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# The Paradox of Implicit Bias and a Plea for a New Narrative

By

Michael Selmi<sup>1</sup>

## Abstract

Over the last decade, implicit bias has emerged as the primary explanation for contemporary discrimination. The idea behind the concept of implicit bias, which is closely connected to the well-known Implicit Association Test (“IAT”), is that many people are unaware of the biases that influence their actions and can engage in discriminatory acts without any conscious intent. Legal scholars have fallen hard for implicit bias and dozens of articles have been written espousing the role implicit bias plays in perpetuating inequality. Within legal analysis, a common mantra has arisen that defines implicit bias as unconscious, pervasive and uncontrollable. What has been overlooked, however, and this is the paradox, is that labeling nearly all contemporary discrimination as implicit and unconscious is likely to place that behavior beyond legal reach. And it turns out that most of what is defined as implicit bias could just as easily be defined as explicit or conscious bias. This article, therefore, challenges the common narrative by questioning the unconscious nature of implicit bias, and showing that such bias is less pervasive and more controllable than typically asserted. A critical review of the IAT will also reveal that implicit bias is most relevant to snap judgments rather than the more common deliberative decisions the legal system addresses. Implicit bias can certainly influence conscious decisions but it rarely dictates them. I will also discuss a recent spate of cases rejecting the implicit bias model to demonstrate that there is a clear mismatch between the implicit bias narrative and our governing legal standards of proof. As a way of realigning the narrative, I will propose that we move away from a focus on the unconscious, and the IAT, to concentrate instead on field studies that document discrimination in real world settings. In addition, by shifting the discussion to how stereotyping, without reference to the unconscious, influences behavior and leads to discriminatory decisions we can return to familiar judicial terrain as courts have been adjudicating claims involving stereotyping for decades.

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<sup>1</sup> Samuel Tyler Research Professor of Law, George Washington University Law School. I am grateful for research assistance provided by Fred DeRitis and Laura Hamilton, as well as comments and conversations from Debbie Brake, Donald Braman, Naomi Schoenbaum and Wendy Parker.

## I. INTRODUCTION

Discrimination, it is widely acknowledged, has changed. It has become both less pervasive and less overt. Indeed, the primary question about contemporary discrimination is just how much it has changed – how much it has receded and how much it has evolved from overt bias to more subtle forms of discrimination. Over the last decade, implicit bias has emerged as the primary explanation for continued inequalities and within this emerging literature it often seems as if all contemporary discrimination results from implicit biases.<sup>2</sup> The idea behind the concept of implicit bias is that many people, often defined to include those who are well-intentioned, are unaware of the biases that influence their actions and therefore discrimination can occur even when the person does not intend any discriminatory treatment.<sup>3</sup> This concept will be defined more extensively below but the basic message is that discrimination can occur without any conscious intent or even awareness by the actor, and implicit bias is commonly equated with unconscious bias.<sup>4</sup> Implicit bias has also penetrated popular culture with popular books, including a prominent discussion by Malcolm Gladwell, newspaper articles touting widespread training on implicit bias, and implicit bias even made an appearance in our most recent Presidential election.<sup>5</sup>

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<sup>2</sup> Within law, UCLA Professor Jerry Kang has been one of the most influential, and prolific, scholars focused on implicit bias. He has likewise been an enthusiastic supporter of the Implicit Association Test (“IAT”), which is now invariably linked to implicit bias within law. *See, e.g.*, Jerry Kang, et al., *Implicit Biases in the Courtroom*, 59 UCLA L. REV. 1124 (20012); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1491 (2005). Professor Justin Levinson has also been an influential and prolific scholar, and supporter of the IAT. *See* IMPLICIT RACIAL BIAS ACROSS LAW (J.D. Levinson & R.J. Smith eds. 2012); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007). More recently Professor L. Song Richardson has published a series of articles emphasizing the role implicit bias plays in the criminal justice system. *See, e.g.*, L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Biases in Public Defender Triage*, 122 YALE L.J. 2623 (2013); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

<sup>3</sup> The popularizing of the term implicit bias is generally traced to the work of Anthony Greenwald and Mazharin along with their frequent collaborator Brian Nosek. *See* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013) (exploring and explaining implicit bias).

<sup>4</sup> *See* Kang et al., *supra* note 2 [Courtroom].at 1129 (noting that “attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection.”); Song & Goff, *supra* note – [Yale], at 2631 (“Implicit biases, once activated, influence many of our behaviors and judgments in ways we cannot consciously access and often cannot control.”).

<sup>5</sup> *See* Emily Bazelon, *How “Bias” Went from a Psychological Observation to a Political Accusation*, N.Y. TIMES Mag., Oct. 18, 2016, available at <https://www.nytimes.com/2016/10/23/magazine/how-bias-went-from-a-psychological-observation-to-a-political-accusation.html?>; MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 72-98 (2005). Shankar Vedantam also published a popular book on the subject and now is a regular feature on NPR. *See* SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES*. An example of his podcast is Shankar Vedantam, *The Thumbprint of the Culture: Implicit Bias & Police Shootings*, June 5, 2017, NPR, available at <http://www.npr.org/2017/06/05/531578107/the-thumbprint-of-the-culture-implicit-bias-and-police-shootings>. Companies, such as Google and Facebook have also very publicly implemented implicit bias training. *See* Favhood Manjoo, *Exposing Hidden Bias at Google*, N.Y. TIMES, September 24, 2014. Facebook’s training can be viewed at <https://managingbias.fb.com>.

Implicit bias has had a particularly strong pull among legal academics and in the last decade, articles espousing the prevalence of implicit bias have proliferated.<sup>6</sup> Implicit bias, in other words is everywhere, and that is part of the problem. Within the legal literature, Implicit bias is commonly defined as unconscious, pervasive and beyond one's control.<sup>7</sup> This is a message, however, that can be difficult to reconcile with our governing legal standards of proof, which often turn on one's ability to control his behavior. As many scholars have argued over the years, our legal system struggles to address unconscious bias<sup>8</sup> but this is a message that has been missed by the recent onslaught of implicit bias enthusiasm, which treats all discrimination as originating from implicit bias even when that label seems overbroad and inappropriate. Although implicit bias may explain some of what we see as discrimination today, it does not explain everything.

Let's consider one of the most well-known studies documenting discriminatory treatment. In response to actual job advertisements, two economists sent out resumes that were identical in content except for the names.<sup>9</sup> Some of the resumes had what the authors defined as identifiably black names while others had what were deemed identifiably white names. The resumes that contained white names received twice as many callback interviews as those with black names.<sup>10</sup> This study has gained great renown and prompted a number of similar studies all of which produce similar results.<sup>11</sup> This and other resume studies likely demonstrate classic disparate treatment discrimination --- two individuals identically situated are treated differently with the only difference between them being their race, and yet the study is routinely identified as involving

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<sup>6</sup> There are now dozens if not hundreds of law review articles emphasizing the role of implicit bias in a wide array of activities. For a sampling of recent articles, but just a sampling, see Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L. J. 559 (2017) (discussing role of implicit bias in pregnancy and pay discrimination); Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765 (2017) (student surveillance); Anna Roberts, *Regaining the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Stereotyping*, 83 U. CHI. L. REV. 835 (2016) (role of implicit bias with prior conviction testimony); Victor D. Quintanilla & Cheryl Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological Licensing of Bias*, 104 CALIF. L. REV. 1, 53 (2016) (role of implicit bias in employment discrimination doctrine); Nicole E. Negoretti, *Implicit Bias and the Legal Profession's Diversity Crisis: A Call for Self-Reflection*, 15 NEV. L.J. 930 (2015) (diversity within law firms); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutor's in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013) (discussing how implicit stereotypes affect juvenile offenders).

<sup>7</sup> This issue will be discussed in more detail in section II.B. For one example District Court Judge Mark Bennett, who has commented extensively on implicit bias defines it as "pervasive," and falling outside of people's awareness and often difficult to control. See Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y. REV. 151, 153 (2010).

<sup>8</sup> Oddly enough, this was the message of the initial and well-known article that sparked interest in the connection between antidiscrimination law and the unconscious. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (criticizing the intent requirement of Equal Protection doctrine for failing to address unconscious bias).

<sup>9</sup> See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AMER. ECON. REV. 991 (2004).

<sup>10</sup> *Id.* at 997-98.

<sup>11</sup> I will return to these studies in section III, *infra*. For one recent example see Michael Ewens, Bryan Tomlin & Lian Choon-Wang, *Statistical Discrimination or Prejudice? A Large Sample Field Experiment*, 96 REV. OF ECON. & STATISTICS 119 (2014) (study based on Craigslist ads for housing demonstrated that those with African-American sounding names received fewer positive responses than those with white-sounding names).

implicit bias.<sup>12</sup> But is there any reason to conclude that implicit bias explains the results? Surely most of those who chose the white over the black candidate would deny that race played any role in their decision but that has never been the standard, at least in law, for defining explicit or intentional discrimination. It also seems particularly strange to label the behavior of a disparate and unconnected group to a single cause – implicit bias – as presumably some of the individuals involved in the study were likely motivated by express bias, others a more complex decisionmaking process where their conscious decision was influenced by implicit or unconscious bias, most likely in the form of negative stereotypes. Whether the individuals were aware of their stereotypes is something, in the abstract, we cannot know and should not be assumed. Others in the study may have been acting on the basis of bias they were truly unaware of, what is now defined as implicit bias. But there is no reason to rush to judgment by labelling the disparities as the product of implicit bias, and it is not at all clear why we would want to do so.

Additional examples are easy to come by. Implicit bias is often relied on to explain actions of police officers who stop and search African Americans more commonly than whites but there again is no particular reason to believe that police officers are unaware of their actions, or unaware of the race of the individual.<sup>13</sup> Police officers will almost certainly deny any racial motive but that denial does not mean that implicit bias explains their actions. Or take the current phenomenon of “mansplaining,” where a man deigns to explain the obvious to a woman. Should that be considered a form of explicit or implicit bias? Again, the man will deny any intent to condescend, and might even point out that he has a sister or a daughter, but there is no reason to think that the person is unaware of what he is doing.<sup>14</sup> It may be that he is unaware of why he is doing it but as I will discuss in more detail, that by itself, should not mean that the behavior is unconscious. When we ask whether these behaviors should be described as explicit or implicit, the answer should be that it could be either, or both, and will depend, at least in part, on how the terms implicit and explicit are defined.

This article challenges the common narrative that contemporary discrimination is the product of implicit bias that is automatic, unconscious, pervasive and beyond one’s control, and I will suggest that although the implicit bias literature is designed to make the legal system more receptive to bias, it has likely had the opposite effect. Defining contemporary discrimination as unconscious and beyond one’s control is not just inaccurate descriptively but it makes such bias more difficult to prove. For example, extensive social psychology research has demonstrated that what is defined as implicit bias can be controlled in any number of ways, which also indicates that

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<sup>12</sup> See, e.g., Jerry Kang, *supra* note --- [Trojan Horses] (discussing study as reflecting implicit bias); Justin D. Levinson, Implicit Bias, *supra* note \_\_\_ [Misremembering], at 359 (noting that resume study reflects implicit attitudes); Victor D. Quintanilla & Cheryl Kaiser, *supra* note \_\_\_ [The Same-Actor Inference] at 53 (discussing the study in the context of implicit bias).

<sup>13</sup> See L. Song Richardson, *supra* note \_\_ [Minn.], at 2039 (“In the policing context, implicit stereotypes can cause an officer who harbors no racial animosity to unintentionally treat individuals differently based solely upon their physical appearance.”).

<sup>14</sup> For what is likely to become a classic example of mansplaining see the effort of fledgling entrepreneur Erlich Bachman explain what mansplaining is to two women who are venture capitalists, which can be viewed at [https://www.youtube.com/watch?v=eyC\\_NKEz62A](https://www.youtube.com/watch?v=eyC_NKEz62A).

it is not unconscious at least in the way that term is typically used.<sup>15</sup> Rather than defining implicit bias as unconscious and uncontrollable, I will suggest that it should be treated as one step, usually the initial step, in a more elaborate deliberative process.<sup>16</sup> Implicit bias has its greatest effect on spontaneous decisions but plays a lesser role on the more common deliberative decisions. And how we label the behavior matters. Courts have long had difficulty addressing unconscious bias, which is most commonly identified with the controversial disparate impact theory where proof of intent is not required.<sup>17</sup> More recently, courts have begun to reject expert testimony regarding implicit bias, in large part because the general message that it is pervasive and unconscious is difficult to square with traditional notions of legal proof.<sup>18</sup>

The legal literature that emphasizes implicit bias to explain contemporary discrimination has also oddly, and I am tempted to say inadvertently, returned us to an era when there were two kinds of discrimination. There is overt discrimination sometimes referred to as animus or old-fashioned discrimination, which is equated with explicit bias, and then there is unconscious or implicit bias.<sup>19</sup> But it is very strange to claim that if discrimination is not animus-based it must be unconscious in nature. That just seems wrong and legal doctrines of proof have been adjudicating subtle discrimination without reference to unconscious bias for more than forty years.<sup>20</sup> As such, the current rigid dichotomy between explicit and implicit bias seems a peculiarly inapt description of contemporary discrimination. One reason for this is that within social psychology explicit bias means something different than it does within law. Social psychology defines explicit bias as individual self-reports, what in law would be the equivalent of an admission or confession of bias, something that is, needless to say, not common. It is surely a mistake to conclude that all discrimination lacking a confession arises from unconscious forces.

This relates to how I believe the narrative should be changed. When most legal scholars discuss implicit bias, what they generally mean is not that the bias is unconscious but that much of discrimination occurs through stereotyping – the police officer who sees young black men and quickly associates them with criminal activity, the employer who looks at a woman’s resume and

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<sup>15</sup> The issue of controlling implicit bias is discussed in section III.A. For a comprehensive review see Nilanjana Dasgupta, *Implicit Attitudes and Beliefs Adapt to Situations: A Decade of Research on the Malleability of Implicit Prejudice, Stereotypes, and the Self-Concept*, 47 *ADVANCES IN EXPER. SOC. PSYCH.* 233 (2013).

<sup>16</sup> See, e.g., Michael A. Olson & Russell H. Fazio, *Reducing Automatically Activated Racial Prejudice Through Implicit Evaluative Conditioning*, 32 *PERS. & SOC. PSYCH. BULL.* 421, 421(2006) (noting that “racial prejudices are often so well learned that they are activated automatically upon encountering a member of a relevant groups and become the first piece of input on the path toward discriminatory behavior.”)

<sup>17</sup> In a recent case applying the disparate impact theory to a federal housing statute, the Supreme Court acknowledged that the disparate impact theory could be used for “counter[acting] unconscious prejudice.” *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2511-12 (2015). See also Reva B. Siegel, *Race-Conscious But Race-neutral, The Constitutionality of Disparate Impact in the Roberts Court*, 66 *Ala. L. Rev.* 653, 667 (2014) (identifying the disparate impact theory with uncovering “hidden and unconscious discrimination.”).

<sup>18</sup> This issue is discussed in section II.B.2.

<sup>19</sup> In an early book on discrimination post-Civil Rights Act, the author divided discrimination into two very similar categories “old-fashioned” racism and “aversive” racism, which has much in common with implicit bias. See JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 54 (1970).

<sup>20</sup> The well-known McDonnell-Douglas structure of proof applicable to employment discrimination claims was designed to address “subtle discrimination” based on circumstantial evidence. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 795 (1973) (“Title VII tolerates no racial discrimination, subtle or otherwise.”).

assumes she will leave the workforce when she has children, or a school principal who reacts differently to behavior by African American students than white students. These behaviors are influenced by unconscious attitudes but the behavior itself is deliberative and intentional and fits easily within standard legal doctrines. Just as courts have been adjudicating claims of subtle discrimination for decades, they have also been establishing liability based on claims of stereotyping for just as long, and shifting the focus away from implicit bias and to stereotyping will align the social psychology research with existing legal standards of proof.<sup>21</sup>

At this point, I should make clear that my critique differs, and in some ways is the opposite of, the existing criticism of implicit bias as measured by the Implicit Association Test (“IAT”). The IAT is the most widely used measure of implicit bias and is what has captured the attention of legal scholars and more recently the public as proof that implicit bias permeates our society. The IAT relies on rapid response to various primes such as pictures of African Americans and it has been repeatedly demonstrated that whites, and often Asians, are quicker to associate African Americans with negative words than they are for whites. This will be discussed in more detail below but the test has proved controversial and has been subjected to strong criticism by a band of dedicated scholars.<sup>22</sup> This criticism has recently bled over into the public domain with a nasty turn between the creators of the IAT and its critics.<sup>23</sup> My critique is quite different. I accept that implicit bias is a real and useful concept, and have long discussed its role in contemporary discrimination though I typically prefer to use the term subtle discrimination to avoid the link to the unconscious.<sup>24</sup> The point I want to emphasize is that the recent enthusiasm among legal scholars for the concept of implicit bias is largely based on a misunderstanding of the theory that leads to labelling behavior as implicit that could just as easily be described as explicit, and by doing so, much of contemporary discrimination is likely to evade legal liability.

This article will proceed in the following way. The first section will analyze and critique the IAT, which within law is seen in tandem with implicit bias. In other words, for legal scholars, implicit bias is tied to the IAT, and I will demonstrate that the test has limited predictive ability.

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<sup>21</sup> A reference to stereotyping appeared, in a concurring opinion, in the very first case the Supreme Court adjudicated under Title VII. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (quoting EEOC guidelines that it was impermissible to refuse “to hire an individual based on stereotyped characterizations of the sexes.”).

<sup>22</sup> *See* F.L. Oswald, Gregory Mitchell, Hal Blanton, J. Jacord & Phillip Tetlock, *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCH. 171 (2013); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006). Although this group of scholars have been the most active critics, others have also questioned the validity and utility of the IAT. *See, e.g.*, Miguel C. Brendl, Arthur B. Marksman & Claude Messmer, *How Do Indirect Measures of Evaluation Work? Evaluating the Inference of Prejudice in the Implicit Association Test*, 81 J. OF PERSONALITY & SOC. PSYCH. 760 (2001) (concluding that it is not possible to infer a single cause from IAT results).

<sup>23</sup> There have recently been two lengthy critiques of the IAT and by association, implicit bias, in the popular press. *See* Tom Barlett, *Can We Really Measure Implicit Bias? Maybe Not*, THE CHRONICLE RVW, Jan. 27, 2017, at B6; Jesse Singal, *Psychology’s Favorite Tool for Measuring Racism Isn’t Up for the Job*, NEW YORK MAGAZINE, Jan. 11, 2017, available at [nymag.com/scienceofus/2017/01/psychologys-racism-measuring-tool-isn-t-up-to-the-job.html](http://nymag.com/scienceofus/2017/01/psychologys-racism-measuring-tool-isn-t-up-to-the-job.html). The Singal article, which is lengthy and offers a sophisticated analysis, chronicles the name-calling and nasty interactions between the various parties.

<sup>24</sup> *See* Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUM. RTS. L. REV. 657 (2003).

The next section will critique the emphasis on the unconscious and the pervasiveness of implicit bias before illustrating how courts have struggled to accept discrimination claims based on implicit bias. The final section will first demonstrate that implicit bias, however defined, can be controlled with a wide variety of interventions, and I will suggest that rather than focusing on social psychology studies, we turn our sights to the increasing volume of field studies that document discriminatory practices in the real world rather than in the lab. Finally, I will urge a return to a focus on stereotyping to move away from emphasizing the unconscious nature of contemporary bias.

## II. DEFINING AND CRITIQUING IMPLICIT BIAS

The concept of implicit bias is rather straightforward, although it can also be difficult to define with specificity. Implicit bias is the term now used to define biases that an individual is generally thought to be unaware of. As psychologists have long explained, individuals are often motivated by unconscious thoughts, and they are often unable or unwilling to acknowledge the influence of those thoughts.<sup>25</sup> This concept is not new and has roots in psychoanalysis, and indeed, the initial exploration within the legal literature of the role of unconscious thoughts as they related to race discrimination were steeped in a Freudian analysis.<sup>26</sup>

### A. *The Implicit Association Test and Implicit Bias.*

What is different about the recent turn to implicit bias is the measurement tool. In the late 1990s, a group of social psychologists developed a test known as the Implicit Association Test, better known as the IAT, to measure implicit biases.<sup>27</sup> The test, which is conducted on line and has been taken in various formats by millions of individuals, requires a rapid response to a series of pictures and words. A test taker is shown a series of pictures of African Americans, or whites, often well-known individuals, and is required to associate the pictures with a set of words, some of which are seen as positive and others as negative.<sup>28</sup> Because the test requires rapid response measured in milliseconds, test takers do not have time to filter their thoughts and the associations are said to reflect their implicit (or unconscious) rather than explicit (conscious) biases.<sup>29</sup> The test calculates a score for each test taker and classifies them into one of four categories ranging from

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<sup>25</sup> For a discussion see FRANK TALLIS, *HIDDEN MINDS: A HISTORY OF THE UNCONSCIOUS* (2002).

<sup>26</sup> The seminal article by Professor Charles Lawrence, certainly one of the most famous law review articles ever written involving discrimination, was steeped in an analysis of the unconscious. See Lawrence, *supra* note \_\_.

<sup>27</sup> The IAT was originally created in 1998 and has been modified over time, including to cover topics beyond the original black-white paradigm. For a discussion by its creators at its inception see Anthony Greenwald, D. McGhee & J. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. OF PERSONALITY & SOC. PSYCH. 1464 (1998).

<sup>28</sup> The test is described in BANAJI & GREENWALD, *supra* note \_\_ [Blindspot], at 39. The founders of the IAT provide a detailed discussion in Brian A. Nosek, Anthony Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, 265, in *SOCIAL PSYCHOLOGY & THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES* (J.A. Bargh ed., 2007). For a helpful explanation of the test within the law review literature see R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1182-1183 (2006).

<sup>29</sup> BANAJI & GREENWALD, *supra* note [Blindspot] at 39.



no bias to high bias, and the results demonstrate that most white individuals more rapidly associate negative words with African Americans and positive words with whites.<sup>30</sup> Similar tests are available for other social categories, including age, gender and sexuality but most of the research centers on the race IAT.<sup>31</sup> The key insight is that the vast majority of people who take the test, upwards of 75%, achieve scores that indicate a prominent level of implicit bias, which has led to the frequent refrain that we all hold implicit biases or unconscious stereotypes.<sup>32</sup>

With the exception of a small group of critics,<sup>33</sup> the IAT has been enthusiastically embraced by legal scholars who commonly see the IAT as documenting “implicit bias . . . that originates in unconscious mental processes that systematically distort the way we see other people.”<sup>34</sup> In similar statements, the IAT is said to provide evidence that biases are unconscious, pervasive and difficult if not impossible to control.<sup>35</sup> It is often noted that there is a sharp divergence between bias measured by the IAT and by explicit measures, making the IAT something like a lie detector, documenting bias even in those who profess fidelity to norms of equality. In addition, legal scholars frequently emphasize the IAT’s ability to predict real world behavior and to do so better than explicit measures.<sup>36</sup>

Outside of law, and in particular within the field of social psychology, the claims regarding the IAT have been more tempered and recently the test has been the subject of considerable public criticism.<sup>37</sup> As I mentioned previously, it is not my intention to join the band of IAT critics but given the immense influence the test has had within legal scholarship, I think it will be helpful to highlight some of its limitations. I should note that no one contests the primary

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<sup>30</sup> *Id.* at 46-47.

<sup>31</sup> The test is available at <https://implicit.harvard.edu/implicit/>, and the website devoted to the test, including related research is available at <https://www.projectimplicit.net/index.html>. It is not entirely clear how the scores that divide the four categories are determined, and some claim that it was arbitrary. The results for the gender IAT are also confusing in that women tend to show higher biases than men on some of the tests. For a discussion of these and other issues see Gregory Mitchell and Philip E. Tetlock, *Popularity as a Poor Proxy for Utility: The Case of Implicit Prejudice* 164, in *PSYCHOLOGICAL SCIENCE UNDER SCRUTINY* (S.O. Lilienfeld & I.D. Waldman 2017).

<sup>32</sup> BANAJI & GREENWALD, *supra* note [Blindspot] at 47 (“[A]lmost 75 percent of those who take the Race IAT on the internet or in laboratory studies reveal automatic White preference.”).

<sup>33</sup> See citations in notes \_\_\_ *supra*. See also Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 867 (2009); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979 (2008).

<sup>34</sup> See Tanya Kateri Hernandez, *One Path for “Post-Racial Employment Discrimination Cases – The Implicit Association Test Research as Social Framework Evidence,”* 32 LAW & INEQUALITY 309, 320 (2014).

<sup>35</sup> See, e.g., Nance, *supra* note \_\_\_ [Emory], at (defining implicit bias as arising “automatically, unintentionally, and unconsciously”); Anna Roberts, *supra* note \_\_, at 861 (“Implicit stereotypes can be defined as unconscious associations between particular groups and particular traits”); Richardson, *supra* note \_\_\_ [Minn.]. at 2042 (“Research in the field of implicit social cognition repeatedly demonstrates that individuals of all races have nonconscious or implicit biases that have behavioral consequences.”); Justin D. Levinson, *supra* note \_\_\_ [Duke], at 359 (“Implicit stereotypes manifest quickly and potentially harmfully in a variety of different ways, and that they do so automatically any time there is a stereotype-consistent cognitive opportunity.”).

<sup>36</sup> See, e.g., Benforado, *supra* note \_\_\_ [Indiana], at 1364 (implicit bias can “predict social and organizationally significant behavior.”); Jerry Kang et al, *supra* note \_\_\_ [Courtroom], at 1130-31 (noting that the IAT “predicts certain kinds of real world behaviors.”); Nance, *supra* note \_\_\_ [Emory], at 822 (“Empirical evidence shows that white preference measured by the IAT predicts discriminatory behavior even among people who hold egalitarian beliefs.”).

<sup>37</sup> See note \_\_\_, *supra*.

finding that on the IAT a majority of white test takers demonstrate a preference for whites over blacks, what is contested is what that means.

The main area of contention regarding the IAT is whether IAT scores predict actual behavior. In other words, would knowing someone's IAT score help determine whether they are likely to act in discriminatory ways. The evidence on this question is both limited and mixed. A significant number of studies have sought to demonstrate that those with high, or higher IAT, scores are likely to engage in discriminatory decisionmaking, and the most common mechanism to establish this connection is to have college students take the IAT and then perform some evaluative act, such as reviewing resumes or a story about a legal trial. Obviously, these are not actual decisions, but even in this laboratory setting, the most recent data demonstrate a very modest connection between the IAT and behavior.<sup>38</sup> Indeed, even the founders of the IAT have recently acknowledged the modest connection but they have also sought to demonstrate that among a large number of decisions, even a modest connection can make a significant difference.<sup>39</sup> Maybe so, but this defense seems highly unusual and would presumably apply to any frequent activity that is associated with a weakly correlated test. Moreover, a recent working paper in which several of the co-authors are affiliated with the IAT, including one of the founders, found "little to no evidence" that changes in implicit bias led to changes in either behavior or explicit bias, again suggesting a weak link between implicit bias scores and behavior.<sup>40</sup>

One area where the IAT has thought to provide significant evidence of predictive behavior has to do with what is known as shooting bias.<sup>41</sup> Over the last two decades, a number of studies

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<sup>38</sup> A recent meta-analysis, a method that evaluates findings across studies, found that the IAT was a poor predictor of behavior. See F. Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOCIAL PSYCHOLOGY 171 (2013). Several of the authors of the meta-analysis are the primary critics of the IAT, which may taint the study in the eyes of IAT defenders even though this study was peer-reviewed and subsequently acknowledged by the IAT founders. For a similar analysis see Rickard Carlsson & Jens Agerstrom, *A Closer Look at the Discrimination Outcomes in the IAT*, 57 SCANDANAVIAN J. OF PSYCHOLOGY, 278 (2016).

<sup>39</sup> See Anthony G. Greenwald, Mahzarin R. Banaji & Brian A. Nosek, *Statistically Small Effects of the Implicit Bias Test Can Have Societally Large Effects*, 108 J. OF PERSONALITY AND SOCIAL PSYCH. 553 (2014). Much of the article seeks to explain differences in the results of meta-analyses regarding the predictive ability of the IAT but goes on to note that even low level correlations can result in "significant cumulative impact of very small acts of discrimination." *Id.* at 559.

<sup>40</sup> See Patrick S. Forscher et al., *A Meta-Analysis of Change in Implicit Bias*, working paper, May 5, 2016, available at [https://www.researchgate.net/publication/308926636\\_A\\_Meta-Analysis\\_of\\_Change\\_in\\_Implicit\\_Bias](https://www.researchgate.net/publication/308926636_A_Meta-Analysis_of_Change_in_Implicit_Bias). Although the authors found that "implicit bias can be changed across many areas of study," they also found that those changes did not affect explicit bias. They wrote, "Most surprising is the fact that we found little to no evidence that the changes caused by procedures on explicit bias behavior are mediated by changes in implicit bias." Working Paper at 34. Two of the authors, Patrick Forscher and Calvin Lai, are affiliated with Project Implicit and another author, Brian Nosek, was one of the founders of the IAT.

<sup>41</sup> The shooter bias studies have frequently been cited by legal scholars as evidence that the IAT predicts behavior. See, e.g., Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along?*, 37 HAWAII L. REV. 339, 361 (2015) (noting that studies demonstrate "that the race/color of the suspect is a factor when officers make the decision to shoot"); Jerry Kang et al., *supra* note at 1138-39 [Courtroom] (while acknowledging mixed results in published studies the authors conclude "we have evidence that suggests that implicit biases could well influence various aspects of policing"); Natalie Bucciarelli Pederson, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 108 (2010) (discussing and relying on a shooter bias study); L. Song

have been conducted, both on students and police officers, to determine whether police officers are more likely to shoot black defendants. The early studies would flash pictures with objects some of which were guns while others were benign objects such as a wrench or a phone, and these studies demonstrated that students and police officers were more likely to identify the benign objects as a gun when it was held by a black individual.<sup>42</sup> But other studies reached different conclusions, including an interesting study in Denver where the police performed better than community members on the test, and were able to modify their behavior after receiving instructions.<sup>43</sup> More recent studies have likewise cast doubt on the strong version of a shooter bias noting that the findings of the earlier studies had not been replicated.<sup>44</sup> In addition, a recent study by economist Roland Fryer based on data from Houston has suggested that police officers shoot African Americans less frequently than white offenders.<sup>45</sup>

I do not mean to suggest that the evidence conclusively refutes the claim of shooter bias or the link to implicit bias; rather I only want to highlight how the legal literature has largely overlooked the conflicting data. Equally important, even if one accepts that there is a shooter bias, there is no clear reason to conclude that the bias is implicit rather than explicit. In an important

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Richardson, *Police Efficiency & the Fourth Amendment*, 87 IND. L. J. 1143, 1170-71 (2012) (discussing shooter bias studies).

<sup>42</sup> One of the most influential early studies involved two different studies in which black and white faces were flashed before an object. In the study where officers were under no time pressure, they accurately assessed whether the object was a gun or an innocent object, like a wrench, though they were generally quicker to identify a gun when a black face was flashed. In the second study where the officer was required to make snap judgments, they were more likely to misidentify the innocent object as a gun when a black face was shown. B. Keith Payne, *Prejudice & Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 181 (2001). The same author later conducted a similar test adding in IAT test scores and found that individuals with higher negative implicit bias towards blacks had a higher weapon bias. The studies are discussed and summarized in B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 287, 287-88 (2006).

<sup>43</sup> See Joshua Correll et al., *Across the Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. OF PERSONALITY AND SOCI. PSYCH. 1006 (2007) (finding that while officers were quick to engage in stereotyped observations of African Americans their ultimate decision to shoot was not affected by stereotypes).

<sup>44</sup> In a more detailed study that focused on more than just race, taking into account other factors such as neighborhoods that influence officers' decisions, the authors concluded: "Although prior shooter bias research . . . often emphasizes the tendency to mistakenly shoot unarmed Black suspects more than unarmed White suspects, no such pattern arose in our work. Although our findings are potentially encouraging, within the broader literature, the evidence as to whether officers display a race bias in their shooting errors is decidedly mixed." William T. L. Cox et al, *Toward a Comprehensive Understanding of Officers' Shooting Decisions: No Simply Answers to This Complex Problem*, 36 BASIC & APPLIED SOC. PSYCH. 356, 362 (2014). The authors went on to note, "The accumulating evidence suggests that a wide range of personal and situational factors may affect these split-second shooting decisions." *Id.* Another meta-analysis of shooter studies recently came to a slightly different conclusion, namely that study participants were quicker to shoot armed black targets but slower to shoot unarmed black targets relative to white targets. See Yara Mekawi & Konrad Bresin, *Is the Evidence from Racial Bias Shooting Task Studies A Smoking Gun? Results from a Meta-Analysis*, 61 J. OF EXPER. SOC. PSYCH. 120 (2015).

<sup>45</sup> See Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, NBER Working Paper No. 22399 (July 2016), available at <http://www.nber.org/papers/w22399.pdf>. The paper generated substantial press and criticism. For a balanced discussion of both the attention and criticism see Daniel Engber, *Was this Study Even Peer-Reviewed? How Journalists Should Write About Unpublished Research*, SLATE, July 25, 2016, available at [http://www.slate.com/articles/health\\_and\\_science/science/2016/07/roland\\_fryer\\_s\\_research\\_on\\_racial\\_bias\\_in\\_policing\\_wasn\\_t\\_peer\\_reviewed.html](http://www.slate.com/articles/health_and_science/science/2016/07/roland_fryer_s_research_on_racial_bias_in_policing_wasn_t_peer_reviewed.html)

article on the Trayvon Martin shooting – a teenage boy killed by a self-proclaimed keeper of the peace who was later acquitted for his act – my colleague Cynthia Lee writes, “It is unlikely that George Zimmerman (the shooter) set out that night intending to kill a Black person, but implicit bias likely influenced him to see Martin as someone who looked suspicious and dangerous.”<sup>46</sup> The first part of her statement seems certainly true – it is unlikely that Zimmerman began his evening with the intent to kill a black person. But from there it is all up to interpretation. This was not a random or unintended act, and I would suggest that it was not an unconscious one either. More likely, Zimmerman associated African Americans, and in particular young African Americans, with criminality, and if one were to ask him and receive an honest answer, Zimmerman would have admitted his bias. So although he did not set out to kill a black person, when he encountered a black person that evening, his beliefs translated into a wrongful shooting because he assumed the teenager was engaging in criminal activity. This may have been based on what is defined as an implicit bias, but it may just as have likely been the product of explicit bias and even more likely some combination of the two. Equally clear, we simply cannot know what motivated the action absent some clear access into his heart or mind, which we do not have. The implicit bias literature suggests that Zimmerman may not have access to that information either, may not be able to access his unconscious beliefs, but again, that is a matter of interpretation, we simply cannot know definitively and we certainly should not take his denials of racial intent as an accurate representation of his thoughts.

In addition to the shooter bias studies, there is one particular study that is frequently cited by legal scholars regarding the predictive ability of the IAT and this study does seem to reflect implicit bias. The study asked doctors to evaluate patient files with the race of the patient as the only distinguishing characteristic among the various files. The doctors also took the IAT and those with higher IAT scores provided more aggressive care to white than black patients, even though they more frequently diagnosed African Americans with a serious heart condition.<sup>47</sup> It is difficult to understand this study without relying on implicit bias as there does not seem to be any obvious reason why doctors would consciously provide inferior care to African Americans. Other studies have documented similar biases in medical treatment and these studies involving actual doctors provide valuable insight into the workings of implicit bias but by themselves the medical studies do not demonstrate a broader link between the IAT and behavior.<sup>48</sup>

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<sup>46</sup> Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1577 (2013) (footnote omitted).

<sup>47</sup> See Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 INTERNAL MED. 1231 (2007).

<sup>48</sup> See, e.g., Lisa Cooper et al., *The Association of Clinicians’ Implicit Attitudes and Race With Medical Visit Communication and Patient Ratings of Interpersonal Care*, 102 AMER. J. OF PUB. HEALTH 979 (2012) (higher IAT scores associated with providing worse care to black patients as well as the perception among those clients that they had worse care). There have been a significant number of studies involving doctors, some of which observe actual patient interactions and others rely on prepared case histories. Many of the studies are discussed in John F. Dovidio, Samuel L. Gaertner & Tamar Saguy, *Color-Blindness and Commonalty: Included but Invisible?*, 59 AMER. BEHAVIORAL SCIENTIST 1518, 1523 (2015) (noting that studies have shown a less willingness to prescribe pain medication to black patients, as well as shorter and less successful visits).

At this point, the evidence linking the IAT to actual behavior seems inconclusive at best. Some scholars have hypothesized that one reason for this is that the IAT may just be measuring cultural stereotypes that people might be familiar with because of their prevalence.<sup>49</sup> If true, there might be less of a reason to expect people would act on the stereotypes reflected in their IAT scores. Indeed, some have suggested just the opposite might be true, namely that the IAT may trigger sympathetic portrayals of African Americans, that individuals taking the IAT might just be reacting to pervasive media stereotypes with which they disagree.<sup>50</sup> The point here is that the enthusiastic embrace by legal scholars of the broad implications of the IAT seem misplaced and are often based on a limited review of the social psychology literature. Most scholars have likewise failed to grapple with the distinction between explicit and implicit bias, an issue to which I will now turn.

### *B. The Legal Mismatch of Implicit Bias.*

The literature on implicit bias, particularly as interpreted in legal scholarship, provides three dominant messages. Implicit bias is said to be unconscious, pervasive and difficult if not impossible to control.<sup>51</sup> Each of these messages proves problematic for legal analysis, in part because social psychology and the law define implicit bias differently, and I will also show that the broad claims advanced by many implicit bias advocates are generally inaccurate.

#### *1. Explicit v. Implicit Bias.*

Within social psychology, implicit bias is defined by its contrast, namely explicit bias, a distinction that does not translate well into the legal landscape. Within legal analysis, explicit bias is typically associated with conscious bias, intentional acts of discrimination. Unconscious bias,

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<sup>49</sup> See Hal Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or “Would Jessie Jackson ‘Fail’ the Implicit Association Test?”* 15 PSYCH. INQUIRY 257, 265-66 (2004) (discussing possibility that IAT is picking up cultural stereotypes rather than individual attitudes).

<sup>50</sup> See Michael R. Andreychik & Michael J. Gill, *Do Negative Implicit Associations Indicate Negative Attitudes? Social Explanations Moderate whether Ostensible “Negative” Associations are Prejudice-Based or Empathy-Based*, 48 J. OF EXPERIMENTAL PSYCHOLOGY 1082 (2012) (suggesting that among some test takers “what is automatically activated in their minds by an African American prime is an empathy-based attitude . . .”).

<sup>51</sup> See L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 271 (2012) (describing implicit bias as “non-conscious” and “typically, unable to control.”); Justin D. Levinson, *supra* note \_\_ [Duke], at 359 (“implicit stereotypes manifest quickly and potentially harmfully in a variety of different ways, and that they do so automatically any time there is a stereotype-consistent cognitive opportunity.”); Anthony Page, *Unconscious Stereotyping & the Peremptory Challenge*, 85 B.U. L. REV. 155, 185-90 (2005) (defining implicit attitudes as “unconscious” and defying “conscious control”); Nance, *supra* note \_\_ [Student Surveillance], at 819 (defining implicit bias as “automatically, unintentionally, and unconsciously” invoked); Anthony Benforado, *supra* note \_\_ [Indiana], at 1363 (“Implicit biases are automatic associations held by individuals often beyond their conscious awareness or control.”).

on the other hand, has long been associated with the disparate impact theory, which does not require proof of intent.<sup>52</sup> This is not how social psychology defines explicit and implicit bias.

Within social psychology, the distinction between implicit and explicit biases arises from self-reported attitudes. As a measure of explicit bias, individuals are asked to record their values or beliefs regarding equality and biases, and these self-reported results are then defined as representing someone's explicit beliefs. As the authors of one study explain: "In a typical study . . . a sample of research volunteers is compared on two tests of racial attitudes. One test is explicit, asking them to report their attitudes on a questionnaire. The other test is implicit. Rather than asking for a self-report, it uses performance on another task to reveal attitudes."<sup>53</sup> Needless to say, this is not what the legal system means by explicit bias, given that these self-reports are the legal equivalent of a confession.<sup>54</sup>

It should, therefore, come as no surprise that these self-reports show high levels of belief in racial or gender equality and low levels of explicit bias.<sup>55</sup> To complete the analytical model, it is the divergence between self-reported beliefs and the recorded associations with the IAT, or other implicit measurement tools, that are then defined as implicit biases. People hold beliefs steeped in stereotypes despite their self-proclaimed attachment to issues of equality – or more colloquially, they say one thing and do another, which is one definition of implicit bias.

This latter issue – the measurement of explicit beliefs – has received less scrutiny than the focus on implicit beliefs, particularly within the legal literature.<sup>56</sup> Yet, whether the self-reported beliefs are accurate measures of explicit bias raises important issues regarding the nature of "implicit beliefs" and may also prove important to the extent the distinction between implicit and explicit beliefs are invoked in legal proceedings. As has been well documented, self-reported attitudes often reflect social norms rather than actual attitudes.<sup>57</sup> Indeed, this was the central reason

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<sup>52</sup> See sources cited in notes \_\_ *supra*. For an additional discussion as applied to employment discrimination see ONTIVEROS, ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 252-54 (9<sup>th</sup> ed. 2016) (discussing issue disparate impact law and lack of intent requirement).

<sup>53</sup> B. Keith Payne, Melissa A. Burkley, Mark B. Stokes, *Why Do Implicit and Explicit Attitude Tests Diverge? The Role of Structural Fit*, 94 J. OF PERSONALITY & SOC. PSYCH. 16, 16 (2008). See also Bertram Gawronski et al., *Temporal Stability of Implicit and Explicit Measures: A Longitudinal Analysis*, 43 PERSONALITY & SOC. PSYCH. BULL. 300 (2016) (relying on questionnaires as a measure of explicit bias); John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. OF PERSONALITY & SOC. PSYCH. 62, 63 (2002) (equating explicit bias with "self-reported prejudice").

<sup>54</sup> The closest analogue the legal system has is what is defined as "direct evidence" in employment discrimination, namely clear evidence, often involving epithets, of discrimination. See, e.g., *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6<sup>th</sup> Cir. 2003) ("[D]irect evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group.")

<sup>55</sup> See, e.g., Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 834 (2012) ("Levels of implicit bias frequently conflict with self-reported attitudes, usually because explicit measures show no bias while implicit measures show bias.").

<sup>56</sup> A notable exception is Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter? Law, Politics, & Racial Inequality*, 58 EMORY L.J. 1053, 1058-59 (2009).

<sup>57</sup> See, e.g., Christain s. Crandall, Mark A. Ferguson, Angela J. Bahns, *When We See Prejudice: The Normative Window and Social Change*, 53, 63, in *STEREOTYPING AND PREJUDICE* (C. Stangor & C. Crandall eds. 2013) ("People

for the move towards measuring implicit attitudes, namely that self-reported attitudes were thought to be unreliable as an indicator of actual beliefs.<sup>58</sup>

Within social psychology, this has been a widely-recognized phenomenon going back to the 1970s when national norms regarding racial bias began to evolve.<sup>59</sup> Back then, social psychologists began to devise a series of experiments to investigate whether people's stated racial beliefs were consistent with their actions. Early studies involved someone dropping a bag of groceries to see whether anyone would come to help, and these studies demonstrated that people were more likely to assist members of their own race.<sup>60</sup> Contemporary implicit measurement tools are essentially an extension of these earlier studies, though the results are now interpreted differently with a focus on how the implicit measurements reveal unconscious biases.<sup>61</sup> This assumption seems far less appropriate if the explicit measures are unreliable.

When individuals are asked to state their beliefs on issues of racial or gender equality, it is widely accepted that they may be reluctant to express feelings that would be identified as racist or sexist in nature.<sup>62</sup> Within voting circles, this common sentiment even has a name -- "the Bradley effect" named in response to the defeat of African-American candidate Tom Bradley for governor of California. In that race, which occurred in 1982, the public opinion polls showed Bradley winning by a wide margin, although the anonymous voting booths proved inconsistent with voters'

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only report having prejudices that are normatively acceptable."); Charles S. Crandall, Amy Eshleman & Laurie O'Brien, *Social Norms and the Expression and Suppression of Prejudice: The Struggle for Internalization*, 82 J. OF PERSONALITY & SOC. PSYCH. 359, 363 (2002) ("People will report their own prejudice according to how much it is socially acceptable.").

<sup>58</sup> See Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. OF PERSONALITY & SOC. PSYCH. 1013, 1014 (1995) (explaining that the unreliability of "self-reported attitudes" is what "motivated pleas for use or more indirect unobtrusive measures of racial attitudes"). See also David Faigman, Nilanjana Dasgupta & Cecilia Ridgeway, *The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1407 (2008) ("Doubts about the accuracy of self-reflection and the honesty of self-reports prompted social psychologists to seek alternative means of identifying motivating factors that influences people's attitudes, beliefs and behaviors.").

<sup>59</sup> See Harold Sigall & Richard Page, *Current Stereotypes: A Little Fading, A Little Faking*, 19 J. PERS. & SOC. PSYCH. 247 (1971)

<sup>60</sup> These and other early studies are discussed in Faye Crosby, Stehanie Bromley & Leonard Saxe, *Recent Unobtrusive Studies of Black & White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOLOGICAL BULL. 546, 549 (1980).

<sup>61</sup> For a discussion of the history of implicit measurement tools see B. Keith Payne & Bertram Gawronski, *A History of Implicit Social Cognition: Where is it Coming From? Where is it Now? Where is it Going?*, in HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY & APPLICATIONS 1-14 (2010).

<sup>62</sup> This is a widely accepted phenomenon: "It is easy for people to edit what they say and to conceal their true attitudes and opinions. Many factors affect people's willingness to express their true attitudes, especially when it comes to prejudices and so motivate socially desirable responding." BERNARD E. WHITLEY JR. & MARY E. KITE, *THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION* 63 (2010); Brian Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUROPEAN REV. OF SOC. PSYCH. 36, 58 (2007) ("[A] variety of perspectives converge on the notion that because of egalitarian norms, people's reports of social preferences will be weaker than what is revealed by implicit measures like the IAT."); Bertram Gawronski & Jan de Houwer, *Implicit Measures in Social and Personality*, in HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY, 283-308 (2014) ("[R]esearchers are well aware that people are sometimes unwilling or unable to provide accurate reports of their own psychological attributes. In socially sensitive domains . . . responses on self-report measures are often distorted by social desirability and self-presentation concerns.").



stated preferences.<sup>63</sup> The concern within the psychology field is the same – people’s stated beliefs may not accurately represent their views on issues relating to equality. Although the unreliability of self-reported attitudes is widely known, the effect on whether we label beliefs as implicit or explicit is just as widely overlooked, again particularly in the legal literature.<sup>64</sup>

Indeed, the entire force of the implicit bias literature turns on the fact is that people’s actions reflect more bias than their stated preferences with the additional message that people are often unaware of these implicit biases and unable to control them. This message might be different if we saw implicit measurement as consistent with explicit beliefs, at least in some instances. Indeed, I certainly do not mean to suggest that what is labelled as implicit bias is invariably a form of explicit bias only that there is likely a greater overlap than is typically assumed. In other words, people may not be more biased than they realize but that they are more biased than they are willing to admit. If that is the case, there is no obvious reason why such bias would be labelled implicit rather than explicit., and implicit bias measures would thus be revealing concealed beliefs rather than unconscious ones.

There is considerable evidence to support this possibility. One way of getting at this question is to assess whether implicit and explicit biases are closely correlated. Although it has generally been assumed that there is a divergence between the two, that is not always the case. For example, a comprehensive review of published studies found that measures of the IAT and explicit self-reports “are systematically related to one another.”<sup>65</sup> Another review found that the differences between explicit and implicit biases are often a function of how the tests are structured.<sup>66</sup> Professor Anthony Greenwald, one of the founders of the IAT, and his colleagues have also concluded that implicit and explicit attitudes tend to be more highly correlated when there is “less motivation to disguise their attitudes on explicit measures.”<sup>67</sup> Consistent with this view, people are more willing to express explicit preferences for thin individuals and negative

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<sup>63</sup> For a discussion of the Bradley effect and its relevance to the 2008 election of President Barak Obama see Nate Silver, *If the Bradley Effect is Gone, What Happened To It?* FiveThirtyEight (Oct. 13, 2008) <http://fivethirtyeight.com/features/if-bradley-effect-is-gone-what-happened/>.

<sup>64</sup> Several legal scholars, although recognizing the potential problem with explicit reports, proceed to treat them as accurate. For example, after noting that self-reports may not be accurate Jerry Kang later notes that “I may honestly self-report positive attitudes toward one social category . . . “ Kang, *supra* note \_\_ [Trojan], at 1507 and 1513. Similarly, Gregory Parks and Jeffrey Rachlinski initially acknowledge that “individuals may not reveal their true attitudes or preferences because of social desirability biases” but then later assume explicit reports are accurate “explicit norms . . . reflect only the slower deductive processes.” Gregory S. Parks & Jeffery Rachlinski, *Implicit Bias, Election '08, and the Myth of Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 684-86 (2010).

<sup>65</sup> See Wilhelm Hoffman, et al., *A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures*, 31 PERSONALITY AND SOC. PSYCH. BULL. 1369, 1382 (2005). The authors went on to note: “These results challenge the assumption that explicitly and implicitly assessed representations are completely disassociated and that correlations between the two are purely random.” *Id.*

<sup>66</sup> See B. Keith Payne, Melissa A. Burkley and Mark B. Stokes, *Why Do Implicit and Explicit Attitude Tests Diverge? The Role of Structural Fit*, 94 J. OF PERSONALITY AND SOC. PSYCH. 16 (2008). The authors explained: “Sometimes differences between test structures are mistaken for differences between implicit and explicit thought. We suggested one means of equating test structures to solve that problem. When the tests were equated, much of the divergence between them evaporated, leaving implicit and explicit tests highly correlated.” *Id.* at 30.

<sup>67</sup> Anthony Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem and Self-Concept*, 10 PSYCHOLOGICAL REV. 3, 18 (2002).



preferences for Muslims.<sup>68</sup> Similar findings were documented for age where people were generally willing to express a preference for younger individuals.<sup>69</sup> In these areas, the social norms are not as strong as they are for race or gender discrimination, and it also appears that those who are less concerned about social norms against racial discrimination, such as some conservatives, are more willing to state their biases explicitly.<sup>70</sup>

All of this suggests what is defined as implicit bias, even within social psychology, might in many instances just as well be labelled as explicit bias. Probably the best way to reconcile these findings is to rely on a categorization advanced by a group of social psychologists some years ago. Under this schema, there is (1) a group of individuals who are truly nonprejudiced and do not obtain high scores on implicit measures; (2) a group of individuals who are willing to express their prejudice on self-reports and then (3) a group of individuals for whom there is a difference between their explicit and implicit measurements, with this group broken down further into a group for whom implicit bias is truly revealing something the individual is unaware of, as is typically asserted, while for another group their explicit bias reports are affected by social norms against bias.<sup>71</sup> It might also be that one's unconscious, or implicit, thoughts influence conscious actions, making it difficult to know how to classify such behavior. The practical problem, and one that has particular force within a legal system is we simply cannot know who falls into which category.

It may be that the focus on the unreliability of explicit measures may not make as much of a difference within psychology where the primary focus is on documenting the pervasiveness of bias. But within law, the distinction between explicit and implicit bias may prove the difference between a finding of liability and no liability. And therein lies the problem – if the observed behavior, whether of an employer, a police officer or some other entity or person, is defined as implicit and unconscious, the law will have a much more difficult time attaching liability.<sup>72</sup> Relatedly, the emphasis on how implicit bias is automatic or uncontrollable may make it less likely that someone will be held liable for behavior that arises from implicit attitudes. This issue will be discussed in more detail in the next section but there is little question that some scholars, and it appears courts as well, conclude that individuals should not be held responsible for behavior they cannot control.<sup>73</sup> This is why the decision to label discriminatory behavior as the product of implicit bias turns out to be so important and again highlights another critical difference between

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<sup>68</sup> See Nosek et al., *supra* note \_\_\_ [European Review], at 58-59 (noting that “explicit preferences for thin people compared to fat people slightly exceeded implicit thin preferences, and explicit preferences for other people compared to Arab-Muslims exceeded implicit preferences.”).

<sup>69</sup> *Id.* [Nosek], at 62.

<sup>70</sup> *Id.* at 79.

<sup>71</sup> See Fazio et al, *supra* note --- [Variability in Automatic Activation], at 1025.

<sup>72</sup> Many legal scholars have sought to find ways to incorporate unconscious behavior into legal structures of proof. See, e.g., Brake, *supra* note \_\_ [Georgetown], at 571 (noting that proof structures are designed “to search for a conscious intent by the decision maker.”). See also Patrick Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Emp. Discrim. Law*, 62 HASTINGS L.J. 67 (2010) Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2005); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrim.*, 56 ALA. L. REV. 741 (2005).

<sup>73</sup> See, e.g., Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (arguing that employers should not be held responsible for behavior they cannot control).

how implicit bias is used within social psychology and law. Social psychology is not concerned with how labelling attitudes can fit within governing legal principles but is instead primarily concerned with educating the public on the presence and operation of discrimination.

## 2. *Implicit Bias and the Unconscious.*

Even though implicit bias has been equated with unconscious bias in law reviews dozens if not hundreds of times, there has been very little effort to explain the link, why it is that implicit bias is defined as unconscious bias. The connection with the unconscious arose early on when Professors Greenwald and Banaji defined implicit bias as incapable of “introspection” in large part because based on explicit self-reports it was presumed that individuals were unaware of their implicit attitudes.<sup>74</sup> Since then, especially in the law review literature, it is has simply been assumed that implicit bias is unconscious in nature. But we have already seen that is not always true, that people may be more aware of their implicit bias than originally thought, and we will also shortly see that they can frequently control whatever implicit bias they may have, providing additional evidence of at least some conscious awareness. A recent study also indicated that implicit bias appears to be less stable over time than explicit bias suggesting that implicit biases may not be deeply rooted in past experience.<sup>75</sup> In any event, it is worth exploring what it means to label behavior as unconscious.

Indeed, it is not always clear what is meant by labelling implicit bias as unconscious. Sometimes the discussions of implicit bias, particularly those that emphasize its unconscious nature, make it seem like we are sleepwalking through life, unable to control or direct our actions, unaware of just what we desire or more accurately how to achieve those desires. This is, in part, the mental image that arises when people say that implicit bias is automatic and uncontrollable. At the same, time no one actually supports this caricature and it seems a more limited meaning is appropriate.

By unconscious what is meant is that the actor is unaware of her underlying motives or rationale.<sup>76</sup> Take the example of a human resources officer who hires a white man over a demonstrably better qualified African-American man. When asked why he did so, under the

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<sup>74</sup> Specifically, the authors stated: “Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.” Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes*, 102 PSYCH. REV. 4, 8 (1995). Legal scholars typically rely on a similar definition. See Kang et al, *supra* note \_\_ [Courtroom], at 1132 (“[I]mplicit biases are attitudes and stereotypes that are not consciously accessible through introspection.”).

<sup>75</sup> See Bertram Gawronski, et al., *Temporal Stability of Implicit and Explicit Measures: A Longitudinal Analysis*, 43 PERS. & SOC. PSYCH. BULL. 300 (2017) (noting that “individual differences in implicit measures show lower levels of temporal stability than individual differences on explicit measures.”) Professor Gawronski and his colleagues have been some of the few psychologists to explore in depth what it means to label implicit bias as unconscious. See Bertram Gawronski & Wilhelm Hofmann, *Are “Implicit” Attitudes Unconscious?* 15 CONSCIOUSNESS & COGNITION 485 (2006).

<sup>76</sup> For a discussion of different ways in which individuals may or may not be aware of their bias see Gawronski, *supra* note \_\_ [Consciousness].

implicit bias theory, the individual would honestly proffer a race-neutral rationale and when pressed, would actually be unaware that race played a role in his decision. The same could be said of the police officer who elects to search an African American but not a white individual who has been pulled over. At the risk of repetition, it should be pointed out that when the individual denies a racial motive, as they always do in the context of litigation, we cannot know if she is being honest or whether she is simply and consciously concealing her own discrimination. It also might be the case that although the person was truly unaware of the operational bias, with a little effort she may have been able to access that bias, in other words, it need not be any all or nothing proposition.<sup>77</sup>

By using these illustrations, we can also see why implicit bias, as measured by the IAT, may not seem like a particularly good predictor of real-world behavior. By design, the IAT requires instantaneous decisions and response times are measured in milliseconds. Very few real-world activities, however, occur in that way. Most, but not all, are the product of deliberation and a number of scholars have emphasized that explicit bias measures likely provide more accurate predictors of deliberate behavior than implicit bias, which is more closely connected to spontaneous behavior.<sup>78</sup> This idea is well established and is generally referred to as a “dual process” or “dual attitudes” theory.<sup>79</sup> These theories have much in common with the more recent popular work of Daniel Kahneman, a psychologist who has been a hugely influential force within behavioral economics. Professor Kahneman divides thought into what he labels System 1 and System 2, with the former representing a fast and automatic thought process and the latter involving effortful or deliberate thoughts.<sup>80</sup>

Within the dual process theory, what we think of as implicit and unconscious bias would likely only play a limited role in deliberative decisions and would have its strongest influence on decisions that must be made without the benefit of time for deliberation or reflection. This might include a police officer’s decision to shoot, and might also explain, at least in part, why police officers are so frequently exonerated for their shootings even in the rare instance when they are

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<sup>77</sup> See Agnes Moors & Jan de Houwer, *Automaticity: A Theoretical and Conceptual Analysis*, 132 PSYCH. BULL. 297 (2006) (arguing against seeing a rigid view of automatic thoughts).

<sup>78</sup> See Gawronski, *supra* note \_\_ [Consciousness], at 492 (“[S]tudies have shown that spontaneous behavior is uniquely predicted by indirectly assessed (but not self-reported) attitudes, whereas deliberate behavior is uniquely predicted by self-reported . . . attitudes.”); John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. OF PERSONALITY & SOC. PSYCH. 62, 66 (2002) (“[I]n general, the pattern of results we observed was consistent with our hypotheses that explicit attitudes would primarily predict deliberative behaviors and implicit attitudes would mainly predict spontaneous behaviors.”).

<sup>79</sup> See Timothy D. Wilson, Samuel Lindsey & Tonya Y. Schooler, *A Model of Dual Attitudes*, 107 PSYCH. REV. 101, 102 (2000) (“We propose that people can have dual attitudes, which are different evaluations of the same attitude object, one of which is an automatic, implicit attitude and the other of which is an explicit attitude.”); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. OF PERSONALITY AND SOC. PSYCH. 5, 15 (1998) (contending that “automatic processes and controlled processes can be disassociated.”).

<sup>80</sup> See DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011). The influence of Kahneman’s work on behavioral economics rivals that of the founders of the IAT on legal scholarship relating to discrimination. See, e.g., Cass R. Sunstein, *The Storrs: Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1838 (2013) (“System 1 works fast. Much of the time it is on automatic pilot . . . System 2 is more like a computer . . . It deliberates. It calculates.”).

indicted.<sup>81</sup> Implicit bias would have less of a role in most employment decisions, cases of school discipline (though perhaps not the initial decision to seek discipline), voting, police searches or other more deliberative decisions.

The behavioral economics literature offers two important insights that help distinguish that work from some of the implicit bias scholarship. First, although the two systems are seen as distinctive, they are also interrelated. System Two can intervene to correct or prevent errors in System One thinking but by the same measure System Two is not flawless, it may also be affected by unconscious biases (stereotypes) that lead to systematic errors.<sup>82</sup> And System One is not invariably flawed. More often than not, System One will work just fine as the unconscious processes will lead to a suitable decision and serve primarily as convenient heuristic devices or shortcuts to help us navigate our daily lives. After all, one reason we judge books by their covers is because we cannot read them all but we do read some, and very few people are likely to make their decision based solely on the cover. The emphasis on how the two systems can work together is important and provides a better picture of how we actually make decisions. A review essay nicely captures the integrated approach by explaining: “[Explicit attitudes result from considering various pieces of information that come to mind, weighing them against each other, and creating consistency among them. Implicit attitude is one piece of the information that plays a variable role in the process.”<sup>83</sup>

Second, and equally important, no one within behavioral economics would contend that all of our thoughts are the result of System 1 thinking whereas it often seems, at least in the legal literature, that implicit bias explains all or most contemporary discrimination. Seeing the two systems as distinct but interrelated provides further evidence that the social psychology definition – which sees explicit and implicit bias as entirely distinct since one is self-reported and the other is measured indirectly – translates poorly into the legal arena.

There are additional reasons to question whether implicit biases are inherently unconscious. One important reason, which will be discussed further shortly, is that there is broad consensus that implicit biases can be controlled, suggesting they are not inevitably beyond our conscious

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<sup>81</sup> The Washington Post, in conjunction with Professors from Bowling Green University, analyzed all police shootings that have occurred since 2005 and found that only 54 officers were prosecuted and most were either cleared or acquitted. See Kimberly Kindy & Kimbrell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST, April 11, 2015, available at [http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm\\_term=.7a0f6723dedd](http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.7a0f6723dedd).

<sup>82</sup> For an excellent discussion of an integrated approach to dual process theories see the blog posts by Yale Law Professor Dan Kahan, *Two Common (and Recent) Mistakes About Dual Process Reasoning and Cognitive Bias*, posted Feb. 3, 2012, and available at <http://www.culturalcognition.net/blog/2012/2/3/two-common-recent-mistakes-about-dual-process-reasoning-cogn.html>. The second in the series is “Integrated and Reciprocal”: *Dual Process Reasoning and Science Communication part 2* (July 24, 2013), available at <http://www.culturalcognition.net/blog/2013/7/24/integrated-reciprocal-dual-process-reasoning-and-science-com.html>.

<sup>83</sup> Icek Ajzen and Nilanjana Dasgupta, *Explicit and Implicit Beliefs, Attitudes, and Intentions: The Role of Conscious and Unconscious Processes in Human Behavior*, 130 in HUMAN AGENCY, FUNCTIONS & MECHANISMS (B. Eitman & F. Haggard eds. 2015).

awareness.<sup>84</sup> An interesting recent study also demonstrated that people were able to predict their implicit bias scores even when they had very different explicit bias reports.<sup>85</sup> The authors of the study interpreted the results to mean that “our participants had some awareness of their implicit attitudes.”<sup>86</sup> An earlier study also indicated that self-reports reflected more bias when the participants were under the impression that inaccurate self-reports could be detected by the examiner.<sup>87</sup> The presence of a black examiner also reduced implicit bias, indicating that participants may have been able to access their implicit thoughts.<sup>88</sup>

So even though it is commonplace within legal scholarship to refer to implicit bias as unconscious, there is reason to contest this label, particularly when it comes to actual behavior as opposed to the snap judgments required by implicit bias measurements. There is also little question that within law it matters tremendously if a behavior is defined as unconscious. In employment discrimination, the disparate impact theory, where unconscious bias is typically pursued, is not only difficult to succeed on but is generally reserved for class action cases.<sup>89</sup> Criminal law and tort law both treat behavior that is beyond one’s control or unconscious differently than if it were conscious behavior.<sup>90</sup>

Similarly, outside of legal responsibility, unconscious bias is often seen as difficult to square with principles of moral responsibility. Within philosophy, there has been a recent surge of interest in the moral responsibility that attaches to implicit biases. Capturing the general consensus, Jennifer Saul has stated, “A person should not be blamed for an implicit bias that they are completely unaware of,” and adds, “Even once they become aware that they are likely to have implicit biases, they do not instantly become able to control their biases, and so they should not be blamed for them.”<sup>91</sup>

This intuitive sense has been validated in a study where students were presented with discrimination scenarios and in some of those scenarios they were told that the discrimination resulted from implicit bias that was automatic and uncontrollable. The study participants who

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<sup>84</sup> See section II. D., *infra*.

<sup>85</sup> See Adam Hahn et al., *Awareness of Implicit Attitudes*, 143 J. OF EXPERIMENTAL PSYCHOLOGY 1369 (2014).

<sup>86</sup> *Id* at 1386.

<sup>87</sup> See Jason A. Nier, *How Dissociated Are Implicit and Explicit Racial Attitudes? A Bogus Pipeline Approach*, 8 GROUP PROCESSES AND INTERGROUP RELATIONS 39 (2005).

<sup>88</sup> See Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. OF PERS. & SOC. PSYCH. 842, 851 (2001) (“Across to measures of automatic prejudice, European Americans . . . exhibited less automatic prejudice in the presence of a Black experimenter than a White experimenter.”).

<sup>89</sup> See Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53 UCLA L. REV. 701 (2006) (discussing limited success of disparate impact claims).

<sup>90</sup> Both torts and criminal law assess liability differently depending on the mental state of the actor or the possibility of deterrence. For an article that explores some of the implications of recent social psychology with existing principles of criminal law see Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501 (2012).

<sup>91</sup> Jennifer Saul, *Implicit Bias, Stereotype Threat and Women in Philosophy*, in WOMEN IN PHILOSOPHY: WHAT NEEDS TO CHANGE?, ed. Katrina Hutchinson & Fiona Jenkins, 39, 55 (2013). See also Neil Levy, *Implicit Attitudes and Moral Responsibility*, 48 NOUS 21 (2011) (arguing that consciousness is necessary to establish moral responsibility.).

were told that the discrimination was attributable to implicit bias rendered judgments that were far more lenient than those on which the discrimination was not described as unconscious. As the authors of the study explained, “Having a theory or implicit race bias to explain discriminatory behavior significantly reduced judgments of moral responsibility.”<sup>92</sup> Aware of this problem, several philosophers have recently crafted arguments in favor of moral responsibility by focusing on the ability to control or anticipate the behavior even when it is automatic in nature.<sup>93</sup> Legal scholars, however, have largely ignored these issues altogether without acknowledging that labelling behavior as implicit, unconscious, automatic and uncontrollable is likely to take the behavior out of the realm of both legal liability and moral responsibility.

### 3. *The Pervasiveness of Implicit Bias.*

Another central aspect of the implicit bias literature is that it is pervasive, that implicit bias affects all of us, and is not simply the product of a few bad apples. As previously mentioned, on the IAT, it is estimated that upwards of 75% of whites register scores indicating high levels of bias against blacks.<sup>94</sup> A recent Pew Research study among a different sample found that 48% of whites had a preference for whites over blacks and 45% of black respondents favored blacks over whites.<sup>95</sup> The study also indicated that the IAT scores of 25% of whites demonstrated a preference for blacks, with the remaining group defined as neutral.<sup>96</sup> Within the legal literature and the media, these results are taken to mean that most people harbor biases.<sup>97</sup>

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<sup>92</sup> C. Daryl Cameron, B. Keith Payne, Joshua Knobe, *Do Theories of Implicit Race Bias Change Moral Judgments?*, 23 SOC. JUST. RSCH. 272, 278 (2010). As is true with most studies in social psychology, the study was conducted with students and was based on vignettes provided to the students. The authors explained the results of their studies: “When participants learned about acts of racial discrimination that were not explained by any psychological theory, they made the most severe moral judgments. When the discrimination was explained as the result of automatic bias that was unconscious but difficult to control, their moral judgments were not much changed. But when they learned that the discrimination resulted from unconscious bias – an attitude that the agent did not know existed – their moral judgments were significantly more lenient.” *Id.* at 285.

<sup>93</sup> For example, Simon Wigley has recently concluded: “While we lack immediate control whilst we are behaving automatically, we do have control over measures that we should preemptively build into our automatic behavior. Hence the fact that an automatic driver hits a child on a pedestrian crossing whom they would not have hit if they were driving attentively, indicates a failure to take due care over the way in which they acquired the skill of driving. Equally, the police officer who arrests the wrong person because of unconscious stereotyping is blameworthy if she could have preemptively revised her automatic behavior.” Simon Wigley, *Automaticity, Consciousness and Moral Responsibility*, 20 PHILOSOPHICAL PSYCHOLOGY 209, 223 (2007). See also Jules Holroyd, *Responsibility for Implicit Bias*, 43 J. OF SOC. PHILOS. 274 (2012) (suggesting indirect control may be sufficient for responsibility).

<sup>94</sup> See BANAJI & GREENWALD, *supra* note \_\_ [Blindspot], at 208.

<sup>95</sup> See Rich Morin, *Exploring Racial Bias Among Biracial and Single-Race Adults: The IAT*, Pew Research Center Social and Demographic Trends, Aug. 19, 2015, available at <http://www.pewsocialtrends.org/2015/08/19/exploring-racial-bias-among-biracial-and-single-race-adults-the-iat>

<sup>96</sup> *Id.* The results for White-Black biracial individuals were slightly different: 42% demonstrated preference for whites, 35% preference for blacks, and 23% showing no preference.

<sup>97</sup> See, e.g., Richardson, *supra* note \_\_ [minn.], at 2042 (“Research in the field of implicit social cognition repeatedly demonstrates that individuals of all races have unconscious or implicit biases that have behavioral consequences.”); Jeffrey J. Rachlinksi et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1197 (2009) (“most people, even those who embrace nondiscrimination norms, hold implicit biases . . .”); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 760 (2012) (“No one is immune from racial bias. Researchers have found that most people, even those who embrace nondiscrimination norms, hold implicit biases.”). Not to pick on a student note but one has even incorporated

As is true with the emphasis on the unconscious, emphasizing the prevalence of implicit bias can be difficult to reconcile with the legal system, where discrimination is typically seen as an anomaly rather than the norm. It is also difficult to reconcile with the notion that discrimination has receded over the last three decades, particularly when implicit bias is said to predict actual behavior. The seventy-five percent figure is actually much higher than the percentage of people who opposed *Brown v. Board of Education* shortly after the decision was decided or interracial marriage in the 1960s.<sup>98</sup> One way to harmonize these figures would be to suggest that implicit bias is less problematic than overt bias but that is not typically the message of the implicit literature nor is it consistent with the emphasis on how the IAT predicts behavior. On the whole, the prevalence of implicit bias in the real world seems like a tough and unnecessary sell – unnecessary because it is simply not necessary to rely so heavily on the concept of implicit bias to describe the presence of contemporary discrimination.

With this in mind, there seems to be a strategic objective underlying the emphasis on the prevalence of implicit bias, one that has a lengthy pedigree within law. My sense is that there is a sentiment among implicit bias advocates that soft-pedaling the discrimination message by suggesting how common it is will lead to a greater willingness to change. This is ultimately an empirical question and there is no clear evidence to support the claim, and experience under the disparate impact theory has not shown companies are more willing to change their practices in light of a disparate impact claim than a disparate treatment, or intentional discrimination, claim.<sup>99</sup> In fact, if anything, the opposite seems to be true, as companies appear to respond more quickly to claims of intentional discrimination especially when those claims reflect overt discrimination. We have seen this recently with a spate of quick corporate reactions to claims of sexual harassment where companies have paid out large settlements and fired prominent figures to stem the tide of negative publicity.<sup>100</sup>

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the theme into the title. See Student Note, *Everyone's A Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127 (2015) (answering the question affirmatively). See also Daniel Politi, *Poll: Majority of Americans Are Racist*, SLATE, Oct. 27, 2012, available at [http://www.slate.com/blogs/the\\_slatest/2012/10/27/poll\\_finds\\_majority\\_of\\_americans\\_are\\_racist\\_prejudiced\\_against\\_blacks.html](http://www.slate.com/blogs/the_slatest/2012/10/27/poll_finds_majority_of_americans_are_racist_prejudiced_against_blacks.html).

<sup>98</sup> A Gallup Poll taken shortly after the decision indicated that 40% of Americans disapproved of *Brown v. Board of Education*. See Joseph Carroll, *Race and Education 50 Years After Brown v. Board of Education*, May, 14, 2004, Gallup Report. For a comprehensive review see HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (1997). One response to this comparison would be to suggest that if measures of implicit bias were included, the numbers might be much higher. Perhaps but this was also a time when overt race discrimination was still legally permissible in voting, employment, housing and public accommodations, and there would have been less of a reason to rely on implicit measures.

<sup>99</sup> In a study I completed some time ago that focused on high profile claims of intentional discrimination against companies such as Coca-Cola and Texaco, there was evidence that companies were often quick to settle the cases to mitigate the public relations harm. See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Litigation and its Effects*, 81 TEX. L. REV. 1249 (2003).

<sup>100</sup> Fox News recently fired three individuals including its Chairman Roger Ailes and one of its leading on-air personalities Bill O'Reilly over claims of sexual harassment. See Brooks Barnes, *Fox Reveals Cost of Sexual Harassment Allegations: \$45 Million*, N.Y. TIMES, May 10, 2017, available at <https://www.nytimes.com/2017/05/10/business/media/fox-news-sexual-harassment-21st-century-fox.html>. The ride-

Where the message that discrimination is in all of us has had its greatest impact is with companies that opt for training, and implicit bias training has become a staple within many companies, police departments and other entities.<sup>101</sup> This seems certainly to be a positive development as the training should provide insight into the nature of contemporary discrimination that too many are still lacking. Depending on how the training is conducted, it also seems likely to differ from the controversial diversity training that previously swept through corporate America to limited effect.<sup>102</sup> For other companies, those less interested in change, the message regarding the depths of implicit bias could have the opposite effect: implicit bias is so common, so prevalent, that it becomes too difficult to root out, it is just a social phenomenon that is largely beyond our control.<sup>103</sup> Indeed there are already concerns that the general message that implicit bias cannot be controlled may limit its effectiveness.<sup>104</sup>

There is an important distinction between relying on implicit bias for educational purposes and for litigation. As reflected in a recent spate of cases, the generic implicit bias message -- that it is unconscious, automatic, uncontrollable and pervasive -- has been mostly ineffective.

#### 4. *Implicit Bias in the Courts.*

Although the cases remain few in number, over the last several years the concept of implicit bias has found its way into a number of courts, often as an explanation for observed disparities. The high-profile Supreme Court case involving claims of sex discrimination against Wal-Mart is certainly the most prominent case in which the concept, though not the term, was explored and

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share company Uber recently fired 20 employees as a result of a high-profile investigation into the culture of the company. See Eric Newcomer, *Uber Fires More than 20 Employees in Harassment Probe*, BLOOMBERG NEWS, June 6, 2017, available at <https://www.bloomberg.com/news/articles/2017-06-06/uber-said-to-fire-more-than-20-employees-in-harassment-probe>. A prominent venture capitalist also recently resigned from his firm in light of sexual harassment allegations. See Marisa Kendall, *500 Startups Founder Resigns After Apologizing for Being "A Creep,"* SAN JOSE MERCURY NEWS, July 3, 2017, available at <http://www.mercurynews.com/2017/07/03/im-a-creep-im-sorry-prominent-silicon-valley-investor-says>.

<sup>101</sup> See note \_\_\_, *supra*, noting training at Google and Facebook. For a discussion of the prominence of implicit bias training in Silicon Valley see Ellen Huet, *Rise of the Bias Busters: How Unconscious Bias Became Silicon Valley's Newest Target*, Forbes, Nov. 2, 2015, available at <https://www.forbes.com/sites/ellenhuet/2015/11/02/rise-of-the-bias-busters-how-unconscious-bias-became-silicon-valleys-newest-target/#45a403af19b5>.

<sup>102</sup> The diversity training widely adopted by businesses in the 1990s came under heavy criticism for its lack of success and occasional unintended consequences. For a recent review of diversity training programs see Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. July-Aug. 2016, available at <https://hbr.org/2016/07/why-diversity-programs-fail>.

<sup>103</sup> One recent study actually came to this conclusion based on a study where individuals were offered high or low-prevalence stereotyping messages and found that those who were provided the high-prevalence messages were also more likely to later engage in stereotyping. See Michell Duguid & Mellisa Thomas-Hart, *Condoning Stereotyping? How Awareness and Stereotyping Prevalence Impacts Expression of Stereotypes*, 100 J. APPLIED PSYCHOLOGY 343 (2015).

<sup>104</sup> See Huet, *supra* note \_\_\_, [Forbes] (“The central contradiction of implicit bias training is that you can’t train for something you can’t control.”).



decisively rejected.<sup>105</sup> Several other lower court cases have also rejected the use of implicit bias theories to prove discrimination, often in the form of excluding the testimony of expert witnesses proffered to testify regarding the prevalence of implicit bias.

The *Wal-Mart* case involved allegations of classwide discrimination in pay and promotions in stores across the country. Central to the plaintiffs' claims was expert testimony by sociologist William Bielby who sought to explain the operation of contemporary sex discrimination. Bielby's testimony, sometimes referred to as social framework evidence, was designed to show that many of the discretionary employment systems instituted by Wal-Mart were vulnerable to discrimination.<sup>106</sup> As part of that argument, Bielby relied on evidence relating to implicit bias to claim that discrimination need not be explicit or overt to influence employment systems. The testimony, which was only partially related to implicit bias, was discussed briefly by the Supreme Court and resoundingly rejected. The problem, the Court noted, was that the testimony could not prove more than that Wal-Mart's systems were vulnerable to discrimination, which is all that such testimony can prove adding, "Bielby's testimony does nothing to advance respondents' case."<sup>107</sup>

The same turns out to be true with implicit bias, and this is an aspect of the mismatch that has been overlooked by legal scholars. As a matter of proof, there is little available response to a claim of implicit bias. When someone is accused on engaging in implicit bias, in searching a suspect or in hiring a white over a black man, there is no available denial because any denial would be steeped in unconscious bias. One might be able to contest the very concept, which is what one finds in some of the criticisms, but absent attacking the concept, little refutation is available. This goes back to the moral responsibility point raised earlier – while advocates of implicit bias may think it will lead to greater findings of liability, the reality is more likely the opposite, that it will lead to more exonerations or a collective judicial shrug if we are all prone to implicit bias that we cannot control.

Indeed, something along these lines appears to explain several recent cases in which courts rejected outright the attempt to introduce evidence relating to implicit bias. Over the last few years, plaintiffs have increasingly sought to introduce expert testimony relating to how implicit bias can influence decisionmaking but courts have often been skeptical about the breadth of the arguments. For example, in a class action race discrimination case brought against the YMCA to challenge their pay and promotion practices, a district court excluded the testimony of Professor and IAT founder Anthony Greenwald because it proved too much. Adopting the magistrate's initial recommendation that the testimony be excluded, the District Court described Greenwald's testimony as not just suggesting that implicit bias "might" affect the process but "he opines that

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<sup>105</sup> See *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The Wal-Mart case has been the subject of extensive commentary, for my own symposium contribution see Michael Selmi, *Theorizing Systemic Disparate Treatment after Wal-Mart v. Dukes*, 32 BERKELEY J. OF EMP. & LAB. LAW 477 (2011).

<sup>106</sup> The Court explained: "Relying on 'social framework' analysis, Bielby testified that Wal-Mart has a 'strong corporate culture' that makes it 'vulnerable' to 'gender bias.'" *Id.* at 354 (citation omitted). The concept of social framework evidence, developed within law, is that an expert will provide a framework, or explanation, for how discrimination operates generally, and implicit bias often plays a role in that explanation. See Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Emp. Discrim. Class Actions*, 78 FORDHAM L. REV. 37 (2009).

<sup>107</sup> *Id.* at 354. In dissent, Justice Ginsburg viewed the evidence more persuasively and noted that Wal-Mart "does nothing to counter unconscious bias on the part of supervisors." *Id.* at 371 (Ginsburg, J., dissenting).

‘implicit or hidden biases . . . are now established as causes of adverse impact that is likely unintended and of which perpetrators are likely unaware.’”<sup>108</sup> The court went on to note that this testimony could be extended to any setting where disparities were observed:

“In other words, unless the evidence to the contrary is ‘clear,’ Dr. Greenwald maintains that it is ‘more likely than not’ that implicit discriminatory bias accounts for any disparity between the treatment of African Americans and other racial groups.”<sup>109</sup>

On this basis, the court excluded the testimony as speculative and lacking a scientific basis.<sup>110</sup>

In another race discrimination case brought in Iowa state court to challenge the state’s process for making executive-level decisions, while permitting the expert testimony of Dr. Greenwald and sociologist Cheryl Kaiser, the court ultimately discounted the persuasive force of the testimony. One problem such testimony continues to run into is that the experts do not typically have any specific evidence regarding bias by the particular defendant, in this case by those who were making the hiring decisions in Iowa. As a result, the testimony is generic in nature and could be applied to any workplace, even those that were seeking to address the potential of discrimination. As the state District Court noted, “Under Dr. Greenwald’s opinion, even in the best-case scenario, with the screening manual followed, bias could still unconsciously invade the process.”<sup>111</sup> The Court was equally concerned regarding the breadth of Professor Kasier’s testimony: “Dr. Kaiser holds the view that implicit bias is so pervasive that any merit-based employment system merely serves to legitimate inequality. This is because the system gives the perception of being fair, when, in fact, the inevitable presence of implicit bias dictates that it cannot be.”<sup>112</sup>

It is obviously difficult to know what to do with that kind of testimony since it is entirely unrelated to the particular workplace involved in the case and could mean that discrimination would be established anytime racial, or other, disparities were proven. Indeed, this is how the Iowa court interpreted the testimony: “Both social scientists seem to operate from the assumption that every three out of four subjective discretionary decisions made in the State’s hiring process were the result of, or tainted by, an unconscious state of mind adverse to African-Americans.”<sup>113</sup> The court ultimately concluded that the implicit bias testimony “does not prove causation.”<sup>114</sup> For similar reasons, Dr. Greenwald’s testimony was recently excluded in a complicated age discrimination case brought under the disparate impact theory.<sup>115</sup> As an interesting twist to the

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<sup>108</sup> Jones v. National Council of YMCA, 34 F. Supp. 3d 896, 899 (N.D. Ill. 2014) (quoting from Greenwald affidavit).

<sup>109</sup> *Id.* at 900.

<sup>110</sup> *See id.* The magistrate’s lengthy report and recommendation can be found at Jones v. National Council of YMCA, 2013 U.S. Dist. LEXIS 129236 (N.D. Ill. 2013).

<sup>111</sup> Pippen v. State, 2012 Iowa Dist. LEXIS 3, 46 (2012). The Supreme Court opinion affirming the District Court’s determination is available at Pippen v. State, 854 N.W.2d, 1 (Iowa 2014).

<sup>112</sup> *Id.* at 47.

<sup>113</sup> *Id.* at 85. The “three out of four” was in reference to Dr. Greenwald’s testimony that 75% of whites who take the IAT show a preference for whites. The court also cited to trial testimony of Dr. Greenwald who was asked what percentage of managers in the executive branch operated with unconscious bias and he stated, “I would be willing to bet if a study was done the percent would be about 75%.” *Id.* at 85.

<sup>114</sup> *Id.*

<sup>115</sup> *See* Karlo v. Pittsburgh Glass Works, 2015 U.S. Dist. LEXIS 90429, at 24-25.

case, the Court of Appeals reversed the lower court's analysis of the disparate impact theory for applying the wrong legal standard but affirmed the exclusion of the expert testimony, which the district court had excluded because it was "not based on sufficient facts or data" and was "not the product of reliable methods."<sup>116</sup>

The combination of the pervasiveness and unconscious nature of implicit bias has made it a difficult argument for many, though certainly not all, courts, to accept. To be sure, a number of courts have permitted and relied on the evidence in employment discrimination claims.<sup>117</sup> The theory has also been used to challenge the constitutionality of state death penalties and found support primarily through concurring opinions.<sup>118</sup> Similarly, in another recent case from Iowa, although the Supreme Court upheld the lower court's decision not to provide a jury instruction on implicit bias in a criminal case, several concurring Justices argued that such an instruction should be permissible or even mandatory.<sup>119</sup>

On the whole, the combination of the pervasive and unconscious nature of discrimination, along with the ill-defined definition of what it means to label the bias as unconscious, has created a serious mismatch between the legal structures of proof and the implicit bias literature. There is a separate question that needs to be addressed. Accepting these criticisms as they are to suggest that there is a clear mismatch between the concept of implicit bias as defined within social psychology and relevant legal standards, what if the analysis of implicit bias is true? What if upwards of 75% of whites are biased, at least implicitly, against African Americans? Should the law ignore the science simply because it is inconsistent with our legal standards? The answer to that question has to be no, as the very best science challenges rather than confirms our existing beliefs.

Yet, when we delve into the implicit bias literature, we do not find scientific findings as typically defined. Rather, the concept of implicit bias is a label that has been applied to the results

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<sup>116</sup> *Id.* See *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 85 (3<sup>rd</sup> Cir. 2017) (affirming exclusion of expert testimony while reversing the court's analysis on the proper analysis of disparate impact theory). See also *Childers v. Trustees of the University of Pa.*, 2016 U.S. Dist. LEXIS 35827 (Mar. 21, 2016, E.D. Pa.) (excluding expert testimony relating to stereotypes relating to women in the workplace in a tenure case).

<sup>117</sup> See *Martin v. F.E. Moran, Inc.*, 2017 U.S. Dist. LEXIS 42974 (N.D. Ill., Mar. 24, 2017) (permitting testimony of Northwestern Professor of social psychology in bench trial where the expert had reviewed the case record); *Samaha v. Washington State DOT*, 2012 U.S. Dist. LEXIS 190352 (W.D. Wash.) (admitting expert testimony of Anthony Greenwald); *Kimble v. Wisconsin Dept. of Workforce Div.*, 690 F. Supp. 2d 765 (E.D. Wisc. 2010) (relying on theory in race discrimination case apparently without benefit of expert testimony).

<sup>118</sup> In *State v. Santiago*, in which the Connecticut death penalty was struck down as unconstitutional, three concurring Justices discussed the relevance of implicit bias to the documented racial disparities. They noted, "It likely is the case that many, if not, most of the documented disparities in capital charging and sentencing arise not from purposeful, hateful racism or racial animus, but from these sorts of subtle, imperceptible biases on the part of generally well-meaning decisions makers." *State v. Santiago*, 318 Conn. 1, 160 (Norcott, J., concurring) (2013). A dissenting Justice noted that the argument made by the concurring Justices could be applied to "any criminal punishment." *Id.* at 403 (Rogers, C.J., dissenting). Similarly in *State v. Addison*, 165 N.H. 381, 606 (N.H. 2013), in upholding New Hampshire death penalty against a constitutionality challenge the Court discussed testimony of Dr. Banaji and commented that she testified that based on the IAT "it would be 'extremely hard' for a black defendant to be tried by a fair and impartial jury in New Hampshire." *Id.* at 606.

<sup>119</sup> See *State v. Plain*, 2017 Iowa Sup. LEXIS, June 30, 2017 (Appel, J., concurring) (advocating for mandatory instruction on implicit bias). It seems quite odd that several of the more high profile cases have arisen in race discrimination cases in Iowa where African Americans constitute only 3% of the population.

of a measurement instrument. What we know is that upwards of 75% of whites more quickly associate negative pictures with African Americans but we do not know why that is the case. The measured bias might be due to unconscious attitudes but it might also be as a result of concealed explicit bias. We also do not know whether those IAT results will translate into behavior – whether, for example, police officers who score high on the IAT are more or less likely to shoot or search an African American, or whether a decisionmaker in a company is more or less likely to hire women as a result of his implicit bias (keeping in mind that what is called implicit bias might be something entirely different). Even if we accept that these higher IAT scores can translate into behavior, we do not know whether individuals can counteract their implicit biases by being more deliberative, seeking collaboration, or learning more about how implicit bias operates.

What we do know, and where I think the emphasis should be, is that resumes sent out with identifiably black names yield fewer call back interviews, as it also true for resumes that indicate a woman is married.<sup>120</sup> We know that African-American boys are disciplined at far greater rates than whites and often for the very same behavior that white students commit, and that African Americans are searched after traffic stops at far higher rates than whites even though contraband is found more commonly among whites who are searched.<sup>121</sup> And we know that there are rarely any convincing race-neutral explanations for these disparities. As an employment discrimination lawyer and advocate, I am confident I could prove that these disparities were the product of intentional discrimination but if I label these actions as arising from implicit bias, I am equally confident that, as a legal matter, they will more likely be found to be nondiscriminatory. I would also suggest there is no reason to label any of this behavior as the product of implicit bias, we simply do not know enough about the underlying actions or motives to conclude that implicit bias best explains the actions, and under current legal frameworks, those motives are typically not relevant.

### III. CHANGING THE NARRATIVE

As I have argued throughout this article, the obsessive focus among legal academics on implicit bias is neither helpful nor necessary. A new narrative is thus in order, and one that builds on the implicit bias literature but seeks to capture the complexities of discrimination outside of the binary world animated by implicit bias. This new narrative would have three components: (1) the ability to control implicit bias, now well established, would become a central part of the analysis, one that would effectively change the way implicit bias is commonly characterized within law; (2) rather than focusing on the IAT, I would suggest that legal scholars pay more attention to field

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<sup>120</sup> See Bertrand and Mullainathan, *supra* note \_\_ [Greg & Emily].

<sup>121</sup> A recent government study found that although African Americans comprise 16% of the public-school population, they account for 33% of out-of-school suspensions. See Office of Civil Rights, U.S. Dep't of Educ., Data Snapshot: School Discipline 2 (2014), [www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf). Discrimination in police stops and searches have been well documented including in the New York City case mentioned earlier. For a thorough discussion see CHARLES EPPS & STEVEN MAYNARD MOODY, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 110-14 (2014).

studies, such as the resume studies discussed earlier, without the necessary emphasis on implicit or unconscious bias; (3) rather than focusing so heavily on implicit bias, I would urge scholars to return to the earlier focus on stereotyping – which is, after all, what underlies most implicit bias and is a more familiar concept both to courts and the general public. This changing narrative would help move us away from the troublesome focus on the unconscious and the notion that discrimination is omnipresent and can explain any observed disparities, of any kind.

#### A. Controlling Implicit Bias.

As noted earlier, an integral part of the legal analysis with respect to implicit bias is that the bias is not just unconscious but largely uncontrollable. Scholars vary on just how uncontrollable they consider implicit bias – some have recognized the scholarship documenting an ability to control bias, while others will acknowledge that unconscious might be controllable without devoting any significant attention to the issue.<sup>122</sup> This turns out to be a crucial issue, one that is also relevant to the question whether it is necessary to define implicit bias as unconscious, given the now considerable evidence that implicit bias can, in fact, be controlled.

Probably the most common claim is that those who are motivated to control prejudice are likely to be able to control implicit bias. People might be motivated for internal reasons – they do not want to engage in biased actions – or external reasons, namely that they do not want to appear biased.<sup>123</sup> Under either scenario, personal motivation has often been shown to hold implicit bias in check.<sup>124</sup> For example, a study involving judges found that, although many of the judges demonstrated high levels of implicit bias on the IAT, they were also able to moderate that bias in the judgments they rendered in mock trials.<sup>125</sup> This surely does not mean that motivated individuals will always be able to control their bias, but it does mean that biases can often be

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<sup>122</sup> A common statement or definition of implicit bias is: “Implicit biases are automatic associations held by individuals often beyond their conscious awareness or control.” Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1363 (2010) (citation omitted). Professor Benforado later acknowledges the possibility of “conscious control” though he does not try to reconcile his previous statement. *Id.* at 1368-69. *See also* Negowetti, *supra* note \_\_ [Legal Profession], at 935 (“implicit biases influence many of our behaviors and judgments in ways we cannot consciously access and often cannot control”); Richardson, *supra* note \_\_ [Ariz. St.], at 271 (describing implicit bias as “non-conscious” and “typically, unable to control”); Page, *supra* note \_\_ [BU] (noting that unconscious bias “[def]ies conscious control” but later discussing ways to control.),.

<sup>123</sup> *See* Ed Plant & Patricia Devine, *The Active Control of Prejudice: Unpacking the Intentions Guiding Control Efforts*, 96 J. OF PERSONALITY & SOC. PSYCH. 640, 644 (2009) (discussing internally and externally motivated people).

<sup>124</sup> *See, e.g.,* Patricia G. Devine et al., *Long-Term Implicit Bias Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. OF EXP. SOC. PSYCH. 1267, 74 (2012) (individuals must be aware of their biases and “they must be concerned about the consequences of their biases before they will be motivated to exert effort to eliminate them); Nilanjana Dasgupta, *The Mechanisms Underlying the Malleability of Implicit Prejudice & Stereotypes: The Role of Automaticity and Cognitive Control*, IN HANDBOOK OF PREJUDICE, STEREOTYPING & DISCRIMINATION, 265, 274-75 (ed. T. Nelson 2009) (motivated individuals are more likely to control implicit bias); Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research, Their Meaning & Use*, 54 Ann. Rev. Psych. 297, 319 (2003) (“In a variety of studies, the more motivated show evidence of having ‘corrected’ for their automatically activated attitudes.”).

<sup>125</sup> *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1221 (2009). Based on this study, the authors concluded, “[I]mplicit biases can translate into biased decisionmaking under certain circumstances, but they do not do so consistently.”).

controlled. In the context of the Dual Process theories discussed earlier, we might think of this control process as upon deliberation, type 2 process can override type 1 impulsive decision.

An important study involving jury deliberations demonstrated just how a desire to appear unbiased to others, what is typically defined as an external motivation, can shape how people deliberate. Professor Samuel Sommers conducted a series of mock jury trials with varied jury compositions. The mock trials were extensive with videotaped testimony and trial transcripts available to the jurors. The central conclusion of the study was that more diverse juries engaged in more careful deliberation, reviewing more of the evidence and taking into account different theories, and ultimately reached different verdicts from less diverse juries.<sup>126</sup> Perhaps the most important insight from the study was that the more intense deliberation was not the result of African American jurors contributing different perspectives but it was the result of white jurors who acted differently, more consciously, in the presence of other diverse jurors, presumably because they did not want to appear biased.<sup>127</sup>

Other studies have also shown that people are likely to act in a less biased fashion when they know their actions are subject to review or judgment.<sup>128</sup> For example, a study of baseball umpires found that umpires were more likely to provide a favorable strike zone to pitchers of the same race as the umpire, but the favoritism receded when the game was nationally televised where the strike zone would be more closely monitored by the national audience.<sup>129</sup> And in the study involving the provision of inferior cardiac care to African American patients that has caught the attention of legal scholars and was discussed earlier, a group of the doctors who participated in the study realized it was designed to measure racial bias and their care did not demonstrate any racial bias.<sup>130</sup>

One of the interesting aspects of the emphasis on motivation is that the group of people who are most likely to want to control prejudice are those who underreport their own explicit biases on self-reports as a way of concealing their prejudice. This group is also likely to have a significant disconnect between their scores on something like the IAT and explicit bias self-reports so it is a

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<sup>126</sup> See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. OF PERSONALITY & SOC. PSYCH. 597, 606 (2006) (noting that “heterogeneous groups deliberated longer and considered a wider range of information than did homogeneous groups.”).

<sup>127</sup> The author explained, “[T]hese differences did not simply result from Black participants adding unique perspectives to the discussion. Rather, White participants were largely responsible for the influence of racial composition, as they raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues when they were members of a diverse group.” *Id.*

<sup>128</sup> See Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 594 (2006) (“Laboratory experiments show that when subjects know that their decision will be reviewed by experimenters, they show lower levels of bias in assigning jobs.”); Madeline E. Heilman, *Gender Stereotypes & Workplace Bias*, 32 RSCH. IN ORG. BEHAVIOR 113, 122 (2012) (“concerns about accountability can curb the effect of stereotype-based expectations on evaluative judgments.”).

<sup>129</sup> See Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1422 (2011).

<sup>130</sup> See Green et al., *supra* note \_\_\_\_ [Thrombolysis], at 1237 (“[T]hose physicians who were aware that the study had to do with racial bias, and who had higher levels of implicit prowhite bias, were more likely to recommend thrombolysis to black patients than physicians with low bias – the opposite of the study’s main effect.”).

group that, based on that disconnect, one might be particularly concerned about.<sup>131</sup> Yet, they may also turn out to be the group most able to control their bias.

Another, and related, way to reduce implicit bias is by increasing awareness. Again, this is not a simple proposition. Increasing awareness is likely to have the strongest effect on those who are receptive to the notion that implicit bias is a real issue, and that discrimination remains a pervasive societal force. In contrast, increasing awareness is likely to have little effect on those who resist the very concept of implicit bias.<sup>132</sup>

Two interesting studies involving basketball referees demonstrate the potential power of awareness. A study authored by two economists found that basketball referees were more likely to call fouls against players who were not of their race, so that white referees were more likely to call fouls against African-American players.<sup>133</sup> The study generated substantial media attention, including strong criticism from the National Basketball Association (“NBA”).<sup>134</sup> Following the widespread attention, the authors conducted another study and found that the bias among referees had all but disappeared.<sup>135</sup> This was true even though the NBA claimed it had not made any changes to its practices and fouls in the middle of a fast-paced basketball game are precisely the kind of instant decisions most likely to be influenced by implicit bias.<sup>136</sup> A recent study involving medical school admissions officials found that having the officials take the IAT and then conduct their admissions with their scores in mind produced a more diverse class than prior years.<sup>137</sup> Increasing awareness of implicit bias is obviously a central part of any educational or training procedure, which are now widespread and are often provided by those who most strongly advocate for the pervasive influence of implicit bias.

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<sup>131</sup> A review of the IAT found that those who were externally motivated to conceal prejudice often sought to respond strategically on the IAT and that those efforts frequently backfired, leading to higher IAT scores. See Leslie R.M. Hausman & Carey S. Ryan, *Effects of External and Internal Motivation to Control Prejudice on Implicit Prejudice: The Mediating Role of Efforts to Control Prejudiced Responses*, 26 BASIC & APPLIED SOC. PSYCH. 215, 222 (2004) (“[T]hose with more external motivation to control prejudice feel more pressure to respond strategically on tasks such as the IAT, and that their efforts backfire, resulting in greater expression of prejudice.”).

<sup>132</sup> See Sylvia P. Perry, Mary C. Murphy & John F. Dovidio, *Modern Prejudice: Subtle, but Unconscious? The Role of Bias Awareness in Whites’ Perceptions of Personal and Others’ Biases*, 61 J. OF EXPERIMENTAL AND SOCIAL PSYCH. 64, 76 (2015) (finding that those who had higher awareness of bias “were more likely to accept feedback of personal bias as credible and take action to reduce their bias.”).

<sup>133</sup> The original study demonstrated racial bias by basketball referees who showed favoritism towards players of their own race. See Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q.J. ECON. 1859 (2010).

<sup>134</sup> An article in the New York times just before the article was published started the controversy. See Alan Schwarz, *Study of NBA Sees Racial Bias in Calling Fouls*, N.Y. TIMES, May 2, 2007, available at <http://www.nytimes.com/2007/05/02/sports/basketball/02refs.html>. The controversy, including the NBA’s response is chronicled in Henry Abbott, *Study on Referees and Race Still Dogs NBA*, ESPN, available at [http://espn.com/blog/truehoop/post/\\_id/22399/study-on-referees-and-race-still-dogs-the-nba](http://espn.com/blog/truehoop/post/_id/22399/study-on-referees-and-race-still-dogs-the-nba).

<sup>135</sup> See Devin G. Pope et al., *Awareness Reduces Racial Bias*, (Nat’l Bureau of Econ. Research, Working Paper No. 19765, Dec. 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2370221](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370221)

<sup>136</sup> See Christopher Ingraham, *What the NBA Can Teach Us about Eliminating Racial Bias*, Feb. 25, 2014, WASH. POST WORKBLOG, available at <https://www.washingtonpost.com/news/wonk/wp/2014/02/25/what-the-nba-can-teach-us-about-eliminating-racial-bias/>.

<sup>137</sup> See Quinn Capers et al, *Implicit Racial Bias in Medical School Admissions*, 92 ACADEMIC MEDICINE, 365 (2017).

Another educational strategy that has been demonstrated to be effective in reducing bias is what is often labelled as contact theory – namely having diverse groups of individuals work or interact together, similar to the Sommers study discussed previously. This has been a long-standing proposition within antidiscrimination scholarship and underlies much of the emphasis on diversity over the last few decades. And it remains relevant, as studies continue to demonstrate that “intergroup contact typically reduces intergroup prejudice.”<sup>138</sup> It is also the case that providing positive counterstereotypes can help alter implicit bias.<sup>139</sup> Strategies that require individuals to consider the perspective of others, in this instance someone of a different race or gender, has also been demonstrated to combat automatic expressions of bias, as has providing more individuating information.<sup>140</sup>

I should be clear that the fact that implicit bias can often be controlled does not mean there is an easy fix to reducing prejudice. If there were, it would have already been adopted. At the same time, studies consistently show that implicit bias can be controlled and regulated, and that its operation is not inevitable.<sup>141</sup> This is also consistent with what we observe in the social world where the pervasiveness of bias as measured by the IAT does not translate into discriminatory actions seventy-five percent of the time. Stereotype activation is not the same as stereotype application. I suspect that one of the reasons people commonly refer to implicit biases as uncontrollable has to do with the IAT, which is specifically designed to require rapid decisions so that those decisions are beyond one’s control. But the mechanism of the IAT is not replicated for most real world actions, and it is a mistake to confuse the lack of control of the IAT with the controllability or malleability of implicit biases more generally.

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<sup>138</sup> Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. OF PERSONALITY & SOC. PSYCH. 751, 766 (2006). A field study involving actual college roommates likewise found that living with an African-American roommate for a semester reduced implicit bias among white students. See Natalie J. Shook & Russell H. Fazio, *INTERRACIAL ROOMMATE RELATIONSHIPS: AN EXPERIMENTAL FIELD TEST OF THE CONTACT HYPOTHESIS*, 19 PSYCHOLOGICAL SCIENCE 717 (2008). The study also found that the white students, who had been randomly assigned to a black roommate, reported having a less satisfying experience than those who had been assigned white roommates. *Id.* at 721.

<sup>139</sup> See Bertram Gawronski et al., *When “Just Say No” is Not Enough: Affirmation vs. Negation Training and Reduction of Automatic Stereotype Activation*, 44 J. OF EXPER. SOC. PSYCH. 370 (2008). See also Dasgupta, *supra* note --, at 272 (positive exposure to individuals of color can reduce implicit bias); Kerry Kawakami, John F. Dovidio & Simone van Kamp, *The Impact of Counterstereotypic Training and Related Corrections Processes on the Application of Stereotypes*, 10 GROUP PROCESSES AND INTERGROUP RELATIONS 139 (2007) (extensive counterstereotypic training moderated effect of gender biases).

<sup>140</sup> See Andres R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. OF PERS. & SOC. PSYCH. 1027 (2011). In the study, adopting the perspective of another was defined as the “active contemplation of others’ psychological experiences.” *Id.* at 1029; Ziva Kunda & Steven J. Spencer, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, 129 PSYCH. BULLETIN 522, 530 (2003) (discussing effect of individuating information)..

<sup>141</sup> A number of social psychologists have concluded that implicit bias is more malleable than often supposed. See Dasgupta, *supra* note --, at 268 (“The advent of new data and new theories has cast doubt on the immutability of implicit attitudes and beliefs.”); Saaid A. Mendoza, Peter M. Gollwitzer and David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCH. BULLETIN 512, 515 (2010) (“[W]ith the aid of action plans, control can be engaged and implemented with little deliberative effort, and therefore, the activation and use of stereotypes may not be as inevitable as presumed.”).



This also means that it may not be necessary to associate implicit bias with unconscious actions or thoughts but it might be better to think of implicit bias as nondeliberative snap judgments that can be moderated in a number of different ways. This, by itself, would be a significantly different message than is typically conveyed by implicit bias advocates, and one that would seem to better capture how we navigate our daily lives.<sup>142</sup> While it may be true that unconscious biases lurk in many if not most of us, it is also true that those biases are commonly held in check, although they may influence our deliberative actions at times.

### *B. The Importance of Field Studies.*

One widely recognized limitation of much of the social psychology research on implicit bias is that it typically involves college students in laboratory settings. Sometimes they are asked for real world decisions such as to read a vignette about a trial and to make judgments about an appropriate criminal sentence or to do mock hiring but as we saw with the earlier discussion, it is often difficult to extrapolate the laboratory findings into real world settings where more is at stake and the decisionmakers are likely to be more sophisticated. This does not mean that the social psychology studies are meaningless; on the contrary, they have provided great insight into the operation of discrimination and often in ways that would be very difficult to replicate in the real world.

Nevertheless, field studies, where researchers seek to test their theories in actual settings provide more compelling evidence of the pervasiveness of discrimination. These studies are most commonly conducted by economists and sociologists, but variations exist within social psychology such as the studies done with actual doctors and often actual medical patients.<sup>143</sup> Although legal scholars have shown great affection for the IAT and the related concept of implicit bias, more could be gained by shifting focus to field studies, which will also provide a better match with legal cases.

As discussed earlier, one of the best, if not the best, known field study involved sending out thousands of resumes in response to actual job postings and varying the names so that some of the resumes had white-sounding names and others had African-American sounding names.<sup>144</sup> The study documented that the resumes, which were identical other than on the names, with African-

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<sup>142</sup> Although most of the prejudice interventions are conscious in nature, two social psychologists have suggested that implicit bias can be controlled implicitly. They explain, "Stereotype control is not only something we consciously perform to overturn, or react to, unwanted thoughts. It is something we proactively engage, outside of conscious awareness, to help produce desired cognition, in the first place, even inhibiting unwanted thoughts before they occur." Gordon B. Moskowitz & Peizhong Li, *Egalitarian Goals Trigger Stereotype Inhibition: A Proactive Form of Stereotype Control*, 47 J. OF EXPER. SOC. PSYCH. 103-16 (2011).

<sup>143</sup> These studies are discussed at \_\_\_ *supra*. Others have recently advocated that social psychologists engage in more field studies. See Eden King & Mikki Hebl, *Oh the Places We Should Go! Stereotyping and Prejudice in (Real) Mixed Interactions*, in STEREOTYPING AND PREJUDICE, 257 (C. Stangor & C. Crandall eds. 2013).

<sup>144</sup> See Bertrand and Mullainathan, *supra* note \_\_\_ [Greg & Emily].

American sounding names resulted in fifty percent fewer callbacks.<sup>145</sup> Since that study was published, there have been a substantial number of variations.

One recent study sent resumes to faculty members looking for lab assistants and demonstrated that both male and female science faculty were less likely to hire a woman, and when they did so, they generally offered a lower starting salary.<sup>146</sup> Another resume study documented discrimination against women with children when the resume made it clear that the applicant was a mother.<sup>147</sup> Inquiries to mortgage brokers seeking information regarding loans and on the loan process found that those with African-American names received fewer responses and less information when responses were received.<sup>148</sup>

Recently the field studies have migrated to the internet, an area rife with potential to document discrimination. One study demonstrated that applicants with African-American sounding names received fewer responses to their requests in response to apartment advertisements on Craigslist.<sup>149</sup> A recent study replicated those results with Airbnb hosts where it was determined in a study of 6,000 listings across 5 cities, that African-American guests received a positive response to their requests roughly 42% of the time compared to a 50% response rate for white guests.<sup>150</sup> And a study on Ebay auctions of baseball cards found that when the cards were held by an African-American hand they sold for approximately 20% less than when they were held by a white hand.<sup>151</sup> Some years ago Professor Ian Ayres, one of the authors of the baseball card study, documented disparities in retail car negotiations where he found that women, and African

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<sup>145</sup> *Id.* at 998.

<sup>146</sup> See Grinne A. Moss-Racusin, et al., *Science Faculty's Subtle Biases Favor Male Students*, 41 PROCEEDINGS NATIONAL ACADEMY OF SCIENCES 16474-16479 (2012).

<sup>147</sup> See Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty*, 112 AMER. J. OF SOCIOLOGY 1297 (2007). The study, which sent out resumes for 600 jobs, found that mothers were called for interviews about half as often as women who were not mothers, and that fathers suffered no penalty compared to men without children, and were occasionally advantaged. *Id.* at 1333. See also David Neumark, Roy J. Bank & Kyle D. Van Nort, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 QUARTERLY J. OF ECON. 915 (1996) (documenting discrimination against women in high-end restaurants).

<sup>148</sup> See Andrew Hangan, *Discrimination in Mortgage Lending: Evidence from a Correspondence Experiment*, 92 J. OF URBAN ECON. 48 (2016). The study concluded that the differential responses from landlords were the equivalent of reducing African-American credit scores by 71 points. A similar study targeting legislators arrived at similar results – white legislators provided fewer responses to African Americans seeking assistance with voter registration than they did for white constituents, while black legislators responded more quickly and thoroughly to requests from African Americans. See Daniel Butler & David E. Brockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AMER. J. OF POLI. SCI. 463 (2011).

<sup>149</sup> See Michael Ewens, Bryan Tomlin & Liang Choon Wang, *Statistical Discrimination of Prejudice? A Large Sample Field Experiment*, RVW. OF ECON. & STATS. 119 (2014). The authors sent out 14,000 rental inquiries and found that while the responses varied significantly by the racial composition of the neighborhood, requests from African Americans yielded approximately 9% fewer responses.

<sup>150</sup> See Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 APPLIED ECON. 1 (2017). One of the more interesting findings of the study was that the discrimination was almost entirely concentrated among those hosts (the name for those who rent out space) who had never had a black guest. *Id.* at 13.

<sup>151</sup> See Ian Ayres, Mahzarin Banaji, & Christine Jolls, *Race Effects on Ebay*, 46 RAND J. OF ECON. 891 (2015). An earlier study involving Ipods advertised on Craigslist found that they sold for less when held by an African American. See Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 ECON. J. F469 (2013).

Americans, often paid higher prices for cars and received less favorable financing terms than white car buyers.<sup>152</sup>

Sociologist Devah Pager, and her colleagues, have conducted several in-person audit studies. These studies differ from the resume, or correspondence, studies in that two, or more, applicants will appear in person to apply for jobs. The first study was focused on documenting the impact of having a criminal record, which Professor Pager found was a significant deterrent to finding a low-wage job.<sup>153</sup> For the purposes of this article, the most significant finding was that the data showed that whites with criminal records had a better chance of getting a favorable response from an employer than an African American without a criminal record.<sup>154</sup> African Americans with criminal records were one-third as likely as whites with criminal records to receive a favorable employer response.<sup>155</sup> A more recent study that focused on low-wage jobs in New York City found that black applicants were half as likely to receive a positive response than similarly situated white applicants.<sup>156</sup>

The advantages to these field studies is that, when they are done correctly, they provide powerful evidence of the presence of discrimination. These studies are specifically designed to isolate race or gender in the decisionmaking process, and these audit studies rely on actual decisionmakers rather than students or other volunteer participants.<sup>157</sup> A possible limitation of these field experiments is that there is typically no basis for determining what underlies the discriminatory treatment; for example, there is no means to determine whether the behavior was the product of animus, unconscious bias, some combination of the two, or perhaps even a neutral nondiscriminatory reason. In the context, of the original resume study focused on names, it has been suggested that class bias rather than race might best explain the results.<sup>158</sup> In any event, the results of these field studies require interpretation to determine whether discrimination underlies the decisions.

But, and this is a critical point, the social psychology studies on implicit bias also require interpretation. When those studies identify implicit bias as explaining the observed results, what is meant is that the observed behavior differs from explicit self-reports, nothing more and nothing

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<sup>152</sup> See Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AMER. ECON. RVW. 304 (1995).

<sup>153</sup> See Devah Pager, *The Mark of a Criminal Record*, 108 AMER. J. OF SOCIOLOGY 937 (2003).

<sup>154</sup> *Id.* at 958. Among applications filed with 350 employers in Milwaukee, 17% of whites with a criminal record received a positive (callback or job) response while 14% of blacks without a criminal record received a similar response.

<sup>155</sup> *Id.* Only 5% of black applicants with a criminal record received a positive response.

<sup>156</sup> See Devah Pager, Bruce Western & Bart Banikowski, *Discrimination in a Low Wage Labor Market: A Field Experiment*, 74 AMER. SOC. RVW. 777 (2009). In this study, 15.2% of black applicants received a positive response compared to 31% of white applicants, and 25.1% of Latino applicants. *Id.* at 787.

<sup>157</sup> For a good discussion that explores advantages and disadvantages of field studies and laboratory experiments see Jason A. Nier & Samuel L. Gaertner, *The Challenge of Detecting Contemporary Forms of Discrimination*, 68 J. OF SOCIAL ISSUES 207, 212 (2012) (concluding that “when one simultaneously considers the result of audit studies using face-to-face interviews and resume procedures, discrimination is clearly the most parsimonious explanation for the results that are observed.”).

<sup>158</sup> See Roland Fryer & Steven Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 QUARTERLY J. OF ECON. 767 (2004). The authors explained that identifiably black names were more common among lower socioeconomic families, though it is not clear that those making the decisions would have known that.

less. Those self-reports may indicate that some of the individuals were unaware of their implicit biases but it is also possible, perhaps just as likely, that those self-reports are inaccurate or that with some deliberation the individuals would be aware or have access to what is defined as implicit bias. In the end, how that implicit bias is treated, or more accurately, how the results are explained, will require interpretation, just as is true with the field experiments.

These real world examples may also provide additional evidence to refute the notion that the bias is unconscious in nature. Surely no one would claim that an Airbnb host was compelled to deny the request from a black guest or that the decision was uncontrollable. The same could be said of the mortgage broker, the employer reviewing resumes, or a landlord responding to an apartment rental request. Some of these individuals engaging in discriminatory activity are likely motivated by old-fashioned racism, a desire not to associate with an African American. Others are more likely acting on racial stereotypes, such as that an African American would prove to be a bad guest, or will ultimately not qualify for a loan. For a variety of reasons these stereotypes may not be reflected in a self-report but it seems highly unlikely, when we consider the actual circumstances of the decisionmaking, that the individual is unaware of the presence of the stereotype. They might try to rationalize it to themselves and others by arguing that their racial stereotypes are statistically sound, what is often referred to as statistical discrimination.<sup>159</sup> Yet, it would also be the case that their stereotypes were inaccurate and overbroad, and the use of stereotypes in this fashion should be provable as intentional discrimination.<sup>160</sup> Moreover, it should be possible to prove that discrimination without resorting to the implicit bias schema, and certainly without seeking to explain whether the behavior is conscious or unconscious in nature. All that needs to be proved under the law is that an individual was treated differently because of his race or her gender; it is not necessary to prove why.<sup>161</sup>

Along these lines, several recent important intentional discrimination cases were proved without resort to implicit bias. Most significantly was a class-action case brought to challenge the stop-and-frisk policy implemented by the City of New York, which a District Court judge struck down as intentionally discriminatory.<sup>162</sup> Similarly, the voter identification laws in North Carolina and Texas were recently struck down as intentionally discriminatory, and again, the courts never

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<sup>159</sup> Economists have argued that some discrimination may be “rational” in that it is based on statistically accurate judgments (“on average”) regarding groups. See Dennis J. Aigner & Glen G. Cain, *Statistical Theories of Discrimination in the Labor Market*, 30 INDUS. LABOR REV. RVW. 749 (1977).

<sup>160</sup> The Supreme Court has long held that it is not a defense to a claim of discrimination that it is statistically rational. See *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978) (invalidating different pension contributions for men and women even though it was true that women were, on average, likely to outlive men). Because the generalizations are often exaggerated or overbroad, there is also an argument that they are not efficient. See Stewart J. Schwab, *Is Statistical Discrimination Efficient?* 76 AMER. ECON. RVW. 228 (1986).

<sup>161</sup> See Banks & Ford, *supra* note \_\_ [Emory], at 1073 (“The concept of unconscious bias is largely irrelevant to any question of unlawful discrimination under Title 7 . . . Under Title 7, the courts have developed a doctrinal framework that does not require the fact finder to make any determination as to the state of mind of the defendant.”).

<sup>162</sup> See *Floyd v. City of New York*, 959 F. Supp.2d 540, 556 (S.D.N.Y. 2013). In the course of a lengthy opinion, the District Court noted that one of the department’s justifications for the stops, namely that someone was acting in a furtive manner, might be a sign of bias because “an officer’s impression whether a movement was ‘furtive’ may be affected by unconscious racial bias.” *Id.* at 578. When the administration of Bill de Blasio took office, the case was settled. See *Floyd v. City of New York*, 770 F.3d 1151 (2d Cir. 2014).

referred to implicit bias even though these were not cases of overt bias.<sup>163</sup> In investigating the practices of the City of Ferguson Missouri, where Michael Brown was shot in 2014, the Department of Justice concluded that the many of the City's practices were infected with intentional discrimination. The final report concluded that the City's practices were intentionally discriminatory as a result of some explicit overt bias as well as persistent stereotyping about African Americans.<sup>164</sup> It is revealing that these circumstances – police stops and shootings, voter identification laws – are precisely the kind of circumstances that advocates of implicit bias see as involving unconscious discrimination. It seems equally clear that implicit bias is not necessary to prove these claims, and as noted earlier in the discussion of moral responsibility, likely not helpful.<sup>165</sup>

I would also suggest that if we were able to translate the resume studies into legal cases, most experienced attorneys, and likely inexperienced attorneys as well, would be able to prove a claim of intentional discrimination. The employer might raise other issues, such as the socioeconomic issue relating to names arguing essentially they were worried about the class of the individual rather than the race, but even then, an attorney would likely be able to link the socioeconomic status to race. Surely there is no reason to believe that all African Americans are poor, or of lower economic status, and looking at the resumes or the record, might demonstrate that the employer's argument is just a pretext for racial discrimination. In other circumstances, it is difficult to see what nondiscriminatory rationale might be available. For example, an Airbnb host who rejects all African American guests, as the study indicated many did, would presumably have a hard time coming up with a race neutral reason. All transactions are processed with credit cards so there is no clear socioeconomic rationale for rejecting the requests, and any other rationale is likely to run right up against a racial explanation. Again, understanding why the host rejected the requests is not necessary, one need only prove that race was the motivating cause.<sup>166</sup>

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<sup>163</sup> See *North Carolina Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4<sup>th</sup> Cir. 2016) (striking down North Carolina voter identification law as having been implemented with a discriminatory purpose). On remand from the Fifth Circuit, a Texas District court reaffirmed its earlier decision that the Texas law was instituted with a discriminatory purpose. See *Veasey v. Abbott*, 2017 U.S. Dist. LEXIS 54253 (S.D. Tex. 2017). The Fifth Circuit had remanded the case because it determined that some of the evidence the district court relied on (past history of discrimination) was impermissible. See *Veasey v. Abbott*, 830 F.3d 216 (5<sup>th</sup> Cir. 2016), *cert. denied*, 137 S.Ct. 612 (2017).

<sup>164</sup> See U.S. Dept. of Justice, Civil Rights Division, Investigation of Ferguson Police Dept., Mar. 4, 2015, at 71-74, available at [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>165</sup> In the voter identification lawsuits in North Carolina and Texas, there is no mention of implicit or unconscious bias in any of the hundreds of pages of decisions.

<sup>166</sup> This turns out to be a difficult legal issue because Airbnb, like Uber, disclaims responsibility for the actions of those who use its App. For a recent discussion of the liability issues see Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017). It is conceivable that the hosts would assert what might amount to a customer discrimination issue – it is not that I do not want to host black guests but I fear that if others see that I host black guests they may not want to rent my place. This kind of customer discrimination, which was raised in opposition to the 1964 Civil Rights Act, is not a defense to a claim of discrimination. See *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908, 913 (2010) (in a case in which a patient demanded white only health care providers court concluded “It is now widely accepted that a company’s desire to cater to the perceived racial preferences of its customers is not a defense under Title VII . . .”).

### C. Return to Stereotyping.

The final modification of the existing narrative would involve a change in both language and emphasis with respect to contemporary discrimination. The most important shift would be to move away from focusing on the unconscious, which, for law, is the most problematic term. And as has been discussed previously, there is simply no scientific reason to conclude that what is defined as implicit bias invariably arises from the unconscious. Perhaps most important, as a legal question, the issue turns out to be entirely irrelevant.

Dropping the focus on the unconscious would be an important step forward and it may be facilitated by moving back to a concentration on stereotyping, a term that is more familiar and has a lengthy history within the legal system.<sup>167</sup> Moreover, it is clear that, more often than not, what scholars mean by implicit bias is that an individual is acting on an ingrained stereotype – associating African Americans, for example, with criminality or women with children and a likelihood to leave the workplace when they have children. Indeed, the founders of the IAT routinely refer to implicit biases as stereotypes and have for many years.<sup>168</sup> Other social psychologists likewise often use the terms interchangeably, as is also true for many legal scholars.<sup>169</sup>

To some, the switch to stereotyping may not seem particularly distinguishable given that some scholars divide stereotyping into explicit and implicit realms.<sup>170</sup> It is not entirely clear what is meant by an explicit stereotype, and examples are rarely given. It may be that an employer concedes that he will not hire African American applicants because he assumes they are less capable than whites, or he may also be willing to admit that he assumes that African Americans are likely tied to criminal activity. Obviously, in the context of an actual legal case, it would be highly unlikely that these sorts of statements would come to light and it is not at all clear that they

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<sup>167</sup> References to stereotyping and their impermissibility go back to the early days of statutory enforcement. *See, e.g.,* *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 717 (7<sup>th</sup> Cir. 1969) (in a challenge to a job classification system discussing “broad class of stereotypes including in which sex is the stereotyping factor.”). The legal scholarship incorporating social cognition theory that arose in the 1990s also typically discussed stereotypes as opposed to implicit bias. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (focusing throughout on social cognition and stereotyping); Jody David Armour, *Stereotypes and Prejudice: Helping Legal Decision-Makers Break the Prejudice Habit*, 83 CALIF. L. REV. 733 (1995).

<sup>168</sup> *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem & Stereotypes*, 102 PSYCH. REV. 4, 6 (1995) (“This article’s use of the ‘implicit’ label for stereotypes serves primarily to emphasize the connection of the existing body of social cognition research on stereotypes to recent cognitive psychological research on implicit memory.”). Their book *BLINDSPOT* also tends to use the terms interchangeably, with an entire Chapter devoted to stereotyping.

<sup>169</sup> *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1260-62 (2001) (linking stereotypes to the IAT); Levinson, *supra* note --, at 354 (“Studies in social cognition have illustrated that racial attitudes and stereotypes are both automatic and implicit.”); Rudman, et al., *supra* note \_\_ [Unlearning], at 857 (“implicit orientations consist of automatic associations (e.g., between Blacks and criminality) that are unavailable to introspection.”); Faigman et al, *supra* note \_\_ [Hastings], at 1427 (associating implicit bias with stereotypes); Roberts, *supra* note \_\_ [Chicago], at 864 (discussing “implicit stereotypes”).

<sup>170</sup> *See* Richardson, *supra* note \_\_ [Minn.] at 2043 (“Stereotypes and attitudes can be explicit (conscious) and implicit (unconscious).”).

should be treated as stereotypes as opposed to what might be called animus-based racism or overt discrimination.<sup>171</sup>

In addition to her audit studies, Devah Pager has interviewed employers to gauge their attitudes and beliefs about race, and her findings were quite revealing. She noted that “one of the most common themes we heard from employers centered on the perceived lack of a work ethic among black men (fully 55 percent mentioned this issue,)” and she noted a common theme surrounding the “perceived threatening or criminal demeanor” of black men.<sup>172</sup> Certainly there is nothing implicit about these beliefs and perhaps they should be classified as explicit stereotyping. Regardless of what they are called, as a legal matter it would not be at all difficult to establish intentional discrimination based on these statements, particularly since these same employers noted that in their own experiences they had not observed individuals who met these stereotypes.<sup>173</sup> This is, after all, the principal harm of stereotyping, namely that the group judgments are exaggerated and overbroad.<sup>174</sup>

The main reason to return to language of stereotyping is that courts, including the Supreme Court, have been relying on claims of stereotyping to prove discrimination cases for at least thirty years, and they have done so without worrying about whether the underlying stereotypes are explicit or implicit, or whether they are unconscious in origin. The most famous case that turned on stereotypes to establish liability is *Price Waterhouse v. Hopkins*, which involved an accountant who sued when her consideration for partnership was delayed.<sup>175</sup> As recounted in the Supreme Court decision, several of the Price Waterhouse partners had suggested that the plaintiff, Ann Hopkins, should go to charm school, should learn to walk and talk more femininely.<sup>176</sup> At the trial, the plaintiff introduced evidence from a well-known social psychologist who was testifying as an expert witness that these, and other comments, evinced stereotypes against working women, who were often held to a double standard in that what was acceptable for men (aggressive behavior) was deemed unacceptable for women.<sup>177</sup> Importantly, no one in the case asked whether

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<sup>171</sup> In addition to implicit and explicit stereotypes, many scholars also distinguish between stereotypes and attitudes but stereotypes are typically involved in behavior. See Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476 (2010) (distinguishing between attitudes and stereotypes). Nevertheless, even under this schema, when implicit bias is manifested in behavior it is typically in the form of a group judgment, or stereotype. See, e.g., Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOCIOL. 299, 315 (2006) (discussing attitudes and stereotyping); Levinson *supra* note \_\_\_ [Duke], at 359 (focusing on “implicit stereotypes”).

<sup>172</sup> See Devah Pager & Diana Karafin, *Bayesian Bigot? Statistical Discrimination, Stereotypes, and Employer Decision Making*, 15 ANNALS OF THE AMER. ACADEMY OF SCIENCES 70, 78, 82 (2009).

<sup>173</sup> *Id.* at 90 (“The findings of this research suggests that, while most employers expressed strong negative views about the characteristics of African American men, fewer than half of those employers reported observations of their own applicants or employees consistent with these general perceptions.”).

<sup>174</sup> See Lincoln Quillian & Devah Pager, *Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization*, 73 SOC. PSYCH. Q. 79, 87 (2010) (noting that “white respondents overestimate their risk of crime victimization more than twice as much in heavily black zip codes relative to areas with few black residents.”).

<sup>175</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>176</sup> *Id.* at 235 (noting comments that Ms. Hopkins should take a “course at charm school,” and “walk more femininely, talk more femininely, dress more femininely.”).

<sup>177</sup> *Id.* Although writing for a plurality of the Court, Justice Brennan approved of the expert testimony, he also added that “[O]ne is tempted to say that Dr. Fiske’s expert testimony was merely icing on Hopkins’ cake. It takes no special training to discern sex stereotype in a description of an aggressive female employee as requiring ‘a course at charm school.’” *Id.* at 256 (plurality opinion).

the stereotypes were unconscious, automatic or uncontrollable, and as one thinks about the evidence, it seems clear that none of those labels would be appropriate.

Since *Price Waterhouse*, courts, including the Supreme Court, have become accustomed to adjudicating discrimination cases based on claims that stereotyping explained the challenged actions. The Supreme Court has evoked the evils of racial stereotyping in cases involving peremptory challenges and voting rights cases,<sup>178</sup> It has also relied on stereotypes in addressing claims under the Family Medical Leave Act concluding that the statute was designed to eradicate stereotypes against working mothers,<sup>179</sup> and in the age discrimination context where, again, the Court noted that the age discrimination act was designed to address stereotypes about older workers.<sup>180</sup> Perhaps most significant, the Court has struck down legislation because it perpetrated stereotypes against women in a lengthy series of cases.<sup>181</sup> Stereotyping, in other words, has been an essential part of the Supreme Court's antidiscrimination doctrine for many years. Importantly, all of these cases in which the Court has discussed the impermissibility of stereotyping involved claims of intentional discrimination, most commonly under the Constitution.

Although there is no question that stereotyping has played an important role in the Supreme Court's doctrine, issues relating to how stereotyping can be proved, and its relevance to establishing claims of intentional discrimination, have been developed most extensively in the lower courts, where there are literally thousands of such cases. To be sure, not all of the cases are successful, but courts have clearly adapted to claims of stereotyping – in a wide array of contexts – and again have done so without resorting to determining whether the stereotypes are consciously invoked.<sup>182</sup> One recent case flatly rejected the notion that there was conscious, explicit discrimination, as reflected in self-reports, and something else. In *Burns v. Johnson*, the

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<sup>178</sup> *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (“We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.”); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (criticizing racially-drawn voting districts because they are premised on stereotypes regarding voting patterns). Justice Marshall had earlier relied on stereotype theory in the original case striking down peremptory challenges as discriminatory. See *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (Marshall, J., concurring) (noting that the “Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes.”).

<sup>179</sup> See *Nevada Dep. Of Human Resources v. Hibbs*, 538 U.S. 721, 731 (2003) (noting that “pervasive sex-role stereotype that caring for family members is women’s work.”). The opinion is replete with references to stereotypes regarding caretakers and working women and is one of the Supreme Court’s best known cases on stereotyping, in part because it was written by Chief Justice Rehnquist at a time when he had substantial responsibility for caring for his grandson.

<sup>180</sup> See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (“Congress’s promulgation of the ADEA was prompted by the concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.”).

<sup>181</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *California v. Goldfarb*, 430 U.S. 199 (1977). These and other cases are discussed in Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 918-21 (2016).

<sup>182</sup> For some illustrative cases see *Ambat v. City & County of S.F.*, 757 F.3d 1017 (9<sup>th</sup> Cir. 2014) (striking down policy prohibiting men from supervising female inmates as resting on invidious stereotypes); *Hall v. City of Chicago*, 713 F.3d 325 (7<sup>th</sup> Cir. 2013) (relying on gender stereotyping to establish liability in sex discrimination case for a job similar to a plumber); *Wexler v. White’s Fine Furniture*, 317 F.3d 564, 572 (6<sup>th</sup> Cir. 2003) (concluding that employer’s decision “adhered to the stereotype that an older manager cannot perform in a high-stress management position where the company would be pushing him to work harder and do more.”); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1<sup>st</sup> Cir. 1999) (“Stereotypes or cognitive biases, based on race, are as incompatible with Title VII’s mandate as stereotypes based on age or sex. . .”).



Department of Homeland Security defended a sex discrimination claim by stating that there were no “sexist or gender-based slurs” used against the plaintiff.<sup>183</sup> In the social psychology literature, that would be termed explicit bias and the court rejected this dichotomy, explaining:

The idea that discrimination consists only of blatantly sexist acts and remarks was long ago rejected by the Supreme Court. As this circuit has repeatedly held, stereotyping cognitive bias, and certain other more subtle cognitive phenomena . . . also fall within the ambit of Title VII’s prohibition on sex discrimination.<sup>184</sup>

Other courts have, likewise, made it clear that the origins of the stereotypes, or the underlying motive, is simply not relevant to the legal inquiry. In a case involving a challenge to the striking of an African-American juror, the dissenting judge complained that the prosecutor was being held responsible for “unconscious bias” whereas the majority countered that, “[W]hy the prosecutor had a conscious motive to strike [the juror] in the first place – whether or not ‘unconscious racism’ partly explained that motive – was simply irrelevant.”<sup>185</sup> At the end of the day, the question was whether the evidence demonstrated that race was “a substantial reason for his use of a peremptory strike.”<sup>186</sup> This is a position that has been reiterated by courts for many years and on many occasions.<sup>187</sup>

Adding implicit bias into the mix is likely to cause more confusion than clarity. Whereas courts are clearly comfortable in incorporating stereotyping theories into their intentional discrimination jurisprudence, they become less comfortable doing so when “unconscious bias” is introduced into the analysis. This is not just because unconscious bias is associated with the distinct disparate impact theory but also because it can become too difficult to refute a claim of unconscious bias, as indicated in the earlier discussion relating to the exclusion of expert testimony who claimed that implicit bias explained most any observed disparity.<sup>188</sup> In other words, turning to implicit bias will rarely, if ever, help prove a case, but it may lead to having more claims dismissed because of the difficulty fitting implicit bias within governing legal structures. Thus the paradox with which I began.

#### IV. CONCLUSION

Discrimination remains a vibrant force in society and some of it is no doubt the result of unconscious or implicit bias. At the same, implicit bias does not explain all contemporary discrimination, and most of the bias that the legal system considers arises from deliberate and conscious actions. Many of these actions are undoubtedly influenced by automatic stereotyping

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<sup>183</sup> *Burns v. Johnson*, 829 F.3d 1 (1<sup>st</sup> Cir. 2016).

<sup>184</sup> *Id.* at 13.

<sup>185</sup> *See Crittenden v. Chappell*, 804 F.3d 998, 1019 (9<sup>th</sup> Cir. 2015), and the dissenting judge’s opinion at 1024.

<sup>186</sup> *Id.*

<sup>187</sup> *See, e.g., EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263 (11<sup>th</sup> Cir. 2000) (“Title VII prohibits ‘the entire spectrum of disparate treatment of men and women resulting from sex stereotypes, even where the stereotypes are benign or not ground in group animus.’”). In a concurring opinion in a disability case, where stereotypes often play a role in proof, Justice Stevens noted the difficulty in distinguishing between animus and stereotyping noting that “the line between animus and stereotype is often indistinct, and it is not always necessary to distinguish between them.” *Olmstead v. L.C. by Zimring*, 527 U.S. 558, 608 (1999) (Stevens, J., concurring).

<sup>188</sup> *See infra* section II.B.4.

but that does not transform them into unconscious acts that are beyond control. If the message of the implicit bias literature is that much of contemporary discrimination is not animus-based, that is a message the legal system learned long ago, and it is a message that does not require an emphasis on the unconscious. No doubt that literature, including its adaptation by law professors, has provided an important educational function by demonstrating the complexities of subtle discrimination but it is now time to return to holding individuals responsible for the choices they make and can control, Rather than focusing on the unconscious, legal scholars should look to field studies for evidence of discrimination and return to a focus on how stereotyping continues to influence thoughts and behavior.