks before the robbery; the defendant is a member of an anti-violence organization; and the defendant had a used movie ticket stub for a show that started 20 minutes before the crime occurred.”
  \item The continuous scale ranged from 0 (definitely not guilty) to 100 (definitely guilty).
  \item See Greenwald et al., Improved Scoring Algorithm, supra note 20, at 213–15.
  \item Greenwald, Nosek and Banaji’s suggested improved scoring measure for the IAT, called a D score, has improved test-response detection (for instance, it throws out indiscriminate responses or
C. Results

1. Guilty/Not Guilty IAT

The results of the Guilty/Not Guilty IAT confirmed our hypothesis that there is an implicit racial bias in the presumption of innocence. Participants displayed a significant association between Black and Guilty compared to White and Guilty, producing a significant IAT effect. These results suggest that participants held an implicit association between Black and Guilty.

2. Pleasant/Unpleasant IAT

The results of this study reproduced the results found in many attitude-race IATs, including Pleasant/Unpleasant IATs conducted by other researchers. Participants displayed a significant association between Black-Unpleasant compared to White-Unpleasant. Specifically, participants associated Black and unpleasant words significantly faster than Black and pleasant words, resulting in a significant IAT effect.

3. Relationship of Implicit Measures to Explicit Measures

We next computed correlation coefficients in order to assess the relationship between the implicit measures (the two IATs) and the explicit measures (the Modern Racism Scale and the feeling thermometers). Interestingly, some implicit scores were correlated with explicit scores. IAT scores on the Pleasant/Unpleasant IAT were correlated with scores on the Modern Racism Scale, such that responses that indicate a lack of attention) and incorporates an inclusive standard deviation for all congruent trials (for instance, both the practice and test block of white-guilty and black-not guilty). Id. at 213. Mean latencies are computed for each block, and complimentary blocks are subtracted from each other (e.g., practice white-not guilty and black-guilty would be subtracted from practice white-guilty and black-not guilty). Id. at 214. These two difference scores are divided by their inclusive standard deviation score, and the average of these two scores is called $D$. Id. For a detailed summary of Greenwald and his colleagues’ scoring algorithm, see Rachlinski et al., Trial Judges, supra note 5, at 1245–46.

responses that indicate a lack of attention) and incorporates an inclusive standard deviation for all congruent trials (for instance, both the practice and test block of white-guilty and black-not guilty). Id. at 213. Mean latencies are computed for each block, and complimentary blocks are subtracted from each other (e.g., practice white-not guilty and black-guilty would be subtracted from practice white-guilty and black-not guilty). Id. at 214. These two difference scores are divided by their inclusive standard deviation score, and the average of these two scores is called $D$. Id. For a detailed summary of Greenwald and his colleagues’ scoring algorithm, see Rachlinski et al., Trial Judges, supra note 5, at 1245–46.

81 Mean = 727.63ms. The IAT measures target results together, such that this result measures an implicit association between the pairs of Black-Guilty and White-Not Guilty, compared to the pairs of White-Guilty and Black-Not Guilty.

82 Mean = 800.16ms, $t = 2.68$, $p < 0.01$.

83 $(D)$ of 0.18 ($t = 3.36$, $df = 65$, $p < 0.01$).

84 For a broad review of IAT results, see Nosek et al., supra note 6, at 105–11.

85 Mean = 613.92ms.

86 Mean = 690.93ms, $t = 3.29$, $p < 0.01$.

87 $(D)$ of 0.21 ($t = 4.11$, $df = 65$, $p < 0.01$).

88 $r = 0.33$, $p < 0.01$. 

participants who displayed greater implicit bias were also likely to report less favorable explicit attitudes towards African Americans. Correlations between the Pleasant/Unpleasant IAT scores and scores on the feeling thermometer towards African Americans were marginally significant,\(^89\) such that participants who displayed greater implicit bias were more likely to report cooler attitudes towards African Americans.

4. Warm Feelings Towards African Americans Correlated with Guilty Implicit Bias

Interestingly, correlation coefficients on the Guilty/Not Guilty IAT showed one significant correlation that differed from the correlations found on the Pleasant/Unpleasant IAT. Scores on the Guilty/Not Guilty IAT correlated with scores on the feeling thermometer regarding feelings towards African Americans,\(^90\) such that people who reported feeling warmly towards African Americans were more likely to show an implicit guilty bias against Blacks.\(^91\)

The opposite correlation patterns of the Guilty/Not Guilty IAT and the Pleasant/Unpleasant IAT suggest that the two implicit measures are measuring different phenomena and tap into different implicit constructs. Although the Pleasant/Unpleasant IAT appeared to tap into a construct measured by the Modern Racism Scale and (marginally) the feeling thermometer, the Guilty/Not Guilty IAT correlated with the feeling thermometer in an opposite direction and did not correlate with the Modern Racism Scale.

Table 1: Means, Standard Deviations of explicit and implicit measures, and correlations among them (n=66).

<table>
<thead>
<tr>
<th>Variables</th>
<th>Means</th>
<th>SD</th>
<th>1</th>
<th>2</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Pleasant/Unpleasant IAT</td>
<td>0.21*</td>
<td>0.42</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Guilty/Not Guilty IAT</td>
<td>0.18*</td>
<td>0.42</td>
<td>-0.07</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Modern Racism Scale</td>
<td>12.56</td>
<td>4</td>
<td>0.33*</td>
<td>-0.01</td>
<td></td>
</tr>
<tr>
<td>4. Thermometer_Black</td>
<td>6.18</td>
<td>1.48</td>
<td>-0.23+</td>
<td>0.29*</td>
<td>0.22+</td>
</tr>
</tbody>
</table>

Note: *\(p < .05\) + \(p < .10\).

\(^89\) \(r = -0.23, p = 0.06\).

\(^90\) \(r = 0.29, p < 0.05\).

\(^91\) Guilty/Not Guilty IAT scores were not significantly correlated with scores on the Modern Racism Scale, \(r = -0.01, n = 66, p = 0.80\), indicating that using that particular measure does not relate to implicit biases in Guilty/Not Guilty associations.
5. Predictive Validity: Guilty/Not Guilty and Pleasant/Unpleasant IATs Predicted Evidence Judgments

To examine whether the IATs predicted participants’ judgments of evidence and criminal guilt, we created a regression model investigating the impact of the two IATs on the totals of evidence judgments. The regression model showed that having stronger implicit associations between Black and Guilty, and having higher Black/Unpleasant IAT scores, predicted judgments of ambiguous evidence as more indicative of guilt. It should be noted that the Guilty/Not Guilty and Pleasant/Unpleasant IATs were individually significant in this model, which indicates that each IAT separately predicted evidence judgments. In addition, because the two IATs were each significant, it also suggests that the Guilty/Not Guilty IAT and Pleasant/Unpleasant IAT are measuring different constructs and are not interchangeable as measures of implicit bias.

Table 2: Regression Analysis

<table>
<thead>
<tr>
<th></th>
<th>B</th>
<th>SE</th>
<th>t</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>88.58</td>
<td>4.11</td>
<td>21.54</td>
<td>.000</td>
</tr>
<tr>
<td>BW</td>
<td>5.54</td>
<td>2.49</td>
<td>2.22</td>
<td>.030</td>
</tr>
<tr>
<td>GI</td>
<td>6.61</td>
<td>2.96</td>
<td>2.23</td>
<td>.029</td>
</tr>
<tr>
<td>AI</td>
<td>9.11</td>
<td>3.01</td>
<td>3.03</td>
<td>.004</td>
</tr>
</tbody>
</table>

Note: BW= black vs. white (1=black; 0=white)
GI= guilty IAT
AI= attitude IAT

Regression equation: Evidence = 88.58 + 5.74 x BW + 6.61 x GI + 9.11 x AI + e

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92 The regression model also included the variable of perpetrator skin tone (dark v. light) from the evidence evaluation task. This variable was also predictive of judgments of ambiguous evidence as more indicative of guilt, $\beta = 0.25, t = 2.22, p < 0.05$. This particular result is discussed in more detail by Levinson & Young, Different Shades of Bias, supra note 15, at 337.

93 $\beta = 0.25, t = 2.23, p < 0.05$.

94 $\beta = 0.34, t = 3.03, p < 0.01$.

95 As expected, IAT score did not alone predict guilty verdicts or guilty scale judgments. In addition, it should be noted that our regression analysis found that the IATs predicted total evidence judgments, rather than total evidence judgments based upon the skin tone of the perpetrator. This later type of predictive validity should be measured in future studies with larger samples. Due to the small sample size in this study, we did not expect to find significant results on such a regression analysis.
In order to investigate the relationship between the two IATs further, we checked to see if the two IATs were correlated. The results indicated that the two IATs were not correlated with each other, further suggesting that the Guilty/Not Guilty IAT measures a different construct than the Pleasant/Unpleasant IAT.

V. DISCUSSION OF RESULTS: IMPLICIT BIAS AND GUILTY AFRICAN AMERICAN MEN

The results of the empirical study show that, when it comes to racial equality and the presumption of innocence, there is reason for concern. First, we found that participants held implicit associations between Black and Guilty. Second, we found that these implicit associations were meaningful—they predicted judgments of the probative value of evidence. Third, we found that the Guilty/Not Guilty IAT was unrelated to and operated differently than a well established attitude-based IAT. Finally, we found that implicit attitudes of race and guilt are quite different from attitudes of race revealed by using explicit measures; in fact, one explicit measure even showed opposite results: participants who reported feeling warmer towards African Americans actually showed more bias on the Guilty/Not Guilty IAT. These findings, taken together, raise questions about racial justice in the law and present evidence to challenge the integrity of the presumption of innocence. It goes without saying that this fundamental legal principle, which “lies at the foundation of the administration of our criminal law[,]” should neither bend nor break when defendants are Black men.

It is also worth highlighting the success of the attitude IAT in our study. Like the Guilty/Not Guilty IAT, the Pleasant/Unpleasant IAT revealed a significant implicit racial bias and predicted evidence judgments. Although we believe that the Guilty/Not Guilty IAT holds the most promise in this particular legal domain, the versatility of attitude IATs is impressive. Researchers should continue to investigate a broad range of IATs in the legal setting.

Due to the single empirical study and still emerging nature of the Guilty/Not Guilty IAT, it is premature to discuss solutions, if there are any, to the implicit

96 \( r = -0.07, \ p = 0.51. \)
97 Thus, asking jurors whether they can be unbiased is unlikely to reveal jurors with strong implicit biases.
99 This future research should include stereotype IATs, which we did not test here. For one interesting study testing the predictive validity of attitude IATs and stereotype IATs, see Rudman & Ashmore, supra note 45, at 368 (finding that the stereotype IAT, but not the attitude IAT, predicted economic decisions based on group status).
100 We intentionally phrase this qualifier in a pessimistic way. Although there is some reason to believe that implicit biases can be temporarily mitigated using certain techniques, none of these techniques address the cultural factors that lead to a society that harbors such biases. For more on debiasing, see Kang & Banaji, supra note 35, at 1107–08 (examining their proposal of “fair measures,” which relies heavily on encouraging counterstereotypic job holders); Levinson, Forgotten
bias revealed by the study. As a measure, the Guilty/Not Guilty IAT would be best served by follow-up testing and subsequent amelioration, if necessary. For example, the measure should be tested in a variety of locations and on broader populations. In addition, the predictive validity of the measure should be tested in realistic trial settings and in larger samples.

VI. CONCLUSION

We consider this study just one part of a broader effort to investigate whether implicit biases facilitate societal and legal inequality.\textsuperscript{101} It is our hope that future empirical studies of implicit bias in the law will continue this effort, specifically by investigating a broad range of legal domains where implicit bias may affect legal decision-making. There are so many areas of the law that have yet to be considered as possible hideouts for implicit bias. A broad range of legal areas, including but not limited to immigration law, contract law, and property law may unknowingly be functioning with the covert and dangerous help of implicit bias. We hope that future studies, particularly those conducted by interdisciplinary research teams, will pursue these areas, while also continuing to investigate the Guilty/Not Guilty IAT.

\textsuperscript{101} This broader effort holds deep importance for those concerned with social justice. Our study, as well as many others, continues to raise questions about what implicit bias says about American culture and society. We do not believe that the covert and automatic nature of implicit racial biases, in light of persisting societal disparities, absolves society of the responsibility for their harm. \textit{See generally} Charles Lawrence, \textit{Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, The Ego, and Equal Protection,”} 40 CONN. L. REV. 931 (2008); Levinson, \textit{Forgotten Racial Equality, supra} note 1; Levinson, \textit{The Complicitous Mind, supra} note 14.
WIGGINS, J.—This appeal raises important questions about race discrimination in our criminal justice system. Kirk Saintcalle, a black man, challenges his conviction for first degree felony murder because the State used a peremptory challenge to strike the only black venireperson in his jury pool. Saintcalle claims the peremptory strike was clearly racially motivated in violation of the equal protection guaranty enshrined in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). We disagree. Batson requires a finding of purposeful discrimination, and the trial court’s finding that there was no purposeful discrimination here is not clearly erroneous. Accordingly, we affirm Saintcalle’s conviction.

However, we also take this opportunity to examine whether our Batson procedures are robust enough to effectively combat race discrimination in the selection of juries. We conclude that they are not. Twenty-six years after Batson,
a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because Batson recognizes only "purposeful discrimination," whereas racism is often unintentional, institutional, or unconscious. We conclude that our Batson procedures must change and that we must strengthen Batson to recognize these more prevalent forms of discrimination.

But we will not create a new standard in this case because the issue has not been raised, briefed, or argued, and indeed, the parties are not seeking to advance a new standard. Applying Batson, we affirm the Court of Appeals.

FACTS

Kirk Saintcalle was convicted of one count of first degree felony murder and three counts of second degree assault, all with firearm enhancements. Saintcalle was accused of entering an apartment in the city of Auburn with two companions, holding three people at gunpoint, and shooting and killing Anthony Johnson. Saintcalle was sentenced to 579 months in prison.

During jury selection at Saintcalle's trial, the prosecution used a peremptory challenge to strike the only black juror in the venire, juror 34, Anna Tolson. This challenge came after the prosecution questioned juror 34 extensively during voir dire—far more extensively than any other juror. Indeed, most of the prosecution's interactions with jurors were quite brief, usually consisting of only a few short questions, but not the interaction with juror 34. The State began questioning juror 34 after another juror made a comment about race:
[JUROR 72]: I feel there are some areas of unfairness in our system. I am aware, for example, that a jury of their peers [sic], yet as you look around this panel, all of the faces are white.

[JUROR 34]: No, not quite.

(Laughter.)

[PROSECUTOR]: You know what, you kind of bring a very important topic to light. If you were seated here in this chair and you looked out at this panel, would you have any concern about whether or not people are going to be able to relate to you or listen to you or feel for you? Juror number—What is your number? Juror number 34, I am going to ask you a little bit about your background. You work at the YMCA?

[JUROR 34]: I work in a middle school.

[PROSECUTOR]: So tell me how that works. So you are a counselor?

[JUROR 34]: Yes.

[PROSECUTOR]: Which means you see a whole lot.

[JUROR 34]: Yes.

[PROSECUTOR]: And where do you work? What school do you work in?

[JUROR 34]: Do I really need to say that?

[PROSECUTOR]: How about you just tell me the city. Is it an inner city school?

[JUROR 34]: Yes.

[PROSECUTOR]: You see a whole lot?

[JUROR 34]: Yes.

[PROSECUTOR]: I am interested to hear from you—I mean, do you have impressions about the criminal justice system?

[JUROR 34]: Yes.

[PROSECUTOR]: You are not going to hurt my feelings if you talk about them a little bit. What are your thoughts?
[JUROR 34]: Gosh, I feel like I am on the spot here.

But being a person of color, I have a lot of thoughts about the criminal system. I see—I have seen firsthand—and a couple people have already mentioned that if you have money, you tend to seem to work the system and get over. And regardless if you are innocent or guilty, if you want to be innocent, your money says you are innocent.

And a person of color, even if you do have an affluent lawyer who has the background, the finance to get you off, because you are a person of color, a lot of times you are not going to get that same kind of opportunities.

And especially with this person being a person of color and being a male, I am concerned about, you know, the different stereotypes. Even if we haven’t heard anything about this case, we watch the news every night. We see how people of color, especially young men, are portrayed in the news. We never hardly ever see anyone of color doing something positive, doing something good in their community.

So kind of like what the person behind me is saying, since most of the people in this room are white, I am wondering what’s running through their mind as they see this young man sitting up here.

[PROSECUTOR]: Right. How about for you, do you think—I mean, you’ve got a whole lot that you are feeling as you sit here and that you are going to be asked to sit in judgment of somebody. How do you think you are going to be able to handle that?

[JUROR 34]: I think number one, because I am a Christian, I know I can listen to the facts and, you know, follow the judge’s instruction. But also it’s kind of hard, and I haven’t mentioned this before because none of those questions have come up for me to answer, but I lost a friend two weeks ago to a murder, so it’s kind of difficult sitting here. Even though I don’t know the facts of this particular case, and I would like to think that I can be fair because I am a Christian, I did lose someone two weeks ago.

[PROSECUTOR]: Was that in Seattle?

[JUROR 34]: Yes.

[PROSECUTOR]: Was that [the] Tyrone case?

[JUROR 34]: Yes.
Report of Proceedings (RP) (Mar. 9, 2009) at 65-68. After a stretch break, the prosecutor resumed questioning juror 34:

[PROSECUTOR]: Juror number 34, I am going to move on to the group, but I wanted to close the loop with you. You have a lot that is going through your mind currently both that would give you a lot of empathy for someone who is charged with a crime and also empathy for someone who may be a victim of a crime. In that way, you may be representative of the perfect juror.

At the same time, we don't put people in a position where it's going to cause them a lot of emotional pain. At this point do you think you could sit in this case and listen to the facts and make a decision based solely on the evidence presented in trial here and be fair to both sides?

[JUROR 34]: I'd like to think that I could be, but kind of what you just mentioned just with the freshness and the rawness of the death of a friend, I am wondering if that would kind of go through my mind. I like to think that I am fair and can listen, be impartial, but I don't know. I have never been on a murder trial and have just lost a friend two weeks prior to a murder.

[PROSECUTOR]: What I am going to do, I am going to ask questions. I am going to kind of move on to the rest of the group so that you have time to think, and then we'll come back and ask you maybe tomorrow to make your final decision about whether or not you think you can be fair. I am sorry for your loss.

Id. at 69-70. The next day, a different deputy prosecuting attorney followed up with juror 34:

[PROSECUTOR]: Go back to [a] couple [of] people juror number 34 sorry [to] focus on you again after yesterday but I just want to try and go back [and] touch base with you. I know[ ] you mentioned yesterday that you had some recent events in your life that may make it difficult for you to serve as jurors [sic] in [this case]. Have you done anymore thinking about that? How are you feeling today?

[JUROR 34]: Yes. I thought about it last night as well as this morning. And, you know, my thought is I don't want to be a part of this jury because of the situations, and the circumstances that I just went through. But I'm thinking if ever I was put in a situation where I needed twelve people who could be honest and look through all the facts or I
guess I'm saying who could be like me I would want me. So sometimes you have to do things that you don't want to do.

[PROSECUTOR]: I guess my only concern is do you feel like maybe some of the emotions that dredge up could cloud your judgment at all on either side. Either you know against the defendant, against the State or I'm just concerned about that particular issue?

[Court inquires whether juror 34 would like to answer the question in private, but juror 34 declines.]

[PROSECUTOR]: So is that something you can set aside or worried at all about the emotions kind of clouding in? I mean, it's just so new in terms of your life?

[JUROR 34]: I mean, I have never been in this situation where I have lost someone. You just went to the funeral. He is young. Only 24. And to be called to jury duty to perhaps be on a jury of a murder suspect. I don't know how I'm going to react. You know, I don't know. I'm—I'm not an emotional person, but I'm thinking as we go through it, and I hear the testimony, and I see the pictures, I don't know. I mean, I'm just being honest. I don't know how I'm going to feel.

RP (Mar. 10, 2009) at 41-43.

After this exchange, the prosecution challenged juror 34 for cause. The judge denied the challenge, and the prosecution announced its intent to exercise a peremptory strike. At that point, Saintcalle raised a Batson challenge.

As required by Batson, the judge first found that Saintcalle had made a prima facie showing of purposeful discrimination. Next, the prosecution presented race-neutral reasons for striking juror 34: the reasons were (1) juror 34's "inattention" during voir dire and (2) the recent death of juror 34's friend. Id. at 101-02. The prosecutor claimed to have spent "a lot of time watching juror 34" and asserted that juror 34 was "very checked out." Id. at 101.

The judge denied the Batson challenge, stating on the record that he accepted the recent death of juror 34's friend as a proper race-neutral reason for
the strike. Near the end of jury selection, the prosecution peremptorily struck juror 34, excusing her from the jury.

The prosecution also attempted to exercise a peremptory against the sole Mexican-American juror in the venire, juror 10, but the judge sustained Saintcalle's *Batson* challenge to that strike, rejecting each of the prosecutor's proffered reasons as pretextual. *Id.* at 119-20.

After Saintcalle was convicted, he appealed, alleging that the peremptory strike of juror 34 (Ms. Tolson) violated the Fourteenth Amendment's guaranty of equal protection. The Court of Appeals rejected his argument finding there was no purposeful discrimination and accepting the State's race-neutral explanation. *State v. Saintcalle*, noted at 162 Wn. App. 1028, 2011 WL 2520000 (2011). We granted review only on the *Batson* issue. *State v. Saintcalle*, 172 Wn.2d 1020, 268 P.3d 224 (2011).

**STANDARD OF REVIEW**

ANALYSIS

Race discrimination in courtrooms "raises serious questions as to the fairness of the proceedings conducted there." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). Discrimination "mars the integrity of the judicial system and prevents the idea of a democratic government from becoming a reality." *Id.*

It is crucial that we have meaningful and effective procedures for identifying racially motivated juror challenges because "[r]acial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try"; it also shamefully belittles minority jurors who report to serve their civic duty only to be turned away on account of their race. *Batson*, 476 U.S. at 87. Perhaps most damaging, racial discrimination "undermine[s] public confidence in the fairness of our system of justice." *Id.* at 87-88. Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin. *Edmonson*, 500 U.S at 628.

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Batson sets forth a three-part analysis for determining whether a peremptory strike unconstitutionally discriminates based on race. First, the person challenging the peremptory must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."\(^2\) Batson, 476 U.S. at 93-94. Second, "the burden shifts to the State to come forward with a [race-]neutral explanation" for the challenge. Id. at 97. Third, "the trial court then [has] the duty to determine if the defendant has established purposeful discrimination." Id. at 98. If the trial court finds purposeful discrimination, the challenge should be granted and the peremptory strike disallowed.

As part of the "purposeful discrimination" analysis, the Supreme Court has established a comparative juror analysis. This entails examining whether the proffered race-neutral explanation could apply just as well to a nonminority juror who was allowed to serve. Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). A corollary is that disparate questioning of minority jurors can provide evidence of discriminatory purpose because it creates an appearance that an attorney is "fishing" for a race-neutral reason to exercise a

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\(^2\) The State argued for the first time in its supplemental brief that we should repudiate the bright line rule approved by a majority of this court that "a defendant establishes a prima facie case of discrimination when . . . the record shows that the State exercised a peremptory challenge against the sole remaining venire member of the defendant's constitutionally cognizable racial group." State v. Rhone, 168 Wn.2d 645, 659, 229 P.3d 752 (2010) (Alexander, J., dissenting) Rhone was a split decision, with a four-justice lead opinion rejecting the proposed bright line rule, a four-justice dissent supporting it, and Chief Justice Madsen concurring stating that "I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent." Id. at 658 (Madsen, C.J., concurring). We grant Saintcalle's motion to strike the issue because any statement about the Rhone bright line rule would be dictum in this case and because the State failed to raise the issue in a timely manner. RAP 13.4(d).
strike. *Id.* at 244-45; *Reed v. Quarterman*, 555 F.3d 364, 379 (5th Cir. 2009). We do not allow prosecutors to go fishing for race-neutral reasons and then hide behind the legitimate reasons they do find. This disproportionately affects minorities.


I. *Batson* in context

Since 1879, the United States Supreme Court has recognized that race discrimination in the selection of jurors violates the Fourteenth Amendment’s guaranty of equal protection. *See Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 309-10, 25 L. Ed. 664 (1879). But to contextualize *Batson* we must look to its origins.

Two decades before *Batson*, the United States Supreme Court held in *Swain v. Alabama* that purposeful discrimination in the use of peremptory challenges violates the equal protection clause. 380 U.S. 202, 223-24, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), *overruled by Batson*, 476 U.S. 79. Under *Swain*, a single act of racism was not sufficient to make out an equal protection claim; a person alleging race discrimination had to prove a long-running pattern of purposefully discriminatory acts. *Id.* at 221-22.

*Swain* did little to curb racial discrimination, establishing a “crippling burden of proof” and leaving peremptories “largely immune from constitutional scrutiny.”
Batson, 476 U.S. at 92-93. Batson reexamined Swain in light of this reality, rejecting Swain's "crippling burden" and establishing the now-familiar three-part test for scrutinizing peremptories. Id. at 92-93, 97-98.

Twenty-six years later it is evident that Batson, like Swain before it, is failing us. Miller-El, 545 U.S. at 270 (Breyer, J., concurring) ("[T]he use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before."). A growing body of evidence shows that Batson has done very little to make juries more diverse or prevent prosecutors from exercising race-based challenges. Justice Breyer explains, concurring in Miller-El and citing a laundry list of sources concluding the same thing:

Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite Batson, the discriminatory use of peremptory challenges remains a problem. See, e.g., [David C.] Baldus, [George] Woodworth, [David] Zuckerman, [Neil Alan] Weiner, & [Barbara] Broffitt, The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis, 3 U. PA. J. CONST. L. 3, 52-53, 73, n. 197 (2001) (in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of nonblack jurors; defense counsel struck 26% of black jurors and 54% of nonblack jurors; and race-based uses of prosecutorial peremptories declined by only 2% after Batson); [Mary R.] Rose, The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County, 23 LAW AND HUMAN BEHAVIOR 695, 698-699 (1999) (in one North Carolina county, 71% of excused black jurors were removed by the prosecution; 81% of excused white jurors were removed by the defense); [Neely] Tucker, In Moore's Trials, Excluded Jurors Fit Racial Pattern, WASHINGTON POST, Apr. 2, 2001, p. A1 (in D.C. murder case spanning four trials, prosecutors excused 41 blacks or other minorities and 6 whites; defense counsel struck 29 whites and 13 black venire members); [George E.] Mize, A Legal Discrimination; Juries Aren't Supposed to be Picked on the Basis of Race and Sex, But It Happens All the Time, WASHINGTON POST, Oct. 8, 2000, p. B8 (authored by judge


In over 40 cases since *Batson*, Washington appellate courts have *never* reversed a conviction based on a trial court’s erroneous denial of a *Batson* challenge. See Suppl. Br. of Pet’r at 2, App. A (collecting cases). Saintcalle’s brief cites 42 Washington *Batson* cases, all of which affirm a trial court’s denial of a *Batson* challenge. Of those 42 cases, 28 involve the prosecution removing every prospective juror of the same race as the defendant—usually one or two black jurors. In only six of these cases were minority jurors permitted to serve, and in eight it is unclear from the record whether minorities were permitted to serve or not. This is rather shocking and underscores the substantial discretion that is afforded to trial courts under *Batson*. And while this alone does not prove that *Batson* is failing, it is highly suggestive in light of all the other evidence that race discrimination persists in the exercise of peremptories.

In short, *Batson*, like *Swain* before it, appears to have created a “crippling burden” making it very difficult for defendants to prove discrimination even where it almost certainly exists.

II. The changing face of race discrimination

In part, the problem is that racism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the...
surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.

Many scholars have written on the topic of unconscious prejudice and implicit bias. In one representative article, Antony Page, Batson’s *Blind-Spot: Unconscious Stereotyping and The Peremptory Challenge*, 85 B.U. L. REV. 155 (2005), the author explains how unconscious biases are formed, why they persist, and how they affect our decisionmaking:

In the late 1970s, ... as part of the “cognitive revolution,” psychologists began to explore the notion that discrimination and other forms of biased intergroup judgment may result from ordinary, routine and completely normal cognitive mental processes. The results of this research suggest that a basic way in which people try to understand their world—categorization—can, of its own accord, lead to stereotyping and discrimination.

*Id.* at 181 (footnotes omitted). Explaining how race discrimination results from ordinary cognitive processes, he notes that “[t]he human mind must think with the aid of categories . . . . We cannot possibly avoid this process . . . . Life is just too short to have differentiated concepts about everything.” *Id.* at 185 (quoting GORDON W. ALLPORT, THE NATURE OF PREJUDICE 20, 173 (1954) (alterations in original) (quoting Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 471 (2010)).

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So we use schemas,\(^5\) categories, and cognitive shortcuts that lead us to unknowingly discriminate.\(^6\)

Once stereotypes have formed, they affect us even when we are aware of them and reject them. Stereotypes can greatly influence the way we perceive, store, use, and remember information. Discrimination, understood as biased decision-making, then flows from the resulting distorted or unobjective information. The attorney exercising the peremptory challenge will be unaware of this biased information processing and so will be unaware of her gender- or race-based discrimination. . . .

To put it simply, good people often discriminate, and they often discriminate without being aware of it.

*Id.* at 160-61 (footnotes omitted). Compounding this problem is that stereotyping is often part of our so-called “social heritage”:

> [S]tereotypes about ethnic groups appear as a part of the social heritage of society. They are transmitted across generations as a

\(^5\) Social schemas can exist at any level of abstraction and along any dimension, such as identity group (for example, race), character traits (for example, dominance), physical traits (for example, tall), social roles (for example, occupation), or general person impressions. Whites in America may attribute to blacks character traits such as laziness or hostility, physical traits such as kinky hair, roles such as entertainer or drug-dealer, and an overall negative person impression.

Page, *supra*, at 189.

\(^6\) People generally match and compare incoming information with the most relevant schema or sub-schema. They then tend to order and process new related stimuli in keeping with other elements of the schema. A schema essentially operates as an implicit theory, which reflexively “directs the perceiver’s attention . . . mediates inferences . . . guides judgment and evaluation; and . . . fills in . . . values for unexpected attributes.” It is a way to integrate new material into familiar understanding and a way to draw conclusions beyond the information given. Not only do we assume the British are reserved or that Canadians are funny (if they are), but we also expect the British to act reserved and Canadians to be funny.

component of the accumulated knowledge of society. They are as true as tradition, and as pervasive as folklore. No person can grow up in a society without having learned the stereotypes assigned to the major ethnic groups.


Unconscious stereotyping upends the *Batson* framework. *Batson* is only equipped to root out "*purposeful*" discrimination, which many trial courts probably understand to mean conscious discrimination. See *Batson*, 476 U.S. at 98. But discrimination in this day and age is frequently unconscious and less often consciously purposeful. That does not make it any less pernicious. Problematically, people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it. See Page, *supra*, at 175-77. Since *Batson*’s third step hinges on credibility, this makes it very difficult to sustain a *Batson* challenge even in situations where race has in fact affected decision-making. *Id.*

More troubling for *Batson* is research showing that people will act on unconscious bias far more often if reasons exist giving plausible deniability (e.g., an opportunity to present a race-neutral reason). In one fascinating study, researchers tested peoples’ unconscious desire to avoid contact with handicapped persons. "In a carefully designed experiment, researchers found that when offered a choice of two rooms in which movies were playing, people avoided the room with a handicapped person, but only when doing so could masquerade as a movie preference." TASK FORCE REPORT, *supra*, at 19 (citing Melvin L. Snyder et al., *Avoidance of the Handicapped: An Attributional Ambiguity Analysis*, 37 J. PERSONALITY & SOC. PSYCHOL. 2297, 2297, 2304 (1979)). But
when offered outright the choice of sitting next to a handicapped or nonhandicapped person, people chose to sit by the handicapped person to conceal their prejudice. *Id.*

None of this means we should turn a blind eye to the overwhelming evidence that peremptory challenges often facilitate racially discriminatory jury selection. Nor does it suggest we should throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it.

III. The constitutional value of a diverse jury

We should also recognize that there is constitutional value in having diverse juries, quite apart from the values enshrined in the Fourteenth Amendment. Article I, section 21 of our state constitution declares, “The right of trial by jury shall remain inviolate.”

We have juries for many reasons, not the least of which is that it is a ground level exercise of democratic values. The government does not get to decide who goes to the lockup or even the gallows. Ordinary citizens exercise that right as a matter of democracy. In England, the jury developed into juries of one’s peers, coming from one’s community. This is the grand heritage of the jury system.

But equally fundamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury. If we allow the systematic removal of minority jurors, we create a badge of inferiority,
cheapening the value of the jury verdict. And it is also fundamental that the defendant who looks at the jurors sitting in the box have good reason to believe that the jurors will judge as impartially and fairly as possible. Our democratic system cannot tolerate any less.

From a practical standpoint, studies suggest that compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. EQUAL JUSTICE INITIATIVE REPORT, supra, at 6, 40-41. In contrast, diverse juries were significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused. Id. at 41. “By every deliberation measure, ... heterogeneous groups outperformed homogeneous groups.” Id. These studies confirm what seems obvious from reflection: more diverse juries result in fairer trials.

Thus, our Batson analysis should reflect not only the Fourteenth Amendment’s equal protection guarantee, but also the jury trial protections contained in article I, section 21 of our state’s constitution.

IV. What to do about Batson?

Race should not matter in the selection of a jury, but under current law it often does. We conclude from this that we should strengthen our Batson protections, relying both on the Fourteenth Amendment and our state jury trial right.

We have a lot of flexibility to do so. The Batson framework anticipates that state procedures will vary, explicitly granting states flexibility to fulfill the promise of equal protection. Batson, 476 U.S. at 99-100 n.24 (“[W]e make no attempt to
instruct [state and federal trial] courts how best to implement our holding today."); 
Johnson v. California, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (recognizing that states have “flexibility in formulating appropriate procedures to comply with Batson”); Hicks, 163 Wn.2d at 489-90 (same). Indeed, the Batson procedure itself was born in state courts out of a growing sense that Swain was failing. Batson, 476 U.S. at 82 n.1, 99.

Likewise, we have authority under federal law to pioneer new procedures within existing Fourteenth Amendment frameworks. Smith v. Robbins, 528 U.S. 259, 273, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000) (states have “wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult policy problems”); Dickerson v. United States, 530 U.S. 428, 438-38, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

We can also extend greater-than-federal Batson protections to defendants under the greater protection afforded under our state jury trial right, a fact we recognized in Hicks. 163 Wn.2d at 492.

Justices Marshall and Breyer argue that the taint of racial discrimination on peremptory challenges is so strong that the only way to remove it is to eliminate the peremptory system altogether. Batson, 476 U.S. at 102-03 (Marshall, J., concurring); Miller-El, 545 U.S. at 266-67, 273 (Breyer, J., concurring). That may be so.

Justice González’s concurring heartfelt opinion argues for immediate abolition of the peremptory challenge. We do not disagree with his call for the need for a departure from the Batson framework, but we believe that such a major
change in trial procedure should be tested in the furnace of advocacy at the trial and appellate levels, with the opportunity for input from a broad range of interests, before we abandon a procedure that was adopted by Washington’s first territorial legislature over 150 years ago. “[W]e are not in the business of inventing unbrieled arguments for parties sua sponte . . . .” In re Pers. Restraint of Coats, 173 Wn.2d 123, 138, 267 P.3d 324 (2011) (quoting State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)). Alternatively, as both we and Justice González’s concurring opinion note, it might be more appropriate to consider whether to abolish peremptory challenges through the rule-making process instead of in the context of a specific case. See infra p. 23.

We have occasionally exercised our power to reach issues not raised by the parties, but this case does not present any of the circumstances justifying exercise of this discretionary power. The parties have not “ignore[d] a constitutional mandate, a statutory commandment, or an established precedent.” City of Seattle v. McCready, 123 Wn.2d 260, 269, 868 P.2d 134 (1994).

With respect to our concurring colleagues, we do not believe that our call for new alternatives to the Batson analysis constitutes “‘turn[ing] a blind eye,’” “throw[ing] up our hands in despair,” or “‘shrink[ing] from this challenge,’” concurrence (González, J.) at 2, nor are we reluctant to change the Batson standard simply because the solution presents a difficult question, see concurrence (Stephens, J.) at 1-2. Rather, we feel that now is the time to begin the task of formulating a new, functional method to prevent racial bias in jury
selection. To do so, we seek to enlist the best ideas from trial judges, trial lawyers, academics, and others to find the best alternative to the *Batson* analysis.

But it may instead be possible to address *Batson*’s shortcomings in a more targeted fashion. The main problem is that *Batson*’s third step requires a finding of “purposeful discrimination,” which trial courts may often interpret to require conscious discrimination. This is problematic because discrimination is often unconscious. A requirement of conscious discrimination is especially disconcerting because it seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a *Batson* challenge. See Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 11 (1997) (noting that one judge “had the uncomfortable feeling that she had just rendered an official ruling that the attorney was lying to the court”). Imagine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism.\(^7\) And if the judge chooses not to do so despite misgivings about possible race bias, the problem is compounded by the fact that we defer heavily to the judge’s findings on appeal. *Hicks*, 163 Wn.2d at 486. A strict “purposeful discrimination” requirement thus blunts *Batson*’s effectiveness and blinds its analysis to unconscious racism.\(^8\) As a first step, we should

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\(^7\) Likewise, “[m]any defense lawyers fail to adequately challenge racially discriminatory jury selection because they are uncomfortable, unwilling, unprepared, or not trained to assert claims of racial bias.” *EQUAL JUSTICE INITIATIVE REPORT*, supra, at 6.

\(^8\) It could be argued (although none of the parties makes this argument) that “purposeful discrimination” already encompasses unconscious bias. This argument flows from the idea that the “purposeful discrimination” requirement was never intended to be a proxy for conscious intent or anything resembling a conscious mens rea, but rather a signpost for distinguishing between discriminatory purpose and disproportionate impact. Before *Batson* was decided, it was well established that disproportionate impact alone does not
abandon and replace Batson’s “purposeful discrimination” requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion. For example, it might make sense to require a Batson challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory or where the judge finds it is more likely than not that, but for the defendant’s race, the peremptory would not have been exercised. A standard like either of these would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a Batson challenge. This in turn would simplify the task of reducing racial bias in our criminal justice system, both conscious and unconscious.

However, a new, more robust framework should do more than simply acknowledge that unconscious bias is a permissible consideration in the Batson

violate the equal protection clause. See Washington v. Davis, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). It could be argued that Batson’s “purposeful discrimination” requirement therefore meant not that the state’s attorney need be found intentionally racist, only that racial bias (conscious or unconscious, as the argument would go) be the source of any disparate impact. This argument finds support in scholarship and in the United States Supreme Court’s equal protection jurisprudence regarding jury selection. See, e.g., Alexander v. Louisiana, 405 U.S. 625, 632, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972) (finding that disproportionate exclusion of blacks in subjective jury selection process was clearly discriminatory even with “no evidence that the commissioners consciously selected by race”); Batson, 476 U.S. at 94 (citing Alexander); see also Hernandez v. Texas, 347 U.S. 475, 482, 74 S. Ct. 667, 98 L. Ed. 866 (1954) (“The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual . . . .”); Ralph Richard Banks & Richard Thompson Ford, (How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality, 58 EMORY L.J. 1053, 1090-93 (2009) (concluding that “discriminatory purpose” includes unconscious bias under current equal protection jurisprudence). This argument makes sense, but we do not consider it here. The issue was not raised or decided below, the trial court easily could have understood “purposeful discrimination” to include unconscious bias, and the facts of this case simply do not compel a finding of purposeful discrimination even if considering unconscious discrimination.
analysis. It should seek to eliminate this bias altogether or at least move us closer to that goal. A new framework should give trial courts the necessary latitude to weed out unconscious bias where it exists, without fear of reversal and without the need to level harsh accusations against attorneys or parties. On the other hand, it may be that Justices Marshall and Breyer are right and the problem is so dire that the only solution is to eliminate peremptory challenges altogether. See Batson, 476 U.S. at 102-03 (Marshall, J., concurring); Miller-El, 545 U.S. at 266-67, 273 (Breyer, J., concurring).

A rule change of this magnitude might also be best made through the rule-making process. This court possesses certain rule-making authority inherent in its power to prescribe rules of procedure and practice, which is supplemented by the Legislature. State v. Templeton, 148 Wn.2d 193, 212-13, 59 P.3d 632 (2002). We could certainly adopt a rule that would strengthen our procedures for Batson challenges, and this may be the most effective way to reduce discrimination and combat minority underrepresentation in our jury system.

V. Application to this case

As urgent as the need for a new framework may be, we cannot create one in this case. Neither party has asked for a new standard or framework, nor have they briefed or argued what that framework might be or how it would apply in this case. The issue also was not raised or decided at the Court of Appeals or the trial court. This means the record has not been developed in a way that will facilitate

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9 Ironically, Justice Stephens's concurring opinion takes this opinion to task for discussing possible solutions and then launches into a lengthy criticism of possible solutions. Concurrence (Stephens, J.) at 2-5.
our review, nor have we obtained the benefit of input from amici, including members of the bar and other stakeholders. It must wait for another case.

VI. The trial court did not clearly err by finding there was no purposeful discrimination in this case

Instead, we apply *Batson* to this case and conclude that the trial court's finding that there was no purposeful discrimination was not clear error. A trial court's decision that a challenge is race-neutral is a factual determination based in part on the answers provided by the juror, as well as an assessment of the demeanor and credibility of the juror and the attorney. *Batson*, 476 U.S. at 98 n.21. The defendant carries the burden of proving purposeful discrimination. *Id.* at 93. The trial judge's findings are "accorded great deference on appeal" and will be upheld unless proved clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). Deference to trial court findings is critically important in *Batson* cases because the trial court is much better positioned than an appellate court to examine the circumstances surrounding the challenge. Further, deference is important because trial judges must have some assurance that the rest of the trial will not be an exercise in futility if it turns out an appellate court would have ruled on a *Batson* challenge differently.

Here, we find no clear error in the trial court's determination that the prosecution had a valid race-neutral reason to peremptorily strike Ms. Tolson. Ms. Tolson said she might have trouble sitting on the jury of a murder trial because someone she knew had recently been murdered:
I mean, I have never been in this situation where I have lost someone. You just went to the funeral. He is young. Only 24. And to be called to jury duty to perhaps be on a jury of a murder suspect. I don't know how I'm going to react. You know, I don't know. I'm—I'm not an emotional person, but I'm thinking as we go through it, and I hear the testimony, and I see the pictures, I don't know. I mean, I'm just being honest. I don't know how I'm going to feel.

RP (Mar. 10, 2009) at 43. In light of Ms. Tolson's statements throughout voir dire, we defer to the trial court's factual finding that the prosecutor was justified in believing there was a realistic possibility that she might have been "lost" as a juror before the end of the case. The record does not compel a contrary conclusion. The trial court observed the juror and agreed that she was having difficulties. Losing jurors during a lengthy trial is always a possibility, and justice is not served when a mistrial is declared or a juror is unable to view and process the evidence. Here, it was entirely reasonable for the court to conclude that the prosecutor's concerns were legitimate and race-neutral, and there was no clear error. We affirm the trial court's finding that there was no purposeful discrimination.

We do, however, acknowledge that Ms. Tolson was questioned far more than any other juror, perhaps in part because she was black. This conclusion is supported by a statistical analysis of the prosecution's voir dire that appears in Appendix A, attached to this opinion. These statistics are rather striking, and in general, disparate questioning of minority jurors can provide evidence of

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10 The charts in Appendix A track two relevant measures of prosecutor questioning: (1) the number of questions asked of each juror by the prosecution and (2) the total number of words spoken (by both prosecutor and venireperson) in direct interaction with each prospective juror. Totals do not include statements or questions made by the prosecutor to the venire at large that were not directed to any particular juror. Totals omit voir dire by defense counsel and individual questioning conducted outside the presence of the full venire.
discriminatory purpose because it can suggest that an attorney is "fishing" for a race-neutral reason to exercise a strike. *See Miller-El*, 545 U.S. at 241; *Reed v. Quarterman*, 555 F.3d 364, 379 (5th Cir. 2009). However, disparate questioning does not itself prove purposeful discrimination. In some cases, there may be good reasons to question minority jurors more than nonminority jurors. Here, for example, the prosecutor began by eliciting Ms. Tolson's views on race in the criminal justice system and later spoke with her regarding the recent death of her friend. These were legitimate topics to explore.\(^{11}\) We defer to the trial court that the disparate questioning in this case, while it may have been motivated in part by race, did not necessarily amount to purposeful discrimination.

We also acknowledge that the prosecution attempted to strike the only Mexican-American juror in the venire, juror 10. RP (Mar. 10, 2009) at 119-20. And while it is true that a court's finding of discrimination against one juror is evidence of discrimination against others, it does not follow that one *Batson* violation necessarily implies another. *Snyder*, 552 U.S. at 478.

Under *Batson*, we defer to the trial court's ruling.

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\(^{11}\) The chief justice's concurring opinion criticizes our reference to statistics of the number of questions asked of Ms. Tolson compared with the other jurors, asking why additional questions were asked and "many other factors" and disclaiming any reliance on statistics. *Concurrence* (Madsen, C.J.) at 5-6. This criticism is particularly inapt in light of this opinion's extensive quotations from the voir dire of Ms. Tolson, *id.* at 3-6, 25, and one statement that disparate questioning does not itself prove purposeful discrimination.
CONCLUSION

Racial inequalities permeate our criminal justice system and present important moral issues we all must grapple with. Twenty-six years after *Batson*, it is increasingly evident that discriminatory use of peremptory challenges will be difficult to eradicate. We should not shrink from this challenge, but this is not the case to address it. It must wait for another day to determine how to adapt *Batson* to the realities of continuing race discrimination and fulfill the promise of equal protection.

We affirm the Court of Appeals.
WE CONCUR.
APPENDIX A

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Grand Total: 193 7676
MADSEN, C.J. (concurring)—Like my colleagues, I am concerned about racial discrimination during jury selection. Here, the issue is whether the prosecutor’s use of a peremptory challenge to dismiss a black member of the jury venire was based on her race and therefore violated equal protection.

The constitutionally based evaluation established in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 69 (1986), is used to make the assessment whether purposeful discrimination occurred. In the first of the *Batson* three-step analysis, the defendant must make a prima facie showing that a peremptory challenge was made on the basis of the venire member’s race. Then, in accord with the *Batson* analysis, the State must offer a race-neutral explanation for the use of the peremptory challenge and, finally, the trial judge must make a determination as to whether racial discrimination occurred.

*Batson*’s framework continues to apply to identify the constitutional equal protection violations that it was intended to reach, those involving purposeful discrimination. But as the Court advised, state courts have some flexibility to develop procedures to comply with *Batson*. *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct.
2410, 162 L. Ed. 2d 129 (2005); see State v. Hicks, 163 Wn.2d 477, 489-90, 181 P.3d 831 (2008). Recently, for example, in State v. Rhone, 168 Wn.2d 645, 229 P.3d 752 (2010), five members of the court agreed that the defendant can establish the prima facie case when the record shows that the prosecution exercised a peremptory challenge against the only remaining member of the venire who is in the same constitutionally cognizable racial group as the defendant. *Id.* at 661 (Alexander, J., dissenting); *id.* at 658 (Madsen, C.J., concurring).¹ I agreed with the Rhone dissent on this point, but also said that this means of establishing the prima facie case should be applied only in future cases, going forward. *Id.* Thus, since the present case arose before Rhone was issued, the alternative approach set out in the dissent in Rhone is not at issue.

Beyond the constitutional inquiry, which is aimed at purposeful discrimination, there are growing concerns about unconscious and implicit racial biases that could also affect jury selection. Both the lead opinion and some of the concurrences consider such concerns at some length.

But the constitutional test from *Batson* is intended to reach *purposeful* discriminatory exercise of the peremptory challenge “based on either the race of the juror or the racial stereotypes held by the party.” *Georgia v. McCollum*, 505 U.S. 42, 59, 112 Among other things, the lead opinion in Rhone observed that the Court in Batson overruled a prior test focusing on systematic discrimination. Rhone, 168 Wn.2d at 652 n.4 (discussing *Miller-El v. Dretke*, 545 U.S. 231, 269–70, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005); Batson; and *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), overruled by *Batson*, 476 U.S. 79). The Court noted that in cases decided after *Swain*, it had “recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case.” *Batson*, 476 U.S. at 95.
No. 86257-5
Madsen, C.J. (concurring)

S. Ct. 2348, 120 L. Ed. 2d 33 (1992). We have not been asked to reassess or modify the Batson approach or to address any policy-based nonconstitutional analyses or nonpurposeful discrimination based on race during jury selection. Nonetheless, both the lead opinion and Justice González’s concurrence discuss possible approaches to address implicit or unconscious discrimination and Justice González calls for abolishment of peremptory challenges to resolve the problem.

The peremptory challenge is an important “state-created means to the constitutional end of an impartial jury and a fair trial.” Id. at 58; accord State v. Latham, 100 Wn.2d 59, 70, 667 P.2d 56 (1983) (the peremptory challenge “is an important and substantial right which protects a party’s constitutional right trial by jury”) (citing Smith v. Kent, 11 Wn. App. 439, 523 P.2d 446 (1983)). Eliminating the peremptory challenge would be an enormous change in our system and certainly one the court should not consider lightly and certainly should not implement sua sponte.

In my view, the analysis in this case should be limited to the issues raised by the parties. The case should be decided under Batson’s “purposeful discrimination” constitutional standard and should not be a forum for discussing how to counter “implicit” or “unconscious” discrimination when these questions have not been raised by the parties. The danger inherent in such discussions is the probability that the court will

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2 As the lead opinion notes, “[n]either party has asked for a new standard or framework, nor have they briefed or argued what that framework might be or how it would apply in this case,” the issue was not raised or decided at the Court of Appeals, and amici, the bar, and other “stakeholders” have not provided any input. Lead opinion at 23-24. The lead opinion also says that this case does not present circumstances calling for exercise of our discretionary power to reach issues not raised by the parties. Id. at 20.
not be fully and completely informed, despite all best efforts, about all aspects of the matter when we have only our own investigation, research, and analysis to consider. The rich tradition of briefing in appellate courts ensures not only that we consider the issues that the parties raise but that we are well informed. The range of resources expands tremendously when, rather than our own research and that provided by the parties, we have in addition input from other interested entities—when a new court rule is proposed, for example.

Here, when the prosecutor used a peremptory challenge to dismiss jury venire member Ms. Anna Tolson, the only black member of the venire, the defendant objected and established a prima facie case of discrimination. The prima facie case was easily made because the prosecutor singled this juror out, making it abundantly clear that he did so on the ground that, because of her race, she would have a different viewpoint from the rest of the venire. The judge appropriately required the prosecutor to explain why the peremptory challenge was exercised and then found that the prosecutor was justified in believing there was a realistic possibility that Ms. Tolson might be lost as a juror before the trial concluded, especially since she had very recently lost someone who was murdered. The judge’s ruling was not an abuse of discretion.

Finally, I offer a brief comment on the lead opinion’s appended charts totaling the number of questions and words with respect to each prospective juror. We are not a group of qualified statisticians. One does not have to look very far to find a significant mistake made by this court when attempting to resolve a question in a case involving
statistics. In a prosecution for murder, in which DNA (deoxyribonucleic acid) evidence was an important part of the State’s case, we originally rejected the State’s expert’s testimony that the defendant’s DNA was a 1 in 19.25 billion “match” to the forensic sample. We concluded that this was basically an assertion that the defendant was the only person with this DNA profile because the 19.25 billion figure was almost four times the population of the earth. *State v. Buckner*, 125 Wn.2d 915, 890 P.2d 460 (1995). On reconsideration, we recognized our error: “Contrary to our original view in this case, we now recognize that a profile probability of 1 in 20 billion or other number greater than the earth’s population may be admissible, as the state of forensic DNA analysis allows for such probabilities.” *State v. Buckner*, 133 Wn.2d 63, 66, 941 P.2d 667 (1997). The mistaken first opinion had, in fact, been singled out as a bad example of statistical analysis of forensic DNA typing. Comm. on DNA Forensic Science: An Update, Nat’l Research Council, The Evaluation of Forensic DNA Evidence (Nat’l Acad. Press 1996).

Without knowing what topics were discussed, why additional questions were asked, whether individual prospective jurors had personal characteristics that may have affected the number of questions asked (hearing difficulties, comprehension levels, etc.) or personal tendencies such as to respond at length or to ask repeatedly for clarification, and likely many other factors, it is insufficient to count questions or individual words. While a marked difference in questioning may suggest discrimination, I would not rely
on charts to show discrimination based on the number of questions asked or the length of
the interactions with individuals during voir dire.\(^3\)

I concur in the result reached in the lead opinion but write separately to express
disagreement with going beyond the arguments of the parties.

\(^3\) Although the lead opinion notes that there are limitations to relying on statistics, inclusion of
detailed graphs and pie charts suggests the opposite.
Madsen, C.J.

Madsen, C.J.
STEPHENS, J. (concurring)—Between Justice Wiggins’s lead opinion, Chief Justice Madsen’s and Justice González’s concurring opinions, and Justice Chambers’s dissenting opinion, thousands of words have been written in this case. Only a fraction speak to the actual result: the court affirms Kirk Saintcalle’s conviction, finding no violation of equal protection under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). I concur in this result.

I write separately to sound a note of restraint amidst the enthusiasm to craft a new solution to the problem of the discriminatory use of peremptory challenges during jury selection. The difficulties inherent in this area have long been recognized, but it is easier to name the problem than to solve it. *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1106-08 (2011) (surveying plans to reform the peremptory challenge, but noting most “are unlikely to resonate beyond the academy and particularly unlikely to resonate with legislatures who must implement any such reform
proposal”); Peter J. Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 WASH. U. L. Q. 713, 796 (1999) (admitting that reform in this area “is easier said than done”). Perhaps the reluctance of both the lead opinion and Justice González’s concurrence to adopt the solutions they suggest belies this concern.¹

Before embracing any new solution, I think it is important to carefully consider our authority as a court sitting in review. We are not acting in our rule-making capacity. And, obviously it is not our role to legislate. We should not skim over the question of what is involved in changing the Batson standard (as Justice Wiggins favors), eliminating peremptory challenges entirely (as Justice González advocates), or exercising our inherent supervisory power to fashion rules to address “the pernicious effect of unconscious racism” (as Justice Chambers suggests). Dissent (Chambers, J.) at 2. Because the issue is entirely unbriefed, we are not adequately informed on all sides of the question. I offer a few observations that give me pause.

First, the rule announced in Batson is narrow, placing a constitutional limit on the exercise of peremptory challenges based on a finding of purposeful

¹ It is also noteworthy that neither of these opinions would find a satisfactory solution to the discrimination problem in the rule proposed by the dissent in State v. Rhone, 168 Wn.2d 645, 659, 229 P.3d 752 (2010) (Alexander, J., dissenting). Under that rule, the Batson threshold of purposeful discrimination would remain and parties would retain the right to exercise peremptory challenges; however, the party proposing to strike “the only remaining minority member of the defendant’s cognizable racial group or the only remaining minority in the venire,” would be required to provide a race-neutral reason for doing so. Id. at 663 (Alexander, J., dissenting).
discrimination.\footnote{This is consistent with other areas of discrimination law, most notably employment law from which the Batson three-part, burden-shifting analysis is drawn. See Batson, 476 U.S. at 94 n.18 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) (noting that the McDonnell Douglas framework “is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination”).} Under controlling precedent from the United States Supreme Court, this is the reach of the federal equal protection clause to invalidate a party’s exercise of peremptory challenges, whether such challenges are authorized by statute or court rule or both. Justice Wiggins suggests that “our Batson analysis should reflect not only the Fourteenth Amendment’s equal protection guaranty, but also the jury trial protections contained in article I, section 21 of our state’s constitution.” Lead opinion at 18. I am unsure what this means, and no one has suggested that our state jury trial right requires restricting or eliminating the use of peremptory challenges. To the contrary, courts have consistently recognized peremptory challenges as integral to “assuring the selection of a qualified and unbiased jury.” Batson, 476 U.S. at 91; State v. Vreen, 99 Wn. App. 662, 666-68, 994 P.2d 905 (2000) (recognizing defendant’s exercise of for-cause and peremptory challenges as part of right to fair trial and impartial jury under federal Sixth Amendment and article I, sections 21 and 22 of our state constitution); State v. Rhone, 168 Wn.2d 645, 654, 229 P.3d 752 (2010) (noting Batson did not transform “a shield against discrimination into a sword cutting against the purpose of a peremptory challenge”). Thus, it may be as valid an argument to say that the state jury trial right enshrines peremptory challenges as to say it restricts them.
Second, the solutions proposed by both the lead opinion and Justice González’s concurrence go far beyond invalidating peremptory challenges that violate the equal protection rights of litigants and jurors recognized in Batson and its progeny. We should therefore at least acknowledge the existence of a subconstitutional “right” of litigants to participate in jury selection by exercising both for-cause and peremptory challenges. Justice González’s concurrence seems to assume that peremptory challenges are wholly within our purview to eliminate. But, we are not the only branch of government concerned with fairness and impartiality in jury trials. Among the statutes in play is RCW 2.36.080, which addresses jury selection and provides in relevant part:

(3) A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.
(4) This section does not affect the right to peremptory challenges under RCW 4.44.130.

While the procedural mechanism for exercising juror challenges in criminal cases has largely moved from statute to court rule, the general provisions in chapter 2.36 RCW apply and the court rules in several instances incorporate or restate the statutory framework. See CrR 6.4. How we could deny a litigant a constitutionally valid exercise of peremptory challenges secured by statute or court rule is an unexamined question.

The most thorough discussion in Washington case law of what the “right” to peremptory challenges means is the Court of Appeals opinion in Vreen, 99 Wn. App. 662. At his trial, the defendant, Vreen, who is African-American, attempted
to exercise a peremptory challenge to remove the sole African-American member of the jury pool. The State objected under *Batson*, and the court rejected Vreen’s stated race-neutral reason for the juror’s removal—that the juror was a pastor and retired serviceman and therefore of “an authoritarian mind-set.” *Id.* at 665-67. Vreen appealed his conviction, contesting the denial of his peremptory challenge. On appeal, the State conceded that the trial court erred in sustaining its *Batson* objection but argued that the erroneous denial of Vreen’s peremptory challenge did not require reversal in the absence of prejudice. *Id.* at 667-68. The Court of Appeals disagreed, noting that “the interplay of challenges for cause and peremptory challenges . . . assures [a] fair and impartial jury.” *Id.* at 668. It concluded that “[a]lthough the denial of a peremptory challenge may not be an issue of constitutional dimension, it is, nevertheless, an important right.” *Id.* Based on the violation of this right, the court granted Vreen a new trial. *Id.* at 671; accord *State v. Bird*, 136 Wn. App. 127, 133-34, 148 P.3d 1058 (2006) (following *Vreen* and granting new trial where defendant was wrongly denied peremptory challenge). I, for one, would like to know more about how the principles discussed in *Vreen* and similar cases inform our consideration of possible solutions to the problem of discrimination in jury selection.

As noted, my purpose today is to sound a note of restraint. We held to the *Batson* standard in *Rhone*, and we do so again today. I do not criticize my colleagues for embracing an opportunity to explore a thorny issue, but I believe there are better avenues than judicial opinions to do so.
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No. 86257-5

GONZÁLEZ, J. (concurring)—This splintered court is unanimous about one thing: Racial bias in jury selection is still a problem—"Solutions to the Problem, Of Course, wait." 3 Langston Hughes, Dinner Guest: Me, in THE COLLECTED WORKS OF LANGSTON HUGHES 173 (Arnold Rampersad ed., 2001). Batson challenges have not ended racial bias in jury selection. Only once has a race-based Batson challenge resulted in reversal in Washington. See State v. Cook, No. 67332-7-I (Wash. Ct. App. May 28, 2013). With the exception of Justice Chambers, my colleagues recast their unwillingness to act as virtuous restraint. Lead opinion at 2; concurrence (Madsen, C.J., joined by J.M. Johnson, J.) at 3-4; concurrence (Stephens, J., joined by C. Johnson and Fairhurst, JJ.) at 1.

There are half-measures that may reduce the amount of bias in the jury selection process, such as tighter control of questioning based on the federal court model or reduction of the number of peremptory challenges that may be exercised. I believe, however, it is time to abolish peremptory challenges. Peremptory challenges are used in trial courts throughout this state, often based largely or entirely on racial stereotypes or generalizations. See infra pp. 15-29. As a result, many qualified
persons in this state are being excluded from jury service because of race. At the same time, trial and appellate courts cannot reliably identify which particular challenges involve racial discrimination and which do not. See infra pp. 30-34. Moreover, the use of peremptory challenges contributes to the historical and ongoing underrepresentation of minority groups on juries, imposes substantial administrative and litigation costs, results in less effective juries, and unfairly amplifies resource disparity among litigants—all without substantiated benefits. See infra pp. 38-52. The peremptory challenge is an antiquated procedure that should no longer be used.

As the lead opinion rightly states, we must “recognize the challenge presented . . . and rise to meet it.” Lead opinion at 17. We must not “turn a blind eye,” “throw up our hands in despair;” or “shrink from this challenge”—but that is precisely what the majority of this court does in this case. Lead opinion at 17, 27; lead opinion at 2; concurrence (Madsen, C.J., joined by J.M. Johnson, J.) at 1, 3; concurrence (Stephens, J., joined by C. Johnson and Fairhurst, JJ.) at 1, 5. Petitioner Kirk Saintcalle complains that racial discrimination was behind the use of a peremptory challenge at his trial and also points out that our current procedural framework is failing to address this ongoing problem. He is right about the ongoing failure of our procedural framework. The majority of this court acknowledges the problem, but does nothing about it. Yet this court has a duty to ensure that the trial procedures it oversees and maintains do not propagate racial discrimination. We can fix this problem directly. We should abolish peremptory challenges in our courts.
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That said, although the peremptory challenges at Saintcalle’s trial constituted error, Saintcalle is not entitled to reversal of his conviction. Given that trial courts throughout the state have been allowing peremptory challenges in good faith to this point, and because peremptory challenges are not always harmful or pernicious, the erroneous allowance of a peremptory challenge does not warrant reversal in every case. See, e.g., Creech v. City of Aberdeen, 44 Wash. 72, 73-74, 87 P. 44 (1906) (erroneous allowance of peremptory held harmless); cf. Rivera v. Illinois, 556 U.S. 148, 157, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) (noting the significance of a “court’s good-faith error”). Instead, reversal is warranted on appeal only if the trial court (1) acted in bad faith in allowing the challenge or (2) allowed the challenge in good faith but failed to comply with Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

One of the reasons why we must abolish peremptory challenges is because it is too difficult to identify the presence of racial discrimination under Batson in any given case and thus, too difficult to identify the individual cases that warrant reversal. In this particular case, the trial court acted in good faith and did not commit clear error in allowing the challenge to prospective juror Tolson. Thus, I concur in the judgment because under the appropriate framework for deciding this case, Saintcalle is not entitled to reversal of his conviction.
I. A DUTY TO ACT

We must address the ongoing problem of racial discrimination in the use of peremptory challenges. Otherwise, we ignore our duty to resolve disputes fully, fairly, and effectively and to ensure that trial procedures in this state promote justice and comply with the federal and state constitutions.

In order to fully, fairly, and effectively adjudicate Saintcalle’s claim we must address the presence of racial discrimination within our jury selection procedures. The primary duty of this court is “to see that justice is done in the cases which come before it, which fall within its jurisdiction.” O’Connor v. Matzdorff, 76 Wn.2d 589, 600, 458 P.2d 154 (1969); see also RAP 1.2(a), (c); 7.3. Accordingly, this court has “frequently recognized it is not constrained by the issues as framed by the parties” and will “reach issues not briefed by the parties if those issues are necessary for decision.” City of Seattle v. McCready, 123 Wn.2d 260, 269, 868 P.2d 134 (1994) (citing cases); State v. Aho, 137 Wn.2d 736, 740-41, 975 P.2d 512 (1999) (citing cases); Hall v. Am. Nat’l Plastics, Inc., 73 Wn.2d 203, 205, 437 P.2d 693 (1968) (noting that courts “frequently decide crucial issues which the parties themselves fail to present” (citing cases)). In other words, we will resolve whatever legal issues must be resolved to properly adjudicate the claims and issues raised on appeal. In this case, Saintcalle has complained that the prosecutor in his case was allowed to exercise a racially discriminatory peremptory challenge. See Suppl. Br. of Pet’r at 3. Saintcalle argues
that “'[r]acial iniquities permeate Washington’s criminal justice system,’” that this state has “fail[ed] to enforce the Equal Protection Clause under Batson,” and that “'[t]he dearth of recent cases in which courts have actually found racial discrimination in jury selection suggests not that such discrimination doesn’t occur, but that the judiciary has failed to identify and remedy it.’”

Accordingly, this case does bring into question the underlying validity of peremptory challenges and the proper framework for reviewing the use of such challenges, even if Saintcalle has not explicitly requested that we alter our court rules or jury selection process. In order to justly and properly resolve Saintcalle’s claim, we must address the deeply flawed procedural and appellate framework in which it arose.

Instead, today this court fails to ensure that none of our trial procedures propagate injustice. We have “inherent power to govern court procedures” as “a necessary adjunct of the judicial function.” City of Seattle v. Hesler, 98 Wn.2d 73, 80, 653 P.2d 631 (1982); see also RCW 2.04.190; State v. Gresham, 173 Wn.2d 405, 428-29, 269 P.3d 207 (2012); State v. Templeton, 148 Wn.2d 193, 212, 59 P.3d 632 (2002); Marine Power & Equip. Co. v. Indus. Indem. Co., 102 Wn.2d 457, 461, 687 P.2d 202 (1984); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); State v. Smith, 84 Wn.2d 498, 501-02, 527 P.2d 674 (1974); State ex rel. Foster-Wyman

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1 Quoting TASK FORCE ON RACE AND THE CRIMINAL JUSTICE SYSTEM, PRELIMINARY REPORT ON RACE AND WASHINGTON’S CRIMINAL JUSTICE SYSTEM 7 (2011) (alteration in original).
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Lumber Co. v. Superior Court, 148 Wash. 1, 4-12, 267 P. 770 (1928). This well-established authority includes the power to create, modify, or waive court rules, see GR 9(j)(1); O'Connor, 76 Wn.2d at 595-97, 600, as well as the power to exercise supervisory authority over the courts of this state, see State v. Bennett, 161 Wn.2d 303, 317-18 & n.11, 165 P.3d 1241 (2007). Our authority in this context is plenary and thus our procedural rules “cannot be abridged or modified by the legislature,” Smith, 84 Wn.2d at 502, although the legislature may supplement our procedural rules by statute, see Gresham, 173 Wn.2d at 428. In accordance with our primary duty to seek justice in the cases that come before us, and because “[n]o rule of this court was ever intended to be an instrument of oppression or injustice,” we have “suspended the rules where justice demanded it.” O'Connor, 76 Wn.2d at 595-96 (quoting State v. Brown, 26 Wn.2d 857, 865, 176 P.2d 293 (1947)); see, e.g., id. at 596, 600 (excepting indigents from court rule and statute imposing filing fee); cf. Sackett v. Santilli, 146 Wn.2d 498, 504, 47 P.3d 948 (2002) (noting this court cannot “contradict the state [or federal] constitution by court rule”).

The use of peremptory challenges in our courts is exactly the type of trial court practice over which we have inherent and ongoing authority. See State v. Tharp, 42 Wn.2d 494, 501, 256 P.2d 482 (1953) ("[T]he selection of the jury is procedural."); see also Fields, 85 Wn.2d at 129. There is no constitutional requirement that peremptory challenges be included within our trial procedures. See, e.g., Rivera v. Illinois, 556 U.S. 148, 152, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); Georgia v.
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McCollum, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (citing cases);
State v. Persinger, 62 Wn.2d 362, 365-66, 382 P.2d 497 (1963); Crandall v. Puget Sound Traction, Light & Power Co., 77 Wash. 37, 40, 137 P. 319 (1913). Thus, peremptory challenges continue to be used in our courts only insofar as we allow them to be used.

If we truly are unsure of the appropriate way to address the ongoing racial discrimination within our jury selection procedures, we should ask for further briefing. See RAP 10.6(c), 12.1(b). But as is explained below, the need to abolish peremptory challenges “is so apparent that additional briefing is unnecessary.” Aho, 137 Wn.2d at 741 (noting that in a rare case in which “briefing is not necessary to full and fair resolution of the issue” we can “decide the issue without additional briefing” (citing cases)). Even if we might eventually be able to devise a framework that incorporates peremptory challenges in some form while adequately addressing the problems described below, we should at the very least abolish the use of peremptory challenges until that time. Again, to the extent that members of this court remain unsure, the proper course of action is to request further briefing, not to ignore the problem.

II. THE NEED TO ABOLISH PEREMPTORY CHALLENGES

We must abolish peremptory challenges in the courts of this state. Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully
and fairly. In practice, however, litigants generally use peremptory challenges to remove qualified and fair jurors whom they deem likely to favor the other side in a close case. Many such challenges are based on nothing more than racial stereotypes or generalizations. But there is no accurate and reliable way to identify which peremptory challenges are based on race and which are not. In addition, peremptory challenges contribute to the underrepresentation of minority groups on juries, impose substantial administrative costs, result in less effective juries, and amplify resource disparity in litigation—without any substantiated benefits.

The peremptory challenge was first created in England to serve purposes that are now irrelevant and outdated, and it was adopted in the Washington Territory without substantial debate, at a time when racial minorities and women were completely ineligible for jury service. Peremptory challenges have been used in Washington since that time but without any serious consideration of their usefulness, and they remain an optional trial procedure subject to our plenary oversight. To prevent ongoing violations of the federal and state constitutions, and more generally as a matter of policy, we should abolish peremptory challenges in this state.

Many jurists and scholars have called for the elimination of peremptory challenges but no jurisdiction in the United States has been willing to be the first to take that necessary step. See, e.g., Flowers v. State, 947 So. 2d 910, 937-39 (Miss. 2007). It should be remembered that in 1911, Washington became only the second state in the nation to allow women to serve on juries. See Joanna L. Grossman,
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Women’s Jury Service: Right of Citizenship or Privilege of Difference?, 46 STAN. L. REV. 1115, 1135 n.118 (1994) (citing LAWS OF 1911, ch. 57, § 1). Prior to that time, the Supreme Court of the Washington Territory proved unwilling to break free from the long standing and entrenched legal tradition of all-male juries. See Harland v. Territory, 3 Wash. Terr. 131, 137, 13 P. 453 (1887) (Turner, J.), overruling Rosencrantz v. Territory, 2 Wash. Terr. 267, 5 P. 305 (1884); see also Rosencrantz, 2 Wash. Terr. at 278-79, 281 (Turner, J., dissenting) (arguing that trial by jury at common law properly required “the jury should be composed of men” because “inherent and acquired differences between himself and wife in mental and physical constitution . . . will continue to operate to give the husband paramount authority in the household . . . until an upheaval of nature has reversed the position of man and woman in the world”). A long standing but antiquated legal tradition should never blind us to the paramount need to ensure that our trial procedures are just. Nor should any progress we have made blind us to the need for further progress. See id. at 278-79 (“It is said that the rights of the weaker sex . . . are more regarded than in the days of Blackstone; and that the theory of that day . . . has been exploded by the advanced ideas of the nineteenth century. This may be true. No man honors the sex more than I. None has witnessed more cheerfully the improvement in the laws of the States, and particularly in the laws of this Territory, whereby many of the disabilities of that day are removed from them . . . . I cannot say, however, that I wish to see them perform the duties of jurors.”). It is time once again for Washington to shed an antiquated and
unjust rule and to lead the nation in the pursuit of justice and equality in jury selection.

1. Voir Dire and Juror Challenges

To understand the role of peremptory challenges in jury selection, we must first consider the purposes and general framework of jury selection as a whole. The underlying goal of the jury selection process is “to discover bias in prospective jurors” and “to remove prospective jurors who will not be able to follow [] instructions on the law,” and thus, to ensure an impartial jury, a fair trial, and the appearance of fairness. *State v. Davis*, 141 Wn.2d 798, 824-26, 10 P.3d 977 (2000). The jury selection process includes the questioning of jurors during voir dire and the exercise of causal and peremptory challenges to remove individual prospective jurors from the venire, until a sufficient number of qualified jurors have been designated for service in the case. *See* CrR 6.3, 6.4, 6.5; CR 47; RCW 4.44.120-.250. The nature and scope of voir dire is left largely to the discretion of the trial court. *See, e.g., Skilling v. United States*, ___ U.S. ___, 130 S. Ct. 2896, 2917, 177 L. Ed. 2d 619 (2010); *Davis*, 141 Wn.2d at 825. We have noted that the scope of this process “should be coextensive with its purpose.” *State v. Laureano*, 101 Wn.2d 745, 758, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 132-33, 761 P.2d 588 (1988).

Challenges for cause are the primary method of excluding prospective jurors from service. Unlike peremptory challenges, for which no reason need be given,
challenges for cause require a showing to the satisfaction of the trial court that a
particular juror is unqualified for service in the case. A “general” causal challenge
alleges that a prospective juror is unqualified to serve in any case because of
insufficient age, lack of citizenship, lack of local residency, inability to sufficiently
communicate or comprehend, disenfranchisement, or a substantial and material
insufficiency in mind or body. See RCW 4.44.150, .160; RCW 2.36.070; see also
CrR 6.4(c)(1), (2). A “particular” causal challenge alleges that a prospective juror is
unqualified to serve in the particular case before the court, due to a blood relation,
other special relationship, or personal interest that renders the prospective juror
unqualified as a matter of law (“implied bias”); or due to inability to be impartial in
fact (“actual bias”); or due to some bodily condition that renders the juror unable to
serve in the particular case. See RCW 4.44.150, .170, .180, .190; see also, e.g., State
“upon a showing of undue hardship, extreme inconvenience, public necessity, or any
reason deemed sufficient by the court . . . .” RCW 2.36.100(1); State v. Roberts, 142
Wn.2d 471, 519, 14 P.3d 713 (2000).

One primary purpose of the voir dire process is to determine whether
prospective jurors harbor “actual bias” and are thus unqualified to serve in the case.
See, e.g., Tharp, 42 Wn.2d at 499. To be free from actual bias, a juror must be able to
(1) set aside personal beliefs, opinions, or values insofar as is necessary to follow the
law and decide the case fairly, see, e.g., Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct.
1639, 6 L. Ed. 2d 751 (1961); State v. Moody, 18 Wash. 165, 169-70, 51 P. 356 (1897); (2) adjudicate disputed factual issues based solely on the evidence that is allowed and presented at trial, see, e.g., Skilling, 130 S. Ct. at 2913; State v. Patterson, 183 Wash. 239, 246, 48 P.2d 193 (1935); and (3) be free from the undue influence of any special relationships or personal interests (even if such relationships or interests do not qualify as implied bias), see Stinson v. Sachs, 8 Wash. 391, 393, 36 P. 287 (1894).

In any given case, the appropriate resolution of a challenge for actual bias is left to the discretion of the trial court. See, e.g., Reynolds v. United States, 98 U.S. (8 Otto) 145, 155, 25 L. Ed. 244 (1878); Skilling, 130 S. Ct. at 2923-24; State v. Gilcrist, 91 Wn.2d 603, 611, 590 P.2d 809 (1979). A deferential standard of review is appropriate for two primary reasons. First, an adjudication of actual bias usually will incorporate factual findings and a consideration of the totality of the circumstances. See Patton v. Yount, 467 U.S. 1025, 1036 n.12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); Patterson, 183 Wash. at 244-45. For example, a juror’s mere assertion that she or he is impartial (or is overly biased) is not dispositive, in part because jurors may not fully appreciate or accurately state the nature of their own biases. See, e.g., Skilling, 130 S. Ct. at 2925; Wainwright v. Witt, 469 U.S. 412, 424-25, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); Patterson, 183 Wash. at 245; Moody, 18 Wash. at 169.

Second, there is no rule of general applicability that can be effectively constructed to govern determinations of actual bias. See Irvin, 366 U.S. at 724-25 (noting that
“[l]Impartiality is not a technical conception” and there is no “‘ancient and artificial formula’” or “‘particular tests’” by which to determine actual bias (quoting United States v. Wood, 299 U.S. 123, 145-46, 57 S. Ct. 177, 81 L. Ed. 78 (1936))). In some cases, whether a given juror must be excluded will be “‘fairly debatable’” and thus will remain subject to the trial court’s discretion. State v. Sisouvanh, 175 Wn.2d 607, 624, 290 P.3d 942 (2012) (internal quotation marks omitted) (quoting Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)); compare Gilcrist, 91 Wn.2d at 611 (in suit brought by two prison inmates, no abuse of discretion in refusing to exclude grounds keeper of junior college who had previously worked with some inmates taking classes and “didn’t like the way the inmates ‘conducted themselves’ there or ‘the way they took care of equipment’”), with Beach v. City of Seattle, 85 Wash. 379, 384, 148 P. 39 (1915) (in suit by plaintiffs injured in transit from social dance, no abuse of discretion in excluding juror who “was decidedly opposed to dances”). But in other cases, the need to excuse a juror for actual bias will be so apparent that the trial court’s refusal to do so will be deemed an abuse of discretion. See, e.g., State v. Parnell, 77 Wn.2d 503, 507-08, 463 P.2d 134 (1970) (abuse of discretion in failing to exclude juror who had attended criminal defendant’s preliminary hearing and then gave an “obviously hostile answer” to defense counsel’s question on the subject), overruled on other grounds by State v. Fire, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001).
The allowance of causal challenges remains the primary method by which we ensure impartial juries in this state. There is no limit on the number of causal challenges allowed. The basis for a causal challenge must be specified and proved, in order to create a sufficient record for appeal, to avoid "sharp practice" and to serve the ends of justice. State v. Biles, 6 Wash. 186, 188, 33 P. 347 (1893); see State v. Lloyd, 138 Wash. 8, 14-15, 244 P. 130 (1926) (rules of evidence apply); RCW 4.44.240. In contrast, litigants are afforded a limited number of peremptory challenges and generally need not specify any reasons for such challenges. See CrR 6.4(e)(1); RCW 4.44.130, .140. The use of peremptory challenges is intended to supplement our overarching framework of excluding unqualified jurors for cause.

2. Peremptory Challenges in Practice

The actual use of peremptory challenges within our jury selection process presents a divergence between theory and practice. In theory, peremptory challenges are supposed to further the goal of an impartial jury. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 n.9, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) ("The process is to ensure a fair impartial jury, not a favorable one."); State v. Larkin, 130 Wash. 531, 533, 228 P. 289 (1924), aff'd, 132 Wash. 698, 232 P. 695 (1925). In practice, however, litigants simply use peremptory challenges to remove the prospective jurors they perceive to be least favorable to their position, regardless of whether such prospective jurors possess biases so severe as to render their participation unfair. See, e.g., Larkin, 130 Wash. at 533; see also, e.g., JAMES J.
The task of determining the favorability of jurors is difficult, in part because of
the limited information available about each juror and his or her relevant knowledge,
beliefs, opinions, and values, and also because of the difficulty of predicting a given
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individual’s likely beliefs and opinions about any particular case. See STARR &
McCORMICK, supra, at 16-12. There is only limited time to extract relevant
information during voir dire. Jurors sometimes conceal or are ignorant about their
own biases, and answers are sometimes incomplete, misleading, or false. See Ginger,
supra, at 1034, 1095; GOBERT & JORDAN, supra, at 117, 459. Some attorneys
conduct external investigations to learn more about the members of the venire, but this
is often impossible, impractical, unreliable, or unethical. See GOBERT & JORDAN,
supra, at 106-27. Although directly relevant information does sometimes become
available—as in cases involving challenges for cause—most of the time even directly
relevant information does not actually disclose the extent of a particular juror’s
underlying bias. In other words, the significance of such information usually remains
at least fairly debatable if not entirely ambiguous or immaterial.

With limited information and time, and a lack of any reliable way to determine
the subtle biases of each prospective juror, attorneys tend to rely heavily on
stereotypes and generalizations in deciding how to exercise peremptory challenges.
See, e.g., TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION: STRATEGY AND
SCIENCE 1-7 to 1-8 (3d ed. 2007); JEFFREY T. FREDERICK, MASTERING VOIR DIRE
AND JURY SELECTION 24 (1995); STARR & MCCORMICK, supra, at 17-6. This
phenomenon is endemic. See, e.g., STARR & MCCORMICK, supra, at 16-7 (“Since
widely-accepted, strongly-fixed, deeply-rooted stereotypes allow speedy evaluations
and judgments, and since the legal system constantly places lawyers in situations that
require them to exercise peremptory challenges quickly, demographic stereotypes have become the obligatory foundation for decisionmaking in jury selection.”). The precise way that stereotypes or generalizations are used, however, depends upon the resources and sophistication of each trial attorney.

The majority of attorneys rely on instinct, lore, and anecdotal experience—used in combination with whatever information about prospective jurors is obtained prior to and during voir dire—to guide the use of peremptory challenges. See GOBERT & JORDAN, supra, at 77; STARR & MCCORMICK, supra, at 7-6. These attorneys tend to rely heavily on speculative and unfounded stereotypes and generalizations that masquerade as insight or wisdom; indeed, the “old lawyer’s lore” passed down from one generation to the next is rampant with such dubious and sweeping declarations. STARR & MCCORMICK, supra, at 5.1-5; see, e.g., ROBERT A. WENKE, THE ART OF SELECTING A JURY 70-71, 76-77, 84-85 (1979) (recommending that civil plaintiffs seek out “[r]elatively unskilled government workers” and that civil defendants seek out “[c]hildless persons,” among other unsupported generalizations); Frederick, supra, at 23 (collecting examples). Often this approach involves the application of a simple and straightforward stereotype concerning a single demographic characteristic. See, e.g., STARR & MCCORMICK, supra, at 5.1-4 (“Williams . . . reduced [the jury pool] by following his own guidelines: ‘strike Scandinavians (too pro-government), keep Irish (pro-underdog)’ . . . .” (quoting Evan Thomas, The Man to See: Edward Bennett Williams—Legendary Trial Lawyer, Ultimate Insider, WASHINGTON MONTHLY (Oct.
Sometimes the attorney instead relies on stereotypes or generalizations concerning a synthesis of multiple characteristics. See, e.g., Wenke, supra, at 76 ("Older members of minority groups tend to be conservative and prosecution-minded if they have had longtime stable careers."); id. at 69 ("[S]eek jurors who identify with your client, who tend to have similar characteristics."); see also Abbott, supra, at 12 (same).

Attorneys with more resources and greater sophistication have gone from using simplistic old lawyer’s lore to using jury consultants and applying social science methods to jury selection. The field of jury consultation emerged in the 1970s and grew dramatically in the 1980s and 1990s as various methods and principles of social psychology were applied to trial strategy with apparent success. See Starr & McCormick, supra, at 5.1-13 to 5.1-36; Donner & Gabriel, supra, at 5-6 to 5-11. Jury consultants now use a variety of techniques to assist trial attorneys in jury selection, including community surveys, mock juries, and focus groups. See, e.g., Starr & McCormick, supra, at 7-1 to 16-32; Gobert & Jordan, supra, at 78. Based on some or all of these various methods, jury consultants usually develop a “statistical profile” to assist the trial attorney specifically in the exercise of peremptory challenges. Starr & McCormick, supra, at 16-3 (noting that this statistical profile is "[o]ne of the primary reasons trial attorneys hire jury/trial consultants"); Gobert & Jordan, supra, at 89; see also Ginger, supra, at 1106 (providing example of model juror profile for hypothetical police misconduct case).
The statistical profile often is complex and reflects the synthesis of a number of demographic and other characteristics. See STARR & MCCORMICK, supra, at 7-47 ("Regression analysis, interaction analysis, or discriminant analysis are the statistical programs most frequently used to develop these profiles."). The profile will be used to select which jurors to challenge and often will guide the attorney's strategies and questioning during voir dire. See GOBERT & JORDAN, supra, at 90. Attorneys also sometimes use jury consultants "to evaluate juror nonverbal responses to voir dire questioning and to identify the likely group dynamics of the jury." Id. at 456 (footnote omitted). Some attorneys instead try to utilize social science methods on their own and on a smaller scale, without incurring the substantial expense of a professional jury consultant. See, e.g., DONNER & GABRIEL, supra, at 6-25; GOBERT & JORDAN, supra, at 103-105; see also ABBOTT, supra, at 22 (providing a universal "juror rater" for practitioners to use in any case based on "an ambitious effort to obtain systematically collected social science data on American values and characteristics").

Attorneys who employ these social science methods still rely heavily on stereotypes or generalizations. Judgments made about each individual prospective juror are based on information collected about other individuals. In other words, each prospective juror is presumed to be similar in relevant respects to those individuals who contributed to the available statistical data and possessed some of the known characteristics of the prospective juror. See, e.g., ABBOTT, supra, at 58. Although
these generalizations are based on more than mere intuition or anecdote, they remain speculative as applied to any particular prospective juror. Further, a great deal of judgment must be exercised in collecting relevant data (e.g., whom to ask, what to ask, and how to ask it), in deciding how to interpret the data, and also in applying the results. See STARR & MCCORMICK, supra, at 5.1-17; ABBOTT, supra, at 78; DONNER & GABRIEL, supra, at 6-24. It is perhaps not surprising then to find that “empirical studies testing the predictive value of scientific jury selection have produced inconclusive findings.” Franklin Strier & Donna Shestowsky, Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice, and What, if Anything, To Do About It, 1999 WIS. L. REV. 441, 458-64 (discussing and collecting studies); see also Dru Stevenson, Jury Selection and the Coase Theorem, 97 IOWA L. REV. 1645, 1653 n.38 (2012) (same); Reid Hastie, Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?, 40 AM. U. L. REV. 703, 718-20 (1991) (same).

In sum, attorneys using a wide variety of approaches to jury selection all rely heavily on stereotypes and generalizations to guide the use of peremptory challenges, in an attempt to obtain the most favorable jury possible in any given case. Rough and rapid judgments about prospective jurors are made based on whatever characteristics are observable or otherwise known and which the attorney believes are relevant in some way. Prospective jurors are then excused based solely on such superficial judgments, notwithstanding the fact that whatever directly relevant information is
available either provides no indication that the prospective juror is unqualified or
provides some indication that is only fairly debatable at best.

3. Racial Discrimination in Peremptory Challenges

Unsurprisingly, peremptory challenges often are motivated by racial
stereotypes and generalizations. The perception of race still heavily influences many
social observations and judgments in our society. Regardless of whether an attorney
uses intuition, old lawyer’s lore, or jury consultation, we should not be surprised to
find that the resultant judgments about prospective jurors are based in whole or in part
on race. Indeed, the existing evidence discussed below shows that racial
discrimination is prevalent in the use of peremptory challenges in Washington and
elsewhere, and our current legal framework necessarily fails to address this problem.

Peremptory challenges can be racially discriminatory in numerous ways. First,
a peremptory challenge can be based on a straightforward, race-based stereotype or
generalization. For example, an attorney might seek to remove a prospective juror
because of an antiquated belief that a member of the prospective juror’s racial group
must be or probably is unable to adequately serve as a juror due to insufficient
integrity, intelligence, or judgment. See, e.g., Norris v. Alabama, 294 U.S. 587, 598-99, 55 S. Ct. 579, 79 L. Ed. 1074 (1935); Neal v. Delaware, 103 U.S. (13 Otto) 370, 402, 26 L. Ed. 567 (1880) (Field, J., dissenting). As another example, an attorney
might challenge a prospective juror due to a belief that a member of the prospective
juror’s racial group necessarily or probably has a certain belief, opinion, or value that
renders the prospective juror relatively unfavorable. See, e.g., Howard v. Senkowski, 986 F.2d 24, 25 (2d Cir. 1993) (prosecutor believed that the fact that prospective jurors were black “made them sympathetic to the defendant”); McCormick v. State, 803 N.E.2d 1108, 1111 (Ind. 2004) (prosecutor speculated that prospective juror would find it difficult passing judgment against a member of his own racial group); Frederick, supra, at 23-24. Straightforward racial stereotypes also can involve a synthesis of multiple characteristics, only one of which is race. See Leahy v. Farmon, 177 F. Supp. 2d 985, 997 (N.D. Cal. 2001) (“My experience is that native Americans who are employed by the tribe are . . . somewhat suspicious of the system.”); Payton v. Kearse, 329 S.C. 51, 55-56 & n.1, 495 S.E.2d 205 (1998) (party using peremptory challenge against alleged “redneck” was “sterotyp[ing] a subgroup of the white race”); Owens v. State, 531 So. 2d 22, 24 (Ala. Crim. App. 1987) (stereotype involving age, single status, and race). Various straightforward racial stereotypes and generalizations remain prevalent today. See STARR & MCCORMICK, supra, at 17-4 (“Given the strength of the beliefs people, including trial lawyers, assign for the effect of race on decision-making, it is nearly impossible to convince them that in many cases, race plays a far less significant role than expected.”); Alafair S. Burke, Prosecutors and Peremptories, 97 IOWA L. REV. 1467, 1468 & n.2 (2012).

Second, a peremptory challenge can be based on a simple or complex statistical juror profile that incorporates race as an indicator of favorability. It appears to be common practice today to track race as a relevant demographic characteristic in
developing statistical juror profiles. See STARR & MCCORMICK, supra, at 7-6, 7-35, 17-19; DONNER & GABRIEL, supra, at 6-23; GOBERT & JORDAN, supra, at 82; ABBOTT, supra, at 13, 48-50. Race currently does correlate, at least roughly, to various beliefs, opinions, and values held in our society. See, e.g., STARR & MCCORMICK, supra, at 16-23, 17-5 (noting for example that “people of color are twice as likely as whites to believe that ‘race relations in the United States are poor’”); see also Matt Haven, Reaching Batson’s Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 97, 97 (2011). But the modern view among at least some jury consultants is that in jury selection today, “[r]ace almost never profiles, except in cases specifically referring to racial issues” and “[r]ace seems to be an ever decreasing factor in determining reactions to case issues.” STARR & MCCORMICK, supra, at 16-3; see also DONNER & GABRIEL, supra, at 1-6 to 1-7. Race no longer regularly “profiles” in part because jury consultants have begun identifying other characteristics in each case—primarily life experiences—they believe to be far more predictive of whether a prospective juror is favorable. STARR & MCCORMICK, supra, at 16-3, 17-4 to 17-6. At the same time, attorneys remain skeptical and resistant to the notion of excluding race from consideration as a potential indicator of favorability. See id. at 7-6, 17-4; cf. ABBOTT, supra, at 2 (noting prior “widespread agreement that demographic and social characteristics . . . are likely to determine values which affect the responses of jurors
to the case”). Further, most attorneys do not have the time or resources to have consultants identify the particular life experiences that might be more effective at indicating favorability in a given case. See id. at 16-6 to 16-8, 16-21 to 16-26; GOBERT & JORDAN, supra, at 105; Stevenson, supra, at 1654 n.39; cf. ABBOTT, supra, at 49 (race included in universal profiler). The use of race in statistical juror profiling remains an ongoing practice.

Third, a peremptory challenge can be based on the desire to obtain a particular racial dynamic on the jury as a whole. See, e.g., Miesner v. State, 665 So. 2d 978, 980-81 (Ala. Crim. App. 1995) (prosecutor “wanted a balanced jury” and thus “wanted some white people on the jury” (some emphasis omitted)). Although the common “tendency in selecting a jury is to consider each juror on his or her individual merits,” the more sophisticated attorneys, and particularly those employing social science methods, also consider group dynamics. GOBERT & JORDAN, supra, at 451, 456; see Frederick, supra, at 155-57. But when an attorney uses a peremptory challenge in an attempt to obtain a particular group dynamic with regard to race, the attorney is engaging in a distinct form of racial discrimination.

Finally, a peremptory challenge can be based on unconscious racial bias. In other words, race can subconsciously motivate a peremptory challenge that the attorney genuinely believes is race-neutral. See lead opinion at 13-17. As one example among many, an attorney might exercise a peremptory challenge based solely on his “gut feeling,” unaware that the race of the challenged juror caused or
substantially contributed to the gut feeling. As another example, an attorney might believe that the basis of her challenge is a prospective juror’s answer to a particular question, unaware that she would neither have asked the question nor have brought the challenge against that prospective juror had he been of a different race. In such circumstances, the challenge is motivated at least in part by underlying racial bias, and thus, is racially discriminatory.

The racially discriminatory use of peremptory challenges is occurring regularly throughout this state. Even after *Batson*, substantial portions of lawyers, judges, and court personnel throughout Washington observed that, to varying degrees, attorneys “use peremptory challenges systematically to eliminate minorities from juries.” *Washington State Minority and Justice Task Force, Final Report* 45, 52, 216, 218, 220, 226-27, 234, 240 (Dec. 1990), *available at* http://www.courts.wa.gov/committee/pdf/TaskForce.pdf. Most concerning is that a full 42.6 percent of surveyed lawyers reported that prosecutors in Washington either “sometimes” or “often” use peremptory challenges to systematically exclude minorities from juries. *See id.* at 226. This collective observation cannot be brushed aside and is not surprising given the degree to which racial stereotypes and generalizations are relied upon in jury selection generally and in the use of peremptory challenges specifically. It would be naïve to think that trial attorneys have abandoned all race-related lore or completely excluded race as a factor when applying social-scientific methods to jury selection. *See, e.g.*, Michael E. Withey, *The* 

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Importance of Connecting with the Jury, in THE JURY: LATEST TECHNIQUES FOR SELECTING AND PERSUADING JURIES 2, 2-3 (Wash. State Trial Lawyers Ass’n, Continuing Legal Educ. May 16, 2001) (on file with the Washington State Law Library) (set of legal education materials provided to lawyers throughout Washington explaining the concept of a jury survey and noting that “[m]ost surveys will test attitudes toward issues by certain demographic characteristics, including gender, age, [and] race”). Race continues to play a significant role in the use of peremptory challenges in Washington.

Evidence from other jurisdictions confirms that racial discrimination in the use of peremptory challenges is widespread. Numerous studies in other states have consistently and uniformly shown a significant influence of race on the use of peremptory challenges in actual practice. Racial disparities in peremptory usage have been documented in the courts of Alabama, Georgia, Illinois, Louisiana, North Carolina, Pennsylvania, and Texas. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010) (noting studies finding substantial racial disparities in peremptory usage in Alabama, Georgia, and Louisiana); Catherine M. Grosso & Barbara O’Brien, A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 IOWA L. REV. 1531, 1538-40 & n.55 (2012) (discussing studies of peremptory challenge usage finding racial disparities in Illinois, Louisiana, North Carolina, Pennsylvania, and Texas). Many of these studies have found that
even after controlling for numerous other potentially relevant factors, race remains highly determinative of peremptory usage. See GROSSO & O'BRIEN, supra, at 1533, 1547, 1552-54 (review of capital trials in North Carolina finding that even after controlling for 65 other variables, “a black venire member had 2.48 times the odds of being struck by the state as did a venire member of another race”); STARR & MCCORMICK, supra, at 17-7 to 17-8 (discussing a comprehensive review of criminal trials in Dallas finding widespread racial disparities and also finding that “no factor reduced the importance of race” (quoting Steve McGonigle et al., Jurors’ Race A Focal Point For Defense: Rival Lawyers Reject Whites at Higher Rate, THE DALLAS MORNING NEWS, Jan. 24, 2006)); David C. Baldus et al., The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis, 3 U. PA. J. CONST. L. 3, 46, 60, 72, 121 (2001) (review of Philadelphia capital murder cases finding that even after controlling for numerous variables “venire member race was a major determinant in the use of peremptories”).

Laboratory studies provide even further evidence that racial discrimination underlies the use of peremptory challenges. In one recent study, attorneys were presented with a criminal trial scenario along with descriptions of two prospective jurors and were instructed to decide as a prosecutor which of the two prospective jurors to challenge peremptorily. See Samuel R. Sommers & Michael I. Norton, Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure, 31 LAW & HUM. BEHAV. 261,
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266-67 (2007). In one condition, the first prospective juror was depicted as white and the second prospective juror as black; in a second condition, the races were reversed but the underlying information remained the same. *Id.* When the first profile was black, attorneys chose to challenge that prospective juror 79 percent of the time; when that same profile was white, attorneys challenged that prospective juror only 43 percent of the time. *Id.* at 267. Likewise, when the second profile was depicted as black, attorneys challenged that prospective juror 57 percent of the time; when that same profile was white, attorneys challenged that prospective juror only 21 percent of the time. *Id.* Thus the attorneys, acting as prosecutors, were significantly more likely to challenge a juror profile when it was depicted as a black prospective juror as opposed to a white prospective juror, all else being equal. The experimenters also found similar effects among college students and law students. *Id.* Further, the experimenters asked each participant to explain his or her choice of whom to strike. A full 96 percent of participants cited relevant underlying substantive information from either profile as “their most important justification,” and only 8 percent of the attorneys (and an even smaller proportion of college students and law students) cited race as being influential at all. *Id.* at 267-68 (explaining that respondents “cited as their most important justification either Juror #1’s familiarity with police misconduct or Juror #2’s skepticism about statistics”). The experimenters rightly concluded that their study “provides clear empirical evidence that a prospective juror’s race can influence peremptory challenge use and that self-report justifications are unlikely to
be useful for identifying this influence . . . .” *Id.* at 269. The experimenters also noted that the findings “are strikingly similar in direction as well as magnitude to conclusions of archival analyses of real peremptory use.” *Id.* (citations omitted).

Other laboratory studies have found similar effects of race on the use of peremptory challenges. *See* GROSSO & O’BRIEN, *supra*, at 1536-38 (discussing studies).

Case-by-case adjudication and appellate review under *Batson* cannot effectively combat the widespread racial discrimination that underlies the use of peremptory challenges throughout this state, and thus, such racial discrimination will continue unabated under our current framework. *Batson* requires a complaining party to make a prima facie case of unlawful discrimination, and whenever such a prima facie case has been made, *Batson* requires the proponent of the challenge to identify his or her reasons. *See* lead opinion at 9. If the proponent’s alleged reasons are lawful, the trial court then must adjudicate whether the challenge is in fact unlawfully discriminatory, and that determination will be reversed on appeal only if it is clearly erroneous. *See* lead opinion at 9-10, 22-23. For numerous reasons, this framework has been and will continue to be largely ineffective at combating racial discrimination in the use of peremptory challenges in Washington.

First, many racially discriminatory peremptory challenges remain unchallenged and are never subjected to judicial review. In some such cases, the presence of racial discrimination remains entirely imperceptible to the opposing party and trial judge, and thus, no objection is raised and the issue is never addressed. Even when racial
discrimination becomes sufficiently apparent to warrant an objection, opposing parties often decide not to object. See STARR & MCCORMICK, supra, at 17-15, 17-18, 17-19 (reporting results of a nationwide survey of trial attorneys, including Washington attorneys); EQUAL JUSTICE INITIATIVE, supra, at 6. Some attorneys are concerned about alienating other prospective jurors or upsetting opposing counsel or the judge; others do not have strong feelings about keeping the challenged prospective juror on the venire and thus accept the peremptory challenge; still others will not raise an objection unless the racial discrimination is already sufficiently obvious to satisfy a demanding trial judge; and some attorneys do not raise a Batson objection because they are engaging in racial discrimination themselves. See STARR & MCCORMICK, supra, at 17-18 to 17-19 ("'What’s good for the goose is good for the gander. We’re taking off one race as fast as they can take off the other. If we challenge them, they will challenge us.'" (quoting survey answers)). Trial judges overseeing such cases might remain unaware of the appearance of racial discrimination or might simply want to avoid inviting substantial complications and administrative costs when no party has objected and judicial review probably would be fruitless. All of this remains deeply concerning, however, because racial discrimination in the use of peremptory challenges harms not only litigants but also “the excluded jurors and the community at large.” Powers v. Ohio, 499, U.S. 400, 406, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Under our current framework, many racially discriminatory peremptory challenges evade review entirely.
Second, even if an objection is made, plausible race-neutral reasons are quite easy to conjure up in any given case, regardless of whether the peremptory challenge is actually based on racial discrimination and regardless of whether such racial discrimination is conscious or unconscious. See, e.g., STARR & MCCORMICK, supra, at 17-11 (quoting one forthright prosecutor as saying, “Very frankly, any attorney worth his salt can make up something to get over a Batson challenge. And, literally, [prosecutors] do make it up. We do.” (alterations in original) (quoting McGonigle, et al., supra); SOMMERS & NORTON, supra, at 263 (“Many researchers have demonstrated that people can offer compelling explanations for their behavior even when unaware of the factors—such as race—that are actually influential.”)). Attorneys are trained to identify distinctions and to provide explanations for conduct. To overcome a Batson challenge based on alleged racial discrimination, an attorney merely has to “be careful not to give a reason that also [applies to a prospective juror of another race] against whom [the attorney does] not exercise a peremptory.” Nancy S. Marder, Batson Revisited, 97 IOWA L. REV. 1585, 1591 (2012); see also, e.g., People v. Randall, 283 Ill. App. 3d 1019, 1025-26, 671 N.E.3d 60 (1996) (deriding “the charade that has become the Batson process,” noting that “[t]he State may provide the trial court with a series of pat race-neutral reasons,” and citing numerous cases involving a slew of such reasons). Proffered reasons sometimes involve subtle observations about a prospective juror’s appearance or demeanor, which are easily alleged but often extremely difficult to scrutinize. See EQUAL JUSTICE INITIATIVE,
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supra, at 18; Marder, supra, at 1591-92. Further, race often will be one of many factors actually motivating a challenge, and thus, race-neutral reasons will be readily available to be included in a true but incomplete explanation. See SOMMERS & NORTON, supra, at 269. It would be naïve to think that attorneys do not rely on readily available and plausible race-neutral reasons to circumvent Batson. Under our current framework, plausible race-neutral reasons remain readily available and regularly invoked.

Third, there usually is no way for a trial court to accurately and reliably determine whether a given peremptory challenge is racially discriminatory. As noted above, proffered race-neutral reasons are almost always plausible, but not always real or comprehensive. The circumstances surrounding a given challenge usually will not resolve the inquiry, and trial judges may be hesitant to question the integrity or self-awareness of counsel. See lead opinion at 20. Further, social science research tells us that trial judges generally are unable to accurately and reliably determine credibility based on demeanor alone, regardless of their confidence in doing so. See, e.g., Paul Ekman & Maureen O’Sullivan, Who Can Catch a Liar?, 46 AM. PSYCHOLOGIST 913, 913-17 (Sept. 1991) (experimenters presented video clips of individual persons describing feelings about a movie each was allegedly watching; trial judges performed only slightly better than chance in determining who was lying about watching the movie, and confidence was not correlated to performance); see also, e.g., Saul M. Kassin, Human Judges of Truth, Deception, and Credibility: Confident But
Erroneous, 23 CARDOZO L. REV. 809 (2002). In addition, trial courts generally do not have the time or resources to review the record in-depth or to conduct statistical analysis prior to resolving a Batson objection. Such a review of the record rarely would provide clarity anyhow. Cf. SOMMERS & NORTON, supra, at 269 ("We observed bias against Black venire members only when examining decisions made by several participants; indeed, for any given participant, we are unable to determine whether the peremptory was influenced by race or whether the justification provided was valid. Only in the aggregate does evidence of racial bias emerge . . ."). Under our current framework, trial courts cannot reliably identify individual instances of racial discrimination in the use of peremptory challenges.

Fourth, there is no way for appellate courts to provide sufficiently meaningful review on appeal. An appellate court is in an even worse position than the trial court to determine whether a particular peremptory challenge was racially discriminatory. Although an appellate court can conduct a searching review of the cold record and undertake statistical analysis as appropriate, see lead opinion, App. A, such review rarely will provide an answer. Even if the appellate court’s searching review uncovers inconsistencies between the race-neutral explanation and the proponent’s treatment of other prospective jurors, the comparable characteristics of the other prospective jurors might have escaped not only the notice of the trial court but also the notice of the attorney, who was faced with the complexities and pressures of navigating voir dire and jury selection. It will be difficult if not impossible to determine whether the
attorney overlooked a comparable juror while crafting a post hoc explanation for the challenge or instead, overlooked that same comparable juror when invoking the challenge in the first place. Under our current framework, appellate review remains in effectual.

Finally, too many unanswered questions remain under Batson, which will continue to cause much confusion and impose substantial litigation costs, all without addressing the underlying problem. See, e.g., DONNER & GABRIEL, supra, at 23-30 ("Since Batson was decided, the trial and appellate courts have struggled with the scope of its application."). For example, it remains unclear exactly which groups are to be protected from discrimination in jury selection. To date, the United States Supreme Court has applied the Batson framework only to discrimination “on the basis of race, ethnicity, or sex.” Rivera, 556 U.S. at 153. The extent to which such protection extends to other groups remains to be determined. See, e.g., DONNER & GABRIEL, supra, at 3-17 to 3-18, 23-46 (age, disability, religion); Mary A. Lynch, The Application of Equal Protection to Prospective Jurors with Disabilities: Will Batson Cover Disability-Based Strikes?, 57 ALB. L. REV. 289 (1993) (disability); Kathyne M. Young, Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire, 48 WILLAMETTE L. REV. 243 (2011) (sexual orientation); Maggie Elise O’Grady, A Jury of Your Skinny Peers: Weight-Based Peremptory Challenges and the Culture of Fat Bias, 7 STAN. J. C.R. & C.L. 47 (2011) (weight); Note, Due
As a second example, it remains unclear how to determine whether a prima facie case has been established, and in particular, how that determination should be reviewed on appeal. The United States Supreme Court has explained that a prima facie case is established whenever the circumstances "permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). The Court in *Johnson* emphasized that trial courts should not be "engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.* at 172, 173. Thus, it would appear that a trial court’s discretion is relatively limited at the first step of the *Batson* inquiry: technically, discrimination is inferable any time that the eventual composition of the jury could change in a relevant way as a result of the disputed challenge. But the Court in *Johnson* did not explicitly spell out such a lenient standard, and in dicta we have since interpreted the prima facie case requirement as being more demanding and have emphasized that the trial court’s determination at step one of *Batson* is discretionary. *See State v. Thomas*, 166 Wn.2d 380, 397-98, 208 P.3d 1107 (2009); *State v. Hicks*, 163 Wn.2d 477, 490-93, 181 P.3d 831 (2008).

Understandably, we have had some difficulty determining the precise outer limits of that discretion, *see State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010), and such struggles are bound to continue under our current framework with no end in sight, *see,*
As a third example, it remains unclear just how direct or substantial the influence of race must be in order to render a peremptory challenge racially discriminatory under *Batson*. Mere reliance on "statistical support" does not immunize a peremptory challenge from attack, and any attorney using peremptory challenges must "look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination."


But if a detailed and complex statistical juror profile includes race among a wide variety of other factors, is a resulting challenge necessarily racially discriminatory under *Batson*? What if the attorney would have challenged the same prospective juror even if the prospective juror’s race had not matched the complex and otherwise matching profile? Or more generally, what if the attorney has two separate and independently sufficient reasons for the challenge, only one of which is based on race? See Kurtis A. Kemper, Annotation, *Adoption and Application of “Tainted” Approach or “Dual Motivation” Analysis in Determining Whether Existence of Single Discriminatory Reason for Peremptory Strike Results in Automatic Batson Violation When Neutral Reasons Also Have Been Articulated*, 15 A.L.R.6TH 319 (2012). What if the attorney investigates race but race does not end up as a factor on the eventual statistical profile used? Or what if the attorney considers the potential significance of
race in order to identify other relevant characteristics that eventually guide her peremptory usage? Cf. STARR & MCCORMICK, supra, at 16-25 ("[L]ook at race and its subcategories and at the case issues to identify any life experience or attitude that might cause concern in jury selection.” (emphasis omitted)). What if, based on a statistical profile, an attorney focuses some of his voir dire questioning on members of a particular race, and then unearths compelling race-neutral reasons to challenge some of them, as predicted by the profile? These questions all reflect the complex nature of peremptory challenges in actual practice and present difficulties that our current framework may not be equipped to handle.

As a final example, it remains unclear whether unconscious racial discrimination is prohibited under Batson. See lead opinion at 19-20 & n.8. Unconscious racial discrimination is extremely inequitable, harmful, and unjust—but also fairly ubiquitous and relatively blameless at an individual level. Unconscious bias is not easily deterred, because the biased individual is not aware of its presence. Further, it is nearly impossible for any observer to identify the presence of unconscious bias in any particular instance. See, e.g., SOMMERS & NORTON, supra, at 269. That said, if peremptory challenges based on unconscious racial bias are prohibited, and if trial courts are made aware of the prevalence of unconscious bias in general, they might be relatively more likely to scrutinize proffered race-neutral explanations and to fully appreciate the potential presence of racial discrimination in the use of peremptory challenges. See lead opinion at 21. Still, any gains would be
modest at best. And regardless, the distinction between conscious and unconscious bias would remain largely irrelevant on appeal, because circumstantial evidence of unconscious bias and circumstantial evidence of conscious bias generally is the same evidence, and only in the rarest of cases will a finding of unconscious bias (or lack thereof) be compelled while a finding of conscious bias (or lack thereof) is not. It should be clear by now that unconscious bias is simply one problem among many. Focusing on any such secondary problem simply distracts from the overarching need to abolish peremptory challenges entirely.

In sum, our current framework will continue to engender confusion and needless administrative and litigation costs, while racial discrimination in the use of peremptory challenges—both conscious and unconscious—continues unabated.

4. The Additional Costs of Peremptory Challenges

The use of peremptory challenges is harmful in this state not only because of the ongoing racial discrimination involved, but also because of a wide variety of other resulting injustices—with no substantiated benefits. In particular, the use of peremptory challenges contributes to the historical and ongoing underrepresentation of minority groups on juries, broadly increases administrative and litigation costs, results in less effective and less socially beneficial juries, and amplifies resource disparities in litigation. On the other hand, the use of peremptory challenges produces no substantiated systemic benefits.
First, the use of peremptory challenges contributes to the underrepresentation of minority groups on juries, even in the absence of purposeful discrimination. Racial minorities in particular are underrepresented on juries for a wide variety of reasons, including the use of peremptory challenges. See, e.g., HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 3-4, 34, 40-42 (1993) (collecting studies and identifying various causes that have a "cumulative effect"); WASHINGTON STATE CENTER FOR COURT RESEARCH, JUROR RESEARCH PROJECT: REPORT TO THE WASHINGTON STATE LEGISLATURE 5-6, 18 (Dec. 24, 2008) (showing underrepresentation of various racial minorities in jury pools in Clark, Des Moines, and Franklin counties), available at http://www.courts.wa.gov/wsccr/docs/Juror%20Research%20Report%20Final.pdf. This ongoing underrepresentation reflects a history of complete exclusion from jury service and subsequent resistance to efforts at inclusion. See Rosencrantz, 2 Wash. Terr. at 278 (Turner, J., dissenting) (noting that "trial by jury at common law" required "free and lawful men" as jurors, and "if he be a slave or bondman, this is defect of liberty"); James Forman, Jr., JURIES AND RACE IN THE NINETEENTH CENTURY, 113 YALE L.J. 895, 910 (2004) ("It is believed that 1860 was the first year in which African Americans served on juries, in either the North or the South."); Fukurai et al., supra, at 14-15 ("Over the next 100 years, litigated cases overwhelmingly viewed blacks as inferior, and this inferiority was ensured by structural conditions imposed in the jury selection process to limit the number of black jurors."). More recently, the
Washington State Jury Commission reported that there remains in Washington "a perception that jury service has been reserved for certain segments of our society," which "increases alienation of the excluded segments and increases resentment by those who [believe] they are summoned too many times." Washington State Jury Comm'n, Report to the Board for Judicial Administration 3 (July 2000), available at http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf. The commission concluded that "special efforts should be made to increase participation in jury service by sectors of society that traditionally have not participated fully, particularly young people and minority communities." Id. Yet the use of peremptory challenges only contributes to the recognized and continuing underrepresentation of minority groups. Each peremptory challenge leveled against a member of a minority group has a relatively greater exclusionary effect because each such challenge removes a greater percentage of that minority group from jury service. Further, many characteristics or life experiences that attorneys perceive as unfavorable, but which do not render a prospective juror unqualified for service, may be relatively more common (or seen as more common) among various minority groups. See, e.g., Grosso & O'Brien, supra, at 1541 & n.63 (noting that striking all persons with a relative in prison could disproportionately exclude racial minorities). Especially when combined with ongoing racial discrimination, these factors show that peremptory challenges are a powerful contributor to the ongoing underrepresentation of minority groups on juries.
Second, peremptory challenges impose substantial administrative and litigation costs. More prospective jurors must be called upon to appear for service, disrupting the lives of many who never actually serve on a jury. Litigants spend much time and money determining how best to exercise peremptory challenges, not in order to ensure the constitutional requirement of an impartial jury, but rather to obtain as favorable a jury as possible. See, e.g., Stevenson, supra, at 1654 n.39 (noting the exorbitant cost of jury consultation). Further, courts and litigants continue to spend inordinate amounts of time and money, both at trial and on appeal, adjudicating myriad claims and arguments under the generally unwieldy and ineffective Batson framework. Allowing the use of peremptory challenges imposes all of these costs on our justice system.

Third, peremptory challenges result in juries that are less effective and less productive. Allowing the use of peremptory challenges tends to exclude people with diverse viewpoints and experiences who are qualified to serve as jurors. See, e.g., Gobert & Jordan, supra, at 272. Yet inclusion and diversity should be considered extremely important goals of the jury system at a systemic level, in addition to the fundamental requirement of impartiality. See Washington State Jury Comm’n, supra, at 3. As the lead opinion rightly points out, such inclusion and diversity is highly beneficial, advancing fairness and the appearance of fairness, and promoting more effective and reflective juries. See lead opinion at 17-18; see also Marder, supra, at 1604 & nn.119-21 (“[T]hey can correct each other’s mistaken notions,
broaden each other's perspectives, and suggest different ways of looking at the evidence.”). Increased diversity and inclusion on juries also has the potential to motivate civic engagement in the community. See Andrew E. Taslitz, The People’s Peremptory Challenge and Batson: Aiding the People’s Voice and Vision Through the “Representative” Jury, 97 IOWA L. REV. 1675, 1709-10 (2012) (discussing “one of the largest studies on juries and democracy”). Allowing the use of peremptory challenges takes us further away from the important goals of inclusion and diversity.

Fourth, the use of peremptory challenges amplifies underlying resource disparity among litigants in a way that brings fundamental fairness into question. This problem arises because thorough jury consultation is quite expensive and available only to wealthy litigants. See, e.g., Strier & Shestowsky, supra, at 474-76. Although the actual efficacy of jury consultation is somewhat dubious, insofar as even a modest advantage can be obtained in the use of peremptory challenges, the result is a potentially slanted jury and a widening of “the already-substantial advantage of the wealthy.” Id. at 463-64, 474. Such an imbalance in jury selection is especially antithetical to the notion of an impartial jury and “creates an untoward public perception of the jury being manipulated by psychological devices, in essence, high-tech jury tampering.” Id. at 472-73 (footnote omitted); see also STARR & MCCORMICK, supra, at 5.1-34; GOBERT & JORDAN, supra, at 118, 453. Normally, resource disparity affects each side’s ability to convince the adjudicator of its position,
not the ability to select the adjudicator in the first place. The latter is a far more fundamental, and in this context an entirely avoidable, problem.

In stark contrast to the numerous and substantial harms resulting from the use of peremptory challenges, the procedure has no material benefits. Various benefits have been identified in theory, but these alleged benefits remain unsupported, specious, or de minimis and clearly outweighed by related costs. See, e.g., Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 812-13 (1997) (“Although there is no shortage of academic and judicial generalizations about the importance of the peremptory challenge, there have been remarkably few efforts to articulate precisely why the peremptory challenge is so important.” (footnote omitted)).

The primary benefit alleged to result from the use of peremptory challenges is jury impartiality. But as already discussed, attorneys use peremptory challenges to exclude unfavorable jurors, not to obtain an impartial jury. Peremptory challenges are used to remove prospective jurors who are qualified but who the attorney believes will be relatively unfavorable in what is probably a close case. This has nothing to do with furthering impartiality in our justice system.

Moreover, peremptory challenges are generally ineffective even for the adversarial purpose of excluding unfavorable jurors. Regardless of their intentions, and notwithstanding attorneys’ collective confidence in their own ability to identify unfavorable or secretly partial jurors, studies of actual peremptory usage show that
attorneys generally are ineffective at doing so, and laboratory experiments confirm
that finding. See Raymond J. Broderick, Why the Peremptory Challenge Should Be
Abolished, 65 TEMP. L. REV. 369, 413 (1992) (citing studies); Marder, supra, at 1596-
98 (same).

In one preeminent study of actual peremptory usage in real criminal trials,
prospective jurors who were removed by peremptory challenge were then formed into
shadow juries to observe the trials from which they had been excused. See Hans
Zeisel & Shari Seidman Diamond, The Effect of Peremptory Challenges on Jury and
Verdict: An Experiment in a Federal District Court, 30 STAN. L. REV. 491, 498-500
(1978). The experimenter were then able to determine whether the attorneys had
reliably excused those jurors who would have voted against them entering
deliberations. See id. at 513-18. The results were “not impressive.” Id. at 517.
Overall, “attorney performance was highly erratic,” with substantial fluctuations from
one case to the next. Id. In the aggregate, prosecutors “made about as many good
challenges as bad ones,” defense counsel fared only “slightly better,” and the results
brought into question “the role of peremptory challenges in furthering the
constitutionally prescribed goal of trial by an impartial jury.” Id. at 517-18.

In another prominent experiment, a mock criminal trial was first conducted and
then numerous practicing attorneys (primarily prosecutors and defense counsel asked
to take up their usual roles) were presented with video of the voir dire. See Norbert L.
Kerr et al., On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial
Pretrial Publicity: An Empirical Study, 40 AM. U. L. REV. 665, 672-79 (1991). The attorneys then reported "how likely they were to use a peremptory challenge" on individual prospective jurors, estimated "which way the juror[s] would lean in the trial," and then were asked to guess how many of their own predictions were correct. Id. at 677-78. The attorneys reported that the simulation was fairly realistic. See id. at 679. But a comparison of attorney ratings to actual juror performance in the mock trial found that "defense attorneys would have done no worse in exercising their peremptory challenges had they simply flipped coins," while prosecutors' ratings "were weakly, but only marginally, correlated with juror behavior," and both groups "grossly overestimated their actual rate of success." Id. at 685, 688-89.

These results should not be surprising. As noted, most lawyers rely on intuition, lore, and anecdotal experience in exercising peremptory challenges. But in practice attorneys rarely if ever can actually confirm the effectiveness of their decisions concerning peremptory challenges. Thus, anecdotal experience and lore in this context are based on nothing more than intuition, which is entirely arbitrary, erratic, and unreliable without any sort of regular experiential validation. See Marder, supra, at 1596-97. Over time, well-established psychological tendencies—such as confirmation bias (the tendency to look for confirmation but not falsification of our hypotheses) and selective information processing (the tendency to readily accept confirming evidence but devalue contradictory evidence)—likely entrench attorneys' preexisting biases, including closely held racial stereotypes and generalizations, and
give attorneys false confidence in the effectiveness of their decisions concerning peremptory challenges. See, e.g., Burke, supra, at 1480-81.

Even the use of jury consultation shows only mixed results, probably because of the various subjective judgments that must be made and the unreliability of using superficial statistical analysis to make individual judgments about complex human beings. See supra, pp. 20-21. And insofar as jury consultation actually can provide a modicum of relative advantage to a litigant, it remains available only to the most wealthy, and thus, works against fairness and impartiality rather than for it.

The notion that impartiality is furthered by allowing litigants to exercise arbitrary and unsupported juror challenges, based on nothing more than whim or generalization, is a farce. We must recognize that it is difficult if not impossible to detect juror bias except in clear cases, that most biases do not render jurors unqualified, and that the solemnity of the proceedings and substance of deliberations will help to ensure just verdicts from our juries. See Marder, supra, at 1601-06; DONNER & GABRIEL, supra, at 10-18; Taslitz, supra, at 1709-10. If there is sufficient evidence that a juror is unqualified, that evidence should be presented to the trial court and ruled upon. Otherwise, the juror should be allowed to serve.

The remaining arguments in support of peremptory challenges fare no better. For example, some have argued that the peremptory challenge “provides a ready corrective for errors by a judge in refusing to grant a challenge for cause.” GOBERT & JORDAN, supra, at 217. Yet a trial judge refusing to grant a challenge for cause
abuses his or her discretion only if the juror’s partiality is abundantly clear, which will be relatively rare, and an abuse of discretion in such circumstances will be rarer still. If appropriate, the standards governing challenges for cause can be addressed directly. But allowing litigants to make unsupported and arbitrary challenges to prospective jurors in order to avoid the mere potential for unreasonable decisions by our trial courts would be senseless.

Others have seen potential value in peremptory challenges as a way to “remove a juror whom [the attorney] has offended by a probing voir dire or by an unsuccessful challenge for cause . . . .” Ginger, supra, at 1054 n.16. But this argument assumes that attorneys must alienate prospective jurors in order to conduct effective voir dire, which is false. Any relevant concerns can be adequately addressed with questioning from the trial court, more delicate questioning or ingenuity from the attorneys, or proceedings outside the presence of the jury, when appropriate. Regardless, both sides remain on equal footing, and the attorneys can be expected to effectively navigate the process. Even if an attorney happens to alienate a prospective juror during voir dire, an alienated juror is not necessarily biased to any material degree.

Similarly, some have noted that allowing peremptory challenges permits “attorneys to choose jurors about whom they feel comfortable,” thus allowing the attorneys to be more effective advocates. GOBERT & JORDAN, supra, at 272. But someone who works as a trial advocate should be able to overcome performance anxiety, and any subtle increase in attorney discomfort in a given case is of no
moment. Again, both sides remain on equal footing, and attorneys can be expected to advocate effectively—even before jurors whom they perceive as hostile.

Still others have advocated for peremptory challenges on the ground that parties are "consequently more likely to be accepting of the jury’s verdict." GOBERT & JORDAN, supra, at 271. But allowing causal challenges provides litigants more than enough involvement in jury selection and adequately ensures fairness and impartiality. The argument also ignores that peremptory challenges interfere with the appearance of fairness in numerous respects, are essentially capricious, and engender disrespect for the legal system in part due to the ongoing presence of racial discrimination and underrepresentation of minority groups on juries. See, e.g., EQUAL JUSTICE INITIATIVE, supra, at 28-30; Marder, supra, at 1609 & n.144; James H. Coleman, Jr., The Evolution of Race in the Jury Selection Process, 48 Rutgers L. Rev. 1105, 1108 (1996); WASHINGTON STATE JURY COMM’N, supra, at 3.

Yet another argument in favor of peremptory challenges is that without them attorneys will spend more time asserting and arguing causal challenges, thus increasing administrative and litigation costs. But attorneys already have more than enough incentive to argue causal challenges whenever possible, in order to conserve the limited number of peremptory challenges available to them. Further, attorneys are able to raise causal challenges only when there is some objective reason to believe that a juror cannot be impartial, and trial courts can easily control the process to avoid unnecessary costs and delays. This argument also ignores the relatively greater costs
that peremptory challenges impose, including the need to call more prospective jurors who never serve, the needless time and money litigants spend on determining how to exercise peremptory challenges, and the ongoing costs of litigating the *Batson* framework.

A final argument in favor of peremptory challenges is that they prevent extremists from getting onto juries and thus, avoid more hung juries and the need for costly retrials. But true extremists are excused for cause if there is evidence to establish their extremism, and if such extremism remains hidden, the unreliable and inaccurate use of peremptory challenges will fare no better at removing the extremism from the jury. Moreover, the solemnity of the proceedings and the substance of deliberations might help to overcome the initial presence of extremism on the jury. In any event, hung juries are relatively rare, notwithstanding the fact that most trials present close cases. See *Paula L. Hannaford-Agor et al., Are Hung Juries a Problem?* 25 (National Center for State Courts, National Institute of Justice, 2002) (finding average hung jury rate of 6.2 percent in 30 jurisdictions across the United States), *available at*


In sum, the substantial costs of allowing the use of peremptory challenges are numerous, well-established, and deeply concerning, while the alleged benefits are unsupported, specious, or de minimis.
5. A Brief History of the Peremptory Challenge

The case for abolishing peremptory challenges becomes even more compelling after considering the origin of the procedure and its history in Washington.

The peremptory challenge first appeared in England during the 13th century. See William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391, 1412 (2001); see also Hoffman, *supra*, at 817-19. Historians believe that the practice originated in English criminal trials because causal challenges made by the King were deemed royally infallible; in response, criminal defendants were provided with a reasonable number of challenges of their own for which no cause would be required. See Pizzi & Hoffman, *supra*, at 819; Broderick, *supra*, at 371-72; Pizzi & Hoffman, *supra*, at 1412. Others have also suggested that peremptory challenges originally were “actually a kind of shorthand challenge for cause in small English villages and towns, where it was commonplace for . . . cause disqualifications to be obvious to all.” Pizzi & Hoffman, *supra*, at 1412. In either case, “peremptory challenges antedated the notion of jury impartiality by some 200 years . . . .” Id. at 1439. Although the need to offset royal infallibility eventually became outdated, the practice of allowing litigants in each case a limited number of peremptory challenges remained a long standing tradition in England that eventually
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was adopted in the United States without much debate or fanfare. See Hoffman, supra, at 823-25.3

The peremptory challenge was adopted in the Washington Territory shortly after the territory’s formation, without any record of substantive debate on the topic. The first legislature of the territory passed comprehensive codes of civil and criminal procedure, both of which provided for the use of peremptory challenges among myriad other procedural matters. See LAWS OF 1854, at 100-29, 129-221; see also id. at 118, 165. The legislative journals reveal that these comprehensive procedural codes were discussed primarily in legislative committees; both codes were passed swiftly, with only “sundry amendments” made during the legislative process. See HOUSE JOURNAL, 1st Sess., at 71, 73, 77-78, 80 (Wash. Terr. 1854); COUNCIL JOURNAL, 1st Sess., at 134-35, 137, 149, 150-51, 153, 160 (Wash. Terr. 1854). There is no record of any debate or deliberations regarding peremptory challenges. At the

3 Although the peremptory challenge became a long standing tradition in England, the practice was eventually abolished in that country in 1988. See, e.g., Nancy S. Marder, Two Weeks at the Old Bailey: Jury Lessons from England, 86 CHI.-KENT L. REV. 537, 553 & n.50 (2011) (“England had the peremptory and eliminated it, and does not seem any worse off for having eliminated it.” (footnote omitted) (citing Criminal Justice Act, 1988, ch. 33, § 188(1) (Eng.)). The comparison is informative, but it is admittedly imperfect because the English jury system does not strictly require jury unanimity for a guilty verdict. See id. at 579-80 (“After the jury has deliberated for at least two hours and has reported to the judge that it is having difficulty reaching a unanimous verdict, the judge can decide to accept a [super-majority] verdict . . . if there is a vote of 11-1 or 10-2.”). English prosecutors may also use a “standby” procedure that is in effect similar to a peremptory challenge, but prosecutors rarely exercise standbys. Nancy S. Marder, Beyond Gender: Peremptory Challenges and the Roles of the Jury, 73 TEX. L. REV. 1041, 1102-03 & n.262 (1995).
time, racial minorities and women were completely excluded from participation on juries. See Forman, supra, at 910; Aaron H. Caplan, The History of Women's Jury Service in Washington, in WASH. ST. B. NEWS, Mar. 2005, at 13.

The original code provisions from the Washington Territory governing the use of peremptory challenges have remained essentially unchanged and unquestioned from the time they were adopted until now. These procedural provisions were still in place when Washington became a state, at which point they were ostensibly adopted by our state constitution as part of a broad incorporation of territorial laws in force at the time. See CONST. art. XXVII, § 2. The sole substantive alteration to these provisions came in 1969 and related to the number of peremptory challenges available to multiple parties on the same side of a case. See LAWS OF 1969, 1st Ex. Sess., ch. 37, § 1, ch. 41, § 1. There is no record of any related discussion or debate concerning the wisdom of maintaining the peremptory system generally. See, e.g., HOUSE JOURNAL, 41st Leg., Reg. Sess., at 162-63 (Wash. 1969) (debate concerned equal distribution of challenges among parties and extent of judicial review).

In 1973, this court adopted its first set of comprehensive criminal court rules, including a provision allowing for the exercise of peremptory challenges. See former CrR 6.4(a) (1973). The Criminal Rules Task Force, which originally drafted and recommended the rules for adoption, provided substantial commentary and explanation regarding many of its proposed rules. See generally CRIMINAL RULES TASK FORCE, WASHINGTON PROPOSED RULES OF CRIMINAL PROCEDURE (May 15,
Regarding the sole provision allowing for the continued use of peremptory challenges, however, the task force simply cited to the relevant preexisting statutes, without further discussion. See id. at 102. Thus, the use of peremptory challenges in this state was allowed to continue, but once again, without substantive debate or discussion concerning the propriety of the procedure.

It is time to consider whether peremptory challenges actually should be part of our jury selection process.

6. The Need To Abolish: Preventing Constitutional Violations

Peremptory challenges must be abolished in order to put an end to the racial discrimination that underlies their use throughout this state. The exercise of a peremptory challenge based on race violates the constitutional requirement of equal protection of laws. See, e.g., Powers, 499 U.S. at 409. Specifically, a defendant has "the right to be tried by a jury whose members are selected by nondiscriminatory criteria," id. at 404, and a prospective juror has "the right not to be excluded from [a jury] on account of race," id. at 409. Peremptory challenges based on race directly violate these constitutional rights.

As already discussed, judicial review of individual peremptory challenges is ineffective and cannot address the ongoing constitutional violations occurring throughout this state. Because this court has plenary authority over trial procedures, we should abolish peremptory challenges in order to deter those violations.
Abolishing peremptory challenges is constitutionally required, given the need to prevent racial discrimination and the lack of any justification for allowing peremptory challenges. When a given policy creates a systematic risk of racial discrimination, the “question is at what point that risk becomes constitutionally unacceptable.” *Turner v. Murray*, 476 U.S. 28, 36 n.8, 106 S. Ct. 1683, 90 L. Ed. 2d (1986); *McCleskey v. Kemp*, 481 U.S. 279, 308-09, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). The point at which such a risk becomes constitutionally unacceptable obviously depends upon the ostensible justifications and need for the given policy or practice. *Compare McCleskey*, 481 U.S. at 311, 313 (risk that some juries were discriminating in capital sentencing held constitutionally acceptable because of the importance of trial by jury, the need to maintain discretion in the criminal justice system, and the presence of safeguards), with *United States v. Jackson*, 390 U.S. 570, 581-83, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) (policy held unconstitutional, regardless of intent, because it posed risk of chilling the exercise of basic constitutional rights and did so “needlessly”). In this case, the policy of allowing peremptory challenges creates a substantial risk of racial discrimination, has the “inevitable effect” of excluding some citizens from jury service on the basis of race, and has no substantiated benefits. *Jackson*, 390 U.S. at 581. There is simply no need for litigants to be able to exclude prospective jurors without reason. But we need not even decide whether the policy of allowing peremptory challenges is unconstitutional.
in itself because our plenary authority in this area already obliges us to abolish peremptory challenges in pursuit of justice.

7. The Need To Abolish: Preventing Other Injustices

In addition to the need to prevent racial discrimination, this court must abolish peremptory challenges in order to eliminate all of the other substantial costs the practice imposes upon our justice system. The disproportionate exclusion of minority groups from jury service, for example, is of great concern. Jury participation is critically important to the functioning and legitimacy of our government. The use of juries validates the justice system through community participation, provides a check against governmental abuses of power, educates citizens and promotes civic engagement, and promotes integration and mutual understanding across social groups. See Powers, 499 U.S. at 406-07; Taslitz, supra, at 1685, 1687, 1698, 1700, 1709-10 ("A racially diverse jury . . . will [] humble criminal-justice-system leaders and their agents before subordinate group members, who are treated for the moment as full and equal members of the People. In this way, [inclusion] amplifies the egalitarian effects of ocular justice."). All of these purposes are substantially thwarted when minority groups are disproportionately excluded from jury service. Members of excluded groups also can be emotionally harmed, and the appearance of fairness is considerably eroded. See supra p. 48. The elimination of peremptory challenges is also needed to reduce wasteful administrative and litigation costs, to promote more effective juries,
and to prevent the amplification of resource disparity in jury selection. See supra pp. 40-42. To further all of these purposes, we must abolish peremptory challenges.

8. Going Forward

Abolishing peremptory challenges will bring us only one step closer to justice. As a general matter, we must continue to oversee the rules of procedure in this state, ensure that such rules are fair and effective, and see that justice is done in each and every case within our jurisdiction. If we finally abolish peremptory challenges and thus resolve the myriad problems associated that procedure, we should then turn our attention to whether our overarching framework of causal challenges needs improvement or clarification. We should also engage in our formal rule-making process in order to consider additional proposals for improving jury selection, including ways to further the goals of inclusion and diversity.

But we should not leave the current system in place while trying to devise such solutions. The use of peremptory challenges in our legal system has never been shown to be beneficial in any way. In stark contrast, the grave problems the practice causes are ongoing, before us, and must be addressed. Such grave problems will continue even if we begin a formal attempt to devise a better solution. Further, a better solution is highly unlikely to ever appear; numerous alternatives to abolishing peremptory challenges already have been proposed, but none appear promising. See, e.g., Jean Montoya, The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory, 29 U. MICH. J.L. REFORM 981 (1996)
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(proposing entirely written voir dire and peremptory challenges); Jeb C. Griebat,

Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for
Ending the Problem of Racial and Gender Discrimination in Kansas Courts While
Preserving the Necessary Function of the Peremptory Challenge, 12 KAN. J.L. & PUB.
POL’Y 323 (2003) (proposing written questionnaires and peremptory challenges prior
to live voir dire); Brian W. Stoltz, Rethinking the Peremptory Challenge: Letting
(proposing a convoluted “peremptory block system”). Even if we do eventually
identify and adopt a better solution, the current system simply cannot stand and thus,
should not be maintained in the meantime.

If we do not abolish peremptory challenges, we should at least take steps to
augment the effectiveness of the current jury selection process under Batson. For
example, we could require trial courts to conduct questioning directly and to impose a
strict relevance requirement for any questions submitted by the attorneys, with an
exception for special circumstances or when the trial judge has established her or his
own declared rules to govern the relevant interests at stake. Cf. State v. Roberts, 142
Wn.2d 471, 519, 14 P.3d 713 (2000) (litigants not entitled to conduct “their own voir
dire of every prospective juror”); STARR & MCCORMICK, supra, at 2-21 (“In federal
cases, 70 percent of voir dire is conducted by judges.”). There are numerous costs and
benefits associated with greater control and questioning by trial judges, see, e.g.,
GOBERT & JORDAN, supra, at 326-27; STARR & MCCORMICK, supra, at 19-4, but
greater control will at least limit the ability of attorneys to go fishing for pretextual race-neutral reasons and will also generally limit the availability of such reasons and properly shift the focus to causal as opposed to peremptory challenges. That said, limiting available information might also promote the greater use of stereotypes and generalizations—underscoring once again the need to eliminate peremptory challenges entirely.

In sum, the need to abolish peremptory challenges is abundantly clear.

III. APPLICATION

Although the allowance of peremptory challenges at Saintcalle’s trial should be considered trial error, Saintcalle himself is not entitled to reversal of his conviction. Because trial courts throughout this state have been allowing peremptory challenges in good faith until now, and because a peremptory challenge is only a small part of the entire trial process and is not innately harmful or pernicious, the erroneous allowance of a peremptory challenge does not warrant reversal in every case. See Creech, 44 Wash. at 73-74; Rivera, 556 U.S. at 157; cf. N. Pac. Ry. v. Herbert, 116 U.S. 642, 646, 6 S. Ct. 590, 29 L. Ed. 755 (1886) (erroneous allowance of causal challenge held harmless); State v. Larkin, 130 Wash. 531, 533, 228 P. 289 (1924) (same); State v. Williams, 132 Wash. 40, 46, 231 P. 21 (1924) (same). Reversal is warranted on appeal only if the trial court (1) acted in bad faith in failing to follow the law or (2) allowed a peremptory challenge in good faith but failed to comply with the Batson framework.
In Saintcalle’s case, the trial court acted in good faith and did not commit clear error in allowing the peremptory challenge of prospective juror Tolson. First, the trial court clearly acted in good faith because at the time of Saintcalle’s trial, peremptory challenges were allowed under the law. Second, the record does not compel a finding that the prosecutor’s challenge of prospective juror Tolson was racially discriminatory. The record discloses that the parties obtained written questionnaires from the prospective jurors prior to voir dire and that the written responses contained substantive information. *See* Verbatim Report of Proceedings (VRP) (Mar. 10, 2009) at 119. The record also reveals that the prosecutor was aware of certain facts about Ms. Tolson that were not divulged during voir dire—including some facts related to the recent death of her friend. *See* Transcript of Proceedings (TP) (Mar. 9, 2009) at 66, 68; VRP at 101-02. If Ms. Tolson revealed in her questionnaire that her friend had recently been murdered, that would reasonably explain why she was questioned extensively. And once thoroughly questioned, Ms. Tolson expressed serious doubts about her ability to serve on the jury—doubts that were far more substantial than those of any other juror. *See* TP at 70 (“I like to think that I am fair and can listen . . . but I don’t know. I have never been on a murder trial and have just lost a friend two weeks prior to a murder.”); VRP at 43 (“I don’t know how I’m going to react . . . [A]s we go through it, and I hear the testimony, and I see the pictures, I don’t know.”). Unfortunately, the questionnaires were not made part of the record. With that material omission in mind, we must affirm the trial court’s decision because the
burden of proof is on Saintcalle and the record “fails to affirmatively establish an abuse of discretion.” *Sisouvanh*, 175 Wn.2d at 619 (citation omitted).

The trial court did subsequently find that the prosecutor attempted to strike a different prospective juror based on race, which the trial court should have considered as relevant to the previous challenge against Ms. Tolson. However, Saintcalle did not ask the trial court to reconsider its prior ruling. Further, even keeping in mind the prosecutor’s subsequent racial discrimination, it still was not clear error for the trial court to find that the earlier challenge to Ms. Tolson was race-neutral.

Based on a review of the record, I cannot say that the trial court clearly erred in allowing the prosecutor’s peremptory challenge and excusing Ms. Tolson from the jury. Applying the appropriate legal framework to this case—that is, reviewing the allowance of a peremptory challenge as error, subject to reversal only in cases involving bad faith or failure to comply with *Batson*—Saintcalle is not entitled to reversal of his conviction.

IV. CONCLUSION

The time has come to abolish peremptory challenges. The use of this procedure propagates racial discrimination, contributes to the historical and ongoing underrepresentation of minority groups on juries, imposes needless administrative and litigation costs, results in less effective juries, amplifies resource disparity in jury selection, and mars the appearance of fairness in our justice system. It provides no material benefits.
At the same time, no jurisdiction in the United States has been willing to be the first to take the necessary step of abolishing peremptory challenges. See Flowers, 947 So. 2d at 938 (Miss. 2007). But mere idle threats will not curb any of the myriad problems associated with peremptory challenges—problems which are ongoing and significant. Cf. id. at 939 ("While we neither abolish peremptory challenges, nor adopt a limited voir dire rule, nor make any specific changes to our peremptory challenge system, we are inclined to consider such options if the attorneys of this State persist in violating the principles of Batson by racially profiling jurors."). The same can be said of "wait[ing] for another case" or some future better rule to come as the court does here. Lead opinion at 24; concurrence (Madsen, C.J., joined by J.M. Johnson, J.) at 1, 3; concurrence (Stephens, J., joined by C. Johnson and Fairhurst, JJ.) at 1, 5. It appears true that "overcoming negative sentiment among judicial actors might present the biggest hurdle to implementation of this proposed reform." Maisa Jean Frank, Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota as a Case Study, 94 Minn. L. Rev. 2075, 2101 (2010). This court should not be blinded by tradition, see J.E.B., 511 U.S. at 142 n.15, and must recognize that "a single courageous state" is always first to act, New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932) (Brandeis, J.,
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González, J. concurring
dissenting). The time has come for Washington to finally abolish the peremptory
challenge.
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CHAMBERS, J.* (dissenting)—Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), was a great, symbolic step forward in providing equal justice under law. But Batson, sadly, has remained primarily symbolic. In practice, Batson merely requires the machinery of justice pause, consider whether a preemptory challenge was racially motivated, find a plausible sounding, nondiscriminatory reason to dismiss a juror, and move on. Batson was doomed from the beginning because it requires one elected person to find that another elected person (or one representing an elected person) acted with a discriminatory purpose. This has proved to be an impossible barrier. Further, Batson, by design, does nothing to police jury selection against unconscious racism or wider discriminatory impacts. I am skeptical—given that we have never reversed a verdict on a Batson challenge—that it does much to police discriminatory purpose itself.

Batson ignores the fact that discrimination is discrimination whether it is purposeful or not. It ignores the fact that discrimination is real whether it is done with racist intent or not. It ignores the fact that the minority juror who is removed because of discrimination is denied the right to participate in one of the two most fundamental democratic processes of our nation. We have learned something from history, and this case gives us an opportunity to show it.

*Justice Tom Chambers is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).
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I believe Justice Alexander was right in *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010). Following his dissent, I would hold that a prima facie case of discrimination is established when the sole remaining venire member of a constitutional cognizable racial group is peremptorily challenged. *Id.* at 661 (Alexander, J., dissenting). I would do this, not under *Batson*, but under our inherent supervisory power and based on our own understanding of the pernicious effect of unconscious racism on a fair system of justice. *See State v. Bennett*, 161 Wn.2d 303, 305, 165 P.3d 1241 (2007); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 674-75, 72 P.3d 151 (2003) (citing *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wn.2d 121, 128-29, 492 P.2d 536 (1972) (finding the difference between de facto and de jure discrimination constitutionally insignificant), *overruled on other grounds by Cole v. Webster*, 103 Wn.2d 280, 288, 692 P.2d 799 (1984)).

I do not believe it would be wise of this court to abandon peremptory challenges altogether. Peremptory challenges are important in ensuring fair trials because jurors are sometimes not candid or fail to understand they have deep seated prejudices that may not be easily developed during voir dire to support a for-cause challenge.

In this case, I am simply not convinced that Kirk Saintcalle received a fair trial before a truly representative jury. I would reverse and remand for a new trial. I respectfully dissent.
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