On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law

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Prologue: Three Portraits of Modern-Day Race Discrimination[1]

Job Opportunities. In a field study exploring employment discrimination,[2] White and Black actors matched for physical characteristics and interpersonal skills applied to entry-level jobs with 340 New York City employers operating restaurants, retail sales, car washes, shipping and moving companies, and the like. In their applications, the actors used qualifications that differed only in the presence or absence of a criminal record. Replicating the results of an earlier field

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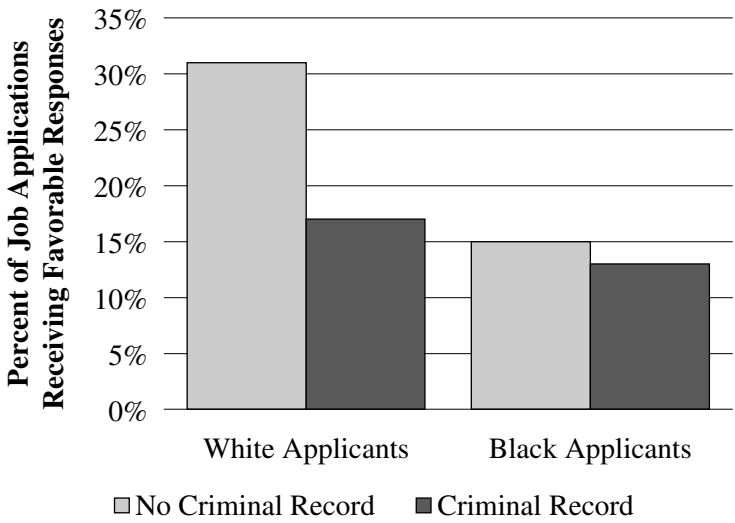
[1] The term "discrimination" can carry either a neutral or pejorative connotation with respect to the character of the individual whose actions to which it is applied. *See, e.g.*, *Discrimination*, Black's Law Dictionary 566 (10th ed. 2014) (quoting Robert K. Fullinwider, The Reverse Discrimination Controversy: A Moral and Legal Analysis 11 (1980)). Psychologists studying development, perception, and learning, for example, use the term to indicate that a participant can tell the difference between two stimuli. That is a good thing, evidencing normal, healthy cognitive development and ability. Among the central insights of the social-cognitive revolution in Psychology, however, is that such processes, when applied to social groups, can be harmful, leading people to treat otherwise similarly situated others differently based upon their race, sex, or other social category into which they are placed. Such discrimination need not be intentional and may occur outside of the conscious awareness of the person who is discriminating. Throughout this article, I use the term to describe this phenomenon.

[2] Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 Am. Soc. Rev. 777 (2009).

experiment conducted in Milwaukee, Wisconsin,[3] as shown by the bars in Figure 1, the results showed that Black applicants with no criminal record had about half the rate of success as White applicants with identical qualifications but comparable success on the job market to White applicants who did have a criminal record.[4]

FIGURE 1: COMPARATIVE EFFECTS OF RACE AND A CRIMINAL RECORD ON EMPLOYMENT OPPORTUNITY



Interviews with the employers who were unknowingly involved in the study suggests that they viewed themselves as having color blind hiring practices and took offense at any suggestion that they might take race into account.[5] Consistent with this, the impressions that the actors had of the employers did not differ significantly by the race of the actor or the outcome of the application.[6] At the same time, when asked, many employers were aware of, or even endorsed, potentially

[3] Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960 (2003); *see also* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (describing study where job applicants with White-sounding names received 50 percent more callbacks than those with African-American sounding names).

[4] This figure depicts the results of research by Pager et al., *supra* note 2, at 785-86, 796.

[5] *See* Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES, 221, 229-30 (2012).

[6] Pager et al., *supra* note 2, at 793.

prejudicial racial stereotypes, for example, that Black individuals tend to be lazy, threatening, criminal, and act inappropriately.[7] And, as the results indicate, there is little question that the actors did, in fact, experience race-based discrimination or that the standard hiring practices for these employers did collectively have a racially disproportionate impact.

Police Practices. New York Police Department (N.Y.P.D.) records show that from 2004 to 2012, its officers conducted over 4.4 million stops, 2.3 million of which included a frisk for weapons.[8] As indicated by the bars in Figure 2, the stops disproportionately included Blacks and excepted Whites. While Whites made up approximately one-third of the residents of the City during that period, they represented just 10% of those stops.[9] By comparison, Blacks, who constituted less than 25% of the population, were subject to 52% of the stops.[10] Moreover, N.Y.P.D. data suggests that that its officers' decisions to stop and frisk New York residents were highly error-prone.[11] The vast majority of those stopped and frisked were innocent.[12] Just 12% of the stops resulted in an arrest or summons.[13] Officers found weapons in only 1.5% of the frisks.[14] As indicated by the lines in Figure 2,[15] where weapons or other contraband were found during a frisk, the success, or "hit," rate was actually higher for Whites than for Blacks.[16]

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7 *See* Pager & Western, *supra* note 5, at 229 (citing Devah Pager & Diana Karafin, *Bayesian Bigot? Statistical Discrimination, Stereotypes, and Employer Decision Making*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 70 (2009)) ("[T]he plurality of employers we spoke with, when considering Black men independent of their own workplace, characterized this group according to three common tropes: as lazy or having a poor work ethic; threatening or criminal; or possessing an inappropriate style or demeanor.").

8 Floyd v. City of New York, 959 F. Supp. 2d. 540, 558 (S.D.N.Y. 2013).

9 *Id.* at 559.

10 *Id.*

11 *See id.* at 558 ("[I]n 98.5% of the 2.3 million frisks, no weapon was found.").

12 *See id.*

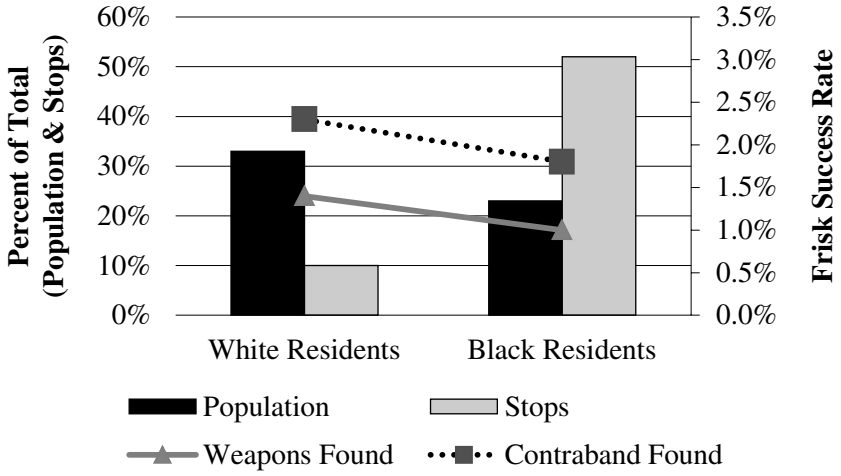
13 *Id*. at 583.

14 Floyd v. City of New York, 959 F. Supp. 2d. 540, 558 (S.D.N.Y. 2013).

15 The underlying data for Figure 2 was drawn from the *Floyd* case, *id.* at 558-59.

16 *Id.* at 559. Such racial disparities in the focus of police officers' efforts at law enforcement, and the disassociation of those efforts from the resulting hit rates, are not unique. *See* MEGAN ARMENTROUT, ET AL., CALIF. STATE POLYTECHNIC UNIV., POMONA & LOYOLA MARYMOUNT UNIV., COPS AND STOPS: RACIAL PROFILING AND A PRELIMINARY STATISTICAL ANALYSIS OF LOS ANGELES POLICE DEPARTMENT TRAFFIC STOPS AND SEARCHES 11, 19, 21 (2007), *available at* http://www.public.asu.edu/~etcamach/AMSSI/reports/copsnstops.pdf (analyzing Los Angeles Police Department records for the 638,732 vehicle stops and searches that LAPD officers conducted from July 2004 to June 2005. The authors found that over 19% of vehicles

FIGURE 2: RATES OF STOPS AND FRUITFUL FRISKS IN NEW YORK CITY BY RACE



When confronted with this information, officers with the N.Y.P.D. vehemently denied that they were racially biased or even that their policing practices are discriminatory.[17] Rather, they argued that the race-based discrepancies were a direct reflection of the proportion of crimes reported to them in which the alleged perpetrator was Black compared to White.[18] The definition of stereotyping, however, is assuming that the characteristics associated with a group apply to each individual in that group.[19] Use of such information to justify the differential treatment of individual members of the group is discrimination.[20]

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stopped with Black drivers were searched compared to just 5% of vehicles with White drivers. As in New York, searches were more likely to be successful when the driver was White (56.2%) than when he or she was Black (44.6%)); *see also* ACLU, BLACK, BROWN AND TARGETED: A REPORT ON BOSTON POLICY DEPARTMENT STREET ENCOUNTERS FROM 2007-2010, at 4 (Oct. 2014), *available at* https://www.aclum.org/sites/all/files/images/education/stopandfrisk/black_brown_and_targeted_online.pdf (analyzing Boston Police Department records of over 200,000 stops and finding that, while Whites and Blacks make up 53.9% and 24.4% of the population of Boston, respectively, 21.8% of stops were of Whites and 63.3% of stops were of Blacks. The racial disparity persists even after controlling for crime rates.).

[17] *Id.* at 560-61, 585-88, 603-05.

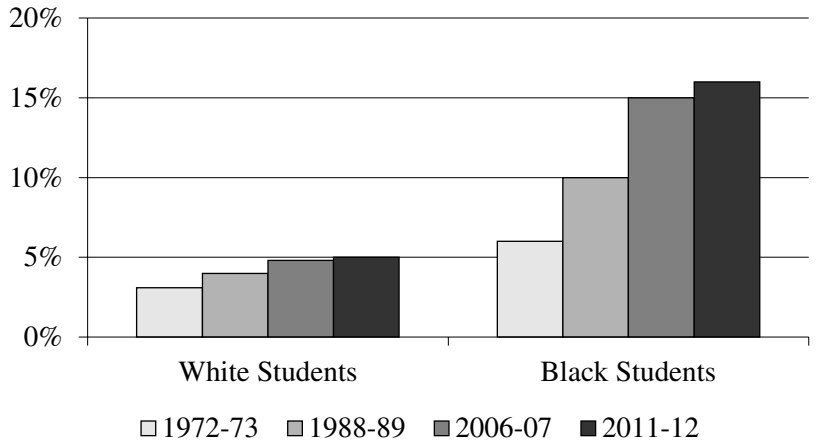
[18] *Id.* at 585.

[19] *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 191-92 (25th ed. 1979).

[20] *See Discrimination*, BLACK'S LAW DICTIONARY 566 (10th ed. 2014) ("3. Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found

School Discipline. Decades of research consistently show that students of color, particularly Black males, receive a disproportionately large percentage of office discipline referrals, suspensions, and expulsions.[21] The problem is getting worse.[22]

FIGURE 3: INCREASING DISPARITY IN PERCENTAGE OF WHITE AND BLACK STUDENTS SUSPENDED FOR ONE OR MORE DAYS



As shown in Figure 3,[23] between 1972 and 2006, suspension rates for White students have increased about one-and-a-half times, from 3.1%

between those favored and those not favored."); *see also* the discussion of discrimination, *supra* note 2.

[21] DANIEL J. LOSEN & JONATHAN GILLESPIE, THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 6-7 (2012), *available at* http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf.

[22] *See id.* at 30.

[23] *See* Kent McIntosh et al., *Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RES. ON CHILD. RISK 4, 2 fig.1 (2014) (relying on data for years 1988-1989, 2006-2007 & 2011-2012 from *Civil Rights Data Collection*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *available at* http://www.ed.gov/about/offices/list/ocr/data.html?src=RT/ (last visited Dec. 29, 2014); and data for years 1972-73 from CHILDREN'S DEFENSE FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN 82 (1975)), *available at* http://digitalcommons.library.tmc.edu/cgi/viewcontent.cgi?article=1215&context=childrenatrisk.

to 4.8%.[24] During the same time, suspension rates for Black students have increased two-and-a-half times, from 6% to 15%.[25]

The differences cannot be explained by poverty rates, culture, or alleged differences in the extent to which White and Black children engage in problem behavior. Black students are referred to the office and suspended at higher rates than their White peers even after accounting for individual socio-economic status and other demographic variables.[26] Similarly, Black students do not engage in more problem behavior.[27] To the contrary, they are significantly more likely to be disciplined even after controlling for how disruptive *their own teachers* think they are.[28] Further, White students are more often disciplined for problem behaviors that are easily spotted and clearly violate school rules, such as smoking and vandalism, whereas Black students are more often disciplined for ambiguous or subjective behaviors, such as disruption, the consequences of which are discretionary.[29] Indeed, one recent study of the records of over 900,000 elementary school students in Texas found that, controlling for 83 variables including socio-economic status, in order to isolate the effects of race, Black students still had a 31% higher likelihood of being subject to school discipline for discretionary violations than White students but a 23% *lower* likelihood of being subject to discipline for mandatory violations.[30] Although structural factors may explain some of the differences, these consistent findings indicate that

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[24] *Id*.

[25] DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2-3 (2010), *available at* http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf.

[26] *See* Russell J. Skiba et al., *Unproven Links: Can Poverty Explain Ethnic Disproportionality in Special Education?* 39 J. SPECIAL EDUC.130, 135-36 (2005); John M. Wallace, Jr. et al., *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 NEGRO EDUC. REV. 47, 57 (2008).

[27] Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, 102 J. EDUC. PSYCHOL. 508, 513-14 (2010).

[28] *Id.*

[29] Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317, 334 (2002).

[30] TONY FABELO ET AL., COUNCIL OF ST. GOV'TS JUST. CTR., BREAKING SCHOOL RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT x, 12, 26, 45, 88 (2011), *available* at http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf.

racial bias may play an important role in the extent to which Black children are disproportionately suspended and expelled from school.[31]

INTRODUCTION

Together, these three portraits of discrimination depict a tableau of inequitable treatment and opportunity. The juxtaposition of racially disproportionate outcomes and race-neutral explanations illustrates a relatively recent understanding of discrimination: the majority of modern racial discrimination in the U.S. likely occurs at the hands of people who genuinely believe that they are behaving equitably but unintentionally act in ways that are not. To be sure, the possibility that individuals can and do discriminate against others without intending to do so has been explored by psychologists for the better part of a century. Marshaling methodological advances over the last 25 years, social psychologists and others have found an accumulating body of strong, convergent empirical evidence supporting the theory.

Drawing on psychological work, Charles R. Lawrence III,[32] Linda Hamilton Krieger,[33] and others[34] introduced the idea of unintentional discrimination to legal scholars with transformative consequences.[35] Referred to generally as "implicit bias," a wide range of contemporary legal scholarship draws on their pioneering work to examine the implications of non-purposeful discrimination for an extraordinary variety of legal topics including employment discrimination,[36] affirmative action,[37] civil procedure,[38] "Terry stops",[39] self-defense,[40]

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31 *See* McIntosh et al., *supra* note 24, at 3.

32 Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); *see also* Charles R. Lawrence III, *Unconscious Racism Revisited: Reflection on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931 (2008).

33 Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); *see also* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

34 *See, e.g.*, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

35 *See* Eugene Borgida & Erik J. Girvan, *Social Cognition in Law*, *in* APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY: ATTITUDES AND SOCIAL COGNITIONS 753 (M. Mikulincer & P. R. Shaver, eds., 2014).

36 *See, e.g.*, Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

37 *See, e.g.*, Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063 (2006).

prosecutorial discretion,[41] jury selection,[42] public defenders' case triage,[43] judicial decision-making,[44] criminal sentencing,[45] immigration,[46] mediation,[47] and arbitration.[48] Research on implicit bias figures prominently in major discrimination-related litigation.[49] The National Center for State Courts,[50] National Counsel for Juvenile and Family Court Judges,[51] American Bar Association,[52] and numerous other

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[38] *See, e.g.*, Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal*'s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011).

[39] *See, e.g.*, Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1565 (2013) ("In this Article, I deal systemically with unconscious bias in the context of legal proceedings broadly. I examine how psychology informs the phenomenon of unconscious bias, and analyze the potential impact of unconscious bias upon the individuals who participate in legal proceedings, including eyewitnesses, lawyers, jurors, and judges."); John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689 (2014); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 103 (2014).

[40] *See, e.g.*, Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV 1 (2010).

[41] *See, e.g.*, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012).

[42] *See, e.g.*, Anthony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

[43] *See, e.g.*, L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE. L.J. 2626 (2013).

[44] *See, e.g.*, Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

[45] 41 *See, e.g.*, Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591 (2009).

[46] *See, e.g.*, Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).

[47] *See, e.g.*, Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71 (2010).

[48] *See, e.g.*, Erik J. Girvan, Grace Deason & Eugene Borgida, *The Generalizability of Gender Bias: Testing the Effects of Contextual, Explicit, and Implicit Theories of Sexism on Labor Arbitration Decisions*, LAW & HUM. BEHAV. 1 (2015), *available at* http://dx.doi.org/10.1037/lhb0000139.

[49] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2549-50 (2011) (discussing a "social framework analysis" conducted by a sociological expert).

[50] *Helping courts address implicit bias: Resources for education*, NAT'L CENTR. FOR ST. CTS., http://www.ncsc.org/ibeducation (last visited Jan. 5, 2015).

[51] Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES (June 1, 2009), http://www.ncjfcj.org/resource-library/publications/lens-implicit-bias.

[52] *Implicit Bias Initiative*, A.B.A., http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html (last visited Jan. 5, 2015); Victor Li, *States with stand your-ground laws have seen an increase in homicides, reports task force*, A.B.A J. (Aug. 8, 2014, 9:40 PM),

organizations provide resources and training to members of the bench and bar about implicit bias.[53] Large corporations, including Google, have hired consultants to train their employees on the topic.[54] Government agencies, the juvenile justice community, and schools are also hungry for this information; in the past year alone, a dozen or so of these types of organizations have welcomed the author to speak at workshops and presentations on understanding and addressing implicit bias.

For those who regularly experience the effects of implicit bias first-hand but are learning about the psychological research on it, the three portraits of discrimination also describe the irrationality, ubiquity, and persistence of a fundamentally unacceptable situation with which they are crushingly familiar. At one workshop on understanding and addressing implicit bias, the members of a Black parents' group spoke, introducing themselves as the "souls behind the data." One mother checked her tears as she shared her 21-year old son's experiences in a school system that worked harder to kick him out and pass him along than educate him, and how she now has lost him to prison. At another, a mother expressed an urgent and gripping fear that her young boys are not safe even from the police officers in their community and teachers in his classrooms, whose jobs it is to protect them. These fears echo across the country. At a protest of the failure of a grand jury to indict the police officer who choked to death Eric Garner, an unarmed Black man stopped for a minor crime, a father pleaded: "Where we headed for? What's the future for me? What's the future for me? You know what I'm saying, for my child, for my son? What is his future?"[55] These parents may know that understanding what might bias police officers', teachers', and employers' perceptions of their children is critical to developing practical solutions. But

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http://www.abajournal.com/news/article/states_with_stand_your_ground_laws_have_more_homicides/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

53 A list of organizations that provide legal resources regarding implicit bias is included in Appendix 1.

54 *See* Google Ventures, *Unconscious Bias @ Work*, YOUTUBE, (Sept. 25, 2014), https://www.youtube.com/watch?v=NLjFTHTgEVU; *see also* Farhad Manjoo, *Exposing Hidden Bias at Google*, N.Y. TIMES (Sept. 24, 2014), http://www.nytimes.com/2014/09/25/technology/exposing-hidden-biases-at-google-to-improve-diversity.html?_r=0.

55 Eyder Peralta, *The Sentiment in New York Captured in a 25-Second Audio Clip*, NAT'L PUB. RADIO (Dec. 4, 2014, 7:56 AM), http://www.npr.org/blogs/thetwo-way/2014/12/04/368422790/the-sentiment-in-new-york-captured-in-a-25-second-audio-clip.

their desperate and pointed questions quickly beg for solutions. What is the plan, my plan, our plan to fix it? – now!

Thinking as a scholar, social scientist, and consulting expert, I am impressed and encouraged by the substantial amount of interest in implicit bias, its implications for various aspects of the legal system, and the willingness of many to meaningfully change their own policies, practices, and procedures to try to eliminate its effects. Thinking as a lawyer, parent, and member of the law and psychology community mindful of Holmes' "bad man" view of the law,[56] I am forced to admit that we have not been especially successful in using the psychological science to help establish a legal requirement that those who are unwilling to take the same steps voluntarily nevertheless have a duty to do so.

For almost 40 years, courts have limited rights under anti-discrimination law—including those under the Due Process Clause of the U.S. Constitution[57] and for disparate treatment under Title VII[58]—to cases in which plaintiffs can show that discrimination was the purpose of the defendants' behavior. The problem is not a shortage of legislation or other positive sources of law that could provide the basis for such an anti-discrimination claim. Such sources, including the Equal Protection Clause[59] and the Civil Rights Act of 1964,[60] purport to protect similarly situated individuals from prejudicial treatment resulting from their race, gender, ethnicity, or national origin.[61] The language in the provisions is generally causal and does not differentiate between conscious or unconscious, intended or unintended discrimination. Thus, on their face, the primary sources of anti-discrimination law appear to create, or at least are consistent with, a right to be free from discrimination whatever the psychological state of the individual perpetrating it.

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56 *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, *reprinted in* 110 HARV. L. REV. 991, 992 (1996).

57 *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976).

58 *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000).

59 U.S. CONST. amend. XIV, § 1.

60 42 U.S.C.A. §§ 2000d–2000d-4 (1964).

61 The primary sources of anti-discrimination law include the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, and statutes, such as the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2012); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2012); and Title VII of the Civil Rights Act of 1964 (Title VII), codified as amended in 42 U.S.C. §§ 2000–2000e-17 (2012).

To the extent that our goal is to use the legal system, instrumentally, to remedy inequity illuminated by insights from work on implicit bias, the resulting gap in legal protection from discriminatory actions that are perpetuated accidentally, negligently, recklessly, or knowingly rather than purposefully, is inconsistent with that goal.[62] Conventional wisdom among psychologically informed critics of anti-discrimination law generally, and those who adopt the behavioral realist approach in particular, is that the law-science gap ought to matter.[63] The behavioral realist approach recognizes that legal doctrine is frequently dependent upon assumptions about human behavior. Where those assumptions are testable, behavioral realists argue that judges should look to the relevant social scientific evidence. If the assumption is wrong, then the doctrine upon which it is based should be brought in conformity with the social science or explicitly justified on other grounds.

It is one thing to use the behavioral realist approach jurisprudentially, as a prescriptive tool for examining, exploring, and critiquing legal doctrine and the assumptions and motives that support it. It is another to apply the behavioral realist approach as a descriptive guide, in the tradition of the Brandeis Brief, which suggests that psychological science can be effectively used to obtain doctrinal change.[64] For the former purpose, rooted as it is in naturalistic philosophy, behavioral realism provides scholars and academics with a defensible prescriptive intellectual yardstick against which to measure the law. For the latter, the utility of the behavioral realist approach is limited by the descriptive accuracy of the classical legalist premise that "every right, when withheld, must have a remedy, and every injury its proper redress."[65] In terms of that premise, the anti-discrimination doctrine reflects a failure of judges to interpret the law with reference to the

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62 The adjective "intentional," often used to modify "discrimination," is legally ambiguous. The distinctions in the Model Penal Code between negligence, recklessness, knowing, and purposeful intent are useful for specifying clearly what type of intent is required. *See* Erik J. Girvan & Grace Deason, *Social Science in Law: A Psychological Case for Abandoning the "Discriminatory Motive" Under Title VII*, 60 CLEV. ST. L. REV. 1057, 1062-63 (2013) (citing MODEL PENAL CODE § 2.02 (1962)).

63 *See* Kang & Banaji, *supra* note 37, at 1064-65; Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1174-75 (2012); Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 635-36 (2015); Krieger & Fiske, *supra* note 36, at 1061.

64 *See* Marion E. Doro, *The Brandeis Brief*, 11 VAND. L. REV 783, 796 (1957).

65 Marbury v. Madison, 5 U.S. 137, 147 (1803).

best social scientific understanding about the advent or extent of actual injury.[66] As neither the existence nor severity of harm from discrimination is dependent upon the intent of those who discriminate, an inquiry into intent should not limit the right to be free from discrimination, or seek redress for it.[67] Judges must simply have failed at some point to recognize that discrimination can occur without purpose. The solution, through scholarship,[68] Continuing Legal Education programs,[69] legal briefing and expert testimony, and even popular science literature[70] is to inform them again, and again, and again.

To employ the most overused cliché of all time, if insanity is doing the same thing repeatedly and expecting different results,[71] at this point, explaining implicit bias to a judge or offering evidence of its effects with the expectation that doctrinal change will follow, may qualify for such a diagnosis. More constructively, as Richard Feynman explained, when people think that they know how the world works but do not get the expected results, the inescapable conclusion is that they are wrong.[72] At some point, absent a supposition that judges on the whole are duplicitous,[73] the ineffectiveness of educational and evidentiary campaigns surrounding implicit bias becomes very difficult to reconcile with a conceptualization of behavioral realism as anything other than prescriptive theory.

In this paper, I assert that the problem is the descriptive limitations of the behavioral realist approach. By examining the approach from the standpoint of the jurisprudential theory of descriptive legal

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66 Krieger & Fiske, *supra* note 36, at 1001.

67 *See generally* Floyd v. City of New York, 959 F. Supp. 2d. 540 (S.D.N.Y. 2013); *see also infra* notes 247.

68 *See* Samuel Bagenstons, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007); Greenwald & Krieger, *supra* note 33; Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Kang, *supra* note 34.

69 *See infra* Appendix 1.

70 *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2007).

71 *See* Daniel D'Addario,"*The definition of insanity" is the most overused cliché of all time*, SALON (Aug. 6, 2013, 7:33 AM), http://www.salon.com/2013/08/06/the_definition_of_insanity_is_the_most_overused_cliche_of_all_time/.

72 youtube picture, *The Essence of Science in 61 Seconds Richard Feynman 02 11 2013 HD Youtube*, YOUTUBE (Nov. 2, 2013), https://www.youtube.com/watch?v=XC9i2cvChaE.

73 Most scholars of whom I am aware openly reject this perspective. *See* Page, *supra* note 42, at 171-74; *see also infra* Part II.B (Naive Realism).

realism and psychological theory of naive realism, advocates of using the psychological science of implicit bias to advance anti-discrimination law may be able to "break out of conventional modes of thought, to challenge underlying assumptions, and to bring previously neglected dimensions into sharp relief."[74] In short, we may be able to begin to chart a more effective way forward for leveraging social science to improve the law.

The remainder of the article proceeds in three parts. In Part 1 I review the legal and psychological background for behavioral realism. I introduce and discuss the purposeful intent limitation in anti-discrimination law and describe how it compares to the major social psychological theories of prejudice and discrimination. Building on this foundation, I review the history and development of behavioral realism as both a dominant psychology-*in*-law[75] approach for the theoretical examination and critique of anti-discrimination doctrine and as a guide for efforts by legal advocates to directly convince courts to bring that doctrine in line with the psychological science. In Part 2, I explain how, to the extent it is taken as a descriptive guide for effectively achieving doctrinal change, the assumptions underlying the behavioral realism approach, and the resulting arguments, do not account for the insights of jurisprudential theory of legal realism or psychological theory of naive realism. Accordingly, advocates who draw on the logic of behavioral realism to try to convince judges to expand the protections of anti-discrimination law will tend to place too much focus on judges' assumed lack of psychological knowledge and their resulting inability to draw inferences from it. Consistent with legal and naive realism, there is reason to believe that lack of knowledge is not the central problem at all. Thus, in order to be effective in application by advocates, behavioral realism must be expanded upon to be more descriptively realistic. In Part 3, I begin to identify the other factors that are likely to be functionally important to include in the model, and challenge the psychology and law community to

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74 Michael Wessells et al., *Psychologists Making a Difference in the Public Arena: Building Cultures of Peace*, *in* PEACE, CONFLICT, AND VIOLENCE: PEACE PSYCHOLOGY FOR THE 21ST CENTURY 350, ch. 30, at 11(Daniel J. Christie, Richard V. Wagner & Deborah Du Nann Winter eds., 2001).

75 The term "psychology *in* law" (as opposed to "psychology *and* law") is used to denote a meaningfully interdisciplinary integration of the fields, rather than one simply borrowing concepts casually from the other to support claims that are already being made on other grounds and for other reasons. *See generally* Borgida & Girvan, *supra* note 35.

embrace additional work along these lines as an essential step to charting a course forward in which psychological science is an effective catalyst for doctrinal change.

I. THE ROLE OF PURPOSEFUL INTENT IN DISCRIMINATION

> "And I have again observed, my dear friend, in this trifling affair, that misunderstandings and neglect occasion more mischief in the world than even malice and wickedness. At all events, the two latter are of less frequent occurrence."
>
> J.W. von Goethe[76]

A. *A Legal Limitation*

Most anti-discrimination claims could be interpreted, based on the phrasing of the source texts and intent of their drafters, to extend to situations involving a discriminatory impact.[77] But judges require most plaintiffs who bring anti-discrimination claims to prove that the defendant acted with a purpose to discriminate.[78] The Equal Protection Clause of the 14th Amendment, for example, is broadly worded to create a right to be treated equally by the government and its officials:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

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[76] JOHANN WOLFGANG VON GOETHE, THE SORROWS OF YOUNG WERTHER 4 (1902).

[77] *See, e.g.*, Krieger, *supra* note 33, 1212-17 (1995).

[78] This point has been discussed at length elsewhere. *See, e.g.*, *Developments in the Law — Race and the Criminal Process, Part VIII: Race and Capital Sentencing*, 101 HARV. L. REV. 1603 (1988); Girvan & Deason, *supra* note 62; Randall L. Kennedy, McClesky v. Kemp, *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1404 (1988) ("In the race relations context, the most significant obstacle to federal judicial interference with sentencing decisions is the Supreme Court's doctrine of purposeful discrimination."); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 541 (1977) ("The Court rejected a nonmotivational theory of racial[ ] discrimination, holding that the equal protection clause of the fourteenth amendment prohibits only government action undertaken with a 'discriminatory purpose.'"); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 328 (1982) ("The 1976 decision of the Supreme Court in *Washington v. Davis* imposed a new burden upon equal protection plaintiffs: proof of invidious intent or purpose.").

> law; *nor deny to any person within its jurisdiction the equal protection of the laws*.[79]

Moreover, as one of the Civil War Amendments, the primary goal of the provision was to help secure the civil rights of freed slaves.[80] Consistent with its breadth and purpose, plaintiffs rely upon the clause in a wide variety of contexts when facing discrimination in public and private spheres, including hiring decisions;[81] enforcement of health and safety regulations;[82] restrictions on school attendance;[83] setting boundaries for voting districts;[84] and in the criminal arena, stops and frisks,[85] jury selection,[86] and the death penalty.[87]

Neither the text of the Amendment itself nor its primary goal conditions the duty of the government and its officials to provide equal protection on their intent. Nevertheless, in *Washington v. Davis*, the Supreme Court held that the clause prohibits only those actions taken with a discriminatory purpose, not those that merely have a discriminatory impact.[88] In the classic case, the issue was whether, when selecting police officers, the District of Columbia was free to use a literacy test that was widely employed by the federal government even though the test was shown to have a failure rate of approximately 57% in Black applicants but only 13% for White and other applicants.[89] Through a study of the test's validity, results on it

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[79] U.S. CONST. amend. XIV, § 1 (emphasis added). With respect to the Federal Government, the Supreme Court has found that, in practice, the Due Process Clause of the Fifth Amendment incorporates the protections of the Equal Protection Clause in the Fourteenth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954), *supplemented sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[80] *See* Strauder v. West Virginia, 100 U.S. 303, 306-07 (1879) (citing Slaughter-House Cases, 83 U.S. 36, 72 (1872)), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

[81] *See* McCleskey v. Kemp, 481 U.S. 279, 291 (1987).

[82] *See* Yick Wo v. Hopkins, 118 U.S. 356, 372-74 (1886).

[83] *See* Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954), *supplemented by* Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[84] *See* Wright v. Rockefeller, 376 U.S. 52, 56 (1964).

[85] *See* Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000); Floyd v. City of New York, 959 F. Supp. 2d. 540, 558 (S.D.N.Y. 2013); *see also generally* David Clark, *"Stop and Frisk" Under* Floyd v. City of New York*: The Difficulty of Proving a Fourteenth Amendment Violation*, 25 GEO. MASON U. C.R. L.J. 341 (2015).

[86] *See* Batson v. Kentucky, 476 U.S. 79 (1986); J.E.B. v. Alabama, 511 U.S. 127 (1994).

[87] *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

[88] Washington v. Davis, 426 U.S. 229, 239 (1976); *see also* Perry, *supra* note 78, at 542.

[89] Perry, *supra* note 78, at 542-44 (citing Davis v. Washington, 512 F.2d 956, 959 (D.C. Cir. 1975), *rev'd* 426 U.S. 229 (1976)).

were shown to be related to performance in police officer training.[90] The results had not, however, been linked to actual performance on the job.[91] Because there was not sufficient evidence that the test was selected *in order to produce* a racially disparate outcome, use of the test was found to be constitutional.[92]

Following *Davis*, the Court reinforced and applied the purposeful intent requirement in a variety of Equal Protection Clause cases involving evidence of a substantial disparate impact. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[93] for example, a religious organization and non-profit corporation sought to build 190 low and moderate-income housing units in an essentially all-White Chicago suburb.[94] The development, which was intended to be racially integrated, with approximately 40% of its residents being Black,[95] required rezoning. Following several public meetings in which the desirability of integrated housing of this kind, integrity of the zoning plan, and possibility of declining property values were discussed, the rezoning request was denied.[96] Reviewing the constitutionality of the decision, the Court reiterated that "[p]roof of racially discriminatory intent or purpose is required to show a violation the Equal Protection Clause."[97] However, where, as is common in legislative decision-making, there is no single, unified reason, cause, or motivation for a governmental action, it is enough that the plaintiff show that racial discrimination was at least "a motivating factor in the decision."[98] Applying this standard, the Court concluded that the plaintiffs had failed to carry their burden of proof.[99]

In *Personnel Administrator of Massachusetts v. Feeney*,[100] the Court confirmed that only purposeful discrimination violates the Equal Protection Clause; knowing discrimination, the Court held,

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[90] *Id*.

[91] *Id*.

[92] *Id*.

[93] Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

[94] *Id.* at 255-60 (of the suburb's 64,000 residents, approximately twenty-seven, or .04%, were Black).

[95] About 40% of the population eligible for housing in the development was Black. *Id.* at 259.

[96] *Id*. at 258.

[97] *Id.* at 265.

[98] Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

[99] *Id.* at 270. For a more robust discussion of psychology and the law of a "discriminatory motive," see Girvan & Deason, *supra* note 62.

[100] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

does not violate the Clause.[101] In *Feeney*, female governmental employees challenged Massachusetts' preference for veterans in government employment. The preference was not related to job qualifications.[102] Further, at the time, approximately 98% of veterans were men and, on the record before the Court, women were regularly passed up for selection in favor of male veterans with lower qualifying scores.[103] Even so, the Court found that there was insufficient evidence that the legislature had enacted the preference "because of" the plainly foreseeable result of gender discrimination rather than "in spite of" it and, on this basis, found the preference to be constitutional.[104]

Finally, in *McCleskey v. Kemp*, the Court was faced with the issue of whether demonstrable racial disparities in the outcomes of capital cases, which were assumed to result from discretion of prosecutors and the jury, violated the Equal Protection Clause.[105] There, the defendant presented the court with a sophisticated analysis of over 2,000 contemporary murder cases in Georgia.[106] The results, summarized in Figure 4, showed that prosecutors sought and jurors awarded the death penalty substantially more often when the people killed were White than when they were Black, suggesting a lower value for Black than White lives. Moreover, this "race-of-victim effect" was larger when the defendant in the case was Black, suggesting that killing someone who is White is seen by prosecutors and jurors as particularly egregious when the person who does so is Black.[107] The discrepancy persisted even after controlling for thirty-nine other nonracial variables and was shown to be strongest for difficult cases, that is, those in which discretion plays the largest role.[108] Figure 4

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101 *Id.* at 279-81.

102 *Id.* at 259.

103 *Id.* at 270-71.

104 *Id.* at 279 (internal quotation marks omitted).

105 McClesky v. Kemp, 481 U.S. 279, 282-83 (1987).

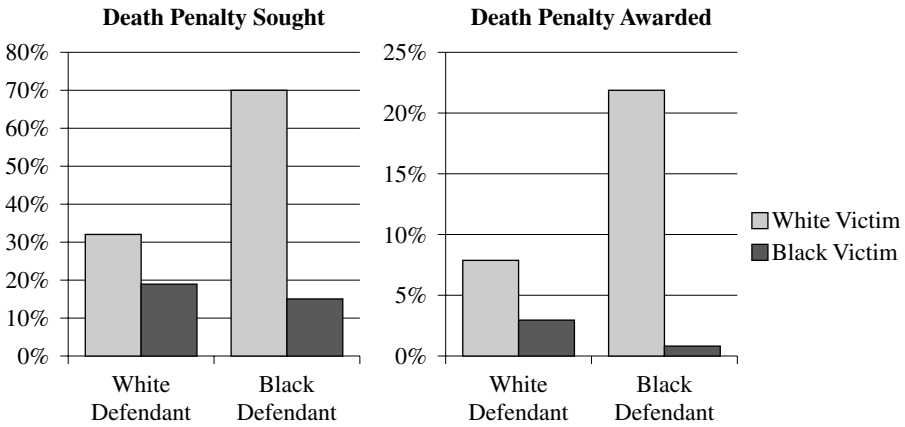
106 *Id.* at 286.

107 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, at 6 (1990).

108 *McCleskey*, 481 U.S. at 287, 287 n.5. For a discussion of the impact of discretion on use of stereotypes in legal decision-making, see, e.g., Erik J. Girvan, Habits of Meaning: When Legal Education and Other Professional Training Attenuate Bias in Social Judgments 8-10, 43-45, 81-85 (May 2012) (unpublished Ph.D. dissertation, University of Minnesota) (on file with University of Michigan Libraries), *available at* http://purl.umn.edu/128753.

describes the pattern of decisions presented to and acknowledged by the *McKleskey* Court.[109]

FIGURE 4: PERCENT OF MURDER CASES IN WHICH DEATH PENALTY IS SOUGHT AND AWARDED BY RACE OF DEFENDANT AND VICTIM



Faced with this evidence, the Supreme Court cited *Davis* for the proposition that "[a] criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination."[110] Applying this standard, while the empirical analysis before the Court showed that there was an increased, race-based risk of receiving the death penalty, it did not "*prove*" that race entered into the sentencing decision or presented a constitutionally unacceptable risk of doing so.[111] Accordingly, in light of the tradition and value of prosecutorial and juror discretion in the criminal justice process, the use of discretionary practices did not violate the Equal Protection Clause.[112]

Since *McCleskey*, federal courts have invoked *Davis'* purposeful intent requirement to deny claims like the following:

- Black and Latino plaintiffs challenging a New York law that prevented them from voting because they had been convicted

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[109] *McCleskey*, 481 U.S. at 286-87. Bars on the left panel represent the percent of cases in which prosecutors sought the death penalty and those on the right panel the percent of cases in which the jury awarded the death penalty.

[110] *Id.* at 351 (citing Washington v. Davis, 426 U.S. 229, 239–240 (1976)).

[111] *Id.* at 322 (emphasis in original).

[112] *Id.* at 297-98.

of a felony, where (a) there was evidence from the early 19th Century history of the law that its original predecessor was enacted because of the impact it would have on Blacks and, (b) currently, while members of those racial/ethnic groups made up 31% of the population, they constituted almost 87% of those denied the right to vote;[113]

- Inmates convicted of possession of crack cocaine challenging the failure to make the partial fix of the 100-to-1 crack to powder cocaine sentencing ratio retroactive, where (a) Blacks were known to make up 30% of crack users but 83% of crack convicts, (b) the average sentences for crack cocaine were 50% longer than for powder cocaine, and (c) Blacks accounted for 88% of those who would benefit from making the new law retroactive;[114]
- And the claims of a Pakistani Muslim who was arrested following the terrorist attacks on September 11, 2001, and placed in a maximum security prison based upon his race, religion, and national origin because he could not prove that the policies that led to his detention were undertaken "because of" rather than "in spite of" the discriminatory impact they would have "upon an identifiable group."[115]

Equally well-documented are the intent-based restrictions on the disparate treatment cause of action under anti-discrimination statutes such as Title VII, the Equal Employment Opportunities Subchapter of the Civil Rights Act of 1964.[116] The story is a familiar one. As with the Equal Protection Clause, by its terms, Section 2000e-2 of Title VII is broadly worded to prohibit employers from treating an employee differently "because of" the individual's race, color, religion, sex, or national origin:

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113 Hayden v. Paterson, 594 F.3d 150, 159-60, 168 (2d Cir. 2010) ("Absent any adequately supported factual allegations as to discriminatory intent behind the enactment of the 1894 constitutional provision, we are compelled to find that the New York Constitution's requirement that the legislature pass felon disenfranchisement laws is based on the obvious, noninvidious purpose of disenfranchising felons, not Blacks or Latinos.").

114 United States v. Blewett, 746 F.3d 647, 671-72 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1779 (2014).

115 Ashcroft v. Iqbal, 556 U.S. 662, 676-77 (2009) (quoting Pers. Adm. of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

116 Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 84-85 (2008).

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; . . . .[117]

The statutory language arguably encompasses all manner of factual causality irrespective of the employer's intent, and therefore, the complete range of employer intent, including negligent, reckless, knowing, and purposeful actions.[118] Moreover, the Congressional goal for the section and other similar provisions[119] was to prohibit employers from discriminating between potential or existing employees based upon their status as members of a protected social category and instead rely upon merit in making their decisions.[120]

Even so, the Supreme Court in *McDonnell Douglas* interpreted the language narrowly to require evidence of a purpose to discriminate.[121] Thereafter, courts have required plaintiffs in Title VII actions

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117 42 U.S.C. §§ 2000e-2 (2012) (emphasis added).

118 *See supra* note 62 and accompanying text; *see also* David L. Faigman et al., Symposium, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1433 (2007).

119 For convenience and brevity, I use Title VII as an example. The thrust of the argument, however, applies beyond the particularities of this statute and regulatory framework. The anti-discrimination statutes include the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2012), the Age Discrimination in Employment Act (ADEA), 42 U.S.C. §§ 12101-12213 (2012), Title VII of the Civil Rights Act of 1964 (Title VII), codified as amended in 42 U.S.C. §§ 2000–2000e-17 (2012), and the Fair Housing Act (or FHA), 42 U.S.C. §§ 3601-3619, 3631 (2012). *See supra* note 61 and accompanying text.

120 Girvan & Deason, *supra* note 62, at 1060-61.

121 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973); *see also* Int'l Bhd. of Teamsters v. United States 431 U.S. 324, 335 (1977). Justice Alito's recent dissent in Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015), provides an excellent example of the error in the claim that the phrase "because of" clearly, as a matter of common language usage, refers to intentional acts in anti-discrimination claims. *Id.* at 2533-38 (Alito, J., dissenting). Joined by Chief Justice Roberts, and Justices Scalia and Thomas, he argues that the plain meaning of the phrase "because of" in the Fair Housing Act means that claims under the act are restricted to those in which there is a finding of intentional discrimination. *Id.* To illustrate the point, Justice Alito collects 14 Washington Post articles published on January 21, 2015, the day the case was argued, that use the phrase "because of." *Id.* at 2534 n.2. Contrary to his assertion, however, several of the examples he cites use "because of" for factual causality, including physical or structural processes or constraints that influence outcomes, the operation and impact of which occurs without intent of any kind: "Berman, Jury Selection Starts in Colo. Shooting Trial, p. A2 ('Jury selection is expected to last four to five months because of a massive pool of potential jurors') . . . Hicks, Post Office Proposes Hikes in Postage Rates, p. A19 ('The Postal Service lost $5.5 billion in 2014, in large

to show that defendants have engaged in "clandestine and covert discrimination,"[122] evidenced "a discriminatory intent or motive,"[123] have "intentionally discriminated against the plaintiff,"[124] or have "discriminatory animus"[125] or "racial animus" and "lie" or offer "a phony reason" to justify their actions.[126]

As in *Arlington Heights v. Metropolitan Housing Development Corp.*,[127] in *Price Waterhouse v. Hopkins*, the Court recognized the possibility that more than one factor can motivate an employment decision.[128] Offering a similar response, it held that Title VII creates a right to be free from discriminatory decisions that harm employees and that are "based on a mixture of legitimate and illegitimate considerations."[129] Even then, however, a plaintiff must show that at least part of the defendant's "true reason" or "actual motive," that is, the defendant's purposeful intent, was to discriminate against the plaintiff based on his or her status as a member of a protected class:[130]

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response,

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part because of continuing declines in first-class mail volume') . . . Letter to the Editor, Metro's Safety Flaws, p. A20 ('[A] circuit breaker automatically opened because of electrical arcing')[.]" *Id.* The examples cited thus show why it is patently false to assert that language which is commonly used to describe a phenomenon such as the automatic operation of a circuit breaker must, as a matter of linguistics or plain meaning, require purposeful intent.

122 United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971).

123 Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988).

124 *Id.*

125 Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978).

126 Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343, 347-48 (7th Cir. 1997); *see also* Bell v. EPA, 232 F.3d 546, 550 (7th Cir. 2000) ("Once the EPA has met this production burden, plaintiffs must establish that the reason offered by the EPA is merely a pretext for discrimination.").

127 Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

128 Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989). Later, in the Civil Rights Act of 1991, Congress amended Title VII (but not other, related anti-discrimination statutes) to indicate that prohibited discrimination under Title VII can be a function of one of the employer's motives rather than just a product of the sole discriminatory motive: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin *was a motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2 (2012) (emphasis added).

129 *Price Waterhouse*, 490 U.S. at 241.

130 *Id.* at 259 (White, J., concurring).

> one of those reasons would be that the applicant or employee was a woman.[131]

Today "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."[132]

B. *The Psychological Science*

Psychologists and sociologists have been studying bias, discrimination, and prejudice for more than a century. [133] Our understanding of these phenomena, and the phenomena themselves, have evolved considerably over this period.[134] Most recently, a substantial body of research from social-cognitive psychology suggests that the best explanations include two distinct types of bias, explicit and implicit, each associated with one of two different types of cognitive processing.[135] The first type of processing, generally known as System 1, is efficient, operates extremely quickly, and is automatic, working mostly outside of our conscious awareness.[136] It monitors, decodes, evaluates, interprets, and otherwise tries to make some sense out of the nearly continuous input our brains receive from the environment without us having to pay attention or make any conscious decisions. The second type of cognitive processing, System 2, is what we experience as conscious attention.[137] It is relatively slow and effortful, allowing us to make controlled and deliberate decisions.

1. Explicit Bias

Explicit bias operates as part of System 2. It is what we typically think of as prejudice: Ethnocentrism, racism, and other consciously

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131 *Id.* at 250.

132 Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 153 (2000).

133 *See, e.g.*, GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954); W.E.B. DU BOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY (1899).

134 Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314 (2009).

135 Jonathan St. B. T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSP. ON PSYCHOL. SCI. 223, 225 (2013); Eliot R. Smith & Jamie DeCoster, *Dual-Process Models in Social and Cognitive Psychology: Conceptual Integration and Links to Underlying Memory Systems*, 4 PERSONALITY AND SOC. PSYCHOL. REV. 108 (2000).

136 *See generally* KAHNEMAN, *supra* note 70.

137 *Id.*

endorsed attitudes, for example, positive or negative feelings or beliefs, like stereotypes, about people based upon their membership in a socially-defined group.[138]

a. *Major Paradigm Pre-1970s: Overt, Explicit Bias*

Both manifestations and our understanding of the nature of explicit bias have evolved since the mid-1900s. Early research focused on overt forms of explicit bias, such as Jim Crow Racism. The experience of World War II, including the need to overcome racial divisions for collective defense, and awareness of atrocities committed in the Holocaust, highlighted the practical need to understand and overcome such prejudices.[139] At that time, direct expression of racial bias was common and open expression and discussion of it largely accepted.[140] For example, in 1942 a nationally representative survey included the following questions:

- "Do you think white [sic] students and Negroes should go to the same schools or separate schools?"
- "Generally speaking, do you think there should be separate sections for Negros in street cars and buses?"[141]

Results showed that 70% of White Americans thought that White and Black students should go to separate schools and that 56% of White Americans favored segregating public transportation.[142] In 1963, 74% of White Americans responded affirmatively when asked "Do you think there should be laws against marriages between Negroes and whites [sic]."[143]

Regular repetition of surveys on these and other similar topics over the course of the civil rights movement and thereafter revealed substantial declines in such overt, explicit racist attitudes. By 1970, just 12% of White Americans responded that they favored segregated

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138 Pearson et al., *supra* note 134, at 323-26.

139 *See* T. W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1950); ALLPORT, *supra* note 133; Milton Rokeach, *Generalized Mental Rigidity as a Factor in Ethnocentrism*, 43 J. ABNORMAL & SOC. PSYCHOL. 259 (1948).

140 Lawrence D. Bobo et al., *The* Real *Record on Racial Attitudes*, *in* SOCIAL TRENDS IN AMERICAN LIFE: FINDINGS FROM THE GENERAL SOCIAL SURVEY SINCE 1972, at 38, 47 fig.3.1 (Peter V. Mardsen ed., 2012).

141 ANDREW M. GREELEY & PAUL B. SHEATSLEY, ATTITUDES TOWARDS DESEGREGATION, NAT'L OPINION RESEARCH CENT., U. OF CHICAGO (1971), *available at* http://files.eric.ed.gov/fulltext/ED068600.pdf.

142 *See id.* at 2 tbl.1.

143 *See id.* at 5 tbl.2.

transportation.[144] By 1973, White support for segregated schools dropped to just 13%, and 37% of White Americans supported laws against inter-marriage,[145] a number that steadily declined to about 10% by 1996.[146] Notwithstanding the substantial declines in overt explicit racial bias, significant racial disparities persisted over the period in a variety of domains, including employment,[147] education,[148] home ownership,[149] the accumulation of wealth,[150] placement in foster care,[151] school discipline,[152] and incarceration.[153] Why?[154]

b. *Major Paradigm 1960s to 1980s: Social Desirability Reduces the Expression of Overt Explicit Racism*

In the 1960s and 1970s, social scientists investigating the role of explicit bias in perpetuating racial disparities began to investigate two

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144 *See id.* at 2 tbl.1.

145 Bobo et al., *supra* note 140, at 45 tbl.3.1.

146 *Id.* at 47, fig.3.1.

147 *See supra* notes 2-3 and accompanying text.

148 *See* Grace Kao & Jennifer S. Thompson, *Racial and Ethnic Stratification in Educational Achievement and Attainment*, 29 ANN. REV. SOC. 417 (2003); Jaekyung Lee, *Racial and Ethnic Achievement Gap Trends: Reversing the Progress Toward Equity?*, 31 EDUC. RESEARCHER 3 (2002).

149 *See* Kerwin Kofi Charles & Erik Hurst, *The Transition to Home Ownership and the Black-White Wealth Gap*, 84 REV. ECON. & STAT. 281 (2002).

150 *See* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA (1999); THOMAS SHAPIRO ET AL., INST. ON ASSETS & SOC. POL'Y, THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE (2013), *available at* http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf; Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53 (2006).

151 *See* ALICIA SUMMERS ET AL., NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE: TECHNICAL ASSISTANCE BULLETIN (2013), *available at* http://www.ncjfcj.org/sites/default/files/Disproportionality%20Rates%20for%20Children%20of%20Color%20in%20Foster%20Care%202013.pdf; E. Michael Foster et al., *Explaining the Disparity in Placement Instability Among African-American and White Children in Child Welfare: A Blinder–Oaxaca Decomposition*, 33 CHILD. & YOUTH SERVICES REV. 118 (2011); Fred Wulczyn et al., *Poverty, Social Disadvantage, and the Black/White Placement Gap*, 35 CHILD. & YOUTH SERVICES REV. 65 (2013).

152 *See supra* notes 22-31 and accompanying text.

153 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth*, 58 SOC. PROBLEMS 257 (2011).

154 There are numerous structural explanations for these disparities, which are vitally important to understanding the problem of contemporary racial discrimination and for crafting a solution. *See, e.g.*, Barbara Reskin, *The Race Discrimination System*, 38 ANN. REV. SOC. 17 (2012). They are beyond the scope of this paper.

possible answers: Suppression or concealment of real attitudes as a result of social desirability concerns[155] and a shift to more subtle forms of "modern" or "symbolic" racism.[156] In survey research, social desirability is the tendency for people to respond to researchers' questions in a way that is viewed as socially acceptable. Thus, it may be that someone consciously endorses biased racial attitudes or beliefs but has learned that they should hide them when asked by academics because it is no longer appropriate to express them in public. Researchers have developed and employed a wide variety of methods to test this tendency, including unobtrusive measures, interventions designed to encourage honesty, and the effects of individual differences in people's sensitivity to social pressure.

Unobtrusive measures involve conducting research in a way that the participants do not believe they are being watched or are otherwise involved in a study.[157] For example, research assistants who were either White or Black might pose as shoppers leaving a store.[158] They would then drop their grocery bags to see if an approaching White (or Black) person would stop to help. If the White research assistant received assistance more often that Black research assistant, racial bias was inferred. Other researchers focused on anti-social behavior, such as whether White bystanders would spontaneously report shoplifting (which was actually staged by a research assistant) at different rates when the shoplifter was Black as opposed to White.[159] Pager's audit study, described in the prologue, is also an example of an unobtrusive measure.[160]

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155 Roger Tourangeau & Ting Yan, *Sensitive Questions in Surveys*, 133 PSYCHOL. BULL. 859, 876-77 (2007).

156 *See* Minako K. Maykovich, *Correlates of Racial Prejudice*, 32 J. PERSONALITY & SOC. PSYCHOL. 1014 (1975); John B. McConahay, Betty B. Hardee & Valerie Batts, *Has Racism Declined in America? It Depends on Who is Asking and What is Asked*, 25 J. CONFLICT RESOL. 563, 577 (1981); David O. Sears & Donald R. Kinder, *Whites' Opposition to Busing: On Conceptualizing and Operationalizing Group Conflict*, 48 J. PERSONALITY & SOC. PSYCHOL. 1141, 1146 (1985).

157 *See generally* EUGENE J. WEBB ET AL., UNOBTRUSIVE MEASURES: NONREACTIVE RESEARCH IN THE SOCIAL SCIENCES (1966); Thomas J. Bouchard, *Unobtrusive Measures: An Inventory of Uses*, 4 SOC. METHODS & RES. 267 (1976).

158 For a review of examples, see Faye Crosby, Stephanie Bromley & Leonard Saxe, *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 548-49 (1980).

159 *See id.*

160 *See supra* note 2 and accompanying text.

In 1980, Crosby, Bromley, and Saxe conducted a review of the results of numerous studies of racial bias involving unobtrusive measures.[161] They found continuing evidence of racial bias, but that the bias was strongest when people were not interacting directly with the person about whom they might be biased. For example, collecting studies of helping behavior involving a face-to-face interaction such as the grocery bag study, they found that White individuals helped Whites more often than Blacks in 32% of the studies and Blacks more often than Whites in 18% of the studies.[162] Whites helped equal numbers of Whites and Blacks in the remaining 50% of the studies.[163] By comparison, in studies of helping behavior that did not involve direct, personal contact, for example, those studies in which the people being observed had the opportunity to provide assistance to someone calling the wrong number or by mailing a forgotten envelope, White individuals helped Whites more often in 75% of the studies and Whites and Blacks equally in 25%.[164] In *none* of the indirect-contact studies did White individuals help Black individuals more often.[165] Based on their review, Crosby, Bromley, and Saxe concluded that "Antiblack prejudice is still strong among American whites,"[166] but that it had shifted to more subtle forms of discrimination.[167]

A second approach for testing whether social desirability was responsible for declines in overt explicit racism was use of manipulations that encourage honesty. A famous example is the bogus pipeline. In their classic work, Jones and Sigall describe the approach as any that:

> involves convincing the subject that there is a machine that provides valid indication of his true feelings, hooking him up to such a machine, introducing theoretically interesting stimulus conditions to the subject while he is hooked up, and finally asking the subject to estimate the machine reading in terms of a scale presumably paralleling the summary readout of the machine.[168]

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161 Crosby, Bromley & Saxe, *supra* note 158, at 548.

162 *Id.* at 550-51 tbl.1.

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.* at 560.

167 Crosby, Bromley & Saxe, *supra* note 158, at 560.

168 Edward E. Jones & Harold Sigall, *The Bogus Pipeline: A New Paradigm for Measuring Affect and Attitude*, 76 PSYCHOL. BULL. 349, 354 (1971). In fact, this is primarily how polygraph

Thus, in a task where the participant responds by pressing a button, a researcher might connect electrodes to participants' arms, claiming (falsely) that they are attached to an "electromyographic" (EMG), "galvanic skin response," or other similarly technical sounding device capable of detecting the participants "implicit muscle movements," "positive and negative emotional states," or other unconscious reaction.[169] The researcher then (falsely) asserts that the machine will detect the participants' real attitudes, beliefs, or preferences.[170]

Employing this procedure, in 1971, Sigall and Page compared the self-reported stereotypes of "Americans" and "Negroes" of participants who were either simply asked the question with those who thought that they were connected to an EMG device.[171] In doing so, they found that some stereotypes did not differ between the two groups of participants, for example, "Americans" are more practical, and "Negroes" are more musical.[172] Other traits, however, particularly those that tended to be more value-laden, differed by condition.[173] For example, individuals who were simply responding to the questions tended to indicate that "honest" did not apply to "Americans" but did apply to "Negroes." However, participants in the EMG condition, like the bogus pipeline, indicated the opposite: "Americans" were honest but "Negroes" were not.[174] Similarly, in both conditions, participants indicated that "Americans" were not lazy. But they only said that "Negroes" were not lazy when they were simply asked the question. Participants who thought that the researcher

machines are frequently used in practice. There is a substantial body of research suggesting that the results of lie detector tests are not especially valid. As such, they are not generally admissible in court. *See e.g.*, Timothy B. Henseler, *A Critical Look at the Admissibility of Polygraph Evidence in the Wake of* Daubert*: The Lie Detector Fails the Test*, 46 CATH. U. L. REV. 1247, 1248 (1996). Even so, as Iacono writes, "few question the *utility* of the tests, especially as a tool to extract information from examinees." William G. Iacono, *Polygraph Testing, in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 219, 234 (Eugene Borgida & Susan Fiske eds., 2008). To the contrary, many government agencies use polygraphs in interviews and interrogations based on "overwhelming anecdotal evidence that many suspects confess under the pressure of these interrogations." *Id.*

169 GSR is real, but the ability of the machine was over-claimed or the machine was not used. Jones & Sigall, *supra* note 168, at 354.

170 *Id.* at 354.

171 *Id.* at 361.

172 *Id.*

173 *Id.*

174 *Id.* at 361.

could detect their true beliefs indicated that the term "lazy" was characteristic of "Negroes."[175]

The same basic result was replicated numerous times. Roese and Jamieson, for example, reviewed ten studies published between 1971 and 1982 involving bogus pipeline techniques that related to prejudiced attitudes, like racism or sexism.[176] Supporting the social desirability explanation, in each of the ten studies, participants to whom the bogus pipeline was administered responded in ways that indicated significantly more prejudice than those in a control condition.[177]

A third approach for testing whether some or all of the apparent decline in overt explicit racism was due to social desirability involved exploring individual differences in motivation to appear unprejudiced.[178] Building on earlier work exploring the ways in which motivation and self-presentation impact how much peoples' own attitudes influence their behaviors,[179] the approach starts with the proposition that some people care deeply about social cues and what others think of them, particularly when it comes to sensitive topics like racism, while others do not. Thus, to the extent social desirability pressure is, perhaps artificially, influencing survey responses, there should be larger apparent declines in racism for people who are concerned about the image they project than among those who do not.

For example, in the late 1990s, Plant and Devine developed a scale measuring people's internal and external motivation to respond without prejudice.[180] As the name suggests, the measure distinguishes between people who wish to appear unprejudiced because of self-presentation concerns, an external motivation, from those who want

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175 Jones & Sigall, *supra* note 168, at 361.

176 Neal J. Roese & David W. Jamieson, *Twenty Years of Bogus Pipeline Research: A Critical Review and Meta-Analysis*, 114 PSYCHOL. BULL. 363, 363-65 (1993).

177 *See id.* at 370 tbl.1, 371 tbl.2.

178 *See* E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 811 (1998); Bridget C. Dunton & Russell H. Fazio, *An Individual Difference Measure of Motivation to Control Prejudiced Reactions*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 316, 316 (1997); Olivier Klein, Mark Snyder & Robert W. Livingston, *Prejudice on the Stage: Self-Monitoring and the Public Expression of Group Attitudes*, 43 BRIT. J. SOC. PSYCHOL. 299, 300 (2010).

179 *See* Mark Snyder, *Self-Monitoring of Expressive Behavior*, 30 J. PERSONALITY & SOC. PSYCHOL. 526, 527 (1974); Erik J. Girvan, Jason Weaver & Mark Snyder, *Elevating Norm Over Substance: Self-Monitoring as a Predictor of Decision Criteria and Decision Time Among Independent Voters*, 10 ANALYSES SOC. ISSUES & PUB. POL'Y 321, 323 (2010).

180 Plant & Devine, *supra* note 178, at 813-14.

to be unprejudiced, an internal motivation.[181] Across several validations studies, they found that, in general, the internal but not external motivation to respond without prejudice was related to less prejudiced responses.[182] More importantly, on a stereotyping task similar to that used by Sigall and Page, for participants who were externally but not internally motivated to respond without prejudice, the extent to which those participants endorsed racial stereotypes depended upon whether they were responding in private or giving their answers orally to a researcher.[183] When in private, this group endorsed significantly more racial stereotypes than when responding in public.[184] For those high in internal motivation to respond without prejudice, however, endorsement of stereotypes was low irrespective of whether they were asked about them in the presence of a researcher or privately.[185] Given this evidence, the authors concluded that social desirability may be directly responsible for some underreporting of racial bias, but that some people are also motivated on their own to be unprejudiced.[186]

c. *Major Paradigm 1980s to Present: Subtle, Explicit Racism*

A second explanation for the discrepancy between a decline in overt explicit racism and persistent biased behaviors is that overt explicit racism has evolved into or been replaced by more subtle explicit racism.[187] As discussed above, many measures of explicit racism showed sharp declines in levels of racial bias from the 1950s to the 1970s and beyond. Other measures, however, particularly those that implicated racism along with other considerations like maintenance of White dominance, indicated that some racial bias was very persistent. For example, in 1985 less than 10% of White Americans believed that schools should be segregated.[188] In the same year, approximately 70% of White Americans objected to their own children attending a school at which half or more of the students were Black, a percentage that had declined only to about 50% by 1996.[189]

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181 *Id*.
182 *Id.* at 814-15.
183 *Id.* at 816.
184 *Id.*
185 *Id.* at 824.
186 *See* Plant & Devine, *supra* note 178, at 816-17.
187 *See* Bobo et al., *supra* note 140.
188 *Id.* at 47.
189 *Id.* at 47 fig.3.1, 50 fig.3.4.

Similarly, the percentage of White Americans who indicated that "White people have a right to keep (Negroes/Blacks/African Americans) out of their neighborhoods if they want to, and (Negroes/Blacks/African Americans) should respect that right" declined from about 40% in 1973 to 15% in 1991.[190] Even so, as late as 2000, 25% of White Americans indicated that they would feel most comfortable in a neighborhood that contained no Blacks and most would prefer a neighborhood in which Whites were the clear majority.[191] Finally, from at least 1975 through 2008, a majority of White Americans have consistently opposed government assistance to Blacks.[192]

Based on findings like these, in the late 1970s and early 1980s, psychologists proposed the existence of "symbolic"[193] or "modern"[194] racism. Unlike overt racism, symbolic racism is not defined by a belief in the inherent inferiority of members of a racial or ethnic group. Rather, it is a professed adherence to "traditional American values such as self-reliance, the work ethic, and respect for authority",[195] and the belief that members of some ethnic or racial groups tend to reject these values.[196] Symbolic racism is thus measured with questions that ask individuals not to endorse inequality *per se*, but instead the extent to which they agree with statements such as:

- "It's really a matter of some people not trying hard enough; if blacks would only try harder, they could be as well off as whites."

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190 *Id.* at 47 fig.3.1.

191 *Id.* at 50-51.

192 *Id.* at 54 fig.3.7.

193 *See, e.g.*, P. J. Henry & David O. Sears, *The Symbolic Racism 2000 Scale*, 23 POL. PSYCHOL. 253 (2002); Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414 (1981); John B. McConahay & Joseph C. Hough, Jr., *Symbolic Racism*, 32 J. SOC. ISSUES 23 (1976); Christopher Tarman & David O. Sears, *The Conceptualization and Measurement of Symbolic Racism*, 67 J. POL. 731 (2005).

194 *See, e.g.*, John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 91 (John F. Dovidio & Samuel L. Gaerter eds., 1986); Arthur P. Brief et al., *Just Doing Business: Modern Racism and Obedience to Authority as Explanations for Employment Discrimination*, 81 ORG. BEHAV. HUM. DECISION PROCESSES 72 (2000); John B. McConahay, *Modern Racism and Modern Discrimination: The Effects of Race, Racial Attitudes, and Context on Simulated Hiring Decisions*, 9 PERSONALITY & SOC. PSYCHOL. BULL. 551 (1983).

195 Eva G. Green et al., *Symbolic Racism and Whites' Attitudes Towards Punitive and Preventive Crime Policies*, 30 L. & HUM. BEHAV. 435, 438 (2006).

196 Tarman & Sears, *supra* note 193, at 756.

- "Irish, Italian, Jewish, and many other minorities overcame prejudice and worked their way up. Blacks should do the same without any special favors."
- "Blacks are getting too demanding in their push for equal rights."[197]

Even after controlling for alternative predictors such as political ideology, age, sex, and income, individuals reporting these beliefs tend to object to social policies that support Blacks[198] and instead favor punitive criminal policies, such as three-strikes laws, that disproportionally harm them.[199] Further, unlike traditional racism, symbolic racism appears to be alive and well. In nationally representative samples of White Americans taken in 1990, 2000, and 2008, for example, a majority of respondents agreed with statements indicative of symbolic racism.[200]

Examples of modern or symbolic racism in the prologue include the employers who indicated that they were not racist and used color-blind policies while at the same time commenting that Black individuals tend to be lazy, threatening, criminal, and act inappropriately.[201] Similarly, N.Y.P.D. officers who claimed that they were simply targeting the "right" sort of people for stops are also consistent with symbolic racism.[202] Finally, subtle explicit bias in the school discipline context may be seen in the relation between school rates of disproportionality and a principal's endorsement of exclusionary discipline and zero tolerance policies.[203]

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197 Henry & Sears, *supra* note 193, at 260-61 tbl.1.

198 Tessa M. Ditonto et al., *AMPing Racial Attitudes: Comparing the Power of Explicit and Implicit Racism Measures in 2008*, 34 POL. PSYCHOL. 487, 500-503 (2013); Joshua L. Rabinowitz et al., *Why Do White Americans Oppose Race-Targeted Policies? Clarifying the Impact of Symbolic Racism*, 30 POL. PSYCHOL. 805, 818 (2009).

199 Green et al., *supra* note 195, at 438.

200 Ditonto et al., *supra* note 198, at 503; Rabinowitz et al., *supra* note 198, at 815 tbl.2, 816 tbl.3, 818; Steven A. Tuch & Michael Hughes, *Whites' Racial Policy Attitudes in the Twenty-First Century: The Continuing Significance of Racial Resentment*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 150 (2011).

201 *See* Pager et al., *supra* note 2, at 780.

202 *See* Floyd v. City of New York, 959 F. Supp. 2d. 540, 561-62 (S.D.N.Y. 2013).

203 Russell J. Skiba et al., *Parsing Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion*, 51 AM. EDUC. RES. J. 640, 663-64 (2014).

2. Implicit Bias

Implicit bias, as it is commonly understood now, emerged in the 1990s from earlier research on stereotyping and automatic psychological processes.[204] It is associated with System 1, which is efficient, automatic, cognitive processing.[205] Rather than conscious endorsement of beliefs or feelings, it has its roots in generalized associations formed from systematically repetitious or unique and limited experience or exposure.[206] Thus, for example, regularly seeing images of Black but not White criminals in the media may lead even people with egalitarian values to treat an individual Black as if he has a criminal background or assume that a racially unidentified gang member is Black.[207]

Given the various limitations on our ability to process information it is necessary to make and rely upon inferences in order to function. The associations we have between our beliefs, or stereotypes about and evaluations of, or attitudes towards groups help us to form these inferences which act as shortcuts that help us navigate the complexity of the world.[208] In doing so, those beliefs and evaluations can bias perception, judgment, and decision-making without our conscious knowledge or intent.[209] This phenomenon is particularly true when people do not or cannot act deliberately, such as, "when a perceiver lacks the motivation, time, or cognitive capacity to think deeply (and

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204 *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995); *see also* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989); Anthony G. Greenwald, *Sensory Feedback Mechanisms in Performance Control: With Special Reference to the Ideo-Motor Mechanism*, 77 PSYCHOL. REV. 73, 73 (1970); David L. Hamilton & Robert K. Gifford, *Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 392, 392 (1976); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977); Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 83-86 (1969).

205 As indicated in the introduction, a great deal has been written recently about implicit bias for a legal audience. *See supra* Part I; *see also* Kang et al., *supra* note 63. Accordingly, I will focus only on the key features here.

206 *See* SUSAN FISKE & SHELLEY TAYLOR, SOCIAL COGNITION: FROM BRAINS TO CULTURE 328 (2007); Greenwald & Banaji, *supra* note 204, at 5-15.

207 *See* Greenwald & Banaji, *supra* note 204, at 5-15.

208 *See* FISKE & TAYLOR, *supra* note 206, at 328.

209 *See* David M. Amodio, *The Social Neuroscience of Intergroup Relations*, 19 EUR. REV. SOC. PSYCHOL. 1, 10 (2008); Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III: Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 17 (2009).

accurately) about others."[210] Thus, however egalitarian their values, individuals' implicit biases are more likely to affect their decisions when the structural demands of a situation exceed the available information; for example implicit biases often affect judgments that are inherently difficult, subjective, or ambiguous,[211] or when cognitive resources are limited, like when decisions must be made quickly or individuals are physically or mentally fatigued.[212]

Unlike explicit biases, implicit biases, such as those favoring Whites over Blacks, are typically measured in a way that does not allow for meaningful conscious deliberation, such as reaction times in a highly speeded task[213] or associations with ambiguous stimuli.[214] The most common measure, the Black/White - Implicit Association Test, commonly known as the IAT,[215] assesses implicit race bias through the differential speed, in milliseconds, and accuracy, through an error penalty, with which participants can simultaneously categorize pictures of Black and White faces and positive and negative words in a series of counterbalanced trials.[216] The extent of the person's implicit racial bias is then calculated from the extent to which he or she is quicker and more accurate in categorizing positive words with White faces and

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210 C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 105 (2000); *see also* FISKE & TAYLOR, *supra* note 206.

211 *See* John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315 (2000) (discussing a study showing bias against blacks in hiring decisions where the candidate's qualifications were ambiguous).

212 *See* Matthew T. Gailliot et al., *Stereotypes and Prejudice in the Blood: Sucrose Drinks Reduce Prejudice and Stereotyping*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 288, 288 (2009) ("[P]eople who have lower levels of blood glucose may be more likely to express prejudice and use stereotypes[.]").

213 *See* Brian A. Nosek & Mahzarin R. Banaji, *The Go/No-Go Association Task*, 19 SOC. COGNITION 625, 625-28 (2001).

214 *See* B. Keith Payne, Clara Michelle Cheng, Olesya Govorun & Brandon D. Stewart, *An Inkblot for Attitudes: Affect Misattribution as Implicit Measurement*, 89 J. PERSONALITY & SOC. PSYCHOL. 277, 277 (2005). For reviews of implicit measures, see Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297, 310 (2003); *see also* IMPLICIT MEASURES OF ATTITUDES 110-13, 118 (Bernd Wittenbrink & Norbert Schwarz eds., 2007).

215 *See* Anthony G. Greenwald, Brian A. Nosek & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: I: An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197, 197 (2003).

216 For sample IATs, see *Take a Test*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html (last visited July 6, 2015).

negative words with Black faces than negative words with White faces and positive words with Black faces.[217]

Relatively early on in implicit bias research, at least one prominent psychologist discussed implicit measures as a "bona fide, not a bogus, pipeline"[218] capable of revealing someone's true attitudes and beliefs. The results of most research since then, however, suggest that explicit and implicit forms of bias are only modestly related, if at all.[219] Consistent with this, while explicit racial biases have declined, implicit racial biases pervade modern society. In a sample of over 700,000 primarily American participants collected from 2000 to 2006, for example, the responses of over two-thirds, 68%, indicated an implicit attitude favoring Whites over Blacks while approximately one-sixth, 14%, had the opposite response pattern.[220] Moreover, the average magnitude of the bias was quite large by conventional standards: 86% of one standard deviation difference in response time and accuracy in favor of associations between White and positive, and Black and negative, concepts compared to White and negative, and Black and positive, ones.[221] Breaking these down by race and ethnicity of those responding, the only group that did not show an implicit bias favoring Whites was Blacks.[222] The average response time difference for Blacks was quite small: -5% of a standard deviation that is, 5% are in favor of Blacks rather than Whites.[223] By comparison the average difference for Whites, Asians, and Hispanics was large: 100%, 88%, and 79% of a standard deviation, respectively, in favor of Whites over Blacks.[224]

There is a fairly substantial and ever-accumulating body of laboratory evidence that, in the aggregate,[225] implicit bias can have a sub-

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217 *See* Anthony G. Greenwald, Brian A. Nosek & Mahzarin R. Banaji, *supra note* 16, at 197-200.

218 Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCHOL. 1013, 1014 (1995).

219 *See* Pearson et al., *supra* note 134, at 317, 330 (2009).

220 Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUROPEAN REV. OF SOC. PSYCHOL. 1, 13-17 tbls.4-7 (2007).

221 *Id*. at 17.

222 *Id.*

223 *Id.* at 13.

224 *Id.*

225 Implicit measures are not clinical diagnostic tools. Brian Nosek, a primary developer of implicit bias measures and one of the central researchers on the topic, and Rachel Riskind caution against using the IAT, and other similar measures of implicit bias, for selection or evaluation at an individual level because it "disregards too much uncertainty in measurement and predictive

stantial impact on perception, judgment, decision-making, and behavior.[226] In real-world samples, levels of implicit bias have been shown to predict: the tendency for pediatricians to recommend pain medication at lower rates for Black children than White children with identical symptoms,[227] discrimination against actual Arab-Muslim[228] and obese[229] job applicants, teachers' expectations for the performance of ethnic minority compared to non-minority children in their classes as well as the actual gap between the non-minority and minority ethnic students on standardized tests,[230] the extent to which labor arbitrators decide disputes in favor of women in actual cases,[231] and how much force police officers used when arresting Black children compared to White children.[232]

In the prologue examples, employers' insistence that they are egalitarian, use color blind hiring processes, and are offended by suggestions of racism, coupled with data showing that their actual decisions basically operate as if all Black applicants have a criminal record, is consistent with implicit racial bias.[233] The same is true for the N.Y.P.D.'s racially disproportionate stops and frisks.[234] Indeed, several studies show that people see Blacks as less innocent than Whites and are more likely to erroneously interpret ambiguous objects as weapons when the objects are in the hands of a Black per-

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validity." Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL'Y REV. 113, 133 (2012).

226 *See* Greenwald et al., *supra* note 209; *but see* Frederick L. Oswald, Gregory Mitchell, Hart Blanton, James Jaccard, and Philip E. Tetlock, *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCHOL. 171, 188 (2013) ("[T]he IAT provides little insight into who will discriminate against whom, and provides no more insight than explicit measures of bias.").

227 Janice A. Sabin & Anthony G. Greenwald, *The Influence of Implicit Bias on Treatment Recommendations for 4 Common Pediatric Conditions: Pain, Urinary Tract Infection, Attention Deficit Hyperactivity Disorder, and Asthma,* 102 AM. J. PUB. HEALTH 988, 992, 993 fig.1 (2012).

228 Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LAB. ECON. 523, 524, 529 (2010).

229 Jens Agerström & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790, 801 (2011).

230 Linda Van den Bergh et al., *The Implicit Prejudiced Attitudes of Teachers: Relations to Teacher Expectations and the Ethnic Achievement Gap*, 47 AM. EDUC. RES. J. 497, 518 (2010).

231 Girvan, Deason, & Borgida, *supra* note 48, at 9.

232 Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 539-40 (2014).

233 Greenwald & Krieger, *supra* note 33, at 965-66.

234 *See supra* notes 8-18 and accompanying text.

son.[235] Finally, evidence that there is greater racial disproportionality in discipline decisions related to more ambiguous or subjective student problem behaviors suggests that implicit bias also affects school discipline decisions,[236] because such problem behaviors require teachers to make an inference or judgment call rather than rely on objective criterion, unlike those related to objective problem behaviors, which do not require such judgment calls.[237]

C. *The Behavioral Realist Critique of Anti-Discrimination Law*

Figure 5 is a general timeline of selected major anti-discrimination case law juxtaposed against the evolution of prominent psychological theories of racial bias, both of which are briefly reviewed above.[238] It is easy to conclude from the illustration that, until the 1970s and 1980s, legal doctrine and psychological theory had a shared understanding of prejudice and discrimination. From that time to the present, psychological research has continued to develop, innovate, and in many ways substantially improve our understanding of bias and discrimination. Legal doctrine, however, stagnated. It only recognizes and targets overt, explicit bias with the accompanied understanding that social desirability concerns might frequently prompt people to conceal it. The legal doctrine largely ignores contemporary theories of subtle explicit or implicit bias as a cause of discrimination.[239]

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235 *See* Goff et al., *supra* note 232, at 529 ("Blacks were seen as less innocent than Whites and people generally."); E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180, 180-82 (2005) (In a simulation, "[police] officers were initially more likely to mistakenly shoot unarmed Black suspects than unarmed White suspects."); *see also* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006-07 (2007); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 181-83 (2001).

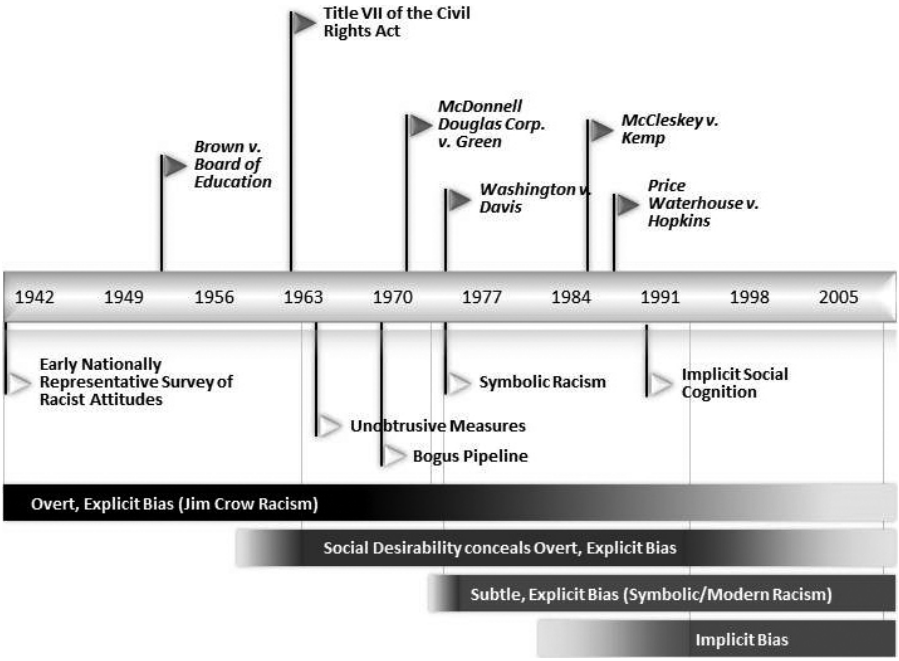
236 Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 85-87 (2011).

237 McIntosh et al., *supra* note 24, at 6-7.

238 *Supra* Part I.B.

239 For the data supporting Figure 5, *see supra* Parts I.A, I.B.

FIGURE 5: OVERVIEW OF MAJOR APPROACHES IN THE LAW AND PSYCHOLOGY OF DISCRIMINATION



While presented in a somewhat more holistic framework here than elsewhere, as the following review illustrates, the basic fact of this law-science gap is well known. For as long as the gap between the psychology and law of discrimination has existed, legal scholars have drawn on the former to examine, critique, or inform their inquiries into the latter. Along with advances in psychological methods, research, and theory, the argument has somewhat evolved. Building on the ground-breaking work of the pioneering scholars in the area, descriptions and critiques of the law-science gap do, however, have certain common elements. The first, a descriptive element, is the identification of a gap between the psychological understanding of discrimination and the way in which judges fashioning anti-discrimination law have operationalized and chosen to combat it. The second, a prescriptive element, is that the psychological understanding of discrimination is primary in that, to the extent social science has established that non-purposeful discrimination is a meaningful problem, the failure to address it is a shortcoming or indictment of the law, judges,

or the legal reasoning they employ. The third, a constructive element, is a proposal for how legal doctrine could be changed to solve the practical problem of determining when non-purposeful discrimination, as opposed to other legitimate factors, caused the complained of injury.

1. Foundations of Behavioral Realism

In 1987, the same year the Supreme Court issued its *McCleskey* decision, the *Stanford Law Review* published Charles R. Lawrence III's seminal, prescient, and highly influential psycho-legal critique of purposeful intent Equal Protection doctrine.[240] The piece opens with vivid accounts of some of his experiences with racism at the hands of what he knew to be "well-meaning," "good, liberal, white" people.[241] As a 5-year old in his progressive, integrated New York City private school, he watched in dismay and shame as his teacher and classmates laughed at the only other Black child represented in the class, a character in the book *Little Black Sambo*, the illustrations of which depicted the boy: "running around a stack of pancakes with a tiger chasing him. He is very black and has a minstrel's white mouth. His hair is tied up in many pigtails, each pigtail tied with a different color ribbon."[242] And his reaction in college, when a colleague offered the back-handed compliment "I don't think of you as a Negro." Or, reflecting, as a father, when Lawrence dropped his 3-year-old daughter off at preschool and was greeted by a small White boy who brought his favorite book to share with the class: *Little Black Sambo*.

Lawrence's thesis is that the metric of intentionality creates a false dichotomy in Constitutional law:

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought-nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's [sic] beliefs, desires, and wishes.[243]

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240 Lawrence III, *supra* note 32.

241 *Id.* at 318.

242 *Id.* at 317.

243 *Id.* at 322.

Accordingly, by endorsing an intent-based inquiry for discrimination, courts artificially limit the extent to which those injured by discrimination can recover for it and create a protective bulwark around the structural and ambient social sources of subordination and inequity that preclude affirmative interventions to address them.

In support of the argument, Lawrence turns from anecdotal experience and lay intuition to psychological theories regarding unconscious influences on behavior, particularly Freudian psychoanalytic notions of repression and cognitive psychological understandings of the ways in which cultural background alters perception.[244] Ultimately, the gap between an Equal Protection doctrine tied to intent and psychological theory makes anti-discrimination law less effective, illustrating the important influence of the unconscious. If racism is "in large part a product of the unconscious,"[245] addressing it, and satisfying the basic public-policy rationale underlying the Equal Protection Clause, will require that the doctrine "come to grips with" the unconscious and acknowledge unintentional discrimination.[246]

To close the law-psychology gap, Lawrence proposes the "cultural meaning" test. Designed to address the difficulty of detecting unconscious racism in practice, the test draws on subtle, explicit theories of racism to direct courts to examine "governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance."[247] In application, courts would thus use public opinion, not

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244 Lawrence was not, however, the first to use Freudian theory to discuss law. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (1930).

245 Lawrence III, *supra* note 32, at 330.

246 *Id.* at 323.

247 *Id.* at 356. The use of explicit (albeit subtle) cues to detect non-purposeful discrimination is not necessarily incongruous for two reasons. First, the purposeful discrimination requirement does not cover modern/symbolic racism, which can reasonably be thought of as producing knowing or reckless, rather than purposeful, discrimination. Second, the proposal is methodologically similar to psychological research that gauges the influence of stereotypes or other characteristics on decisions using independent ratings of stimuli involved in the decision. For example, using photographs in the public record, Eberhardt, Davies, Purdie-Vaughns, and Johnson found that the extent to which a sample of students rated individuals in the photographs (who, unbeknownst to the students, were convicted felons) to be racially stereotypical predicted whether the convicts were actually given the death penalty versus life in prison. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality Of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006). Similarly, again using publically available photographs, Todorov, Mandisodza, Goren, and Hall showed that independent ratings of how competent the features of candidates for U.S. Senate were predicted whether they were actually elected to office. Alexander Todorov et al., *Inferences Of Competence From Faces Predict Election Outcomes*, 308 SCIENCE 1623 (2005).

overt racial classification, as a litmus test for the need to apply heightened scrutiny: if the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decision-makers.[248] Thus, for example, the school segregation at issue in *Brown v. Board of Education*,[249] is generally understood in terms of racial hierarchy descended from slavery, making it a clear-cut case.[250] By comparison, *Arlington Heights*[251] represents a more difficult case.[252] Using the cultural meaning test, the court's inquiry would focus not on the integrity of zoning ordinances, a facially non-racial consideration, but rather on evidence of a history of use of similar regulations and restrictive covenants to preserve racial residential balances preferred by Whites and to combat "white flight." Finally, applied to *Washington v. Davis*,[253] the test would prove even more difficult for plaintiffs given the relatively race neutral history of civil service examinations generally.[254] There the Court would, for example, permit evidence of the unique relationship police officers have with white and black communities. In the end, a finding that the plaintiffs' rights were violated would turn on their ability to show that the disproportionate test results would be interpreted by the general population in racial terms, that is, as an indication of the inherent intellectual inferiority of Blacks, rather than evidence of poverty, poor education, or random chance.[255]

Almost a decade later, Linda Hamilton Krieger broke additional ground by advancing a similar critique of purposeful discrimination doctrine based on the then solidifying social-cognitive psychology of implicit bias.[256] Her target was the judicial requirement that plaintiffs in disparate treatment cases under Title VII prove that the defendant acted with a discriminatory motive. Echoing Lawrence, Krieger opened her piece with an illustrative story about her experience liti-

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248 Lawrence III, *supra* note 32, at 356.

249 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

250 *See* Lawrence III, *supra* note 32, at 362-63 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

251 Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

252 *See* Lawrence III, *supra* note 32, at 366-69.

253 Washington v. Davis, 426 U.S. 229 (1976).

254 *See* Lawrence III, *supra* note 33, at 369-76.

255 See *id.* at 362-76.

256 Krieger, *supra* note 33.

gating in the gap between discriminatory treatment and intentional discrimination.[257] She was representing a Salvadorian man, the only minority in his workplace; he had been passed over for promotion and ultimately fired.[258] He was convinced that he had been discriminated against and could recount subtle forms of bias, like White employees being commended where he was not, being reprimanded when they were not, and differences in tones of voice used with him.[259] But there were no overt signs of prejudice to point to in the record, such as, racial epithets or discriminatory policies or practices. Moreover, her client's former manager "adamantly denied" that he had acted discriminatorily and, when pressed, ultimately burst out angrily, over his attorney's objections: "Look, I don't appreciate being called a bigot. Mateo's being a Mexican [sic] didn't make any difference to me; it's like I didn't even notice it." It was but one of several cases Krieger experienced involving "offended, defensive decision-makers accused of discrimination," "embittered employees who knew they had been treated differently because of their race or gender or ethnicity," and no evidence that the "employer harbored a discriminatory motive or intent."[260]

In the discussion that follows, Krieger extensively reviews Title VII case law for judicial assumptions and (mis)understandings of discrimination which support their narrowed interpretation of the legal doctrine, including that stereotyping and bias are intentional processes of which decision-makers are completely aware.[261] The judicial understandings reflect and conform to an earlier, outdated psychological perspective:

> As these observations indicate, the current jurisprudential understanding of the nature and causes of discrimination did not originate in federal discrimination caselaw. Rather, current jurisprudence reflects the perspective taken by personality and social psychologists who studied and theorized about intergroup discrimination from the 1920s

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257 *Id.* at 1162-163.

258 *Id.*

259 For the impacts of such subtle distinctions, see, e.g., Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOLIGIST 271 (2007).

260 Krieger *supra* note 33, at 1164.

261 *Id.* at 1173-74.

> into the 1980s, before the emergence of a cognitive approach to intergroup relations.[262]

Following a comprehensive review of the ways that contemporary psychological theory undermines the assumptions reflected in Title VII case law to back up her assertion, Krieger concludes that because the phenomenon and psychological understanding evolved, but not the legal doctrine of discrimination, "there now exists a fundamental 'lack of fit' between the jurisprudential construction of discrimination and the actual phenomenon it purports to represent."[263] As a result, "[t]he assumptions underlying Title VII's disparate treatment theory have been so substantially undermined by social cognition theory that they can no longer be considered valid."[264]

To close the gap, Krieger offers two recommendations. First is adoption of a "motivating factor" approach in disparate treatment cases. Under the approach, the court's inquiry would focus, given whatever evidence the plaintiff could marshal, on whether the plaintiff's status as a member of a protected class "played a role" or "made a difference" in the employer's decision, irrespective of whether that difference was the purpose or a purpose of the employer's action.[265] Plaintiffs who could make a showing of such "cognitive bias-based disparate treatment" would be entitled to equitable relief, as is true now with disparate impact cases.[266] Plaintiffs who could also show purposeful intent could get compensatory and punitive damages.[267] Second, Krieger suggests that avoiding discrimination could be made a prescriptive duty: employers would have an affirmative obligation to take efforts to locate and address factors that resulted in discrimination, with the negligent failure to do so resulting in liability.[268] In making this suggestion, however, Krieger notes that our knowledge of how to reduce implicit bias is perhaps, inadequate to support such a rule or point to interventions that are outside of an employer's control: "[c]ognitive psychologists have told us more about the short-comings

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262 *Id.* at 1177.

263 *Id*. at 1217.

264 *Id*. at 1211.

265 *Id.* at 1242.

266 Krieger, *supra* note 33, at 1244.

267 *Id.*

268 *Id.*; *see also* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Girvan & Deason, *supra* note 62.

of human social inference cognition than about how the various biases they identify can be reduced or controlled."[269]

2. Behavioral Realism as Jurisprudential Theory

Lawrence's and Krieger's foundational, psychologically-informed critiques showed how, as a result of psychologically inaccurate assumptions the legal doctrine interpreting the Equal Protection Clause and Title VII, respectively, fail even on their own "intent" based terms to achieve the underlying anti-discrimination purpose. Building on this work, a jurisprudential approach for using psychological science in law coalesced a decade later. At that time, the *California Law Review* published a symposium issue focused largely on the theory of implicit bias and its legal implications.[270] In it, Linda Hamilton Krieger and Jerry Kang collaborated with three leading social cognitive psychologists at the forefront of basic social scientific research on implicit bias: Anthony Greenwald, Mahzarin Banaji, and Susan Fiske. Together, the scholars introduced the concept of *behavioral realism*.

Behavioral realism is a prescriptive jurisprudential method or approach based upon the proposition that judges ought not to speculate about human behavior. Rather, to the extent possible, judges have the affirmative responsibility to base their assumptions about how people act on a solid evidentiary, that is to say, scientific footing.

> Behavioral realism, like naturalism, stands for the proposition that judges should not generate the behavioral theories sometimes used in the construction or justification of legal doctrine through a solely conceptual, *a priori* process. To the extent that legal doctrines rely on stated or unstated theories about the nature of real world phenomena, behavioral realism argues, those theories should remain consistent with advances in relevant fields of empirical inquiry. And where the real world phenomena relevant to a particular area of law concern human social perception, motivation, and judgment, the relevant domains of empirical inquiry with which legal theories should remain

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269 Krieger, *supra* note 33, at 1245.

270 *See* Greenwald & Krieger, *supra* note 33; Jolls & Sunstein, *supra* note 68; Krieger & Fiske, *supra* note 36; Kang & Banaji, *supra* note 37; Richard R. Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); *see also* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 440 (2007).

> consistent include cognitive social psychology and the related social sciences.[271]

In the issue, advocates of the approach attributed the origin of the law and psychology gaps, at least in part, to lack of judicial knowledge.[272] Legal doctrine, for example, is thought to have been developed "in ignorance of [implicit social cognition] generally and implicit bias specifically"[273] and to "typically reflect common sense based on naive psychological theories."[274] Such theories, by definition, represent less accurate models of human behavior than those grounded in more recent social science.[275] Their use by judges, however, is understandable as a form of "intuitive" or "lay" psychology that all of us tend to develop based on our anecdotal experiences and observations:

> [J]udges, like most people, take for granted certain assumptions about how people behave and what motivates them. These assumptions seem self-evidently correct, even when they are wrong. For this reason, judges sometimes incorporate empirically testable social science claims into their legal reasoning without even noticing that they are doing so.[276]

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271 Krieger & Fiske, *supra* note 36, at 1001; *see also* Ronald J. Allen & Brian Leiter, *Naturalized epistemology and the Law of Evidence*, 87 VA. L. REV. 1491 (2001) ("At the most general level, then, naturalizing epistemology means viewing philosophical theorizing about knowledge as more than an a priori armchair exercise, but rather as continuous with an dependent upon empirical science"); Brian Leiter, *Naturalism and Naturalized Jurisprudence*, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 79 (Brian Bix ed., 1998); Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 L. & SOC. INQUIRY 975, 975 (2006) (discussing legal realism and its ethnographic components).

272 *See* Krieger & Fiske, *supra* note 36 at 998 (attributing the gap to differences in the goals and sources of legitimacy of the legal system (conclusively resolve particular disputes, stability and predictability) and sciences (continuously advance knowledge, rigorous testing and evolution)).

273 Kang & Banaji, *supra* note 37, at 1078.

274 Lane, Kang & Banaji, *supra* note 270, at 440.

275 Kang & Banaji, *supra* note 37, at 1079 ("A model that supposes that discrimination takes place explicitly, through a rational cost-benefit analysis or other expression of explicitly held views has become woefully out-of-date.").

276 Krieger & Fiske, *supra* note 36, at 1002; *see also* Page, *supra* note 42, at 173 & n.83 ("[T]he Court is ignoring or is blind to unconscious bias[.] . . . Any acceptance of unconscious bias, however, has not (yet) affected the Batson procedure's focus on the striking attorney's discriminatory intent. One reason for this may be that the Court still believes discrimination is 'easy to identify.'").

But use of such "common sense" psychology, when it is wrong, ought to be corrected.

Building on the common elements of Lawrence's and Krieger's writings, behavioral realism derives its prescriptive force primarily from considerations of effectiveness and legitimacy of legal doctrine: Can legal doctrine be better designed to achieve its stated goals? Are there inconsistencies between what legal doctrine does and what it purports to do and, if so, are they innocent mistakes, justifiable departures, or intentional efforts to subvert the stated goals? Consistent with the insights underlying the scientific method and naturalistic philosophy, if it is possible to know how the world works, then having and acting on that knowledge will produce more predictable results than proceeding in ignorance of it. With respect to antidiscrimination law, to the extent legal doctrine incorporates accurate models "of what discrimination is, what causes it to occur, how it can be prevented, and how its presence or absence can best be discerned in particular cases[,]" then the doctrine is more likely to be able to achieve its intended purpose.[277] The failure to incorporate the models is particularly problematic in a legal system that values just and reasonable, or at least not arbitrary or hypocritical, results.[278] As such, failures to reconcile the two must be exposed, changed, and justified or admonished as covert departures from stated public policy.

3. Behavioral Realism as a Descriptive Model

As a jurisprudential approach, behavioral realism advances the use of psychological evidence of how behavioral phenomenon occur as a lodestar for assessing what legal doctrine related to that behavior ought to be or not be in theory. Distinct from this is the applied approach to behavioral realism. It is defined by arguments based on the psychological science which are made with the affirmative expectation that, in practice, by educating judges about the science and the psychology-law gap, one will convince those judges to hold defendants

277 Krieger & Fiske, *supra* note 36, at 1001; Girvan & Deason, *supra* note 62, at 1067-68 (stressing the importance of a clear and coherent definition of "motive" in Title VII discrimination cases).

278 *See* Kang & Banaji, *supra* note 37, at 1065 ("The law views itself as achieving just, fair, or at least reasonable results. If science reveals that the law is failing to do so because it is predicted on erroneous models of human behavior, then the law must transparently account for the gap instead of ignoring its existence.").

liable for the effects of implicit biases (or at least reinterpret doctrine to encompass such liability).

The clearest examples of applied behavioral realism come in context of court cases. Following the tradition of the Brandeis brief,[279] litigants and *amici curiae* include information about and evidence of implicit bias in legal briefing in anti-discrimination cases based on the idea that education about how non-purposeful discrimination causes injury in fact will convince judges to recognize a cause of action for it.[280] Certain law review articles also emphasize the use of psychological scientific information to achieve change. Building directly on Lawrence's jurisprudential work, for example, Paterson, Rapp, and Jackson advocate directly for the use of education about and evidence of implicit bias to advance Equal Protection doctrine.[281]

Whether other works meet the definition depends upon the goals of expectations with which they are developed and deployed. Jurisprudential law and psychology scholarship designed to expose underlying assumptions supporting racial or sexual subordination, for example, does not itself qualify.[282] As indicated above, interpretations

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279 *See, e.g.*, John Frazier Jackson, *The Brandeis Brief-Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1, 2 (1993); John Monahan and Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 1986 U. PA. L. REV. 477, 480-83 (1986).

280 *See, e.g.*, Brief of Sociologists, Social Psychologists, and Legal Scholars as Amici Curiae Supporting Respondent, Texas Dep't of Hous. and Cmty. Affairs v. The Inclusive Cmtys. Project, Inc., 135 S.Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405800; Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents, Wood v. Moss, 134 S.Ct. 2056 (2014) (No. 13-115), 2014 WL 645422; Brief of Sociologists, Social and Organizational Psychologists, and Legal Scholars as Amici Curiae Supporting Respondents, Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 134 S.Ct. 636 (2013) (mem) (No. 11-1507), 2013 WL 5883306; Brief of Amicus Curiae the American Psychological Association in Support of Respondents, Fisher v. Univ. of Tex. at Austin, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3527855; Brief of the American Educational Research Association as Amicus Curiae in Support of Respondents, Parents Involved in Cmty. Schs. v. Seattle Schs. Dist. No. 1, 551 U.S. 701 (2007), 2006 WL 2925967; Brief of Amicus Curiae, Professors Engaged in Implicit Bias Research, in Support of Defendant-Appellee, North Carolina v. Robinson, (2013) (No. 411A94) 2013 WL 9047372.

281 Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1180 (2008).

282 Lawrence himself wrote that, while doctrinal change may be a goal of behavioral realism, it was not his purpose. Rather, he wrote to provide others like him, who were reading Equal Protection cases, reassurance that they were sane. *See* Charles R. Lawrence, III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931, 948 (2008).

of that scholarship as promoting the presentation of psychological science as a necessary and sufficient route to doctrinal change, however, does. Similarly, I would not regard educational resources designed to inform people about implicit bias in the hopes of a first-person impact, that is, convincing readers to alter their own behaviors, as applied behavioral realism. Many of the resource guides for the bench and bar on implicit bias collected in the Appendix are structured with this goal in mind: They summarize the psychological science with an expressed intent of convincing judges and lawyers to change their own practices in ways that are thought to reduce implicit bias or its effects. Similarly, Jerry Kang and colleagues' recent comprehensive review of *Implicit Bias in the Courtroom* is specifically designed to educate practitioners and judges about implicit bias and equip them with practical, concrete suggestions for what might be done about it.[283] Richardson and Goff's work examining the implications of implicit bias for how public defenders manage their cases has a similar approach and stated goal.[284] To the extent that they and others expect that providing information about implicit bias will convince judges to recognize a cause of action for the effects of implicit bias, that is if they are reading the prescriptive notion that law ought to account for its discrepancies with science as a descriptive suggestion that the law does in fact do so, then that use is applied behavioral realism.

These distinctions are fundamental to my central goal for this piece: To present a critical but constructive case for thoughtful, effective use of psychological science to illuminate and advance anti-discrimination law. In light of this goal, the jurisprudential uses of the behavioral realism approach have been very successful in prompting thought, analysis, and discussion. Educational efforts of many of those involved in the psychology and law community have also been, and continue to be, critically important in convincing people and organizations to take steps to correct their own biases. By comparison, attempts to leverage psychological science to produce doctrinal change in anti-discrimination has not, thus far, worked. To the contrary, in some instances, advocacy based directly on informing courts about implicit bias has been counterproductive.[285] In Part II, I attri-

283 Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1127 (2012) (book review).

284 Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631-34 (2013).

285 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548-54 (2011).

bute this failure to problems inherent in the applied behavioral realism approach: As a descriptive model, behavioral realism is overly simplistic, omitting consideration of critical barriers that prevent knowledge of the psychological science from being as influential as advocates hope, and often expect, it will be. Accordingly, it projects an overestimation of the persuasive value of psychological science in doctrinal change and encourages advocates to tend not to consider, and thus fail to adequately address, the more significant barriers to achieving expanded anti-discrimination rights.

II. JURISPRUDENTIAL AND PSYCHOLOGICAL REALISM

"Essentially, all models are wrong, but some are useful."

—George E. P. Box[286]

"There is nothing so practical as a good theory."

—Kurt Lewin[287]

On its face, the behavioral realism approach may appear to be a compelling and constructive model for convincing judges to recognize a right to be free from discriminatory treatment beyond that perpetrated purposefully. Those utilizing the behavioral realist approach extensively review psychological theory and evidence supporting the proposition that most contemporary discrimination likely occurs non-purposefully. They also show how legal doctrine and the key underlying assumptions that support it are at odds with the evidence-based understanding, leaving those injured by discrimination in fact with no legal claim. Finally, these scholars acknowledge the practical difficulties that the legal system faces in trying to reliably detect non-purposeful discriminatory behavior and develop proposals to address this concern. If adopted, these proposals seem likely to help ensure that anti-discrimination doctrine will recognize a cause of action that more closely matches discriminatory injuries.

Notwithstanding its prescriptive jurisprudential and analytical strengths, however, the behavioral realism approach has been ineffective at prompting actual doctrinal change. In this section, I suggest

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[286] GEORGE E. P. BOX & NORMAN R. DRAPER, EMPIRICAL MODEL BUILDING AND RESPONSE SURFACES 424 (1987).

[287] Kurt Lewin, FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS 169 (1975).

that it is not effective in this regard because, as understood and applied, it is inadequately descriptively realistic under both jurisprudential and psychological theory. The logic of the argument that social scientific evidence of injury in fact from non-purposeful discrimination compels, or ought to compel, a judge to recognize a claim for such discrimination (or at least an explanation of why such a claim should not be recognized) parallels the classical legalist jurisprudential model. The shortcomings of that model are among the core insights of legal realism. In addition, the tendency for people to (erroneously) attribute disagreements about public policy issues to a lack of knowledge on the part of those with whom they disagree, and to proffer empirical evidence and other facts and expecting attitude and behavioral change to result, is an example of the psychological phenomenon naive realism.[288]

When we advance the psychological science of implicit bias as a justification for expanding anti-discrimination rights, and when we offer education about it as a solution, we fall prey to the shortcomings identified by legal and naive realism. And the insights from legal realism and naive realism explain why our approach is unlikely to succeed. I discuss the legal realism and naive realism in parts A and B respectively, and apply them to identify shortcomings in the behavioral realist approach in part C.

A. *Legal Realist Critique of a Classical Legalist Jurisprudence*

A traditional, classical legalist conception of the law is that of a framework of rights and duties: rights, on the one hand, to be free from injuries and the corresponding duties, on the other hand, to avoid inflicting injuries on others.[289] When such a right is transgressed and the duty breached, the injured party may petition and ultimately invoke the "whole power of the state" to obtain redress.[290] Indeed, the idea that rights to seek redress follow automatically from injuries

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288 *See* Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN'S L. REV. 231, 269-72 (2009).

289 *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28 (1913); *see also* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 984 (1982).

290 *See* Hohfeld, *supra* note 289, at 34; Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

has long been considered a foundational, even definitional, premise in legal reasoning.

- "If an act of parliament be made for the benefit of any person, and he is hindered by another of that benefit, by necessary consequence of law he shall have an action; and the current of all the books is so . . . Now if this be so in case of an Act of Parliament, why shall not common law be so too? For sure the common law is as forcible as any Act of Parliament."[291]
- It is "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[292]
- "When any act doth prohibit any wrong or vexation, though no action be particularly named in the act, yet the party grieved shall have an action grounded upon this statute."[293]
- "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."[294]
- "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[295]

So much so, that it is enshrined in numerous state Constitutions.[296]

More contemporarily, the rights-for-injuries concept is frequently invoked by judges to find that there is an implied private right of action. In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, for example, the U.S. Supreme Court cited Chief Justice

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[291] Lord Chief Justice Holt could state this as an unquestioned proposition already in 1702, as he did in *Ashby v. White,* 6 Mod. 45, 53–54, 87 Eng. Rep. 808, 815 (Q.B.); *quoted in* Alden v. Maine, 527 U.S. 706, 811-12, (1999).

[292] 3 WILLIAM BLACKSTONE COMMENTARIES *1, *23.

[293] 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 117 (1797) (reprinted in 2 HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE 5B (1986)).

[294] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[295] *Id*.

[296] *E.g.*, LA. CONST. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.").

Marshall's "very essence of civil liberty" language from *Marbury* in support of its holding that, where the plaintiff had "suffered great humiliation, embarrassment, and mental suffering" from a warrantless search of his apartment in violation of the Fourth Amendment, he was entitled to seek money damages.[297] Similarly, in *Mattis v. Schnarr* the Eighth Circuit Court of Appeals held that a father whose son had been shot and killed by a police officer had standing to bring a declaratory judgment action challenging the constitutionality of the state statute allowing the shooting.[298] In its decision, the court invoked the rights-for-injuries premise and concluded that it would be "untenable" for a parent who had lost a child to be unable to challenge the statute that permitted the loss:

> We believe that 'parenthood is a substantial interest of surpassing value and protected from deprivation without due process of law' — a fundamental legal right. The plaintiff alleges that this fundamental right has been invaded. The only way to determine this issue is to examine the constitutionality of the statutes and a declaratory judgment action is an appropriate method to do this.[299]

Impressive pedigree, intuitive appeal, and successful applications notwithstanding, a legal model in which rights follow from injuries is potentially misleading and overly simplistic.

As commonly articulated and employed, the classical legalist model facilitates synthesis of a wide range of complex and diverse legal doctrine and procedure. For a great many injuries the law does, in fact, recognize a corresponding right to state a claim for relief. But like all models, as useful as it may be under some circumstances, ultimately, it is not accurate. In this case, the benefits of the principle's simplicity are purchased at the costs of a fundamental circularity or "indeterminacy."[300] Not all injuries merit a right to redress, only those injuries that are legally cognizable and thus relate to violations of

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297 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389-97 (1971).

298 Mattis v. Schnarr, 502 F.2d 588, 590-91 (8th Cir. 1974).

299 Mattis v. Schnarr, 502 F.2d 588, 595 (8th Cir. 1974) (*citing* White v. Minter, 330 F.Supp. 1194, 1197 (D. Mass. 1971).

300 *See generally*, Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2465-67 (2014) (reviewing LEE EPSTEIN ET AL, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013)).

legally vested rights. Thus, plaintiffs have no right to seek redress for harm or loss in fact unless the law recognizes the loss or harm as meriting such a right. The fact of injury itself is necessary but in many cases insufficient for the recognition of a right to seek relief.

The distinction between legally and non-legally recognized injuries is perhaps most clearly embodied in the tort doctrine of *damnum absque injuria*: "A tort, whether intentional or negligent, involves a violation of a *legal duty,* imposed by statute, contract or otherwise, owed by the defendant to the person injured. Without such a duty, any injury is 'damnum absque injuria'—injury without wrong."[301] Common examples of entire categories of such injuries include diminution of property value from activities of neighbors (for example, pollution) that never reach a plaintiff's land (that is, not actual trespass), accurate but negative publicity, and fair competition.[302] But any tort case in which the plaintiff has demonstrated injury and causation, but not duty and breach, represents *damnum absque injuria*. A law-and-economics translation of the classic Hand formula for reasonable care illustrates the point. The formula states that defendants ought not be liable in a negligence action when the costs of the precaution necessary to avoid injuring the plaintiff (that is, the burden, B) is less than the expected value of the injury (that is, the severity of the injury or loss, L, times the probability of the injury, P): $B < PL$.[303] In application, it is a prescriptive assertion that injuries that are more expensive to prevent than to compensate victims for should not support a right to recovery at all.[304] An individual who is harmed by people who have expended more than the expected value of the injuries they will cause to make their behaviors safe ought to bear his or her own losses.

Moreover, showcasing the rights-for-injuries premise's descriptive and predictive shortcomings, judges themselves do not always agree whether it applies in a specific case. Indeed, there are plenty of examples of courts disagreeing about whether a right to seek a remedy for a class of injuries ought to be legally recognized, particularly when

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301 5 B.E. Witkin, Summary of California Law § 6 (10th ed. 2005); *see also* Singer, *supra* note 289 at 1026; 1 Jacob A. Stein, Stein on Personal Injury Damages § 1:1 (3d ed. 1997) ("[T]here can be 'damage without injury' in those instances in which the loss or harm was not the result of a violation of a legal duty. These situations are often described with the Latin phrase 'damnum absque injuria.'").

302 *See* Adkins v. Thomas Solvent Co., 440 Mich. 293, 310-14 (1992).

303 *See generally*, WILLIAM M. LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 85 (1987).

304 *See generally id.*

plaintiffs are denied the ability to have claims heard by a court on procedural or other grounds unrelated to the merits of the claim, with the dissent invoking the rights-for-injuries language to express their concern. For example, in *Nixon v. Fitzgerald*, a former employee of the U.S. Air Force was terminated after giving damaging Congressional testimony about military cost overruns.[305] The Court held that the former President of the United State was entitled to absolute immunity from liability for damages from acts within his official responsibility.[306] The dissent, invoking *Marbury*, protested that the move from qualified to absolute immunity denied a right to relief "for the violation of a vested right," thereby abandoning "basic principles that have been powerful guides to decision."[307]

Similarly, in *Lujan v. Defenders of Wildlife*, members of an environmental organization brought a claim contesting the Secretary of the Department of the Interior's regulation narrowing the geographic scope of protections under the Endangered Species Act.[308] Finding that the phrase "case or controversy" in Article III of the U.S. Constitution limited legally cognizable injuries to those that the defendant could show were "concrete and particularized" and "actual or imminent" rather than diffuse or speculative harm or loss, the Court held that Congress could not confer broad-based standing to challenge the decision and that the allegations in the pleading was inadequate.[309] The dissent, described the limitation imposed by the court as "what amounts to a slash-and-burn expedition through the law of environmental standing[,]" in which it could not join because "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'"[310]

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305 *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982).

306 *Id.* at 732.

307 *Id.* at 768-69.

308 Lujan v. Defenders of Wildlife, 504 U.S. 555, 557-58 (1992).

309 *Id.* at 560-76.

310 *Id.* at 606 (citing *Marbury v. Madison,* 1 Cranch 137, 163, 2 L.Ed. 60 (1803)); *see also* Ashcroft v. Iqbal, 558 U.S. 662 (2009) (Increasing pleading standards); Bell Atlantic Corp. v. Twombley, 550 U.S. 544 (2007); Arar v. Ashcroft, 585 F.3d 559, 622 (2d Cir. 2009) (Barrington, J., dissenting) (citing Marbury regarding decision to narrow the scope of a Bivens claim); Lieberman v. Univ. of Chi., 660 F.2d 1185, 1195 (7th Cir. 1981) (Swygert, S.J., dissenting) (dissent from ruling that damages were unavailable to plaintiff under Title IX for alleged sex discrimination); *see also* Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 6 CATO SUPREME COURT REVIEW 23, 39 (2007).

Mindful of the circularity, legal realists have long worked to strip terms like "right" and "duty" of any particular importance or mystique beyond that of a conclusory label for when courts would act: "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; – and so of a legal right."[311] In doing so, their goal is to focus analytical attention on locating those extra-legal instrumental factors that affect which injuries are legally recognized and which are not.[312] Frequently, the outcome of such an inquiry is the same as under a straightforward application of the rights-for-injuries principle and that the classical legalist model suffices. Other times, it is thought that the results may differ, suggesting that the law is determined more by idiosyncratic judicial attitudes, beliefs, biases, and "experience" than simple application of legal logic.[313] A good example of this is the "Railroad Rule" (that is, that railroads always win), memorably embodied in one of Keith Aoki's comics (Figure 6):[314]

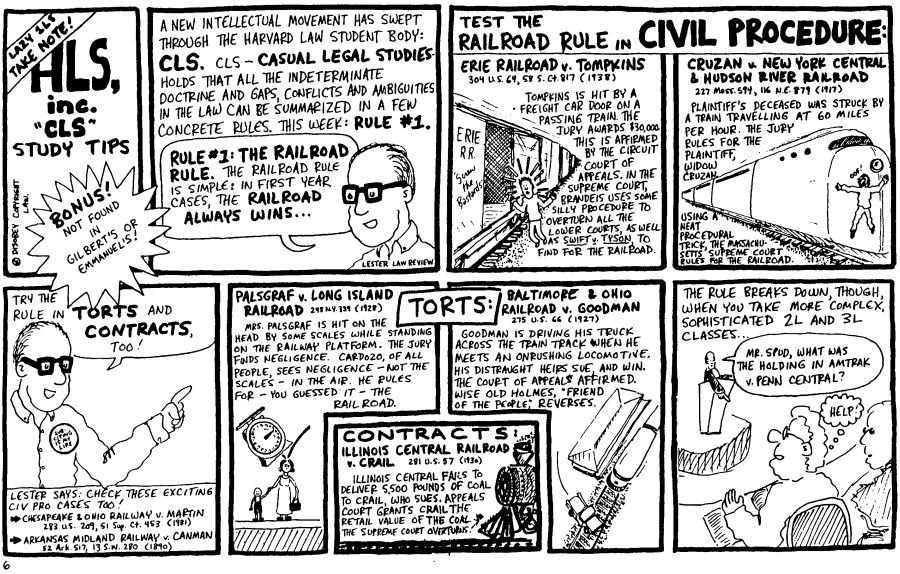
311 *See* Holmes *supra* note 290, at 458; *see also* Hohfeld, *supra* note 289, at 12.

312 *See* Thomas J. Miller & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834-35 (2008); *see generally*, L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 431-38 (1934) (exploring the concepts of legal relevancy and legal certainty); *see generally* Stewart Macaulay, *the New Versus the Old Legal Realism: "Things Ain't What They Used to Be"*, 2005 WIS. L. REV. 365, 370-75 (describing the theory of legal realism and how it is influenced by rules and bias); *see generally* Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal* Realism, 6 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 555, 560-63 (2010).

313 *See* Holmes *supra* note 290, at 471-73.

314 Keith Aoki, *Aoki Center for Critical Race and Nation Studies*, UC DAVIS SCHOOL OF LAW https://law.ucdavis.edu/centers/critical-race/.

FIGURE 6: HLS, INC. "CLS" STUDY TIPS BY KEITH AOKI



Of course, as the last panel of Figure 6 suggests, railroads do not always win. Even so, an empirical review of the outcomes of cases from 1870 to 1970 shows that, while hardly deterministic, being a Railroad may matter.[315] When appealing trial-court judgments for individuals, railroads won 39% of the time while individuals appealing trial-court judgments for railroads won 37% of the time.[316] Other relatively powerful litigants appear to enjoy a similar, albeit modest, advantage, which the authors attribute more to access to superior legal resources than judicial bias.[317]

More recently, Epstein, Landes, and Posner presented empirical evidence that the political ideology (conservative or liberal) of federal judges and justices conditionally predict the extent to which their votes, in the form of judicial opinions, concurrences, and dissents, tend to favor conservative or liberal positions.[318] Lacking more direct

315 Stanton Wheeler, Bliss Cartwright, Robert A. Kagan & Lawrence M. Friedman, *Do the "Haves" Come out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 LAW & SOC'Y REV. 403, 422-23 (1987).

316 *Id.*

317 *See id.*

318 *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 28 (2013).

measures, political scientists and empirically minded legal scholars have developed several ways to estimate judges' political ideology. The most common are the party of the President who nominated them, Segal-Cover scores (for Supreme Court Justices only) calculated from editorials about judicial nominees in two liberal and two conservative newspapers, and Martin-Quinn scores and their variants based upon the judges voting record in relation to other judges.[319]

Using the latter two measures, Epstein, Landes, and Posner found that, in non-unanimous Supreme Court decisions from 1937-2009, 72% of the opinions written or endorsed by conservative justices supported conservative positions, 60% of the votes by moderate justices supported conservative positions, and 25% of the liberal justices' votes supported conservative positions.[320] The differences are more pronounced in certain categories of cases, for example, those involving civil liberties, where 81% of the votes by conservative justices were conservative, 63% of the votes by moderate justices were conservative, and 20% of the votes by liberal justices were conservative.[321] Replicating the analysis in a database of Federal Appellate Decisions from 1925-2002, the proportion of opinions that could be categorized as conservative was 56% for conservative judges, 52% by moderate judges, and 49% by liberal judges.[322] Again, some categories of cases showed larger differences. In Constitutional cases, for example, 62% of votes by conservative judges were in a conservative direction, 55% for moderate judges, and 50% for liberal judges.[323] Finally, in a sample of district court cases from 1995 to 2008, 72% of decisions in cases tried by Republican appointees were ideologically conservative compared to 67% by Democratic appointees.[324] One the one hand, the fact that approximately one-third of the decisions of the Supreme Court are unanimous and that the effect of political ideology appears to be quite small among district and appellate court judges, which hear all cases rather than just the most controversial, supports the utility of the simpler classical legalist model.[325] On the other hand,

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319 Epstein, at 70-77.

320 *Id*. at 115

321 *Id.*

322 *Id*. at 165

323 *Id.*

324 *Id*. at 212

325 Lawrence B. Solum, The Positive Foundations of Formalism: False Necessity and American Legal Realism, 127 HARV. L. REV. 2464, 2478 (2014) (book review); Symposium, *Pitfalls of*

the political ideology of a judge or justice is somewhat predictive and, particularly at the U.S. Supreme Court level, appears to have a substantial impact. This fact is strong evidence for the veracity, and with respect to the Supreme Court, utility of the realist position.

The outcomes of these particular inquiries are less important to the purposes of this argument than the fact they were undertaken at all. The classical legalist jurisprudential model assumes relatively deterministic, logical relations among injuries, rights, and remedies confined within a framework of orthodox legal reasoning. Legal realism, by comparison, envisions the presence of other, extrinsic factors that may influence whether and the extent to which particular types of injuries become recognized as rights. Factors like the status of one party as a railroad or the political ideology of a judge do not exist in the model of the legal system described by the rights-for-injuries premise.

Expanding the classical legalist model to include the capacity for a legal realist inquiry into extrinsic causal variables comes with its own costs in terms of increased complexity and, without a strong commitment to rigorous empirical inquiry, the possibility of endless speculation and debilitating and alienating cynicism. Early legal realists, for example, are famously caricatured and critiqued for theorizing that the outcome of legal decisions were influenced by mundane or "frivolous" factors such as what a judge had for breakfast.[326] (As it turns out, there is evidence that judges are more harsh on convicted criminals before lunch, when the judges are tired and hungry,[327] as well as when they are up for reelection.[328]) But, in circumstances where injury in fact is not afforded a right to relief, the additional insights available under the legal realist model are perhaps most likely to be sufficiently useful to justify the price.[329] The gap between the

Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking, 58 DUKE L.J. 1895 (2009).

326 Vitalius Tumonis, *Legal Realism & Judicial Decision-making*, 19(4) JURISPRUDENCE 1361, 1362 (2012); Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 993 (1992).

327 Shai Danziger, et al., *Extraneous Factors in Judicial Decisions*, 108(17) PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 6889, 6890 (2011).

328 Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When it Runs for Office?* 48(2) AMERICAN JOURNAL OF POLITICAL SCIENCE 247, 261 (2004).

329 Erik J. Girvan, *Rethinking the Economic Model of Deterrence: How Insights from Empirical Social Science Could Affect Policies Towards Crime and Punishment*, 5 REV. OF L. & ECON 462, 487-88 (2009).

ever mounting psychological evidence of injury from non-purposeful discrimination and the lack of legal recognition of such injury presents just such a situation. It is thus one in which advocates of expanded anti-discrimination rights should be particularly suspect of the validity of a model or approach which suggests that evidence of injury itself will be sufficient to prompt recognition of a legal right.

B. *Naive Realism and Over-reliance on Evidence-Based Arguments*

Naive realism is a general social psychological theory of how people respond when they learn that others do not share their perceptions, beliefs, attitudes, or opinions on important topics. It explains why proponents of expanded anti-discrimination rights (including myself) tend to perceive the results of research on implicit bias as conclusive evidence that the law is failing. And why we would attribute the existence and persistence of the purposeful-discrimination requirement to judicial ignorance of modern social-cognitive psychology. Finally, the theory of naive realism suggests why the purported cause is likely incorrect and why we should expect educational interventions designed to inform judges by themselves to be ineffective at prompting doctrinal change.

People perceive reality, form judgments, and make decisions in a way that is filtered and distorted by a wide variety of psychological processes.[330] Familiar optical illusions, for example, illustrate how the perceptual cues that our brains use to interpret visual stimuli can fail when they are inconsistent with the external world. Social psychologists generalize this basic phenomenon in the concept of *construal*, the idea that: "The impact of any "objective" stimulus situation depends upon the personal and subjective meaning that the actor attaches to that situation."[331]

While the all stimuli must be perceived and their meaning of be interpreted,[332] outside of optical illusions, hallucinations, and certain clinical psychological conditions, the effects of construal do not generally yield radically different results for present, physically accessible phenomena. Few people will disagree about whether a brick wall is

330 *See* LEE ROSS & RICHARD NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 11 (Temple University Press 1991).

331 *Id.*

332 *See* JEROME S. BRUNER, BEYOND THE INFORMATION GIVEN: STUDIES IN THE PSYCHOLOGY OF KNOWING 1 (Jeremy M. Anglin ed., W.W. Norton & Company, Inc. 1973).

blocking their path. For phenomena that are not readily, physically verifiable, however, construal tends to be biased by social cues:

> Thus where the dependence upon physical reality is low the dependence upon social reality is correspondingly high. An opinion, a belief, and attitude is 'correct,' 'valid,' and 'proper' the extent that it is anchored in a group of people with similar beliefs, opinions, and attitudes.[333]

The classic example of this is the differing perceptions of Dartmouth and Princeton Football fans of documented in Hostorf and Cantril's *They Saw a Game* study.[334] After a particularly rough game, the researchers surveyed fans from both teams and found not only different opinions on who initiated the fighting (86% of Princeton Students but only 36% of Dartmouth students blamed Dartmouth), but also, the existence and number of the resulting penalties themselves (Princeton students saw, on average, 9.8 infractions by Dartmouth; Dartmouth students an average of just 4.3 by their team).

As a conceptual replication of the study, Dan Kahan and colleagues asked participants about their ideological predispositions and then showed them video footage from an actual protest, which included footage of protesters, pedestrian, and police interactions.[335] Half the participants were told that the video showed a pro-life protest at an abortion clinic. The other half were told that it showed a gay-rights protest at a military recruiting station. As with the football fans, partisanship impacted perceptions. To summarize relevant results, for people whose ideology would lead them to oppose abortion but support the military/oppose homosexuality, when the footage was attributed to a pro-life protest of an abortion clinic, just 39% reported seeing the protestors blocking pedestrians while 70% indicated that the police violated protestors' rights. When the same footage was attributed to a gay-rights protest of a recruiting center, however, fully 74% saw protestors blocking pedestrians and only 16% thought the police violated protestors' rights—so too for people whose ideology favored pro-choice and gay-rights. For these partici-

333 Leon Festinger, *Informal Social Communication*, 57 PSYCHOL. REV. 271, 272-73 (1950).

334 Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. OF ABNORMAL AND SOCIAL PSYCHOLOGY 129 (1954).

335 Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 869, 872 (2012).

pants, when the footage was attributed to protests of an abortion clinic, 76% saw the protestors blocking pedestrians and just 28% believed the police had violated protesters' rights. When they thought the protest was of a military recruiting center, 45% saw protestors blocking and 76% thought that police violated protestors' rights.[336] Thus, for both groups, ideology influenced perception of facts regarding the event and the legal inferences drawn from them.

In part as a result of such *motivated reasoning* and other similar biases,[337] people hold a wide range of diverging perspectives and opinions about a variety of topics, including those that seem amenable to resolution with reference to specific evidence such as the deterrent value of the death penalty,[338] social utility of firearms,[339] existence of anthropocentric global warming,[340] and safety of nuclear waste disposal practices[341] or genetically modified foods.[342] But on issues like these, about which people tend to care deeply but positions with respect to which have social symbolic significance, each person tends to believe that their perceptions, perspectives, and opinions are fairly accurate, authentic, and the most reasonable. The contradiction is understandable in terms of difference in subjective experience. We all have introspective access to our own experiences, knowledge, and thought processes. And, as well-meaning people, when introspection reveals that we were perhaps biased, we generally attempt to make

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336 *Id*. at 880, 883.

337 Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636, (Thomas Gilovich, Dale Griffin, & Daniel Kahneman, eds., 2002); Emily Pronin, Thomas Gilovich & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 781 (2004).

338 *See* Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011); Dan M. Kahan & Donald Braman *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006); Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection: An Experimental Study* (Cultural Cognition Lab, Working Paper No. 107, 2012).

339 *See* Dan M. Kahan, Hank Jenkins-Smith & Donald Braman, *Cultural Cognition of Scientific Consensus*, 14 J. RISK RES. 147, 148 (2011); *see also* Donald Braman & Dan M. Kahan, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PENN. L. REV. 1291, 1299 (2003).

340 *See* Dan M. Kahan et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732, 732-35 (2012).

341 *See* Dan M. Kahan et al., *Cultural Cognition of Scientific Consensus*, 14 J. RISK RES. 147, 160 (2011).

342 Jooyoung Kim and Hye-Jin Paek, *Information Processing of Genetically Modified Food Messages Under Different Motives: An Adaptation of the Multiple-Motive Heuristic-Systematic Model*, 29 RISK ANALYSIS 1793, 1793 (2009).

adjustments. At the same time, we lack information about others' memories and thought processes. We can, however, observe the external, potentially biasing influences on them.

Unfortunately, motivated reasoning and other subtle biases rarely leave a consciously accessible trace on our own thinking and thus we are frequently unable to detect when they have influenced our own perceptions, judgments, decisions, or behaviors.[343] We appear unbiased to ourselves even when we are biased. As a result, when we interact with those with whom we disagree about the facts or implications of facts on important issues, we tend to assume that their experiences or their selves are in some way deficient, not us. And, as anyone who has ever had a friend make a comment on social media with which they disagreed and reacted by finding and posting an article showing the other their mistake, we respond accordingly by first trying to inform them (to no avail) and then concluding that *they*, not us, are hopelessly biased.

Capturing these insights in specific, first-person propositions, the theory of naive realism thus predicts that, when we find that we disagree with someone about something that matters to us, we all tend to have the following thoughts and reactions:

- I see stimuli, issues, and events as they are in objective reality, and my social attitudes, beliefs, preferences, priorities, and the like follow from a relatively dispassionate (indeed, unmediated) apprehension of the information or evidence at hand.
- Other rational social perceivers generally share my judgments and reactions – provided that they have had access to the same information that gave rise to my views, and provided that they too have processed that information in a reasonably thoughtful and open-minded fashion.
- The failure of a given individual or group to share my judgments and reactions arises from one of three possible sources:
  - the individual or group in question may have been exposed to a different sample of information than I was (in which case, provided that the other party is reasonable and open-minded, the sharing or pooling of information will lead us to reach agreement);

343 *See* Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PHYSIOLOGICAL REV. 231, 241 (1977).

- the individual or group in question may be lazy, irrational, or otherwise unable to unwilling to proceed in a normative fashion from objective evidence to reasonable conclusions; and
- the individual or group in question may be biased (either in interpreting the evidence or in proceeding from evidence to conclusions) by ideology, self-interest, or some other distorting influence.[344]

Naive realism thus describes how, when we are faced with a public policy disagreement with a respected other, the common, natural first response is to conclude that the other person is not as informed. Accordingly, our initial motivation and reaction is to want to provide them with the missing information, assuming that this will cause them to agree with us. Resting, as it does, on extensive evidence of a systematic asymmetry between the effects of bias and our attributions to them,[345] the theory's core insight extends beyond the motivated response. For important issues on which perspectives have become partisan, the predictable impulse that disagreements can be resolved simply by educating others as to the facts we find convincing is itself naive. As such an issue, discrimination, and the appropriate legal responses to it, is likely to be a topic in which proffering social scientific evidence itself is predictably ineffective.[346]

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344 Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636, 647 (Thomas Gilovich, Dale Griffin, & Daniel Kahneman, eds., 2002).

345 Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others,* 28 PERSONALITY & SOC. PSYCHOL. BULLETIN. 369, 369 (2002); Lee Ross & Andrew Ward, *Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, VALUES AND KNOWLEDGE 103, 108-09 (Standford Ctr. on Conflict and Negotiation, Working Paper No. 48, 1995).

346 While not discussed formally in relation to the theory of naive realism, the possibility that the science of implicit bias may not, as a practical matter, be persuasive is considered by the jurisprudential founders of behavioral realism. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 503 (2010) (observing that "[o]f course everything we have written may be politically naive" and discussing three categories of "cultural, social, and political forces" objections to the acceptance of the science of implicit bias); *see also* Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS UNIV. L. J. 1140, 1146 (2010) (considering that, although science and evidence-based counts of discrimination theoretically have extra persuasive power and are somewhat privileged in policymaking, they still can be denied by those with ideological motivations to do so).

C. *Classical Legalism and Naïve Realism in Applied Behavioral Realism*

The logical force behind applied behavioral realism relies to a significant extent on the classical legalist rights-for-injuries premise. A range of public policy sources condemn discrimination and suggest that equal treatment is a fundamental right.[347] The results of recent psychological research and theorizing provides ample support for the proposition that neither the existence of nor severity of harm from discrimination is dependent upon the intent of those who ultimately discriminate.[348] Therefore, given evidence of an injury that likely resulted from discrimination in fact based upon someone's membership in a protected category, a legal right to be free from and seek redress for it ought to follow. When such a right is not available because judges only recognize injury from purposeful discrimination, the failing is understood as a problem of judicial knowledge and understanding. Judges are continuing to apply outdated psychological theory. The solution is thus to inform them because, if they know of the injury, then under the rights-for-injuries principle, the ability to seek redress for it must follow.

Similarly, the psychological processes described by naive realism describe the assumptions underlying the impulse to use information about psychological research on implicit bias and its effects to advocate for an expanded right to be free from discrimination. Lawyers, legal scholars, social scientists, and other proponents of expanded legal protections against discrimination who are aware of psychological research on implicit bias tend to view the results of the research as evidence that their position is correct.[349] When they learn that respected others, such as judges, do not share this perspective, the proponents attribute the difference to lack of information or experience which they have but suspect the judges do not: Knowledge of the recent psychological advances which explain discrimination as a product of implicit bias. The proposed (and seemingly obvious) first solution is thus to provide the judges with that information. As anyone involved in a debate over social media with a friend who has forwarded an article supporting their position knows, however, the

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347 *See* Strauder v. West Virginia, 100 U.S. 303, 306-08 (1879) (citing Slaughter-House Cases, 83 U.S. 36, 72 (1872)), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

348 *See supra* Sections I.B & Prologue (discussing research on implicit bias).

349 *See supra* Section I.C.3.

absence of information is rarely the actual problem and providing that information generally does not have the intended effect.

Given the insights of legal and naive realism, as advocates for expansion of anti-discrimination rights based upon or with the assistance of the psychological science of implicit bias, we have little reason to expect that, as a practical matter, additional evidence of injury from non-purposeful discrimination is itself sufficient to compel the desired outcome. Moreover, consistent with those insights and undercutting the utility of the behavior realist approach, there is evidence that judicial ignorance of injury from non-purposeful discrimination was never actually the problem. The solution Lord, Lepper, and Preston recommended for motivated reasoning was to deliberately consider evidence for the opposite conclusion one is otherwise motivated to draw.[350] I turn to some of that evidence now.

First, if the reason that judges did not recognize a right to seek redress from injury caused by non-purposeful discrimination is a lack of knowledge about such injury, then we would expect that the relevant insight was not available to them at that time. With respect to research on implicit bias itself, that is true. Awareness of the existence of unconscious psychological processes and their relevance to discrimination, however, predates the relevant judicial decisions. Lawrence, for example, wrote his psychologically-informed critique of *Washington v. Davis* before implicit bias took root in the field of psychology as a fully recognized construct.[351] Instead he relied primarily on insights of older, Freudian psychological theory regarding the general influence of unconscious processes. Given this, unlike the later psychologically-informed critiques, Lawrence did not fault the *Davis* Court for relying on the vestiges of an earlier era of psychological knowledge or claim that it failed to update its understanding of the psychology of discrimination. Rather, he asserted that judges were and are aware of relevant psychological insights:

> [F]ew today would quarrel with the assertion the there is an unconscious—that there are mental processes of which we have no awareness that affect our actions and the ideas of which we are aware. There

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350 Charles G. Lord, et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCH. 1231, 1231 (1984).

351 Eugene Borgida & Erik J. Girvan, *Social Cognition in Law, in* APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY: ATTITUDES AND SOCIAL COGNITION 753, 758 (Eugene Borgida & John A. Bargh, eds., 2015).

> is a considerable, and by now well respected, body of knowledge and empirical research concerning the workings of the human psyche and the unconscious. Common sense tells us that we all act unwittingly on occasion. We have experienced slips of the tongue and said things we fully intended not to say, and we have had dreams in which we experienced such feelings as fear, desire, and anger that we did not know we had.[352]

Even so, in crafting legal doctrine, judges nevertheless generally "refused to acknowledge what we know about the unconscious," and, with few exceptions, "students of the unconscious are excluded, and we pretend that what they have learned is unknown."[353] Because, at least within the Court's motivation-oriented framework, the discrimination he observed was largely caused unintentionally, in order for the doctrine to be effective, he argued that courts should interpret the Equal Protection Clause as a special case within a legal system that targets consciously motivated actions. His argument that Equal Protection doctrine ought to be interpreted to account for unconscious influences, thus, is one of exceptionalism to a general practice, not judicial ignorance.

Coming to the defense of the way in which the behavior realist approach has been applied to try to promote doctrinal change, one could counter-argue that Freudian theory was quite generalized and, ultimately, has questionable factual support.[354] Theory and research results associated with implicit bias are more empirically grounded, more tailored to the particulars of discrimination, and more normatively compelling. Thus, it may be that the persistence of the purposeful intent requirement is attributable to a lack of knowledge of implicit bias in particular, not unconscious processes generally.

Consistent with the predictions of naive realism and legal realist critique of the classical legalist jurisprudence, however, specific judicial knowledge of implicit bias most frequently appears not to matter. Recent campaigns centered on raising judicial awareness of the existence of and injuries from non-purposeful discrimination have been very successful in raising awareness of implicit bias. They have not been effective in promoting doctrinal change.

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352 Lawrence, *supra* note 32, at 329.

353 *Id*.

354 *See generally*, Seymour Fisher & Roger P. Greenberg, FREUD SCIENTIFICALLY REAPPRAISED: TESTING THE THEORIES AND THERAPY (1996).

As noted in the introduction, over the last two decades, education and advocacy efforts by legal scholars, lawyers, and psychologists based upon this work have been substantial and are ongoing.[355] To some extent, these efforts have been quite successful. Judges themselves now acknowledge in published opinions that they know about implicit bias and are "aware that unconscious racism could affect the outcome of trials." If recognition of rights necessarily followed awareness of injuries or belief and behavior change followed exposure to uncongenial facts, then such education and evidence of injury from implicit bias should be associated with doctrinal change. That has not been the case. Awareness notwithstanding, appellate courts have largely rejected the opportunity to expand the right to be free from non-purposeful discrimination based upon implicit bias, even when it is directly presented them.

In *State v. Martin*, for example, the Minnesota Supreme Court explicitly rejected the invitation to alter legal doctrine based on theory and evidence of implicit bias. The case involved a Black juvenile indicted and convicted as an adult of first-degree murder for a gang shooting.[356] During voir dire, the first Black male juror questioned whether minorities receive the same treatment as non-minorities in the criminal justice system. The prosecutor later exercised a peremptory challenge against the juror. On appeal, Martin asserted that the peremptory challenges was based on the juror's race, if not explicitly, then implicitly. The court summarily declined to consider the argument, holding that "[o]ur case law under *Batson* is well established. We see no reason to extend existing law to include 'implicit bias.'"[357]

In an opinion somewhat reminiscent of that in *McCleskey*, in *State v. Saintcalle* the Washington Supreme Court took a step forward by recognizing implicit bias and two steps back by refusing to adapt legal doctrine to it.[358] In the case, the Black defendant appealed, based upon implicit bias, his unsuccessful *Batson* challenge of the prosecutor's peremptory strike of the only Black juror. In considering the argument, the Court reviewed and unanimously accepted the implications of research on implicit bias related to jury selection and acknowledged the limitations of *Batson*:

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355 *See, e.g.*, Appendix 1.

356 State v. Martin, 773 N.W.2d 89, 102-03 (Minn. 2009) (citations omitted).

357 *Id*.

358 State v. Saintcalle, 309 P.3d 326, 339 (Wash. 2013), *cert. denied,* 134 S. Ct. 831 (U.S. 2013).

> [T]he problem is that racism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.[359]

Nevertheless, the Court splintered on what, if anything, should be done to address the problem. Ultimately, citing procedural shortcomings, the majority of the Court declined to recognize a right to challenge use of a peremptory strike on the basis of implicit bias.[360]

Finally, historically, even in cases where social science is thought to have influenced judicial judgments, there is little evidence that the judges actually considered themselves beholden to it. In *Brown v. Board of Education*, for example, the Court cited the Clarks' doll studies.[361] In the studies, Black children are shown White and Black plastic infants and asked questions about them – Which is the nice doll? Which is the pretty doll? Which is the good doll? – to which most answer the White doll. Then they are asked which is like them? After a moment's hesitation, they pick the Black doll. The result is heartrending and provocative.[362]

The images of children who have internalized racially prejudicial stereotypes of people like them and the studies from which the images come certainly document a social problem and demand a response. But they do not identify the cause of the internalized prejudice nor do they provide any evidence to suggest that integrating schools is solution. Indeed, the research base for understanding the conditions

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359 *Id*.

360 State v. Saintcalle, 309 P.3d 326, 339 (Wash. 2013) ("As urgent as the need for a new framework may be, we cannot create one in this case."); *see also* Pippen v. State, 854 N.W.2d 1, 33, 46 (Iowa 2014) (Waterman, J., concurring) (recognizing that implicit bias affected some decisions, but affirm district court's judgment against plaintiffs); *but see* Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d 765, 778 (E.D. Wis. 2010) ("Thus, in addition to failing to provide a credible explanation of the conduct complained of, Donoghue behaved in a manner suggesting the presence of implicit bias.").

361 Brown v. Board of Education, 347 U.S. 483, 494 n.11 (1954).

362 *See* 4 Truth and Justice, *Kiri Davis: A Girl Like Me*, YouTube (Apr 16, 2007), https://www.youtube.com/watch?v=Z0BxFRu_SOw (last accessed Jul 21, 2015); *see also* MegaWackyVideos, *Parents React To The Child Race Doll Test!!!*, YouTube (May 20, 2010), https://www.youtube.com/watch?v=UOVwrcTzRBs (last accessed Jul 21, 2015).

under which intergroup contact can reduce bias, and when it may make bias worse, developed only after courts had spent years blindly attempting that remedy through fairly extreme uses of equitable authority. Judicially imposed desegregation of schools was only sometimes effective, as it frequently did not go smoothly for the communities involved. And judges ultimately got out of the business of doing so.[363] Sixty years later, *de facto* school segregation is increasing.[364] And the doll study still replicates.[365] Few if any doubt that *Brown v. Board of Education* was an important, landmark decision in the struggle for civil rights. It is, however, more of an example of the sort of doctrinal developments which behavioral realism decries as incorporating assumptions and inferences that go well beyond the science than a model of evidence-based doctrinal development that would be consistent with the expectations of applied behavioral realism.

III. WHAT TO CONSIDER GOING FORWARD

"The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."

—Justice Oliver Wendell Holmes, Jr.[366]

"If that is a settled constitutional doctrine, then I do not care what any . . . professor in sociology tells me."

—Justice Felix Frankfurter[367]

To frustrated advocates against discrimination, the science of implicit bias can come as a welcome revelation [368] and the behavioral realist approach for leveraging it to challenge and change legal doc-

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[363] *See generally*, Gary Orfield & Chungmei Lee, *Historic Reversals: Accelerating Resegregation, and the Need for New Integration Strategies*. CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES (2007), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf.

[364] *Id*. at 41-43.

[365] *See* 4 Truth and Justice, *supra* note 362; *see also* MegaWackyvideos, *supra* note 362.

[366] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[367] ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952, 1965 (L. Friedman ed., 1969); *see also* J.A. Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 153 (1990).

[368] To be sure, this is not at all a universal response. *See generally* Jerry Kang, *Implicit Bias and Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139 (2010); *see also* Glenn Adams & Phia S. Salter, *A Critical Race Psychology is not Yet Born*, 43 CONN. L. REV. 1355 (2011).

trine a promising, intuitive, and attractive way to make progress or at least halt the ground lost over the last couple decades. But for those to whom the validity of the basic premise that law ought to test its behavioral assumptions against social science research results seems all but self-evident (myself included), it can be easy to attribute the law-psychology gap to judicial ignorance. We are thus more likely to adopt a classical legalist logic and the naive realist notion that evidence of injury backed by social psychological research is ultimately persuasive. And we are likely to ignore evidence of the basic ineffectiveness of this approach at driving legal doctrinal change.

The job of lawyers and other advocates is not to construct arguments for people who already agree with their clients' or their own positions, but to find ways to convince those who do not. In this spirit, my goal is generative: To present a critically self-reflective description and analysis of the failings of the primary approach to the psychology and law of anti-discrimination to direct attention to extrinsic factors that might present more constructive paths forward. Space limitations preclude a comprehensive identification and exhaustive discussion of all of those factors here. Nevertheless, the voices of those for whom discrimination is a desperate, day-to-day reality, and my firm belief in the constructive vote of no confidence, mandate that I take the first steps forward in this effort and review some of the more likely possibilities.

A. *(Im)permissible Inferences*

A common insight among law and psychology scholars is that the legal system and social sciences – and those who participate in them – have different goals, methods, styles of inquiry, and expertise.[369] Judge and lawyers, for example, are trained to use an adversarial process to achieve the acceptable resolution of individual disputes and, in doing so, create a body of precedent. The legitimacy of the process is dependent as much on stability, transparency, and predictability of the process as the validity of a particular outcome in relation to abstract notions of truth.[370] They are generally not expert in the use statistics

[369] MARK COSTANZO, PSYCHOLOGY APPLIED TO LAW 8-13 (2004); Krieger & Fiske, *supra* note 36, at 997-98; *see also* Girvan & Deason, *supra* note 62, at 1065-67.

[370] *Id.*

or other social science methods.[371] By comparison, social scientists are trained to seek truth over time using methods that encourage objective empirical engagement with and testing of hypotheses. The legitimacy of their work depends upon incremental advancements in knowledge and the ability of others to replicate, or disprove, the results of their studies.[372] They are not generally experts in managing the normative tradeoffs endemic to the legal system.

The differences between social science and law can present a problem of permissible inferences for those seeking to apply generalized insights about implicit bias to determine the facts of particular cases.[373] Social cognitive psychologists explore, identify, and test processes related to implicit bias, and make predictions about its effects, at an aggregate level. By comparison, often what judges, lawyers, and jurors want to know is not what tends to happen but whether a particular individual discriminated against another in the specific situation before them. Just as knowing that men tend to be taller than women does not allow one to infer that a particular man is taller than a particular woman, specific inferences about whether discrimination occurred in a case cannot reliably be drawn from the general social scientific theory of implicit bias.[374]

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371 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 599 (1993) (Rehnquist, J., dissenting) (stating that "[D]efinitions of scientific knowledge, scientific method, scientific validity, and peer review" [are] "matters far afield from the expertise of judges."); State v. Saintcalle, 309 P.3d 326, 339 (Wash. 2013) (Madsen, C.J., concurring) (stating that "[Judges] are not a group of qualified statisticians" and that 'significant mistake[s] [have been] made by this court when attempting to resolve a question in a case involving statistics."); *see* Sophia I. Gatowski, et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW AND HUMAN BEHAVIOR 433, 455 (2001); Girvan & Deason, *supra* note 62, at 1065-67.

372 Costanzo, *supra* note 369, at 8-13.

373 *See generally*, David L. Faigman et al., *Group to individual (G2i) Inference in Scientific Expert Testimony*, 2014 UNIV. OF CHI. L. REV. 417; *see also* David L. Faigman, *Evidentiary Incommensurability-A Preliminary Exploration of the Problem of Reasoning from General Scientific Data to Individualized Legal Decision-Making*, 75 BROOK. L. REV. 1115 (2010).

374 Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOCIAL ISSUES AND POL'Y REV. 113, 134 (2012) ("Making decisions about individuals based on their scores on implicit measures is fraught with uncertainty about the measurement itself and its applicability to the behavior in question. The presence or absence of implicit bias may be associated with particular behavioral outcomes, but there is uncertainty for any individual case. The absence of implicit bias does not guarantee that a behavior was not motivated by social biases, and the presence of implicit bias does not guarantee that a behavior was motivated by social biases. As such, our normative position for evaluative applications is the same as for selection applications: the present sensitivity of implicit measures does not provide adequate justification for this application in general.").

A solution to the inferential shortcomings of general social science when applied to a specific case is for advocates to use the psychology of implicit bias only to target assumptions and public policy underlying doctrinal and procedural rules themselves, not the facts of a specific case.[375] For example, while implicit bias research may not support an inference that the particular defendant's actions were, in fact, discriminatory, it can be used to convince the court that employers who do not discriminate in some circumstances (such as objective hiring decisions) may nevertheless discriminate in others (like subjective promotion decisions);[376] that it is appropriate for the court to be skeptical of, or not accept at all, irrational or arbitrary justifications for exercising peremptory strikes against minority jurors;[377] or that police officers' intuitions about reasonable suspicion when stopping minorities ought not to be given complete deference.

B. *Judicial Role in Policymaking*

Another barrier to judicial acceptance of the psychological science of implicit bias relates to concerns over the limited policymaking role, and expertise, of judges. One of the concurring opinions in *Saintcalle*, for example, cautioned strongly that the court lacks the necessary scientific understanding and rulemaking authority to craft a solution to the problem of implicit bias in jury selection.[378] For its part, the majority conceded that it could address the issue but felt that the sort of changes needed may best be accomplished through the administrative rule-making process.[379]

The descriptive and normative scope of the policymaking role and authority of judges, particularly those on appellate and supreme courts, is a matter of regular controversy. The appointment hearings for Justice Sotomayor, for example, raised debate about whether she

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375 A successful example of this is State v. Lawson, 291 P.3d 673 (Or. 2012), in which the Oregon Supreme Court reviewed and relied upon psychological research regarding the unreliability of eyewitness testimony to craft a new burden-shifting framework for challenges to eyewitness identifications.

376 Krieger, *supra* note 33, at 1209.

377 Caren Myers Morrison, *Negotiating Preemptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 55 (2014).

378 State v. Saintcalle, 309 P.3d 326, 339 (Wash. 2013) (Madsen, C.J., concurring) (stating that "[Judges] are not a group of qualified statisticians" and that 'significant mistake[s] [have been] made by this court when attempting to resolve a question in a case involving statistics.").

379 *Id*. at 339 (majority opinion).

would be sufficiently constrained by "the rule of law."[380] Conversely, Justice Roberts' comments during his hearings that judges are like umpires, they "don't make the rules; they apply them," were interpreted as endorsement of judicial restraint with respect to policymaking.[381] Public charges of judicial activism as to the results of specific decision similarly suggest that legislatures, not courts, are the appropriate branch of government to craft public policy.[382]

Values associated with the separation of powers notwithstanding, as a practical matter, judges can and do regularly make public-policy decisions. In a case concerning the constitutionality of limits on the ability of candidates for judicial office to campaign, Justice Scalia observed that an assertion that judges did not make law was plainly inaccurate:

> This complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well.[383]

As part I.A. illustrates, this judicial power is also true for statutory interpretation. But that does not mean that the backdrop of potential public criticism is irrelevant. To the contrary, particularly in politically controversial topics like the right to an abortion,[384] and perhaps equally whether and how legal doctrine can be altered to combat discrimination and advance equality, principles of judicial restraint and

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380 The 'Empathy' Nominee: Is Sonia Sotomayor Judically Superior to 'a White Male'? Wall Street Journal (May 27, 2009), http://www.wsj.com/articles/SB124338457658756731.

381 Bruce Webber, Umpires v. Judges, The New York Times (July 11, 2009), http://www.nytimes.com/2009/07/12/weekinreview/12weber.html?pagewanted=all.

382 *Judicial Activism*, THE HERITAGE FOUNDATION, available at http://www.heritage.org/initiatives/rule-of-law/judicial-activism; *see also* A Judge's Assault on Immigration, The New York Times (February 17, 2015), available at http://www.nytimes.com/2015/02/18/opinion/a-judges-assault-on-immigration.html.

383 Republican Party of Minnesota v. White, 536 U.S. 765, 784 (2002).

384 Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 864-65 (1992) ("Our analysis would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis,* but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.").

consistency like *stare decisis* are highly salient to judges. Effective advocacy in such domains may thus require explicit efforts to address them.

C. *Judicial Economy*

A third potential "other factor" preventing recognition of a right to be free from non-purposeful discrimination is the strain that administering such an anti-discrimination doctrine may place on the judicial system. Courts, particularly those of original jurisdiction, are fundamentally pragmatic institutions tasked with the efficient, expedient resolution of individual disputes.[385] Judges are, in the first instance, concerned with deciding concrete cases. In doing so, as noted above, they are constrained by considerations and perceptions of justice[386] but also the sheer volume of their workload.

This practical consideration may seem secondary, particularly when juxtaposed against the scope of what is asserted to be a fundamental right. But it can be highly influential. Under the name of "judicial economy" or "efficiency," courts often cite concerns about the practical impact that a particular doctrine or procedure may have on their ability to function when deciding how broadly or narrowly to interpret it. Examples include the justification for claim and issue preclusions,[387] supplemental jurisdiction,[388] and the extent that implication of a federal law in an element of a traditionally state-law claim creates "arising under" (also known as federal question) federal subject matter jurisdiction.[389] The lack of adequate financial and human

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385 Fed. R. Civ. P. 1 and U.S. CONST. amend. VI.

386 Erik J. Girvan, Robert J. Cramer, Caroline Titcomb, Tess Neal & Stanley Brodsky, *The Propriety of Peremptory Challenges for Perceived Personality Traits*, 37 LAW & PSYCHOL. REV. 47, 77 (2013).

387 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) ("Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.").

388 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) ("That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them.")

389 Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 319 (2005) ("A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of tradi-

resources to administer the court system is a frequent topic for Chief Justices of U.S. Supreme Court to cover in their annual reports on the federal judiciary.[390]

Arguments and evidence under the behavioral realist approach are targeted largely toward the justice ideal, paying short shrift to concerns of judicial economy that may be a central objection to creation of right to be free from non-purposeful discrimination. A reasonable interpretation of opinions like *McKleskey v. Kemp*,[391] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*,[392] or *Wal-Mart Stores, Inc. v. Dukes*,[393] is that, scientific evidence notwithstanding, a majority of the U.S. Supreme Court is concerned about the practical impact of judicial attempts to address subtle, widespread, and potentially intractable problems with discrimination. For advocates of greater legal protection from discrimination who are operating under a classical legalist logic, presenting facts showing that a great many people are suffering injury in fact may be construed as strong support for judicial intervention. For the judges in charge of managing the cases, however, the very same facts may support the opposite conclusion. Indeed, to them, opening the courthouse doors to potential claims against the vast majority of the U.S. population —the proportion estimated to have implicit biases—may seem like a functional impossibility.

D. *Judicial Ideology*

A fourth factor to consider is differences in judges' values. Epstein, Landes, and Posner's analysis shows that appellate judges'

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tionally state cases into federal courts. Expressing concern over the 'increased volume of federal litigation,' and noting the importance of adhering to 'legislative intent, *Merrell Dow* thought it improbable that the Congress, having made no provision for a federal cause of action, would have meant to welcome any state-law tort case implicating federal law 'solely because the violation of the federal statute is said to [create] a rebuttable presumption [of negligence] . . . under state law.'").

390 2013 Year-End Report, U.S. Supreme Court at *5-*6, http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf; 2012 Year-End Report, U.S. Supreme Court at *10, http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf; 2010 Year-End Report, U.S. Supreme Court at *5-*8, http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf; 2008 Year-End Report, U.S. Supreme Court at *2-*9, http://www.supremecourt.gov/publicinfo/year-end/2008year-endreport.pdf.

391 McClesky v. Kemp, 481 U.S. 279, 308-09 (1987).

392 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007).

393 *See* Wak-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2544, 2546 (2011).

decisions are influenced by differences in their political ideology. Over the last decade, Jonathan Haidt and colleagues have developed and found evidence for a framework of bases for, or foundations of, morality, adherence to which varies depending upon political ideology.[394] Under the framework, in making moral judgments, liberals tend to emphasize considerations of fairness, reciprocity, and caring for the weak. In addition to these considerations, conservatives' morality also incorporates and values in-group loyalty, respect for authority, and maintaining purity or sanctity. Given the different moral foundations, evidence of and potential solutions to discrimination are likely to be construed very differently by liberals and conservatives. On the one hand, because discrimination is inconsistent with both justice and care and solutions like expanding the duty to prevent discriminatory behavior threaten none, liberals will strongly support making necessary changes. On the other hand, conservatives will tend to experience ambivalence on the issue. As for liberals, treating people differently on the basis of immutable characteristics is inconsistent with notions of justice and care for weaker, disadvantaged groups. Even so, proposed solutions to it could easily contravene considerations of in-group loyalty.

Political psychologists have also found strong evidence of personality traits that relate to people's political ideology and whether they support policies that implicate equality.[395] Social Dominance Orientation (SDO), for example, is a preference for a hierarchical, rather than egalitarian, social structures.[396] Those higher in SDO tend to view the

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394 *See e.g.*, Jesse Graham, Jonathan Haidt & Brian A. Nosek. "*Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96.5 JOURNAL OF PERSONALITY AND SOCIAL PSYCH. 1029 (2009); Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives have Moral Intuitions that Liberals May Not Recognize*, 20 SOCIAL JUSTICE RESEARCH 98, 103-05, 112 (2007); Jesse Graham, Brian A. Nosek, Jonathan Haidt, Ravi Iyer, Spassena Koleva & Peter H. Ditto, *Mapping the Moral Domain*, 101 JOURNAL OF PERSONALITY AND SOCIAL PSYCH. 366 (2011).

395 Marc Stewart Wilson & Chris G. Sibley, *Social Dominance Orientation and Right-Wing Authoritarianism: Additive and Interactive Effects on Political Conservatism*, 34 POL. PSYCHOL. 277, 283 (2013); Alain Van Hiel & Ivan Mervielde, *Explaining Conservative Beliefs and Political Preferences: A Comparison of Social Dominance Orientation and Authoritarianism* 32 J. OF APPLIED SOCIAL PSYCHOL. 965, 965-66 (2002).

396 Pratto, Felicia, Jim Sidanius, Lisa M. Stallworth & Bertram F. Malle, *Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes*, 67 J. OF PERSONALITY AND SOCIAL PSYCH. 741, 741-42 (1994); Felicia Pratto, Jim Sidanius & Shana Levin, *Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward*, 17 EUR. REV. OF SOCIAL PSYCHOL. 271, 273 (2006).

world as a competitive, zero-sum place and endorse strong notions of individualism, the protestant work ethic, and other norms that promote and maintain hierarchy. Right Wing Authoritarianism (RWA), by comparison, is a tendency to view the world generally, and change in particular, as threatening. Those high in RWA support traditional social structures, including punishment of those who threaten them. Together, these traits have been found to underlie a substantial amount of prejudicial attitudes and support for policies that tend to disadvantage minorities.[397] Proposals for and arguments supporting expanded anti-discrimination rights and duties that fail to take these fundamental differences of values and worldview into account are far less likely to be accepted.

E. *Remedial Concerns*

A fifth potential factor is a judicial concern that there is nothing that can be done about non-purposeful discrimination from sources like implicit bias or, to the extent something can be done, the ends do not justify the costs of implementing them. It is a concern about remedies. "A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged."[398] Remedies often are treated as an almost procedural afterthought, something that follows naturally from an injury and substantive right to relief. As the instrumental end of litigation, however, remedies, and limitations on which and whether they are available, can very effectively diminish the scope of a substantive right, or extinguish it altogether: "Absence of remedy is absence of right."[399]

Consistent with the classical legalist perspective, when faced with a violation of a substantive right that presents difficult or imperfect remedial options, most of the time judges find liability appropriate

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[397] Bernard E. Whitley, Jr., *Right-Wing Authoritarianism, Social Dominance Orientation, and Prejudice*, 77 J. OF PERSONALITY AND SOCIAL PSYCHOL. 77, 126, 132-33 (1999); Bo Ekehammar, Nazar Akrami, Magnus Gylje & Ingrid Zakrisson, *What Matters Most to Prejudice: Big Five Personality, Social Dominance Orientation, or Right-Wing Authoritarianism?*, EUR. J. OF PERSONALITY 463, 463, 465, 467, 478 (2004); Jarret T. Crawford & Jane M. Pilanski, *The Differential Effects of Right-Wing Authoritarianism and Social Dominance Orientation on Political Intolerance*, 35 POL. PSYCHOL. 557, 557-60 (2013); V. Paul Poteat & Lisa B. Spanierman, *Modern Racism Attitudes Among White Students: The Role of Dominance and Authoritarianism and the Mediating Effects of Racial Color-Blindness*, 152 J. OF SOCIAL PSYCHOL. 758, 759-60 (2012).

[398] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1 (4th ed. 2010).

[399] EDWIN N. GARLAN, LEGAL REALISM AND JUSTICE 44 (1941); *but see* Laycock, *supra* note 385, at 7-8.

and task themselves, or juries, with doing the best they can.[400] But in certain instances, the remedial tail wags the substantive dog and courts refuse to recognize a right to relief altogether because the remedy contemplated is impossible, impracticable, or otherwise undesirable as a matter of public policy. This, perhaps in combination with practical considerations and differences in values and worldviews, may be the case for implicit bias.

The phenomenon of implicit bias is reasonably well established. Unfortunately, research into the exact processes that cause implicit bias, mechanisms by which it functions, and field-tested interventions to change it or reduce its effects are still in their infancy.[401] Reflecting this point, in one of the most recent comprehensive reviews of the present state of knowledge regarding what factors can attenuate implicit bias or reduce its impact on behavior, Lai, Hoffman, and Nosek, conclude that, "[l]ooking forward, the next step is to investigate how these mechanisms can be utilized to reduce implicit prejudice for the practical interest of mitigating discrimination."[402] As a result, judges who are knowledgeable and concerned about implicit bias feel there is little to do other than continuing educations and awareness of the problem:

> [T]he disparity in sentencing of these individuals who are so similarly situated, save race or ethnicity, at least requires consideration of what impact unconscious preferences or biases may have played in the disparity. Because there is no "cure" for completely ridding ourselves of these hidden influences, an appreciation for their existence and an awareness of how they impact decision making will go a long way in helping to improve our justice system. Continuing education, discussions, and research will aid these endeavors.[403]

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400 Doug Rendleman, *Remedies-the Law School Course*, 39 BRANDEIS L.J. 535, 536 (2001).

401 For example, there have been next to no empirical tests of decisions in the legal system. *See* E.J. Girvan, et al., *The Generalizability of Gender Bias: Testing the Effects of Contextual, Explicit, and Implicit Theories of Sexism on Labor Arbitration Decisions* 3 (working paper 2015).

402 Calvin K. Lai, et al., *Reducing Implicit Prejudice*, 7 SOCIAL AND PERSONALITY PSYCH. COMPASS 315, 330 (2013); *see also* Calvin K. Lai, et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions* J. OF EXPERIMENTAL PSYCH. GENERAL (2014) (finding that numerous proposed interventions did not work to reduce implicit bias in the lab while others showed promise).

403 State v. Sherman, 2012-Ohio-3958, 2012 WL 3765041, ¶49-50 (Ohio Ct. App. Aug. 30, 2012).

To be sure, there is a substantial body of laboratory work developing and testing theory about the conditions under which implicit biases operate and can be changed.[404] There is also ongoing fieldwork testing interventions based on aspects of this theory, often with promising results.[405] And there are many reasons for those who are persuaded by research on implicit bias to voluntarily explore theory-based practices that are thought to reduce it or its effects.[406] But even the most rigorous concrete proposals for addressing implicit bias extrapolate from the general theory to support recommendations rather than provide evidence of a validated intervention shown to work in the relevant context.[407]

For a sympathetic audience committed to addressing their own biases, this is often enough to work with. But for a skeptical one, such as an overworked judge unwilling to devote a substantial amount of resources to supervising development projects, or who is anxious about the impact of doctrinal change in this area, or for whom the moral imperative underlying the behavioral realist approach is less clear, the state of the psychological science of solutions for implicit bias itself offers little comfort. If the applied behavioral realism approach is to be effective in expanding anti-discrimination rights, it is the concerns of latter, not the former, that must be understood and addressed.

CONCLUSION

Work on implicit bias and the law and psychology of discrimination has been extremely influential, even transformative, in legal

404 *See generally* Laurie A. Rudman, Richard D. Ashmore & Melvin L. Gary, *"Unlearning" Automatic Biases: the Malleability of Implicit Prejudice and Stereotypes*, 81 J. OF PERSONALITY AND SOCIAL PSYCH. 856, 858 (2001); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. OF PERSONALITY AND SOCIAL PSYCH. 800, 800-01 (2001); Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY AND SOCIAL PSYCHOLOGY REVIEW 242, 242-43 (2002); Calvin K. Lai, et al., *Reducing Implicit Racial Preferences: A Comparative Investigation of 17 Interventions* (January 2014); Calvin K. Lai, Kelly M. Hoffman & Brian A. Nosek, *Reducing Implicit Prejudice* 7 SOCIAL AND PERSONALITY PSYCHOLOGY COMPASS 315, 315-330 (2013).

405 Devine, Patricia G., Patrick S. Forscher, Anthony J. Austin, and William TL Cox. "Long-term reduction in implicit race bias: A prejudice habit-breaking intervention." *Journal of Experimental Social Psychology* 48, no. 6 (2012): 1267-1278; Vincent et al.

406 *See* Appendix, *infra*.

407 Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1186 (2012).

thought. Perhaps more than ever, scholars, judges, bar associations and other legal organizations, as well as government agencies, primary and secondary schools, colleges and universities, and businesses large and small are eager to learn about and make changes to address the extent to which they unintentionally contribute to the problem of inequity. There are, however, still many who are not willing to do so. Courts, recognizing a right only to be free from purposeful discrimination, have not fully embraced the implications of the psychological science and interpreted anti-discrimination doctrine in a way that creates a duty for the sceptics to make the same effort.

For those regularly on the receiving end of discrimination due to implicit bias, the injury is no less real and the need for a solution no less urgent. The behavioral realism approach to integrating insights from psychology and other social science into the law has inspired and defined a substantial volume of research. But it has not proven effective at achieving the needed doctrinal change. It is time for advocates to expand on and move beyond the descriptive assumptions of its classical normative structure and actively seek out, test, and find ways to overcome those extrinsic factors preventing recognition of complete anti-discrimination rights. The future of the souls behind that data, and those of their children, depend on it.

APPENDIX 1: SELECTED ORGANIZATIONS WITH LEGAL RESOURCES REGARDING IMPLICIT BIAS

Jurisdiction	***Organization Name***	***Resource***
National	*American Bar Association*	*Implicit Bias Initiative, A.B.A., http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html (last visited Jan. 5, 2015)*
National	*American Bar Association*	*Verna Myers, Why Effective Retention Requires Attention to Our Implicit Biases, L. Prac. Mag. (A.B.A., Chicago, Ill.), Sept./Oct. 2012, available at http://www.americanbar.org/publications/law_practice_magazine/2012/september-october/from-counting-heads-to-cultivating-minds.html.*
National	*American Bar Association*	*J. Dalton Courson, Reality Check: Combating Implicit Bias, A.B.A. (Dec. 21, 2012), http://apps.americanbar.org/litigation/committees/lgbt/articles/fall2012-1212-reality-check-combating-implicit-bias.html*
National	*American Bar Association*	*Practicing Law While Breaking the Confines of Implicit Bias in and Outside the Courtroom (CLE), A.B.A. Young Lawyers Division, May 17, 2014, http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2014_spring_conference/practicing_law_while_breaking_confines_bias.authcheckdam.pdf*
National	*Association of Corporate Counsel*	*Janie F. Schulman & Stephanie L. Fong, Implicit Bias in the Legal Profession, Ass'n of Corp. Couns. (Jan. 30, 2015) http://www.acc.com/chapters/sandiego/upload/Implicit-Bias-in-the-Legal-Profession-2.pdf*
National	*Fair and Impartial Policing*	*The Psychology of Bias, Fair & Impartial Policing, http://www.fairimpartialpolicing.com/bias/ (last visited Feb. 13, 2015)*
National	*Lexvid*	*Amy Oppenheimer, Unconscious Bias and the Legal Profession, Lexvid (Apr. 8, 2014) http://www.lexvid.com/cle/elimination-of-bias-cle*
National	*National Center for State Courts*	*Pamela M. Casey et al., Helping Courts Address Implicit Bias: Resources for Education, Nat'l Ctr. for St. Cts. (2012), http://www.ncsc.org/ibeducation*

National	*National Center for State Courts*	*Strategies to Reduce the Influence of Implicit Bias, Nat'l Ctr. for St. Cts., available at http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx (last visited Feb. 14, 2015)*
National	*National Center for State Courts*	*Jerry Kang, Implicit Bias: A Primer for Courts, Nat'l ctr. for st. cts. (Aug. 2009), available at http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf.*
National	*National Consortium on Racial and Ethnic Fairness in the Courts*	*Implicit Bias Training, Nat'l Consortium on Racial & Ethnic Fairness Cts., http://www.national-consortium.org/Implicit-Bias/Implicit-Bias-training.aspx (last visited Feb. 13, 2015)*
Alaska	*Alaska Bar Association*	*Mark W. Bennett, Judge, U.S. District Court for the N.D. Iowa, & Bernice B. Donald, Judge, U.S. District Court for the W.D. Tennessee, Presentation at the 2010 Alaska Bar Convention: Implicit Bias in the Legal System (Apr. 29, 2010) (materials available at https://www.alaskabar.org/servlet/download?id=849)*
California	*California Minority Counsel Program*	*Jerry Kang, Professor, UCLA School of Law, et al., CLE Presentation at the California Minority Counsel Program: Inside Diversity VI: Implicit Bias in the Workplace – Los Angeles (Oct. 3, 2013) (CLE description available at http://www.cmcp.org/event/id/338724/INside-Diversity-VI-Implicit-Bias-in-the-Workplace—-Los-Angeles.htm)*
California	*The Bar Association of San Francisco*	*Yolanda Jackson, Addressing Bias in the Legal Profession, B. Ass'n of S.F. (Feb. 2011), http://www.sfbar.org/cle/tests/self-study-exams-feb2011.aspx.*
California	*Legal Services of Northern California*	*Gillian Sonnad, Implicit Bias, A Judge's Perspective, Legal Services of N. Cal., (Aug. 23, 2010), http://equity.lsnc.net/2010/08/implicit-bias-a-judges-perspective/*

California	*Marin County Bar Association*	*Michael Roosevelt, Senior Court Services Analyst, Center for Families, Children & the Courts, CLE Presentation to the Marin County Bar Association: Unconscious Bias: Recognize the Signs (In Yourself & Others) (Nov. 15, 2013) (cached CLE description available at http://webcache.googleusercontent.com/search?q=cache:OZNkrqc0OksJ:https://cle.marinbar.org/index.cfm%3Fpg%3DsemwebCatalog%26panel%3DshowSWOD%26seminarid%3D5074+&cd=1&hl=en&ct=clnk&gl=us*
California	*Marin County Women Lawyers*	*Claudia M. Viera, Mediator, Mediation Law Offices of Claudia Viera, CLE Presentation at Marin County Women Lawyers: Understanding the Impact of Unconscious Bias (Oct. 29, 2013) (CLE description available at http://mcwlawyers.org/ai1ec_event/understanding-the-impact-of-unconscious-bias)*
California	*San Fernando Valley Bar Association*	*Myer J. Sankary, Eliminating Bias in the Legal Profession: Lessons from the Cognitive Sciences, Valley Lawyer (San Fernando Valley B. Ass'n, Tarzana, Cal.), Feb. 2014, at 17, available at http://www.scribd.com/doc/238184726/Elimination-of-Bias-in-the-Legal-Profession-Lessons-from-Cognitive-Science#scribd*
California	*San Francisco Public Defender's Office*	*Jeff Adachi, Public Defender, San Francisco, Address at the UC Hastings College of Law's Criminal Litigation Ethics Seminar (Aug. 1, 2013) (transcript available at http://sfpublicdefender.org/news/2013/08/read-jeff-adachis-talk-on-implicit-bias/)*
California	*San Joaquin Valley Bar Association*	*Zayante P. Merrill & Hon. William D. Johnson, Implicit Bias: Can We Overcome Our Unconscious Prejudice, Across the Bar (San Joaquin Balley B. Ass'n, Stockton, Cal.), May/June 2014, at 13, available at http://www.sjcbar.org/40-mayjune-2013-across-the-bar/file*
California	*Verna Myers Consulting Group*	*Eliminating Implicit Bias in the Legal Profession: Dramatic Interventions, Verna Myers Consulting Group, available at http://movingdiversityforward.com/?p=37 (last visited Feb. 13, 2015)*

Colorado	*Colorado Bar Association*	*Rosalie Chamberlain, Principal, Rosalie Chamberlain Consulting, CLE Presentation to the Colorado Bar Association: Exploring Bias and Its Impact on Effective Diversity & Inclusion Efforts (Nov. 13, 2011) (CLE description available at http://www.cobar.org/repository/Inside_Bar/DILP/Fall%20CLE%20Expo%20-%20Nov%202011%20-%20Flyer.pdf)*
District of Columbia	*District of Columbia Bar Association*	*D.C. Judicial Conference Tackles Implicit Bias in Decision Making, Legal Beat (D.C. B. Ass'n, Washington, D.C.), Apr. 2011, available at http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/april-2011-legal-beat.cfm*
Florida	*Hillsborough County Bar Association*	*Rachel Godil, Director of Research, Perception Institute, CLE Presentation to the Hillsborough County Bar Association: Diversity, Inclusion and the Effect of Implicit Bias (Dec. 5, 2014) (CLE description available at https://www.hillsbar.com/UserFiles/12%205%20Diversity%20Committee.pdf)*
Idaho	*Idaho State Bar*	*Molly O'Leary, What Do You Mean I'm Biased?, The Advocate, Sept. 2012, at 10, available at http://isb.idaho.gov/pdf/advocate/issues/adv12sep.pdf*
Illinois	*Chicago Bar Association*	*Leslie Richards-Yellen, Partner and Chief Diversity and Inclusion Officer, Hinshaw & Culberston LLP, CLE Presentation at the Chicago Bar Association: Implicit Bias in the Legal Profession (Mar. 25, 2014) (CLE description available at http://www.chicagobar.org/source/Meetings/cMeetingFunctionDetail.cfm?section=calendar&product_major=Y3414W&functionstartdisplayrow=1; program available at http://westlegaledcenter.com/program_guide/course_detail.jsf?courseId=100019315)*
Illinois	*Illinois Legal Aid*	*Working with Diverse Client Populations, Ill. Legal Aid, June 20, 2013, available at http://67.202.86.67/index.cfm?fuseaction=home.dsp_content&contentID=8748*

Illinois	*Illinois State Bar Association*	*Michael B. Hyman, Implicit Bias in the Courts, Ill. B.J., Jan. 2014, at 40, available at http://www.isba.org/ibj/2014/01/implicitbiasinthecourts (login required)*
Kentucky	*Kentucky Bar Association*	*Jacqueline D. Alexander, Assistant County Attorney, Fayette County Attorney's Office, et al., CLE Presentation to the Kentucky Bar Association: The Duty of Awareness: The Ethics of Implicit Bias in the Courtroom (June 21, 2013) (CLE materials available at http://www.kybar.org/documents/cle/ac_material/ac2013_57.pdf)*
Massachusetts	*Massachusetts Bar Association*	*Stephen I. Lipman, Voir Dire Enlighten Jurors About Unconscious Bias, Section Rev. (Mass. B. Ass'n, Boston, Mass.), Spring 2002, at 16-18, available at http://www.massbar.org/publications/section-review/2002/v4-n2/voir-dire-enlightens-jurors-about.*
Massachusetts	*Boston Bar Association*	*Verna Myers, Principal, Verna Myers Consulting Group, CLE Presentation at the Boston Bar Association: The Impact of Unconscious Bias at Work (Mar. 1, 2012) (CLE description available at https://www.bostonbar.org/membership/events/event-details?ID=10008)*
Michigan	*State Bar of Michigan*	*Why Did I do That? The Science Behind Our Decisions, State Bar of Michigan, (April 20, 2013), http://www.michbar.org/programs/ATJ/pdfs/JIsummit_April13.pdf*
Minnesota	*Minnesota State Bar Association*	*BraVada Garrett-Akinsanya, Executive Director, African American Child Wellness Institute, et al., CLE Presentation at the Minnesota State Bar Association: Unlocking Unconscious Bias Strengthening the Spirit of ICWA (Oct. 22, 2014) (CLE description available at http://msba.mnbar.org/about-msba/diversity-inclusion/events/2014/09/22/unlocking-unconscious-bias-strengthening-the-spirit-of-icwa-(indian-child-welfare-act)#.VN_M9PnF9yw)*

Missouri	*Bar Association of Metropolitan Saint Louis*	*Kimberly Jade Norwood, Professor, Washington University in St. Louis School of Law, CLE Presentation at the Bar Association of Metropolitan Saint Louis: Implicit Bias & Ethics in the Legal Profession (June 26, 2014) (CLE description available at http://www.bamsl.org/event/id/451395/Free-CLE-Implicit-Bias—Ethics-in-the-Legal-Profession.htm)*
Nebraska	*Nebraska State Bar Association*	*Kimberly Papillon, Senior Education Specialist, California Judicial Council's Administrative Office of the Courts, CLE Presentation at the Nebraska State Bar Association: Implicit Bias: The Neuroscience and Empirical Psychology of Decision-Making (Oct. 10, 2014) (CLE description available at http://www.nebar.com/general/custom.asp?page=AnnlMtgSpeakers)*
New Jersey	*New Jersey Bar Association*	*Tanya K. Hernandez, Professor, Fordham University School of Law, Keynote Address at the New Jersey Bar Association: From Implicit Bias to Broader Inclusion in the Legal Profession (Feb. 29, 2012) (transcript available at http://www.njsba.com/images/content/1/0/1003917.pdf)*
North Carolina	*North Carolina Advocates for Justice*	*North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System, N.C. Advocs. For Just., https://www.ncaj.com/index.cfm?pg=NC_Racial_Justice (last visited Feb. 13, 2015)*
North Dakota	*North Dakota Commission to Study Racial and Ethnic Bias in the Courts*	*Final Report and Recommendations, N.D. Commission Study Racial & Ethnic Bias Cts., June 2012, http://www.ndcourts.gov/court/committees/bias_commission/Final Report2012.pdf*
Ohio	*Columbus Bar Association*	*Jerry Kang, Professor, UCLA School of Law, CLE Presentation at the Columbus Bar Association: Implicit Bias and the Legal Profession (Feb. 13, 2014) (panel description available at http://www.cbalaw.org/cba_prod/Main/News_Items/Implicit_Bias_and_the_Legal_Profession.aspx)*

Oregon	*Oregon State Bar*	*Melody Finnemore, Culture of Awareness: Prejudice May Exist Even When People Aren't Aware of Their Biases, Or. St. B. Bull., Nov. 2010, available at https://www.osbar.org/publications/bulletin/10nov/cultureSB1.html*
Washington	*University of Washington School of Law*	*Student Training for Pro-Bono Program, Univ. Wash. Sch. L., http://www.law.washington.edu/PService/ProBono/Training.aspx (last visited Feb. 15, 2015)*
Washington	*Washington State Bar Association*	*Achieving Inclusion, Wash. St. B. Ass., http://www.wsba.org/About-WSBA/Diversity/Achieving-Inclusion (last visited Feb. 13, 2015)*
Washington	*Washington State Bar Association*	*Robert S. Chang, Professor, Seattle University School of Law, CLE Presentation to the Washington State Bar Association: Explicit and Implicit Bias in the Courtroom (Oct. 19, 2012) (audio available for purchase at https://www.mywsba.org/OnlineStore/ProductDetail.aspx?ProductId=7741&page=none&mt)*