One Path for "Post-Racial" Employment Discrimination Cases—The Implicit Association Test Research As Social Framework Evidence

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To create new norms, you have to understand people's existing norms and barriers to change. You have to understand what's getting in their way.[1]

The 50th Anniversary of the Civil Rights Act of 1964 finds the status of civil rights in the United States at a critical juncture. The formal edifice of a civil rights structure precariously stands amidst the erosion of substantive rights for victims of discrimination by a conservative Supreme Court majority increasingly suspicious of any civil rights claims that do not emanate from disgruntled "reverse discrimination" narratives. Today's legal civil rights struggle is in large measure the effort to retain the foundational premise that racial discrimination is still a pervasive and problematic dynamic that the law should be engaged in addressing. In short, the biggest battle for civil rights attorneys today is operating within a civil rights structure that makes it increasingly difficult for any plaintiff (other than "reverse discrimination" plaintiffs) to lodge a triable case of discrimination. Modern civil rights doctrine now approaches racial discrimination as an exceptional occurrence for which plaintiffs must navigate a treacherous obstacle course of evidentiary burdens.

Within the employment discrimination context, the attempt to salvage anti-discrimination law doctrine has been lodged on several fronts.[2] Of particular note has been the effort to

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1. Atul Gawande, *Slow Ideas*, THE NEW YORKER (July 29, 2013), http://www.newyorker.com/reporting/2013/07/29/130729fa_fact_gawande?currentPage=all (discussing why some medical innovations spread swiftly and others slowly).

2. *E.g.*, Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387, 387 (2011).

incorporate "social framework" evidence. Social framework evidence refers to general social science research results used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case.[3] The primary appeal of social framework evidence is that it offers the potential to more accurately situate a specific case of discrimination against a backdrop understanding of how discrimination actually operates, which can better assist a fact finder in identifying the manifestations of discrimination.[4]

Yet, given the powerful societal conviction in a "post-racial" America narrative of discrimination as an exceptionally rare event caused by aberrant malicious individuals, general social framework evidence alone will be unlikely to assist most plaintiffs in presenting a persuasive case of discrimination.[5] This is because general social framework evidence alone does not address the principal barrier to change that exists for many fact finders—the entrenched belief that discrimination is only caused by intentionally "racist" individuals who are much fewer in number now that Jim Crow segregation has long been dismantled. With this constrained view of discrimination as aberrational and consciously motivated as the social norm, any plaintiff accounts that deviate from this larger societal narrative will be met with resistance that general social framework evidence is likely impotent against. What is needed is a legal tool that can directly speak to the larger societal narrative in ways that assist fact finders to better understand contemporary manifestations of discrimination.

This Article proposes that the use of general social framework evidence specifically incorporate detailed information about the burgeoning social psychology literature regarding "implicit bias," and, in particular, the Implicit Association Test (IAT) designed to detect the extent of an individual's implicit

3. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987) ("We therefore propose a new category, which we term social framework, to refer to *the use of general conclusions from social science research in determining factual issues in a specific case.*").

4. *E.g.*, John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1729 (2008) (citing State v. Alger, 764 P.2d 119, 127–28 (Idaho Ct. App. 1988) ("A novel role for empirical research is emerging—a use of general research conclusions to set a background context for deciding crucial factual issues at trial.")).

5. *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1597–98 (2009).

biases.[6] Implicit bias is a type of discrimination that originates in unconscious mental processes that systematically distort the way we see other people.[7] Studies have shown that even the most "well-meaning" person, who explicitly rejects all kinds of discrimination, unwittingly allows unconscious thoughts and feelings, which usually contain some degree of bias, to influence their objective decisions.[8] Indeed, a number of scholars have pointed to the importance of considering implicit bias as a justification for reforming the doctrinal contours and standards of employment discrimination claims.[9] This Article recommends that

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6. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465–66 (1998) (providing a model for administration of the IAT).

7. Barbara Reskin, *Unconsciousness Raising: The Pernicious Effects of Unconscious Biasing*, 14 REGIONAL REV. 33, 33–34 (2005).

8. *See* Mahzarin R. Banaji et al., *How (Un) Ethical Are You?*, HARV. BUS. REV., Dec. 2003, at 58 ("Because implicit prejudice arises from the ordinary and unconscious tendency to make associations, it is distinct from conscious forms of prejudice, such as overt racism or sexism.").

9. *E.g.*, Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007); Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83 (2008); Emma Reece Denny, *Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339 (2012); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); David Hausman, *How Congress Could Reduce Job Discrimination by Promoting Anonymous Hiring*, 64 STAN. L. REV. 1343 (2012); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007); Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97 (2010); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999); Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010); Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347 (2008); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71 (2003); Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008); Boyd Byers, *Freakonomics*, The Weakest Link, *And Implicit Bias*, 13 KAN. EMP. L. LETTER 7 (2006); Nancy Gertner,

in the absence of such doctrinal reform, the presentation of social framework evidence needs to explicitly include the details of implicit bias research and the IAT, in an effort to provide an effective plaintiff account of discrimination that responds to the confusion created for fact finders by today's social norms.

Thus far, employment discrimination lawyers have been largely reticent introducing detailed implicit bias research out of concern that judges would view it as too amorphous and attenuated to fit the current employment discrimination jurisprudence.[10] Indeed, leading civil rights organizations have been urging plaintiffs' lawyers "to present this evidence in court to establish that implicit bias is the catalyst of discriminatory injustices in this day and age."[11] The main focus of this Article is to address the reticence of plaintiffs' lawyers that has hindered the consideration of implicit bias research in employment discrimination cases thus far.

While the law review literature has already amply noted that social framework evidence encompasses a broad array of social science research evidence which can include, but is not limited to, implicit bias research, this Article distinctively proposes: 1) that social framework evidence be more broadly introduced into employment discrimination cases beyond the current practice of bringing forth expert witness testimony to explain the social psychology of stereotyping when stereotyped perspectives are concretely manifested in the workplace, and 2) that specific details about the insights drawn from the implicit association testing research be included. In short, this Article proposes a litigation strategy that can more effectively elucidate the operation of discrimination in the absence of overt articulations of stereotyping, by introducing detailed implicit bias research as a backdrop for assessing when disparities in treatment, status, access, or opportunity are the result of discrimination despite the absence of overt stereotyping. To the extent that employment

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Losers' Rules, 122 YALE L.J. ONLINE 109 (2012), *available at* http://yalelawjournal.org/the-yale-law-journal-pocket-part/procedure/losers%E2%80%99-rules/.

10. *See, e.g.*, Maurice Wexler, Kate Bogard, Julie Totten, & Lauri Damrell, *Implicit Bias and Employment Law: A Voyage into the Unknown*, 41 BNA DAILY LAB. REP. I-1, March 1, 2013, at 4, *available at* http://www.orrick.com/Events-and-Publications/Documents/orrick-wexler-bogard-totten-damrell.pdf ("[I]mplicit bias evidence has no place in the current legal framework").

11. Eva Paterson, *Litigating Implicit Bias*, POVERTY & RACE (Poverty & Race Res. Council), Sept./Oct. 2011, *available at* http://www.prrac.org/full_text.php?text_id=1365&item_id=13243&newsletter_id=119&header=Race+%2F+Racism&kc=1.

discrimination lawyers have been reticent introducing detailed implicit bias research and judges have been equally cautious about admitting such evidence, this Article provides guidance as to how to incorporate this evidence into the existing employment discrimination jurisprudence.

Section I will introduce the contours of social framework evidence and explain why the present "post-racial" narrative about discrimination requires that detailed information about the social psychology of implicit bias be inserted into a social framework proffer. Section II will then concretely explain how detailed implicit bias testing data can inform social framework evidence. Section III will explore the receptivity of current case law to implicit bias social framework evidence, and Section IV will conclude with a specific case example of how detailed implicit bias social framework evidence can be applied to aid fact finders in more accurately assessing allegations of employment discrimination.

I. Why the Post-Racial Context Needs Detailed Implicit Bias Testing Research Data

When the Civil Rights Act of 1964 was enacted, there was no particular need for litigants to import social framework evidence, let alone detailed implicit bias data. Newspapers and the televised evening news were replete with concrete images of the reality of the violence of racial segregation and the relevance of race in how society was structured.[12] Indeed, *McDonnell Douglas Corp. v. Green* "encapsulated the century of struggle that led up to the successor of another assassinated President signing antidiscrimination legislation into law."[13] The social context of the time provided every discrimination case with an immediate social framework for processing claims, and an understanding that circumstantial evidence of discrimination was sufficient in the absence of a defendant's legal justification for differential treatment, status, access, or opportunity. No overt statements of

12. *See* ANIKO BODROGHKOZY, EQUAL TIME (2012) (exploring the crucial role of network television in reconfiguring attitudes about race relations during the civil rights movement and unmistakably influencing the ongoing movement for African American empowerment, desegregation, and equality); GENE ROBERTS & HANK KILBANOFF, THE RACE BEAT (2006) (detailing how news stories, editorials, and photographs in the American press profoundly changed the nation's thinking about civil rights in the South during the 1950s and 60s).

13. Jeffrey A. Van Detta, *Requiem for a Heavyweight:* Costa *as Countermonument to* McDonnell Douglas*—A Countermemory Reply to Instrumentalism*, 67 ALB. L. REV. 965, 971 n.31 (discussing Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972)).

discriminatory intent were required because the social reality filled in the explanatory gap between the lack of an employer justification and the conclusion that differential treatment, status, access, or opportunity was indicative of discrimination. The social context of the reality of racism was the metaphorical glue that connected differential status and the absence of a nondiscriminatory employer justification into a structure identified as "discrimination."

But with the dismantlement of visible Jim Crow segregation and the cessation in television film coverage of massive physical brutality against scores of African Americans, the reality of racism became more attenuated for those not directly affected by it. The formal access to education and the labor market for certain segments of communities of color also created an impression that the legacy of racism was behind us. Over time, many judges and juries came to discrimination claims without the metaphorical glue of a conviction in the reality of racism. At the same time, the conservative majority of the Supreme Court employed what Ian Haney-López terms "intentional blindness" to purposely undercut the jurisprudential ability to locate triable claims of discrimination.[14]

Thus, at present even the most well-intentioned of fact finders can find themselves struggling to ferret out space in the antidiscrimination doctrine to make sense of the discrimination claims that are presented. It is not so much that the nature of discrimination has completely changed, but that the social norms for identifying discrimination have changed. Today the "post-racial" social norm is that racism is an aberration instigated by consciously malicious individuals.[15] With that as the norm for identifying discrimination, fact finders feel constrained from connecting racial disparity and an employer's flimsy or absent justification for the disparity with a finding of discrimination.[16]

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14. Ian Haney-López, *"Intentional Blindness,"* 87 N.Y.U. L. REV. 1779, 1861 (2012) ("Intentional blindness, not intentional ignorance, more aptly characterizes the racial jurisprudence of the Supreme Court's conservatives. They seem to understand that racism is a pervasive problem, yet oppose the courts and the Constitution to contribute to the solution.").

15. Cho, *supra* note 5, at 1597–98 (defining post-racialism as a rhetoric that contends that racism has already been largely transcended).

16. *E.g.*, Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 480–81, 492 (2011) (predicting that after *Dukes*, courts will require a "narrative of discrimination" to justify a claim of systemic discrimination because of the modern absence of a presumption that statistical disparity is automatically explained as discrimination).

What is needed is a new form of metaphorical glue. Social framework evidence that presents the details of the social psychology data about implicit bias testing might be able to serve that role.

Many courts already readily admit general social framework evidence. Legal scholars Laurens Walker and John Monahan describe social framework evidence as the admission of empirical information to construct a frame of reference for deciding factual issues.[17] While this is a form of judicial notice that is of neither legislative facts nor adjudicative facts as contemplated in Federal Rules of Evidence Rule 201,[18] "a growing number of courts have held that the use of social frameworks to correct beliefs that are erroneous does indeed 'assist the trier of fact.'"[19] This is because the Federal Rules of Evidence do not bar the use of social science in this manner,[20] thereby allowing a court to admit empirical information "to keep it responsive to its changing environment."[21]

Judges customarily admit empirical information through the use of expert witnesses for the purpose of assisting a trier of fact to understand the evidence.[22] In fact, within the employment discrimination context experts are commonly used in a number of ways.[23] Experts providing testimony on the deployment of racial stereotypes in the workplace bear the burden of disabusing fact finders of what they believe is "common sense."[24] In addition, social framework evidence has also been deployed in discrimination claims to elucidate the role of unchecked

17. Walker & Monahan, *supra* note 3, at 570 (defining social framework as the use of general conclusions from social science research in determining factual issues in a specific case).

18. FED. R. EVID. 201 (judicial notice of adjudicative facts).

19. Walker & Monahan, *supra* note 3, at 580.

20. *Id.* at 582.

21. E.F. Roberts, *Preliminary Notes Toward a Study of Judicial Notice*, 52 CORNELL L. REV. 210, 210 (1967) (describing the role of judicial notice in the successful operation of the common law).

22. *See* Walker & Monahan, *supra* note 3, at 583 (referring to the admission of social science evidence by expert testimony).

23. Brian L. McDermott & Susanna P. Mroz, *The Use of Experts in Employment Discrimination Litigation*, THE FEDERAL LAWYER, June 2011, at 20, *available at* http://www.fedbar.org/federal-lawyer-magazine/2011/june/columns/labor-employment-corner.pdf.

24. *See* KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS 14–28, § 17.03[3][g] (2d ed. Supp. 2005); *see also* Tanya Katerí Hernández, *Employment Discrimination in the Ethnically Diverse Workplace*, 49 JUDGES' J. 33, 35 (2010), *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1013&context=faculty_scholarship.

subjectivity in biased decision-making as discussed in *Wal-Mart Stores, Inc. v. Dukes*.[25]

While this is a case narrative that can describe how unconscious biases are allowed to fester with unchecked managerial subjectivity, thus far litigants have not directly integrated the details about the social psychology data on implicit association testing bias. In fact, neither the plaintiff's briefs nor the amicus curiae briefs submitted in *Dukes* included detailed implicit bias research in their presentations.[26] While the plaintiff's expert witness reports and testimony made a number of general references to it being "widely accepted that stereotypes are social categories that are available to us and are invoked in cognition, whether we're aware of it or not,"[27] the record did not include any specifics about implicit association testing research.[28] This absence was probably a result of the plaintiff's understanding, as articulated in its brief before the Supreme Court,[29] that precedent

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

26. *See* Brief for Respondents, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277); Brief for the ACLU and National Women's Law Center, et al. as Amici Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for American Sociological Association and the Law and Society Association as Amici Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for Civil Procedure Professors as Amicus Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for Consumers Union of United States, Inc., National Consumer Law Center, and Center for Constitutional Rights as Amici Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for the Institute For Women's Policy Research as Amicus Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for Labor Economists and Statisticians as Amicus Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for Law and Economics Professors as Amicus Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief of NAACP Legal Defense and Educational Fund, Inc., et al. as Amici Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for National Employment Lawyers Association, the Equal Justice Society, and the Legal Aid Society-Employment Law Center as Amici Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for Public Citizen, Inc., as Amicus Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for Public Justice, P.C., the National Association of Consumer Advocates and the National Consumers League as Amici Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief of the United Food and Commercial Workers International Union et al. as Amici Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277); Brief for U.S. Women's Chamber of Commerce, National Partnership for Women & Families, and California Women Lawyers as Amici Curiae Supporting Respondents, *Dukes*, 131 S. Ct. 2541 (No. 10-277).

27. Deposition of William T. Bielby at 71, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252).

28. *See id.* Furthermore, any plaintiff-lawyer interest in introducing the details of implicit bias research would have necessitated a social psychologist expert witness in addition to the expertise of an esteemed sociologist like William Bielby.

29. Brief for Respondents at 36–37, *Dukes*, 131 S. Ct. 2541 (No. 10-277).

had long established the relevance of gender stereotyping research in discrimination cases such as *Price Waterhouse v. Hopkins*.[30] Furthermore, *Price Waterhouse*'s validation of the relevance of stereotyping for discrimination claims provided little guidance as to how to analyze stereotypes as evidence and no information about the science of implicit bias.[31]

Unfortunately, after the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*,[32] regarding the evidentiary guidelines for having a class action certified, the terrain for using social framework evidence may have been narrowed.[33] Despite the fact that the case was directly about class action procedures, and only indirectly about substantive antidiscrimination law, Justice Scalia's majority opinion expressed great skepticism about judicially considering more than general social science research summaries, such as when experts seek to apply the general social science research to specific case facts and thereby opine on the

30. *See* 490 U.S. 228 (1989).

31. *See id.* at 256 ("It takes no special training to discern sex stereotyping . . . ."); *see also* Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 599 (2011) (describing how the Supreme Court's poor guidance has lead to a legacy of inconsistency in lower courts' determinations as to when an allegation of discrimination supported by a claim of stereotyping should reach a trier of fact).

32. 131 S. Ct. 2541 (2011). In *Dukes*, past and present female employees of Wal-Mart sought to uphold their certification as a class action under Federal Rules of Civil Procedure 23(a) and (b)(2). *Id.* at 2547. They alleged, in particular, that their local managers' discretion over pay and promotions was exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. *Id.* at 2548 (citing 42 U.S.C. § 2000e-2(k)). The crux of the claim for class action status was that the discrimination the women faced, in light of this subjective decision-making policy, was common to all Wal-Mart's female employees. *Id.* The Court majority concluded that there was not significant proof that Wal-Mart operated under a general policy of discrimination common to all the proposed class members. *Id.* at 2557–58. The proffered evidence of commonality was deemed insufficient because a corporate policy of allowing discretion by local supervisors over employment matters is not ipso facto discrimination in an employer of Wal-Mart's large size, where "it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction." *Id.* at 2554–55. In addition, the Court unanimously concluded that the claims for backpay were improper under the Federal Rules of Civil Procedure 23(b)(2), on the basis that "the monetary relief is not incidental to the injunctive or declaratory relief." *Id.* at 2557. The Court was unwilling to "authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant" or "when each class member would be entitled to an individualized award of monetary damages." *Id.*

33. *See* Elizabeth M. Schneider & Nancy Gertner, *"Only Procedural": Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767, 771 (2012/13) ("[T]he majority's findings not only raised the bar for class action treatment, but also effectively recharacterized gender law in the workplace.").

likelihood of discrimination.[34] Deborah Weiss describes this as the contrast between the Court's acceptance of a "pure social framework" and its seeming rejection of an "applied social framework" exemplified by Justice Scalia's statement:

> [Plaintiff's expert Dr. Bielby] could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5[%] or 95[%] of the employment decisions at Wal-Mart might be determined by stereotyped thinking." . . . [This] is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say.[35]

Justice Scalia's rejection of the relevance of Dr. Bielby's testimony suggests that litigants may now be limited to general social framework evidence where, for instance, an expert explains the general social science research on the operation of stereotyping and bias in discretionary decision-making. For several decades, courts have accepted such general social framework evidence in employment litigation as it provides a general context for the fact finder to interpret the legal meaning of presented facts.[36] What *Dukes* now calls into question is the further ability of experts to directly link general social science findings to an employer's specific workplace policies.

Some scholars suggest that such links between social science findings and an employer's workplace policies should only be made when an expert has conducted his or her own empirical research in that particular workplace,[37] while others suggest that *Dukes*'s restriction on social science evidence might be limited to the context of class action certifications, where specificity is now needed to allege commonality of class claims.[38] Indeed, Justice

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34. *See Dukes*, 131 S. Ct. at 2555.

35. Deborah M. Weiss, *The Impossibility of Agnostic Discrimination Law*, 2011 UTAH L. REV. 1677, 1685–86 (2011) (quoting *Dukes*, 131 S. Ct. at 2553–54 (first alteration in original) (citation omitted)).

36. *See* Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 39 (2009) (explaining the use of social framework expert testimony and its role in employment discrimination litigation, especially in the class action context).

37. *E.g.*, John Monahan et al., *supra* note 4, at 1736–42 (claiming that experts who link findings from empirical academic studies to behaviors in a particular case do not apply the same level of "intellectual rigor" that was used to produce the study from which they extrapolate).

38. *E.g.*, Megan Whitehill, *Better Safe than Subjective: The Problematic Intersection of Pre-Hire Social Networking Checks and Title VII Employment Discrimination*, 85 TEMP. L. REV. 229, 263 (2012) (speculating that after *Dukes* a single plaintiff could introduce expert testimony on such social science evidence, in

Scalia's discussion of social framework evidence says nothing about how it can be relevant in discrimination cases.[39] His skepticism that social framework evidence does not prove discrimination overlooks the true purpose of social framework evidence, which merely seeks to provide context within which a fact finder can examine the evidence to then decide whether there was discrimination. In short, *Dukes* says nothing relevant about how social framework evidence is properly used to present a case of discrimination.[40] Furthermore, subsequent to the *Dukes* decision, other litigants have had success in having a class certified based on social framework evidence.[41] Nevertheless, while the full ramifications of the *Dukes* decision will take time to develop, there is a deep concern that the decision is likely to result in greater judicial scrutiny of social science evidence. Unfortunately, the possible post-*Dukes* chill on using applied social framework evidence means that fact finders may be left at a loss for understanding the relevance of the general social framework to the specific case before them.

Yet standing alone, general social framework evidence about the vulnerability of subjective decision-making to the operation of stereotyping can still leave fact finders grasping for what meaning it should have in a particular case. For instance, in *Dukes*, Justice Scalia was perturbed that the social framework evidence submitted regarding how a strong corporate culture of unfettered subjective managerial decision-making made it vulnerable to gender bias could not, in turn, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart."[42] While Justice Scalia's exhortation for exacting precision in asserting how often stereotyping occurs in a workplace may never be possible in workplaces where employers

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that the testifying expert witness would not need to indicate with statistical specificity how regularly such discriminatory motivation occurs, because there is no need to prove commonality and that the testimony's inability to offer statistical specificity would go to its persuasiveness).

39. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–54 (2011) (referring to Dr. Bielby's social framework analysis).

40. *But see* David L. Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298909# (proposing different admissibility standards for expert testimony depending on whether experts are proffering framework evidence to describe general scientific propositions as opposed to diagnostic evidence to apply the general propositions to individual cases).

41. McReynolds v. Merrill Lynch, No. 05C6583, 2012 WL 5278555 (N.D. Ill. July 13, 2012) (granting class certification in a disparate impact racial discrimination case).

42. *Dukes*, 131 S. Ct. at 2553.

do not repeatedly verbalize their stereotyped perspectives, the research on implicit association testing does quantify how pervasive implicit racial bias can be across a society.[43] Informing fact finders about the details of implicit association testing and what it reveals about how much implicit racial bias is infused in our social order may enhance the ability of fact finders to more readily identify how the facts before them could involve race-based differentiation in the midst of seeming race neutrality in ways that evidence regarding subjective decision-making alone is no longer always able to do.

II. Filling in the Contemporary Explanatory Gap: Detailed Implicit Bias Research and Testing As Social Framework Evidence

Research in the field of social psychology reveals that individuals rely on implicit attitudes to process information and have biases that they do not know they have.[44] Implicit attitudes are positive or negative evaluations of some concept (person, place, thing, or idea) that occur outside of a person's awareness and control.[45] These implicit attitudes, as psychologists call them, are picked up over a lifetime, absorbed from our culture, and work automatically to color our perceptions and influence our choices.[46] When those implicit attitudes attribute particular qualities to members of a specific social category, they are then implicit stereotypes.[47] Most people do not see their own implicit bias, which can appear spontaneously as intuition, a gut feeling, or a

43. *Compare id.* at 2554 (saying there is no "significant proof" that an employer "operated under a general policy of discrimination" without specificity of how often stereotyped thinking determines employment decisions), *with* Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 24 (2011) (pointing out that experiments like the IAT provide a "concrete measure by which to assess the influence of implicit biases on behavior").

44. *See* Russell H. Fazio et al., *Attitude Accessibility, Attitude-Behavior Consistency, and the Strength of the Object-Evaluation Association*, 18 J. EXPERIMENTAL SOC. PSYCHOL., 339, 341 (1982) (an attitude "is an association between a given object and a given evaluative category"); Robert B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOL. 151 (1980) (noting that humans can control the way emotions are expressed, but not the fact that they exist).

45. *See* Anthony Greenwald & Mahzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 7 (1995)

46. *See* Krieger, *supra* note 9, at 1199–1200 (describing the relationship between implicit bias and schemas).

47. Greenwald & Banaji, *supra* note 45, at 14.

vague doubt about a person.[48] This is why discriminatory actions rooted in racial implicit bias are also referred to as "unconscious racism" by some legal scholars.[49]

In 1998, the scientific literature introduced an IAT designed to detect the extent of an individual's implicit biases.[50] Thereafter, a massive study called Project Implicit has used a simple online version of the IAT to measure the pervasiveness of implicit social bias.[51] "The project, housed jointly at the University of Virginia, Harvard University[,] and the University of Washington, collects 20,000 responses a week—and hundreds of researchers are using its data to predict how people will behave based on their unconscious prejudices."[52] The project is funded in part by the National Institute of Mental Health and the National Science Foundation.[53]

Project Implicit's online IAT studies how quickly individuals "associate a group of people, shown in photographs, with either positive or negative words."[54] The IAT is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with faces and names of socially favored groups than with socially disfavored group faces and names.[55] Ease of association, measured by judgment speed, is taken as evidence for an implicitly-held attitude toward that social group.[56] There are IAT tests that measure implicit bias regarding gender, sexuality, religion, Arab-Muslims, disability, age, weight, skin-tone, and race.[57] Once the test is completed, test-takers receive ratings like

48. *Id.* at 8 ("implicit *attitudes* are introspectively unidentified (or inaccurately identified) traces of past experiences that mediate favorable or unfavorable feeling, thought, or action toward social objects.").

49. *E.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

50. Greenwald et al., *supra* note 6.

51. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit (last visited Feb. 8, 2014).

52. June Kronholz, *How the Unconscious Affects the Truth*, WALL ST. J., Aug. 2, 2008, at W6.

53. *Id.*

54. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 39 (2013).

55. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html (last visited Feb. 14, 2014) ("We would say that one has an implicit preference for thin people relative to fat people if they are faster to categorize words when Thin People and Good share a response key and Fat People and Bad share a response key, relative to the reverse.").

56. *Id.*

57. Sarah E. Redfield, Professor Emerita of Univ. of NH, Beyond Bias: Deconstructing Stereotypes, Address at the ABA Section of Litigation Annual Conference 17, Apr. 24–26, 2013, *available at*

"neutral," "slight," "moderate," or "strong" preference for a particular group as a measure of their implicit bias on the subject tested.[58] In short, the IAT measures the strength of associations between concepts like particular racial groups and positive or negative evaluations or stereotypes about that concept.

The findings from Project Implicit's six million participants over a decade of testing show that a majority of sampled Americans have some form of implicit bias.[59] The associations are not randomly oriented but instead are biased in directions that favor groups higher in the social hierarchy. For instance, with respect to race, the IAT testing reveals that some 75% of Whites, Hispanics, and Asians show an unintentional bias for Whites over Blacks.[60] In addition, one third of Blacks also show a preference for Whites over Blacks.[61]

Yet people are unaware of their implicit biases. Ordinary people, including the researchers who direct the IAT project, are found to harbor implicit biases even while honestly "reporting that they regard themselves as lacking these biases."[62] Nevertheless, implicit biases predict behavior.[63] Those who are higher in implicit bias have been shown to display greater discrimination.[64]

A number of examples bear this out beyond the context of reaction time studies of implicit bias with the IAT test. Studies of the labor market context manifest implicit biases. The studies show that many Whites who earnestly believe in equal rights will still recommend hiring a White job candidate more often than a person with identical credentials who is Black, even where race is not explicit on a resume but merely suggested by an ethnic-sounding surname.[65] Indeed, White applicants with felony convictions are often preferred over Black candidates without

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http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/39_beyond_bias.authcheckdam.pdf.

58. The test is available at www.projectimplict.net.

59. *See, e.g.*, Kronholz, *supra* note 52.

60. *See* BANAJI & GREENWALD, *supra* note 54, at 47 & 221 n.6.

61. *See id.*

62. *See* Redfield, *supra* note 57, at 18.

63. BANAJI & GREENWALD, *supra* note 54, at 47–50; Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210, 217 (2012).

64. *See* BANAJI & GREENWALD, *supra* note 54; Tracey G. Gove, *Implicit Bias and Law Enforcement*, 78 THE POLICE CHIEF, Oct. 2011, *available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=2499&issue_id=102011.

65. *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); *see also* Nicholas D. Kristof, *Racism Without Racists*, N.Y. TIMES, Oct. 5, 2008, at WK10.

prison records.[66] In experiments, otherwise identical job applicant folders presenting the person as either White or Black yield different results.[67] The White employer "thinks that he or she is selecting on the basis of nonracial factors like experience," but in fact is not.[68]

The pervasiveness of such implicit bias was most recently manifested in the bankruptcy context. A study of racial disparity in using a more costly and punitive form of consumer bankruptcy in Chapter 13 rather than Chapter 7 found that bankruptcy lawyers are more likely to steer Black debtors into Chapter 13 than White filers, even when they had identical financial profiles.[69] In the study, a survey was sent to lawyers asking them questions based on fictitious couples who were seeking bankruptcy protection.[70] When the couple was named "Reggie and Latisha" and attended an African Methodist Episcopal Church— as opposed to a White couple, "Todd and Allison," who were members of a United Methodist Church—the lawyers were more likely to recommend a more costly Chapter 13 bankruptcy, even though the two couples' financial circumstances were identical.[71]

Nor are implicit racial biases solely embedded in attitudes about Blacks. Unconscious stereotypes also arise with respect to other non-White racial groups. In a study of mock juror evaluations of litigators taking depositions, jury-eligible adults took the IAT test and later were shown photographs of a White lawyer and an Asian lawyer and then listened to two separate audio tapes of each of those lawyers taking a deposition with the exact same audio—thus with identical lawyering styles.[72] Despite the identical audio, the mock jurors with IAT biases favoring Whites submitted evaluations that preferred the White lawyer as more competent and worth recommending to family and friends, seemingly based on their implicit stereotypes about Asian lawyers.[73]

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66. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960 (2003).

67. Kristof, *supra* note 64.

68. *Id.*

69. Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 395 (2012).

70. *Id.*

71. *Id.*

72. Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 896–97 (2010).

73. *Id.* at 901.

Similarly, in IAT studies regarding Latinos, participants were shown to hold the implicit stereotype that Latinos are less intelligent than Anglo Whites.[74] Furthermore, the greater a participant's implicit bias against Latino immigrants, the larger the person's opposition to legal and illegal immigration.[75] In studies of judges specifically, similar patterns of pervasive implicit bias were also shown,[76] including judges from various jurisdictions, both elected and appointed.[77] These findings show that virtually none of us, despite our best efforts, are free from implicit bias.

Repeated validity tests demonstrate the IAT's psychometric worthiness.[78] The validity testing has also shown that the implicit association test results are more predictive of social behavior than self-reports of explicit bias.[79] As a result, testimony about the science of implicit bias is readily admissible as "reliable evidence" under the Supreme Court's *Daubert v. Merrell Dow Pharmaceuticals* test for the admission of scientific evidence, because it is grounded in the scientific method with appropriate testing validation that are related to the legal inquiry into discrimination.[80] Since the introduction of the IAT in 1998, "hundreds of peer-reviewed scientific publications have produced largely consistent results," indicating that implicit biases are both pervasive and of a strong statistical magnitude.[81]

Given the scientific data about the pervasiveness of implicit bias, a number of commentators recommend using expert

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74. James M. Weyant, *Implicit Stereotyping of Hispanics: Development and Validity of a Hispanic Version of the Implicit Association Test*, 27 HISP. J. BEHAV. SCI. 355, 355 (2005).

75. Efrén O. Pérez, *Explicit Evidence on the Import of Implicit Attitudes: The IAT and Immigration Policy Judgments*, 32 POL. BEHAV. 517, 531, 533 (2010).

76. *E.g.*, Jeffrey J. Rachlinski & Sheri Lynn Johnson, *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME. L. REV. 1195, 1205–06 (discussing the results of a study conducted on seventy judges from a large urban jurisdiction in the eastern U.S., forty-five judges from a large urban jurisdiction in the western U.S., and a group of eighteen judges who attended an optional session at a regional judicial education conference).

77. *Id.* (noting that the judges were all appointed to the bench initially but that some then stood for reelection).

78. Brian A. Nosek, Anthony G. Greenwald, & Mahzahrin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265, 286 (J. A. Bargh ed., 2007).

79. *See* Greenwald & Krieger, *supra* note 9, at 954.

80. *See, e.g.*, Faigman et al., *supra* note 9, at 1430–31 (noting that collectively the empirical studies on implicit bias appear to satisfy the *Daubert* reliability requirement).

81. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010).

witnesses in discrimination cases to educate the judge and jury about the nature and pervasiveness of unconscious discrimination.[82] Yet this has been discussed primarily with the objective of finding methods for litigating an "unconscious discrimination" cause of action.[83] In contrast, this Article instead focuses on the benefit of incorporating detailed implicit bias research into all Title VII claims as a framework for more coherently presenting a narrative of employment discrimination.[84] In particular, inserting detailed implicit bias research into social framework evidence is an effective way to respond to fact finder confusion as to why Justice Scalia's presumption in *Dukes*, that "left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all,"[85] is not accurate.

To be clear, such information would be presented for the sole purpose of a creating a social framework to construct a frame of reference for deciding the factual issues, and not as a vehicle for imparting a general group bias to an individual defendant on the legal question of discriminatory intent.[86] Nor is this Article

82. *See* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 496 (2005).

83. *See, e.g., id. But see, e.g.*, Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009) (arguing that it may be misplaced to seek a cause of action for implicit bias discrimination because implicit bias is not readily reachable through legal coercion).

84. The possibility for using implicit bias as social framework evidence was initially raised by Jerry Kang's & Kristin Lane's joint observation that "[i]f general psychological discoveries about gender discrimination can be admitted as social framework evidence in *Price Waterhouse*, general findings about implicit bias and its undermining of colorblindness should be similarly admissible. The same evidentiary standards that admitted the former testimony should admit the latter." Kang & Lane, *supra* note 81, at 494–95 (2010); *see also* Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1153–54 n.118 (2012) (suggesting that lawyers use an expert witness to provide social framework evidence that identifies particular attributes that exacerbate biased decisionmaking in the workplace, and then immediately call another witness who is familiar with the defendant's work environment to ask that witness whether each of those particular bias-exacerbating attributes exists).

85. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011).

86. *See* FED. R. EVID. 702 (authorizing the use of expert witnesses with specialized knowledge to "help the trier of fact to understand the evidence"); *see also* JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 12 at 50 (1992) (stating that the Federal Rules of Evidence do not "permit opinion on law except questions of foreign law"); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 3 FEDERAL EVIDENCE § 7:12 (4th ed.) (describing how in practice when "parties offer expert

proposing that defendants be specifically "tested" for implicit bias regarding their propensity to discriminate.[87] In fact, the static focus on an employer's individual IAT results at a specific moment in time does not address this Article's broader concern for using the science of implicit bias to construct a more expansive framing for the ubiquity of racial stereotypes, and how they can be infused in even the most race-neutral-seeming workplaces. In other words, more important than any individual employer's IAT results is a societal narrative of discrimination that can assist fact finders to identify the contexts that give rise to discrimination. While the Supreme Court has yet to directly address the issue of implicit bias in employment discrimination, some courts in the United States have already begun to rely upon the social science of implicit bias for assessing the facts in a case in both disparate treatment and disparate impact cases in ways that can be viewed as the foundation for beginning to address the reticence of judges and employment discrimination lawyers to introducing detailed implicit bias research.[88]

III. The Current Case Law Receptivity to Implicit Bias Social Framework Evidence

As early as 1999 (just four years after the publication of Linda Hamilton Krieger's seminal article "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity"[89]), the First and Eleventh Circuits recognized the legal relevance of implicit bias in employment discrimination cases.

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testimony on the content of law during the ordinary course of trial, it is properly rejected").

87. Jerry Kang, *The Missing Quadrants of Antidiscrimination: Going Beyond the "Prejudice Polygraph,"* 68 J. SOC. ISSUES 314 (2012) (noting that the focus on admitting individual IAT scores as pseudo prejudice polygraphs is much too narrow and obscures the broader range of potential legal responses to the development of the science of Implicit Social Cognition); Allan G. King & Syeeda S. Amin, *The Propensity to Stereotype as Inadmissible "Character" Evidence*, 27 A.B.A. J. LAB. & EMP. L. 23, 37 (2011) (objecting to the possibility of administering implicit association tests on defendant employers to show that decision-makers acted in conformity with their implicit bias).

88. *See, e.g.*, Thomas v. Eastman Kodak Co., 183 F.3d 38, 61 (1st Cir. 1999).

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

A. *Early Judicial Recognition of the Implicit Bias Concept*

In *Thomas v. Eastman Kodak Co.*, the First Circuit factored in concerns with unconscious bias in its analysis of the discrimination allegations.[90] In the case, Myrtle Thomas, the plaintiff, was the only Black Customer Service Representative (CSR) in Eastman Kodak's Wellesley, Massachusetts office, and in 1993 she was terminated.[91] Thomas alleged that Kodak's layoff decision was discriminatory because it resulted from a ranking process that relied on racially biased performance appraisals prepared in 1990, 1991, and 1992. "[92] Before Thomas was laid off, she received very positive performance reviews from her employer.[93] In 1989, when a Customer Service Management position opened up, she applied for the position but was told that she was unqualified.[94] Instead, the position went to Claire Flannery, a former CSR who had been working as a division secretary.[95] The appointment of Flannery "marked a significant downturn in Thomas's fortunes at Kodak."[96] According to Thomas, Flannery treated her differently from other CSRs (e.g., never accompanied her to customer meetings), gave her bad performance reviews, and consistently discouraged her from applying for other leadership positions within the company.[97]

> In January 1993, Kodak decided to reduce the number of employees in its Office Imaging Division. It selected employees for layoff using a 'Performance Appraisal Ranking Process' ('PAR process'), which produced a numerical score for each employee by adding together the employee's overall performance appraisal score for each of the three preceding years, after weighting the most recent score by a factor of 25 and the second most recent score by a factor of 5.[98]

Since Thomas began receiving negative performance reviews from Flannery, she had a low PAR score and was laid off.[99] Four months later, Thomas sued Kodak, claiming that its 1993 decision to terminate her "was discriminatory because it was based on

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90. 183 F.3d at 61 ("The concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments.").

91. *Id.* at 42.

92. *Id.*

93. *Id.* at 43.

94. *Id.* at 44.

95. *Id.*

96. *Id.* at 45.

97. *Id.*

98. *Id.* at 46.

99. *Id.*

discriminatory performance appraisals conducted by Flannery from 1990 through 1992."[100]

The court discussed unconscious bias and stated that Title VII case law recognizes the "validity of claims based on employers' biased or stereotypical thinking."[101] The court found that Thomas had sufficiently demonstrated that Flannery did treat Thomas differently from other employees and that it was likely due to Flannery's racial bias against Thomas even if it was a "less conscious bias."[102] For instance, Thomas presented evidence that even Flannery's assessments of the objective quantity of machines and installations that Thomas was responsible for were seemingly tainted by her race-based views of Thomas.[103] Flannery accorded Thomas a "below average score" of 3 "for managing 730 machines and 110 installations," while a co-worker received the much higher score of 5 for managing far "fewer machines (504) and fewer installations (81)."[104] In the absence of any evidence that Flannery was mentally imbalanced or otherwise ill-equipped to judge the difference between large and small quantities of work product, there is no race-neutral logical explanation for her disparity in employee evaluations across race. It is only with the court's intuitive use of an implicit-bias-informed social framework that any coherent rationale can be distilled from the divergence between objectively measured above-average work product and a below-average evaluation.

The implicit bias research the court references is what connects the unexplained irrationality of disparity in evaluations with the recognition of racial discrimination.[105] Specifically, when even the objective quantification of work product is subject to widely divergent assessments depending on the race of the employee, the implicit-bias-informed social framework helps explain the unexplainable. Similarly, Flannery's refusal to provide Thomas with computer training, appropriate developmental opportunities, and the ability to be evaluated based upon observed interactions with customers, as Flannery did with other employees, only begins to make sense when analyzed within the implicit bias-informed social framework, given the absence of

100. *Id.*
101. *Id.* at 60 n.14.
102. *Id.* at 64.
103. *Id.* at 45–46, 62–63.
104. *Id.* at 62–63.
105. *Id.* at 61.

any proffered business justification.[106] This is why the court concluded:

> It also appears, from the picture that Thomas paints (and which Kodak does not dispute) that Flannery was at times inappropriately upset or angry with Thomas, to the point of behaving unprofessionally. This, in turn, suggests that she did not respond neutrally to Thomas. A jury might reasonably infer from Thomas's description of these incidents that Thomas's race was an issue for Flannery and that Flannery's evaluations of Thomas were affected by some form of conscious animus *or less conscious bias* . . . .
>
> Given this, it is reasonable to infer that race played a determinative role in the evaluation process-especially since there is also other evidence that Flannery treated Thomas poorly. Indeed, the very fact that Thomas was the only Black CSR at the Wellesley office may have increased the likelihood that she would be evaluated more harshly.[107]

Similarly, the Eleventh Circuit, in *In re Employment Discrimination Litigation v. Alabama*,[108] validated the doctrinal value in considering unconscious bias. In the case, a group of African American plaintiffs brought claims against the State of Alabama for race discrimination in employment.[109] In the court's discussion of disparate impact, the court stated that "the disparate impact analysis was designed as a 'prophylactic' measure . . . to get at '[d]iscrimination [that] could actually exist under the guise of compliance with [Title VII].'"[110] The court reasoned that the disparate impact analysis was created to help weed out discrimination that is hidden, including unconscious bias, by allowing a plaintiff to bring discrimination lawsuits against an employer by demonstrating that its business practices produced a disparate impact on minority groups without needing to prove the subjective intent of the employer, because "even if one assumed that [discrimination through subjective employment criteria] can be adequately policed through disparate treatment analysis, the problem of *subconscious* stereotypes and prejudices would remain."[111]

Furthermore, at least one court has allowed testimony about implicit bias even in the absence of an expert witness. In

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106. *Id.* at 63.

107. *Id.* at 64–65 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 235–36 (1989)) (emphasis added).

108. 198 F.3d 1305, 1321–22 (11th Cir. 1999).

109. *Id.* at 1308–09.

110. *Id.* at 1321 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 435 (1971)).

111. *Id.* at 1321 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988)) (emphasis added).

Prue v. University of Washington, Mr. Prue, an African American, "brought claims against the University of Washington for discriminating against . . . him on the basis of race and age by refusing" to consider him "for an Administrative Coordinator position and then referring him only to manual labor positions."[112] Mr. Prue had a Master's Degree in Education Administration and Supervision and had spent twenty-five years providing "support to doctors, professors, students and staff in university and hospital settings."[113]

In September 2005, when the employer interviewed him for a temporary position in the School's Department of Medical Education, the interview was brief.[114] The employer claimed that this was because Mr. Prue did not seem interested in the position.[115] The next day a White man was hired for the position.[116] Mr. Prue reported his dissatisfaction with the five-minute interview and the interviewer's statement that the position "was not for you" to the Vice President of Human Resources.[117] During the employment discrimination litigation, Mr. Prue sought to explain how the cursory treatment he received was informed by implicit racial bias.[118]

The employer moved to exclude testimony and questions regarding 'implicit bias' and 'stereotyping' that plaintiff's counsel asked defendants' witnesses about during their depositions.[119] The employer objected on the basis that there would be no expert testimony to explain what "implicit bias" meant.[120] However, the court concluded that "the term 'bias' and the issue of stereotyping are within the understanding of a typical juror,"[121] and that "[i]f the witnesses questioned about the topics do not understand the

112. Plaintiff's Trial Brief at 1, Prue v. Univ. of Wash., No. C07-1859RSL, 2009 WL 1899478 (W.D. Wash. May 27, 2009).

113. *Id.*

114. *Id.* at 2.

115. *Id.* at 7.

116. *Id.*

117. *Id.* at 3 ("Mr. Prue contacted the University Complaint Investigation and Resolution Office (UCIRO) to report race and age discrimination on September 28, 2005.").

118. *Id.* at 3–4.

119. Prue v. Univ. of Wash., No. C07-1859RSL, 2009 WL 1174455, at *3 (W.D. Wash. Apr. 29, 2009).

120. *Id.*

121. *Id.*

terms, they [could] so state.... Accordingly, using the terms [would] not unduly confuse the jury."[122]

Most recently, the 2010 case of *Kimble v. Wisconsin Department of Workforce Development* provided the most comprehensive detail about the role of implicit bias in the employer's act of discrimination.[123] *Kimble* was a case in which an African American male employee alleged that he had been denied pay raises because of his supervisor's racist decision-making.[124] The judge evaluating the case concluded that the supervisor's highly subjective evaluation process for employees was questionable because of the many contradictions that other witness testimony revealed.[125] The judge stated in the opinion that "when the evaluation of employees is highly subjective, there is a risk that supervisors will make *judgments based on stereotypes of which they may or may not be entirely aware.*"[126] The judge then specifically referred to the literature regarding implicit bias, the supervisor's absence of written criteria for conducting consistent and fair employee evaluations, the failure to consult the employees' immediate supervisors for performance reviews, and the failure to have the compensation award decisions subject to meaningful review, as evidence of the subjective evaluation process prone to implicit bias.[127] Particularly noteworthy is how the judge detected that the supervisor regarded the plaintiff through his implicit biases "as if he were veiled with images of incompetency," inasmuch as the supervisor was often quick to blame the plaintiff for workplace failings before discovering all the facts, while at the same time overlooking the faults of other employees who were not Black males.[128]

Judges can become so engaged with the social science of implicit bias that they will even provide litigants a blueprint for submitting such information. In *Thomas v. Troy City Board of Education*, an Alabama District Court Judge found that, despite the fact that the employer had articulated a legitimate

122. *Id.* Yet, it may very well be that the absence of an expert witness who could elaborate on the significance of implicit bias and its scientific validity influenced the jury's verdict in favor of the defendant employer.

123. 690 F. Supp. 2d 765 (E.D. Wis. 2010).

124. *Id.*

125. *Id.* at 772.

126. *Id.* at 775–76 (emphasis added).

127. *Id.* at 776.

128. *Id.* at 776–77 (quoting Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23, 41 (1996)).

nondiscriminatory reason for preferring a White candidate who had the desired experience and enhanced educational level that the African American plaintiff Mr. Thomas lacked, "[this did] not necessarily mean that no discrimination occurred in the selection process."[129] The court went on to explain how, despite the fact that the defendant employer had successfully disputed the allegation of discrimination with its proffer that it chose the candidate it perceived to be the most qualified for the job, it was still possible that "Thomas was subjected to discrimination [because] . . . [s]uch subjective decision-making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of . . . ."[130] After noting that the court had not been provided with any evidence that the employer's decisions had been shaped by unconscious racial stereotypes as detailed in the legal scholarship that the judge liberally quoted from Charles Lawrence III, the judge admonished the employer to take into account the operation of unconscious bias when making all future hiring decisions.[131] Thus, despite the fact that the plaintiff in the case had no evidence that the employer's proffered nondiscriminatory reason was a mere pretext, and the plaintiff had not raised or litigated the issue of unconscious bias, the *Troy* court still provided all future litigants with a blueprint of how to raise it in their complaints and which sources to reference.

B. Judicial Resistance to the Implicit Bias Concept

Of course, there are also cases that have expressed resistance to the consideration of implicit bias social framework data. An examination of such cases offers up guidance about how to mitigate the judicial resistance. Namely, the cases suggest that greater detail about the science of implicit bias should be offered. Merely referencing of the general idea of implicit bias is not automatically persuasive.

For instance, in *Burrell v. County of Santa Clara*, the plaintiffs, three African American females, brought disparate impact claims against the County of Santa Clara Health Department for denying all of them promotions based upon their

129. Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004).

130. *Id.*

131. *Id.* at 1309–10.

racial backgrounds and other factors.[132] However, each of the plaintiffs failed to submit any statistical evidence of disparate impact within the company.[133] They simply stated that "'[b]ased on the implicit bias test studies, there are few groups of employees as impacted by the glass ceilings as much as African Americans. '"[134] In response, the court noted that "[t]estimony about the general challenges faced by a minority group, without more, does not constitute evidence that any particular employer's practices had a disparate impact on that group."[135]

Going into greater depth about the science of implicit bias not only provides greater clarity regarding its relevance to the analysis of a particular allegation of discrimination, but also provides the opportunity to possibly win over judicial skeptics. When judges and other legal actors are exposed to the literature regarding implicit associations, the results can be quite transformative.

One such skeptic was Judge Mark Bennett, a nineteen-year veteran of the federal court in the Northern District of Iowa.[136] But once he was provided with the substantive details about the science of implicit bias, he became committed to supporting its consideration in the legal profession.[137] His own account of his conversion to becoming a supporter of legal considerations of implicit bias is as follows:

> My own introduction to implicit bias was deeply unnerving. Associate Dean Russ Lovell of the Drake University Law School, with whom I have co-taught Advanced Employment Discrimination Litigation for many years, suggested that I visit a Harvard University website about Project Implicit. The site, www.implicit.harvard.edu, includes an online test on different types of biases called the Implicit Association Test (IAT). At that time, I knew nothing about the IAT, but as a former civil rights lawyer and seasoned federal district court judge—one with a lifelong commitment to egalitarian and anti-discrimination values—I was eager to take the test. I knew I would "pass" with flying colors. I didn't.

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132. Burrell v. Cnty. of Santa Clara, No. 11-CV-04569-LHK, 2013 WL 2156374, at *15, *29, *35 (N.D. Cal. May 17, 2013).

133. *Id.* at *34.

134. *Id.* at *25.

135. *Id.*

136. *The Honorable Judge Mark W. Bennett Biography, Judges Information*, U.S. DIST. CT. N.D. IOWA, http://www.iand.uscourts.gov/e-web/home.nsf/0/17a5762715fa4c52862573c90079072c (last visited Feb. 10, 2014); *see* Judge 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 (2010).

137. Bennett, *supra* note 136, at 149–50.

> Strongly sensing that my test performance must be due to the quackery of this obviously invalid test, I set out to learn as much as I could about both the IAT and what it purported to measure: implicit bias. After much research, I ultimately realized that the problem of implicit bias is a little recognized and even less addressed flaw in our legal system, particularly in our jury system. I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. Implicit biases cause subtle actions, . . . [b]ut they are also powerful and pervasive enough to affect decisions about whom we employ, whom we leave on juries, and whom we believe. Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.[138]

As a result of his exposure to the science of implicit bias, Judge Bennett now includes "a slide about implicit bias in the PowerPoint presentation that [he] show[s] before allowing attorneys to question potential jurors" in all cases.[139] He also suggests that jury instructions include a brief discussion of implicit bias and then urge jurors to attempt to be aware of them and thereby control them.[140]

It is not only skeptics of the IAT that will need to be persuaded, but also judges who are convinced of the relevance of the IAT but are concerned that incorporating empirical data about implicit bias will inadvertently diminish the capacity of civil rights doctrine to redress the harms of discrimination. Legal scholars Ralph Richard Banks and Richard Thompson Ford have detailed many of these concerns about the turn to implicit bias research weakening antidiscrimination doctrine.[141] Banks and Ford are particularly concerned that the rhetoric of unconscious bias is so compelling that it will transfigure the goal of antidiscrimination doctrine away from the practicalities of addressing substantive inequality and instead focus on the utopian and amorphous goal of eradicating unconscious bias.[142] This is worrisome to Banks and Ford because it reinforces a misguided preoccupation with

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138. *Id.*

139. *Id.* at 169.

140. *Id.*

141. Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); *see also* Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 907 (2010) (observing that "[i]n some respects, Banks, Ford and Johnson are right. Addressing the cognitive pathologies that contribute to biased decisionmaking cannot be the sole objective of antidiscrimination efforts. The problem is that unless these pathologies are accounted for and surmounted, the broader structural reforms they seek . . . may never . . . get off the ground.").

142. Banks & Ford, *supra* note 141 at 1110.

individual mindsets rather than an assessment of unequal status, access, and evaluation, which are the substance of inequality in the workplace.[143] To be sure, if Banks's and Ford's predictions about unconscious bias discourse diverting antidiscrimination doctrine away from measurable equality goals like integration, reparations, or equal outcomes, were to come to pass, the goal of racial justice would indeed be in peril.[144]

Outside of the employment discrimination context, the judicial discussion of implicit bias has varied from being the model of metaphorical glue for appropriately identifying discrimination, to being fraught with problems that resonate with Banks's and Ford's concerns with racial justice. A review of those cases suggests that with concrete guidance courts can be amenable to the appropriate admission of implicit bias research.

C. The Treatment of Implicit Bias in Other Legal Contexts

Before the development of the IAT, the existence of unconscious biases was already being acknowledged in certain areas of law, such as jury selection and questions regarding the constitutionality of officer arrests.[145] But with the proliferation of implicit bias research, the term "implicit bias" has found its way into other areas of law.

State v. Sherman presents a case of considering the role of implicit bias in criminal sentencing.[146] The Ohio Court of Appeals

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143. *Id.* at 1110–16.

144. Nevertheless, Jerry Kang provides a useful response to Banks's and Ford's concerns when he notes, "[t]his is not to say that the social cognitive model [of implicit bias research] explains nothing. It explains a great deal, and most importantly, provides the most potent response to the presumption that we are all already colorblind. . . . It might be distracting attention and resources from to other methodologies . . . . [But] [o]ne way to gauge the worth of the investment is to see how much more the science (as compared to other forms of progressive discourse) upsets the Right." Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1148–49 (2010); *see also* John Powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, POVERTY & RACE (Poverty & Race Res. Council), Sept./Oct. 2011, *available at* http://www.prrac.org/full_text.php?text_id=1363&item_id=13241&newsletter_id=119&header=Race+%2F+Racism&kc=1 (critiquing Banks & Ford for overlooking how "implicit bias insights are crucial to addressing the substantive inequalities that result from structural racialization" and how the implicit bias research is deeply engaged in studying the connection between the individual and society).

145. *See* Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1191–94 (2008).

146. State v. Sherman, No. 97840, 2012 WL 3765041 (Ohio Ct. App. Aug. 30, 2012).

vacated a trial sentence of six months for a White defendant that was vastly disproportionate to the seven year prison term for a similarly situated non-White defendant.[147] In a concurring opinion, Judge Stewart invoked implicit bias as a possible explanation for the disparity in sentencing, and identified studies that question "whether unconscious or hidden bias may lead to harsher criminal penalties for certain offenders, despite the judges' professional commitment to sentence proportionality."[148]

The court held that "the large discrepancy in sentences between similarly situated defendants" compelled the court to vacate the defendant's sentence and remand the case for resentencing.[149] In her concurrence, Judge Stewart discussed the role that implicit bias may have played in the matter.[150] The judge discussed the nature of implicit bias and cited to numerous law review articles on the topic in addition to those articles specifically pertaining to the implicit bias of judges.[151] The judge then specifically noted that "the disparity in sentencing of these individuals who are so similarly situated, save race or ethnicity, at least requires consideration of what impact unconscious preferences or biases may have played in the disparity" and warrants vacating the sentence and remanding for sentencing "[b]ecause there is no 'cure' for completely ridding ourselves of these hidden influences, an appreciation for their existence and an awareness of how they impact decision making will go a long way in helping to improve our justice system."[152]

Similarly, in *United States v. Vandebrake*,[153] a federal judge referred to his concern about the effect of implicit bias in his explanation of his departure from the federal sentencing guidelines. The judge rejected, on policy grounds, the relatively lenient treatment of antitrust violators in the Sentencing Guidelines, as compared to defendants sentenced for fraud, and imposed a sentence on an antitrust defendant of forty-eight months, rather than a sentence in the guidelines range of twenty-one to twenty-seven months.[154] The judge specifically opined on the social forces behind the lenient treatment of antitrust violators:

147. *Id.* at ¶¶ 10, 11, 40.
148. *Id.* at ¶ 48 (Steward, P.J., concurring).
149. *Id.* at ¶ 39–40.
150. *Id.* at ¶ 49 (Steward, P.J., concurring).
151. *Id.* at ¶¶ 44–49.
152. *Id.* at ¶¶ 49–50.
153. 771 F. Supp. 2d 961 (N.D. Iowa 2011).
154. *Id.* at 999–1005, 1012.

> One cannot help but wonder why sentences under the Sherman Act are so low. Is it the result of be [sic] explicit and/or *implicit bias* on behalf of Congress? The captains of American industry at the time of the Sherman Act's passage in 1890, and the most likely targets of prosecution under the Sherman Act, were the likes of J.P. Morgan, John D. Rockefeller, Andrew Carnegie, and Meyer Guggenheim. These individuals were almost exclusively wealthy, White, Anglo–Saxon, protestant males who were politically well-connected. Although the demographics of American industry have changed since 1890, the overly lenient sentencing (in my view) for white collar, antitrust criminals found in the origins of the Sherman Act lingers today in the United States Sentencing Commission Guidelines.[155]

In *United States v. Smith*, the court held that the defendant was permitted to offer expert testimony on eyewitness identification, specifically, cross-racial identification that can be impaired by implicit bias.[156] The testimony did not run afoul of Rule 702 of the Federal Rules of Evidence because it was reliable and assisted the jury in reaching a fair determination as to the witnesses' credibility.[157] Furthermore, the testimony did not violate Rule 403 of the Federal Rules of Evidence, because the probative value of the testimony was not outweighed by danger of unfair prejudice.[158]

The issue of cross-racial identification arose within the context of a criminal trial where the jury found the defendant guilty only of bank robbery and illegally possessing a firearm.[159] At trial, the prosecution's strongest evidence proffered were "two eyewitness identifications by individuals who had little contact with [the defendant]."[160] One of the eyewitnesses was White, and the defendant was Black.[161]

The defendant offered expert testimony from Dr. Sol Fulero, a professor who has written extensively on the topic of eyewitness identification.[162] The purpose of Fulero's testimony was to supply jurors with information on specific factors that impact witness accuracy, most importantly, information showing that cross-racial eyewitness identifications are less accurate than same-race

155. *Id.* at 1002–03 (emphasis added).
156. 621 F. Supp. 2d 1207, 1212–21 (M.D. Ala. 2009).
157. *Id.* at 1212–19.
158. *Id.* at 1219–21.
159. *Id.* at 1209.
160. *Id.* at 1214–15.
161. *Id.* at 1215.
162. *Id.* at 1213.

identifications.[163] The prosecution moved to exclude Fulero's testimony, relying on Rules 702 and 403 of the Federal Rules of Evidence.[164] The court allowed Fulero to give his opinion about the science of eyewitness identifications because it satisfied the *Daubert* test as reliable scientific knowledge that would aid the jury.[165] After concluding that Fulero's methods satisfied the reliability prong, the court discussed at length the importance of his research in informing the jury's deliberations.[166]

In concluding that the expert testimony on cross-racial identification was reliable and admissible, the court cited to authorities that have incorporated the research on implicit bias.[167] The expert testimony led to the conclusion that eyewitness testimony might be impaired by subconscious biases where the events involve members of a different race.[168] The court held that this information properly aided the jury in reaching a fair and accurate conclusion, because it allowed for "better understandings of human decisionmaking, including the flaws, weaknesses, and biases that characterize human life."[169]

The court also rejected the prosecution's argument under Rule 403 that Fulero's testimony would confuse and mislead jurors about their role as the ultimate arbiters of eyewitnesses.[170] On the contrary, the court found the testimony to be probative, given that it constituted "scientifically robust evidence that seeks to correct misguided intuitions and thereby prevent jurors from making common errors in judgment simply by giving them more accurate information about issues directly relevant to the case."[171]

The court concluded that the testimony on cross-racial eyewitness identification allowed the jury to interpret the evidence in a way that was "more fully developed and reliable than it would otherwise have been."[172] As a result, the defendant received a fairer trial, and "the jury, the court, and the entire judicial system can rest much more comfortably that [the defendant's] robbery conviction is a reliable outcome because the conviction is much less

163. *Id.* at 1215–16.
164. *Id.* at 1209.
165. *Id.* at 1211–19.
166. *Id.*
167. *Id.* at 1215–16.
168. *Id.* at 1215–19.
169. *Id.* at 1219.
170. *Id.* at 1219–21.
171. *Id.* at 1221.
172. *Id.* at 1222.

likely to have been infected by the flaws uncovered by recent empirical studies on eyewitness-identifications."[173]

While the aforementioned cases demonstrate a judicial willingness to consider implicit bias research, there are also instances of a judicial refusal to consider it. Often judicial refusal is rooted in a fundamental concern with the mechanics of how to properly consider implicit bias research. The case of *State v. Martin* is an example of those judicial tensions.[174] In *Martin*, a case alleging prosecutorial bias, the court held that it is not required to look to implicit bias in deciding *Batson* challenges to the prosecution's exercise of peremptory juror strikes.[175]

On an appeal from a conviction for first-degree premeditated murder, the defendant argued that the district court should be alert for a prosecutor's subconscious, implicit bias, in addition to the more obvious and explicit purposeful discrimination in the exercise of peremptory strikes.[176] The court soundly rejected admission of that theory: "Martin does not cite to any cases that support his argument that the district court should look to implicit, in addition to explicit, bias in *Batson* challenges, *nor does he detail how a court should investigate implicit bias.*"[177] The court then held that the defendant failed to carry his burden of proving purposeful discrimination and thus held that the findings of the lower court were not clearly erroneous.[178]

State v. Martin thus suggests that in order for the proffer of implicit bias research to be broadly considered by judges, concrete guidance about how this research should be deployed will be necessary for persuading some judges to admit it. Judicial resources such as the National Center for State Courts Implicit Bias Primer for courts that has been circulated by the American Bar Association will be particularly useful.[179] Such guidance is

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173. *Id.*

174. 773 N.W.2d 89 (Minn. 2009).

175. To succeed on a *Batson* challenge,

> (1) [T]he defendant must make a prima facie showing that the prosecutor executed a peremptory challenge on the basis of race; (2) the burden then shifts to the prosecution to articulate a race-neutral explanation for striking the juror in question; and (3) the district court must determine whether the defendant has carried the burden of proving purposeful discrimination.

Id. at 101 (citing Purkett v. Elem, 514 U.S. 765, 767 (1995)).

176. *Id.* at 102.

177. *Id.* (emphasis added).

178. *Id.* at 104.

179. JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS (AUG. 2009), *available at*

also necessary because even those judges who are willing to admit implicit bias research have, at times, misconstrued it in ways that further racism rather than oppose it. This is because simple surface discussions of unconscious racism are incorporated at the same time a court completely overlooks the structures of racism relevant to the case.

For example, in *Chin v. Runnels*, a criminal case regarding a conviction for second-degree murder, the petitioner filed a petition for a writ of habeas corpus claiming that Chinese Americans, Filipino Americans, and Hispanic Americans were excluded from service as forepersons on the grand jury that indicted him, thereby violating his right to equal protection.[180] While the court recognized that "[t]he complete absence of grand jury forepersons of Chinese, Filipino or Latino descent over a 36-year period begs the question whether unconscious stereotyping or biases may have contributed to the exclusion of these groups notwithstanding the best intentions of those involved,"[181] it nevertheless held that it was entirely reasonable for the state court to rely on the testimony of individuals who had an inside understanding of the judges' selection process and concluded that the government rebutted the petitioner's prima facie case of discrimination.[182] Yet this assessment is based upon an inherently subjective selection process where judges selected the foreperson after an off-the-record, in-chambers discussion looking for individuals with leadership capacity, administrative abilities, and people skills when making recommendations.[183] In fact, the court noted that "[a] number of courts have recognized that subjective decision-making allows for subtle biases or unconscious stereotyping to affect selection processes"[184] and that a growing body of social science recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias.[185]

But despite the judicial recognition that the selection process was susceptible to abuse given that the judge selected the foreperson after personally observing each prospective juror, and that the conversations leading to the selections occurred off the record, the court held that the state court's judgment that the

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http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf.

180. 343 F. Supp. 2d 891, 893 (N.D. Cal. 2004).

181. *Id.* at 906.

182. *Id.* at 903

183. *Id.* at 896.

184. *Id.* at 906.

185. *Id.*

government rebutted the petitioner's prima facie case of discrimination was not an "'unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"[186] While it is true that the appellate review inquiry into the reasonableness of a lower court's holding is a more circumscribed inquiry than if the matter had been presented for de novo review where the court could more closely scrutinize the state court's findings, it is highly puzzling how the appellate court could acknowledge all the ways that implicit bias operates in a problematic fashion while at the same time not connecting it to the actual facts of the case. It is as if by genuflecting regarding the topic of unconscious discrimination, cover is provided for being judicially passive about its effects on equal protection in ways that undermine the efficacy of antidiscrimination law—the very fear Banks and Fords raised in their 2009 article.[187] Furthermore, the few employers that have voluntarily addressed the issue of implicit bias have done so in ways that parallel some of the concerns raised by Banks and Ford about the danger of misapplied uses of implicit bias research.

D. Employer Initiatives for Implicit Bias Reduction Policies

In 2008, Weyerhaeuser, one of the world's largest forest products companies, publicly stated that it had made the decision to look into combating unconscious bias within its corporate walls.[188] Yet its articulated concern with implicit bias was seemingly focused on the feelings of individual employees rather than measurable outcomes of equal status, access, and treatment. Effenus Henderson, the company's Chief Diversity Officer specifically stated, "I think it is important to recognize that bias exists, and you must coach leaders in a way that will allow them to recognize it . . . . This will help them build inclusive behaviors that help recognize things that exist in all of us that can at times get in the way of being inclusive and respectful of others."[189] While it is certainly worthwhile to encourage corporate leaders to be inclusive and respectful, substantive equality requires more than a code of proper workplace etiquette.

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186. *Id.* at 904–05 (quoting 28 U.S.C. § 2554(d)(2)).

187. Banks & Ford, *supra* note 141, at 1110.

188. Cook Ross, Inc., *Proven Strategies for Addressing Unconscious Bias in the Workplace*, 2 CDO INSIGHTS 12 (Aug. 2008), *available at* http://www.cookross.com/docs/UnconsciousBias.pdf (presenting special case study on Weyerhaeuser company).

189. *Id.*

Similarly, Chubb Insurance has developed bias awareness training for its management teams as a device for specifically addressing unconscious bias, along with a dedicated phone line, called "Voice of the Employee," to provide an open channel of communication for employees to tackle workplace bias.[190] Like with the Weyerhaeuser goals of inclusion and respect, Chubb's attempts to alter management's mindsets about the value of their employees are certainly admirable, yet they misperceive the substantive equality goals of antidiscrimination doctrine.

Fortunately, there are examples of other employers who instead respond to the implicit bias research by implementing concrete practices to pursue substantive equality. For example, when Home Depot implemented a new employment structure for an automated hiring and promotion system called Job Preference Process ("JPP"), discriminatory practices were reduced significantly.[191] With the JPP, job applications are submitted through computer or telephone kiosks.[192] It is "an in-store computer or telephone system that enables employees and applicants to indicate their job preferences and qualifications, and thus automatically become part of the pool for any position that meets those preferences and qualifications."[193] The purposes of the JPP include the following:

> (i) to improve the information available to Home Depot's management in making promotion and employee development and training decisions; (ii) to provide a systematic Division-wide method, consistent with equal employment opportunity, for Home Depot Associates to make informed and documented decisions about their career preferences; (iii) to provide a systematic framework within which Home Depot will incorporate such Associate preferences into its retail store promotion and Associate development and training decisions; and (iv) *to establish a meaningful basis for setting Benchmarks* . . . .[194]

The JPP program has been successful in pursuing substantive equality because once a manager posts a job opening, he or she automatically receives a list of all qualified applicants

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190. *Id.* at 7 (presenting a special case study on Chubb Group of Insurance Companies).

191. Reskin, *supra* note 7, at 36.

192. *Id.*

193. Susan Strum, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 512–13 (2001).

194. Consent Decree at 39, Butler v. Home Depot, 984 F. Supp. 1257 (N.D. Cal. 1997) (No. C 94-4335 SI), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1005&context=condec (emphasis added).

through the computer's standardized matching process.[195] This curtails a manager's discretion to hire their friends and demographically homogeneous circles of contacts and thereby reduces the likelihood that managers' conscious and unconscious in-group favoritism will determine their employment decisions.[196]

Home Depot is not alone in responding to concerns of unconscious bias by developing concrete practices for pursuing substantive equality. Deloitte & Touche, one of the largest accounting, tax, and management consulting firms in the United States, develops participatory task forces that assess whether the assignment process within each of its offices is based on proper criteria and not on bias, specifically gender-based bias.[197]

The review of the foregoing case studies suggests that companies can respond to the insights from implicit bias research in either cursory or substantive fashions. The shallow use of implicit bias research that Banks and Ford fear is not preordained. Nevertheless, those concerned with meaningful equality are well advised to be vigilant in advancing and supporting implicit bias research applications that profoundly engage the pursuit of racial justice. As the scholar who first encouraged us to consider the role of unconscious discrimination in the enforcement of racial equality, Charles Lawrence, III has stated that we must challenge ourselves "to see the cultural meaning that [W]hite supremacy has constructed, to see it so that we can begin the work of reconstructing those meanings and our shared humanity.... [A]nd do this difficult work that will make our wounded world whole."[198]

IV. Incorporating Implicit Bias Research Social Framework Evidence—A Case Example

The proposal for employment discrimination litigants to begin inserting the details of implicit bias research into social framework evidence can conceivably be deployed in any number of ways, depending on the facts of a disparate treatment case or disparate impact case. Nevertheless, the following sample application of the proposal is offered with the knowledge that concrete examples offer the best guidance. In fact, revisiting a

195. Reskin, *supra* note 7, at 36.

196. *Id.*

197. Strum, *supra* note 193, at 492.

198. Charles Lawrence, III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 977 (2008).

previously litigated case provides the opportunity to assess the potential advantages of the proposal.

In Section III of this Article, *Thomas v. Troy City Board of Education*[199] was presented as a case where a judge urged the defendant-employer to consider the importance of implicit bias even after the defendant successfully disputed the discrimination allegation with its proffer of a legitimate nondiscriminatory rationale. It is thus useful to consider the ways implicit bias could have been invoked by the plaintiff in a way that could have made a more persuasive case of discrimination by providing a social framework that enables a fact-finder to readily identify the signs of discrimination in today's climate of post-racial discourse.

In *Thomas*, the plaintiff, Willie Thomas, had been an employee of the Troy City school system for over twenty-five years.[200] For five years he held the position of assistant superintendent; he also spent nine years employed at the central office as an administrator.[201] The concern with racial discrimination arose when Thomas applied for the vacant position of superintendent. Eighteen individuals applied for the position.[202] After an initial screening of the applicants' resumes, eight candidates were deemed qualified for the position (three of whom were Black), and of those eight, four were selected for interviews (all of whom were White).[203] Thomas was in the group of eight candidates who met the qualifications for the position but was deemed unattractive for interviewing purposes (like the other two Black candidates).[204]

The process for selecting whom to interview appeared quite neutral on its face but was rife with opportunity for the operation of implicit bias. To select interview candidates, each of the five board members numerically ranked the applicants. The votes were then tallied, and interviews were offered to the four candidates with the highest rankings.[205] The five-person voting board had two Black members, one of whom was the only board

199. 302 F. Supp. 2d 1303 (M.D. Ala. 2004).

200. *Id.* at 1305.

201. *Id.*

202. *Id.* at 1306.

203. *Id.*

204. This demographic data that was discussed by the parties during the pre-trial conference was unfortunately not part of the official record, because it was not submitted to the court in the form of a sworn statement within the court deadline for summary judgment motions. *Id.* at 1306 n.2.

205. *Id.* at 1306.

member who ranked Thomas in the top four candidates,[206] despite Thomas' twenty-five years of administrative experience with the city school system, a master's degree, and course work towards his doctorate degree.[207] While the degree of subjectivity in the process, and the resulting demographically skewed results, suggest a context highly susceptible to the operation of implicit bias, presenting an implicit bias research social framework would have assisted the fact-finder in identifying how the very parameters for decision-making were themselves influenced by racial stereotypes, despite the absence of any overtly racialized remarks on the part of the decision-makers.

Specifically, the main articulated criterion for choosing the new superintendent was "the ability to improve academics in Troy City Schools . . . [and] an emphasis on academic programs and the ability to understand and structure academic programs."[208] On its face, the employer's stated criterion appears to be nondiscriminatory, despite the racially skewed results it produced in a racially diverse jurisdiction like Alabama. Furthermore, in the contemporary social context in which post-racial rhetoric questioning the continued existence of racism is pervasive, a fact finder might find it difficult to understand how seemingly race-neutral selection criteria can yield racially skewed results.

In contrast, providing a social framework with detailed implicit bias research would provide the fact finder with a vehicle for better understanding how facial race neutrality can yield racial disparity. This would entail: 1) a summary of what scientific research now shows us about how the brain cognitively functions and often operates on auto pilot by relying upon culturally learned implicit biases to make assessments; 2) an explanation of the IAT and how it measures the strength of implicit biases; and 3) a description of the IAT research studies demonstrating the pervasiveness of racial implicit bias and its effect on decision-making, as shown in resume studies and other studies described in Section II of this Article.

With the proffer of the implicit bias testing research social framework, the fact-finder in *Thomas* would have been able to assess the facts with a heightened attention to the ways in which culturally pervasive implicit biases could have influenced the subjective decision-making of the employer. Thus, when viewing the *Thomas* facts through the social science lens of implicit bias,

206. *Id.*
207. *Id.* at 1307–08.
208. *Id.*

the longstanding racial stereotypes about the intellectual inferiority of Blacks are salient (even though never voiced by the employer), and they elucidate how a Black man with a master's degree, twenty-five years of administering federal programs for the school district, and five years' experience as assistant superintendent was deemed ill-suited to understanding and structuring academic programs. While the White candidate who was chosen did have academic experience as a teacher, and then as a principal of an elementary school, an objective comparison informed by the implicit bias research suggests that more simple elementary school instruction pales in comparison to Thomas' actual experience as assistant superintendent and administrator.

An implicit bias testing research social framework would also have been useful in contextualizing the spurious allegations that were made about the plaintiff's credit history. Specifically, during the school board's deliberations, an unsubstantiated accusation of having an unsatisfactory credit rating was raised and viewed as pertinent because "one of the main responsibilities of a superintendent is 'that he's the chief fiscal officer for the school system and has to enure [sic] that money is managed in an efficient and effective manner.' Therefore, consideration of Thomas's credit history, even if the history was inaccurate, is a legitimate consideration."[209] In contrast, an implicit bias research social framework lens could have provided the backdrop for then introducing how the unstated racial stereotype about Blacks as irresponsible with money and other matters explains the alleged relevance of the unsupported accusations of financial mismanagement. This is because the implicit bias research social framework contextualizes how employers can inappropriately draw negative inferences from specious and unsubstantiated accusations when such accusations conform to culturally entrenched biases.

In short, without an implicit bias research social framework, plaintiffs like Thomas are left struggling to explain the unexplainable—the existence of racially distinctive treatment without any overt employer references to race-based justifications or stereotypes. With an implicit bias research social framework, a fact-finder has a lens for identifying how, even in the absence of racially biased or stereotyped employer statements, racially differentiated treatment can be explained by socially pervasive implicit bias. While the contemporary presumptions about a

209. *Id.* at 1308.

presumably "post-racial" society will continue to present challenges to litigators attempting to explain the significance of racial disparity in the absence of an overt Jim Crow segregation mandate, this Article offers the implicit bias testing research social framework as one mechanism for assisting fact finders in recognizing the harms of racial discrimination.