
Deconstruct and Superstruct: Examining Bias Across the Legal System

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TABLE OF CONTENTS

INTRODUCTION	1563
I. DECONSTRUCT: THE PSYCHOLOGY OF UNCONSCIOUS BIAS	1565
II. SUPERSTRUCT: IMPLICIT AND UNCONSCIOUS BIAS IN THE CONTEXT OF LEGAL PROCEEDINGS.....	1573
CONCLUSION.....	1582

INTRODUCTION

The fourth edition of *Webster's New World College Dictionary* defines "bias" as "a mental leaning or inclination; partiality; bent[,] . . . to cause to have a bias; influence; prejudice . . ." ¹ In the law, we have tended to think of bias in the straightforward context of claims of employment or housing discrimination. More recently, awareness has increased that eyewitness identifications and identifications from criminal line-ups can be skewed by bias. ² However, the potential for

* Copyright © 2013 Debra Lyn Bassett. Justice Marshall F. McComb Professor of Law, Southwestern Law School. I presented this paper at the 2013 Annual Meeting of the Association of American Law Schools. I would like to thank the other panelists — Montré Carodine, Bryan Fair, Catherine Grosso, Kevin Johnson, Barbara O'Brien, and Rex Perschbacher — and the individuals who attended the panel presentation, for their helpful comments and feedback. Many thanks also to Interim Dean Austen Parrish for his ongoing encouragement and research support.

¹ WEBSTER'S NEW WORLD COLLEGE DICTIONARY 141 (4th ed. 2002).

² See Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research*, 56 AM. PSYCHOLOGIST 405, 405 (2001); see, e.g., EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (Gary L. Wells & Elizabeth F. Loftus eds., 1984) (discussing possible psychological causes of inaccurate eyewitness identifications); Lynn Garrioch & C.A. Elizabeth Brimacombe, *Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence*, 25 LAW & HUM. BEHAV. 299 (2001) (finding eyewitness confidence regarding their identification may be impacted by bias from

bias reaches more fundamentally across every participant category within the legal system.

Law is a distinctively human activity, involving a series of human actors — clients, lawyers, judges, jurors, witnesses, and court personnel. The potential for bias reaches across every area of the law through all of these human actors in legal proceedings. For example, the potential for bias extends to layperson-witnesses, whose identification of perpetrators or characterization of events may be tainted by bias. The potential for bias extends to attorneys, who may favor one client over another, adopt assumptions, or assert peremptory challenges due to biased stereotypes or expectations. The potential for bias extends to jurors, who may approach legal proceedings with biases or prejudices that impact their perceptions and their decision-making in evaluating the participants in those proceedings. And the potential for bias extends to judges, who may be biased in favor of (or against) particular claims, particular litigants, or particular lawyers.

Psychological studies have demonstrated the existence of unconscious bias³ — a phenomenon to which all these categories of participants in legal proceedings are susceptible. However, there has been little attempt to discuss the full range of ramifications across the legal system. Instead, discussions of unconscious bias — indeed, discussions integrating any psychological concept with the law — typically have taken aim at one specific issue within the law,⁴ rather

line-up administrators); Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106 (2004) (discussing the potential for a line-up administrator's bias to influence the eyewitness); Carolyn Semmler et al., *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334 (2004) (noting that biased instructions increase the likelihood of mistaken identification); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (2006) (discussing the potential for biased feedback to impact an eyewitness's confidence in his or her selection from a line-up); see also Mark Hansen, *Show Me Your ID: Cops and Courts Update Their Thinking on Using Eyewitnesses*, A.B.A. J., May 2012, at 18, 18 (quoting Professor Gary Wells as saying that the progress made in the past few years with respect to problems with police lineup procedures “seems like a runaway train’ compared with what he witnessed during the first [thirty years]”).

³ The literature has used the synonyms “implicit,” “automatic,” and “unconscious” in describing such bias. See Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity and Cognitive Control*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 267, 267 (Todd D. Nelson ed., 2009) (noting that “[t]hese subtle reactions have been variously labeled implicit, automatic, unconscious, or nonconscious”). My preference is “unconscious” bias.

⁴ See *infra* note 50 (providing examples). One relatively recent publication examines implicit bias more broadly, but is aimed at implicit racial bias across legal

than examining the applicability of the psychological concept across a broader legal context.⁵

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. In doing so, I encourage a broader recognition of the potential role of unconscious bias in legal proceedings, and seek to identify commonalities in recognizing and remedying such bias.

I. DECONSTRUCT: THE PSYCHOLOGY OF UNCONSCIOUS BIAS

Many, perhaps even most, lawyers took an introductory psychology course in college. However, for those who did not, and for those who have forgotten, the study of psychology includes, among other things, principles concerning thinking⁶ and memory.⁷ The psychological study of thinking, called cognition, includes how people form concepts, solve problems, make decisions, and form judgments, as well as the biases that can create error.⁸ Psychological study in these areas carries particular significance to legal proceedings because, of

subject-matter areas rather than across legal proceeding participants. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012) (examining implicit racial bias in communications law, corporate law, criminal law, education law, employment law, environmental law, federal Indian law, health law, intellectual property law, property law, tax law, and tort law). Some articles also have devoted a portion of their discussion to the general existence of implicit bias in individuals. *See, e.g.,* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (discussing the existence of implicit bias and advocating for behavioral realism). *See generally* JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING* (2012) (educating law students and lawyers about general psychological research relevant to broader legal practice, such as persuasion and decision-making).

⁵ *See infra* notes 71-74 and accompanying text. *See generally* Justin D. Levinson, *Racial Disparities, Social Science, and the Legal System*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 4, at 1, 5 (noting that “other than in areas where it is more noticeable, such as in employment discrimination and criminal law, it is initially difficult to consider intuitively how implicit bias might function”).

⁶ *See generally* DAVID G. MYERS, *PSYCHOLOGY* ch. 10 (7th ed. 2004) (discussing the processes of thinking and language).

⁷ *See generally* MICHAEL W. EYSENCK & MARK KEANE, *COGNITIVE PSYCHOLOGY: A STUDENT’S HANDBOOK* 536 (4th ed. 2000) (defining a schema as “an organized packet of information about the world, events, or people, stored in long-term memory”); MYERS, *supra* note 6, at ch. 9 (discussing memory types and processes).

⁸ *See* MYERS, *supra* note 6, at 385.

course, legal proceedings attempt to solve problems through the use of individuals who make findings of fact and conclusions of law — individuals who thereby necessarily form judgments and make decisions.

Psychology tells us that we form schemas, employ heuristics, and often err in forming judgments and in making decisions. Schemas are concepts that organize and interpret information⁹ and in which we group similar objects, events, ideas, and people;¹⁰ heuristics are mental shortcuts.¹¹ Errors in forming judgments and making decisions result from framing (the way an issue is posed or presented),¹² cognitive illusions,¹³ the use and misuse of heuristics,¹⁴ and forms of bias, including stereotyping and prejudice,¹⁵ hindsight bias,¹⁶ and unconscious bias.¹⁷

⁹ See *id.* at 143.

¹⁰ See *id.* at 387. An example of a concept is animals, which includes a broad range of living creatures such as dogs, giraffes, monkeys, and elephants.

¹¹ See EYSENCK & KEANE, *supra* note 7, at 532 (defining heuristics as “a rule-of-thumb technique for solving a problem”); RICHARD C. WAITES, *COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY* 52 (2003) (describing heuristics as “a mental shortcut”); Shane Frederick, *Automated Choice Heuristics*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 548, 548 (Thomas Gilovich et al. eds., 2002) (describing heuristics as the mechanism “people use to simplify choice — the procedures they use to limit the amount of information that is processed or the complexity of the ways it is combined”); Richard E. Nisbett et al., *The Use of Statistical Heuristics in Everyday Inductive Reasoning*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT*, *supra*, at 510 (describing heuristics as “rapid and more or less automatic judgmental rules of thumb”).

¹² MYERS, *supra* note 6, at 395; see EYSENCK & KEANE, *supra* note 7, at 484 (“Many of our decisions are influenced by irrelevant aspects of the situation (e.g., the precise way in which an issue is presented). This phenomenon is known as *framing*.”).

¹³ Cognitive illusions are essentially the cognitive errors “that infect human reasoning.” Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 334 (1986); see Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 227 (1986). See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779-80 (2001), for a discussion of cognitive illusions in the context of the judiciary.

¹⁴ MYERS, *supra* note 6, at 389-91; see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1075-102 (2000) (summarizing the most common heuristics and biases). For a discussion of heuristics in the context of the judiciary, see Arthur J. Lurigio et al., *Understanding Judges’ Sentencing Decisions: Attributions of Responsibility and Story Construction*, in *APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES* 91 (Linda Heath et al. eds., 1994); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 102 (2000) (discussing effects of heuristics and biases upon judges).

¹⁵ MYERS, *supra* note 6, at 715 (defining a stereotype as “a generalized (sometimes

Until the 1980s, most psychologists believed that one's attitudes, including stereotypes and prejudices, operated consciously — that is, psychologists believed that individuals were aware of their own biases and prejudices.¹⁸ Due to this belief, researchers typically relied upon individuals' self-reporting in measuring attitudes and stereotypes.¹⁹ Beginning in the 1980s, and continuing with an explosion of research in the 1990s,²⁰ psychologists documented that attitudes have both

accurate but often overgeneralized) belief about a group of people"); *id.* at 714 (defining prejudice as "prejudgment" and as "an unjustifiable and usually negative attitude toward a group — often a different cultural, ethnic, or gender group . . . Like other forms of prejudgment, prejudices are schemas that influence how we notice and interpret events."); *id.* at 715 ("Prejudice generally involves stereotyped beliefs, negative feelings, and a predisposition to discriminatory action."). See generally RUPERT BROWN, *PREJUDICE: ITS SOCIAL PSYCHOLOGY* 4 (2010) ("[O]ne essential aspect of the phenomenon of prejudice — that it is a social orientation either towards whole groups of people or towards individuals *because* of their membership in a particular group. The other common factor . . . is that they stress the negative flavo[r] of group prejudice.").

¹⁶ MYERS, *supra* note 6, at 21 (defining hindsight bias as "the tendency to believe, after learning an outcome, that one would have foreseen it"). For a discussion of hindsight bias in the context of the judiciary, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 595-602 (1998).

¹⁷ See Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (1995) (finding unconscious gender stereotyping in fame judgments, and finding that explicit expressions of sexism or stereotypes were uncorrelated with the observed unconscious gender bias); Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142 (1996) (concluding that "stereotypes may be automatically activated"); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (finding that stereotypes are "automatically activated in the presence of a member (or some symbolic equivalent) of the stereotyped group and that low-prejudice responses require controlled inhibition of the automatically activated stereotype"); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) (noting that "[a]versive racism has been identified as a modern form of prejudice that characterizes the racial attitudes of many Whites who endorse egalitarian values, who regard themselves as nonprejudiced, but who discriminate in subtle, rationalizable ways"); Kerry Kawakami et al., *Racial Prejudice and Stereotype Activation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 407, 407 (1998) ("[H]igh prejudiced participants endorsed cultural stereotypes to a greater extent than low prejudiced participants. Furthermore, for high prejudiced participants, [African-American] category labels facilitated stereotype activation under automatic and controlled processing conditions.").

¹⁸ See Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995).

¹⁹ See *id.*

²⁰ See *supra* note 17 and authorities cited therein.

“explicit” and “implicit” indices. Explicit attitudes are those that operate consciously, whereas implicit attitudes operate unconsciously.²¹

The best known psychological studies of unconscious bias are those involving the Implicit Association Test (IAT), developed by Professors Anthony Greenwald, Debbie McGee, and Jordan Schwartz,²² and expanded by Professors Greenwald, Mahzarin Banaji, and Brian Nosek.²³ The IAT’s popularity is demonstrated not only by the wealth of psychological²⁴ and legal commentary²⁵ referring to the test, but also

²¹ Dovidio et al., *supra* note 17, at 511 (citing Greenwald & Banaji, *supra* note 18, at 8).

²² Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998).

²³ Karen Kersting, *Not Biased?*, MONITOR ON PSYCHOL., Mar. 2005, at 64, 64; Sally Lehrman, *The Implicit Prejudice*, SCI. AM. (May 22, 2006), <http://www.scientificamerican.com/article.cfm?id=the-implicit-prejudice>.

²⁴ See, e.g., Rainer Banse et al., *Implicit Attitudes Towards Homosexuality: Reliability, Validity, and Controllability of the IAT*, 48 ZEITSCHRIFT FUR EXPERIMENTELLE PSYCHOLOGIE 145 (2001) (using IAT to measure implicit attitudes toward homosexuality); Frederic F. Brunel et al., *Is the Implicit Association Test a Valid and Valuable Measure of Implicit Consumer Social Cognition?*, 14 J. CONSUMER PSYCHOL. 385 (2004) (discussing IAT’s validity in the context of implicit consumer cognition); Joachim C. Brunstein & Clemens H. Schmitt, *Assessing Individual Differences in Achievement Motivation with the Implicit Association Test*, 38 J. RES. PERSONALITY 536 (2004) (examining validity of IAT in the context of achievement tendencies); Boris Egloff & Stefan C. Schmukle, *Predictive Validity of an Implicit Association Test for Assessing Anxiety*, 83 J. PERSONALITY & SOC. PSYCHOL. 1441 (2002) (adapting IAT for anxiety assessment); Jeremy D. Heider & John J. Skowronski, *Improving the Predictive Validity of the Implicit Association Test*, 9 N. AM. J. PSYCHOL. 53 (2007) (examining extent to which IAT measures of racial attitudes predicted social behaviors); Wilhelm Hofmann et al., *A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1369 (2005) (examining correlation between IAT and self-report measures); Andrew Karpinski & Ross B. Steinman, *The Single Category Implicit Association Test as a Measure of Implicit Social Cognition*, 91 J. PERSONALITY & SOC. PSYCHOL. 16 (2006) (examining the Single Category IAT); Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435 (2001) (examining IAT in the context of intergroup discrimination); Michael A. Olson & Russell H. Fazio, *Reducing the Influence of Extrapersonal Associations on the Implicit Association Test: Personalizing the IAT*, 86 J. PERSONALITY & SOC. PSYCHOL. 653 (2004) (proposing variant of the IAT); Scott A. Ottoway et al., *Implicit Attitudes and Racism: Effects of Word Familiarity and Frequency on the Implicit Association Test*, 19 SOC. COGNITION 97 (2001) (examining the effects of word familiarity and frequency on the IAT); Jane E. Swanson et al., *Using the Implicit Association Test to Investigate Attitude-Behaviour Consistency for Stigmatised Behaviour*, 15 COGNITION & EMOTION 207 (2001) (using IAT to assess implicit attitudes toward stigmatized behavior).

by the test's integration into popular culture, including its ready — and free — availability on the Internet,²⁶ its discussion in a best-selling book,²⁷ its mention in stories in newspapers and television,²⁸ and its inclusion in YouTube.²⁹

The IAT, which is taken on a computer, employs latent response or reaction time in the pairings of images of target groups (such as white

²⁵ See, e.g., Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009) (discussing IAT in the context of antidiscrimination law); Debra Lyn Bassett, *Distancing Rural Poverty*, 13 GEO. J. ON POVERTY L. & POL'Y 3 (2006) (discussing IAT in the context of rural poverty law and policy); Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002) (discussing the impact of IAT and cognitive psychology on lawyers and legal scholars); Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353 (2009) (referencing IAT in the context of hate speech); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (discussing implicit bias and its impact on discrimination law and policy); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006) (discussing IAT and the potential for law and policy to reduce implicit bias); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1 (2011) (referencing IAT in the context of antidiscrimination law); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012) (discussing IAT in the context of Fourth Amendment and police bias); Russell K. Robinson, *Perpetual Segregation*, 108 COLUM. L. REV. 1093 (2008) (considering IAT in the context of the workplace and judiciary); Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764 (2012) (referencing IAT in the context of corporate law); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011) (discussing use of IAT to illustrate employment discrimination).

²⁶ The IAT is found at <https://implicit.harvard.edu/implicit/>.

²⁷ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 77-81, 87, 97 (2007).

²⁸ See, e.g., Damon Darlin, *Extra Weight, Higher Costs*, N.Y. TIMES, Dec. 2, 2006, <http://www.nytimes.com/2006/12/02/business/02money.html?pagewanted=all> (discussing use of IAT to measure weight bias); Nicholas D. Kristof, *What? Me Biased?*, N.Y. TIMES, Oct. 29, 2008, at A39, available at <http://www.nytimes.com/2008/10/30/opinion/30kristof.html> (discussing use of IAT to gauge reactions to presidential candidates); John Tierney, *In Bias Test, Shades of Gray*, N.Y. TIMES, Nov. 17, 2008, at D1, available at <http://www.nytimes.com/2008/11/18/science/18tier.html> (discussing criticisms of IAT); *How Biased Are You?* (Discovery Channel broadcast Mar. 20, 2000) (discussing use of IAT).

²⁹ See *Anderson: Why Was the Implicit Association Test Created?*, (Warner Bros. television broadcast, Apr. 17, 2012) [hereinafter *Anderson*], available at <http://www.youtube.com/watch?v=kk7snXxHvzc>; see also Anthony Greenwald, Professor, Lecture at the University of Washington, Allen L. Edwards Psychology Lecture Series: *The Psychology of Blink: Understanding How Our Minds Work Unconsciously*, Apr. 29, 2009, available at <http://www.youtube.com/watch?v=3UhONepzSBM>.

faces and black faces) with words representing attributes (such as good or bad) by having participants press designated computer keys.³⁰ Participants respond more quickly when they perceive a strong correlation between the target group and the attribute. “When highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty.”³¹ The repeatedly validated IAT³² has consistently reflected

³⁰ See Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES, 265, 265-67 (John A. Bargh ed., 2007) [hereinafter *IAT at Age 7*].

The IAT is a method for indirectly measuring the strengths of associations among concepts. The task requires sorting of stimulus exemplars from four concepts using just two response options, each of which is assigned to two of the four concepts. The logic of the IAT is that this sorting task should be easier when the two concepts that share a response are strongly associated than when they are weakly associated.

Id. at 267; see also Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18 (2009) [hereinafter *Predictive Validity*] (“The IAT assesses strengths of associations between concepts by observing response latencies in computer-administered categorization tasks.”).

In an initial block of trials, exemplars of two contrasted concepts (e.g., face images for the races Black and White) appear on a screen and subjects rapidly classify them by pressing one of two keys (for example, an *e* key for Black and *i* for White). Next, exemplars of another pair of contrasted concepts (for example, words representing positive and negative valence) are also classified using the same two keys. In a first combined task, exemplars of all four categories are classified, with each assigned to the same key as in the initial two blocks (e.g., *e* for Black or positive and *i* for White or negative). In a second combined task, a complementary pairing is used (i.e., *e* for White or positive and *i* for Black or negative).

Id.

³¹ Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001).

³² See Blasi, *supra* note 25, at 1250 (noting that the IAT has been “extensively validated”); Greenwald et al., *Predictive Validity*, *supra* note 30, at 17 (assessing 122 research reports); Nosek et al., *IAT at Age 7*, *supra* note 30, at 286 (stating that the IAT has “a solid base of evidence for its internal, construct, and predictive validity”); see also Anthony G. Greenwald, *Implicit Association Test: Validity Debates*, Anthony G. Greenwald, PhD, http://faculty.washington.edu/agg/iat_validity.htm (last visited Feb. 11, 2013) (providing links to studies of the IAT’s validity).

that most people harbor unconscious biases in a variety of areas, including race, gender, and disability.³³

There is a difference, of course, between having unconscious biases versus acting on those biases³⁴ — a distinction that the IAT creators have repeatedly noted, even if occasionally some of the test's subsequent enthusiasts or detractors have not.³⁵ An early interview with Professor Banaji, for example, explained that the IAT “do[es] not measure actions. The [IAT], for example, does not measure racism as much as a race bias.”³⁶ Professor Banaji “tells . . . volunteers who show biases [on the IAT] that it does not mean they will always act in biased ways — people can consciously override their biases.”³⁷

³³ See Brian Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 36 (2008). During my presentation of this paper earlier this year, one individual opined that the IAT — and the concept of unconscious bias generally — was merely a cover for actual, conscious racism. The phenomenon of unconscious bias may well provide a “cover” or “excuse” for some consciously prejudiced individuals. However, the IAT's creators have documented the unconscious bias phenomenon in individuals who have devoted their lives to civil rights and equality, and have documented the phenomenon in African-Americans as well as Caucasians. See, e.g., *How Biased Are You?*, *supra* note 28. Even if unconscious bias may sometimes be invoked in an attempt to provide a socially acceptable excuse for prejudice, my proposal to educate and inform legal proceeding participants about unconscious bias still serves an important purpose, because psychological studies have shown that bringing biases to the fore increases awareness and counters the effect of such biases. See *infra* notes 38-44 (describing psychological studies into overcoming unconscious bias).

³⁴ See Hart Blanton et al., *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 J. APPLIED PSYCHOL. 567, 578 (2009) (stating that they “failed to find a robust relationship between IAT scores and discriminatory behavior”); see also Jolls & Sunstein, *supra* note 25, at 971-72 (noting that “the relationship between IAT scores and behavior remains an active area of research”).

³⁵ See Nosek et al., *IAT at Age 7*, *supra* note 30, at 282.

A rarely asserted interpretation of the IAT is that it might serve as a lie-detector, revealing associations that are more “real,” “true,” or accurate than self-report. Our review of the IAT literature has not found any article that endorsed this position, but we did find a number of articles that criticized users of the IAT for espousing that position, either incorrectly attributing the lie-detector view to the originators of the IAT, or attributing the view without supporting citation.

Id.

³⁶ Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12.

³⁷ *Id.*; see also Anderson, *supra* note 29 (excerpt from Anderson Cooper broadcast interviewing Professor Anthony Greenwald about the IAT):

[Prof. Greenwald]: This is what we call an implicit attitude preference. It is something very different from what's meant by racism.

Indeed, there is an extensive psychological literature suggesting that unconscious biases can be overcome, at least temporarily.³⁸ Measures

[Anderson Cooper]: So you're not saying that people who do this — who score that way — are racist?

[Prof. Greenwald]: Not at all, and I can't say that strongly enough, because what this test measures is something that is possessed by many people who are quite clearly not racist — they are egalitarian — but they still show this association.

See generally Nosek et al., *IAT at Age 7*, *supra* note 30, at 285 (“Until understanding of the IAT’s predictive validity develops further, it is premature to use the IAT as a diagnostic indicator for conclusions that have important, direct, and personal consequences — for example, as a device for selection for employment [T]here is still much to learn before its appropriate applications are known.”).

³⁸ See, e.g., Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 829-30, 837 (2001) (accessing a counter-stereotype mentally can reduce implicit bias); Katja Corcoran et al., *A Tool for Thought! When Comparative Thinking Reduces Stereotypic Effects*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 1008 (2009) (theorizing that automatic stereotyping can be reduced); 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, 1020-22 (2007) (providing information about implicit bias may mitigate the effects of such bias); Dasgupta, *supra* note 3, at 272 (exposure to counter-stereotypic cues can significantly influence implicit bias); Nilanjana Dasgupta & Shaki Asgari, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 645 (2004) (exposure to women in leadership positions can reduce implicit biases in women); Dasgupta & Greenwald, *supra* note 31, at 806 (exposure to admired minority exemplars can decrease implicit bias); Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antisocial Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 270 (2006) (appealing to a person’s egalitarian beliefs can moderate discriminatory behavior); Maja Djikic et al., *Reducing Stereotyping through Mindfulness: Effects on Automatic Stereotype-Activated Behaviors*, 15 J. ADULT DEV. 106 (2008) (finding that when mindfulness is experimentally induced, automatic stereotyping may decrease); Alexander R. Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007) (finding that implicit bias was reduced when physicians were made aware of their personal bias); Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83 (2003) (concluding that participants altered their implicit racial preference when slowing their responses); Sophie Lebrecht et al., *Perceptual Other-Race Training Reduces Implicit Racial Bias*, 4 PLOS ONE 1 (2009) (finding that implicit bias can be altered by training); Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 844-47, 851-52 (2001) (contending that racial prejudice is subject to social influence); Jennifer A. Richeson & Nalini Ambady, *Effects of Situational Power on Automatic Racial Prejudice*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 177, 179-81 (2003) (demonstrating that participant’s situational and hierarchical roles influenced their implicit racial biases); Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417, 419-20 (2004)

subjected to psychological study that reflect promise in overriding unconscious biases cover an array of approaches, including mental imagery of counter-stereotypes,³⁹ exposure to actual admired exemplars who are counter-stereotypical,⁴⁰ diversity within the operating environment,⁴¹ exposure to multicultural viewpoints or diversity education programs,⁴² educating individuals about unconscious bias,⁴³ and appealing to individuals' beliefs in equality and fairness.⁴⁴

In sum, due to unconscious bias, it is possible for individuals who claim — and believe — that they are not prejudiced nevertheless to harbor stereotypes and biases.⁴⁵ However, the fact that unconscious bias does not automatically equate to overt racism is significant — as is the ability to override one's unconscious biases. With this psychological background, I now turn to the applicability of this psychological research to legal proceedings.

II. SUPERSTRUCT: IMPLICIT AND UNCONSCIOUS BIAS IN THE CONTEXT OF LEGAL PROCEEDINGS

Until the relatively recent psychological studies of unconscious bias, psychology and the law approached discrimination and prejudice from the same perspective, with both psychologists and the law operating

(exposing participants to multicultural viewpoints displayed significantly reduced implicit bias on IAT); Laurie A. Rudman et al., “Unlearning” Automatic Biases: *The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001) (diversity education program reduced implicit bias at least temporarily); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001) (finding that presence of blatant racial issues can impact racial bias of jurors).

³⁹ Blair et al., *supra* note 38, at 837.

⁴⁰ Dasgupta & Asgari, *supra* note 38, at 645; Dasgupta & Greenwald, *supra* note 31, at 806.

⁴¹ Lowery et al., *supra* note 38, at 844-47; Richeson & Ambady, *supra* note 38, at 179-81.

⁴² Richeson & Nussbaum, *supra* note 38, at 419-20; Rudman et al., *supra* note 38, at 856.

⁴³ Correll et al., *supra* note 38, at 1020-22; Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1223 (2009); *see also* Blasi, *supra* note 25, at 1277 (stating that psychological studies “suggest that there is good reason explicitly to instruct juries in every case, stereotype-salient or not, about the specific potential stereotypes at work in the case”).

⁴⁴ Dasgupta & Rivera, *supra* note 38, at 270.

⁴⁵ Greenwald & Banaji, *supra* note 18, at 15; *see also* Devine, *supra* note 17, at 5-7 (discussing unconscious bias).

from the position that individuals were aware of their biases and prejudices, and accordingly, that discrimination was manifested in overt, express ways. Just as psychologists relied on self-reporting in assessing stereotypes, biases, and prejudices, the law relied on overt actions when finding actionable discrimination. Thus, the law of discrimination developed in sync with then-prevalent psychological understandings. But when psychological developments created a shift in that discipline's approach to account for unconscious bias, the law did not immediately follow suit, and has continued to exhibit great reluctance to do so.

It is easy to forget that the law's acceptance of psychology and psychological studies is relatively recent — perhaps because psychological studies have not always translated well to real life;⁴⁶ perhaps because the law has been somewhat insular.⁴⁷ Whatever the

⁴⁶ See Tori deAngelis, *Closing the Gap Between Practice and Research*, MONITOR ON PSYCHOL., June 2010, at 42, 42 (“When researchers complain that practitioners pay little heed to research findings, practitioners counter that research isn’t always relevant to real-world practice.”); Christopher Peterson, *Translational Research in Positive Psychology*, THE GOOD LIFE BLOG (May 11, 2009), <http://www.psychologytoday.com/blog/the-good-life/200905/translational-research-in-positive-psychology> (“[A] lot of psychological research translates poorly, despite the protests of the psychologists who do the studies. For every great example of basic research that speaks to the real world . . . there are many more examples that travel poorly out of the journals where they are published.”). See generally Gregory Mitchell, *Revisiting Truth or Triviality: The External Validity of Research in the Psychological Laboratory*, 7 PERSP. ON PSYCHOL. SCI. 109 (2012) (finding that psychological studies usually replicate in the real world, but that some sub-disciplines fare better than others).

⁴⁷ See, e.g., GEOFFREY M. STEPHENSON, *THE PSYCHOLOGY OF CRIMINAL JUSTICE* 155 (1992) (“The enthusiasm which psychologists have shown for research on eyewitness testimony has been matched by lawyers’ and legal scepticism about the usefulness of psychologists’ insights.”); Joy L. Lindo, *New Jersey Jurors Are No Longer Color-Blind Regarding Eyewitness Identification*, 30 SETON HALL L. REV. 1224, 1225 n.6 (2000) (“Despite the demonstrated potential for wrongful convictions, the law historically has been hesitant to accept the findings of psychological research.”); Timothy Dylan Reeves, *Tort Liability for Manufacturers of Violent Video Games: A Situational Discussion of the Causation Calamity*, 60 ALA. L. REV. 519, 546 (2009) (“Tort law has traditionally been slow to accept social science, in particular psychology and psychological illness.”). In noting the law's increased receptiveness to psychology, at least one commentator has credited the law and economics movement:

Through its success and influence, law and economics has changed the norms of what is acceptable in legal theory and law teaching. Both have become more interdisciplinary in recent years (the former more than the latter), and social scientific methods have gained in prominence. Consequently, the path is more open now for other social scientific and interdisciplinary approaches than it was thirty years ago

Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345, 1420

reason, the law traditionally has been slow in accepting psychological methodology. And although today's commentators certainly have not overlooked the impact of psychology on law — to the contrary, the legal literature is replete with articles examining this relationship⁴⁸ — some scholarship may reflect, at least in part, vestiges of the law's traditional hesitancy to accept psychology.⁴⁹

Recent law review articles integrating psychological concepts have tended to select one specific area within the law and to analyze how one or more psychological principles apply to that specified area.⁵⁰

(2008).

⁴⁸ See *infra* note 50 and authorities cited therein.

⁴⁹ See, e.g., Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?"*, 15 PSYCHOL. INQUIRY 257, 258 (2004) (stating that "the case has yet to be made that implicit prejudice is prejudice," and stating that the IAT may reflect cultural stereotypes and "socioeconomic realities" rather than prejudice); Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 710-11 (2009) (discussing weaknesses of psychological instruments designed to measure bias).

⁵⁰ See, e.g., Hon. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023 (2008) (juror bias); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002) (judicial bias); Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657 (2005) (judicial bias); Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2003) (rural bias); Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181 (2011) (judicial bias); Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83 (2008) (discrimination law); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008) (discrimination law); Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451 (2012) (eyewitnesses); Guthrie et al., *supra* note 13, at 779-80 (judicial bias); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (communications law); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006) (discrimination law); Erica A. Nichols, *The Dangers of Eyewitness Identifications and the Need for Change in Iowa*, 57 DRAKE L. REV. 985 (2009) (eyewitnesses); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 (1994) (judicial bias); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005) (peremptory challenges); Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97 (2010) (discrimination law); Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) (juror bias); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It?)*, 40 J. MARSHALL L. REV. 455 (2007) (discrimination law); Derek Simonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044 (2011) (eyewitnesses); Sommers & Ellsworth, *supra* note 38, at 201 (juror bias); David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 OR. L. REV. 263 (2010) (eyewitnesses); Collin P. Wedel, *Twelve Angry (and Stereotyped) Jurors:*

Such an approach is often appropriate and useful when the psychological concept is one of several alternative theories or approaches that the writer wishes to explore. However, applying a particular psychological concept with a broader brush, so that its applicability across a wider audience or variety of contexts is illustrated, prevents the potential myopia inherent in a narrower application and offers the possibility of finding commonalities in a useful “big picture.” With this in mind, I turn to the potential for unconscious bias across the full range of participants in legal proceedings.

The existence of unconscious bias carries a potentially powerful impact in legal proceedings, where the public has put its trust in the judicial system to achieve a fair result. If, in fact, the judicial system is not operating fairly — if instead, unconscious bias is tainting the results of some legal proceedings — public confidence in our system of justice is misplaced, at least some of the time.⁵¹ To aid in understanding the magnitude of this problem, let me offer a few examples of the potential impact of unconscious bias with respect to the five major categories of participants in legal proceedings: witnesses, jurors, lawyers, judges, and court personnel.

First, with respect to witnesses, psychological studies have already demonstrated that eyewitness identifications — prized in our legal system as a particularly persuasive form of proof — are susceptible to memory gaps, the desire to be helpful, and subtle cues from police that can result in misidentifications.⁵² Indeed, “[t]he most common element in all wrongful convictions later overturned by DNA evidence

How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges, 7 STAN. J. C.R. & C.L. 293 (2011) (peremptory challenges); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165 (2011) (juror bias). Compare Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1120 (2006) (“[I]t is a sweeping claim to say that, after half a century of legal, political and educational efforts to check prejudice, the vast majority of Americans remain prejudiced.”), with Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 479-80 (2007) (summarizing flaws in the arguments offered by Professors Mitchell and Tetlock).

⁵¹ NAT’L CTR. FOR STATE COURTS, *BIAS IN THE COURT! FOCUSING ON THE BEHAVIOR OF JUDGES, LAWYERS, AND COURT STAFF IN COURT INTERACTIONS 1-5* (1997), available at <http://www.ncjrs.gov/pdffiles1/Digitization/173729NCJRS.pdf> (“Public trust and confidence in our legal system is grounded in the perception of fairness and equality in our courts”); *id.* at 1-6 (“Words, actions, and behaviors that indicate bias diminish public trust and confidence When the public perceives biased behavior by court officers or employees, it diminishes their confidence in the quality and fairness of the entire justice system.”).

⁵² See generally *supra* note 2 and authorities cited therein.

has been eyewitness misidentification.”⁵³ It is also well documented that eyewitnesses have difficulty identifying individuals of another race.⁵⁴ These potential errors already raise grave concerns and have generated extensive research and commentary,⁵⁵ but unconscious bias adds still another basis for potential misidentification. As described by one commentator:

One of the most popularly known studies on implicit bias and eyewitness identification involves a photograph of two men fighting; one man held a knife while the other was unarmed. When both men in the photograph were Caucasian, subjects generally remembered correctly which man was holding the knife. When the Caucasian man was armed and the African-American man was unarmed, the majority of subjects, both African-American and Caucasian, misremembered the African-American man as holding the knife.⁵⁶

Thus, even if existing proposals for reducing eyewitness misidentification are adopted, unless unconscious bias also is addressed, the potential for continued misidentifications remains.

Second, with respect to jurors, lawyers use juror questionnaires and voir dire to select a fair and impartial jury. Yet individuals often are reluctant to admit to bias,⁵⁷ and court decisions have recognized that unconscious bias has the potential to impact jurors’ perceptions,

⁵³ *Eyewitness Identification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/Eyewitness-Identification.php> (last visited Mar. 2, 2013).

⁵⁴ See, e.g., PATRICK M. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 75-76 (1965) (describing a case in which five individuals spent several hours being victimized by an individual of another race, and identified as the perpetrator a man who, aside from race, bore no resemblance to the man ultimately found to have committed the offense). See generally Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 *CORNELL L. REV.* 934 (1984) (discussing problems associated with cross-racial identifications); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 *AM. J. CRIM. L.* 207, 211-14 (2001) (examining the reliability of cross-racial identifications).

⁵⁵ See *supra* note 2 and authorities cited therein.

⁵⁶ Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform*, 91 *DENV. U. L. REV.* (forthcoming 2013) (manuscript at 20-21) available at <http://www.ssrn.com/abstract=2081921> (citing Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Pager, *A Picture’s Worth a Thousand Words: Conversational versus Eyewitness Testimony in Criminal Convictions*, 44 *AM. CRIM. L. REV.* 1, 29-30 (2007)).

⁵⁷ See *State v. Tucker*, 629 A.2d 1067, 1077-78 (Conn. 1993) (“A juror is not likely to admit being a prejudiced person . . . and indeed might not recognize the extent to which unconscious racial stereotypes might affect his or her evaluation of a defendant of a different race . . .”).

assessments, and ultimately, their verdicts.⁵⁸ Accordingly, unconscious bias may taint legal proceedings despite attorneys' efforts to empanel jurors who are free of bias.⁵⁹

Third, with respect to lawyers, ethical rules prohibit lawyers from manifesting bias or prejudice.⁶⁰ Yet the potential for unconscious bias exists in any number of areas, including perceptions of, and interactions with, clients;⁶¹ pretrial plea negotiations;⁶² decisions to exercise peremptory challenges;⁶³ and prosecutorial discretion in charging defendants.⁶⁴

Fourth, with respect to the judiciary, federal judges take an oath to "administer justice without respect to persons,"⁶⁵ and are required to

⁵⁸ See *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); *Turner v. Murray*, 476 U.S. 28, 35 (1986) (White, J.) ("More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of the petitioner's crime, might incline a juror to favor the death penalty.").

⁵⁹ See *Turner*, 476 U.S. at 42 (Brennan, J., dissenting) ("[R]acial bias inclines one to disbelieve and disfavor the object of the prejudice, and it is similarly incontestable that subconscious, as well as express, racial fears and hatreds operate to deny fairness to the person despised . . ."); Reshma M. Saujani, "The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395, 419 (2003) ("[T]he unconscious nature of juror bias prevents the voir dire from impaneling fair and impartial jurors . . .").

⁶⁰ See, e.g., MODEL RULES OF PROF'L CONDUCT, R. 8.4 cmt. 3 (2011) ("A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates [Model Rule 8.4] paragraph (d) when such actions are prejudicial to the administration of justice.").

⁶¹ See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1553 (2004) (finding that capital defense attorneys exhibit the same levels of implicit bias as the rest of the population generally).

⁶² See Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 4, at 229, 242 (suggesting that implicit bias can influence pretrial plea negotiations).

⁶³ See, e.g., *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) ("[N]ot even the lawyer herself[] can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial . . . stereotype.").

⁶⁴ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 115 (2010) ("Numerous studies have shown that prosecutors interpret and respond to identical criminal activity differently based on the race of the offender.").

⁶⁵ 28 U.S.C. § 453 (2006).

perform all judicial duties without bias or prejudice.⁶⁶ Yet the judicial oath and ethical obligations do not render judges immune from unconscious bias; indeed, “judges harbor the same kinds of implicit biases as others [and] these biases can influence their judgment.”⁶⁷ Thus, unconscious bias has the potential to infect judicial rulings, orders, and decisions.

Fifth, with respect to court personnel, unconscious bias has the potential to implicate fairness concerns, including both perceptions of fairness and the fairness of actual court outcomes. Court clerks who accept court filings may unconsciously respond differently to individuals of different races, leading them to provide more help to some individuals than to others. As a mundane example, suppose a litigant presents paperwork for filing, and the paperwork lacks a required two-hole punch across the top.⁶⁸ The court clerk may reject the paperwork when proffered by some individuals, but in other cases may accept the paperwork and simply punch it themselves. Although rejecting paperwork lacking the two-hole punch probably will have little impact on the case, it potentially impacts public perceptions of the accessibility of justice. A less public example involves judicial law clerks — lawyers who work full-time for one or more judges and whose responsibilities may include conducting legal research, reviewing records, summarizing facts, and writing rough drafts of judicial opinions.⁶⁹ Judicial law clerks typically work “behind the scenes” and often have no direct contact with the public, but their research, summaries, and characterizations can have a powerful impact on how their judge approaches a case.⁷⁰ Thus, if unconscious

⁶⁶ MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2011).

⁶⁷ Rachlinski et al., *supra* note 43, at 1195; *see id.* at 1225 (reporting that ninety-seven percent of judges surveyed placed themselves in the top half of their peer group in their ability to “avoid racial prejudice in decisionmaking” and that fifty percent placed themselves in the top quartile).

⁶⁸ *See, e.g.*, CAL. CT. R., 2.115, *available at* http://www.courts.ca.gov/documents/title_2.pdf at p. 9 (“Each paper presented for filing must contain two prepunched normal-sized holes, centered 2-1/2 inches apart and 5/8 inch from the top of the paper.”).

⁶⁹ *See Who Does What, Chambers Staff: Judge’s Law Clerk and Judicial Assistant*, FED. JUD. CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu5b&page=/federal/courts.nsf/page/351?opendocument> (last visited Mar. 2, 2013).

⁷⁰ *See* BERNARD SCHWARTZ & STEPHAN LESHNER, *INSIDE THE WARREN COURT* 37-48 (1983) (discussing “clerk power”); David Crump, *How Judges Use Their Law Clerks*, N.Y. ST. B.A. J., May 1986, at 43, 43-44 (discussing law clerks’ influence on their judges).

bias affects a law clerk's assessment, this bias potentially can influence the ultimate outcome of the case.

We have seen that most people are subject to biases that operate unconsciously⁷¹ — which suggests that most of the participants in legal proceedings, including lawyers, judges, jurors, witnesses, and court personnel, harbor such biases. Fortunately, we have also seen that several methods have shown potential promise in overriding these biases⁷² — which suggests that these biases can be reduced, if not eliminated, through the use of appropriate awareness-enhancing measures.⁷³ The American Bar Association's Section on Litigation has already initiated a program that hopes to increase the judiciary's self-awareness of unconscious bias,⁷⁴ and there have been three pilot judicial education programs addressing unconscious bias in California, Minnesota, and North Dakota.⁷⁵ Due to the prominence of the

⁷¹ See *supra* notes 3, 21-24 and accompanying text.

⁷² See *supra* notes 38-44 and accompanying text.

⁷³ See Blasi, *supra* note 25, at 1276 (“To the extent that there is good news in the current science about stereotypes, it is that while we may be unable to do much about their automatic activation, we can nevertheless behave in substantially nonprejudiced ways if we are so motivated.”).

⁷⁴ See Mark A. Drummond, *Section of Litigation Tackles Implicit Bias*, LITIG. NEWS, Spring 2011, at 20, 20-21 (reporting on the ABA's creation of a program addressing implicit bias in the judiciary). See generally Rachlinski et al., *supra* note 43 (proposing implementation of testing and training to address judicial bias); Jill D. Weinburg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313 (2012) (noting the importance of diversity and empathy in judicial decision-making). Some states, such as California, require one hour of “elimination of bias in the legal profession” as part of attorney continuing legal education. See *MCLE Requirements*, STATE BAR OF CAL., <http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx> (last visited Feb. 11, 2013). Training in unconscious bias can be, and sometimes is, incorporated into these CLE programs. See, e.g., *Quickly and Easily Satisfy Your Attorneys' Elimination of Bias MCLE Requirements*, RAINMAKING FOR LAWYERS, <http://rainmakingforlawyers.com/speeches/elimination-of-bias-in-the-legal-hiring-process> (last visited Feb. 11, 2013) (including mention of unconscious bias). However, just as the reach of the ABA Section on Litigation program is limited because its audience is the judiciary (some programs have also included court personnel), CLE programs are similarly limited because lawyers are the only attendees. One article has reported one judge's approach to educating jurors about unconscious bias, but such juror education is not currently routine or widespread. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1181-84 (2012) (discussing one judge's approach to educating jurors about this topic). As explained *infra*, my proposal would extend the recipients of such information and training to all of the participants in legal proceedings.

⁷⁵ PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION 6 (2012), available at <http://www.ncsc.org/IBReport>. The report notes that “[o]ne state focused primarily on judges, another on general members of the Judicial Branch, and another on the

judiciary in American legal proceedings, these programs are an excellent beginning.

My proposal calls for an expansion of some of the more promising concepts from psychological studies to a broader audience, including not just judges, but every lawyer, client, juror, witness, and court employee, before legal proceedings can begin in any given case. The sheer number of individuals to whom this prerequisite would apply necessarily requires an approach that can easily be standardized, applied, and repeated. Accordingly, some of the more innovative and creative measures described in the psychological literature, despite their appeal, are unlikely to work effectively in this context. In particular, achieving diversity within the operating environment, mental imagery of counter-stereotypes, and exposure to actual admired exemplars who are counter-stereotypical likely require more time and more resources than are available to the courts in light of courts' limited budgets and time constraints.

Instead, my proposal urges the adoption of a standardized program that integrates three approaches from prominent psychological studies: diversity education, educating individuals about unconscious bias, and appealing to individuals' beliefs in equality and fairness. A central clearinghouse for information, such as the National Conference of State Courts or the Federal Judicial Center, seems an appropriate entity to create a program in a standardized format, such as a DVD, that courts could purchase and show before the beginning of any legal proceeding. This bears some similarity to the practice of some courts in offering a standardized informational recording for citizens responding to a summons for jury service. Recognizing that some individuals "tune out" rather than attend to these recordings, I would urge judges to speak briefly at the outset of any such recording to impress upon the participants the seriousness of the program that they are about to see.

I have no illusions that my proposed program will magically eradicate all stereotypes, biases, and prejudices. However, I do believe that decreasing negative unconscious biases is a worthwhile goal and that a standardized program is a relatively cost-efficient — and potentially highly effective — effort, and the program's focus on education and fairness renders it largely non-controversial. As Professor Blasi has written, "If our values include fairness and treating

members of a Racial Fairness Committee, including representatives from the court as well as community organizations." *Id.*

people as individuals, then anything that increases self-awareness should decrease our application of stereotypes.”⁷⁶

CONCLUSION

In a sense, law is about human weaknesses and human failings. Criminal activity, misunderstandings, jealousies, and bad behavior all form bases for actionable legal consequences. We refer to the procedures by which we obtain legal remedies as our “justice system,” and intrinsic to the integrity of the justice system is fairness. Achieving fairness in legal proceedings potentially can be limited by another human weakness or failing — the automatic activation of unconscious bias. Because unconscious bias has the potential to undermine the fairness of legal proceedings, efforts to minimize the effects of unconscious bias within the participants to such proceedings is a desirable goal toward furthering fundamental fairness.

⁷⁶ Blasi, *supra* note 25, at 1277.