First Impressions

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INDEX OF MATERIALS AND REFERENCE ARTICLES

Page 1 ABA JOINT STATEMENT ON ELIMINATING BIAS IN THE CRIMINAL JUSTICE SYSTEM

This three page statement recognizes the threat that implicit bias poses to the administration of justice and proposes:

1. The collection of data on law enforcement contacts with civilians;
2. The collection and publication of race/charging/sentencing data by prosecutors;
3. Enlistment of experts to assist prosecution offices in creating protocols and practices to address disparities borne out by data;
4. Implicit bias training for all justice partners;
5. Swift action to address misconduct by prosecutors;
6. Diversification of offices through hiring from represented communities;
7. Increased public communication with community stakeholders and openness to alternative approaches to traditional justice issues;
8. Education regarding the role of prosecutors;
9. Transparency in OIS incidents and BWC footage;
10. Expulsion of repeat bad actors;
11. Increased attention to the collateral consequences of convictions.

Page 8 THE ABA's "CONSCIOUS PROSECUTOR" TOOLKIT

This two page tool kit includes several links to speakers, articles, and videos related to understanding and protecting against implicit bias.

Page 11 PROSECUTOR'S CHEAT SHEET ON INTERRUPTION OF HARMFUL BIASES

This five page document includes basic research on the prevalence and impact of bias and where prosecutors can improve use of discretionary decision making powers. The cheat sheet also provides guidance on being an ally and overcoming one's own implicit biases. These include:

1. Conscious stereotype replacement;
2. Counter stereotypic visualization to re-train the brain automatic categorizations;
3. Focusing on individual characteristics rather than group characteristics;
4. Conscious consideration of "other" perspectives;
5. Increasing contact with "other" communities and individuals.

Page 16 ABA DIVERSITY AND INCLUSION 360 COMMISSION TOOLKIT INTRODUCTION

This seven page guide is the result of the ABA's efforts to help judges, prosecutors and public defenders address implicit bias by providing numerous links to online resources that:

1. Explain the social science term implicit bias;
2. Provide some examples of where implicit biases live and thrive;
3. Explain how they exist;
4. Raise consciousness about the power of these unknown "mind bugs," as some have called them, and their ability to negatively impact decision-making;

5. Help you identify some of your own implicit biases;
6. Examine how implicit biases might show up in the performance of your job;
7. Provide some tools to help you catch and correct snap decision-making that may be linked to harmful implicit biases; and
8. Provide you with the knowledge that will allow you to help others catch decision-making that might be based on implicit biases.

Page 23 HOW TO THINK ABOUT IMPLICIT BIAS, Scientific American March 2018

This 9 page article provides information regarding the utility and veracity of data imputed from Implicit Association Tests, which show that almost all people harbor implicit biases and that there is a relationship between those biases and discriminatory behavior.

Page 32 TRANSFORMING PERCEPTION; BLACK MEN AND BOYS, AN EXECUTIVE SUMMARY

This 24 page Executive Summary provides an extremely well researched and resourced summary of information pertaining to the perception of black males, a description of commonly held biases against them, and ways to alter perceptions and reduce bias. This guide also includes information on successful interventions in police departments and schools. Of particular interest is summarized information regarding the interrelation of racial anxiety, the perception that you will "appear racist" and increased use of excessive force.

Page 54 THE IMPACT OF IMPLICIT RACIAL BIAS ON THE EXERCISE OF PROSECUTORIAL DISCRETION
By: Robert J. Smith & Justin D. Levinson, Seattle University Law Review Vol 35:795

This 52 page law review article was published in 2008, but contains significant research on the disproportionate impact that implicit bias appears to have on people of color in the criminal justice system, particularly how it relates to prosecutorial discretion. Among the concerns addressed are:

1. Priming: a cognitive phenomenon that describes the impact of frequent exposure to negative stereotypes, culminating in automatic classifications, that can only be overcome through conscious de-biased thought;
2. The history and legacy of implicit association testing, with predictive analysis of how results in other areas of expertise, such as medicine, indicate a strong likelihood that implicit biases held by prosecutors may be the cause of some disparities in treatment among people of color;
3. A discussion of the potential areas where bias can impact prosecution work including the decision to charge, what to charge, bail or custody, discovery, plea bargaining, jury selection, argument, and sentencing; and
4. A summation of ideas designed to reduce implicit bias.

Page 86 IMPROVING PROSECUTORIAL DECISION MAKING: SOME LESSONS OF COGNITIVE SCIENCE
Alafair S. Burke, William and Mary Law Review March, 2006

This 30 page law review article details the available science pertaining to cognitive bias in decision making, using illustrative studies to highlight areas of concern for implicit bias in prosecutorial decisions. The article provides concrete recommendations designed to reduce or eliminate bias including increased transparency and review of charging and conviction data, adherence to issuing standards, pre-trial discovery, judicial involvement in plea bargaining, switching sides, peer and

committee review, involvement in conviction review, and diversification of the relationships among prosecutors. With regard to decision making bias, the article explores four areas of significant concern:

1. Confirmation bias, which describes the tendency of people to disregard evidence that negates a previously held theory;
2. Selective information processing, which describes the practice of isolating or overvaluing information from a larger body of facts in order to justify a desired outcome;
3. Belief perseverance which refers to people adherence to a theory even after it has been contested; and
4. The intolerance for cognitive dissonance, which leads people to avoid confronting stereotypes and perceptions, because it is simply easier to rely on previously held standards or beliefs.

JOINT STATEMENT ON ELIMINATING BIAS IN THE CRIMINAL JUSTICE SYSTEM

July 2015

The American Bar Association and the NAACP Legal Defense and Educational Fund, Inc., have long and proud traditions of fighting for civil rights, human rights and equal justice. Although, over the years, we have celebrated much progress in these arenas, we are now confronted by a troubling and destabilizing loss of public confidence in the American criminal justice system. The growing skepticism about the integrity of the criminal justice system is driven by real and perceived evidence of racial bias among some representatives of that system. This crisis of confidence must be addressed, and the time to act is now.

While we believe that the overwhelming percentage of law enforcement officers, prosecutors and judges are not racist, explicit bias remains a real factor in our country – and criminal justice system – and implicit or unconscious bias affects even those who may believe themselves to be fair. Indeed, as Supreme Court Justice Anthony Kennedy once observed (in the 2001 case of *Board of Trustees v. Garrett*), prejudice may arise from not just overt "malice or hostile animus alone," but also "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in respects from ourselves."

One would have to have been outside of the United States and cut off from media to be unaware of the recent spate of killings of unarmed African American men and women at the hands of white law enforcement officers. Several of these killings, like those of Walter Scott in South Carolina, 12-year-old Tamir Rice in Ohio and Eric Garner in New York, have been captured by citizen video and viewed nationwide. More recently, the in-custody death of Freddie Gray sparked days of unrest in Baltimore, which ended only when the officers (who were of multiple races) were charged by the local prosecutor.

Given the history of implicit and explicit racial bias and discrimination in this country, there has long been a strained relationship between the African-American community and law enforcement. But with video cameras and extensive news coverage bringing images and stories of violent encounters between (mostly white) law enforcement officers and (almost exclusively African-American and Latino) unarmed individuals into American homes, it is not surprising that the absence of criminal charges in many of these cases has caused so many people to doubt the ability of the criminal justice system to treat individuals fairly, impartially and without regard to their race.

That impression is reinforced by the statistics on race in our criminal justice system. With approximately 5 percent of the world's population, the United States has approximately 25 percent of the world's jail and prison population. Some two-thirds of those incarcerated are persons of color. While crime rates may vary by neighborhood and class, it is difficult to believe that racial disparities in arrest, prosecution, conviction and incarceration rates are unaffected by attitudes and biases regarding race.

And, to the extent that doubts remain, the U.S. Department of Justice's recent investigation of law enforcement practices in Ferguson, Missouri, should put them to rest. In Ferguson, the Justice Department found that the dramatically different rates at which African-American and white individuals in Ferguson were stopped, searched, cited, arrested and subjected to the use of force could not be explained by chance or differences in the rates at which African-American and white individuals violated the law. These disparities can be explained at least in part by taking into account racial bias.

Given these realities, it is not only time for a careful look at what caused the current crisis, but also time to initiate an affirmative effort to eradicate implied or perceived racial bias – in all of its forms – from the criminal justice system.

As lawyers, we have a very special role to play. As the Preamble to the American Bar Association Model Rules of Professional Conduct states,

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

What must we do? The answer lies in making both macro and micro changes in our criminal justice system.

At the macro level, Congress and state legislatures must look at the vast array of laws that criminalize behaviors that pose little, if any, danger to society. We have over-criminalized conduct throughout the United States and have come inappropriately to rely on the criminal justice system to address problems of mental health and poverty. We have adopted unnecessary zero-tolerance policies in schools that inappropriately require police officers to take the place of teachers and principals and become behavioral judges. We need fewer criminal laws, and fewer circumstances in which police, prosecutors and judges are called upon to deal with social, as opposed to criminal, issues.

Overcriminalization is such a significant problem that virtually every careful observer of criminal justice in America, conservative or liberal, recognizes it. This consensus presents a unique opportunity to unflinchingly confront the need to improve our justice system.

Decriminalization is, however, not a short-term solution to the current crisis of confidence. Every day, law enforcement officers, prosecutors and judges are making discretionary decisions in a country where, literally, any person could be arrested for something if government officials focused sufficient time and energy on him or her.

We must therefore take immediate action at the micro level to begin the process of rebuilding trust and confidence in the criminal justice system and fulfilling the promise of equal justice.

Prosecutors play an important and vital role within the criminal justice system and should be leaders in this effort. We have begun what we anticipate will be a series of conversations focused on identifying ways in which prosecutors can play a more powerful role in addressing the problem of racial bias our justice system. Our organizations arranged an off-the-record discussion that included prosecutors and other participants in the criminal justice system committed to equal justice. We emerged from our discussion with a commitment to advancing the reforms listed below. We regard these reforms as necessary investments that are essential to strengthening public confidence in the rule of law and the legitimacy of our justice system.

1. We need better data on the variety of interactions between law enforcement and citizens. Earlier this year FBI Director James Comey – himself a former federal prosecutor – acknowledged that gathering better and more reliable data about encounters between the police and citizens is "the first step to understanding what is really going on in our communities and our country." Data related to violent encounters is particularly important. As Director Comey remarked, "It's ridiculous that I can't know how many people were shot by police." Police departments should be encouraged to make and keep reports on the racial identities of individuals stopped and frisked, arrested, ticketed or warned for automobile and other infractions. Police departments should report incidents in which serious or deadly force is used by officers and include the race of the officer(s) and that of the civilian(s). This will certainly require investment of funds, but that investment is key to a better future. We cannot understand what we cannot measure, and we cannot change what we cannot understand.

2. Prosecutors should collect and publicly disclose more data about their work that can enable the public to obtain a better understanding of the extent to which racial disparities arise from the exercise of prosecutorial discretion. While this data collection will also require investment of funds, it is essential to achieving the goal of eliminating racial bias in the criminal justice system.

3. Prosecutors and police should seek assistance from organizations with expertise in conducting objective analyses to identify and localize unexplained racial disparities. These and similar organizations can provide evidence-based analyses and propose protocols to address any identified racial disparities.

4. Prosecutors' offices, defense counsel and judges should seek expert assistance to implement training on implicit bias for their employees. An understanding of the science of implicit bias will pave the way for law enforcement officers, prosecutors and judges to address it in their individual work. There should also be post-training evaluations to determine the effectiveness of the training.

5. Prosecutors' offices must move quickly, aggressively, unequivocally – and yet deliberately – to address misconduct that reflects explicit racial bias. We must make clear that such conduct is fundamentally incompatible with our shared values and that it has an outsized impact on the public's perception of the fairness of the system.

6. Prosecutors' offices and law enforcement agencies should make efforts to hire and retain lawyers and officers who live in and reflect the communities they serve. Prosecutors and police should be encouraged to engage with the community by participating in community forums, civic group meetings and neighborhood events. Prosecutors' offices should build relationships with African-American and minority communities to improve their understanding about how and why these communities may view events differently from prosecutors.

7. There should be a dialogue among all the stakeholders in each jurisdiction about race and how it affects criminal justice decision-making. In 2004, the ABA Justice Kennedy Commission recommended the formation of Racial Justice Task Forces – which would consist of representatives of the judiciary, law enforcement and prosecutors, defenders and defense counsel, probation and parole officers and community organizations – to examine the racial impact that policing priorities and prosecutorial and judicial decisions might produce and whether alternative approaches that do not produce racial disparities might be implemented without compromising public safety. There is little cost associated with the assembly of such task forces, and they can develop solutions that could be applicable to a variety of jurisdictions provided that the various stakeholders are willing to do the hard work of talking honestly and candidly about race.

8. As surprising as it might seem, many people do not understand what prosecutors do. Hence, prosecutors' offices, with the help of local and state bar associations, should seek out opportunities to explain their function and the kinds of decisions they are routinely called upon to make. Local and state bar associations and other community organizations should help to educate the public that the decision *not* to prosecute is often as important as the decision *to* prosecute; that prosecutors today should not to be judged solely by conviction rates but, instead, by the fairness and judgment reflected in their decisions and by their success in making communities safer for all their members; and that some of the most innovative alternatives to traditional prosecution and punishment – like diversion and re-entry programs, drug and veteran courts and drug treatment – have been instigated, developed and supported by prosecutors.

9. To ensure accountability, the public should have access to evidence explaining why grand juries issued "no true bills" and why prosecutors declined to prosecute police

officers involved in fatal shootings of unarmed civilians. The release of grand jury evidence, as in Ferguson, is one way to promote the needed accountability.

10. Accountability can also be promoted by greater use of body and vehicle cameras to create an actual record of police-citizen encounters. With the proliferation of powerful firearms in our communities, law enforcement departments reasonably seek equipment that enable them to protect themselves and their communities when called upon to confront armed and dangerous individuals seeking to engage in criminal or terrorist acts. However, while it is appropriate to arm our police and train them in the use of ever-more powerful weapons, it is equally important to train our law enforcement officers in techniques designed to de-escalate tense situations, make accurate judgments about when use of force is essential and properly determine the appropriate amount of force required in each situation.

11. We must recognize that not every lawyer has the judgment and personal qualities to be a successful prosecutor, administer justice and be willing to acknowledge the possibility of implicit bias. Prosecutors who routinely engage in conduct or make decisions that call into question the fairness or integrity of their offices should be removed from office if they cannot be trained to meet the high standards expected of public officers. At the same time, the terms “prosecutorial misconduct” and “police misconduct” should be used with greater care. Even the best prosecutors will make mistakes, much like the best defense lawyers and judges do. There is good reason to limit the characterization of “misconduct” to intentional acts that violate legal or ethical rules.

12. Prosecutors, judges and defense counsel must pay more attention to the collateral consequences of convictions. In many jurisdictions, after an individual is convicted of an offense and completes his or her sentence (by serving time, paying a fine or completing probation or parole), the individual nevertheless faces a life sentence of disqualification and deprivation of educational, employment, housing and other opportunities. This runs counter to the interests we all share in rehabilitation of the offender and positive re-integration into and engagement with the communities in which they live. In many cases, prosecutions can be structured to limit some of the most pernicious of these consequences, provided that the lawyers and the courts take the time and care to examine alternative disposition options. Prosecutors, judges and defense counsel should join together to urge legislatures and administrative agencies to reconsider the laws and regulations that impose these collateral consequences and determine whether they can be modified to provide more opportunities for former offenders without compromising public safety.

The American criminal justice is unquestionably at a moment of crisis. But there are many steps we, as members of the bar, can and should take quickly to begin to turn the ship of justice around and ensure that the system delivers the blind justice that it promises. If we commit ourselves to confronting and eliminating the racial biases that now exist, we can restore the much-needed public confidence in our criminal justice system. As Supreme Court Justice Thurgood Marshall once exhorted in accepting the Liberty Medal Award in

1992, "America can do better." Indeed, "America has no choice but to do better."

Both the American Bar Association and the Legal Defense Fund will continue to convene meetings with prosecutors and other law enforcement groups to support the reforms we have identified. We also will work to support and advance a robust dialogue among prosecutors and leaders in the profession about how best to eliminate racial bias from our justice system.

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President, American Bar Association

Sherrilyn Ifill
President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.

<u>The following individuals participated in the discussion that led to this joint statement:</u>

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John Chisholm
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District Attorney of New York County

THE CONSCIOUS PROSECUTOR

Implicit Bias Toolkit for Prosecutors

As we know, prosecutors must be fact-based and fair in the pursuit of justice. Prosecutors cannot base their judgements on whim, bias or hunches. Studies have shown that all people have implicit biases that could influence their decisions. Training can help prosecutors to understand this issue and provide strategies for assuring that prosecutorial decisions are based on the facts and not predisposed by irrelevant implicit biases.

This interactive tool kit, compiled by Prosecutors' Center for Excellence, in collaboration with the National Black Prosecutors Association and the American Bar Association Criminal Justice's Prosecution Function Committee, offers information about the trainings recommended by various prosecutor offices, as well as links to websites, videos of presentations and research on the issue of implicit bias.

Speakers on Implicit Bias (in alphabetical order)
Prosecutor Trainings 2016 - 2017

Speaker: Mahzarin Banaji
Website: Link to Mahzarin Banaji website
You Tube: See a presentation
Where: Manhattan DA's office, New York

Speaker: Kimberly Burke, Center for Policing Equity. Phil Goff, Co-Founder and President
Website: Link to Center for Policing Equity website
Where: DC US Attorney's Office, Washington DC

Speaker: Lorie Fridell
Website: Link to Fair and Impartial Policing website
You Tube: See a presentation
Where: Statewide anti-gun violence program in New York State for police and prosecutors.

Speaker: Rachel Godsil
Website: Link to Perception Institute website
You Tube: See a presentation
Where: NYC Law Department, New York (the Law Department does mostly civil cases for New York City, but they have a Family Court prosecution unit.)

Speaker: Dan Harris, University of Pittsburgh Law School and Wayne Mackenzie, General Counsel, New York City Department of Probation
You Tube: See ABA panel discussion on The Conscious Prosecutor
Where: ABA Panel on the Conscious Prosecutor and the Miami Dade State Attorney's Office, Florida

Speaker: Mark Katrikh of the Museum of Tolerance in LA
Website: Link to Museum of Tolerance website
Where: Yolo County DA's Office, California

Speaker: Prof. Kim Norwood, Washington University in St. Louis
Prosecutor's Cheat Sheet: Read
You Tube: See a presentation

Speaker: Kimberly Papillion
Website: Link to The Better Mind website
You Tube: See a presentation
Where: San Francisco DA's Office, California

Speaker: Khatib Waheed
Website: Link to Khatib Waheed website
You Tube: See a presentation
Where: St. Louis Circuit Attorney's Office, Missouri

Other Resources and Materials

ABA Implicit Bias Toolkit and Articles:
The ABA created an implicit bias toolkit of training for judges, defense attorneys and prosecutors. They have various materials and training videos on their site.

- ABA Toolkit: Link to ABA Implicit Bias Video and Toolkit Portal
- ABA PowerPoint: Implicit Bias & Prosecutors – ABA PowerPoint. Read
- ABA Article: 3 Techniques to Address Your Implicit Bias (11/2016)

Prosecutors' Encyclopedia (PE):
PE is a wiki for prosecutors that contains an extensive case law library, expert information and transcripts, training materials and a policy library curated by Prosecutors' Center for Excellence (PCE). Current prosecutors have access by requesting an account at MyProsecutor.com.

- **Articles and Research:** A collection of articles, studies and other materials related to implicit bias can be found in the PCE Policy Library. Link to articles
- **Implicit Bias Experts.** Link to expert pages

Project Implicit – Harvard: Project Implicit sponsors the Implicit Bias Test. Link to Project Implicit website. The Implicit Bias Test (IAT) measures the strength of association between concepts and evaluations. Take the test

Videos Demonstrating Various Implicit Bias Scenarios: See videos

Other Websites:

Kirwan Institute for the Study of Race and Ethnicity. Established in May of 2003, the Institute does interdisciplinary research at Ohio State University. It publishes an annual implicit bias review and provides implicit bias trainings: Link to Kirwan Institute website

Nextions. Nextions is a consulting firm that does implicit bias training and research. Link to Nextions website. Director Arin Reeves lectures on implicit bias. See a presentation

The Kaleidoscope Group. The Group is a Chicago-based consulting firm that does implicit bias training. Link to The Kaleidoscope Group website. CEO Doug Harris lectures on implicit bias. See a presentation

Implicit Bias 101:

Prosecutor's CHEAT SHEET on conscious raising and interruption of harmful biases

1) Take several **IATs** ("Implicit Association Test"): https://implicit.harvard.edu/implicit/takeatest.html.

2) **Research:** Just like any other thing you want to learn more about, do your homework on implicit bias. I have put together a 17 page "Resource List." This list is used by the American Bar Association Diversity and Inclusion 360 Commission. I have divided into books, websites, general readings and readings specific for groups like prosecutors. Check it out.

3) Notice biased messages as they are portrayed in **society.** I showed you many examples during our workshop. These examples represent the many ways in which smog (implicit harmful biases) sneak into the air we breathe. Remember the GOOGLE slide I shared: googling black teens resulted in completely different images than googling the term "white teens." There was a controversy on 6/27/16 with a Red Cross pool safety campaign poster that portrayed darker skinned children as not following pool safety rules and white children following pool safety rules. Great large message on being safe at pools. But imagery contained subtle, unconscious messages that will automatically plant in your mind and unconsciously retain the images of who follows the rules and who does not. See 'Racist' Pool Safety Poster Brings Red Cross Apology, at http://www.msn.com/en-us/news/us/racist-pool-safety-poster-brings-red-cross-apology/ar-AAhByGH?ocid=spartanntp.

4) **See something, say something.** When you see unjust situations, or similar situations that are treated completely differently, push back. Do not be a bystander. Speak up; speak out. This does not mean being confrontational but it does mean not standing in silence. Consider the Stanford rape case. Judge stated that jail would "be bad" for the defendant. Why? What makes him different? Consider sentence differences—one gets 6 months, another 30+ years, for identical crime. Consider the differences in how some Americans are talking about the treatment of Muslims generally because one American born Muslim committed a mass murder. We do not have similar discussion of surveillance and banning when American born Christians commit mass murder.

   Remember the prosecutor I discussed from Florida. Are there others you know who think like he does? He spoke. What about those who think similarly but don't share their views publically? And are not we right to ask why he felt comfortable sharing his views with co-workers, family and Facebook friends. He freely made offensive statements over and over in an environment where no one challenged what he said. Let's challenge that. Office culture and environment are important. They affect, subconsciously, our own decisions. People are around me know what acceptable language around me consists of and if they do not, they can be sure that I will have some polite conversation with the, about the line crossing. Let's make it uncomfortable for people to cross our lines.

5) Consider changes to your environment. Social Scientist Professor Patricia Devine suggests 4 steps:

   a) Stereotype replacement: recognizing stereotypic responses within oneself and society, labeling them, and replacing them with non-stereotypic responses (replacing negative images with positive images).

   b) Counter-stereotypic imagine: imaging examples of out-group members who counter popularly held stereotypes (I counter popularly held negative stereotypes about people who look like me. Consider others you know).

   c) Individuating: viewing others according to their personal, rather than stereotypic, characteristics (Google Joshua Bell experiment: Bell is one of the most famous violinist in the world. He played Bach pieces on a $3.5 million dollar violin outside a Metro stop in DC but because he presented as "homeless," no one bothered to listen to him.

   d) Perspective taking: adopting the perspective in the first person of a member of a stigmatized group. (Using myself as example: imagine how I might feel when I go into Home Depot or Lowes or Macys or, or, or and multiple white folks ask me to help them locate items in the store. This is not uncommon in my life. This simultaneously causes embarrassment and resentment. Imagine my teenage daughter, who is periodically stopped by security at the malls (Chesterfield and West County in particular). She is always with a group of her friends, who are white and they are never questioned. She has never had merchandise she couldn't produce a receipt for. What is her perspective? What message is she being sent?

   e) Contact: INCREASE your exposure to out group members—go to lunch, dinner; work with, find some way to bring more difference into your life. Social groups, places of worship. Consider your children's friends as well.

6) In your **role as prosecutor**, consider:

   a) When you have discretion, how do you decide what situations should be **investigated**?

   b) **What crimes** will you/do you focus on? Those that are easy to prove? What about carjacking and drug use vs. bank thefts, corruption). Focus on particular crimes tells a lot about who you will net as your defendants. What about neighborhoods. Consider example of Anacostia in Washington DC for drugs but never Georgetown, which also is no stranger to drugs

   c) **Are you getting police reports, presentence reports, probation reports etc. that might contain some bias?** Can you compare the language used in those reports to other similar reports you have read? Consider the DOJ report on the St. Louis County Family Court. The DOJ found, among other things, that the reports about black juveniles were written in

completely negative and racially biased ways as compared to those written about white juveniles accused of same crimes. See generally: UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, *Investigation of the St. Louis County Family Court St. Louis, Missouri* (July 31, 2015), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf. Have you experienced something similar in your practice? Make note.

d) You have tremendous discretion in what you **charge**. Will you charge federally? Send to state with different recommendations? Not charge at all? What will you charge? Possession or possession with intent to distribute? Can you do what Judge Missouri did, i.e., go back and look at your record. Are you charging white and blacks who have committed the same crime in the same way?

e) What **deals and/or pleas** will you consider? No prosecution? Plead guilty but no jail time, Plead guilty with jail time. Again what is the "color" of the differences here? Socioeconomic differences? Question why society is more lenient and understanding of crimes committed by children who come from upper middle income two parent households but not poor children who did not and do not have education, money, access, etc. Of course this happens with adults also. We are more empathetic and willing to give difference rehabilitation chances to people of means than we are people without means. Why? Many studies show blacks more likely to be recommended jail time for same crime as whites. Look at your own data: what are you doing? Who gets a second chance? Gets to go home? Gets treatment? Is incorrigible? How can we change lives for the greater good?

f) **Jury Instructions:** seriously consider following Federal District Court Judge Mark Bennett's approach of instructing jurors to be aware of their biases.[1] ABA Diversity and Inclusion 360 Commission also successfully shepherded passing of ABA Resolution to encourage the use of implicit bias instructions with jurors.

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[1] U.S. District Court Judge Mark Bennett **1598* expressly tells jurors in his courtroom that they should not rely on implicit biases:

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

See, e.g., Anna Roberts, (Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias, 44 CONN. L. REV. 827, 859 (2012). Judge Bennett's implicit bias instruction is now mandatory in the state of California.

g) **Sentence recommendations**: There are huge racial differences. Look at your data. Read the study out of Stanford: darker skin, "blacker" features = longer sentence recommendations. You have great discretion in your sentence recommendations. The Federal Sentencing Guidelines are NOT mandatory. You do not have to go after the greatest level of severity possible. Watch "Burning Bridges, at https://www.youtube.com/watch?v=tBMIEManHoA&feature=youtu.be. Six youth burn down a covered bridge in Bucks County, PA. Could have faced multiple felonies, 40 plus years in jail. They were given shot at restorative justice. It worked and all are now productive members of our society. See also Adam Foss Ted talk on giving young people chances at life: http://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system?language=en#t-421101.

h) **Voir Dire**: Batson is really, really easy to get around. Should you? Indeed, might you be determined to NOT take advantage of the fact that you CAN give any explanation to get around Batson? More importantly, consider what you see throughout the country: why are black prospective jurors stricken from juries (in criminal cases especially when defendant is black but *even when defendant is white*). Every time you strike of black prospective juror, ask: is race making a difference here? Would I use same reasons to strike if this person were white? Indeed, are there sitting jurors with identical or virtually identical facts/situations that I did not strike, question or even notice shared the same disfavored characteristic of the person I struck? See *Foster v. Chatman, 578 U.S. ___ (2016).*

i) **Opening & Closing Statements:** Make race salient. Do not keep at bay as if it doesn't exist. If we have learned nothing else in the last few years, we have learned that it *always* exists even when we try to be blind to it or are totally unconscious that it is operating. Look at social science studies. This is real. Omnipresent. It does exist and it affects decisionmaking in every single context, by lawyers, by judges, by jurors.

j) **Think about race as you prepare case; call expert witnesses**; constantly challenge yourself on bias of race. Take the race bull by the horns. Don't be colorblind. The data shows huge racial disparities. Being colorblind exacerbates the problem. We know for example, that black males exact fear in minds of MANY, just walking (and many includes blacks! Remember Jessie Jackson's famous revelation in this area back in the 1980s). This affects reasonable fear in self-defense cases for example. It also works against the black victim in cases where he is quickly labeled the aggressor. Recall studies I shared in presentation. Review these studies on your Resource List. Experts can help educate jurors understand social framework evidence about the operation of implicit biases. Studies prove that making race salient can interrupt negative unconscious assumptions. Color conscious and not color blindness is real vehicle to just and fair outcomes.

k) **Animals:** Do you refer to human beings as animals? How often? Under what circumstances? Studies show that *even after controlling for same crimes*, black criminal defendants are much more likely to be referred to as animals in the media and *by lawyers prosecuting them* than

white defendants. Why? Of course, I don't think we should call any human being an animal but if you are going to do it, we must strive to be consistent.

l) **Winning/Decisions/Justice**: Prosecutors freely admit the truism that it is incredibly easier to get convictions when defendant is black and victim is white than if both defendant and victim are black. Is that a reason to go after these easier cases with more zeal? Does this perpetuate racial bias in our society? These are the kinds of questions we can challenge ourselves on, constantly. Constantly. And what about other things that go on in your office that you personally do not condone or participate in. Do you, as agent for the United States Government and protector of all people in our nation have some responsibility for the tone in your office? How can you make a difference in the culture and atmosphere of your work place?

m) **Empathy/understanding/compassion work:** Any chance you can do some relating to people who have less than? Do you drive everywhere? How about taking the bus for a month? Ok, a week. Can you donate some time in a homeless shelter? Food pantry? Can you spend time with children in underperforming public schools? Tutor children in juvenile detention? Finds ways to expose yourself to people who have less than and are living under extreme distress. You will remember their struggles.

7) SLOW DOWN

8) Watch the ABA Judge video produced by the ABA Diversity and inclusion 360 Commission: https://www.dropbox.com/sh/uddq3ep0l94lp1g/AACfh5lhcq7NPdPTKfCEoy9Sa?dl=0&preview=Implicit+Bias+Final+Render+-+Paulette+Intro+-+Credits+-+Logo.mp4 ***(DOWNLOAD TO YOUR COMPUTER FIRST!).***

Our prosecutor video will be ready in just a few weeks! Look out for it on the ABA 360 website soon! It will include Power point slides, the Resource list I have already shared with you, a "Dear User" memo, and our video. Stay tuned! It will be an invaluable resource!

ABA Diversity and Inclusion 360 Commission Toolkit Introduction

Dear User,

The information provided in this Toolkit is designed to help you recognize some of the biases that we all have, including, specifically, the implicit biases of judges, prosecutors, and public defenders. The goals of this toolkit are to:

1. Explain the social science term *implicit bias*;
2. Provide some examples of where implicit biases live and thrive;
3. Explain how they exist;
4. Raise consciousness about the power of these unknown "mind bugs," as some have called them, and their ability to negatively impact decision-making;
5. Help you identify some of your own implicit biases;
6. Examine how implicit biases might show up in the performance of your job;
7. Provide some tools to help you catch and correct snap decision-making that may be linked to harmful implicit biases; and
8. Provide you with the knowledge that will allow you to help others catch decision-making that might be based on implicit biases.

We all have biases. Every one of us. This is not a finger-pointing expedition. Rather, we are sharing with you the evidence of this science, offering strategies for you to find the implicit biases hidden within you to help you reduce their harmful effects. As you learn more about how these biases work in society and in your life, you will not only become more mindful and deliberate in your decision-making but also be able to help others in the profession with whom you interact regularly: court personnel, including law clerks, officers of the court, other lawyers, parties to litigation, witnesses, and jurors.

Implicit biases are unwitting and unconscious cognitions that include stereotypes, beliefs, attitudes, intuitions, gut feelings, and related intangibles that we categorize in our brains—without conscious effort—every fraction of a second.[1] For instance, if we think that a particular category of human beings is frail—the IAT (Implicit Association Test) indicates that many of us categorize the elderly in this way[2] —we will not raise our guard around them. That is a stereotype in action. If we identify someone as having graduated from our beloved alma mater, we will feel more at ease—that is an attitude in action.

Your ever-efficient brain automatically organizes all of the information it receives and places the information into cognitive boxes, shorthands, or schemas, if you will. A more colloquial way to think of a schema is the aforementioned "stereotype," though the two terms are not entirely interchangeable. Consider some of the data collected about what many people think when they see an Asian male. The data shows that many people believe Asians and Asian-Americans are extremely smart, excellent students, excellent in mathematics, and pretty good at some martial art; play, *really well*, some musical instrument; and are also really polite, kind, and shy—in other words, the model minority.[3] These labels have

1.) JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS 1 (Aug. 2009), available at http://jerrykang.net/research/2009-implicit-bias-primer-for-courts/.

2.) You will learn much, if you have not already, by taking an "implicit association test," or "IAT" as it is commonly known. The IAT is explained in other parts of your Toolkit. One of the IATs deals with how people implicitly view the elderly. The fragile and the elderly are always paired together. For more about this result in particular or the IAT generally, visit https://implicit.harvard.edu/implicit/.

3.) https://www.bing.com/videos/search?q=jerry+kang+ted+talk&view=detail&mid= C199BFAA2157E6F0C7FBC199BFAA2157E6F0C7FB&FORM=VIRE; see also Bernadette Lim, "Model Minority" Seems Like a Compliment, but It Does Great Harm, N.Y. TIMES (Oct. 16, 2015), http://www.nytimes.com/roomfordebate/2015/10/16/the-effects-of-seeing-asian-americans-as-a-model-minority/model-minority-seems-like-a-compliment-but-it-does-great-harm.

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implicit origins. Based on information that we are fed in society through television, movies, the media, work, and social exposures, our mind quickly creates schemas and puts these associations into one box. These social schemas form based on everything that we've ever consciously and unconsciously seen and heard. So when we see an Asian male, we immediately think of many of the characteristics and adjectives referenced above even though we do not know *that* individual. These judgments, assumptions, and attitudes require no contemplative, deliberate thought. It just happens.

Social scientists categorize our dual ways of thinking into two systems: System 1 and System 2. System 1 is the unconscious mode, which helps us make snap judgments and is where our schemas live. System 2 is our deliberative mind, i.e., the conscious mode that is active in explicit biases. The focus of this Toolkit is to get you more conscious of System 1, that place where, as it turns out, 90 percent of your mind operates.

In a similar vein, we also must think about coded words and microaggressions. Take coded language, for example. It is not uncommon for women to be referred to as aggressive or bossy, characteristics viewed positively with male employees but considered negatively with female employees.[4] Is the woman "opinionated" or "sassy"? Why? And why are men not ever similarly categorized?[5] Consider some race-related terms and words. *Inner city* and *urban education* are terms most quickly associated with predominantly black, brown, and poor areas.[6] *Thugs* is a word almost exclusively used in connection with black men.[7]

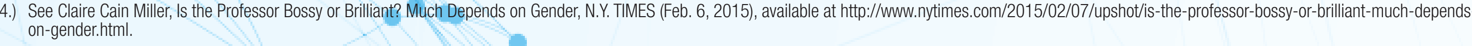
Microaggression is another type of behavior the ABA is hopeful that this Toolkit will help reduce and ideally eliminate. Microaggressions are "commonplace daily indignities, whether intentional or unintentional, that communicate racial slights and insults towards [minorities]."[8] Studies have shown that the recipients of microaggressions experience greater degrees of loneliness, anger, depression, and anxiety.[9] There are many examples of microaggressions in daily life, some of which include assuming that a black student in an elite school is there because of affirmative action, confusing black attorneys for court staff, telling an LGBT person that s/he does not "look like" an LGBT person, telling a black person that s/he is "articulate," touching someone else's hair without permission, asking people of color where they are from, and assuming that all Asian-Americans are Chinese and/or speak an Asian language.[10] An attempt to be aware of microaggressions and taking a thoughtful approach to language when speaking with minority groups are part of this process of consciousness raising, education, and correction.

This program is designed to help with all of these areas. It includes a PowerPoint presentation that focuses on the aforementioned goals. It includes a video, too—just a short 10 to 12 minutes, designed to allow you to hear from experts and others who perform the very same role that you do in the judicial system. Implicit biases are analyzed in the video; and others, whether judge, prosecutor, or public defender, share their own implicit biases and strategies for how they work to be continually mindful of them in order to interrupt them. Finally, this Toolkit contains a comprehensive bibliography and resource list, including a large category of books, articles, and websites that focus on implicit bias generally for those who want to learn more about this fascinating social science; material specifically addressed to judges; material specifically addressed to prosecutors; and material specifically addressed to defenders.

Whether you are a judge, a prosecutor, or a defender, we hope that you find this Toolkit useful. This is fascinating yet challenging work. It is not rocket science, but because biases are in our DNA, it will require great determination and conscious effort to catch assumptions that are made and applied automatically. The Toolkit will reveal the benefits of deliberation, i.e., slowing down to take a few extra moments to focus on the person in front of you before making decisions that will or might affect that person.

We are confident that you will not only learn about that stranger that lives within you but also actually enjoy the materials contained herein and this journey.

Thank you



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7.) Id.

8.) Microaggressions: Be Careful What You Say, NATIONAL PUBLIC RADIO (Apr. 4, 2014, 10:23AM), available at http://www.npr.org/2014/04/03/298736678/microaggressions-be-careful-what-you-say.

9.) Id.

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https://www.bing.com/videos/search?q=jerry+kang+ted+talk&view=detail&mid=C199BFAA2157E6F0C7FBC199BFAA2157E6F0C7FB&FORM=VIRE.

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D.) THE NATIONAL CENTER FOR STATE COURTS WEBSITE

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E.) MATERIALS SPECIFIC TO JUDGES, PROSECUTORS, AND DEFENSE COUNSEL

Judges:

Videos produced by the ABA Diversity and Inclusion 360 Commission: Video for Judges; Video for Prosecutors; Videos for Public Defenders. Please visit: www.ambar.org/360commission to access the videos.

Prosecutors:

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How to Think about "Implicit Bias"

Amidst a controversy, it's important to remember that implicit bias is real—and it matters

By Keith Payne, Laura Niemi, John M. Doris on March 27, 2018

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When is the last time a stereotype popped into your mind? If you are like most people, the authors included, it happens all the time. That doesn't make you a racist, sexist, or whatever-ist. It just means your brain is working properly, noticing patterns, and making generalizations. But the same thought processes that make people smart can also make them biased. This tendency for stereotype-confirming thoughts to pass spontaneously through our minds is what psychologists call implicit bias. It sets people up to overgeneralize, sometimes leading to discrimination even when people feel they are being fair.

Studies of implicit bias have recently drawn ire from both right and left. For the right, talk of implicit bias is just another instance of progressives seeing injustice under every bush. For the left, implicit bias diverts attention from more damaging instances of explicit bigotry. Debates have become heated, and leapt from scientific journals to the popular press. Along the way, some important points have been lost. We highlight two misunderstandings that anyone who wants to understand implicit bias should know about.

First, much of the controversy centers on the most famous implicit bias test, the Implicit Association Test (IAT). A majority of people taking this test show evidence of implicit bias, suggesting that most people are implicitly biased even if they do not think of themselves as prejudiced. Like any measure, the test does have limitations. The stability of the test is low, meaning that if you take the same test a few weeks apart, you might score very differently. And the correlation between a person's IAT scores and discriminatory behavior is often small.

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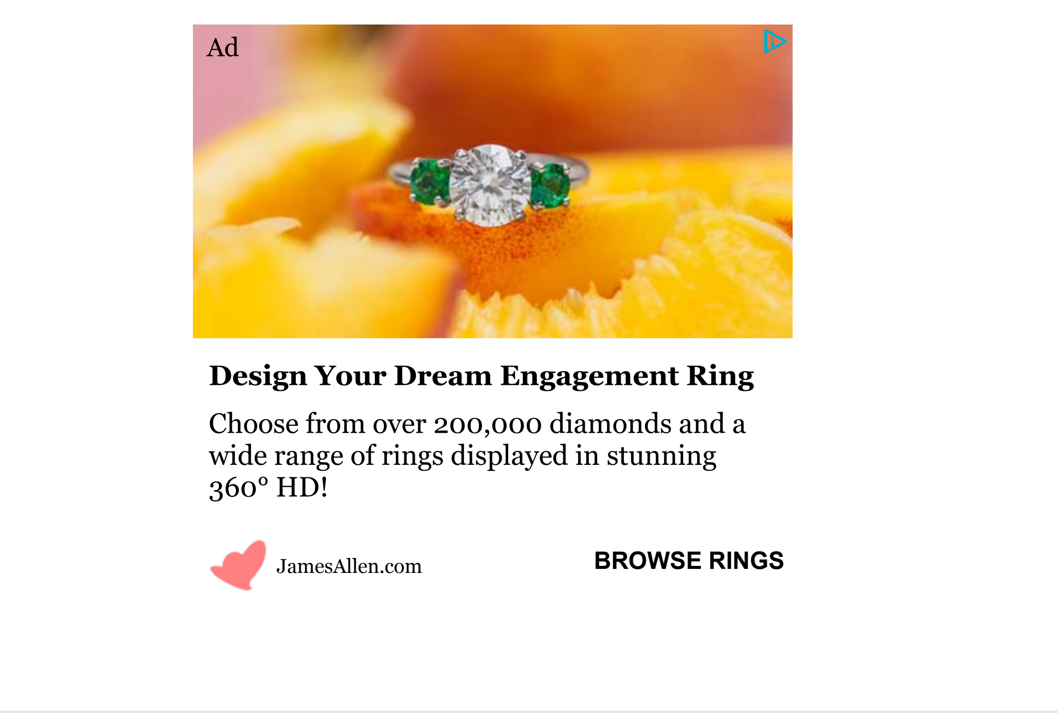

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The IAT is a measure, and it doesn't follow from a particular *measure* being flawed that the *phenomenon* we're attempting to measure is not real. Drawing that conclusion is to commit the *Divining Rod Fallacy*: just because a rod doesn't find water doesn't mean there's no such thing as water. A smarter move is to ask, "What does the other evidence show?"

In fact, there is lots of other evidence. There are perceptual illusions, for example, in which white subjects perceive black faces as angrier than white faces with the same expression. Race can bias people to see harmless objects as weapons when they are in the hands of black men, and to dislike abstract images that are paired with black faces. And there are dozens of variants of laboratory tasks finding that most participants are faster to identify bad words paired with black faces than white faces. None of these measures is without limitations, but they show the same pattern of reliable bias as the IAT. There is a mountain of evidence—independent of any single test—that implicit bias is real.

The second misunderstanding is about what scientists mean when they say a measure predicts behavior. It is frequently complained that an individual's IAT score doesn't tell you whether they will discriminate on a particular occasion. This is to commit the

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Palm Reading Fallacy: unlike palm readers, research psychologists aren't usually in the business of telling you, as an individual, what your life holds in store. Most measures in psychology, from aptitude tests to personality scales, are useful for predicting how *groups* will respond *on average*, not forecasting how particular *individuals* will behave.

The difference is crucial. Knowing that an employee scored high on conscientiousness won't tell you much about whether her work will be careful or sloppy if you inspect it right now. But if a large company hires hundreds of employees who are all conscientious, this will likely pay off with a small but consistent increase in careful work on average.

Implicit bias researchers have always warned against using the tests for predicting individual outcomes, like how a particular manager will behave in job interviews—they've never been in the palm-reading business. What the IAT does, and does well, is predict average outcomes across larger entities like counties, cities, or states. For example, metro areas with greater average implicit bias have larger racial disparities in police shootings. And counties with greater average implicit bias have larger racial disparities in infant health problems. These correlations are important: the lives of black citizens and newborn black babies depend on them.

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Field experiments demonstrate that real-world discrimination continues, and is widespread. White applicants get about 50 percent more call-backs than black applicants with the same resumes; college professors are 26 percent more likely to respond to a student's email when it is signed by Brad rather than Lamar; and physicians recommend less pain medication for black patients than white patients with the same injury.

Today, managers are unlikely to announce that white job applicants should be chosen over black applicants, and physicians don't declare that black people feel less pain than whites. Yet, the widespread pattern of discrimination and disparities seen in field studies persists. It bears a much closer resemblance to the widespread stereotypical thoughts seen on implicit tests than to the survey studies in which most people present themselves as unbiased.

One reason people on both the right and the left are skeptical of implicit bias might be pretty simple: it isn't nice to think we aren't very nice. It would be comforting to conclude, when we don't consciously entertain impure intentions, that all of our intentions are pure. Unfortunately, we can't conclude that: many of us are more biased than we realize. And that is an important cause of injustice—whether you know it or not.

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Transforming Perception: Black Men and Boys

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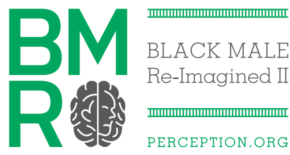

Transforming Perception: Black Men and Boys

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INTRODUCTION

We see so much promise in our children. We want their lives to be filled with love, play, and achievement. We hope their teachers recognize what is special and teach them all they need to learn. We hope their schools spark their curiosity about the world and a desire to excel.

We hope that their schools and communities are supportive and forgiving during the difficult teen years. We hope our children will commit their energies to a sport, an instrument, or some other activity that demands discipline, commitment, and mastery. We imagine their future when they find and fulfill their own unique gifts in a career that brings them satisfaction and respect. We envision a steady path toward college or a skilled trade followed by a good job and a family. While the economic situation is precarious and the future is uncertain, we try to prepare our children to succeed and flourish.

If we are Black parents in the United States, we share these same hopes for our children. However, based on our own experience, we also fear for our children. This is especially true for our sons, as they navigate the complexity of race in the 21st century.

While there has been undeniable progress in terms of racial attitudes and opportunities, the daily realities facing Black men and boys create substantial challenges and obstacles. We know someone will use race to mock or taunt our sons. We know some teachers will underestimate our sons' capacities and will subtly convey those attitudes to our sons. Their enthusiasm and exuberance may be judged as unruly behavior and they will be disciplined. On the opposite end of the spectrum, a teacher, thinking that she is being "nice" – or worried about facing us in parent teacher meetings -- will give our sons good grades for work that is not their best effort. We know what kind of message that will send to our sons – who will become experts at recognizing when they are being patronized.

We will have "the conversation" with our son about the potential danger he faces from police – who may protect him, but sometimes pose the greatest threat. Our conversation will include a warning that some people may view *him* as a threat and will respond to him with fear. We worry that employers will overlook our son's potential. We can imagine a White employer cutting a job interview short before he has a chance to display his skill.

We worry that the economic challenges we face in the Black community will create instability for them – our house will be undervalued and the college fund lessened, our jobs lost and not easily replaced. Our greatest fear is that they will lose us too early: because of discriminatory health care treatment, street violence, a misidentification – the list is still far too long.

Black men and boys face a country beset with contradictions. Both the hopes and the fears are real. Black men and boys can reach every pinnacle of success our country has to offer. They also face a set of obstacles unique to them as they work toward those successes.

We cannot accept that these obstacles are either permanent or insurmountable. Our predecessors in the Civil Rights Movement created a path toward political change that toppled Jim Crow and opened doors previously nailed shut. Civil Rights leaders masterfully harnessed the media and popular culture to challenge stereotypes and to shed light on the horrors of racial oppression. Their strategies were rooted in a sophisticated understanding of human motivations and the complexity of people's fears and ideals.

Race has always been a social construct. Until the middle of the last century, that construct was fixed by the belief that races were blunt categories into which each of us fit. The category into which Black people fit was defined as inferior and, particularly in the Jim Crow South, neither class nor individual circumstance mattered. With the legal changes wrought by the *Brown v. Board of Education* litigation and the impact of the Civil Rights Movement, that categorical inferiority has been successfully challenged.

We no longer live in a racial binary. Perceptions and reactions to a particular Black man or boy will depend upon how he is situated: class status, skin color, comfort level, and context all matter. Whites and members of other racial and ethnic groups may also differ markedly in their perceptions and reactions based upon their own experiences in integrated environments and a host of other factors. But race remains highly salient. Black males remain at significant risk of experiencing high suspension rates in school, disproportionate levels of arrest and imprisonment, and chronic unemployment.

Social science has enormous promise, however, to change the way his teachers and coaches, those who may be his employers, and the police he will encounter see him and more importantly respond to him. Advances in psychology and neuroscience allow us to understand the complexities of people's racial reactions and measure the effect of our toxic racial culture on perceptions and behavior. With this information, we are devising interventions that alter the effect of racial bias and anxiety on the everyday life of Black men and boys.

The American Values Institute and our research advisors from academia and advocacy are in the vanguard of this work. This report shares AVI's original research along with the cutting edge research in social psychology and neuroscience that provides empirically grounded proposals for change. It reviews the current research on the complex psychology of race, which shows that while the shift in values precipitated by the Civil Rights Movement has been profound, these egalitarian ideals have not yet truly permeated people's unconscious stereotypes, or their emotions and fears.

Understanding Our Brain: The Power of Perception

"We use categories for people too. Based upon visual and aural cues, we make automatic judgments about what category a particular person fits within and we often act on those judgments."

Knowing how the brain works is critical to understanding how race operates. Most of our actions occur without our conscious awareness. Through socialization, our brains have created visual and aural categories (or schemas, to use the scientific phrase) for most of the sights we see and sounds we hear (Macrae & Bodenhausen, 2000). This process is referred to as 'implicit social cognition."

We use categories for people as well as objects. Based upon visual and aural cues, we make automatic judgments about what category a particular person fits within and we often act on those judgments. These categories and judgments normally serve us well. However, we can obviously be wrong. Our errors are usually meaningless – not recognizing that a small flat object playing a song is an mp3 player and not a cell phone. In some instances, these errors can be life-threatening – the object in a man's hand is a cell phone and not a gun. Why might the life-threatening errors occur more in some situations than others? Because categories also influence what people pay attention to, how they organize their attention, and what they later remember (Whitley & Kite, 2010; Hamilton, 1981).

Not surprisingly, our brain's automatic use of categories is particularly risky with respect to humans. Categorization can activate stereotypes that hamper rather than help our assessment of how to behave or respond in a given situation (e.g. Hamilton & Sherman, 1994). The widespread stereotype of Black criminality makes it more likely that a cell phone will appear to be gun if the man holding it is Black rather than White.

Scientists define stereotypes as the beliefs and opinions people hold about the characteristics, traits, and behaviors of a certain group (Allport, 1954; Macrae, Mile, Bodenhausen, 1994; Hilton & Von Hippel, 1996). Stereotypes often cause us to make assumptions (both negative and positive) about people based upon superficial characteristics (Schneider, 2004). They also tend to be self-perpetuating, which leads to their deep entrenchment.

Creating Perceptions of Black Men and Boys: Culture of Racial Stereotypes

For those whose knowledge of race is largely mediated through the media, race itself triggers a complex set of emotions: fear, envy, anxiety, but also admiration and desire.

Negative stereotypes continue to be powerful despite the egalitarian norms we purport to hold. Media plays a significant role in shaping our perceptions of race. For many Whites and people of other races and ethnicities, the media's portrayal of Black men and boys is the primary basis for their knowledge and emotional reaction. With a few notable examples in politics, most media present Black men as figures to be admired for their athleticism, artistic or entertainment talent, or feared for their criminality. For those whose knowledge of race is largely mediated through the media, race itself triggers a complex set of emotions: fear, envy, anxiety, but also admiration and desire.

Black men and boys are systematically portrayed in negative ways in both news and entertainment programming, which can have the effect of activating and exacerbating racial stereotypes (Dixon, 2008).

On local news shows, Blacks are disproportionately portrayed as criminals, and Whites as victims. The overrepresentation of the criminality of Blacks and the victimization of Whites

is accompanied by other racially-skewed effects, such as the over-portrayal of Black-on-White violence, and the increased likelihood that a Black defendant will face prejudicial pretrial news coverage (Dixon, 2008).

Network news programs also portray negative racial stereotypes in ways that conflict with reality and create a series of harmful associations (Dixon, 2008). In 1996, a study demonstrated that networks typically associated Blacks with poverty and overrepresented poor Blacks in their coverage. Other studies confirmed that Black criminality is over-portrayed both at the national and local level. Together, these media-perpetrated tendencies toward bias and discrimination have the potential to agitate and reinforce numerous harmful racial stereotypes.

Once a group or category has been defined, humans tend to exaggerate the differences between different groups and to presume homogeneity among all "members" of the group (Quattrone & Jones, 1980; Nelson, 2006). People are more easily able to differentiate or individualize among members of their own group (Whitley & Kite, 2010). They are also more likely to attribute negative behavior of a member of their own group to the particularities of the person or situation, but to attribute the same behavior of a member of an "out-group" to a characteristic of the group (Pettigrew 1979; Duncan, 1976).

Social psychologists report that these stereotypes are robust and frequent and lead to a wide variety of negative associations, including people's categorization of ambiguously aggressive behavior (Devine, 1989), their decision to categorize non-weapons as weapons (Payne, 2001), the speed at which people will shoot someone holding a weapon (Correll, et al., 2002), and the likelihood that they will shoot at all (Greenwald, et al., 2003; Eberhardt, Goff, Davies & Purdie, 2004).

Implicit Bias Against Black Men and Boys

Modern bias against Black men and boys has morphed into a new form. Some continue to hold explicit stereotypes about Black men and boys and to be consciously prejudiced attitude against them, but the numbers of such people have declined markedly in the last century (Sears, Hetts, Sidanius & Bobo, 2000). In 1933, 75% of whites openly described Black people as "lazy" but fewer than 5% did so beginning in the 1990s (Brown, 1995). Researchers have found that most Americans subscribe consciously to the norm that Black people deserve equal treatment and that racial integration is a desirable goal (Bobo & Charles, 2009, p. 245).

The evolution of egalitarian conscious values does not mean that stereotypes traditionally associated with Black people have been eliminated; rather they continue to linger in people's unconscious and express themselves in a variety of ways constituting what is termed "implicit bias."

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Measuring implicit bias against Black men and boys

To understand implicit bias, we need to move beyond "self reporting" because most people consciously reject bias. However, scientists can assess implicit bias levels by measuring people's reactions to stimuli. A widely used measure of implicit bias is the "Implicit Association Test" (IAT) which is housed on the website Project Implicit. The IAT is a computer task that asks participants to link pictures of White male faces or Black male faces with either Good words

(e.g. Joy, Love, Peace) or Bad words (Nasty, Evil, Awful) by pressing a particular key on the computer's keyboard. Project Implicit has found that most people respond more quickly when White male faces and Good words are assigned the same key and Black male faces and Bad words the same key than the reverse.

A significant majority of Whites as well as Asian Americans and Latinos show anti-Black bias in the IAT and almost half of African Americans also show anti-Black bias (for reviews of this research see Dasgupta, 2004; Dasgupta, 2008). This research has also shown a marked discrimination against skin tone; men with darker skin fare less well in both tests of implicit bias and in empirical work on sentencing, hiring, and other important life domains (Kahn & Davies, Eberhardt, et al., 2006; Blair & Maddox).

Other measures of implicit bias include physiological responses to images of Black male faces, assessing blood pressure changes, increases in sweat, and brain imaging shown in fMRI (functional magnetic resonance imaging) scans (Phelps, 2000). Because so many of our actions are a result of our unconscious associations, implicit bias can result in behaviors that are contrary to our conscious values.

Favoring our own kind

Those Whites who hold explicit in-group preference will rarely understand their feelings as "racist" because they do not involve active animus against people of other races.

Some implicit bias is a result of the unconscious association of negative stereotypes with Black men – but bias can manifest as a result of comparatively positive preference for one group versus another. Social scientists refer to this phenomenon as "in-group" bias or preference and it is sometimes implicit and sometimes explicit. Those Whites who hold explicit in-group preference will rarely understand their feelings as "racist" because they do not involve *active* animus against people of other races. However, although we tend to think of racial discrimination foremost as treating a person or a group *worse* because of the different or disfavored racial group, treating a favored racial group better results in the same outcome. In both, one racial group benefits and the other is harmed because of race.

Contemporary social science research has identified that much present discrimination is a result of favoritism toward an in-group rather than hostility toward an out-group (Tropp & Molina, 2012). For example, when evaluating Whites and Blacks, Whites generally will not overtly rate Blacks negatively—they will simply rate similarly situated Whites more positively (Dovidio & Gaertner, 2006).

Dehumanizing the other

At its most pernicious, our country's historical subordination has resulted in the dehumanization of Black people. This is a practice that often undergirds subordination, war, and violence toward other groups throughout history. The association of groups of people as non-human has been used as a way to reduce the moral resistance to actions that would otherwise be unacceptable to the actor. While this practice is no longer an explicit strategy in our country, the associations linger. A recent study has found that the association of blacks with apes is closely correlated with police officers' use of excessive force against young Black males. (Goff et al., 2008).

Modern Bias on the Ground

Implicit bias and the tendency toward in-group preference are not inactive in the unconscious. They have a pernicious effect in important life domains including criminal justice, employment, education, and health treatment. It cannot always be determined whether a particular disparate effect is a result of a negative view toward Black men and boys or an in-group preference toward White men and boys – but the combined negative results of the two are profound.

Recent studies provide powerful evidence that implicit bias (either negative toward Blacks or positive toward Whites) translates into a wide range of behaviors that have significant negative effects on Black men and boys. These behaviors include allowing racial biases to bleed into important decision making as well as non-verbal behaviors that affect day-to-day interactions.

Criminalizing the Black Male

Researchers working to determine whether there is a link between stereotypes about Black criminality and police response have found that when police officers are primed to think about crime by words such as "violent, crime, stop, investigate, arrest", they more quickly focus on Black male faces than comparable White male faces (Eberhardt, et al., 2004). The priming also led police officers to remember the faces as having more stereotypically African American features than they actually did and "more likely to *falsely* identify a face that was more stereotypically Black." (Eberhardt, et al., 2004).

> The priming also led police officers to remember the faces as having more stereotypically African American features than they actually did and "more likely to falsely identify a face that was more stereotypically Black."

Police officers showed bias when confronted with pictures of faces and asked, "who looks criminal?" They more often choose Black faces than White and the disparity increases as the Black face becomes more stereotypically Black. The study demonstrated well the powerful effects of stereotypical associations on visual perceptions and attentions – findings that carry important implications for split-second police-citizen interactions (Eberhardt, 2004).

Black men and boys appear also to fare worse with prosecutors – though there are fewer studies and most are decades old (Kang et al, 2012). Studies in the 1980s and 90s found that some city prosecutors were more likely to prosecute Black than White defendants and a 2000 report found that prosecutors were more likely to offer White defendants generous plea bargains (Kang et al, 2012).

Race matters in capital sentencing in more than one way. Not only are murderers of White victims more likely to be capitally sentenced than murderers of Black victims, but Black murderers of White victims are more likely to be sentenced to death if they appear more stereotypically Black (Eberhardt, 2006).

Racialized Obstacles to Educational Opportunity

While the vast majority of teachers undoubtedly have the best of intentions, the evidence is strong that implicit bias is affecting our classrooms. National statistics on school suspension paint a particularly grim portrait of the fate of Black boys. The disproportionate suspension

White boys are typically suspended for concrete and observable violations such as smoking, fighting, or obscenity; Black boys tend to be suspended for violations such as disrespect, noisiness, or defiance, which are more abstract and subjective in nature and therefore more likely to be influenced by stereotyping and bias.

rates are a striking example of the "discriminatory discipline" that many Black boys experience. This phenomena is experienced by many parents as particularly noticeable beginning in fourth grade as boys move closer to adolescence, often referred to as the "fourth grade" syndrome. In general, suspension rates are higher for boys. Boys are suspended twice as often as girls (9.1% vs. 4.5%), but the problem is acute for Black boys who are suspended at twice the rate of Hispanic boys and three times the rate of White boys (15.0%, 6.8%, and 4.8%, respectively). According to the National Center of Education Statistics, in 2006, Black and Hispanic boys accounted for nearly two thirds of the three million suspensions and over half of the 102,080 expulsions in U.S. public schools (Planty et al., 2009).

A male student of color who is suspended is three times as likely to drop out of school by the 10th grade and is in turn three times as likely to end up incarcerated (Goertz, Pollack, & Rock, 1996). One little-known but chilling marker of this disproportionality is that, by the age of 15, roughly 2% of the black male American population is simply *missing;* these boys are neither in school nor in the criminal justice system. They are most likely alive, but they are utterly disenfranchised from society (Flynn, 2008). This is a fate suffered by no other demographic group in America.

Sadly, statistics such as these are often thought to reflect objectively worse conduct among black boys – research shows this assumption to be wrong (Gregory, Skiba, & Noguera, 2010). Rather, black boys in particular appear to be referred for suspension more readily because their group membership leads them to be stereotyped as more threatening, disruptive, and uncooperative by teachers and school administrators. For example, studies find that whereas white boys are typically suspended for concrete and observable violations such as smoking, fighting, or obscenity, Black boys tend to be suspended for violations such as disrespect, noisiness, or defiance, which are more abstract and subjective in nature and therefore more likely to be influenced by stereotyping or bias (Skiba et al., 2002). Black boys' behaviors seen through the lens of implicit bias are interpreted far differently than the same behavior by a White boy. The suspension statistics are a chilling example of how stereotypes shape behavioral ambiguity to color social judgments (Aronson & Noguera, 2013).

The Bias Continues

HIRING HURDLES : Implicit bias may also impact employment. Researchers have found that race can have powerful effects on a job applicant's prospects for an interview (Bertrand, 2003). Once inside the door, the racial tensions and biases often continue. Measures of implicit bias have been shown to correlate with discriminatory hiring decisions (Ziegert, 2005). Over time, although self-reported measures of racial bias in hiring selections have generally declined over time, the impact of implicit bias on employment decisions has not (Dovidio & Gaertner, 2000).

IMPLICIT ASSUMPTIONS AND HEALTHCARE : Racial disparities in health treatment are well-documented and widespread, cutting across socioeconomics, geography, and even affecting those portions of our healthcare system with universal access (i.e. veteran access to healthcare) (Sabin 2009). Black patients received a poorer quality of care in studies involving cancer treatment, cardiovascular diseases, kidney transplants, children's medication, pain management, and many other areas. Racial disparities existed in doctor-patient communications, and in overall clinical interactions. Doctors also exhibited tendencies to believe that White men would be more likely to follow prescriptions than Black men.

Blocking the Pipeline

Often it is assumed that Black students benefit in the college admissions and higher admissions contexts. However, studies by Hodson & Dovidio show that in making college admission decisions using two criteria (GPA and SAT), decision-makers weigh these criteria differently depending on the race of the candidate. For White candidates they emphasize the criterion where the candidate is strong and de-emphasize the criterion on which the candidate is weak. For Black candidates they do the opposite.

In our report, we describe the role that implicit bias plays in undermining perceptions of capacity of Black students and the continuing stigmatization experienced by Black students. We also discuss the particularly hostile climate faced by Black students in states that have abolished affirmative action.

Altering Perceptions and Reducing Bias

What mechanisms can alter inaccurate perceptions and reduce the effects of modern bias? Early research shows that thoughtful interventions can reduce both the bias itself and the behaviors linked to implicit bias. Because implicit bias is caused by the automatic association of Black men and boys with negative stereotypes, researchers have focused on whether exposing people to counter-stereotypes can decrease implicit bias. Research to date suggests that this strategy has merit.

> Repeated exposure to positive images of Black men and boys will be an important strategy to reduce implicit bias - and reducing the saturation of continued negative stereotypes is likely of even greater significance.

The studies focusing on decreasing implicit racial bias have included exposing people to positive historical exemplars like Martin Luther King, Jr. (and contrasting these positive associations with negative White figures such as Charles Manson) and showing videos of comforting settings such as outdoor barbecues (Dasgupta & Greenwald, 2001). Both have reduced implicit bias as measured by the IAT significantly and the result lasted for over 24 hours (Kang et al, 2012; Dasgupta & Rivera, 2008). While not all exposure studies have showed such significant results (Joy-Gaba & Nosek, 2010), the majority of published studies have shown implicit bias reduction after exposure to admired counter-stereotypic individuals suggesting that repeated exposure to positive images of Black men and boys will be an important strategy to reduce implicit bias – and reducing the saturation of continued negative stereotypes is likely of even greater significance (Kang, 2012).

Even as we work to reduce implicit bias itself, we must also focus on interrupting the behavioral effects of existing bias. Research shows that people can and do over-ride implicit biases on decision-making (e.g. Dasgupta & Rivera, 2006). In situations where we are making important decisions – who to hire, whether to find a defendant guilty or not, what diagnosis to give a patient – we can act according to our conscious egalitarian values even if we hold implicit biases. Studies also show that people will act according to egalitarian values when conscious that race may affect their decision-making. People can be taught to doubt their own objectivity around race and other charged categories that can lead to this sort of vigilance (Casey et al, 2012).

Several organizations and academics, including AVI and researchers with whom we work, are involved in projects to educate judges and other important actors in the legal system about the possibility that implicit bias affects behavior (e.g. Kang, 2012). These trainings appear successful in altering judges' perceptions that they are objective and alerting them to the possibility that implicit bias may affect their decisions about sentencing and other important

outcomes. (Casey et al , 2012). Federal Judge Mark Bennett also does direct jury training about implicit bias during jury selection and in his jury instructions, he expressly directs jurors not to "decide the case based on 'implicit biases.'" (Bennett, 2012).

Researchers such as Pedro Noguera and Joshua Aronson are developing interventions to reduce teachers' unconscious stereotyping of Black boys. These interventions are based on the premise that teachers who learn to appreciate their students as individuals will be less likely to default to stereotypes when viewing student behavior. It simply becomes much harder to dislike a student or see him as merely a representative of a group (e.g., black troublemaker) if one has been given a window into his life and circumstances (Wilson, 2011).

Becoming Colleagues, Friends, and Family: Inter-group Contact

Individualized interventions show promise, but of equal or even greater significance are addressing structural conditions in which people operate. In other words, segregated work places, schools, and neighborhoods deeply affect the incidence of implicit bias and in-group preference.

The individualized interventions show promise, but of equal or even greater significance are addressing the structural conditions in which people operate. In other words, segregated work places, schools, and neighborhoods deeply affect the incidence of implicit bias and in-group preference. Whites who grow up and are educated in segregated environments appear more likely to hold implicit biases and in-group preferences than those who benefited from early experiences of integration (Tropp & Molina).

Increased diversity has also been shown to decrease the automaticity of stereotypical associations and to encourage more thoughtful decision-making. Studies of juror deliberations have shown, for example, that racially diverse jurors engage in longer discussions, make fewer inaccurate statements, and have greater discussions of race-related topics (Sommers, 2006). Indeed, Professor Sommers found that the simple knowledge that they would be serving on a diverse rather than an all-White jury led White jurors to be less likely to believe at the conclusion of the evidence that the Black defendant was guilty (Sommers, 2006).

Race as an Emotional Construction

Black men and boys often experience the anxiety that they will be the subject of discrimination of hostile or distant treatment. White people may experience the mirror anxiety that they will be assumed to be racist.

Our researchers have concluded that the emotions of race are a critically important component of the challenges confronting Black men and boys. This literature is less known than the implicit bias work that has garnered increasing attention recently. Our report contains a detailed review of this literature and shares our original research in this domain.

Race triggers powerful emotions. Among them is "racial anxiety," which is discomfort about the potential consequences of inter-racial interactions. Black men and boys often experience the anxiety that they will be the subject of discrimination and hostile or distant treatment. White people may experience the mirror anxiety that they will be assumed to be racist by the Black man or boy and therefore, will be met with distrust or hostility.

It may seem surprising that Whites experience "racial anxiety" – but in light of the importance of the social norm of egalitarianism, many Whites truly fear being perceived as racist. This fear is a subset of a broader form of identity anxiety—which has been labeled "stereotype threat" (Steele & Aronson, 1995). Stereotype threat is the frequently unconscious fear that one's actions may confirm stereotypes about their identity groups. Stereotypes differ across groups

so this anxiety can play out differently for particular identity groups and in different situations (Steele, Spencer & Aronson, 2001). It has been most well documented by its effect on the academic performance of students of color who fear confirming the negative stereotypes of intellectual inferiority (Steele & Aronson, 1995). This form of stereotype threat also affects women in math and science and can be triggered in white men when compared to Asian Americans (Aronson & McGlone, 2009).

More recently, it has also been identified in whites with respect to the stereotype that they are racist or otherwise biased against members of marginalized groups (Goff, Steele, and Davies, 2008). Because our society considers racism or bias immoral, the fear of being thought racist or biased can be quite powerful. This anxiety has been shown to reduce the cognitive functioning of whites with high implicit bias levels after they have interacted with a person of color (Trawalter, Richeson & Shelton, 2009).

Race and Identity Threat

Because of the salience of race in the United States, people of all races and ethnicities often experience physiological threat and cognitive depletion in anticipation of and following an interracial interaction (Page-Gould, Mendoza-Denton & Tropp, 2008). Indeed, research has shown that Black people's physiological and psychological health can be compromised by interracial interactions or by the anticipation of assessment by Whites (Trawalter, Richeson & Shelton, 2009; Steele, 2011). As with other stressors, racial anxiety can yield cardiovascular and other stress-induced illnesses (Mays, Cochran & Barnes, 2006).

In addition to the physical symptoms, racial anxiety tends to affect the verbal and non-verbal behaviors of members of both groups (Dovidio, Kawakami & Gaertner, 2002). People experiencing anxiety often physically distance themselves from each other, share eye contact less, and their verbal tone is less friendly and engaging. When both sides of the inter-racial dyad are experiencing anxiety, both members felt the interaction was negative and the anxiety can spiral (Page-Gould et al, 2008). As with implicit bias, racial anxiety can have significant effects across important life domains from the criminal justice system, employment, education, and health.

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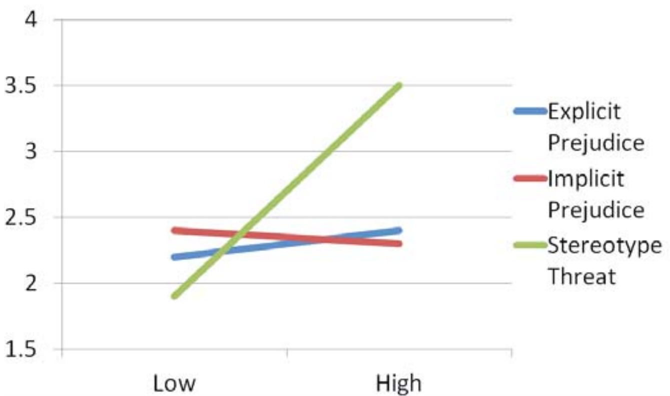
Police to Fear

Among the most dramatic and troubling findings about racial anxiety is its correlation with police use of excessive force. In his work with police departments across the country, Professor Phillip Atiba Goff has found that anxiety about appearing racist has a *greater* correlation with the excessive use of force than either explicit or implicit bias. The graph below shows the conditions most linked to excessive use of force.



The results were significant. Racially anxious police officers are more of a risk of using excessive force than are explicitly racially biased police officers (though the latter are more likely to engage in racially disparate pedestrian stops) (Goff & Martin, 2013).

Stereotype Threat

Research shows that anxiety about negative stereotypes can trigger physiological changes in the body and the brain (especially an increased cardiovascular profile of threat and activation of brain regions used in emotion regulation), cognitive reactions (especially a vigilant self-monitoring of performance), and affective responses (especially the suppression of self-doubts). These effects all divert cognitive resources that could otherwise be used to maximize task performance,

(Schmader & Johns, 2003).

Stereotype threat was initially identified in the academic domain. It has been shown to hurt the academic performance of Black students who fear confirming pernicious stereotypes about intellectual inferiority (Steele & Aronson, 1995). Why does stereotype threat have such striking effects? When people are aware of a negative stereotype related to the particular domain, their attention may be split between the test at hand and concern that their actions may confirm that stereotype. Or their actions may respond to the need for self-image and/or group based maintenance.

Research shows that anxiety about negative stereotypes can trigger physiological changes in the body and the brain (especially an increased cardiovascular profile of threat and activation of brain regions used in emotion regulation), cognitive reactions (especially a vigilant self-monitoring of performance), and affective responses (especially the suppression of self-doubts). These effects all divert cognitive resources that could otherwise be used to maximize task performance,(Schmader & Johns, 2003). So our most motivated young Black men may experience a culturally constructed obstacle that prevents them from performing to their true capacity when taking tests like the Scholastic Aptitude Test (SAT) for college, the Law School Aptitude Test (LSAT) or Medical College Aptitude Test (MCAT) to get into law and medical schools The effects then undermine their opportunities to attend colleges or graduate schools of choice or to obtain scholarships. And if they are admitted with a test score that does not accurately reflect their ability, that score often affects their confidence levels once in college or graduate school and the cycle continues. Stereotype threat does not begin at the college admissions process. It has been shown to influence performance as early as middle school (Cohen et al, 2006).

"White" stereotype threat (the fear of being seen as a racist) can also diminish the likelihood of academic success for Black boys and young men. There are fewer studies in this area, but those studies suggest that some White teachers may be undermining their students' educational advancement out of fear that they will be viewed as racist.

In a recent study, poorly written essays were sent to 113 middle school teachers in the Northeast who were instructed to provide feedback to the student author (Harber, 2012). The teachers who thought they were responding to Black and Latino students provided less critical feedback and more praise than to White students. The only exceptions were teachers who felt that they had supportive principals; these teachers provided equal feedback to White and Black students (though still less critical feedback to Latino students).

A related phenomena is that a fear of appearing prejudiced can lead to a "failure to warn"—a documented phenomenon where teachers or counselors fail to instruct a Black student about the potential negative consequences of a difficult proposed course or plan (Crosby, 2007). In a 2007 study, peer advisors were given information about a prospective student who was seeking advice about whether to take a particularly challenging schedule. Peer advisors who thought the student was White or Asian American recommended against the schedule as too much work for a given semester, but advisors who had Black students did not (Crosby, 2007).

Successful Interventions

Reducing racial anxiety and its effects on behavior is as important as reducing bias. Both result in conditions that create significant obstacles to the full inclusion of Black men and boys in our society – and in the context of the criminal justice system, can literally be dangerous.

Reducing racial anxiety and its effects on behavior is as important as reducing bias. Both result in conditions that create significant obstacles to the full inclusion of Black men and boys in our society – and in the context of the criminal justice system, can literally be dangerous.

POLICE DEPARTMENTS : Cutting edge work by Phillip Atiba Goff with several major police departments provides an instructive pathway to ameliorate the harmful effects of racial anxiety. Professor Goff's solutions begin with an intensive diagnostic process of institutional dynamics to determine the factors that create racial anxiety. He then devises institutional interventions that alter the dynamics within the institutions to reduce the discriminatory outcomes.

SCHOOLS : Stereotype threat can be mitigated and schools can create conditions in which Black boys and young men have a greater likelihood of reaching their potential. We have learned for example that Black students who have been taught that intelligence is malleable rather than fixed were more engaged with their studies and ultimately had higher grade point averages. (Aronson et al., 2002)

In addition, stereotype threat diminishes and Black students are more apt to perform to their potential when they are not the only representative or one of few representatives of their group and when same-race role models are present (Inzlicht & Ben-Zeev, Marx & Roman, Marx & Goff, Sekaquaptewa & Thompson, 2002; Walton et al, 2008; Purdie-Vaughn et al, 2008). In diverse environments, group membership tends to become less defining of individual identity. Rather than feeling like "the Black guy" in the engineering class, the student can simply be himself and not see his performance as linked to his group identity.

Conclusion: A Culture Shift

To counter implicit bias and the heightened emotion around race, we ultimately have to change the distorted perceptions of Black men and boys. This report explains why we need a change in the cultural context. Visual culture, in particular, plays an important role in reinforcing implicit bias, increasing our racial anxieties and undermining conversations about racial equality and opportunity. Thus, we must work toward developing a more accurate portrayal of Black men and boys in the cultural domain. This cultural shift will show the similarities in experiences, concerns, and values among men and women of all races. Challenging the caricatures—Black men and boys as either criminals or exceptionals (the President, the occasional judge, the star athlete)—will enhance productive interaction among all communities. A cultural shift has enormous potential to increase inter-group empathy. Although we have seen some movement in popular culture with regard to race, we must also be vigilant about the continued prevalence of stereotyped portrayals of black criminality and inferiority. Those of us seeking to address issues of race through messaging campaigns and programs face enormous obstacles in light of the continuous onslaught of stereotypes prevalent in the mainstream media and the myth of colorblind perception that has been largely internalized. American society has a profound misunderstanding of the role that bias plays in creating structural and individualized obstacles to full inclusion of marginalized groups. Using the framework of "implicit bias" and "race as an emotional trigger" allows us to talk about race without accusing people of "being racist," when they genuinely believe they are egalitarian. The social science described in this report helps people understand why inter-racial dynamics can be so complicated and challenging for people despite their best intentions. AVI is working with multifaceted research, a positive counter-narratives and de-biasing messaging to reach and engage a mainstream audience in the ongoing struggle to end racism.

Although we have seen some movement in popular culture with regard to race, we must also be vigilant about the continued prevalence of stereotyped portrayals of black criminality and inferiority. Those of us seeking to address issues of race through messaging campaigns and programs face enormous obstacles in light of the continuous onslaught of stereotypes prevalent in the mainstream media and the myth of colorblind perception that has been largely internalized.

Research Advisors

Joshua Aronson is an Associate Professor of Applied Psychology at New York University.

After receiving a PhD from Princeton, Aronson did post-doctoral work at Stanford University with Professor Claude Steele. In 1995 Steele and Aronson published their landmark laboratory studies on "stereotype threat," a performance-inhibiting phenomenon that occurs when students confront the negative expectations of the particular stereotypes assigned their race. The studies show that if you could minimize stereotype threat in testing situations, you could get rid of a big portion of the gap between blacks and whites on standardized tests.

Since then, Aronson has continued his laboratory research, but he has also conducted intervention work in the schools, both examining the psychological underpinnings of the performance gap and developing practical methods for reducing it. Aronson is also starting to assemble a nationwide coalition of experts concerned with this achievement gap who will eventually create a national task force to focus their efforts and share research.

Matt A. Barreto is an Associate Professor in Political Science at the University of Washington, Seattle and a founding member of the Washington Institute for the Study of Ethnicity, Race and Sexuality (WISER).

He received his Ph.D. in political science from the University of California, Irvine in 2005. His research examines the political participation of racial and ethnic minorities in the United States and his work has been published in the *American Political Science Review, Political Research Quarterly, Social Science Quarterly, Urban Affairs Review*, and other peer-reviewed journals. Matt specializes in Latino and immigrant voting behavior, and teaches courses on Racial and Ethnic Politics, Latino Politics, Voting and Elections, and American Politics at UW. Part of his research agenda also includes public opinion and election surveys, including exit polling methodology. Matt is also an affiliated research scholar with the Tomas Rivera Policy Institute (www.trpi.org) since 1999 and with the Center for the Study of Los Angeles (www.lmu.edu/csla) since 2002. In 2004, he was a co-author of the TRPI/Washington Post National Survey of Latino voters and in 2005, he was co-principal investigator of the CSLA Los Angeles Mayoral exit poll.

DeAngelo Bester has nearly 10 years of experience leading local, state, and national racial justice organizing campaigns around issues such as educational equity, preservation and expansion of affordable housing, and increasing access to living wage jobs for African Americans. During his tenure with NPA, DeAngelo has designed a number of political education trainings. In his current role as the project director for NPA's Dismantling Structural Racism Project, he is designing a comprehensive curriculum around structural racialization and developing effective communications around race for community based organizing groups. He is a skilled facilitator and strategic planner.

Ludovic Blain is an author and progressive entrepreneur, having created projects domestically and on three continents. Ludovic is currently Program Director of the Progressive Era Project/Color of Democracy Fund, working with donors to build progressive power of people of color in key counties in California. Previously he helped to direct the Closing the Racial Wealth Gap Initiative at the Insight Center, working with 140 economic and financial experts of color to develop and advocate for federal policies that would close the racial wealth gap. Previously Ludovic was the National Campaign Coordinator for the $6 million 12 state Equal Voice for America's Families Campaign, and has led organizing and advocacy work for almost two decades on environmental justice, anti-racist strategic communications and other racial justice issues.

Camille Charles is Edmund J. and Louise W. Kahn Term Professor in the Social Sciences and Professor of Sociology and Education, at the University of Pennsylvania.

She is author of *Won't You Be My Neighbor: Race, Class and Residence in Los Angeles* (Russell Sage, Fall 2006), which class- and race-based explanations for persisting residential segregation by race. She is also co-author of The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities (2003, Princeton University Press). More recently, she is co-author of the forthcoming book, *Taming the River: Negotiating the Academic, Financial, and Social Currents in Selective Colleges and Universities* (co-authored with Douglas S. Massey and colleagues; Princeton University Press), the second in a series based The National Longitudinal Survey of Freshmen, and Race in the American Mind: From the Moynihan Report to the Obama Candidacy (with Lawrence Bobo). She is also nearing completion of a sole-authored book on Black racial identity in the United States, tentatively titled, The New Black: Race Conscious or Post Racial? Professor Charles earned her Ph.D. in 1996 from the University of California, Los Angeles, where she was a project manager for the 1992-1994 Multi-City Study of Urban Inequality. Her research interests are in the areas of urban inequality, racial attitudes and intergroup relations, racial residential segregation, minorities in higher education, and racial identity; her work has appeared in Social Forces, Social Problems, Social Science Research, The DuBois Review, the American Journal of Education, the Annual Review of Sociology, The Chronicle of Higher Education, and The Root.

Nilanjana Dasgupta is a Professor of psychology at the University of Massachusetts, Amherst. She is interested in people's beliefs and attitudes toward social groups, with special attention to mental processes that promote stereotypes and prejudices toward disadvantaged social groups.

Her recent projects focus on specifying factors that create and magnify stereotypes and prejudice, examining their influence on behavior and developing strategies aimed at undermining such biases. These projects have been funded by the National Science Foundation, National Institute of Mental Health and the American Psychological Foundation.

Rachel D. Godsil is the co-founder and research director for the American Values Institute, a national consortium of social scientists, advocates, and law professors focusing on the role of implicit bias in law and policy, as well as the Eleanor Bontecou Professor of Law at Seton Hall University Law School.

She is currently pursuing research projects to determine differential empathy levels toward young men and police officers, media messages to address racialized moments, and the link between stereotype threat and the success of students of color in law. Professor Godsil's recent publications include Implicit Bias in the Courtroom (UCLA Law Review) co-authored with Jerry Kang et al.; Implicit Bias in Environmental Decision Making in Implicit Racial Bias Across the Law (Oxford University Press, 2012), and Implicit Bias Insights as Preconditions to Structural Change, co-authored with john powell. She has written several amicus briefs in cases involving civil rights, including on behalf of the National Parent Teacher Association in the Parents Involved in Community Schools v. Seattle School District litigation at the Supreme Court. She is also the co-editor of Awakening from the Dream: Civil Rights Under Siege and the New Struggle for Equal Justice (Carolina Academic Press, 2005).

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He was born in Philadelphia, PA, and raised in the nearby suburbs. He concentrated in Afro-American Studies at Harvard University and studied Social Psychology at Stanford University before taking his first appointment at The Pennsylvania State University. While there, Dr. Goff created the Africana Research Center's Post-Doctoral Fellowship Program and coordinated it for 2 years before leaving. His research has led him to become an expert in race, policing, and intersectional identity. In that capacity, Dr. Goff has been recruited as an equity researcher and consultant for police departments around the country, a role he continues to play enthusiastically. His work on equity issues in policing has led to foundation of the Consortium for Police Leadership in Equity with Tracie L. Keesee. Goff's research investigates the possibility that contextual explanations play an under-explored role in producing racial inequality. Rather than focusing on racial attitudes that are internal to an individual, his research examines ways in which environmental factors can produce racially disparate outcomes. Through this research, he hopes to expand the scope of what comes to mind when one thinks of the causes and consequences of inequality.

DeLeon L. Gray is an Assistant Professor of Educational Psychology at North Carolina State University.

He has several early career highlights including working in the professional sector at three national organizations that specialize in understanding the science of the mind and human behavior—the National Institutes of Health, the Association for Psychological Science, and the American Institutes for Research. He possesses a command over quantitative analytical approaches with a Master's degree in Quantitative Research, Evaluation, and Measurement. To date, his research program has been recognized with several prestigious honors, including a Spencer Foundation Dissertation Fellowship, a Dissertation Research Fellowship from The Ohio State University, and an AERA Minority Dissertation Fellowship. In addition, the quality of his work has been acknowledged with national awards such as the Research on Socially and Economically Underrepresented Populations Award (RiSE-UP) from the Association for Psychological Science. DeLeon examines the "social triggers" that prompt achievement behavior in diverse educational environments. Specifically, he is intrigued by how students perceive, remember, and interpret information about themselves and others, and how these mental representations facilitate the adoption of the very goals, values, and self-perceptions that determine aptitude. Practically, his research informs discussions on how student patterns of underachievement and emotional turbulence can be disrupted by strategies borne of an understanding of social cognition and motivation.

Connie Cagampang Heller is co-founder of the Linked Fate Salon. The salon offers progressive activists and funders an informal place to think about and discuss movement building strategies with peers across issues and sectors. She serves on the Advisory Board of the Center for Social Inclusion and Americans for American Values, as well as on the Boards of Americans For a Fair Democracy, and World Trust Educational Services.

Jerry Kang is a Professor of Law at UCLA School of Law and also of Asian American Studies. His teaching and research interests include civil procedure, race, and communications. He is also an expert on Asian American communities, and has written about hate crimes, affirmative action, the Japanese American internment and its lessons for the War on Terror.

On communications, Professor Kang has published on the topics of privacy, pervasive computing, mass media policy, and cyber-race (the techno-social construction of race in cyberspace). His work regularly appears in leading journals, such as the UCLA, Stanford, and Harvard Law Reviews. During law school, Professor Kang was a supervising editor of the Harvard Law Review and Special Assistant to Harvard University's Advisory Committee on Free Speech. He joined UCLA in Fall 1995 and was elected Professor of the Year in 1998 and received the Rutter Award for Excellence in Teaching in 2007. At UCLA, he helped found the Concentration for Critical Race Studies, the first program of its kind in American legal education and acted as its founding co-director for two years. During 2003-05, Prof. Kang visited at both Georgetown Law Center and Harvard Law School. Prof. Kang is a member of the American Law Institute, has chaired the American Association of Law School's Section on Defamation and Privacy, serves on the Board of Directors of the Electronic Privacy Information Center, and has received numerous awards including the World Technology Award for Law and the Vice President's "Hammer Award" for Reinventing Government.

john a. powell is an internationally recognized expert in the areas of civil rights and civil liberties and a wide range of issues including race, structural racism, ethnicity, housing, poverty, and democracy. In addition to being a Professor of Law and Professor of African American Studies and Ethnic Studies, Professor powell holds the Robert D. Haas Chancellor's Chair in Equity and Inclusion. He is also the Director of the Haas Diversity Research Center (HDRC), which supports research to generate specific prescriptions for changes in policy and practice that address disparities related to race, ethnicity, gender, sexual orientation, disability, and socioeconomics in California and nationwide. He was recently the Executive Director of the Kirwan Institute for the Study of Race and Ethnicity at The Ohio State University and held the Gregory H. Williams Chair in Civil Rights & Civil Liberties at the Moritz College of Law.

Professor powell has written extensively on a number of issues including structural racism, racial justice and regionalism, concentrated poverty and urban sprawl, opportunity based housing, voting rights, affirmative action in the United States, South Africa and Brazil, racial and ethnic identity, spirituality and social justice, and the needs of citizens in a democratic society.

Previously, Professor powell founded and directed the Institute on Race and Poverty at the University of Minnesota. He also served as Director of Legal Services in Miami, Florida and was National Legal Director of the American Civil Liberties Union where he was instrumental in developing educational adequacy theory.

Professor powell has worked and lived in Africa, where he was a consultant to the governments of Mozambique and South Africa. He has also lived and worked in India and done work in South America and Europe. He is one of the co-founders of the Poverty & Race Research Action Council and serves on the board of several national organizations.

L. Song Richardson is Professor of Law at the University of Iowa College of Law. She received her BA from Harvard College and her JD from The Yale Law School. Professor Richardson's current research utilizes the science of implicit social cognition to study criminal procedure, criminal law and policing. Currently, she is working on a book that examines the legal and moral implications of mind sciences research on policing and criminal procedure. She is also co-editing a book titled The Future of Criminal Justice in America that will be published by Cambridge University Press. Professor Richardson's scholarship has been published by law journals at Cornell University, the University of California, Duke, Iowa, Northwestern University, the University of Minnesota, and Indiana (Bloomington), among others. Her legal career has included partnership at a boutique criminal law firm and work as a state and federal public defender in Seattle, Washington. She was also an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc. Immediately upon graduation from law school, Professor Richardson was a Skadden Arps Public Interest Fellow with the National Immigration Law Center in Los Angeles and the Legal Aid Society's Immigration Unit in Brooklyn, NY. Professor Richardson has been featured in numerous local and national news programs, including 48 Hours. She teaches Criminal Law, Criminal Procedure, and Law and Social Science.

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Her main research programs concern experiences with intergroup contact, identification with social groups, interpretations of intergroup relationships, and responses to prejudice and disadvantage. She has received the Gordon Allport Intergroup Relations Prize from the Society for the Psychological Study of Social Issues for her research on intergroup contact, the Erikson Early Career Award for distinguished research contributions from the International Society of Political Psychology, and the McKeachie Early Career Teaching Award from the Society for the Teaching of Psychology. Dr. Tropp has been a member of the Governing Council of the Society for the Psychological Study of Social Issues, and she currently serves on the editorial boards of Personality and Social Psychology Bulletin and Group Processes and Intergroup Relations. In addition, Dr. Tropp has been engaged in many efforts to integrate contributions from researchers and practitioners to improve intergroup relations. She has collaborated with national organizations to present social science evidence in US Supreme Court cases on racial desegregation, and she has worked on state initiatives designed to improve interracial relations in schools. She is currently a member of the Joint Learning Initiative on Children and Ethnic Diversity (JLICED), an international, interdisciplinary network of researchers, policymakers, and practitioners working to reduce racial and ethnic divisions and build social inclusive communities through effective early childhood education programs.

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The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion

Robert J. Smith & Justin D. Levinson[*]

I. INTRODUCTION

The disproportionate incarceration of minorities is one of the American criminal justice system's most established problems. In spite of a societal backdrop in which descriptive claims of a "post-racial" America prosper, the problematic racial dynamics of criminal justice persist. The numbers are stark and clear: one out of every twenty-nine black adult women and men are currently incarcerated compared with only one out of every 194 whites.[1] But less clear are the causes of these disparities. For decades, scholars have struggled to understand why America prosecutes and incarcerates minorities at such massive rates. Perspectives on this troubling issue cover an incredibly wide range of themes, spanning from racist discussions of "biological differences" to thoughtful considerations of structural racism. A scientific revolution, however, has generated new interest with regard to how upstanding people—including judges, jurors, lawyers, and police—may discriminate without intending to do so. This implicit bias revolution has created new opportunities to empirically investigate how actors within the legal system can perpetuate discrimination in ways that have been—until now—almost impossible to detect.

The topic of implicit racial bias in the legal system is extraordinarily broad, and scholars are beginning to consider how it might illuminate inequality across a range of legal domains.[2] In the criminal law setting, in

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1. JENIFER WARREN, THE PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008 34 tbl.A-6 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (aggregating numbers for all fifty states). For younger adults, the numbers are similarly startling. *See id.* One out of every nine black males between ages twenty and thirty-four are incarcerated. *Id.*

2. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., forthcoming 2012) (considering implicit racial bias across fourteen different legal domains).

particular, there has been noticeable progress. Recent empirical projects have begun the pursuit of assessing how implicit racial bias likely affects police, judicial, and juror decision-making.[3] But scholars have yet to conduct an in-depth examination of how implicit bias might affect one of the most noteworthy parts of the criminal justice system—prosecutorial discretion—and no empirical projects focused on implicit bias have gained access to prosecutors as study participants. The idea that prosecutors might be partially responsible for propagating inequality in the criminal justice system is far from new.[4] Until now, however, it has been difficult to explain in detail why prosecutors—the vast majority of whom would never intend to hold double-standards based on race—might nonetheless be unwitting propagators of bias.

From the arrest of a suspect to the sentencing of a defendant, consider the range of discretion-based decisions that prosecutors must make on a daily basis: Should an arrested citizen be charged with a crime? At what level should bail be recommended? Should bail be opposed? What crime or crimes will be charged? Should charges be dropped? Should a

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3. *See* 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, 1006–09 (2007); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007) [hereinafter Levinson, *Forgotten Racial Equality*]; Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 187–89 (2010) [hereinafter Levinson et al., *Guilty by Implicit Racial Bias*]; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV 1195, 1195–96 (2009).

4. *See* Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2094–106 (2004) (considering the extreme deference given to prosecutors); Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1599–600 (2004) (addressing "unconscious race empathy" that white prosecutors may have with white defendants or white victims); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1819 (1998) (alluding to unconscious biases produced due to similarities between prosecutors and victims); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 140–41 (2003) (proposing that it "[i]s likely that unconscious racism influences a prosecutor even more than it affects others"); Lucy Adams, Comment, *Death by Discretion: Who Decides Who Lives and Dies in the United States of America?*, 32 AM. J. CRIM. L. 381, 389–90 (2005) ("[A] white prosecutor may—consciously or subconsciously—perceive a crime to be more 'outrageously or wantonly vile, horrible, or inhuman' if it is alleged to have been committed against a white victim . . . ." (quoting GA. CODE ANN. § 17-10-30(b)(7) (1994) (footnote omitted))).

We do not claim that implicit racial bias accounts for all of the racial discrepancies in the criminal justice system. Structural racism, for example, may explain some of the disparity. In addition, for some types of crime, differences in offense rates also may help explain part of the variance. *See Homicide Trends in the U.S.*, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/content/homicide/race.cfm (last visited Feb. 3, 2012) (indicating that black Americans represent 52% of the known homicide offenders between 1976 and 2005). It should be noted, however, that both structural racism and implicit bias could account for some or even all of the disproportionality in arrest rates.

plea bargain be offered or negotiated? Which prosecuting attorney will prosecute which alleged crime? What will the trial strategy be? Will minority jurors be challenged for cause or with peremptory challenges? What sentence will be recommended?

This range of discretion offers a starting point with which to investigate how implicit bias might infect the prosecutorial process. Following a long line of scholarship examining the causes of racial disparities in the criminal justice system,[5] this Article argues that implicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways.

The Article is organized as follows: Part II provides an introduction to implicit bias research, orienting readers to the important aspects of implicit bias most relevant to prosecutorial discretion. Part III begins the examination of implicit bias in the daily decisions of prosecutors. The Part presents key prosecutorial discretion points and specifically connects each of them to implicit bias. Part IV recognizes that, despite compelling proof of implicit bias in a range of domains, there is no direct empirical proof of implicit bias in prosecutorial decision-making. It thus calls for an implicit bias research agenda designed to further examine how and when implicit bias affects prosecutorial decision-making, including studies designed to test ways of reducing the harms of these biases. It then begins a necessarily early look at potential remedies for the harms associated with implicit bias in prosecutorial discretion.

II. IMPLICIT BIAS AND ITS RELEVANCE TO PROSECUTORIAL DISCRETION

Implicit racial bias describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways. Since the late 1990s, a vast amount of research on implicit bias has demonstrated that a majority of Americans, for example, harbor negative implicit attitudes toward blacks and other socially disadvantaged groups, associate women with family and men with the workplace, associate Asian-Americans with foreigners, and more.[6] Fur-

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5. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA (2011); James Foreman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, N.Y.U. L. REV. (forthcoming 2012); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

6. *See* Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 447–48 (2005); Thierry Devos & Debbie S. Ma, *Is Kate Winslet More American Than Lucy Liu? The Impact of Construal Processes on the Implicit Ascription of a National Identity*, 47 BRIT. J. SOC. PSYCHOL. 191, 191–92 (2008); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs*

thermore, researchers have found repeatedly that people's implicit biases often defy their awareness and self-reported egalitarian values. In this Part, we begin by summarizing research on implicit racial bias generally,[7] and then provide specific examples of studies that facilitate our consideration of whether prosecutors may make decisions in biased ways. Because we believe that prosecutors' implicit biases manifest in a series of related decisions in which their perceptions of the defendants' dangerousness are paramount (ranging from the decision to charge to sentencing recommendations), we consider implicit bias studies that show that people automatically classify members of certain groups (particularly African-Americans) as dangerous, aggressive, and hostile. We also consider studies that show that when racial stereotypes such as these are active, people unintentionally make decisions in biased ways. These studies will set the stage for a step-by-step consideration of the points in time at which prosecutors might be unwittingly influenced by implicit bias.

A. Priming: The Automatic Activation of Stereotype Networks

"Priming" is a cognitive phenomenon that reveals how exposing people to photos, symbolic representations, or members of stereotyped groups activates a vast network of stereotypes about that group. Psychologists define priming as "the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context."[8] In the context of prosecutorial decision-making, priming might explain how, even with only minimal contact with an arrestee (such as seeing the arrestee's name, racial or ethnic classification, or photograph), racial stereotypes can be immediately and automatically activated in the mind of a prosecutor, without the prosecutor's awareness.

Racial and ethnic stereotypes can be primed easily. A study by Daniel Gilbert and Gregory Hixon demonstrated that simply seeing a person from a stereotyped group can activate stereotypes related to that

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from a Demonstration Website, 6 GROUP DYNAMICS 101, 101–02 (2002) (reporting results from 600,000 IATs on a popular online website). Much of this Part's description of implicit bias is based on Justin D. Levinson, *SuperBias: The Collision of Behavioral Economics and Implicit Social Cognition*, AKRON L. REV. (forthcoming 2012). Some of the descriptions of implicit bias, including study summaries and footnotes, are reproduced sometimes verbatim from that article.

7. Our goal is to provide a focused discussion of implicit racial bias as it relates to prosecutorial discretion. We therefore do not provide a full review of implicit bias scholarship. Other articles have provided broader reviews of implicit bias more generally. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 2; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007); Levinson, *Forgotten Racial Equality*, *supra* note 3.

8. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996).

group. Participants in the study were asked to complete a videotaped word fragment task presented by a research assistant holding cue cards.[9] Half of the participants watched a video featuring an Asian research assistant, and half watched a video featuring a Caucasian research assistant.[10] In each condition, the research assistant held the cards containing fragments that could be completed with either neutral words or with words stereotypic of Asians.[11] For each fragment, participants completed as many words as possible in fifteen seconds. The researchers found that simply seeing an Asian research assistant activated participants' ethnic stereotypes.[12] Participants who saw an Asian research assistant completed more stereotype-consistent words than participants who saw a Caucasian assistant.[13] This study shows how easily racial or ethnic stereotypes can be activated; simply seeing a person from a certain group can awaken harmful stereotypes.

Studies show that priming specifically activates the stereotype of the dangerous black male. Researchers Laurie Rudman and Matthew Lee, for example, primed participants by playing either pop music or rap music.[14] They hypothesized first that simply hearing rap music would activate participants' racial stereotypes, and second that these primed stereotypes would cause people to make more negative judgments about a black person.[15] The results of the study confirmed these predictions. Participants who listened to the rap music not only had their stereotypes activated but also rated a black person's behavior as less intelligent and more hostile than participants who listed to popular music.[16] It should be noted that asking participants about their own prejudices did not predict their judgments of the black person—a finding that supports the theory that stereotypes can affect decision-making even absent a person's endorsement or awareness.[17]

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9. Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 510 (1991). As Gilbert and Hixon point out, "Stereotypes are forms of information and, as such, are thought to be stored in memory in a dormant state until they are activated for use." *Id.* at 511.

10. *Id.* at 512.

11. For example, participants saw the fragments: "RI_E," "POLI_E," "S_ORT," and "S_Y." *Id.* at 510.

12. *Id.* at 513–14.

13. For example, they wrote: RICE, POLITE, SHORT, and SHY. *Id.*

14. Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 136–39 (2002). On average, participants listened to the music for thirteen minutes. *Id.* at 136. Participants were led to believe that they were participating in a marketing study. *Id.* at 135.

15. *Id.*

16. *Id.* at 139. This result was compared to participants who read about and rated a white person. *Id.* at 136.

17. *Id.* at 145.

Other researchers have shown how even subliminal priming techniques can activate a range of negative stereotypes about African-Americans. In one of the most well-known studies of subliminal priming and race, Patricia Devine showed participants rapidly flashing words, including stereotypes, that were associated with African-Americans, including "Blacks," "Harlem," "poor," and "athletic."[18] Participants then were asked to read a story about a person engaging in hostile behaviors that were designed to be somewhat ambiguous, such as demanding money back from a store clerk, and asked to make judgments about the person engaging in these behaviors. The results of the study confirmed the dangers of priming racial stereotypes. Participants who were primed with more of the African-American stereotyped words judged the actor's ambiguous behavior as more hostile than participants who were primed with fewer of the stereotyped words. Devine concluded, "[T]he automatic activation of the racial stereotype affects the encoding and interpretation of ambiguously hostile behaviors for both high- and low-prejudice subjects."[19]

Stereotypes can thus be activated by seeing a member of a stereotyped group, by hearing a certain type of music, or by being exposed to stereotype-consistent words. In the trial context, studies related to priming have found that even simply showing mock jurors a photograph of a dark-skinned suspect can activate harmful racial stereotypes and affect decision-making.[20] Justin Levinson and Danielle Young, for example, showed mock juror participants a series of photographs of a crime scene, including one security camera photo that showed a masked suspect robbing the store.[21] In the photo, the suspect, who was holding a gun, was dressed such that the only racially identifying information was the skin of his forearm. Half of the participants saw the photo showing the suspect with dark skin, and the other half of the participants saw a photo of the suspect with lighter skin. Despite the obvious legal irrelevance of the suspect's skin color to the evidence, Levinson and Young found that the skin tone of the perpetrator in the photo affected the way participants

18. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 9, 10 (1989).

19. *Id.* at 11.

20. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 310 (2010); *see also* Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How "Legal Priming" Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059, 1059–62 (2005) (finding that simply informing study participants that they were jurors in a criminal trial caused them to make harsher behavioral and mental state attributions of out-group members).

21. Levinson & Young, *supra* note 20, at 337.

judged trial evidence and rated the defendant's guilt on a guilty/not-guilty scale.[22]

More specifically, mock jurors who saw the darker-skinned perpetrator found the same ambiguous evidence as more likely to indicate guilt, compared to mock jurors who saw the photo of the lighter-skinned perpetrator. Another study by Levinson found that simply changing the name and race of a suspect caused participants to remember case-relevant information in racially biased ways.[23] That is, participants who read about an African-American participant in a fight were more likely to remember that person's aggressive actions than those who read about a white fight participant. Furthermore, in some instances participants even "misremembered" certain facts—falsely recalling aggressive things the perpetrator had actually not done—in racially biased ways.[24] These studies show how simple situational cues, such as even brief exposure to racial information, can activate a vast network of racial stereotypes and affect decision-making in concerning ways. It would be expected, then, that when prosecutors work on cases involving members of stereotyped groups, stereotypes regarding these group members are automatically activated.

B. The Implicit Association Test

In addition to the obvious relevance of research on priming to prosecutorial discretion, other research in the field of implicit social cognition helps illustrate how implicit biases might operate to affect prosecutors' decisions. The development of the Implicit Association Test (IAT), for example, revolutionized the way the world looked at and understood implicit bias.[25] Perhaps because its Web accessibility allows people to test (and attempt to overcome) their biases first hand, the IAT has served as a compelling and sometimes controversial symbol of implicit bias.[26] In the IAT,

22. *Id.*

23. Levinson, *Forgotten Racial Equality*, *supra* note 3, at 350.

24. *Id.* at 400–01.

25. Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 123 (Henry L. Roediger III et al. eds., 2001); Greenwald et al., *supra* note 6, at 1464.

26. Several legal scholars have debated the best uses of the IAT, focusing on such issues as the meaning of reaction times as well as the question of whether IAT scores can predict behavior, known as predictive validity. *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479 (2007); Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087, 1130–31 (2008); Lane et al., *supra* note 7, at 430; Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1028, 1032–33 (2006);

> Participants sit at a computer and are asked to pair an attitude object (for example, black or white, man or woman, fat or thin) with either an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts) by pressing a response key as quickly as they can. For instance, in one task, participants are told to quickly pair pictures of African American faces with positive words from the evaluative dimension. In a second task, participants are obliged to pair African American faces with negative words. The difference in the speed at which the participants can perform the two tasks is interpreted as the strength of the attitude (or, in the case of attributes, the strength of the stereotype). For example, if participants perform the first task faster than the second task, they are showing implicitly positive attitudes toward blacks. Similarly, if they are faster to perform tasks that oblige categorizing women with home than tasks that oblige categorizing women with career, they are showing implicit sex stereotyping.[27]

Nilanjana Dasgupta and Anthony Greenwald explain why the speed of association is important: "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."[28] Laurie Rudman and Richard Ashmore similarly describe the IAT's methodology as relying on "well-practiced associations between objects and attributes."[29]

Researchers who employ the IAT have found that the majority of tested Americans harbor negative implicit attitudes and stereotypes toward blacks, dark-skinned people, the elderly, and overweight people, among others.[30] For example, with regard to race, people consistently implicitly associate black with negative attitudes such as *bad* and *unpleasant*, and with negative stereotypes such as *aggressive* and *lazy*.[31]

Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737, 737 (2009).

27. Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 2, at 9, 16–17 [hereinafter Levinson et al., *Social Science Overview*].

28. 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).

29. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 359 (2007).

30. Nosek et al., *supra* note 6, at 101.

31. Rudman & Ashmore, *supra* note 29, at 361.

With regard to gender, for example, Americans tend to associate men with *career* and women with *home*.[32]

To legal scholars, the IAT has become a symbol of implicit bias.[33] There are two primary reasons for the compelling nature of the measure. First, research has shown consistently that people's implicit biases frequently diverge from their self-reported attitudes, a phenomenon known as dissociation.[34] Thus, people who view themselves as having favorable attitudes toward certain groups may be surprised to learn that this explicit favorability is not reflected in their own implicit cognitions. This fact would likely be relevant in the context of prosecutors, as we would predict that most prosecutors report their racial attitudes to be egalitarian.

Second, the IAT's popularity among scholars as a symbol of inequality may be traced to its success in predicting the way people make decisions. That is, the simple methodology of the IAT has shown how implicit bias leads to important real-world consequences, ranging from doctors' medical treatment decisions to human resource officers' decisions on whether to offer an interview to a job candidate.[35] In the case of prosecutors, we are primarily interested in whether prosecutors' implicit

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32. *See* Nosek et al., *supra* note 6, at 101; *see also* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 1 (2010) (finding that law students display this particular implicit bias as well as an implicit association between men and judges, and women and paralegals).

33. Numerous scholars have discussed implicit racial bias and the IAT. *See, e.g.*, Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 365–66 (2009) (suggesting that hate speech may lead to implicit bias); Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 658 (2007) (claiming that racial profiling relies on cognitive processes that harbor implicit biases); Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1445–54 (2008) (considering the relational aspects of implicit bias in the workplace); Jonathan Kahn, *Race, Genes, and Justice: A Call to Reform the Presentation of Forensic DNA Evidence in Criminal Trials*, 74 BROOK. L. REV. 325, 373 (2008) (discussing the results of IATs in the context of forensic DNA evidence); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 479 (2008) (discussing implicit bias in the context of sexual orientation bias); Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 41–46 (2009) (discussing implicit bias in the context of prisoners' rights); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 74–77 (2009) (predicting that implicit bias leads to housing discrimination against illegal immigrants); Gregory S. Parks & Quinetta M. Roberson, *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination through the Lens of Title VII*, 20 HASTINGS WOMEN'S L.J. 3, 19–34 (2009) (considering race- and gender-based implicit bias in politics and in the workplace); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 507 (2007) (noting that implicit bias may affect housing rentals more than employment decisions).

34. *See* Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meanings and Use*, 54 ANN. REV. PSYCHOL. 297, 303 (2003); Kang, *supra* note 7, at 1513; *see also* Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUST. RES. 129, 133 (2004).

35. *See* Siri Carpenter, *Buried Prejudice*, SCI. AM. MIND, Apr./May 2008, at 32– 33.

biases will lead to biased decision-making. Although no studies have yet tested whether implicit biases affect prosecutorial decisions, similar research in nonlegal professions has shown that implicit biases predict important decisions in concerning ways.

For example, medical researchers found that when asked to diagnose and treat a hypothetical patient (who was pictured as either black or white), emergency room doctors in Boston and Atlanta relied on their implicit racial biases.[36] Doctors who showed more bias in the black–white IATs were more likely to offer a preferred heart treatment to a white patient than a black patient.[37] Similarly striking research emerged in Sweden where Dan-Olof Rooth replied to hundreds of job postings by submitting resumes that differed only in the ethnicity revealed by the applicant's name.[38] Rooth measured which resumes elicited invitations to interview and subsequently tracked down the individual human resources officers responsible for making the interviewing decisions. Without knowing the true purpose of the study, the human resources officers completed an IAT. The researcher was able to measure the relationship between the officers' IAT scores and their previous decisions of whether to interview a candidate.[39] He found that the greater the human resources officers' implicit bias, the more likely those officers were to extend an interview to a non-Arab candidate. Other studies, including a meta-analysis of over 100 IATs, confirm that implicit bias on the IAT indeed predicts the way people make decisions in the real world.[40]

Few IATs have been conducted in the legal setting, but the ones that have tend to show that implicit racial biases are powerful and have broad effects.[41] A study by Levinson, Young, and Huajian Cai, for ex-

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36. Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1231 (2007).

37. *Id.* at 1235. Specifically, the doctors were asked to recommend a course of treatment for the patient and were then asked to complete three IATs testing their implicit racial biases. *Id.* at 1233. The study showed that doctors not only implicitly preferred white patients to black patients but also that their implicit racial biases predicted whether or not they would recommend thrombolysis (clot busting) treatment to a white or black patient suffering from myocardial infarction. *Id.* at 1234–35. The more the doctors implicitly preferred the white patients, the more likely they were to recommend thrombolysis treatment to white but not black patients. *Id.* at 1235. No similar predictive validity was found by asking doctors about their explicit racial preferences. *Id.* at 1233. On average, doctors self-reported no racial preferences at all. *Id.*

38. Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence* (Inst. for the Study of Labor, University of Kalmar, Discussion Paper No. 2764), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984432.

39. *Id.* at 9–11.

40. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 32 (2009).

41. *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1542 (2004) (finding implicit racial bias among capital defense attorneys); Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblind-*

ample, tested implicit associations relating to the presumption of innocence and found that people hold implicit associations between *black* and *guilty*.[42] Using an IAT created specifically to examine the implicit connections of the presumption of innocence, as well as a traditional IAT measuring implicit racial attitudes, the researchers also showed that IAT scores predicted the way in which participants evaluated ambiguous trial evidence.[43]

Considered together, over a decade of research on implicit racial bias shows that racial stereotypes can be activated easily and can lead to powerful and biased decision-making. In the case of prosecutorial decision-making, there is significant reason to be concerned that implicit biases could similarly lead to discriminatory results. The next Part pursues this possibility by deconstructing prosecutorial decision-making and considering the various ways that implicit racial bias could challenge the integrity of the current prosecutorial system.

III. Implicit Racial Bias Can Operate in Every Phase of Prosecutorial Discretion

Prosecutors enjoy more unreviewable discretion than any other actor in the criminal justice system.[44] In this Part, we analyze this vast discretion by first isolating its various component parts and then exploring how implicit racial bias can operate in each phase of prosecutorial discretion.[45] We focus on three primary areas: (1) charging decisions, including both the decision of whether to charge and the decision of what crime to charge; (2) pretrial strategy, such as the decisions to oppose bail, offer a plea bargain, or disclose potentially exculpatory evidence to the defense; and (3) trial strategy, such as the decision to strike potential jurors or to analogize the defendant to an animal during closing arguments.

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ness, 7 J. Empirical Legis. Stud. 886 (2010) (finding that implicit stereotypes about the ethnicity of successful litigators predicted judgments of litigator performance); Rachlinski et al., *supra* note 3, at 1195–96 (finding that judges possess implicit biases favoring whites over blacks, and these biases sometimes predicted a judge's decisions).

42. Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 3, at 206.

43. *Id.*

44. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 960 (2009).

45. For a discussion of the possible impact of implicit racial bias on other actors in the criminal justice system, see Charles Ogletree, Robert J. Smith & Johanna Wald, *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* Implicit Racial Bias Across the Law, *supra* note 2, at 45, 50–60.

A. Charging Decisions

The first decision that a prosecutor makes in most criminal cases is whether to charge the suspect, and if so, with what charge.[46] In some cases the decision involves whether to charge the suspect at all. This power is an expression of mercy—holding back the legitimate power of the State. But as the United States Supreme Court noted in *McCleskey v. Kemp*, "[T]he power to be lenient [also] is the power to discriminate."[47] Empirical studies confirm that the Court's observation has played out; prosecutors are less likely to charge white suspects than black suspects.[48] These findings are true even when statistically controlled for prior criminal record.[49] Faced with such discrepancies in charging decisions, the question becomes: If two suspects with substantially similar backgrounds are arrested for identical crimes in the same jurisdiction, how can the suspect's race possibly matter? One possibility is that implicit bias is at play.

1. Charge or Release?

In order to understand the role that implicit racial bias might play in a decision of whether to charge a suspect with a crime, consider an ambiguous case of self-defense.[50] Imagine two homicide cases with identi-

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46. In federal cases, and in a minority of states, the prosecutor's charging decision must be approved by a grand jury. This process, however, usually consists of little more than "rubber stamping" prosecutorial charging decisions. *See* Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication*, 78 MICH. L. REV. 463, 474 (1980) (indicating that grand juries rarely serve as a check against the charging decisions of prosecutors).

47. McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (internal citation omitted); *see also* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 35 (1998) ("A prosecutor may unconsciously consider a case involving a white victim as more serious than a case involving a black victim. This unconscious view may influence not only the charging decision, but related decisions as well." (internal citations omitted)); Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 475 (2009) ("In the Jena Six case it can be argued that the prosecutor is capable of compassion in that he chose not to prosecute the white students who placed nooses on the schoolyard tree.").

48. Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 647 (2012) [hereinafter *Task Force Report*] ("[E]ven after legally relevant factors . . . are taken into account," racial differences affect how cases are processed: whites are less likely to have charges filed against them. (citing Robert D. Crutchfield, *Ethnicity, Labor Markets, and Crime*, *in* ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND SPACE (Darnell Hawkins ed., 1995))). Similarly, prosecutors have been shown to charge white and black defendants differently in homicide cases. *See* Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 587 (1985) (finding that the race of the defendant and victim mattered in charging decisions in Florida).

49. Radelet & Pierce, *supra* note 48, at 591.

50. This phenomenon is not limited to the self-defense context. For one particularly powerful example, consider the following story from a former United States Attorney:

cal facts except the race of the victim: one is black and the other is white. The suspect in each case claims self-defense, specifically alleging that he accidently bumped into the deceased outside of a bar at night, at which point the deceased warned, "You better watch yourself, or you're going to get yours." The suspect contends that the deceased then reached toward his waist and began to pull out a shiny object. The suspect, thinking the deceased was reaching for a weapon, fired his own handgun in what turned out to be a fatal shot. No gun was located near the victim's body, but police found a silver cell phone several feet from the deceased.

Prosecutors must assess the strength of a potential self-defense claim to determine whether they should bring charges at all, and if so, whether to offer a plea to manslaughter or another less serious charge. Assessing the strength of a possible self-defense claim requires an instinctual judgment: did the suspect reasonably believe that the deceased was reaching for a weapon? Recall our discussion of research indicating that Americans implicitly associate black citizens with aggression and hostility. Additional empirical research shows that people specifically associate blacks with guns and other weapons. For example, thousands of IATs taken online over the years have confirmed that the vast majority of Americans implicitly associate blacks with weapons and whites with harmless objects.[51] Other studies using priming methodology support this finding. Keith Payne, for example, found that when participants viewed rapidly flashing photos of black faces immediately before seeing photos of guns, they were significantly faster at identifying the guns than after being primed by white faces.[52] Applying this research to the scenario

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> I had an [Assistant U.S. Attorney who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, "Why do you want to drop the gun offense?" and he said, "He is a rural guy who grew up on a farm. The gun he had with him was a rifle. He is a good ol' boy, and all the good ol' boys have rifles, and it's not like he was a gun-toting drug dealer." But he [was] a gun-toting drug dealer, exactly.

JAMES E. JOHNSON ET AL., BRENNAN CTR. FOR JUSTICE, RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 11 (2010), http://www.brennancenter.org/page/-/Justice/ProsecutorialDiscretion_report.pdf?nocdn=1.

51. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes,* 18 EUR. REV. SOC. PSYCHOL. 36, 55 (2007). We do not intend to suggest that implicit racial biases operate to the detriment of only black minorities. We focus on black Americans primarily, however, because research from the implicit bias literature is most robust in this area. We hope this work will be expanded to include a better understanding of the effects of implicit biases on all negatively stereotyped groups.

52. B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). Similarly, when participants saw photos of white faces immediately before photos of tools, they were significantly faster at identifying the tools. *Id.* at 185. Interested in similar real-world applications of implicit bias and the association with weapons found by other researchers, Joshua Correll created a videogame-like study designed to test a phenomenon called, "Shooter Bias." Joshua Correll et al.,

above, one could predict that a person perceived to be hostile and implicitly associated with weapons—a black person—would be perceived by prosecutors as likely reaching for a weapon.

The research, especially IAT findings that people implicitly dissociate whites and weapons, also suggests that prosecutors might be more likely to believe that the white victim was reaching for his cell phone, and thus, that the suspect acted unreasonably in shooting the deceased. So, switch the facts and assume that both victims are white. If suspect one is black, because Americans associate black citizens with hostility and aggression, then the prosecutor might be inclined to believe that the black suspect acted too quickly in shooting the unarmed man, while the same prosecutor might be inclined to believe that the white suspect—not only unencumbered by these negative associations but also bolstered by positive stereotypes such as lawful, trustworthy, and successful[53]—acted reasonably in discharging his weapon. Of course, these dynamics would be amplified in a cross-racial shooting because stereotypes affect the evaluation of both the suspect's and the victim's behavior. A white victim would be more likely to be perceived as reaching for a cell phone, and a black victim would be more likely to be perceived as reacting unreasonably in discharging his weapon.

Implicit racial bias might also affect prosecutorial discretion in the charging decision in a non-self-defense scenario. Consider a case in which the prosecutor must decide whether to charge a suspect with forcible rape. According to the suspect, after a romantic dinner and a movie, the complaining witness invited him back to her house. They entered her bedroom. The complaining witness grabbed his crotch area and started kissing him. He directed her onto the bed and began taking off her (and

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The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314–15, 1322 (2002) [hereinafter Correll et al., *Police Officer's Dilemma*]. The "game" displays a series of photos of white and black suspects and pairs each individual suspect with either a gun or an innocuous object (such as a cell phone). *Id.* at 1315. Study participants play the game by looking at the suspects as they appear on the screen and then determining (as fast as possible), based upon whether the suspects are holding a gun or not, whether or not to shoot. *Id.* They are instructed to shoot armed suspects as fast as possible, and not shoot (by hitting a safety button) unarmed suspects as fast as possible. *Id.* at 1315–16. Similar to the IAT, the researcher in this study measures the participants' reaction time in milliseconds as well as the number of errors they make in shooting or not shooting suspects. *Id.* at 1317. The results of the study consistently show that the vast majority of participants shoot armed black suspects faster than armed white suspects, and even more concerning, make errors in a systematic way by shooting more unarmed black suspects than unarmed white suspects. *Id.* at 1318; *see also* Joshua Correll et al., *Event-Related Potentials and The Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 120, 122 (2006) (finding that shooter bias is related to the activation of fear in participants' brains).

53. These are words that are often used in a black–white stereotype IAT. *See* Rudman & Ashmore, *supra* note 29, at 361.

then his) clothes and began having intercourse. After roughly one minute, she slapped his face. Taking this as a sign of sexual play, he slapped her back. After roughly another minute, he saw tears rolling down her face, immediately stopped having intercourse and asked her, "What's wrong?"

The witness tells a different story. She contends that the suspect closed the door after they entered the bedroom. He approached her quickly as though he was going to shove her against the door. She put up her hand in a defensive posture and struck him in the crotch area. He began kissing her. At first she tried to pull away, but then she "just sort of stopped resisting." He shoved her onto the bed and began taking off her (and then his) clothes. She said it "all happened so quickly" that she didn't know what was happening and felt like she was in "shock." She slapped his face as hard as she could muster. He then slapped her across the face with such force that she thought "my jaw had shattered." She began to sob. After a pause, he asked her, "What is wrong?" and then rolled off from on top of her. She began to sob very loudly. How does the prosecutor evaluate whether to charge this crime as a rape or consider the conduct to represent a reasonable mistake?

As prosecutors process the contested facts of the case, they cannot help but consider both the rape suspect and the complaining witness. Regarding the race of the suspect, research confirms that people associate the crime of rape with black perpetrators. A study by Jeanine Skorinko and Barbara Spellman found that when asked to identify societal conceptions of criminals for certain crimes, participants overwhelmingly selected black perpetrators as being associated with the crime of rape.[54] After reading the competing statements of the suspect and the complaining witness, and seeing the mug shot of the suspect, a black male, prosecutors might implicitly associate *black male* with sexual aggression and insatiability, and even, as the research suggests, specifically with the crime of rape.[55] It is not that the prosecutors consciously think about the black suspect and purposefully decide that black males are rapists. Rather, the associations are automatic; the prosecutors might "sense" aggression in the interaction or might have an instinctual reaction that the suspect is an incorrigible offender, but those thoughts are not necessarily

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54. Jeanine L. Skorinko & Barbara A. Spellman, Speech at the 1st Annual Conference on Empirical Legal Studies: Stereotypic Crimes: How Group-Crime Associations Affect Memory and (Sometimes) Verdicts and Sentencing 19 (Oct. 27, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917761.

55. *See* Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 251 (2007) ("Research shows black males have been characterized traditionally as hypersexual, 'lascivious, sexual monsters who preyed upon white women.'" (citation omitted)).

consciously linked to race. And, again, it matters who the complaining witness is too. White women historically have been portrayed as pure and sexually modest. Black women, by contrast, are stereotyped as promiscuous and seductive.[56] If the complainant in a rape case is a black woman, the prosecutor might implicitly associate the victim with such stereotypes and unintentionally devalue the accusation.

2. Determining What Crime to Charge

In other cases, the question is what crime to charge. The American Bar Association's Standards for the Prosecutorial Function lists the following factors among those for the prosecutor to consider in making the charging decision: What motives did the accused possess? Is the offense proportionate to the potential punishment? What is "the extent of the harm caused by the offense"?[57] Each of these guideposts requires highly subjective decision-making. Evidentiary assessments in these contexts are not as simple as determining whether a gun was fired. Consider a scenario in which a prosecutor must choose between charging a suspect with simple drug possession or possession with intent to distribute. Imagine two suspects are arrested, both possessing the same quantity of drugs—one suspect is black, one is white. Stereotypes related to drug using versus drug dealing become relevant, and any implicit associations that prosecutors might have regarding race and the particular crimes can affect the charge rendered. If we assume that prosecutors hold similar stereotypes as the rest of us (and there is little reason to believe otherwise)[58] then it becomes clear how when a prosecutor sees a young black male with drugs, the association between young black male and drug dealer[59] can affect the evaluation of whether this particular person intended to sell the drugs or to consume them for personal use.[60]

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56. *Id*. ("[B]lack female rape victims are either ignored by the media altogether or portrayed as 'loose, promiscuous, oversexed, whorish women.'" (citation omitted)).

57. A.B.A. CRIMINAL JUSTICE SECTION STANDARDS: PROSECUTION FUNCTION §§ 3-3.9(b)(iv), (iii), (ii) (1992), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html.

58. *See, e.g.*, JOHNSON ET AL., *supra* note 50; Levinson et al., *Social Science Overview*, *supra* note 27, at 9–12.

59. Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 446 (2005) (noting that the stereotypical representation of a dangerous drug dealer overlaps with the stereotypical characteristics of black Americans).

60. Supporting this argument, there is evidence of significant gaps between actual drug dealing rates and the arrest rates from drug dealing. *See* Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 121 (2008) (examining statistics from Seattle, Washington, and finding that although the majority of drug dealers were found to be white, 64% of drug dealing arrestees were black).

Another charging decision that illustrates how implicit racial bias might infect prosecutorial decision-making involves the decision to charge juvenile suspects (those under the age of eighteen) in adult court as opposed to juvenile court. The differences between juvenile and adult proceedings are drastic. Although the goal of adult court is to punish the offender, the goal of juvenile court centers on the well-being of the juvenile delinquent.[61] Moreover, while in most jurisdictions a juvenile charged with a serious offense in juvenile court faces detention until his twenty-first birthday (or five years after the commission of the crime, whichever is longer),[62] the same juvenile charged in adult court could face decades of (or, in the most serious cases, life) imprisonment.

Several criteria guide the decision to transfer a juvenile into adult court, including: "The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living";[63] "[t]he seriousness of the alleged offense";[64] "[w]hether the alleged offense was committed in an aggressive, violent, premeditated or willful manner";[65] and "[t]he prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile."[66] In order to get a sense of the various ways in which implicit racial bias can operate in the decision to transfer a juvenile to adult court, once again consider the stereotype that black Americans are more aggressive and hostile than their white counterparts. When prosecutors assess "the seriousness of the alleged offense" or whether the offense was committed in an "aggressive or violent" manner, they assess the facts not in a vacuum but in relation to the offender. Similarly, when prosecutors evaluate the juvenile's "home, environmental situation, emotional attitude and pattern of living," stereotypes of Latino families living in crowded and squalid conditions may affect the prosecutors' judgments. Thus, given the broad discretion of prosecutors and the close connection between the legal standards and racial and ethnic stereotypes, it is likely that two identical charges can end up in different courts (juvenile versus adult) despite substantially similar facts.

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61. Administrative Office of the Courts of Georgia, *Juvenile Courts*, GEORGIACOURTS.GOV, http://www.georgiacourts.gov/index.php?option=com_content&view=article&id=169&Itemid=0 (last visited Feb. 6, 2012) ("The purpose of our Juvenile Courts is to protect the well-being of children, provide guidance and control conducive to child welfare and the best interests of the state, and secure care for children removed from their homes.").

62. *Id.*

63. Kent v. United States, 383 U.S. 541 app. at 566–67 (1966) (listing factors to be considered in deciding whether to transfer a case to adult court).

64. *Id.* app. at 566.

65. *Id.* app. at 567.

66. *Id.*

Imagine a sixteen-year-old youth who steals a candy bar from a convenience store, the store clerk struggles to restrain the juvenile before he exits the store, and the juvenile punches the clerk in the face, rendering him unconscious. Did the juvenile strike the store clerk because it was the only way he could get free and avoid apprehension? Did the juvenile just panic? Or is the juvenile the type of person who will react violently at the drop of a dime*?* If the juvenile is black, the prosecutor assessing the facts of this case might be primed by the picture of the juvenile, the notation that he is black, or even the recognition of a stereotypically black name that triggers associations between the black juvenile and the concepts of aggression and hostility.[67] The activation of these negative constructs can translate into a sense that the crime (or the offender) is more aggressive or violent than would be the case if the prosecutor assessed the facts of the case in a truly race-neutral manner. This implicitly biased evaluation process has been documented in juvenile probation officers and police officer participants. Sandra Graham and Brian Lowery, for example, found that when these participants were subliminally primed with words related to the category black, they judged an adolescent's behavior as more dispositional, of greater culpability, and more likely to lead to recidivism.[68]

Consistent with these startling results, research from the field suggests that decision-makers in fact possess the perception that misbehavior by black youth is more dispositional than misbehavior by white youth. Analyzing official court assessments of juvenile offenders, George Bridges and Sara Steen found that officials "consistently portray black youths differently than white youths in their written court reports, more frequently attributing blacks' delinquency to negative attitudinal and personality traits."[69] Just as in Graham and Lowery's study, the researchers found that perceived "negative internal attributes" that the black children possessed outweighed even characteristics such as the seriousness of the offense and prior criminality.[70]

The operation of implicit racial bias on the charging decisions of prosecutors can even mean the difference between life and death. For

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67. In addition to the stereotypes that apply to black citizens, and especially black males, there is some evidence of powerful stereotypes that apply uniquely to black youth. *See, e.g.*, Rashmi Goel, *Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender*, 27 LAW & INEQUALITY 1, 39 (2009) (referencing "the stereotype of the 'big Black kid' as bestial, uncontrollable, and aggressive" (citation omitted)).

68. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 483 (2004).

69. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 567 (1998).

70. *Id.*

offenses eligible for capital punishment, the decision to prosecute also includes whether to seek the death penalty. If prosecutors decide to prosecute for capital punishment, they need to choose which aggravating factor(s) (those elements which elevate ordinary first-degree murder to a murder that is eligible for a possible death sentence) to allege.[71] For example, prosecutors could assert that this particular murderer deserved the death penalty relative to the average murderer because he is a "future danger" to society.[72] All murderers have, by definition, purposefully taken a human life. But how do prosecutors decide which murderers are among the most likely murderers to represent a future danger to society? The decision requires prosecutors to make a highly subjective predictive determination and thus a determination prone to bias. When prosecutors evaluate the capitally accused suspect, whom do they see? As we have explained, the mere activation of a racial stereotype has been shown to lead to harsher attributions of criminal disposition and hostility, even in ambiguous situations. In the case of a black defendant, particularly one who possesses more Afrocentric features, these same negative stereotypes of a hostile black defendant could, in turn, influence whether the prosecutor views the defendant as a future danger.[73]

Thus, whether the charging decision involves the prosecution of a forcible rape case, the decision to charge a drug crime as either simple possession or possession with the intent to distribute, or even whether to seek the death penalty against a particular defendant, the discretion enclosed in each of these moments of prosecutorial decision-making permits the operation of implicit racial bias in the criminal justice system.

B. Pretrial Strategy

1. Bail Determinations

Once a charging decision has been made, prosecutors must determine whether to oppose bail and, if not, how high of a bail to recom-

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71. For a fuller exploration of this phenomenon, see Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 2, at 229, 231–43.

72. *See, e.g.*, Buck v. Thaler, 132 S. Ct. 32, 35–36 (2011) (Sotomayor, J., dissenting from denial of certiorari) ("[T]he [Texas] prosecutor [in a capital murder case] said: 'you have determined that . . . the race factor, black, increases the future dangerousness [of the defendant] . . . . [The expert] answered, 'yes.'").

73. Indeed, research shows that there is a relationship between death sentences and the stereotypically black appearance of defendants. *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006). Other research confirms the effect of stereotypically black appearances in criminal decision-making. *See* Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 674 (2004).

mend. There is empirical evidence to suggest that, at least in some jurisdictions, minority defendants receive less favorable pretrial detention determinations than their white counterparts.[74] Similar to a prosecutor's decision to charge, this finding might be partially driven by implicit racial attitudes and stereotypes. In the bail context, in addition to the stereotype of the black defendant as hostile and prone to criminality,[75] which itself could lead to inflated bail requests, implicit racial bias might also operate through a functionally distinct mechanism—namely, the implicit devaluation of the defendant. One major factor in all bail determinations is the strength of the defendant's ties to the community, including employment situation. Here, the assumption is that if a defendant has a good job and a solid connection with the community, then the defendant will be less likely to flee.

As studies such as stereotype IATs repeatedly demonstrate, black Americans are stereotyped as being less intelligent, lazier, and less trustworthy than white Americans.[76] If a prosecutor is primed with a picture of the black defendant as she reviews the case file prior to the bail hearing, these negative work- and character-related stereotypes might cause the prosecutor to view the black defendant's work history and community connection with more skepticism than a similar background provided by a white defendant's background.[77] On the other hand, a white prosecutor might view a similarly situated white defendant with positive implicit attitudes and stereotypes activated. These stereotypes might lead to the judgment that a hard-working and intelligent white defendant has a

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74. *Task Force Report*, *supra* note 48, at 628 ("Disparate treatment has been discovered in the context of pretrial release decisions, which systematically disfavor minority defendants."); *see also* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 987 (1994) (finding that black and male Hispanic defendants in New Haven, Connecticut appeared to be given bail at unjustifiably high amounts).

75. The pretrial bail context is analogous in many respects to posttrial sentencing, a topic that we do not discuss in depth in this Article. After a jury convicts the defendant, the prosecutor must decide what sentence to recommend to the trial judge. *See Task Force Report*, *supra* note 48, at 647. Here, too, there is evidence to suggest racially disparate outcomes. *Id.* In Washington State, for example, black defendants in felony drug cases are roughly two-thirds more likely than comparable white defendants to receive a prison sentence. *Id.* at 648. The role of implicit racial bias on the operation of prosecutorial discretion might inform these disparities too. Studies suggest that prosecutors recommend harsher sentences for black defendants. *Id.* at 647. The implicit connection between black citizens and hostility, dangerousness, and criminality can operate in the sentencing recommendation context just as it operates to influence the amount of bail the prosecutor recommends for a suspect pretrial. *See id.* at 650.

76. *See, e.g.*, Rudman & Ashmore, *supra* note 29, at 361.

77. Of course, in some circumstances, this employment-related stereotype, as well as others, might reflect reality. For example, there is evidence that black Americans are disproportionately poor and have lower employment rates. There is, however, evidence that implicit bias can lead to such results. *See, e.g.*, Rooth, *supra* note 38.

strong employment background and an intimate connection with the community.

2. Disclosure of Exculpatory Evidence

The Due Process Clause of the Fourteenth Amendment requires prosecutors to disclose to the defense any exculpatory information they uncover.[78] But the evidence does not always make its way into the defense counsel's hands. Sometimes this is because prosecutors willfully refuse to turn over the evidence despite its exculpatory nature. Take the case of *Connick v. Thompson*.[79] John Thompson spent eighteen years in the Louisiana State Penitentiary—most of them on death row—before his release in 2003.[80] At his capital murder trial, Thompson opted not to testify in his own defense because he was previously convicted of armed robbery.[81] The proof of his innocence of the armed robbery languished in the files of the New Orleans Crime Laboratory.[82] One month before his scheduled execution, a defense investigator stumbled upon a lab report indicating that the blood evidence the prosecution presented at trial did not match Thompson's blood type.[83] One assistant district attorney "intentionally suppressed [the] blood evidence," and then, shortly after being diagnosed with terminal cancer, confessed his wrongdoing to another assistant district attorney who did not reveal the secret until five years later.[84] The Louisiana Supreme Court vacated both convictions.[85] Upon his release, the Jefferson Parish District Attorney retried Thompson for capital murder. A jury acquitted him.

Why would prosecutors choose to not turn over exculpatory evidence? One possibility is that they are convinced that the defendant committed the crime despite the potentially exculpatory evidence, and they believe that the evidence would unduly harm the chance to convict a dangerous offender. Under this theory, whether to disclose potentially

78. United States v. Agurs, 427 U.S. 97, 107 (1976) (holding that prosecutors must turn over to the defense evidence "clearly supportive of a claim of innocence" regardless of whether the defense requests the evidence); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

79. Connick v. Thompson, 131 S. Ct. 1350, 1355 (2011). This description of the *Connick* case first appeared in Robert J. Smith, *Recalibrating Constitutional Innocence Protections*, WASH. L. REV. (forthcoming 2012).

80. *Connick*, 131 S. Ct. at 1355.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1356 n.1.

85. *Id.* at 1355.

exculpatory evidence turns, in part, on the seriousness of the charges and the perceived strength of the defense case as discounted for revelation of the piece of evidence to the defense. Perceptions of the seriousness of the crime, in turn, depend in significant part on the how the prosecutor views the defendant. If the defendant is implicitly associated with hostility, criminality, or dangerousness, then implicit racial bias can influence the decision to disclose (or not) the ambiguous evidence by altering the perception of the defendant, which, in turn, alters the perception of the seriousness of the crime. Thus, prosecutors' decisions to comply with their *Brady* obligations also can be infected by implicit racial bias.

3. Plea-Bargaining

Most criminal cases are resolved by plea bargain, where the defendant admits guilt in exchange for a reduced charge (or a lesser sentencing recommendation). Unlike the disclosure of exculpatory evidence, plea-bargaining is subject to almost zero oversight. We have argued that, in several contexts, implicit racial bias thrives in the midst of discretionary determinations. Plea-bargaining is no exception. Consider a sampling of four "factors" among those the Department of Justice instructs federal prosecutors to consult in deciding whether to pursue a bargained disposition: (1) "[T]he nature and seriousness of the offense or offenses charged"; (2) "the defendant's remorse or contrition and his willingness to assume responsibility"; (3) "the public interest in having the case tried rather than disposed of by a guilty plea"; and (4) "the expense of trial and appeal."[86] How might the defendant's (or the victim's) race have an impact on the prosecutor's decision whether to offer a plea bargain, and if a plea is in fact offered, how much of a charging reduction will be offered in exchange for the guilty plea?

First, consider prosecutors' assessment of the "seriousness of the offense charged." Imagine a domestic violence case where a man severely abuses his spouse. Does it matter if the spouse is black?[87] Imagine white prosecutors deciding whether to offer the suspect a plea deal on a misdemeanor battery charge. As the prosecutors attempt to quantify the seriousness of the offense, they might not be able to empathize with the fear and pain of a black woman as much as they could empathize with a white woman subjected to domestic abuse. This phenomenon is known as "in-group favoritism," which is defined as "our tendency to favor the

86. U.S. DEP'T OF JUSTICE, GRAND JURY MANUAL: PLEA AGREEMENTS IX-7 to -8 (1991), *available at* http://www.justice.gov/atr/public/guidelines/207144.pdf (excerpted from Principles of Federal Prosecutions).

87. Similarly, does it matter if his spouse is a man?

groups we belong to."[88] Justice Scalia might use the term in-group favoritism to label the "undeniable reality" he described in his dissent in *Powers v. Ohio* "that all groups tend to have particular sympathies . . . toward their own group members."[89]

There is experimental support for the existence and power of in-group favoritism, or bias, as it relates to empathizing with a victim. Alessio Avenanti used a method called transcranial magnetic stimulation (TMS) to measure corticospinal activity level in participants who viewed short video clips of a needle entering into the hand of either a light-skinned or dark-skinned person.[90] Consistent with the in-group empathetic-bias explanation, Avenanti found that region-specific brain activity levels were higher when Caucasian-Italian participants viewed the clip of a light-skinned participant experiencing pain than when they saw a clip of a dark-skinned target being subjected to pain.[91] Returning to the white prosecutors trying to assess the seriousness of the domestic abuse suffered by a black woman, prosecutors might undervalue the extent of the harm caused by the abuse relative to the harm that they would consider a similarly situated white woman—perhaps someone who reminds them of their mothers, sisters, or daughters—to have suffered.

The defendant's race (as well as the victim's race) can also influence the plea-bargaining process. Imagine a prosecutor trying to determine whether to offer a defendant a plea to manslaughter (and thus a term of years) or to proceed to trial to try to obtain a second-degree murder conviction (and thus, in many jurisdictions, life without parole). Whether "the public interest" is satisfied by a plea bargain (as opposed to going to trial where the defendant could receive a harsher sentence) and whether "the expense of trial" is worth it turn on how the prosecutor views the defendant. Is this person dangerous and thus likely to commit a future crime? As a white prosecutor reviews the case file of a young white defendant, the prosecutor might be unknowingly affected by positive implicit stereotypes relating to lawfulness and trustworthiness. This could lead to a more lenient evaluation of the defendant—troubled, but

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88. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476 (2010).

89. Powers v. Ohio, 499 U.S. 400, 424 (1991) (Scalia, J., dissenting).

90. Alessio Avenanti, *Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018, 1020–21 (2010). Interestingly, both groups showed activity levels indicating empathy when viewing needles entering nonfamiliar purple hands. *Id.* The researchers interpret this result as indicating that empathy was not simply inhibited by unfamiliarity but also by racial bias and stereotypes. *Id.*

91. Similarly, African-Italian participants showed more empathy-consistent brain activity levels when viewing a dark-skinned person experiencing pain than when viewing a light-skinned person experiencing pain. *Id.* Results also showed that participants' empathic response was predicted by their implicit racial biases. *Id.*

not a bad person, for example—and thus a plea offer is more likely to follow. As we have well-covered by now, the opposite will be true when the prosecutor views a black defendant; the prosecutor's mind will likely trigger automatic associations between the defendant and the concepts of violence and hostility. On a related point, as the prosecutor attempts to determine the degree of remorse the defendant has displayed (for example, during plea negotiations), the stereotype that black citizens are less fully human might render the prosecutor less able to detect remorse from a defendant's body language or more likely to reject a black defendant's apology as self-serving or otherwise not genuine.[92] So too might the stereotypes that black citizens are violent, hostile, and prone to criminality have an impact on the degree of remorse that the prosecutor is able to detect in a defendant.

C. Trial Strategy

1. Jury Selection

Lawyers selecting a jury in a criminal case are allocated a predefined number of peremptory challenges, which they can use to eliminate prospective jurors without justification. Under the Due Process Clause of the Fourteenth Amendment, these strikes cannot be used to eliminate jurors based on their race.[93] The prohibition against race-based strikes is clear, but policing the rule is far murkier. Courts routinely uphold peremptory challenges based on largely unverifiable race-neutral explanations, for example, those based on avoiding eye contact, possessing an apparent lack of intelligence, or showing signs of nervousness. Indeed, it is so difficult to detect conscious evasion of the prohibition against racially motivated strikes that Justice Powell noted in *Batson*, "[P]eremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[94]

Striking black jurors used to be based on explicit racism. For instance, in *Miller-el v. Cockrell*, the U.S. Supreme Court discussed a trial manual (titled *Jury Selection in a Criminal Case*) used in the Dallas County District Attorney's Office in the 1960s and 70s.[95] Among the advice offered by the manual to trial prosecutors: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no

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92. *See* Philip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 304–05 (2008).

93. Batson v. Kentucky, 476 U.S. 79, 84 (1986).

94. *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

95. Miller-El v. Cockrell, 537 U.S. 322, 335 (2003).

matter how rich or how well educated."[96] Even in the twenty-first century, prosecutors struggled to mask racially motivated strikes. For example, in one Louisiana capital case, the prosecutor explained that he struck one black juror because he was "the only single black male on the panel with no children."[97] There is less reason to believe that the vast majority of prosecutors today strive to strike jurors on the basis of race. This does not mean that race-based strikes are not a problem. Indeed, Justice Breyer recently noted that "[he] was not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem."[98]

Implicit racial bias might help to explain why egalitarian-minded prosecutors nonetheless disproportionately strike black jurors.[99] In addition to the stereotype that black citizens are prone to criminality (and thus might sympathize more with those who commit crime), prosecutors might associate black citizens with lack of respect for law enforcement and opposition to the prosecution of drug crimes or use of the death penalty as a punishment.[100] If a prosecutor questions a prospective black juror, the simple act of even talking to that person might activate any of these negative stereotypes as well as more general negative implicit attitudes, causing the prosecutor to think or feel negative thoughts about the juror. The prosecutor might project this negativity through body language and gestures, which could, in turn, cause jurors to avoid eye contact, provide awkward or forced answers that make the juror appear less intelligent, or simply fidget and look nervous. Thus, even accurate race-neutral behavior descriptions might stem from racialized assessments (albeit, without conscious thought) of the characteristics of individual jurors.

2. Closing Arguments

Implicit racial bias can also have an impact on the content of a prosecutor's closing argument and, in turn, on the manner in which the jury (or judge) views the evidence in the case. In *Darden v. Wainwright*, the prosecution referred to the defendant during closing arguments as an "animal"[101] that "shouldn't be out of his cell unless he has a leash on him

96. *Id.* (citation omitted).

97. State v. Harris, 820 So. 2d 471, 474 (La. 2002).

98. Miller-El v. Dretke, 545 U.S. 231, 268 (2005) (Breyer, J., concurring).

99. Antony Page has elegantly made this argument. *See* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

100. Of course (and, in some cases, for good reason) these last two stereotypes, which likely derive from a more general mistrust in the criminal justice system, might be accurate.

101. Darden v. Wainwright, 477 U.S. 168, 180 n.11 (1986).

and a prison guard at the other end of that leash."[102] "In a recent Louisiana case, the prosecution referred to the black . . . defendant as '[a]nimals like that (indicating)' and implored the jury to 'be a voice for the people of this Parish' and to 'send a message to that jungle.'"[103] The use of animal imagery in reference to the accused can both depend on and perpetuate the negative effects of implicit race bias.

Referring to the accused in nonhuman terms dehumanizes the defendant in the eyes of the jurors and could potentially lead to harsher punishment. In a compelling empirical study that showed how people continue to mentally link blacks with apes, Philip Goff and colleagues asked participants to view a degraded image of an ape that came into focus over a number of frames.[104] When primed with a consciously undetectable image of a black face, participants were able to identify the ape in fewer frames; conversely, when primed with a consciously undetectable white face, participants required more frames to detect the ape than when they received no prime at all.[105] The study confirmed that people, most of who claimed not to have even heard of the stereotype linking blacks to apes, nonetheless implicitly associated blacks with apes, a finding that heightens the concern surrounding the use of animal imagery during prosecution.

In a related study that linked the animal-imagery study to criminal sentencing, Goff next explored the black–ape association by comparing the frequency of animalistic references to black defendants with that of similar references to white defendants in a dataset of 600 criminal cases prosecuted in Philadelphia between 1979 and 1999.[106] The study found that coverage from the *Inquirer*, Philadelphia's major daily newspaper, of black defendants included, on average, nearly four times the number of dehumanizing references per article than articles covering white capital defendants.[107] Furthermore, the study found a strong correlation between the number of times an animalistic reference was made and the likelihood that the defendant received the most severe punishment available.[108]

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102. *Id.* at 180 n.12.

103. Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 403–04 (2012) (citing State v. Harris, 820 So. 2d 471 (La. 2002) (transcripts containing the prosecutor's references are on file with the Louisiana Supreme Court and the authors)).

104. *See* Goff et al., *supra* note 92, at 303–05.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

D. Beyond the Trial: More Prosecutorial Discretion

This Part has provided a step-by-step account of the potential impact that implicit racial bias can have on prosecutorial discretion. We have focused narrowly on case-specific decisions ranging from the decision to charge a suspect to how the prosecutor maneuvers through the pretrial process to the decisions the prosecutor makes at the trial. This discussion remains incomplete, however. The idea that easily activated stereotypes of certain defendants can influence the decision-making process applies with equal force to other forms of prosecutorial discretion. For example, prosecutors must decide whether to join defense lawyers in urging for a conviction to be vacated in a case of actual innocence. Is a prosecutor convinced by a lower quantum of evidence in a case involving a white prisoner (who might or might not be a violent offender) than in a case involving a black or Latino prisoner? Perhaps the question is whether to recommend a defendant to drug counseling or to press instead for jail time—do implicit stereotypes of black citizens have an impact on the prosecutor's assessment of the suitability of alternative sentencing?[109]

Or consider office-wide decisions, such as on which crimes to concentrate prosecution efforts given limited resources.[110] Is the decision to target street gangs—one recently made a top priority by the Department of Justice—influenced by the perceived explosion of Latino gangs and the conception of Latinos as drug dealers and "illegal aliens," or is the decision based solely on the seriousness of the crime involved? Again, before we can answer that the seriousness of the crime drives the policy choice, are we able to gauge the seriousness of the crime without being influenced by our conception of the offenders? Indeed, the race of the defendant might infiltrate the prosecutor's core beliefs about the justifications of punishment—do black defendants tend to activate the concep-

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109. There is also emerging research suggesting that black citizens are viewed as possessing more static personality traits and thus as being less capable of change. This research would also be quite relevant to a prosecutor's decision whether to recommend counseling or jail time for a black offender. *See* Jennifer Eberhardt, The Ape and the Static Being: Two Views of Blacks in the Modern Era, Panel at the Michigan State Law Review Symposium: Moving Beyond "Racial Blindsight"? The Influence of Social Science Evidence After the North Carolina Racial Justice Act (Apr. 8, 2011), *available at* http://www.law.msu.edu/blindsight/media.html.

110. *See* Davis, *supra* note 47, at 36.

> [I]f a prosecutor deems a particular case to be more serious than others, she will tend to invest more time and resources in that case, both investigating and preparing for trial. Such an increased investment would consequently yield more evidence and stiffen prosecutorial resolve. The likelihood of conviction is also obviously increased by the additional investment in investigation. Thus, although the strength of the evidence and the likelihood of conviction are facially race-neutral factors, they may be influenced by an unconsciously racist valuation of a case involving a white victim.

Id.

tion that offenders deserve to be punished[111] whereas white defendants tend to activate other justifications for punishment, such as deterrence or rehabilitation?

We hope that we have conveyed a sense that the potential impact of implicit racial bias on prosecutorial discretion is broad and deep. In the remainder of this Article, we explore the ways in which we might build a body of proof to support our contention that implicit racial bias infects the decisions of prosecutors, and finally, we consider possible remedies for avoiding or minimizing the damage associated with the operation of such bias.

IV. ADDRESSING THE EFFECTS OF IMPLICIT RACIAL BIAS ON PROSECUTORIAL DISCRETION

As we have demonstrated, there are compelling reasons to believe that prosecutors unwittingly display implicit racial bias at a variety of decision points. One could expect that in the aggregate, the harms of these biases are quite substantial. It is important to note, however, that empirical studies have yet to test prosecutors directly or prove that prosecutors act automatically in bias-influenced ways. We therefore encourage researchers to take on the charge of pursuing our hypotheses empirically. Although we expect to pursue some of these hypotheses ourselves, the best science is collaborative, transparent, and forward-looking. We thus specifically encourage researchers to test precisely where and how implicit bias operates in the context of prosecutorial decision-making and provide here several examples of potential starting points.

For instance, testing our hypothesis regarding prosecutors' decisions whether or not to charge, researchers might examine whether participants subliminally primed with black and white faces make different decisions when deciding how to charge suspects (versus opting not to prosecute) in borderline cases. A similar research methodology could be used to test our hypothesis regarding implicit bias and plea-bargaining. One could, for example, measure whether participants primed with a black face are less likely (than those primed with a white face) to recommend a plea deal to a lesser charge in the context of a particular crime, such as forcible rape, which plays into black stereotypes of sexual aggression. Using a different methodology relating to our hypothesis regarding the use of animal imagery in closing arguments, researchers

111. *See* Goff et al., *supra* note 92, at 301–05. In one study, Goff and his colleagues had participants watch a video of police officers beating a black suspect. *Id.* at 302. Video participants had previously been primed with either words relating to apes or big cats. *Id.* at 301–02. Participants primed with the ape words were more likely to report that the police beating was "deserved" and "justified" than those participants primed with the big cat words. *Id.*

could perform a coding analysis on actual closing arguments made by prosecutors, counting references to animal imagery, and could then seek to test those prosecutors using an implicit bias measure such as the IAT. If such a participant group could be located and tested (of course, without knowing the exact purpose of the study), it might be possible to measure whether implicit bias levels predict prosecutors' use of animal imagery in closing arguments. We believe studies such as these would help to pinpoint the exact locations where implicit bias is most likely to infect prosecutorial decision-making.[112]

We also encourage researchers and policymakers to consider remedial possibilities for the problem of implicit racial bias in prosecutorial discretion. The most obvious remedies, unfortunately, are the least likely to succeed. For instance, raising claims that prosecutors are selectively prosecuting black defendants is not a promising avenue. We know of no defendant who has obtained relief on these grounds in the modern era,[113] primarily because the U.S. Supreme Court has ruled that a defendant must demonstrate that similarly situated suspects of other races were not subjected to prosecution in order to even gain discovery on such a claim.[114] Nor are Fourteenth Amendment Due Process or Eighth Amendment Cruel and Unusual Punishment claims destined to succeed. In *McCleskey v. Kemp*, the Court rejected a capital defendant's statistical offering that racial arbitrariness infected Georgia's capital sentencing process and ruled that a defendant must show that racial bias infected *his* case before he might prevail on Eighth or Fourteenth Amendment grounds.[115]

Nor do we believe that implicit racial biases are subject to easy eradication. The associations that are triggered when people view a person of a particular race are likely the product of extensive cultural and social learning.[116] Some portion of our social learning is misinformed (e.g., "Black citizens are more hostile than white citizens."). Some por-

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112. Of course, these suggestions are only a few examples of a range of possible studies.

113. *See* Bibas, *supra* note 44, at 970 (noting in this context that "[n]o race-based claim has succeeded for more than a century").

114. United States v. Armstrong, 517 U.S. 456, 458 (1996).

115. McCleskey v. Kemp, 481 U.S. 279, 292 (1987).

116. Researchers have considered various social-learning-related factors that lead to implicit biases. *See, e.g.*, Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 79, 79–81 (2004) (indicating that both early life experiences and culturally held biases, as well as other factors, lead to implicit biases). Stereotypes more generally have been shown to be learned by extremely young children. *See* Page, *supra* note 99, at 203 (claiming to find that stereotypes arise when a person is as young as three years old and are usually learned from parents, peers, and the media); *see also* Frances E. Aboud & Maria Amato, *Developmental and Socialization Influences on Intergroup Bias*, *in* BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES 65, 73–76 (Rupert Brown & Samuel L. Gaertner eds., 2001).

tion, however, is perhaps accurate, though built on the foundations of structural inequality. Consider the stereotype that black citizens have less respect for law enforcement or trust in the judicial system. These stereotypes accurately reflect most polling data and also reflect underlying realities about police-citizen relations in minority-concentrated urban areas.[117] In order to undo this cultural and social learning, we would need to see fundamental changes in the political, economic, and social structures that undergird our country.[118]

But there are some promising shorter-term remedial avenues. Stephanos Bibas suggests that prosecution offices might collect and store comprehensive information on racial demographics at each stage of the charging process. The collected data would be made available internally and to a variety of external stakeholders, which would both allow for the review of "systemic patterns" and "create feedback loops and new metrics for prosecutorial success."[119] Prosecutors' offices might also provide live or video trainings on implicit bias to attorneys and paralegals and could also include thoughtful discussions and explanations of implicit racial bias in training manuals that address each of the decision points where implicit racial bias is likely to infect the process. Although there is no guarantee that live or written trainings would necessarily reduce bias, those who are egalitarian-minded could use these explicit reminders to self-monitor.[120]

Category-masking, the process of hiding racial demographic data until after the relevant decision is made, also holds some potential as a structural change that could reduce the effects of implicit bias. This process has previously been proposed as a possible remedy for race-based

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117. *See, e.g.*, U.S. DEP'T OF JUSTICE: CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT xix (2011), *available at* http://www.justice.gov/crt/about/spl/nopd_report.pdf ("[C]ommunity members, especially members of racial, ethnic, and language minorities . . . expressed to us their deep distrust of and sense of alienation from the police."); Smith & Sarma, *supra* note 103, at 391 ("Part of the discrepancy stems from first-hand encounters with law enforcement that the black citizen interpreted to be racist, either explicitly (e.g., use of terms with racial meaning, such as 'nigger' or 'boy') or vicariously (e.g., being stopped for 'driving while black.')" (citation omitted)).

118. *See* Levinson, *Forgotten Racial Equality*, *supra* note 3, at 420 (noting that short-term remedies for implicit bias should not obscure the need for long-term cultural change).

119. *Id.*

120. This suggestion is analytically similar to the use of an implicit bias jury instruction for criminal trials. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 149–51 (2010) (suggesting the use of implicit bias jury instructions and revealing that—as a federal district court judge—"I now include a slide about implicit bias in the PowerPoint presentation that I show before allowing attorneys to question potential jurors").

jury selection.[121] In the jury selection context, litigants would exercise a first round of peremptory strikes based on answers to juror questionnaires that were scrubbed for demographic data.

A similar effort undergirds the decision to proceed under the federal death penalty statute—when the prosecutor receives the case file they are (theoretically)[122] unaware of the race of either the victim or the defendant. Broadening this type of remedial effort beyond the situations of jury questionnaires and capital cases, one could imagine a process inside a district attorney's office whereby a case intake coordinator masks all demographic information on a computerized case file (including the defendant's name and mug shot) until after the assistant district attorney handling the case has made a nonbinding charging decision (and preliminary plea bargain eligibility assessment).[123] In addition, when office-wide data show significant disparities in charging or plea bargains in relation to a particular offense, any charging or bargaining decisions in those types of cases could be reviewed by a more senior prosecutor or a committee of prosecutors (with demographic data masked) regardless of the races involved. This process could continue until the office-wide data demonstrate that the disparity has been eliminated (or proven to be accounted for by legitimate nonracial variables).

Finally, we believe the hiring and promotion of a more diverse pool of assistant district attorneys might curb the operation of implicit racial bias and might even improve the quality of decision-making on an office-wide level. Research in the jury context, for example, has shown that diverse group decision-making is better than homogenous group decision-making.[124] Furthermore, research in other areas, such as the education arena, has found that students exposed to counter-stereotypical role models—for example, women engineering professors—actually harbored

121. *See, e.g.*, Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 535 (2008) ("Research on orchestras, for example, demonstrates that female musicians are more likely to be hired when they audition behind a screen, effectively concealing their gender." (citing Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000))).

122. In reality, racial background is often easily predicted from other characteristics such as the name of the defendant or victim or the neighborhood where each resides. A truly colorblind process would exclude as much demographic data as possible without restricting the necessary case facts that the decision-maker must take into account.

123. Of course, true masking would require masking neighborhood demographics and even the names of the defendant and the victim, as these factors could easily "tip off" the prosecutor as to the racial background of the parties involved.

124. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 597 (2006) (comparing all white juries to mixed juries, and finding that mixed juries performed better).

reduced implicit bias.[125] Based on these studies and others, we would expect that a diverse prosecutor's office might not only facilitate an atmosphere with less implicit bias but could perhaps also lead to even more thoughtful and efficient decision-making. A related proposal that is both more aggressive and also more targeted to prosecutorial discretion would be to help assistant district attorneys better understand the minority group population that they serve (both the victims and the defendants) by encouraging these lawyers (perhaps with housing or tax incentives) to live in neighborhoods disproportionately impacted by the charging decisions made by the district attorney's office.[126]

Each of the potential remedies we discuss above would benefit from empirical testing, yet we do not believe, considering the likely ongoing harms, that waiting for a perfect scientific answer to the debiasing question is the best response. It is true that there are no easy answers for remedying the influence of implicit racial bias on prosecutorial discretion. Yet, justice should not wait, and the search for fairness in the criminal justice system must continue with both a moral compass and a thirst for emerging social-scientific knowledge.

125. 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, 642–45 (2004).

126. Of course, as one of the student editors who reviewed this piece noted, "Another suggestion is to lessen the workload of prosecutors so that they have more time to fully analyze and develop the facts of each case. Presumably, with more information and time spent analyzing what is going on, prosecutors will be more informed and rely less on their snap judgments or gut feelings."

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Articles

***1587** IMPROVING PROSECUTORIAL DECISION MAKING: SOME LESSONS OF COGNITIVE SCIENCE

Alafair S. Burke [FNa1]

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***1588** Introduction

Earl Washington Jr., a black mentally retarded farmhand, spent seventeen years in prison-nearly ten of them on death row-for the rape and murder of a white woman before DNA tests linked another man to the crimes. [FN1] The evidence originally implicating him was questionable. The victim provided little identifying information, indicating before her death only that a black man had attacked her. [FN2] Washington was convicted based largely on his own confession, even though he simultaneously provided factually inconsistent confessions to four other crimes and did not know the location of the crime scene, whether other people were present, or even the victim's race without the assistance of leading questioning from police. [FN3] When defense counsel sought postconviction relief based on the discovery of another man's DNA on a blanket linked to the crime, prosecutors resisted. [FN4] Even after Washington was pardoned because of exonerating evidence, prosecutors insisted that he remained a viable suspect. [FN5]

***1589** Earl Washington's case raises questions about the discretionary decisions his prosecutors made from the moment they received the case. Why did they look past apparent problems with the confession? Why did they resist the evidentiary testing that ultimately exonerated an innocent man? Why would they still not concede innocence after his exoneration? Traditionally, commentators have clothed the study of prosecutorial decision making in the rhetoric of fault, attributing normatively inappropriate outcomes to bad prosecutorial intentions and widespread prosecutorial misconduct. [FN6] From this perspective, Earl Washington's conviction, and his prosecutors' refusal to concede his innocence even after a gubernatorial pardon, result from prosecutorial overzealousness, [FN7] a culture that emphasizes winning, [FN8] the absence of "moral courage," [FN9] and the failure of prosecutors to act as neutral advocates of justice. [FN10]

***1590** This focus upon incentives, priorities, and values as potential taints upon the exercise of prosecutorial discretion reveals an implicit but important assumption about prosecutors: they are rational, utility-maximizing decision makers. Prosecutors choose to overcharge defendants, withhold exculpatory evidence, and turn a blind eye to claims of innocence; therefore, the traditional inference goes, they must value obtaining and maintaining convictions over "doing justice." [FN11] To ensure that prosecutors do not rationally opt for misconduct to maximize their conviction rates, the fault-based literature recommends reform through changes to the prosecutorial cost-benefit analysis. Common strategies include more stringent ethical rules, [FN12] increased disciplinary proceedings and sanctions against prosecutors, [FN13] and professional [FN14] and financial [FN15] rewards based on factors other than just obtaining convictions.

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Consider, however, a different explanation for the failure of prosecutors always to make just decisions. Perhaps prosecutors sometimes fail to make decisions that rationally further justice, not because they fail to value justice, but because they are, in fact, irrational. They are irrational because they are human, and all human decision makers share a common set of information-processing tendencies that depart from perfect rationality. A ***1591** compelling body of cognitive research demonstrates that people systematically hold a set of cognitive biases, rendering them neither perfectly rational information processors, nor wholly random or irrational decision makers. [FN16] Drawing on the cognitive literature, the growing literature of behavioral law and economics explores the limitations of cost-benefit rationality, challenging the assumption of traditional economists that people are perfect wealth maximizers. [FN17] From both the cognitive and behavioral economics literature emerges a theory of bounded rationality that seeks to explain how cognitive biases and limitations in our cognitive abilities distort perfect information processing in nonrandom, predictable ways. [FN18]

***1592** Others have suggested how cognitive bias and bounded rationality can affect juries, [FN19] judges, [FN20] the regulation of risk, [FN21] federal rulemaking, [FN22] corporate disclosures, [FN23] contract law, [FN24] consumer choice, [FN25] employment discrimination, [FN26] and group deliberations. [FN27] This Article seeks to explain how cognitive bias can affect the exercise of prosecutorial discretion. Viewing cases like Earl Washington's through a lens of human cognition, rather than fault, colors not only the description of the problem, but also the recommended solutions. When the underlying problem is human irrationality, rather than the malicious intentions of a single prosecutor or the indifference of a prosecutorial culture, the result is a far more complicated story about the criminal justice system. If prosecutors fail to achieve justice not because they are bad, but because they are human, what hope is there for change?

***1593** This Article explores the potential that even "virtuous," [FN28] "conscientious," [FN29] and "prudent" [FN30] prosecutors fall prey to cognitive failures. Part I summarizes four related aspects of cognitive bias that can affect theory formation and maintenance. Part II explores how these cognitive phenomena might adversely affect the exercise of prosecutorial discretion. Finally, Part III proposes a series of reforms that might improve the quality of prosecutorial decision making, despite the limitations of human cognition.

I. Cognitive Bias: Four Examples of Imperfect Decision Making

Decades of empirical research demonstrate that people's beliefs are both imperfect and resistant to change. Once people form theories, they fail to adjust the strength of their beliefs when confronted with evidence that challenges the accuracy of those theories. [FN31] Indeed, theory maintenance will often hold even when people learn that the evidence that originally justified the theory is inaccurate. [FN32] At the same time that people fail to consider information that disconfirms a theory, they tend both to seek out and to overvalue information that confirms it. [FN33]

This Article explores four related but separate aspects of cognitive bias that can contribute to imperfect theory formation and maintenance: confirmation bias, selective information processing, belief perseverance, and the avoidance of cognitive dissonance. Confirmation bias is the tendency to seek to confirm, rather than ***1594** disconfirm, any hypothesis under study. [FN34] Selective information processing causes people to overvalue information that is consistent with their preexisting theories and to undervalue information that challenges those theories. [FN35] Belief perseverance refers to the human tendency to continue to adhere to a theory, even after the evidence underlying the theory is disproved. [FN36] Finally, the desire to avoid cognitive dissonance can cause people to adjust their beliefs to maintain existing self-perceptions. [FN37] This Part summarizes the empirical literature regarding each of these cognitive phenomena.

A. Confirmation Bias

When testing a hypothesis's validity, people tend to favor information that confirms their theory over disconfirming information. [FN38] Good evidence suggests that this information-seeking bias results because people tend to recognize the relevance of confirming evidence more than disconfirming evidence. [FN39] This is true even when an effort to disconfirm is an essential step towards confirmation of the hypothesis under test.

For example, in a classic study of confirmation bias in hypothesis testing, Peter Wason presented subjects with

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four cards and told them that each card contained a letter on one side and a number on the other. [FN40] The revealed sides of the four cards displayed one vowel, one consonant, one even number, and one odd number. [FN41] Subjects were then asked which of the four cards needed to be ***1595** turned over to test the following rule: If a card has a vowel on one side, then it has an even number on the other side. [FN42]

Proper scientific method requires that researchers seek to disprove their working hypotheses. [FN43] Accordingly, the rational test of Wason's "if vowel, then even number" card test is to turn over the vowel and odd number cards. The vowel card provides a relevant test because discovery of an odd number on its backside would disprove the tested rule. The odd number card provides an equally relevant test because the discovery of a vowel on the backside of the odd number card would disconfirm the proposed "if vowel, then even number" rule in the same way as any odd number on the other side of the vowel card.

However, to test the rule that all vowel cards had even numbers on the other side, subjects overwhelmingly selected from their four choices either just the vowel card, or the vowel and the even number cards. [FN44] They failed to select the odd number card that was necessary to test the rule properly. [FN45] Moreover, subjects who chose the even number card erred still further because that card's backside offered no probative value to the rule at hand. [FN46] The subjects' choice of cards demonstrated that the subjects failed to recognize the importance of disconfirming evidence and instead sought information that would tend to confirm the working rule. [FN47]

In another classic study, Mark Snyder and William Swann replicated confirmation bias in the context of social inference. [FN48] Subjects were asked to select questions from a list for the purpose of interviewing a target person. [FN49] Half of the subjects were instructed to choose questions that would test whether the target person was an extrovert, and half were told to test whether the ***1596** target person was an introvert. [FN50] The results demonstrated a strong confirmation bias. [FN51] Subjects selected questions that could only prove, and never disprove, their working hypothesis. [FN52] For example, subjects testing for extroversion chose questions like "What would you do if you wanted to liven things up at a party?," while subjects testing for introversion chose questions like "In what situations do you wish you could be more outgoing?" [FN53]

The social science literature suggests that people demonstrate confirmation bias not only in seeking new information, but also in the recollection of stored information. In one study, subjects were given the same list of traits about a woman named Jane. [FN54] Some of the listed traits were characteristic of extroversion, some of introversion, and others neutral. [FN55] Two days later, subjects were asked to determine Jane's suitability for a job either as a real estate agent or as a librarian. [FN56] Even though all subjects were exposed to the same information about Jane, those subjects testing Jane's suitability for real estate work tended to recall more extroverted than introverted facts about her, whereas the reverse was true for subjects testing her suitability as a librarian. [FN57] The researchers concluded that subjects were searching their memories in a biased manner, preferring information that tended to confirm the hypothesis presented. [FN58]

B. Selective Information Processing

A good deal of empirical research demonstrates that people are incapable of evaluating the strength of evidence independent of their prior beliefs. People not only demonstrate search and recall preferences for information that tends to confirm their preexisting ***1597** theories, they also tend to devalue disconfirming evidence, even when presented with it. As a result of selective information processing, people weigh evidence that supports their prior beliefs more heavily than evidence that contradicts their beliefs.

Charles Lord, Lee Ross, and Mark Lepper conducted what is perhaps the most well-known study demonstrating this bias against disconfirmation. [FN59] Based on prior questioning, the researchers knew that half of their subjects were proponents of the death penalty who believed that the death penalty deterred murder, while the other half were opponents who did not believe that the death penalty deterred. [FN60] Subjects were asked to evaluate two studies, one that supported a deterrent efficacy of the death penalty, and one that suggested the death penalty's inefficacy as a deterrent. [FN61] The researchers found that proponents of the death penalty judged the prodeterrence study as more convincing than the nondeterrence study, whereas opponents of the death penalty reached the opposite conclusion. [FN62] Even though the studies described the same experimental procedures but with differing results, subjects articulated detailed justifications to support their conclusion that the study supporting their preexisting view

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was superior. [FN63] Moreover, as a result of the biased evaluation of the two studies, subjects became more polarized in their beliefs. In other words, even though all subjects read two contradictory studies on the death penalty, proponents of the death penalty reported that they were more in favor of capital punishment after reading the studies, while opponents reported that they were less in favor. [FN64]

Other researchers have replicated the phenomenon of selective information processing in a variety of contexts. [FN65] Social scientists ***1598** have suggested that the mechanism for selective information processing is attributable at least in part to motivational factors. [FN66] As an initial matter, people choose to expose themselves to information that is consonant with their beliefs rather than dissonant. [FN67] Moreover, when exposed to dissonant information, they are motivated to defend their beliefs, giving more attention and heightened scrutiny to information that challenges those beliefs. [FN68] They will search internally for material that refutes the disconfirming evidence, and, once that material is retrieved from memory, a bias will exist to judge the disconfirming evidence as weak. [FN69] In contrast, when presented with information that supports ***1599** prior beliefs, people allocate fewer resources to scrutinizing the information and are more inclined to accept the information at face value. [FN70]

At a general level, selective information processing may be normatively rational. [FN71] When new information is compatible with what we already know, it is probably accurate. Careful scrutiny and a search for contradictory material would expend cognitive resources unnecessarily. [FN72] On the other hand, information that is incompatible with existing information may be fallacious, and cognitive work to reveal the fallacy is well spent. [FN73] Of course, disconfirmation bias leads to effective decision making only when the prior beliefs that bias the assimilation of new information are themselves supported by accurate information. [FN74] In criminal cases, prosecutors enjoy no such guarantee, potentially basing their theories of guilt on retracted confessions, flawed eyewitness testimony, and false testimony from jailhouse informants. [FN75]

C. Belief Perseverance

Although selective information processing can prevent rational, incremental adjustments in response to new information, the phenomenon of belief perseverance describes the tendency to adhere to theories even when new information wholly discredits the theory's evidentiary basis. With belief perseverance, human cognition departs from perfectly rational decision making not through biased assimilation of ambiguous new information, but by failing to adjust beliefs in response to proof that prior information was demonstrably false.

***1600** In a well-known experiment by Lee Ross, Mark Lepper, and Michael Hubbard, subjects were asked to discern between fake and actual suicide notes. [FN76] By manipulating false feedback given to subjects as they performed the dummy task, the experimenters led subjects to believe that they had average performance, above average performance (success condition), or below average performance (failure condition). [FN77] Following their completion of the task, subjects were fully debriefed and learned that the feedback had been false, predetermined, and random. [FN78] Subjects were even shown the experimenters' instruction sheet, which preassigned subjects to each of the three performance conditions and stipulated the corresponding feedback to be delivered. [FN79]

After subjects were debriefed, they were asked to assess their actual performance on the task, to estimate the average performance, and to predict their probable performance if they were to repeat the task. [FN80] The researchers found considerable belief perseverance among subjects, despite the debriefing. Subjects assigned the "success condition" rated both their actual and future task performance more favorably than other subjects, while subjects assigned the "failure condition" showed the opposite pattern, continuing to rate their performance unfavorably. [FN81]

Moreover, the study found that belief perseverance was not limited to self-evaluation, but extended to perceptions of others. Observer subjects who watched both the feedback sessions and the subsequent debriefings from behind a one-way glass also continued to demonstrate belief perseverance after the debriefings. [FN82] In other words, observers tended to maintain their beliefs about the observed subject's ability to distinguish between fake and actual suicide notes, even after learning that the feedback was false. [FN83]

***1601** Similarly, in another study, Anderson, Lepper, and Ross presented subjects with purportedly authentic

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histories of firefighters and asked the subjects to write an explanation of the relationship between risk preference and firefighting abilities observed in the case histories. [FN84] By manipulating the case histories, the experimenters led subjects to perceive either a positive or negative correlation between the two traits. [FN85] The researchers reported that, even after subjects were debriefed concerning the fictitious nature of the case histories, they continued to cling to the theories they formed from those histories. [FN86] In other words, the subjects adhered to their conclusions, even after the evidence underlying the conclusions was wholly discredited. As the researchers concluded, "[i]nitial beliefs may persevere in the face of a subsequent invalidation of the evidence on which they are based, even when this initial evidence is itself ... weak." [FN87]

D. The Avoidance of Cognitive Dissonance

Another phenomenon that can affect prosecutorial cognition is the desire to find consistency between one's behavior and beliefs. The social science evidence suggests that inconsistency between one's external behavior and internal beliefs creates an uncomfortable cognitive dissonance. To mitigate the dissonance, people will adjust their beliefs in a direction consistent with their behavior. [FN88]

For example, in a classic study, Leon Festinger and James Carlsmith paid subjects either one or twenty dollars to misinform another person, a confederate who was supposedly waiting to serve as a subject, that a long, boring task was actually interesting. [FN89] ***1602** Even though subjects were all required to complete the same mundane task, the subjects who were paid only a dollar to deceive the confederate reported that they found the task more interesting than either the subjects who received the more substantial payment or the control subjects, who had performed the task but had not been asked to deceive the confederate. [FN90]

The researchers concluded that cognitive dissonance was created by the conflict between the subjects' beliefs that the task was boring and the subjects' behavior in telling someone that the task was interesting. [FN91] To reconcile this dissonance, subjects who were paid only a dollar to mislead adjusted their own beliefs about the task. [FN92] In contrast, those who were paid twenty dollars had an additional consonant cognition-"I was paid twenty dollars to lie"-and therefore had no need to adjust their beliefs to be consistent with their conduct. [FN93] Since Fester and Carlsmith's original study, other researchers have reported robust effects of cognitive dissonance in other settings. [FN94]

II. The Ethical Prosecutor and Cognitive Bias

No reason exists to believe that lawyers are immune from the documented bounds of rationality, and yet the literature on prosecutorial decision making continues to describe prosecutors as rational, wealth-maximizing actors who would make better, more just decisions if they only had better, more just values. [FN95] Through the lens of the cognitive phenomena summarized in Part I, a more ***1603** complicated story is evident. That prosecutors should be motivated by justice, not conviction rates, should go without saying. The harder question to answer is whether good motives, both individually and institutionally, are enough. The implications of the cognitive literature suggest not.

The broad powers of the prosecutor are familiar. If brought into an investigation prior to a suspect's arrest, prosecutors can shape the investigation's direction and scope by, for example, determining whom to investigate and through what tactics. [FN96] Once an arrest is made, the prosecutor's full powers come into play as she determines whether to bring charges, what charges to bring, whether to drop charges once brought, whether to negotiate a plea and under what terms, whether to grant immunity, and what sentence to seek upon conviction. [FN97] This Part explores some of the potential ways that cognitive bias may taint the decision making of even ethical prosecutors when executing this broad discretion.

A. Investigation and Charging Decisions

The potential for cognitive bias to creep into prosecutorial decision making starts from the earliest case-screening stages, when prosecutors must determine whether sufficient evidence exists to proceed with a prosecution. In hypothesis testing terms, they are testing the hypothesis that the defendant is guilty. [FN98] The phenomenon of confirmation bias suggests a natural tendency to review the reports not for exculpatory evidence that might disconfirm the tested hypothesis, but instead for inculpatory, confirming evidence. [FN99] In Earl Washington's case, for example, the prosecutor might have been looking for the fact of the confession, ***1604** not for the

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surrounding circumstances that might undermine its reliability.

If the investigation is still ongoing, confirmation bias might cause law enforcement officers to conduct searches and to ask questions that will yield either further inculpatory evidence or nothing at all. Just as Snyder and Swann's subjects primarily asked suspected extroverts questions like "What would you do if you wanted to liven things up at a party?," [FN100] police eyeing an initial suspect might ask, "What were you and the victim fighting about the night before the murder?" Confirmation bias will reduce the likelihood that the investigation will be directed in a manner that would yield evidence of innocence. [FN101]

Recent attention to the risks of wrongful convictions [FN102] has brought to light the influence of "tunnel vision," whereby the belief that a particular suspect has committed the crime might obfuscate an objective evaluation of alternative suspects or theories. [FN103] In Illinois, a special commission on capital punishment identified tunnel vision as a contributing factor in many of the capital convictions of thirteen men who were subsequently exonerated and released from death row. [FN104] Similarly, in Canada, a report issued ***1605** under the authority of federal, provincial, and territorial justice ministers concluded that tunnel vision was one of the eight most common factors leading to convictions of the innocent. [FN105] In cognitive terms, the tunnel vision phenomenon is simply one application of the widespread cognitive phenomenon of confirmation bias. Law enforcement fails to investigate alternative theories of the crime because people generally fail to look for evidence that disconfirms working hypotheses.

B. Sticky Presumptions of Guilt

If the prosecutor decides to pursue charges, the potential of cognitive bias to taint decision making only worsens. Prosecutorial reluctance to revisit a theory of guilt is difficult to explain when prosecutors are viewed as rational actors. Attempts to do so often rely on accounts of either individual or institutional indifference to the truth. [FN106] However, widespread prosecutorial skepticism of innocence claims is wholly understandable, and in fact predictable, in light of disconfirmation bias, belief perseverance, and cognitive consistency. Although some have argued to the contrary, [FN107] many commentators believe that the ethical prosecutor brings charges only when she is sufficiently certain in her own mind of the accused's guilt. [FN108] Accordingly, if charges are brought, the prosecutor ***1606** has presumably made a personal determination about the defendant's guilt. If additional evidence arises, selective information processing comes into play. The prosecutor will accept at face value any evidence that supports the theory of guilt and will interpret ambiguous evidence in a manner that strengthens her faith in the case. [FN109] Should any potentially exonerative evidence arise, she will scrutinize it carefully, searching for an explanation that undermines the reliability of the evidence or otherwise reconciles it with the existing theory of guilt. [FN110] As a result of selective information processing, she will continue to adhere to her initial charging decision, regardless of the new information.

Indeed, even if the inculpatory evidence that initially supported the charges is wholly undermined, belief perseverance suggests that the theory of guilt will nevertheless linger. Others have noted the large number of cases, such as Earl Washington's, in which prosecutors continue to insist that a released defendant remains a suspect. [FN111] Although prosecutorial resistance to claims of factual ***1607** innocence is often attributed to a prosecutorial culture tainted by politics and an indifference to justice, [FN112] sticky beliefs about guilt may simply be the result of belief perseverance.

Consider, for example, the government's much criticized spy charges against Ahmad Al Halabi, an Air Force translator at the U.S. naval base at Guantanamo Bay. [FN113] The initial evidence appeared damning. Al Halabi had stored nearly two hundred detainee notes in his personal laptop, had taken prohibited photographs of the base's guard towers, and had plans to travel to Syria. [FN114] A computer analyst concluded from an inspection of Al Halabi's laptop that he had already e-mailed some of the stored documents over the Internet. [FN115]

Within weeks, a different computer investigator concluded that the initial analysis of the laptop was flawed and that Al Halabi had not sent any material over the Internet. [FN116] Nevertheless, for nearly four months prosecutors continued to seek additional analysis from the "best places." [FN117] Even when prosecutors concluded that absolutely no evidence existed to show that Al Halabi e-mailed any materials, the government dismissed only those charges that alleged the transmittal of classified information; sixteen charges, including espionage,

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remained. [FN118]

Still, the government's case had problems. The supposedly secret documents on Al Halabi's laptop were innocuous communications, such as letters from detainees to parents. [FN119] Moreover, he had an explanation for their presence on his laptop: translators, including himself, had been asked to alleviate a shortage of computers on the ***1608** base by using their personal computers. [FN120] Al Halabi did admit to photographing the base, but only to remember his military service there, not to conduct espionage. [FN121] He also offered a justification for his anticipated travel to Syria-his upcoming wedding. [FN122] Nevertheless, prosecutors persisted, arguing that the wedding was a ruse to conceal Al Halabi's true intentions of delivering secret information to an enemy. [FN123]

Ultimately, the government conceded that only one of the nearly two hundred documents on Al Halabi's computer was classified as secret. [FN124] Nearly all charges were dropped, and Al Halabi agreed to plead guilty to relatively minor charges relating to the mishandling of a document, the prohibited photographs of the camp, and his false statements concerning the photographs. [FN125] What was once a death penalty case ended with a discharge and demotion, but no additional jail time. [FN126]

Some have suggested that Al Halabi was the victim of an anti-Muslim witch hunt at Guantanamo. [FN127] Although Al Halabi's Muslim faith undoubtedly contributed to the government's willingness to believe that he was a spy, belief perseverance may have played a larger role in the government's unwillingness to yield that belief. After the evidence of e-mailing was demonstrated to be inaccurate, the theory of guilt continued to taint the prosecutor's evaluation of the remaining evidence. [FN128] Indeed, even after the government's case ***1609** unraveled, Al Halabi's prosecutor insisted, "He was engaged in suspicious behavior. He took prohibited photographs." [FN129]

C. The Disclosure of Exculpatory Evidence

The fallibility of human cognition raises especially disturbing questions about a prosecutor's ability to determine whether evidence is exculpatory. Under Brady v. Maryland [FN130] and its progeny, prosecutors must disclose materially exculpatory evidence to the defense. [FN131] The problem lies in the Court's definition of "materiality." Borrowing from the Court's standard in Strickland v. Washington for granting a new trial based on ineffective assistance of counsel, [FN132] the Court held in United States v. Bagley that evidence is material and therefore required to be disclosed to the defense "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [FN133] The Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." [FN134] The Court subsequently made clear that the materiality standard is not whether the trial's outcome would more likely than not have ***1610** been different with the evidence at issue, but whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." [FN135]

Because Brady's materiality standard turns on a comparison of the supposedly exculpatory evidence and the rest of the trial record, applying the standard prior to trial requires that prosecutors engage in a bizarre kind of anticipatory hindsight review. They must anticipate what the other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence at issue would place "the whole case" [FN136] in a different light. [FN137] Others have previously criticized Brady for relying on prosecutors to determine the materiality of evidence in their own files. [FN138] Prosecutors, some say, are in a poor position to evaluate the materiality of evidence because they are unaware of the planned defense strategy [FN139] and are, in any event, conflicted by their desire to win. [FN140] Moreover, if a prosecutor wrongly decides to withhold materially exculpatory evidence, the misapplication of the standard may never be detected, and there will never be judicial review of the prosecutor's decision. [FN141]

The point about Brady made in this Article is a slightly different one. This Article does not dispute that a prosecutor's review of her own file for exculpatory evidence might be biased; rather, this Article sees cognitive psychology as providing a potential basis for explaining the mechanism underlying the prosecutor's bias. From ***1611** this perspective, the prosecutor's application of Brady is biased not merely because she is a zealous advocate engaged in a "competitive enterprise," [FN142] but because the theory she has developed from that enterprise might trigger cognitive biases, such as confirmation bias and selective information processing. [FN143]

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Brady requires a prosecutor who is determining whether to disclose a piece of evidence to the defense to speculate first about how the remaining evidence will come together against the defendant at trial, and then about whether a reasonable probability exists that the piece of evidence at issue would affect the result of the trial. [FN144] During the first step, a risk exists that prosecutors will engage in biased recall, retrieving from memory only those facts that tend to confirm the hypothesis of guilt. [FN145] Moreover, because of selective information processing, the prosecutor will accept at face value the evidence she views as inculpatory, without subjecting it to the scrutiny that a defense attorney would encourage jurors to apply. [FN146]

Cognitive bias would also appear to taint the second speculative step of the Brady analysis, requiring the prosecutor to determine the value of the potentially exculpatory evidence in the context of the entire record. [FN147] Because of selective information processing, the prosecutor will look for weaknesses in evidence contradicting ***1612** her existing belief in the defendant's guilt. [FN148] In short, compared to a neutral decision maker, the prosecutor will overestimate the strength of the government's case against the defendant and underestimate the potential exculpatory value of the evidence whose disclosure is at issue. As a consequence, the prosecutor will fail to see materiality where it might in fact exist.

D. Stickier Presumptions of Guilt Postconviction

A further barrier to prosecutorial neutrality arises upon the defendant's conviction. Just as the majority of commentators believe that prosecutors should bring charges only when they are personally convinced of an accused's culpability, prosecutors also have an obligation to seek postconviction redress if they believe that an innocent person has been convicted. [FN149] Even if prosecutors do not seek the defendant's release sua sponte, one would at least expect a conscientious prosecutor not to oppose relief for an innocent person who requests it. [FN150] The problem, of course, is convincing the prosecutor that the defendant is, in fact, innocent.

Whether the conviction was obtained through a jury verdict or the defendant's own guilty plea, the prosecutor will view the conviction as further evidence confirming the accuracy of her initial theory of guilt. [FN151] The prosecutor's strengthened belief in her theory will continue to taint her analysis of any new evidence submitted by the defense postconviction. [FN152]

Moreover, cognitive dissonance will further hinder the prosecutor's ability to conduct a neutral evaluation of potentially ***1613** exculpatory evidence. [FN153] The conviction of an innocent person is inconsistent with the ethical prosecutor's belief that charges should be brought only against suspects who are actually guilty. [FN154] To avoid cognitive dissonance, an ethical prosecutor might cling to the theory of guilt to reconcile her conduct with her beliefs, especially after the defendant has been convicted. From this perspective, prosecutorial bias against postconviction exculpatory evidence is not an indication of corrupt ethics at all; rather, it may indicate a deep but biasing adherence to the edict that prosecutors should only do justice. A prosecutor may give short shrift to claims of innocence, in other words, not because she is callous about wrongful convictions, but because she cannot bring herself to believe that she has played a part in one.

III. Improving Prosecutorial Decision Making

Prosecutorial shortcomings such as tunnel vision, failures to disclose exculpatory evidence, and stubborn adherence to theories of guilt are often categorized as "prosecutorial misconduct," [FN155] suggesting a culpable mental state in the wrongdoing prosecutors. Not surprisingly, then, commentators who seek to prevent these prosecutorial shortcomings look for reform through improvements in prosecutorial values. [FN156] Common reform suggestions include, ***1614** for example, increases in both the frequency and severity of sanctions against unethical prosecutors and a transformation of a prosecutorial culture that is described as valuing conviction rates above justice. [FN157] If only prosecutors cared about claims of innocence, the story seems to go, we might trust their decision making.

Without disputing the suggestion that some prosecutors-both individually and institutionally-could give more weight to doing justice, this Article has tried to suggest that the story is a more complicated one. This Article seeks to add a cognitive dimension to the traditional explanation of "misconduct," not because all prosecutors are well intentioned, but because suggesting that only bad-intentioned prosecutors are at risk of poor decision making is simply too easy. Prosecutors sometimes make biased decisions, this Article has argued, because people generally are

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biased decision makers. A cognitive explanation for prosecutorial bias suggests that improving the values of prosecutors is not enough; an improvement in the cognitive process is required. This Part attempts to set forth some initial suggestions for reform, aimed at reducing the influence of cognitive bias upon sound prosecutorial decision making.

A. Improving the Initial Theory of Guilt

Confirmation bias, selective information processing, and belief perseverance are all triggered by the decision maker's existing beliefs. In the context of prosecutorial decision making, the biasing theory is the prosecutor's belief that the defendant is guilty. Once that belief is formed, confirmation bias causes her to seek information that confirms the theory of guilt; selective information processing causes her to trust information tending to confirm the theory of guilt and distrust potentially exculpatory evidence; and belief perseverance causes her to adhere to the theory of guilt even when the evidence initially supporting that theory is undermined. [FN158]

Because the theory of guilt triggers sources of cognitive bias, prosecutorial neutrality should be at its peak prior to the prosecutor's ***1615** charging decision, before she has formed a theory of guilt that will taint subsequent information processing. [FN159] Accordingly, the accuracy of a prosecutor's decision making would be maximized if she had access to all relevant evidence gathered by the police prior to making the initial charging decision. Early access to all relevant evidence could be improved in two ways. First, prosecutors could be involved in investigations prior to initiating formal charges, as they often are in the federal system or in major crime investigations at the state level. [FN160] Second, in less serious cases in which resources would not feasibly permit prosecutorial involvement in the cases's investigative stage, police should record, preserve, and disclose to the prosecutor all evidence collected during their investigation, both inculpatory and exculpatory. [FN161]

Because police agencies act independently of prosecutors' offices in most jurisdictions, prosecutors have no guarantee that police will give them the information they need to make a fully informed evaluation of a case. [FN162] Although Brady provides defendants a right of access to material exculpatory evidence, it does so through a trial right that governs the conduct of prosecutors, not the police. [FN163] And although the Supreme Court has extended prosecutors' Brady obligations to all exculpatory evidence known to law enforcement agencies "acting on the government's behalf in the case," [FN164] no ***1616** doctrinal basis exists for assuring prosecutorial access to this information.

Professor Fisher has suggested that prosecutorial access to exculpatory information gathered by the police could be increased either directly through legislation or indirectly through changes to the ethical rules that govern prosecutors. [FN165] This Article seeks only to offer an additional reason for ensuring the police's full disclosure of information to prosecutors and does not explore the best doctrinal basis for doing so. Prosecutorial access to all information gathered by police during their investigation is essential not only to the ability of prosecutors to comply with Brady but also to the accuracy of their initial charging decisions, which the cognitive literature suggests are hard to shake. [FN166]

Of course, no process can assure one hundred percent accuracy in a prosecutor's decision making. However, improving prosecutorial access to investigatory information prior to the initial charging decision improves decision-making outcomes in two related ways. First, it maximizes the availability of prosecutorial neutrality, ensuring that the prosecutor's initial theory about the case is based upon all available information. Second, to the extent that the prosecutor's initial charging decision will bias her subsequent decisions in the case, improving the accuracy of the prosecutor's initial theory of guilt will mitigate from a normative perspective the adverse effects of cognitive bias upon the prosecutor's ultimate decisions.

B. Educating Prosecutors and Future Prosecutors

Another possible method of improving prosecutorial decision making is to train prosecutors and future prosecutors about the sources of cognitive bias and the potential effects of cognitive bias upon rational decision making. Commentators often look to ***1617** education to improve prosecutorial decision making, [FN167] but they tend to emphasize education about good prosecutorial values. They have argued, for example, that prosecutors should be admonished to approach cases with "a healthy skepticism" and "to assume an active role in confirming the truth of

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the evidence of guilt and investigating contradictory evidence of innocence." [FN168] To the virtuous prosecutor, these obligations are apparent. What is less apparent are the cognitive biases that may taint the decision making of even ethical prosecutors.

With increased academic attention to the effects of cognitive bias on legal theory, doctrine, and practice, there has been some movement toward teaching law students about the limits of their own rationality. [FN169] Additionally, recent responses to wrongful convictions have included the recommendation that prosecutors learn about cognitive bias and its effects upon prosecutorial decision making. [FN170] Some empirical evidence suggests that self-awareness of cognitive limitations can improve the quality of individual decision making. [FN171] For example, recall that in their well-known experiment involving the fake suicide note task, Ross, Lepper, and Hubbard found that both the actors who performed the task and the observers who watched maintained their beliefs about the actors' ability to perform the task, even after being told that the experimenters provided false feedback. [FN172] As part of the study, experimenters also exposed some subjects to a further "process debriefing," which provided a detailed discussion of the belief ***1618** perseverance phenomenon. [FN173] The experimenters found that process debriefing eliminated the effects of the false feedback, at least among the subjects who completed the task themselves. [FN174]

However, some social science evidence suggests that self-awareness is not enough to prevent cognitive bias. For example, although Ross, Lepper, and Hubbard found that "process debriefing" about the phenomenon of belief perseverance eliminated belief perseverance among subjects concerning their own performance on the suicide note task, they also found continued perseverance effects among observer subjects, despite process debriefing. [FN175] In other words, observer subjects continued to view an actor's ability as consistent with the discredited feedback. [FN176] Similarly, Wason found that alerting subjects to their errors in the card-selection task did little to improve their accuracy in selecting the appropriate cards for hypothesis testing. [FN177] Accordingly, although education about cognitive bias may hold some potential to improve prosecutorial decision making, it is doubtful that education alone will assure prosecutorial neutrality.

C. The Practice of "Switching Sides"

One possible method for the ethical prosecutor to avoid cognitive bias would be to act as her own neutralizing adversary by generating pro-defense counterarguments to her own prosecutorial interpretations of the evidence against the defendant. Cognitive research suggests that the generation of explanatory arguments plays a role in belief perseverance, and that generating explanatory counterarguments can mitigate belief perseverance. For example, recall Anderson, Lepper, and Ross's study, in which subjects were led to believe through fictionalized case histories that either a negative or positive correlation existed between risk preference and ***1619** firefighting abilities. [FN178] The study replicated the basic belief perseverance phenomenon, with subjects continuing to adhere to beliefs about the perceived relationship even after learning that the case histories were fictional. [FN179] Importantly though, the researchers asked subjects prior to the debriefing to generate possible explanations for the perceived relationship. [FN180] Those subjects who generated a plausible theory to support the observed correlation displayed more perseverance than subjects whose explanations simply restated the existence of an observed correlation. [FN181]

One suggested mechanism for belief perseverance, then, is that once a theory is formed to explain a data set, it exists apart from the data and may continue to be treated as the most plausible theory even after the underlying data is discredited. [FN182] Such a mechanism suggests that generating countertheories should mitigate perseverance effects, and the cognitive literature does provide some support for counterexplanation as a debiasing technique. [FN183] Anderson and Sechler, for example, found that ***1620** subjects who were asked to generate arguments to support an assigned position shifted their attitudes toward the assigned position. [FN184] However, when the experimenters asked subjects to generate arguments to support the opposite position, the belief perseverance effects were reversed. [FN185] Similarly, Lord, Lepper, and Preston found a corrective effect when subjects were induced to consider opposing possibilities, either upon explicit instruction or through exposure to materials that made the opposing possibility more salient. [FN186]

In lawyer terms, a prosecutor seeking to avoid cognitive bias through counterexplanation would simply switch litigation sides and play the role of her own devil's advocate, a practice she probably learned her first year of law

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school. The mental exercise of switching sides could help mitigate cognitive bias in two separate contexts. [FN187] First, as evidence is evaluated on an ongoing basis during a case's pendency, the prosecutor could try to generate plausible explanations of both guilt and innocence for each piece of incoming evidence. This procedure might serve as inoculation against unwarranted belief perseverance by preventing the prosecutor's theory of guilt from becoming disconnected from the evidence underlying it. Second, if an early piece of evidence is subsequently discredited, a prosecutor who had formed an opinion of guilt based in part on the discredited evidence could imagine alternative explanations for any remaining evidence. This counterexplanation exercise of switching sides would assist the prosecutor in an unbiased evaluation of the prosecution's remaining case without the discredited evidence.

***1621** D. Second Opinions and Committee Input

Another possible method to mitigate the influence of cognitive bias on prosecutorial decision making is to involve additional, unbiased decision makers in the process. The reduction of bias might be achieved internally within a prosecutor's office by establishing a process for "fresh looks" of a file by a lawyer or a committee of lawyers whose evaluation would not be tainted by earlier developments in the case. [FN188] For example, such a process might be helpful when the prosecuting attorney learns of a new piece of potentially exonerating evidence and the initial theory of guilt might cause her to undervalue its importance. [FN189] A fresh look might also be helpful when the credibility of a piece of evidence that contributed to the prosecutor's initial charging decision is undermined. A separate attorney would be able to comment on the strength of existing evidence against the defendant without the taint of a preexisting theory of guilt. [FN190] Similarly, a fresh look attorney would not be biased by the desire to avoid the cognitive dissonance associated with having charged an innocent person with a crime. [FN191]

Limitations exist, however, in another prosecutor's ability to provide a neutral evaluation of a coworker's case. Herbert Packer observed long ago the operational "presumption of guilt" that allows the fast-paced case screening process in most district attorneys' offices to function. [FN192] At least some prosecutors might open each ***1622** new file assuming that police would not have arrested the suspect and referred him for charges if they did not have their man. [FN193] Accordingly, a prosecutor serving as a fresh look attorney may be tainted by an initial theory of guilt even before reading a police report. Moreover, a fresh look attorney may be reluctant to dissent from her colleague's initial case evaluation. The social science literature demonstrates the difficulty decision makers have in resisting the power of their peers. [FN194] For example, in Solomon Asch's classic studies on conformity, he found that large percentages of subjects could be induced to reach erroneous conclusions in a simple line-matching task if a number of the researchers' confederates first answered incorrectly. [FN195]

Accordingly, a more meaningful fresh look process might involve an advisory committee that includes nonprosecutors. Asch's research on conformity demonstrated the power of even one lone dissenting voice to encourage people to depart from group opinion and assess a problem independently. [FN196] Judges, defense attorneys, and civil practitioners would be less likely to apply a presumption of guilt and would feel less pressure to conform their views to other prosecutors; accordingly, they may be more likely to provide a true fresh look. [FN197]

***1623** Some prosecutors might resist the involvement of outsiders in the case-evaluation process as an unwarranted intrusion into prosecutorial discretion. However, the full scope of prosecutorial discretion could be preserved if the fresh look committee served solely in an advisory capacity and the district attorney's office retained ultimate decision-making authority. Moreover, the committee's advisory capacity could be limited to specific questions, such as the strength of a case or the potential value of exonerating evidence. [FN198] Such a limited consulting role would not involve the committee in the broader policy questions that generally justify deference to prosecutorial discretion, such as the jurisdiction's enforcement priorities or where a single case fits within those priorities. [FN199]

With limited responsibilities, a diversely constituted fresh look committee could be modeled loosely after the civilian review boards that increasingly monitor police. [FN200] Most of those boards participate in the oversight of police departments in narrow ways, such as resolving complaints against individual police officers, without interfering in broader questions about the department's policing ***1624** strategies. [FN201] Although police departments initially balked at even minimal civilian involvement in their affairs, at least some role for external monitoring of police is increasingly acceptable. [FN202] If prosecutors' offices could survive a similar cultural adjustment, they could have the benefits of neutral fresh looks without sacrificing the autonomy brought by

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prosecutorial discretion. [FN203]

E. Prosecutorial Involvement in Innocence Projects

Another proposal for reform is increased prosecutorial involvement in the organizations that govern and address professional ethics among lawyers generally and prosecutors specifically, such as state and local bar committees, innocence projects, and groups concerned with providing quality defense representation in criminal cases. Currently, prosecutors are underrepresented in bar and pro bono oriented activities. [FN204] Apart from the benefits that might inure to these organizations from increased and diversified participation, prosecutorial involvement in such groups would provide prosecutors with a venue for behavior demonstrating their commitment to protecting innocent defendants. That objective behavioral commitment could in turn assist prosecutors in their own internal decision making by mitigating the biasing effects of cognitive dissonance.

Part II.D suggested that cognitive dissonance might prevent prosecutors from neutrally evaluating defendants' claims of innocence because ethical prosecutors may not want to believe that they have convicted, or even charged, an innocent person of a crime. Accordingly, to resist dissonance, the prosecutor might underestimate ***1625** the merits of a claim to innocence. [FN205] However, recent research on dissonance suggests that dissonance resistance can be mitigated when people are given an alternative method of affirming their own values and self-perceptions. For example, Claude Steele has theorized that cognitive dissonance results from people's desire to affirm their own sense of integrity. [FN206] According to Steele's self-affirmation theory, a person changes her beliefs in the face of dissonant conduct because the act implies that the person is not "morally adequate" and challenges the person's self-adequacy. [FN207] To affirm her own image, the person adjusts her beliefs in response to the dissonance. [FN208] Steele's theory is consistent with this Article's suggestion that prosecutors may resist reevaluating a defendant's guilt in an attempt to preserve their own sense of professional integrity.

Steele's research provides some support not only for the theorized mechanism underlying the reaction to dissonance, but also for its corollary that belief adjustment in response to dissonance can be mitigated if people are provided an alternative mechanism for self-affirmation. For example, Steele and Liu asked subjects to write an essay supporting increases in tuition, even though the subjects opposed the hikes. [FN209] Subjects were also asked to complete a questionnaire about politics and economics. [FN210] Replicating the classic finding of cognitive dissonance, subjects generally demonstrated a change in their beliefs, reporting less opposition to tuition increases after writing essays favoring them. [FN211] However, the researchers found that subjects who valued politics and economics, and who had affirmed their values by completing the required questionnaire, demonstrated less belief change as a result of the forced counterattitudinal essay. [FN212] The researchers construed the ***1626** data as suggesting that salient, self-affirming cognitions might help people respond objectively to information that challenges their self-image. [FN213]

Similarly, in another study, researchers found that subjects who were asked to write an essay opposing state funding for the construction of handicapped facilities demonstrated less change in their beliefs about the appropriateness of such facilities if they expected to have an opportunity to personally assist the handicapped after the experiment. [FN214]

These studies suggest that prosecutors could mitigate the effects of dissonance resistance on decision making by creating alternative mechanisms to support their own self images as ethical prosecutors committed to the pursuit of justice. Personal involvement in professional organizations that value legal and prosecutorial ethics might increase the prosecutor's own confidence in her commitment to protecting the innocent and may therefore decrease the likelihood of bias in evaluating claims of innocence.

F. Repairing Brady

This Article's final suggestion for reform concerns a prosecutor's disclosure of evidence to the defense under Brady v. Maryland. [FN215] The previously suggested reforms of increased prosecutorial access to information, prosecutorial training about cognitive bias, the practice of switching litigation sides, internal fresh look reviews, and prosecutorial involvement in professional organizations all carry some potential to improve a prosecutor's application of the Brady standard because they all seek to mitigate cognitive bias and will therefore increase the

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likelihood of an accurate assessment of the exculpatory value of a piece of evidence. Additional improvement***1627** in prosecutorial disclosure, however, requires a rethinking of Brady's materiality standard.

As explored in Part II.C, limiting a prosecutor's constitutional disclosure obligation to evidence that poses a "reasonable probability" [FN216] of affecting a case's outcome invites decision making that is biased against disclosure. Because the prosecutor has already formed a theory of guilt, she will overestimate the value of inculpatory evidence, underestimate the value of the exculpatory evidence, and ultimately undercount instances of materiality. [FN217] The problem with the Court's Brady doctrine is its use of a harmless error standard not just in determining whether the reversal of a conviction is warranted based on the nondisclosure of exculpatory evidence, but also in determining whether disclosure is required in the first place.

This flaw results from the Court's misplaced reliance in the Brady context on the standard established in Strickland v. Washington [FN218] for granting a new trial based on ineffective assistance of counsel. [FN219] Importantly, unlike Brady's materiality standard, the Court's test under Strickland is a two-prong test that separates the standard for attorney performance from the question of the defendant's entitlement to a new trial should counsel fail to meet that standard. [FN220] The first prong makes clear that the standard for attorney performance is that of "reasonably effective assistance." [FN221] The second prong of Strickland applies as a harmless error standard, asking whether the deficiency of counsel's performance affected the trial's outcome. [FN222] In light of the two ***1628** prongs separating the standard for attorney performance from the standard for a defendant's remedy, a defense attorney who looked to Strickland for guidance about her duties of performance would be hard pressed to argue that she was professionally, ethically, and legally entitled to provide an incompetent, unreasonable defense as long as her client was a lost cause. [FN223]

Unlike Strickland's two-prong test, the Court's prosecutorial disclosure jurisprudence establishes a single standard for determining both counsel's obligations and the defendant's entitlement to relief if those obligations go unmet. [FN224] As a standard for determining the availability of postconviction relief, Brady's materiality requirement may be a sensible method of ensuring that convictions are not lightly reversed when undisclosed evidence could not have affected a case's disposition. It is not, however, a helpful pretrial standard for prosecutors trying to determine at the outset whether to disclose evidence to the defense.

The standard governing prosecutors' disclosure to the defense should be separate from the standard that determines whether a defendant's conviction should be reversed due to a failure to disclose. Importantly, to mitigate cognitive bias, the standard for disclosure should require prosecutors to evaluate the potential exculpatory value of evidence from the defense's perspective, not through the lens of their preexisting theory of guilt. For example, Professor Capra suggested long ago that prosecutors should be required to disclose any evidence "favorable to the defendant's preparation or presentation of his defense." [FN225]

Model Rule of Professional Conduct 3.8(d), the ethical rule governing prosecutors' disclosure of evidence, is a step in the right direction because it requires prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor ***1629** that tends to negate the guilt of the accused or mitigates the offense." [FN226] Although the rule primarily codifies prosecutors' constitutional obligations under Brady, the provision does not contain the limitation of materiality found in the Court's due process jurisprudence. [FN227]

Unfortunately, an ethical rule that governs prosecutorial disclosure is unlikely to alter the psychology of prosecutors trained to apply the well-known, constitutionally based Brady standard. As an initial matter, prosecutors receive far more training about the constitutional rules of criminal procedure than about ethical rules. [FN228] Accordingly, they may not even be aware that Model Rule 3.8(d) requires broader disclosure than Brady. Even if aware of the gap between the Model Rule and Brady's materiality standard, prosecutors may feel an obligation as an advocate to violate Model Rule 3.8(d) and to pursue all constitutional means of convicting a defendant they believe is guilty. [FN229] Because prosecutors, unlike private attorneys, are members of law enforcement, empowered by the executive branch, it is not uncommon for them to think of their obligations only as law enforcement officers governed by constitutional and statutory rules, not as lawyers governed by the rules of professional conduct. [FN230]

***1630** The failure of bar authorities to inject ethical rules into the daily practice of prosecutors does little to alter

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this psychology. Even prosecutors who violate their constitutional disclosure obligations are rarely disciplined. [FN231] Thus, prosecutors who fail to disclose evidence that falls under Model Rule 3.8(d), but not Brady, are unlikely to be disciplined. [FN232] In short, the rejection of the materiality requirement by Model Rule 3.8(d), standing alone, is unlikely to alter the decision-making process of a prosecutor evaluating the exculpatory value of evidence.

Critics of Brady have suggested a variety of alternative reforms. Professor Capra has argued for a right to in camera inspection of the prosecutors' files so that a judge can fully effectuate the defendants' Brady rights. [FN233] Still others have argued for the "open file" policies already adopted by several jurisdictions in capital prosecutions. [FN234] This Article's purpose is not to explore fully the ***1631** relative strengths and weaknesses of all possible reforms. Rather, this Article's intention is to demonstrate that the Brady rule should be modified to separate the standard that governs the disclosure requirement from the harmless error standard that determines the availability of a remedy if required discovery is withheld. Moreover, in light of what we know about cognitive bias, the governing standard for prosecutorial disclosure should attempt to avoid the recipe for cognitive disaster that is inherent in the current Brady standard. Broadening the Brady standard to include all favorable information, rather than just materially favorable information, would be a helpful move in the right direction. A standard turning on the favorability of the evidence instead of its materiality invites reviewing the file from the defense's perspective and therefore mitigates the influence of the prosecutor's preexisting theory of guilt on the decision-making process.

Conclusion

I wanted to write this Article to explore questions I have carried in my own mind since my first weeks as a prosecutor. Fresh out of my judicial clerkship, I was asked to help draft the papers required to obtain the release of two people who had been convicted of murder five years earlier. Police suspected that the woman whom the defendants supposedly killed, Tanya Bennett, was in fact the victim of a self-named, self-confessed serial killer. But even after the so-called Happy Face Killer included Bennett on his list of victims and provided detailed information about her murder, the prosecutors in my office who had obtained the original convictions remained doubtful. The Happy Face Killer must have known one of the convicted defendants, they speculated, or perhaps read the details in the newspaper. Only when the man led police to Bennett's long-abandoned purse, buried beneath half a decade's growth of blackberry bushes near the Columbia River Gorge, did the state agree to release the previously convicted defendants.

***1632** As a new lawyer reviewing the reports only with the benefit of hindsight, I could see potential problems with the prosecution's original case. Like Earl Washington's, [FN235] the defendants' convictions rested largely upon a retracted confession, obtained after repeated police questioning and corroborated by little other evidence. Nevertheless, I wondered as I drafted a memorandum summarizing the events leading to the erroneous convictions, would I have done anything differently? I do not purport to have the answer to that question today, but I do know that it was a valid question to ask myself then and, more importantly, a question that ethical prosecutors themselves need to raise in daily practice.

This Article has attempted to explore how cognitive bias might trigger poor decision making by prosecutors who intend to do justice. By doing so, this Article seeks to complement rather than supplant the vast literature that treats prosecutors as rational actors who choose to engage in misconduct. Adding a cognitive dimension to the current discussion of prosecutorial decision making is important in two different ways.

First, it shapes the direction of reform. Although sanctions and other alterations of the prosecutorial cost-benefit analysis may deter wrongful conduct in prosecutors who are not motivated to do justice, a cognitive explanation for how even virtuous prosecutors might contribute to wrongful convictions suggests that good values are not enough. As an admittedly introductory effort, this Article sets forth a few suggestions for enhancing neutral decision making by ethical prosecutors.

Moving beyond fault-based rhetoric to include a cognitive view of prosecutorial decision making also establishes a necessary discursive shift in the important, ongoing study of wrongful convictions. Using only the language of fault in the discussion invites an adversarial relationship between prosecutors and advocates for the innocent, because prosecutors naturally resist their depiction as wrongdoers. By antagonizing prosecutors and creating an opposing political force, the language of fault impairs the chances for meaningful prosecutor-initiated reforms, such

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as internal review ***1633** committees [FN236] or office guidelines to improve the exercise of prosecutorial discretion. [FN237]

In contrast, a cognitive explanation for faulty prosecutorial decision making creates the potential to fold ethical prosecutors into the dialogue. This discursive shift may encourage ethical prosecutors to examine the danger that they might personally contribute to wrongful convictions. Only when that happens can ethical prosecutors improve the quality of their own decisions and attempt to implement reforms that might improve the prosecutorial decision making of others.

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[FN1]. Maria Glod, DNA Not Enough To Charge Va. Rapist: Authorities Kept Identity a Secret, Wash. Post, Mar. 11, 2004, at B4.

[FN2]. Id.

[FN3]. Washington v. Murray, 952 F.2d 1472, 1478 n.5 (4th Cir. 1991) (noting the questionable circumstances surrounding Washington's interrogation); Eric M. Freedman, Earl Washington's Ordeal, 29 Hofstra L. Rev. 1089, 1091- 94 (2001) (detailing the history of the Washington "confessions").

[FN4]. See Washington v. Murray, 4 F.3d 1285, 1286 (4th Cir. 1993); see also Editorial, Justice Begrudged, N.Y. Times, Apr. 10, 2004, at A14 (advocating "an honest vetting of the judicial process that allowed [Washington's] name to be sullied in the first place").

[FN5]. See Glod, supra note 1 ("There are several people who are potential suspects, and I cannot rule out Earl Washington." (quoting prosecuting attorney)). The current county prosecutor, who assumed office after Washington was convicted, was perhaps even more insistent about his guilt, telling a local paper after Washington's exoneration, "It has been my position all along that Earl Washington is guilty, and that is still my position." Complaint ¶ 117, Washington v. Buraker, 322 F. Supp. 2d 692 (W.D. Va. 2004) (No. 3:02-CV-00106) (civil suit filed by Earl Washington against several Virginia officials); see also Margaret Edds, An Expendable Man: The Near-Execution of Earl Washington Jr. 181 (2003) ("No one, it seemed, was more convinced of Washington's guilt than [the county's prosecuting attorney]."). Washington's civil suit is still pending. See Washington v. Wilmore, 407 F.3d 274, 275- 76 (4th Cir. 2005) (affirming the district court's denial of summary judgment on one of Washington's claims).

[FN6]. See Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 Fordham L. Rev. 851, 890 (1995) ("Prosecutorial misconduct is readily apparent to any lawyer who keeps abreast of appellate review of criminal convictions.").

[FN7]. See Stanley Z. Fisher, In Search of the Virtuous Prosecutor: A Conceptual Framework, 15 Am. J. Crim. L. 197, 204-13 (1988) (describing factors that cause prosecutors to pursue cases "overzealously"); Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 458 (1992) (arguing that "the present ethos of overzealous prosecutorial advocacy" is "ingrained"); Judith L. Maute, "In Pursuit of Justice" in High Profile Criminal Matters, 70 Fordham L. Rev. 1745, 1747 (2002) (noting that "[o]verzealous prosecutors may become too closely aligned with ... witnesses who are willing to shade or falsify their testimony in order to obtain a conviction").

[FN8]. See Kenneth Bresler, "I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions, 9 Geo. J. Legal Ethics 537, 541 (1996) (decrying prosecutors who "keep personal tallies ... for self-promotion"); Meares, supra note 6, at 882 (describing the "desire to 'win"' as "a central characteristic of prosecutorial culture"); Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. Rev. 125, 134 (2004) (attributing the lack of prosecutorial support for postconviction claims of innocence in part to "the

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emphasis district attorneys' offices place on conviction rates").

[FN9]. Bennett L. Gershman, The Prosecutor's Duty to Truth, 14 Geo. J. Legal Ethics 309, 350 (2001); see also Anthony V. Alfieri, Prosecuting Race, 48 Duke L.J. 1157, 1242-45 (1999) (discussing prosecutorial discretion guided by "moral norms"); Bruce A. Green, The Role of Personal Values in Professional Decisionmaking, 11 Geo. J. Legal Ethics 19, 59-60 (1997) (advocating ad hoc invocation of moral judgment).

[FN10]. Prosecutors are not only obligated to act as advocates to enforce the law but are also entrusted to ensure that justice is met. See Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2001) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); cf. Steven K. Berenson, Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?, 41 B.C. L. Rev. 789, 792-94 (2000) (discussing the public interests served by prosecutors).

[FN11]. See generally Bruce A. Green, Why Should Prosecutors "Seek Justice"?, 26 Fordham Urb. L.J. 607, 636 (1999) (emphasizing a prosecutor's unique "duty to avoid the public perception that criminal proceedings are unfair"); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 107-09 (1991) (describing the psychological factors that limit the effectiveness of "do justice" provisions).

[FN12]. Bruce A. Green, Prosecutorial Ethics as Usual, 2003 U. Ill. L. Rev. 1573, 1587.

[FN13]. Kenneth Rosenthal, Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence, 71 Temp. L. Rev. 887, 889 (1998) (noting an "absence of disciplinary sanctions against prosecutors, even in the most egregious cases"); Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C. L. Rev. 721 (2001) (assessing the lack of discipline for prosecutorial misconduct).

[FN14]. Berenson, supra note 10, at 846 (recommending that professional advancement in prosecutors' offices "should be based on richer measures of compliance with the 'do justice' standard, rather than simply on conviction rates"); Erwin Chemerinsky, The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles, 8 Va. J. Soc. Pol'y & L. 305, 320-21 (2001) (suggesting that prosecutors be rewarded with promotion opportunities for identifying police misconduct); Medwed, supra note 8, at 172 (advocating incentives for prosecutors to respond to postconviction claims of innocence).

[FN15]. Meares, supra note 6, at 873-74 (proposing the reduction of overcharging by rewarding prosecutors financially for obtaining convictions on charges initially pursued).

[FN16]. See Ziva Kunda, Social Cognition: Making Sense of People 211-63 (1999); Richard Nisbett & Lee Ross, Human Inference: Strategies and Shortcomings of Social Judgment 17-42 (1980); Steven Pinker, How the Mind Works 175 (1997); see also Cass R. Sunstein, Behavioral Analysis of Law, 64 U. Chi. L. Rev. 1175, 1175 (1997) (noting that although "[c]ognitive errors ... may press behavior far from the anticipated directions," human decision making is not "unpredictable, systematically irrational, random, rule-free, or elusive to social scientists"). See generally Daniel Kahneman, Paul Slovic & Amos Tversky, Judgment Under Uncertainty: Heuristics and Biases (1982).

[FN17]. Traditional law and economics assumes that actors make utility-maximizing decisions about their behavior, weighing with perfect rationality the benefits of a behavior against its costs, assessed by the likely sanction and probability of detection. See, e.g., A. Mitchell Polinsky, An Introduction to Law and Economics 77-78 (2d ed. 1989).

[FN18]. See generally Cass R. Sunstein, Behavioral Law and Economics (2000); Christine Jolls, Cass R. Sunstein & Richard H. Thaler, Theories and Tropes: A Reply to Posner and Kelman, 50 Stan. L. Rev. 1593, 1594-96 (1998); Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Cal. L. Rev. 1051, 1075 (2000). For example, reliance on the "availability heuristic" causes people to overestimate the occurrence of events that are easily imagined. Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequency and Probability, 5 Cognitive Psychol. 207, 208 (1973). As a result,

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they may be more fearful of and more willing to devote resources to prevent highly salient and unlikely occurrences, such as airplane crashes, than less salient and more likely events, such as automobile accidents. See generally Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 Stan. L. Rev. 683, 685 (1999). Similarly, the "endowment effect" describes the overvaluation of property that is already owned, which can distort efficient bargaining. See generally Russell Korobkin, The Endowment Effect and Legal Analysis, 97 Nw. U. L. Rev. 1227, 1232-35 (2003).

[FN19]. Rebecca Hollander-Blumoff & Matthew T. Bodie, The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act, 90 Iowa L. Rev. 1361, 1375-88 (2005) (discussing the effects on jury decision making of disclosing the cap on jury awards); Saul M. Kassin, The American Jury: Handicapped in the Pursuit of Justice, 51 Ohio St. L.J. 687, 697 (1990) (noting that cautionary instructions and cross-examination may not cure damage of misleading witness testimony because early impressions are resistant to change); Edward J. McCaffery et al., Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards, 81 Va. L. Rev. 1341, 1354-73 (1995) (considering how the use of cognitive theory in the framing of jury instructions can affect monetary awards for pain and suffering).

[FN20]. Dan Simon, A Psychological Model of Judicial Decision Making, 30 Rutgers L.J. 1, 121-23 (1998).

[FN21]. Kuran & Sunstein, supra note 18, at 711-23.

[FN22]. Stephanie Stern, Cognitive Consistency: Theory Maintenance and Administrative Rulemaking, 63 U. Pitt. L. Rev. 589, 620-30 (2002).

[FN23]. Donald C. Langevoort, Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms), 146 U. Pa. L. Rev. 101, 130-48 (1997).

[FN24]. Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 Stan. L. Rev. 211, 225-58 (1995).

[FN25]. Norman I. Silber, Observing Reasonable Consumers: Cognitive Psychology, Consumer Behavior and Consumer Law, 2 Loy. Consumer L. Rep. 69, 71 (1990).

[FN26]. Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161, 1186-217 (1995).

[FN27]. Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 Yale L.J. 71, 88-90 (2000).

[FN28]. H. Richard Uviller, Commentary, The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA, 71 Mich. L. Rev. 1145, 1155-59 (1973) (discussing ethical problems unique to prosecutors).

[FN29]. Monroe H. Freedman, Understanding Lawyers' Ethics 219 (1990) (speaking of the charging obligations of "conscientious prosecutors").

[FN30]. Leslie C. Griffin, The Prudent Prosecutor, 14 Geo. J. Legal Ethics 259, 261 (2001) (discussing the moral and legal discretion held by prosecutors in performing their jobs).

[FN31]. Nisbett & Ross, supra note 16, at 169.

[FN32]. Id.

[FN33]. See Charles G. Lord, Lee Ross & Mark R. Lepper, Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. Personality & Soc. Psychol. 2098 (1979); Mark Snyder & William B. Swann, Jr., Hypothesis-Testing Processes in Social Interaction, 36 J. Personality & Soc. Psychol. 1202 (1978).

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[FN34]. See infra Part I.A.

[FN35]. See infra Part I.B.

[FN36]. See infra Part I.C.

[FN37]. See infra Part I.D.

[FN38]. P. C. Wason & P. N. Johnson-Laird, Psychology of Reasoning: Structure and Content 210-11 (1972).

[FN39]. Id. at 202-17; see also Kunda, supra note 39, at 112-17 (describing hypothesis confirmation when evaluating other people); Joshua Klayman & Young-Won Ha, Confirmation, Disconfirmation, and Information in Hypothesis Testing, 94 Psychol. Rev. 211 (1987) (arguing that confirmation bias is better understood as a positive test strategy).

[FN40]. P. C. Wason, Reasoning About a Rule, 20 Q. J. Experimental Psychol. 273, 273 (1968).

[FN41]. Id.

[FN42]. Id. at 273-75.

[FN43]. See generally Karl R. Popper, The Logic of Scientific Discovery 32- 33 (1968).

[FN44]. Wason, supra note 40, at 273-77.

[FN45]. Id. at 276-77.

[FN46]. Id. at 280-81. To discover a vowel on the other side of the even number card would simply provide an example consistent with the "if vowel, then even number" rule. However, to discover a consonant on the other side would do nothing to disprove the "if vowel, then even number" rule, which says nothing about the reverse side of consonant cards. Id. at 280.

[FN47]. Id.

[FN48]. Snyder & Swann, supra note 33, at 1202.

[FN49]. Id. at 1203.

[FN50]. Id. at 1203-04.

[FN51]. Id. at 1202-12.

[FN52]. Id.

[FN53]. Id. at 1204.

[FN54]. See Mark Snyder & Nancy Cantor, Testing Hypotheses About Other People: The Use of Historical Knowledge, 15 J. Experimental Soc. Psychol. 330 (1979).

[FN55]. Id. at 330-33.

[FN56]. Id. at 333.

[FN57]. Id. at 334-35.

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[FN58]. Id. at 341-42.

[FN59]. Lord, Ross & Lepper, supra note 33, at 2098.

[FN60]. Id. at 2100.

[FN61]. Id.

[FN62]. Id. at 2101-02.

[FN63]. Id. at 2103.

[FN64]. Id. at 2103-04.

[FN65]. See, e.g., Craig A. Anderson et al., Argument Availability as a Mediator of Social Theory Perseverance, 3 Soc. Cognition 235, 244-48 (1985) (argument availability); Peter H. Ditto & David F. Lopez, Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions, 63 J. Personality & Soc. Psychol. 568 (1992) (information evaluation); Kari Edwards & Edward E. Smith, A Disconfirmation Bias in the Evaluation of Arguments, 71 J. Personality & Soc. Psychol. 5 (1996) (argument evaluation); Charles G. Lord, Mark R. Lepper & Elizabeth Preston, Considering the Opposite: A Corrective Strategy for Social Judgment, 47 J. Personality & Soc. Psychol. 1231 (1984) (social judgment); Arthur G. Miller et al., The Attitude Polarization Phenomenon: Role of Response Measure, Attitude Extremity, and Behavioral Consequences of Reported Attitude Change, 64 J. Personality & Soc. Psychol. 561, 563-64 (1993) (attitude polarization among research participants with a broad range of preexisting attitudes); Geoffrey D. Munro & Peter H. Ditto, Biased Assimilation, Attitude Polarization, and Affect in Reactions to Stereotype-Relevant Scientific Information, 23 Personality & Soc. Psychol. Bull. 636 (1997) (biased assimilation and attitude polarization in the processing of stereotype-relevant scientific information); Norbert Schwarz et al., Interactive Effects of Writing and Reading a Persuasive Essay on Attitude Change and Selective Exposure, 16 J. Experimental Soc. Psychol. 1, 5-9 (1980) (reporting that subjects found sample letters to the editor more convincing and less biased when the letters supported their own positions). But see Miller et al., supra, at 561-69 (replicating the study by Lord, Ross, and Lepper, but finding no attitude polarization when subjects' positions were directly assessed by asking the same questions presented prior to the administration of the opposing studies).

[FN66]. See Ziva Kunda, The Case for Motivated Reasoning, 108 Psychol. Bull. 480, 493-95 (1990); Tom Pyszczynski & Jeff Greenberg, Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model, in 20 Advances in Experimental Social Psychology 297, 333 (Leonard Berkowitz ed., 1987); Tom Pyszczynski, Jeff Greenberg & Kathleen Holt, Maintaining Consistency Between Self-Serving Beliefs and Available Data: A Bias in Information Evaluation, 11 Personality & Soc. Psychol. Bull. 179, 186-88 (1985).

[FN67]. See Tom Pyszczynski, Jeff Greenberg & John LaPrelle, Social Comparison After Success and Failure: Biased Search for Information Consistent with a Self-Serving Conclusion, 21 J. Experimental Soc. Psychol. 195, 206-11 (1985) ("In both studies failure subjects showed a high level of interest in acquiring additional information when they expected it to reveal that most other students performed poorly and very little interest in acquiring additional information when they expected it to reveal that most others performed well.").

[FN68]. See Ditto & Lopez, supra note 65, at 580-82 (suggesting a mechanism by which motivational factors affect judgment processes); Edwards & Smith, supra note 65, at 18 (summarizing the values that supposedly underlie the motivation to defend prior beliefs).

[FN69]. See Edwards & Smith, supra note 65, at 18 (proposing a model to account for disconfirmation bias).

[FN70]. Id.

[FN71]. Nisbett & Ross, supra note 16, at 171 (addressing the normative status of disconfirmation bias); Edwards &

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Smith, supra note 65, at 22 (same).

[FN72]. Edwards & Smith, supra note 65, at 22.

[FN73]. Id.

[FN74]. Nisbett & Ross, supra note 16, at 171.

[FN75]. See Darryl K. Brown, Rationing Criminal Defense Entitlements: An Argument from Institutional Design, 104 Colum. L. Rev. 801, 822-25 (2004) (discussing sources of wrongful convictions); Stanley Z. Fisher & Ian McKenzie, A Miscarriage of Justice in Massachusetts: Eyewitness Identification Procedures, Unrecorded Admissions, and a Comparison with English Law, 13 B.U. Pub. Int. L.J. 1, 3-15 (2003) (same).

[FN76]. Lee Ross, Mark R. Lepper & Michael Hubbard, Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm, 32 J. Personality & Soc. Psychol. 880, 882 (1975).

[FN77]. Id. at 882-83.

[FN78]. Id. at 883.

[FN79]. Id.

[FN80]. Id.

[FN81]. Id. at 883-84.

[FN82]. Id. at 884-87.

[FN83]. Id.

[FN84]. Craig A. Anderson, Mark R. Lepper & Lee Ross, Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information, 39 J. Personality & Soc. Psychol. 1037, 1039-40 (1980).

[FN85]. Id.

[FN86]. Id. at 1040-42.

[FN87]. Id. at 1045.

[FN88]. See generally Leon Festinger, A Theory of Cognitive Dissonance 1-31 (1957) (explaining that individuals seek to reduce dissonance and achieve consonance between their beliefs and behavior, and that individuals will often avoid situations that give rise to dissonance).

[FN89]. Leon Festinger & James M. Carlsmith, Cognitive Consequences of Forced Compliance, 58 J. Abnormal & Soc. Psychol. 203, 204-07 (1959).

[FN90]. Id. at 207-08.

[FN91]. Id. at 209-10.

[FN92]. Id.

[FN93]. Id.

[FN94]. See, e.g., Robert B. Cialdini, Influence: Science and Practice 73- 92 (3d ed. 1993) (stating that people are

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more likely to agree to substantial requests after first agreeing to small ones); Elliot Aronson & Judson Mills, The Effect of Severity of Initiation on Liking for a Group, 59 J. Abnormal & Soc. Psychol. 177, 177-81 (1959) (reporting that subjects who were required to undergo an embarrassing initiation to join a group subsequently evaluated the group as more interesting than did control subjects); Robert E. Knox & James A. Inkster, Postdecision Dissonance at Post Time, 8 J. Personality & Soc. Psychol. 319, 319 (1968) (finding that racetrack bettors upgraded the likelihood of their horses winning after placing a bet).

[FN95]. See supra notes 7-16 and accompanying text.

[FN96]. Griffin, supra note 30, at 266-68.

[FN97]. For a discussion of the powers of the prosecuting attorney, see generally Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 Iowa L. Rev. 393, 432-38 (2001) (describing prosecutorial abuse of the charging power); Green, supra note 12, at 1587-88 (describing prosecutorial discretion); Griffin, supra note 30, at 263-303 (discussing the various aspects and restrictions on prosecutorial discretion as well as recommending standards that should guide it).

[FN98]. See Popper, supra note 43, at 32-33.

[FN99]. See supra Part I.A for a discussion of confirmation bias.

[FN100]. Snyder & Swann, supra note 33, at 1204.

[FN101]. See supra notes 48-57 and accompanying text.

[FN102]. Much of this attention has come from postconviction exonerations of innocent defendants, often in the form of DNA evidence, and even in a startling number of capital cases. See, e.g., Jim Dwyer, Peter Neufeld & Barry Scheck, Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted 262-67 (2000) (providing statistics on DNA exonerations); Death Penalty Information Center, Innocence and the Death Penalty, http:// www.deathpenaltyinfo.org/article.php?did=412&scid=6 (listing 123 death-row exonerations since 1973) (last visited Mar. 12, 2006).

[FN103]. See Randolph N. Jonakait, The Ethical Prosecutor's Misconduct, 23 Crim. L. Bull. 550, 559 (1987) ("The natural inclination is not to see inconsistent or contradictory evidence for what it is, but to categorize it as irrelevant or a petty incongruity."); James McCloskey, Commentary, Convicting the Innocent, 8 Crim. Just. Ethics 2, 56 (1989) (noting that "[o]nce [the police] come to suspect someone as the culprit .... [e]vidence or information that does not fit the suspect or the prevailing theory of the crime is dismissed as not material or is changed to implicate the suspect"); Medwed, supra note 8, at 140-41 (discussing prosecutorial deference to police with tunnel vision); Ellen Yaroshefsky, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 Fordham L. Rev. 917, 945 (1999) (noting that prosecutors "get wedded to their theory and things inconsistent with their theory are ignored" (citation omitted)).

[FN104]. Comm'n on Capital Punishment, State of Ill., Report of the Governor's Commission on Capital Punishment 19-22 (2002), available at http:// www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_02.pdf.

[FN105]. FPT Heads of Prosecutions Comm. Working Group, Report on the Prevention of Miscarriages of Justice 3, 34-41 (2005), available at http:// canada.justice.gc.ca/en/dept/pub/hop/PreventionOfMiscarriagesOfJustice.pdf.

[FN106]. See McCloskey, supra note 103, at 56.

[FN107]. Commonly cited for this proposition is Professor Uviller, who wrote, "[W]hen the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury." Uviller, supra note 28, at 1159; see also Fisher, supra note 7, at 230 n.144 (noting that the "prevailing view, at least in the world of practice, surely" does not require prosecutors to have a personal belief in the defendant's guilt); Zacharias, supra note 11, at 94

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(asserting that "prosecutors need not act as judges of their witness's testimony unless they are sure the witness is falsifying facts"). The limited scope of Uviller's oft-quoted approval of the agnostic prosecutor is apparent. More recently, Uviller explained, "The prosecutor should be assured to a fairly high degree of certainty that he has the right person." H. Richard Uviller, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit, 68 Fordham L. Rev. 1695, 1703 (2000) [hereinafter Uviller, The Neutral Prosecutor].

[FN108]. See, e.g., Freedman, supra note 29, at 219 ("[C]onscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty."); Gershman, supra note 9, at 309 (noting from experience that it was "accepted ethos" that prosecutors should not take a case to trial unless personally convinced of the defendant's guilt); Green, supra note 12, at 1588 ("[P]rosecutors are expected to bring prosecutions only when the guilt of the accused is sufficiently certain."); John Kaplan, The Prosecutorial Discretion-A Comment, 60 Nw. U. L. Rev. 174, 178-79 (1965) (noting from his own experience that "[t]he great majority, if not all, of the assistants felt that it was morally wrong to prosecute a man unless one was personally convinced of his guilt"); Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 BYU L. Rev. 669, 700 ("Prosecutors do not serve the interests of society by pursuing cases where the prosecutors themselves have reasonable doubts as to the factual guilt of the defendants."); Whitney North Seymour, Jr., Why Prosecutors Act Like Prosecutors, 11 Rec. Ass'n B. City N.Y. 302, 312-13 (1956) (noting that charging decisions are made "only after [prosecutors] have satisfied [themselves] of the defendant's actual guilt").

[FN109]. See supra Part I.B for a summary of selective information processing and disconfirmation bias.

[FN110]. See supra Part I.B.

[FN111]. See Freedman, supra note 3, at 1100-01, for a discussion of the government's reaction to exculpatory evidence presented by Washington's defense counsel. A released defendant's celebration will be commonly coupled with a prosecutor's statement that the defendant has not been exonerated. See Glod, supra note 1 (quoting Earl Washington's prosecutor as saying that he "cannot rule out" Washington as a suspect); Sara Rimer, DNA Testing in Rape Cases Frees Prisoner After 15 Years, N.Y. Times, Feb. 15, 2002, at A12 (reporting that a defendant was released after fifteen years based on exonerating DNA; prosecutor insists there is "no reason to doubt the validity of [the defendant's] confession" but that "there is [in]sufficient evidence to convict him beyond a reasonable doubt, and in this business a tie goes to the defendant"). In at least one case, the prosecution decided to retry the defendant after new DNA evidence led to his release. Bruce Lambert, Prosecutor Will Retry Man Freed by DNA in L.I. Rape-Murder, N.Y. Times, Sept. 12, 2003, at B5 (announcing prosecutor's decision to retry released defendant based on his retracted confession).

[FN112]. See, e.g., Medwed, supra note 8, at 132-69 (discussing the institutional and political barriers to prosecutorial recognition of postconviction claims of innocence).

[FN113]. For a summary of the investigation of a supposed spy ring at Guantanamo, see Nicole Guadiano, Case Closed? Not Yet; Spy Charges Have Been Dropped in Guantanamo Trials, but Many Questions Remain Unanswered, A.F. Times, Oct. 11, 2004, at 22.

[FN114]. 60 Minutes: Spy Ring at Gitmo? (CBS television broadcast Nov. 24, 2004) (transcript available at http:// www.cbsnews.com/stories/2004/11/24/60minutes/main657704.shtml).

[FN115]. Id.

[FN116]. Id.

[FN117]. Id.

[FN118]. See Guadiano, supra note 113.

[FN119]. 60 Minutes: Spy Ring at Gitmo?, supra note 114.

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[FN120]. Id.

[FN121]. Id.

[FN122]. Id.

[FN123]. Id.

[FN124]. Guadiano, supra note 113.

[FN125]. Id.

[FN126]. Id.

[FN127]. See id.; Elizabeth Mehren, Translator Pleads Guilty to Taking Documents, L.A. Times, Jan. 11, 2005, at A12 (quoting a spokesperson for the Council on American-Islamic Relations as saying that the case against Al Halabi "seemed to be based more on anti-Muslim hysteria than ... on the actual facts"); 60 Minutes: Spy Ring at Gitmo?, supra note 114.

[FN128]. An attorney for a similarly situated defendant described the problem: "I think the people who are responsible at Guantanamo Bay created in their minds the notion there was a spy ring of people who were all Muslims and they were basically in cahoots with one another." 60 Minutes: Spy Ring at Gitmo?, supra note 114 (quoting Eugene Fidell, defendant James Yee's attorney).

[FN129]. Id.

[FN130]. 373 U.S. 83 (1963).

[FN131]. Id. at 87. Although the Court recognized in Brady that prosecutorial suppression of evidence could amount to a due process violation, it later restricted the scope of this due process right to the discovery of evidence that was material either to guilt or punishment. In Brady, the Court held that a prosecutor's failure to disclose a cooperating witness's statement, which the defense requested and which revealed that the witness was the principal actor in the charged murder, violated due process. Id. at 84- 87. In United States v. Agurs, the Court distinguished specific requests for information, like the one at issue in Brady, from vague requests for exculpatory evidence and cases in which defense counsel made no request at all. 427 U.S. 97, 106-07 (1976). In the latter cases, the Court held that the prosecutor's constitutional obligation to disclose extended only to exculpatory evidence that met a "standard of materiality." Id. at 107. Later, in United States v. Bagley, 473 U.S. 667, 682 (1985), the Court held that a single standard of materiality governed all cases involving nondisclosed exculpatory evidence.

[FN132]. 466 U.S. 668 (1984). In Strickland, the Court held that a trial counsel's incompetence warrants a new trial only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Strickland Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Id.

[FN133]. Bagley, 473 U.S. at 682.

[FN134]. Id.

[FN135]. Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[FN136]. Id.

[FN137]. See Green, supra note 12, at 1592 n.101 (noting the difficulty of assessing the materiality of evidence prospectively).

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[FN138]. See, e.g., Daniel J. Capra, Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review, 53 Fordham L. Rev. 391, 393-97 (1984); Tom Stacy, The Search for the Truth in Constitutional Criminal Procedure, 91 Colum. L. Rev. 1369, 1393 (1991).

[FN139]. Stacy, supra note 138, at 1393.

[FN140]. Capra, supra note 138, at 394-95; Stephen A. Saltzburg, Perjury and False Testimony: Should the Difference Matter So Much?, 68 Fordham. L. Rev. 1537, 1578-79 (2000) ("In our adversary system, any limitation like 'materiality' invites prosecutors and their law enforcement assistants to make their own biased judgments about materiality."); Stacy, supra note 138, at 1393.

[FN141]. Capra, supra note 138, at 396 n.35; Saltzburg, supra note 140, at 1579 (noting that, in most cases, "withheld evidence will never see the light of day," thereby preventing judicial review); Stacy, supra note 138, at 1393.

[FN142]. Capra, supra note 138, at 395.

[FN143]. This Article does not attempt to tackle the difficult question of whether courts are themselves immune to heuristics that might taint rational decision making. For example, a number of scholars have posited that courts may favor decisions made by their predecessors, leading to information cascades. See generally Andrew F. Daughety & Jennifer F. Reinganum, Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts, 1 Am. L. & Econ. Rev. 158, 159 (1999) (analyzing the "informational cascades" that occur among courts "when their decisions are decreasingly determined by their own information and increasingly determined by the actions of others"); Eric Talley, Precedential Cascades: An Appraisal, 73 S. Cal. L. Rev. 87, 192 (1999) (evaluating "whether a cascade theory of precedent represents a cogent description of legal evolution, focusing principally on information cascades"). Reviewing courts may thus also be subject to a bias in favor of what prior courts have already done.

[FN144]. United States v. Bagley, 473 U.S. 667, 682 (1985); Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

[FN145]. See supra notes 53-57 and accompanying text for a discussion of confirmation bias's effect on recall.

[FN146]. See supra Part I.B for a summary of selective information processing.

[FN147]. See supra notes 135-39 and accompanying text.

[FN148]. See supra notes 66-69 and accompanying text for a discussion of people's tendency to scrutinize information that is dissonant with existing theories.

[FN149]. Green, supra note 11, at 637-42; Uviller, The Neutral Prosecutor, supra note 107, at 1704-05 (arguing that prosecutors have an obligation to investigate any "firmly based charge" that an innocent defendant has been convicted and, if the claim is substantiated, "to urge immediate remedy to assist the court in righting the wrong").

[FN150]. See generally Young v. United States, 315 U.S. 257, 258 (1942) ("The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent.").

[FN151]. See supra Part I.A for a discussion of selective information processing.

[FN152]. See supra notes 83-86 and accompanying text for a discussion of how belief perseverance can affect a prosecutor's evaluation of potentially exculpatory evidence.

[FN153]. See supra Part II.B for a discussion of postconviction belief perseverance.

[FN154]. See supra note 108 for citations to the many scholars who have concluded that an ethical prosecutor does not bring charges unless she personally believes that the defendant is guilty.

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[FN155]. See Roberta K. Flowers, What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors, 63 Mo. L. Rev. 699, 734 (1998); Bennett L. Gershman, Mental Culpability and Prosecutorial Misconduct, 26 Am. J. Crim. L. 121, 133-35 (1998); Peter J. Henning, Prosecutorial Misconduct in Grand Jury Investigations, 51 S.C. L. Rev. 1, 14-20 (1999); Andrew M. Hetherington, Prosecutorial Misconduct, 90 Geo. L.J. 1679 (2002); Medwed, supra note 8, at 174.

[FN156]. Another model of reform is the limitation of prosecutorial discretion. See, e.g., Davis, supra note 97, at 460-64; Robert Heller, Comment, Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion, 145 U. Pa. L. Rev. 1309, 1325-28 (1997). The judiciary is typically loathe to intrude upon the broad discretion of prosecutors, in part out of respect for the separation of powers. See United States v. Armstrong, 517 U.S. 456, 464 (1996) (invoking separation of powers concerns in setting a high standard for scrutinizing the charging decisions of federal prosecutors). For purposes of this Article, the lessons of cognitive psychology are used to suggest methods of improving the quality of decisions made within the scope of a prosecutor's discretion, but the proper breadth of that discretionary authority is not addressed.

[FN157]. See supra notes 12-16 and accompanying text.

[FN158]. See supra Part I.A-C for a summary of confirmation bias, selective information processing, and belief perseverance.

[FN159]. See supra Part II.A.

[FN160]. The prosecutor's participation during investigations is a relatively recent but increasingly common role. See Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 Fordham L. Rev. 723, 733-36 (1999) (discussing the twentieth-century development of the prosecutorial role in investigations).

[FN161]. Of course, full disclosure from police to prosecutors does not resolve flaws that exist in the investigation stage, such as the investigating officers' tunnel vision and other cognitive biases. See, e.g., McCloskey, supra note 103, at 56. That is why recent reform suggestions in the context of wrongful convictions have included training police officers to continue to investigate all alternative theories. See, e.g., Comm'n on Capital Punishment, supra note 104, at 20-21. Moreover, even if flaws exist in the police investigation, full disclosure by police officers to prosecutors, coupled with enhanced disclosure duties of prosecutors to defense attorneys, see infra Part III, would likely increase the probability that those flaws might be detected prior to conviction.

[FN162]. The State of Illinois Commission on Capital Punishment recently attempted to resolve this problem in the context of preserving the integrity of capital offense investigations. See Comm'n on Capital Punishment, supra note 104, at 22.

[FN163]. See United States v. Bagley, 473 U.S. 667, 682 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963).

[FN164]. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[FN165]. See Stanley Z. Fisher, The Prosecutor's Ethical Duty To Seek Exculpatory Evidence in Police Hands: Lessons from England, 68 Fordham L. Rev. 1379, 1385 (2000); see also Lissa Griffin, The Correction of Wrongful Convictions: A Comparative Perspective, 16 Am. U. Int'l L. Rev. 1241, 1251-55 (2001) (comparing the Brady regime to the English requirement that police record and disclose to prosecutors all relevant information).

[FN166]. See supra Part II.A.

[FN167]. See, e.g., Ellen S. Podgor, The Ethics and Professionalism of Prosecutors in Discretionary Decisions, 68 Fordham L. Rev. 1511, 1513 (2000).

[FN168]. Gershman, supra note 9, at 342, 348.

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[FN169]. See Joseph W. Rand, Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making, 9 Clinical L. Rev. 731, 734 (2003) (illustrating the use of case studies in clinical education to teach students about cognitive bias).

[FN170]. Comm'n on Capital Punishment, supra note 104, at 111 (suggesting that all prosecutors and defense lawyers who try capital cases should receive periodic training on the dangers of tunnel vision or confirmation bias, and other factors contributing to wrongful convictions); FPT Heads of Prosecutions Comm. Working Group, supra note 105, at 40-41 (recommending educating prosecutors about tunnel vision).

[FN171]. See Nisbett & Ross, supra note 16, at 191 ("The effectiveness of a variety of procedures for discrediting information also may depend on their capacity to make subjects aware of some of the processes underlying the perseverance of their beliefs.").

[FN172]. See Ross, Lepper & Hubbard, supra note 76, at 880-87.

[FN173]. Id. at 885.

[FN174]. Id. at 887-88.

[FN175]. Id. at 888.

[FN176]. Id.

[FN177]. See Wason & Johnson-Laird, supra note 38, at 194-97 (summarizing evidence demonstrating the difficulty subjects had with the card-selection task even when fully informed about the correct response).

[FN178]. See Anderson, Lepper & Ross, supra note 84, at 1039. The study is summarized in notes 183-86 infra and accompanying text.

[FN179]. Anderson, Lepper & Ross, supra note 84, at 1045.

[FN180]. Id. at 1039.

[FN181]. Id. at 1045; see also Anderson et al., supra note 65, at 244-48 (finding that subjects who produced causal arguments to support their beliefs were more likely to show a perseverance of belief after the presentation of evidence that explicitly disconfirmed their initial beliefs); Lee Ross et al., Social Explanation and Social Expectation: Effects of Real and Hypothetical Explanations on Subjective Likelihood, 35 J. Personality & Soc. Psychol. 817, 825-26 (1977) (finding that subjects who generated an explanation for purely hypothetical data demonstrated greater belief perseverance than subjects who had not generated an explanation).

[FN182]. Anderson, Lepper & Ross, supra note 84, at 1047; see also Nisbett & Ross, supra note 16, at 183-86 (attributing belief perseverance to misplaced adherence to causal explanations); Craig A. Anderson, Inoculation and Counterexplanation: Debiasing Techniques in the Perseverance of Social Theories, 1 Soc. Cognition 126, 128 (1982) [hereinafter Anderson, Inoculation] (suggesting a possible mechanism for the perseverance enhancing effect of explanation). Some have suggested that confirmation bias and the availability heuristic may play a role in the mechanism for belief perseverance. If people search their memories for confirming evidence to support a theory while they are forming it, that retrieved information remains available and therefore influential to decision making, even after the initial evidence that led to the theory is undermined. See Kunda, supra note 16, at 100 (suggesting a link between belief perseverance and the availability heuristic).

[FN183]. See Nisbett & Ross, supra note 16, at 190 ("It seems probable that attempts to discredit beliefs may have relatively greater impact when they prompt the use of plausible theories or 'scripts' that encompass both the initial information and the subsequent challenge to that information.").

[FN184]. Craig A. Anderson & Elizabeth S. Sechler, Effects of Explanation and Counterexplanation on the

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Development and Use of Social Theories, 50 J. Personality & Soc. Psychol. 24, 27-28 (1986).

[FN185]. Id. at 29.

[FN186]. Lord, Lepper & Preston, supra note 65, at 1239. The researchers found that both strategies for inducing subjects to consider the opposite had greater corrective effects than instructions for subjects to be fair and unbiased. Id.

[FN187]. These examples are based upon psychologist Craig Anderson's examples of how perseverance-reducing procedures can be used generally. See Anderson, Inoculation, supra note 182, at 129.

[FN188]. The establishment of internal "fresh look" procedures would resemble committees formed in some district attorneys' offices to review cases resting upon the testimony of a single eyewitness. See Medwed, supra note 8, at 127 & n.6; Robin Topping, Panel Puts Justice Before Prosecution, Newsday, Jan. 8, 2003, at A21 (describing such a committee in Nassau County, New York).

[FN189]. See supra Part II.A for a discussion of how a prosecutor's initial charging decision may cause her to underestimate the exculpatory value of subsequently discovered evidence.

[FN190]. See supra Part II.B for a discussion of how belief perseverance can cause a prosecutor to adhere to her theory of guilt even after critical evidence against the defendant is undermined.

[FN191]. See supra Part II.D for a discussion of how the avoidance of cognitive dissonance can prevent prosecutors from acknowledging that they have charged or convicted an innocent person of a crime.

[FN192]. Herbert L. Packer, The Limits of the Criminal Sanction 160 (1968) ("The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands.").

[FN193]. See George T. Felkenes, The Prosecutor: A Look at Reality, 7 Sw. U. L. Rev. 98, 112 (1975) (describing the phenomenon of "pre-conviction" as the tendency of prosecutors to presume the guilt of the accused).

[FN194]. See, e.g., Leonard Berkowitz & Nigel Walker, Laws and Moral Judgments, 30 Sociometry 410, 418 (1967) (finding that subjects' approval of conduct conformed to their peers' opinions).

[FN195]. Specifically, subjects were asked to choose which of three lines was the same length as a comparison line. See Solomon E. Asch, Social Psychology 450-59 (1952) [hereinafter Asch, Social Psychology]; Solomon E. Asch, Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority, 70 Psychol. Monographs 1 (1956); see also Richard S. Crutchfield, Conformity and Character, 10 Am. Psychologist 191, 196 (1955) (replicating Asch's study with female subjects).

[FN196]. Asch demonstrated the power of a lone dissenting voice in his line-matching studies. When experimenters varied the research design to include one accurate confederate among the inaccurate peers, subjects deviated from majority opinion and chose the correct line. Asch, Social Psychology, supra note 195, at 477-79; see also Cass R. Sunstein, Why Societies Need Dissent 21 (2003) (noting that the lone person with knowledge of the truth may not want to risk her reputation by insisting that she is correct).

[FN197]. See Nisbett & Ross, supra note 16, at 291 (suggesting that collective and institutional judgments are most capable of improvement because of the potential to formalize decision-making procedures to account for cognitive barriers to effective evaluations).

[FN198]. Professor Freedman has suggested a similar process in which a panel acting like a grand jury would review postconviction innocence claims in capital cases. See Eric M. Freedman, Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases, 18 N.Y.U. Rev. L. & Soc. Change 315, 322-23 (1990).

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[FN199]. The judiciary has typically deferred to prosecutorial discretion, reasoning that its exercise calls for decisions that the judiciary is ill-equipped to make. These include decisions about law enforcement priorities, the appropriateness of a single prosecution as a part of those priorities, the allocation of prosecutorial resources, and the individualization of justice in a single case. See Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) (noting that the prosecutor, not the judiciary, must evaluate the merits of the case, allocation of resources, and enforcement objectives); Wayte v. United States, 470 U.S. 598, 607 (1985) ("Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.").

[FN200]. See generally David H. Bayley, Community Policing: A Report from the Devil's Advocate, in Community Policing: Rhetoric or Reality 225, 236-37 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (arguing that external monitoring of police is an essential component of implementing community policing); Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 575-78 (1997) (discussing the increase in the use of civilian oversight boards in the policing context).

[FN201]. Livingston, supra note 200, at 665.

[FN202]. Id. at 664-66.

[FN203]. Professor Davis has advocated the creation of prosecution review boards to review complaints against prosecutors and their discretionary decisions. Davis, supra note 97, at 463-64. This Article's proposal differs by recommending the participation of outsiders to improve the quality of prosecutorial decisions as they are being made.

[FN204]. See, e.g., The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 53 (1999) (statement of John Smietanka, former prosecutor) (testifying that "[t]ime, money and, to some unfortunate extent, a cultural chasm" prevent prosecutors from "meaningful participation" in bar activities); cf. Lisa G. Lerman, Public Service by Public Servants, 19 Hofstra L. Rev. 1141 (1991) (noting obstacles that prevent government lawyers from undertaking pro bono work).

[FN205]. See supra Part II.D.

[FN206]. Claude M. Steele, The Psychology of Self-Affirmation: Sustaining the Integrity of the Self, in 21 Advances in Experimental Social Psychology.261, 277 (Leonard Berkowitz ed., 1988).

[FN207]. Id. at 278.

[FN208]. Id.

[FN209]. Claude M. Steele & Thomas J. Liu, Dissonance Processes as Self-Affirmation, 45 J. Personality & Soc. Psychol. 5, 7-8 (1983).

[FN210]. Id.

[FN211]. Id.

[FN212]. Id.

[FN213]. Id.

[FN214]. Claude M. Steele & Thomas J. Liu, Making the Dissonant Act Unreflective of Self: Dissonance Avoidance and the Expectancy of a Value-Affirming Response, 7 Personality & Soc. Psychol. Bull. 393, 396-97

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(1981). Subjects demonstrated reduced attitude change as a result of writing the essay if they were led to believe that they would provide study assistance for blind students after the experiment. Id. at 393.

[FN215]. See Part II.C, supra, for a discussion of Brady v. Maryland, 373 U.S. 83 (1963), and the potential of cognitive bias to affect its application.

[FN216]. United States v. Bagley, 473 U.S. 667, 682 (1985).

[FN217]. See supra Part II.C.

[FN218]. 466 U.S. 668 (1984). In Strickland, the Court held that the demonstration of trial counsel's incompetence warrants a new trial only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Strickland Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Id.

[FN219]. See Bagley, 473 U.S. at 682 (relying on Strickland, 466 U.S. at 694-95, in defining the "materiality" of evidence subject to disclosure).

[FN220]. Strickland, 466 U.S. at 687.

[FN221]. Id. Trial counsel's performance is measured by an objective standard and is reasonably effective if her services fall within the range of competence demanded in a criminal case. Id. at 687-88.

[FN222]. Id. at 694.

[FN223]. Strickland does permit a court reviewing trial counsel's performance after the fact to apply the second prong first, thereby avoiding any ruling on the attorney's performance by ruling instead that any proven incompetence would have been harmless. Id. at 697. Accordingly, Strickland does permit attorney incompetence to go unaddressed absent separate civil or disciplinary proceedings against counsel. Nevertheless, as a decision providing prospective guidance to defense counsel, Strickland does make clear that the standard for attorney performance is reasonably effective assistance. Id. at 687.

[FN224]. Brady v. Maryland, 373 U.S. 83, 87 (1963).

[FN225]. Capra, supra note 138, at 428.

[FN226]. Model Rules of Prof'l Conduct R. 3.8(d) (1998). With respect to sentencing, the rule goes on to require disclosure to the defense and the court of "all unprivileged mitigating information known to the prosecutor ...." Id.

[FN227]. See Gershman, supra note 9, at 328 (noting that prosecutors' constitutional obligations are narrower than their ethical obligations under Rule 3.8(d)); Lisa M. Kurcias, Note, Prosecutor's Duty To Disclose Exculpatory Evidence, 69 Fordham L. Rev. 1205, 1205-06, 1216 (2000) (discussing the difference between prosecutors' obligations under Brady and Model Rule 3.8(d)).

[FN228]. See Melilli, supra note 108, at 686 (explaining that young lawyers entering into service as prosecutors are inexperienced and given little or no education in prosecutorial ethics).

[FN229]. See John M. Burkoff, Prosecutorial Ethics: The Duty Not "To Strike Foul Blows," 53 U. Pitt. L. Rev. 271, 274-75 (1992) (noting that prosecutors' groups and especially the Department of Justice have been critical of the American Bar Association's attempts to regulate the unethical conduct of prosecutors).

[FN230]. See Zacharias, supra note 13, at 761 (noting that bar authorities often operate under the power of the judiciary and may be reluctant to discipline prosecutors because of concerns about the separation of powers). When Richard Thornburgh was Attorney General, for example, he accused "[t]he defense bar, with ABA sponsorship, [of] attempting to use rules of professional conduct to stymie criminal investigations and prosecutions." Press Release,

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U.S. Dep't of Justice, National Association of Attorneys General, and National District Attorneys Association (Aug. 6, 1991). He argued that the enforcement of ethical rules against prosecutors amounted to

an undisguised effort by the defense bar to undo what both Congress and the Supreme Court have declared to be the law .... We find it curious and inappropriate that the ABA, in which the interests of the defense bar are well-represented, should be in the business of making rules for the government's conduct of criminal prosecutions, particularly in areas where the courts and legislatures have already acted. This is the business of Congress and the courts.

Id.

[FN231]. See Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. Rev. 693, 697 (1987); Joseph R. Weeks, No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence, 22 Okla. City U. L. Rev. 833, 898 (1997) ("[T]he disciplinary process has been almost totally ineffective in sanctioning even egregious Brady violations."); Zacharias, supra note 13, at 755.

[FN232]. See Green, supra note 12, at 1593 (reporting that "courts and disciplinary authorities do not sanction prosecutors for failing to disclose evidence as required by the rule but not by other law").

[FN233]. Capra, supra note 138, at 426-30.

[FN234]. James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2145-56 (2000) (calling for open file access in capital cases); Jenny Roberts, Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases, 31 Fordham Urb. L.J. 1097, 1153-54 (2004) (arguing in favor of open file discovery as a prophylactic rule to protect Brady rights); Victor Bass, Comment, Brady v. Maryland and the Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 113 (1972) ("[T]he prosecutor's entire file should, except in special cases, be open to defense inspection."). But see John G. Douglass, Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining, 50 Emory L.J. 437, 460-61 (2001) (arguing that open file and other informal discovery processes have shortcomings); Steven Alan Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1462-64 (1987) (arguing that open file policies deter prosecutors from seeking out additional information that might benefit the defendant).

[FN235]. See supra text accompanying notes 1-10 for a discussion of the Earl Washington case.

[FN236]. See supra notes 188-95 and accompanying text for a discussion of the power to improve the exercise of prosecutorial discretion through review committees within district attorneys' offices.

[FN237]. Many have suggested that internal guidelines may be one of the most effective methods of improving the exercise of prosecutorial discretion. See, e.g., Norman Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. Rev. 1, 57 (1971); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1562 (1981).

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