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Edited by Justin D. Levinson and Robert J. Smith  
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## Introduction

### Racial Disparities, Social Science, and the Legal System

*Justin D. Levinson*

Discussions of race in the United States have taken on an optimistic tone, led by confident commentators who tout America's successful retreat from its racist past. This new, hopeful dialogue comes complete with factual support. For example, racial minorities have reached the pinnacle in government and leadership roles, which positions them atop traditionally Caucasian hierarchies; instances of overt racism have been declining for decades; and America's diverse and multicultural society keeps growing, affording new educational and job opportunities to traditionally disadvantaged peoples. Without a closer look, one could embrace this new vision of race in the United States without seeing or considering an ominous subterranean context.

Yet a deeper examination reveals the complexity of America's racial challenges and the legal system's unwitting complicity in the persistence of racial disparities. America's racial progress does offer comfort if viewed in isolation (after all, declining overt racism is something to embrace), but it also obscures systematic racial bias that forges ahead, undeterred. Massive racial disparities in America persist – in the criminal justice system, in economic advancement, in property ownership, and beyond. Consider the incarceration statistics: despite comprising only about 13 percent of the population, today African Americans make up almost 50 percent of the incarcerated. Economic figures similarly do little to comfort those who hope that equality has been achieved: African American and Latino families are disproportionately likely to be in the bottom fifth of Americans based on earnings per family. The story of property ownership is not much better: fewer than half of African American and Latino families are homeowners compared to 75 percent of Caucasian families.

When measured in the context of the legal system and beyond, these continuing disparities should no longer be understood by referencing dated and racist notions of nature or biology, nor should they be examined simply by invoking the vision of the

standouts, those leaders who have emerged against the odds from underrepresented communities into the public eye. Instead, continuing systematic racial disparities must be understood by engaging in a deeper, social science-based inquiry that considers how a multitude of forces, particularly implicit biases, converge on society and the legal system.

In deconstructing the ways that racial disparities continue to plague the United States, emerging scientific evidence on the human mind helps demonstrate why equality may be so elusive. This new evidence reveals how human mental machinery can be skewed by lurking stereotypes, often bending to accommodate hidden biases reinforced by years of social learning. Although implicit bias may be harder to conceptualize than traditional symbols of racial discrimination (for example, the skinhead), its truth is revealed to us through rigorous scientific method used by scores of social scientists to consistently reveal a disquieting but potent truth: despite cultural progress in reducing overt acts of racism, the effects of implicit racial attitudes and stereotypes are powerful and pervasive. This book argues that these effects are so powerful and pervasive that they help explain not only the continued subordination of historically subordinated groups but also the legal system's complicity in that subordination.

The science underlying this hidden and biased context, known to social scientists as implicit social cognition, explains how the vast majority of Americans still perceive the world in race-tinged constructs, and it demonstrates how people have the potential to rely on racial and gender stereotypes in almost any law-relevant situation, even without awareness that they are doing so. In the legal context, implicit racial biases can be easy to perceive, or they can be more deeply hidden. Here are a few examples:

- *Corporate decision-making:* A corporate manager, without knowing it, relies on stereotypes when evaluating an employee. The manager, influenced by racial stereotypes related to laziness, notices more easily that an employee seeking promotion has been late to work or occasionally takes breaks in excess of corporate time limits. The manager notes these instances in corporate human resources records.
- *Governmental action:* Congress and the IRS, attempting to formulate an auditing scheme to maximize auditing efficiency and deter tax fraud, decide to audit people who claim the earned income tax credit, a credit that IRS policymakers and auditors perceive to be a minority-benefiting tax measure. Although their audit is supported by evidence that the EITC is erroneously claimed at a high rate, it is also based on unfounded racial stereotypes about the morality and trustworthiness of the perceived targets of the audits.
- *Health care:* A patient complains of chest tightness and a feeling of heavy pressure. He is afraid, in pain, and surrounded by his loving family. A doctor checks his vitals, tests his blood for cardiac enzymes, and performs an EKG. The

doctor consults the test results and makes a treatment decision. She believes that her decision is entirely evidence based, but in fact it has been influenced by her perception of the patient's diet, his willingness to change life habits, and his cooperativeness. In turn these perceptions have been driven by the patient's race.

Each of these examples raises questions about implicit bias and racial justice in the American legal system. To pursue these questions further, one might ask in turn: Does either corporate law or employment discrimination law deal with the corporate manager's (unconscious) selective documentation of racially stereotypic facts about an employee? Can members of a minority community successfully challenge an IRS audit scheme that was initiated because of implicit racial stereotypes? And when stereotype-driven assumptions lead to decisions to treat patients differently, does health care law allow for objection or reform?

This edited volume tackles these issues and many more. Each chapter confronts the dangerous role of implicit racial bias in a different area of law,<sup>1</sup> discusses its challenges, and proposes future directions. Most of these discussions are cutting edge; implicit bias is typically discussed in limited legal contexts. Outside of criminal law and employment discrimination law, scholars are still only beginning to consider the deep and troublesome role of how implicit bias manifests itself in law and society. This volume introduces new discussions of implicit bias across fundamental areas of the law, including the legal areas of property, tort, corporate, health, education, communications, taxation, intellectual property, and environmental, while also building on discourse in the traditional areas of employment discrimination and of criminal law and procedure.

#### I. THE SCIENTIFIC BASICS

A social scientific understanding of implicit bias may be helpful here. The concept of implicit bias has two key components. First, as the name implies, it is implicit, which means that it is generally outside the awareness and control of a person. Second, also as the name implies, it is biased, which means that it disproportionately affects people in meaningful ways.<sup>2</sup> A few brief examples of studies on implicit bias and their implications help demonstrate the dangerousness of the implicit biases that often lurk below our consciousness. Chapter 1 picks up where this brief introduction

<sup>1</sup> Robert J. Smith and I have selected fourteen important areas of law for this volume. Our list is by no means exclusive, and we hope that future projects tackle implicit bias in these and other contexts.

<sup>2</sup> Anthony Greenwald and Linda Krieger give a more formal scientific definition. They explain a bias as "a displacement of people's responses along a continuum of possible judgments" and implicit biases as "discriminatory biases based upon implicit attitudes or implicit stereotypes." Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 950–51 (2006).

leaves off, presenting a detailed summary of the science underlying implicit racial bias.

*Eliciting stereotypes:* Imagine listening to a hip-hop song on an iPod. Do you like the beat? Perhaps. Do the lyrics rhyme and are they catchy? Likely. Do they trigger racial biases within you? Probably. As social psychologists have found, listening to rap songs for just a few minutes has the power to transform the way you think about the world.<sup>3</sup> Imagine that after listening to the music, you made a hiring decision, or you taught a class, or you witnessed a crime. Research shows that you are likely to use a vast network of racial stereotypes triggered by the music (even those entirely unrelated to the themes of the music) to guide you as you make decisions.

*Pulling the trigger:* Pretend you are a police officer on beat patrol. You receive a report of an armed robbery that has just occurred a few blocks away. Your senses are heightened as you look for suspicious activity. You turn the corner and see a man who looks at you with trepidation. “Don’t move,” you demand, and approach the man with your weapon drawn. The man reaches into his pocket and quickly removes an object. Do you shoot? Social scientists have found that people presented with a lifelike simulation of this situation are quicker to shoot armed black men than armed white men and to make more shooting errors by firing on unarmed black men than unarmed white men.<sup>4</sup>

*Allocating resources:* Envision you are on the board of directors of a successful company. Today, the company is deciding how to support local charities. Many charities are in contention. Will you support a program for the Girl Scouts? The NAACP? Or the opera? Might your resource allocation decisions, unbeknownst to you, track your implicit biases, thereby steering money toward charities that cater to the already privileged? That is quite possible, based on research findings showing that implicit stereotypes predict how people allocate resources to certain groups.<sup>5</sup>

## II. EARLY LEGAL DISCOURSE

Scholars are beginning to consider the massive impact of implicit bias across the law, especially in a couple of well-developed areas. Here, I briefly highlight the early work on implicit bias in the law and set the stage for the chapters in this volume.

The consistent results of implicit social cognition research are startling, and for some who experience these studies firsthand (for example, through easy-to-access web-based demonstrations<sup>6</sup>), the results lead to deep reflection. It is surprising,

<sup>3</sup> Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 4 *GROUP PROCESSES & INTERGROUP REL.* 133 (2002).

<sup>4</sup> Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 1314 (2002).

<sup>5</sup> Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 *GROUP PROCESSES & INTERGROUP REL.* 359, 368 (2007).

<sup>6</sup> See, e.g. <https://implicit.harvard.edu/implicit/demo/takeatest.html> (last visited Oct. 3, 2011).

then, that legal scholarship has yet to consider systematically the implications of implicit social cognition research. Although the social scientific methods for detecting implicit bias have filled the pages of academic journals for over a decade, legal scholars have struggled to contextualize this new science into more than a few important areas of discourse. Perhaps this struggle might be best explained because other than in areas where it is more noticeable, such as in employment discrimination and criminal law, it is initially difficult to consider intuitively how implicit bias might function – for example, in legal areas that deal with tax, property, and corporations. A brief discussion of what discourse on implicit bias has revealed about law will help contextualize what has yet to be considered.

The most salient issues demonstrating the power of implicit bias emerge in the employment context. Linda Hamilton Krieger, who introduced social cognition research to the employment discrimination community, argued that Title VII’s “intent to discriminate” requirement should be replaced by a causation standard.<sup>7</sup> This work, informed by a then cutting-edge understanding of social science research, followed in the footsteps of Charles Lawrence’s groundbreaking article, “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,” which focused primarily on constitutional law and called on society to take responsibility for all of its biases, both conscious and unconscious.<sup>8</sup> These articles stoked a scholarly interest in considering hidden biases. In the context of employment discrimination law, for example, well over a dozen scholars have followed Krieger’s lead, debating and critiquing how evidence of implicit bias may fit within legal tests in the employment context. Implicit bias, then, has become a popular and controversial topic in the employment discrimination context.

Less popular and comprehensive, yet still partially uncovered, is the role of implicit bias in criminal law and policy. In this area, just a few scholars have delved deeply into implicit social cognition.<sup>9</sup> In separate projects, my colleagues and I have relied on implicit bias research to argue, for example, that judges and juries misremember case facts in racially biased ways,<sup>10</sup> that skin tone affects the way jurors evaluate

<sup>7</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

<sup>8</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Although Lawrence’s article drew primarily on Freudian psychology, his powerful and well-reasoned arguments set the stage for discussions of implicit social cognition. In fact, this article was so successful in deconstructing bias in light of constitutional principles that we chose not to include a chapter on constitutional law in this volume. Instead, we invited Lawrence to address his other area of expertise, education law, in light of implicit bias findings.

<sup>9</sup> Many more have speculated about its potential for explaining injustice in the criminal justice system.

<sup>10</sup> Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007). Although the empirical study in this article did not test judges’ implicit memory biases, there is reason to believe that judges display similar implicit biases compared to the rest of the population. See Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

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evidence,<sup>11</sup> that the process of “death-qualifying” jurors during capital jury selection automatically triggers implicit racial stereotypes,<sup>12</sup> and that people implicitly associate black with guilty.<sup>13</sup> Thus far, three of these four arguments have direct empirical support.<sup>14</sup>

Beyond employment discrimination law and criminal law, however, scholars have been slower to consider deeply the way implicit biases propagate inequality throughout the legal system.<sup>15</sup> Although many scholars have become intrigued by the concept of implicit bias and frequently mention it as something to be investigated further, implicit bias-focused scholarship in most areas of law is still quite thin. This volume provides a comprehensive and critical analysis of implicit bias across fourteen areas of law, each written by experts in the field.

### III. THIS VOLUME

The volume begins by engaging the scientific underpinnings of implicit bias. In Chapter 1, I join with psychologists Danielle Young and Laurie Rudman to detail the science behind implicit racial bias, setting the stage for each of the remaining chapters. Readers unfamiliar with implicit social cognition methods and findings will find this chapter to be a helpful starting point. The remainder of the volume examines a wide range of legal areas in light of implicit bias.

Each contribution offers a new approach to discourse in its individual field, yet the authors’ treatment of implicit racial bias throughout the volume can be synthesized. First, the chapters paint a broad picture of the way implicit racial bias may function

<sup>11</sup> Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010).

<sup>12</sup> Justin D. Levinson, *Race, Death and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009).

<sup>13</sup> Justin D. Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Bias: The Guilty Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010). For another important article on implicit racial bias and criminal law, see L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

<sup>14</sup> We have yet to test whether “death qualifying” jurors during capital jury selection automatically triggers racial stereotypes.

<sup>15</sup> Some scholars have succeeded in considering implicit racial bias in areas of law other than employment and criminal law, but these articles tend to stand alone in their fields. For example, Jerry Kang has considered implicit bias in the context of communications law and policy and was the first legal scholar to engage comprehensively with the updated methods of implicit social cognition. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–1539 (2005). For other interesting discussions of implicit bias outside of employment and criminal law, see Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded – As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451 (2008); Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 ILL. L. REV. 237 (focusing on a range of cognitive biases, including automatic ingroup preference); Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1 (2010) (arguing that poll workers rely on implicit bias in interacting with voters); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455 (2007).

as an interconnected and often impenetrable barrier across law and society. In this lens, consider how the story lines of several chapters might intersect for members of a stereotyped family or community:

A young girl walks to school, eager for the opportunity to engage and learn, despite the so-called achievement gap. Later that morning, her mother reports to the courthouse, jury summons in hand, excited to participate in a civic responsibility. On the same day, her grandfather goes to the local Emergency Room, afraid that his chest pains might mean that he has suffered a heart attack. Nearby, a nonprofit organization serving underprivileged youth prepares to make its “pitch” to a local corporation, seeking a charitable donation that will allow it to survive and fulfill its mission.

Each of these story lines, which by themselves illustrate separate challenges within the educational, civic, health, and economic spheres, becomes connected by implicit bias. For example, Charles Lawrence, in Chapter 7 on education law, considers how implicit bias may affect the way that racial disparities in education are explained and addressed, resulting in powerful harms to black children. Robert Smith and Ben Cohen, in considering capital punishment in Chapter 14, argue that implicit bias may lead to the disproportionate exclusion of African American jurors. Michele Goodwin and Dr. Naomi Duke, in Chapter 6 on health care law, argue that quality medical treatment may be reserved, due to implicit racial stereotypes, for members of privileged groups. And in my chapter on corporations (Chapter 9), I suggest that implicit bias may lead companies to donate money to elite (white) charities instead of to nonprofits that benefit minorities. In reading the chapters, it is crucial not only to grapple with their topic-focused claims but also to note that each potentially biased domain does not stand alone; rather, it is part of a network of interconnected forces that can impede justice.

Another way to synthesize the chapters in this volume is to consider the similarities and differences in the authors’ specific claims of biased decision-making. By reflecting on the contributors’ claims in this way, one can gain new perspective on each subject area, as well as understand how implicit bias may actually manifest in additional domains beyond those considered by the authors. Taking this decision-focused perspective highlights the breadth of the authors’ claims: they explore decisions made by individual actors (e.g., neighbors, judges, or doctors), those made by groups (e.g., juries or corporate boards), and those made by government or administrative entities (e.g., Congress or the IRS).

In Chapter 3, Charles Ogletree and his colleagues, for example, suggest that a wide range of individual decision-makers, including prosecutors, defense counsel, police, and judges, may be biased in the criminal law context, perhaps even all related to a single trial. Jerry Kang takes a different approach in Chapter 8 on communications law. He focuses on a unique relationship between law and bias: the biases triggered and heightened in large groups of citizens by a complicit system of law and policy.

Other contributors blend their claims of bias. For example, in Chapter 2, Michelle Wilde Anderson and Victoria Plaut claim that a range of biased decisions, including those made by groups (city councils) and individuals (tax assessors and neighbors), affect property law and development. When considering the authors' various claims of bias, it becomes apparent that some of these claims may inform even other chapters. For example, borrowing from Kang, criminal law commentators could explore whether certain crime policies might actually become delivery mechanisms of bias, rather than reflections of bias. Or, borrowing from Ogletree and colleagues, communication law scholars could argue that administrative decisions serve not just as a trigger for bias but also are a result of bias.

Focusing on the specific claims of bias additionally informs discussions of how to respond to implicit bias. For example, should implicit bias be countered by training decision-makers, advocating for more neutral laws, or encouraging more diversity in organizations? In the context of employment discrimination law, Judge Nancy Gertner and Melissa Hart claim in Chapter 5 that current case law amplifies the opportunity for an individual judge's implicit biases to affect a summary judgment decision. To address this problem, one might attempt to reduce the influence of implicit bias on individual trial judges, perhaps through bias reduction or diversity training. Another solution might include a push for legislatively initiated change to reshape the bias supporting laws. Arguments made by other authors perhaps necessitate broader solutions. For example, in Chapter 10 Dorothy Brown argues that Congress and the IRS made stereotype-driven decisions in choosing to audit citizens who claimed the earned income tax credit. Resolving potential bias by Congress may be harder to address through training, and reforming federal law generally requires congressional approval. Thus, additional solutions may be required. Yet, if implicit bias is so powerful that Congress is susceptible to it, solutions short of cultural change may well be fleeting. As the chapters discuss, the potential for implicit bias to affect nearly all decision-makers means that creative and comprehensive remedies will likely be needed.

These chapters, rooted in the major subjects of law, provide a comprehensive look at the dangers of implicit racial bias in the legal system. Individually, they offer a compelling look at the potential harms that implicit bias can play in a particular legal domain. Taken together, they amplify the depth and interconnectedness of implicit racial bias in all areas of the law. By doing so, they highlight the major challenges that lie ahead for policymakers, practitioners, scholars, and citizens as they participate in the continuing struggle for fairness and equality.



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## 1

## Implicit Racial Bias

*A Social Science Overview*

*Justin D. Levinson, Danielle M. Young, and Laurie A. Rudman*

A little after 2:00 a.m. on the first day of 2009, San Francisco Bay Area Rapid Transit (BART) Officer Johannes Mehserle arrived at the Fruitvale BART station after receiving reports of a fight on a train.<sup>1</sup> On arrival, he was directed by another officer to arrest Oscar Grant, who, along with other fight suspects, was sitting on the ground next to the wall of the station. As Mehserle, who was joined by other officers, prepared to arrest Grant, Grant began to stand up, and Mehserle forced him to the ground face first. Another officer stood over Grant and uttered, “Bitch-ass n-.”<sup>2</sup> As Mehserle attempted to handcuff Grant, some eyewitnesses testified that Grant resisted by keeping his hands under his torso. Although Grant was lying face down and was physically restrained by another police officer at the time of his alleged resistance, Mehserle removed his department-issued handgun from its holster and shot Grant in the back from point-blank range. Grant died later that morning.

At trial, the jury convicted Mehserle of involuntary manslaughter, but acquitted him of more serious homicide charges that would have treated the killing as intentional. The involuntary manslaughter conviction indicates that the jury likely believed two key pieces of Mehserle’s testimony: first, that he thought Grant was reaching for a gun, and second, that he mistook his own gun (which was on the right side of his body and weighed twice as much) for a Tazer (on the left side of his body). How could an officer possibly perceive a mostly compliant, restrained man as a gun-toting threat?

Research on implicit racial bias suggests that, when implicit racial stereotypes are activated, the human mind is capable of major feats, such as turning an

<sup>1</sup> The facts we present are largely based on bail hearing documents and video recordings of the event. For one video recording, see thecaliforniabeat, *New Footage of Oscar Grant Shooting*, YouTube (Feb. 24, 2010), <http://www.youtube.com/watch?v=KxnFQ.IvOt4>.

<sup>2</sup> Philip Matier & Andrew Ross, *BART ‘N-word’ bombshell waiting to go off*, S.F. CHRONICLE, June 29, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/06/28/BA4E18EMPH.DTL&tsp=1>.

innocent hand into one reaching for a gun. For more than a decade, researchers have explored how implicit racial bias (as contrasted with self-reported, or explicit, racial bias) contributes to systematic racial discrimination. Implicit racial bias explains the process whereby the human mind automatically and unintentionally reacts to different groups in divergent ways, a process that can have unfortunate consequences. One fundamental aspect of the implicit racial attitudes uncovered by implicit social cognition research is that they frequently differ from people's self-reported (often egalitarian) racial attitudes. Because of the automatic nature of these biases, people are often unaware of them or how they affect their judgments.

In this chapter, we lay the foundation for studying implicit racial bias across the law by examining examples from more than a decade of research on the unconscious and automatic activation of racial stereotypes. This examination includes a discussion of the ease with which racial stereotypes are activated (particularly through the phenomenon known as "priming"), a consideration of how social scientists measure implicit bias (including through the Implicit Association Test and the shooter bias "videogame"), and an exploration of the relationship between implicit bias and real-world behaviors and decision-making. The chapter concludes by describing empirical studies of implicit racial bias in the legal system.

#### RACIAL PRIMING: THE UNCONSCIOUS ACTIVATION OF STEREOTYPES

Priming is a term imported from cognitive psychology that describes a stimulus that has an effect on an unrelated task. Psychologists have defined it as "the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context."<sup>3</sup> Simply put, priming studies show how causing someone to think about a particular domain can trigger associative networks related to that domain.<sup>4</sup> Activating these associative networks, which can include stereotypes, can affect people's decision-making and behavior, often without their conscious awareness.

A study conducted by John Bargh and his colleagues provides a simple example of priming outside of the racial context.<sup>5</sup> In the study, which was designed to examine the behavioral effects of activating stereotypes related to the elderly, the researchers primed participants by exposing them to one of two lists of words. Half of the participants unscrambled sentences that contained words designed to subtly prime participants with the category of elderly; thus, the sentences included

<sup>3</sup> 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).

<sup>4</sup> Several of the descriptions we provide of priming and the Implicit Association Test are based, sometimes verbatim, on the descriptions given in Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345 (2007), and Justin D. Levinson, *Race, Death and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009).

<sup>5</sup> Bargh, *supra* note 3.