

# The Myth of Objectivity: Implicit Racial Bias and the Law (Part 2)

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## Abstract

The centrality of race to our history and the substantial racial inequalities that continue to pervade society ensure that "race" remains an extraordinarily salient and meaningful social category. *Explicit* racial prejudice, however, is only part of the problem. Equally important - and likely more pervasive - is the phenomenon of *implicit* racial prejudice: the cognitive processes whereby, despite even our best intentions, the human mind automatically classifies information in racial categories and against disfavoured social groups. Empirical research shows convincingly that these biases against socially disfavoured groups are (i) pervasive; (ii) often diverge from consciously reported attitudes and beliefs; and (iii) influence consequential behaviour towards the subjects of these biases. The existence of implicit racial prejudices poses a challenge to legal theory and practice. From the standpoint of a legal system that seeks to forbid differential treatment based upon race or other protected traits, if people are in fact treated differently, and worse, because of their race or other protected trait, then the fundamental principle of anti-discrimination has been violated. It hardly matters that the source of the differential treatment is implicit rather than conscious bias. This article investigates the relevance of this research to the law by means of an empirical account of how implicit racial bias could affect the criminal trial trajectory in the areas of policing, prosecutorial discretion and judicial decision-making. It is the author's hypothesis that this mostly American research also applies to South Africa. The empirical evidence of implicit biases in every country tested shows that people are systematically implicitly biased in favour of socially privileged groups. Even after 1994 South Africa – similar to the US – continues to be characterised by a pronounced social hierarchy in which Whites overwhelmingly have the highest social status. The author argues that the law should normatively take cognizance of this issue. After all, the mere fact that we may not be aware of, much less consciously intend, race-contingent behaviour does not magically erase the harm. The article concludes by addressing the question of the appropriate response of the law and legal role players to the problem of implicit racial bias.

## Keywords

Racial bias; Implicit racial bias; Racism; Implicit Association Test; Prosecutorial Discretion; Judicial Decision-making

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Virtue is a state of war,  
and to live in it  
we have to always combat with ourselves  
- *Jean-Jacques Rousseau*

## 1 Introduction

In the previous part of this article<sup>1</sup> I examined the empirical evidence that shows implicit racial bias in society to be systematic, robust and pervasive. I also made out a case for why the law should take notice of implicit racial bias. In this part I continue the discussion of the relevance to the law of this body of research, with specific focus on implicit bias leading up to and in the courtroom. In this regard I give an empirical account of how implicit bias may potentially influence the criminal litigation trajectory.<sup>2</sup> Next, I illustrate why this mostly United States research is relevant to South Africa. Then I consider some legal-normative issues surrounding implicit bias. I conclude by addressing the question of the appropriate response of the law and legal role players to the problem of implicit racial bias.

## 2 The criminal litigation trajectory

Since the individual actors in the criminal justice system are neither perceptibly nor cognitively nor behaviourally colour-blind, one could hardly expect the criminal justice system itself to be. In fact, an extensive body of empirical research in the United States has demonstrated that implicit racial biases may influence the perceptions, judgments and behaviour of police officers, prosecutors and judges, and hence the way in which Black defendants are treated and judged, as compared with their White counterparts.<sup>3</sup>

Even the most cursory engagement with the American criminal justice system drives home the point forcefully that the United States "shuts behind bars an overwhelmingly disproportionate number of black and brown persons".<sup>4</sup> The numbers are as stark as they are clear. Although African

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<sup>1</sup> See *PER / PELJ* 2017 (20) - DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20n0a1312>.

<sup>2</sup> I focus on the criminal litigation trajectory because, unlike the civil litigation context, in the criminal justice system it is not merely that implicit racial biases might lead to harmful discriminatory behaviour. In the context of criminal justice, where lives hang in the balance, the consequences might be catastrophic.

<sup>3</sup> Smith, Levinson and Robinson 2014 *Ala L Rev* 877; Kang *et al* 2012 *UCLA L Rev* 1151.

<sup>4</sup> López 2010 *Cal L Rev* 1028.

Americans constitute only 13% of the US population, they make up almost 1 000 000 (43%) of the total of 2 300 000 incarcerated persons.<sup>5</sup> There is near universal agreement among commentators that the startling racial disparities that pervade the American justice system cannot simply be explained away as a function of poverty and poor choices.<sup>6</sup>

Psychologists have explored and documented empirical evidence of longstanding implicit negative stereotypes of Blacks that pervade the American psyche.<sup>7</sup> In the context of criminal justice, the stereotype most commonly applied to Blacks - or more specifically to young Black males - is that they are hostile, violent and prone to criminality.<sup>8</sup> This implicit racial stereotype, in turn, creates a lens through which actors in the criminal justice system automatically perpetuate inequality.<sup>9</sup>

Consider for example the crucial milestones in a criminal case flowing to trial. Firstly, on the basis of a crime report the police investigate particular areas and persons of interest and ultimately arrest a suspect. Secondly, the prosecutor decides to charge the suspect with a particular crime. Thirdly, the prosecutor makes recommendations and the presiding judicial officer makes decisions about bail and pre-trial detention. Fourthly, the defendant decides whether or not to accept a plea bargain after consulting his defence attorney or Legal Aid attorney. Fifthly, the case proceeds to trial, and the presiding officer not only manages the proceedings, but also makes decisions about evidentiary motions, objections, witness credibility and, ultimately, about the defendant's guilt. Finally, if the accused is convicted, the prosecutor makes sentencing recommendations and the presiding officer ultimately decides upon the appropriate sentence.

Clearly, implicit biases need to sway only a few of the countless decisions at each stage along the spectrum of discretionary points to aggregate into a substantial effect. For the sake of manageability, I focus on some of the more striking experimental results that might feature during the police

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<sup>5</sup> US Department of Justice 2015 <https://www.bjs.gov/content/pub/pdf/jim14.pdf>; NAACP 2016 <http://www.naacp.org/pages/criminal-justice-fact-sheet>. One out of every nine African American males between the ages of 20 and 34 is incarcerated. Warren *et al* *One in 100* 34. In many large American cities more than half of the young Black men are under the control of the criminal justice system. Alexander *New Jim Crow* 16.

<sup>6</sup> See Smith, Levinson and Robinson 2014 *Ala L Rev* 872.

<sup>7</sup> See, for example, Devine and Elliot 1995 *Pers Soc Psychol Bull* 1139.

<sup>8</sup> Banks, Eberhardt and Ross 2006 *Cal L Rev* 1172.

<sup>9</sup> Smith, Levinson and Robinson 2014 *Ala L Rev* 874.

encounter, in the exercise of prosecutorial discretion, and in judicial decision-making at trial and sentencing.

## **2.1 Police encounter**

On 4 February 1999 four New York City police officers saw a 23-year old West African immigrant, named Amadou Diallo, standing in front of his apartment building in a high-crime area of the Bronx. He seemed suspicious, so they decided to question him. Moments later, Diallo lay dead. The officers, believing that he was reaching for a gun, had fired 41 shots at him, 19 of which struck home. The item that Diallo was reaching for was not a gun, but his wallet. The officers were charged with second-degree murder. Their principal defence was that they genuinely believed their lives to be in danger. Their argument succeeded and they were acquitted.<sup>10</sup> Moral outrage in response to this incident derived from a salient principle of justice: an individual should be judged on the basis of his conduct, not his social category.

Of course, Diallo was by no means the only incident of white police officers mistakenly and fatally shooting an unarmed Black person in the United States in recent memory. In fact, there are a number of highly publicised incidents almost every year. Information compiled by the Bureau of Justice Statistics indicates that African Americans are four times more likely than Whites to die during an encounter with a law enforcement officer.<sup>11</sup>

However, it was the Diallo tragedy that spurred questions around the degree to which any implicit racial bias on the part of the police officers influenced their perceptions and decisions to open fire. In the wake of this incident, several laboratories created controlled environments analogous to the police officers' situation to examine the psychological underpinnings of implicit racial bias that could lead to such devastating results.

Eberhardt *et al*<sup>12</sup> demonstrated the bi-directional activation between "Black" and "criminality". When participants were subliminally primed with a Black male face as opposed to a White male face or no face at all, they were able to more quickly distinguish the faint outline of a weapon that slowly emerged

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<sup>10</sup> Carpenter 2008 <http://www.affirmact.blogspot.co.za/2008/05/buried-prejudice-bigot-in-your-brain.html>. For an in-depth discussion of the Diallo case, see Gladwell *Blink* 189 *et seq*.

<sup>11</sup> Banks, Eberhardt and Ross 2006 *Cal L Rev* 1173.

<sup>12</sup> Eberhardt *et al* 2004 *J Pers Soc Psychol* 876.

from visual static. Thus, by implicitly thinking "Black", the participants more quickly saw a weapon.

Interestingly, this phenomenon also occurred in the reverse. Thus, not only did the idea of "Black" trigger weapons, but participants being subliminally primed with drawings of weapons also triggered visual attention more quickly to Black male faces than White male faces.

It bears repeating that in this study the primes were all flashed *subliminally*.<sup>13</sup> Thus, the behavioural differences in visually attending to Black faces and remembering them negatively in stereotyped ways were all triggered implicitly, without the participants' conscious awareness.<sup>14</sup>

The experimenters also exposed participant police officers to a group of Black faces and a group of White faces and asked "Who looks criminal?" The police officers not only viewed more Black faces than White faces as criminal, but they also evaluated the most stereotypically Black faces (eg those faces with wide noses, thick lips or darker skin) as most criminal of all.<sup>15</sup>

To directly explore the question whether people are prone to accidentally shoot Black suspects more often than White suspects, Correll<sup>16</sup> developed a "shooter bias" paradigm video simulation. Participants are confronted with photographs of an individual (a "target") holding an object, superimposed on various city landscapes such as bust stops and parks. If the object is a weapon, the participant has to press one key to shoot. If the object is harmless (such as a cell phone, wallet or cold drink) the participant must press another key to holster the weapon.

Not surprisingly, under severe time pressure the participants made mistakes. However, their mistakes were not randomly distributed. Shooting behaviour systematically correlated with the race of the target. Participants were quicker to shoot when the target was Black than when the target was White. Also, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets. Conversely, they failed to shoot more armed White targets (misses) than armed Black targets.<sup>17</sup>

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<sup>13</sup> The photograph flashed for only 30 milliseconds.

<sup>14</sup> Kang *et al* 2012 *UCLA L Rev* 1137.

<sup>15</sup> Banks, Eberhardt and Ross 2006 *Cal L Rev* 1172; Smith, Levinson and Robinson 2014 *Ala L Rev* 882.

<sup>16</sup> Correll *et al* 2002 *J Pers Soc Psychol* 1314.

<sup>17</sup> Correll *et al* 2002 *J Pers Soc Psychol* 1317, 1319.

The experimenters were surprised to find that these results were consistent in both White and Black participants.<sup>18</sup> Thus, the race of the *participant* did not have any impact on shooter bias. This suggests that shooter bias is firmly rooted in the culturally held implicit racial stereotype linking Blacks to danger.<sup>19</sup>

## 2.2 *Prosecutorial discretion*

Consider the first decision that a prosecutor makes in most criminal cases: whether or not to charge the suspect and, if so, with what crime or crimes. This charging power is inherently an expression of mercy, ie should the legitimate power of the State be reined in or not? However, as the US Supreme Court noted in *McCleskey v Kemp*:<sup>20</sup> "[T]he power to be lenient is also the power to discriminate".

It is trite that prosecutors exercise vast and largely un-reviewable discretion in their charging and plea-bargaining decisions.<sup>21</sup> Studies in the United States have routinely found that prosecutors - the vast majority of whom would never consciously intend to hold double standards based upon race - exercise this discretion in racially biased ways, contributing significantly to the racial disparities in the criminal justice system.<sup>22</sup>

For example, a 1985 study found Los Angeles prosecutors more likely to press charges against Black than White defendants - a disparity that could not be accounted for by race-neutral factors, such as a prior record, the seriousness of the charge or the use of a weapon.<sup>23</sup> Similar studies in Florida and Indiana in the late 1980s also found charging discrepancies based upon the race of the defendant.<sup>24</sup> A US Sentencing Commission Report disclosed that federal prosecutors were more disposed to offer White

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<sup>18</sup> Correll *et al* 2002 *J Pers Soc Psychol* 1324.

<sup>19</sup> Levinson 2007 *Duke LJ* 358.

<sup>20</sup> *McCleskey v Kemp* 481 US 279 312 (1987).

<sup>21</sup> From the arrest of a suspect to sentencing of the defendant, consider the range of discretion-based decisions that prosecutors must make on a daily basis: Should an arrested person be charged with a crime? What crime or crimes should be charged? Should bail be recommended or opposed? At what level should bail be recommended? Should the charges be dropped? Should a plea bargain be offered or negotiated? What sentence will be recommended?

<sup>22</sup> See generally Rehavi and Starr *Racial Disparity*.

<sup>23</sup> Radelet and Pierce 1985 *L Soc Rev* 615-619.

<sup>24</sup> See sources cited in Kang *et al* 2012 *UCLA L Rev* n 56.

defendants generous plea bargains, with sentences below prescribed sentencing guidelines, than to offer them to Black or Latino defendants.<sup>25</sup>

In order to get a sense of how implicit racial bias might skew prosecutorial decisions in a racially biased manner, consider two scenarios of self-defence with identical facts, except for the race of the victim: in one the victim is Black, and in the other White.<sup>26</sup> The suspect in each claims self-defence, and alleges specifically that he accidentally bumped into the deceased outside a pub at night. The deceased became angry and warned the suspect that "He's going to get it!" The suspect contends that, at this point, the deceased reached towards his waist and started pulling out a shiny object. The suspect, believing that the deceased was reaching for a gun, pulled out his own handgun and fatally shot the deceased.

In order to assess the strength of the self-defence claim to determine whether charges should be brought for murder or whether a plea-bargain for manslaughter or some other less serious offence might be appropriate, prosecutors must make an instinctual judgment: did the suspect reasonably believe that the deceased was reaching for a weapon?

This judgment is not made in a race-neutral vacuum. As described above, empirical research bears out that most Americans (and, as I argue below, this is likely the case for most South Africans as well) hold implicit racial stereotypes that associate Blacks with aggression and hostility and, specifically, that associate Blacks with weapons. Applying this research to the *scenario* above, it is more than likely that prosecutors would perceive the Black victim as having reached for a weapon.

By contrast, IAT findings suggest that people hold positive stereotypes about Whites, such as "law-abiding", "trustworthy" and "successful", and specifically that they *dissociate* Whites and weapons.<sup>27</sup> Prosecutors would therefore likely be more inclined to accept that the White victim was reaching for his cell phone and, thus, that the suspect acted unreasonably. Of course, these dynamics would be amplified in a cross-racial shooting, because implicit racial bias would affect the evaluation of *both* the suspect and the victim's behaviour.

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<sup>25</sup> US Sentencing Commission Leadership Conference on Civil Rights 2000 <http://www.proteccivilrights.org/pdf/reports/justice.pdf>.

<sup>26</sup> See Smith and Levinson 2011 *Seattle U L Rev* 806-807.

<sup>27</sup> Smith and Levinson 2011 *Seattle U L Rev* 808.

I do not suggest that prosecutors consciously think about a Black suspect or victim and consciously decide that Blacks are hostile and violent, and therefore that they are more likely to shoot or that they can more justifiably be shot. In fact, most prosecutors would expressly - and genuinely - disavow such conscious thought processes. However, as emphasised in the first part of this contribution, these negative stereotypes operate subconsciously and automatically. That is what makes implicit racial bias so insidious.

What about defence attorneys? In general one might think that - because they are frequently put in the role of interacting with clients belonging to disfavoured social groups and because they are often ideologically and professionally committed to racial equality - defence attorneys as a group might have implicit racial biases materially different from the rest of the population. However, Eisenberg and Johnson found evidence to the contrary. As measured by the IAT, capital punishment defence attorneys show implicit racial bias against Blacks approximately to the same extent as does the population at large.<sup>28</sup>

### **2.3 Judicial decision-making**

A judge - the archetype of the impartial actor in the criminal justice system - exercises significant discretion in the typical criminal trial in setting bail, deciding motions, ruling on the admissibility of evidence, presiding over the trial, rendering a verdict, and sentencing the defendant. If ordinary adults carry a "bigot in the brain", as an article in *Scientific American Mind* referred to implicit biases, then data collected by Rachlinski *et al*<sup>29</sup> suggest that:

[A]n invidious homunculus might reside in the heads of most judges in the United States, with the potential to produce racially biased distortions in the administration of justice.

Before returning to the Rachlinski *et al* study, let us consider a broader statistical overview of evidence of racial bias in bail setting and sentencing which, in the United States as in South Africa, falls squarely within the purview of the trial judge. A study of bail setting in Connecticut found that judges set bail at amounts that were 25% higher for Black defendants than for similarly situated White defendants.<sup>30</sup> Empirical data from Washington State also suggests that defendants from disfavoured social groups receive

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<sup>28</sup> Eisenberg and Johnson 2004 *De Paul L Rev* 1545-1555.

<sup>29</sup> Rachlinski *et al* 2009 *Notre Dame L Rev* 1221.

<sup>30</sup> Ayres and Waldfoegel 1994 *Stan L Rev* 992.

less favourable pre-trial detention determinations than their White counterparts.<sup>31</sup>

Federal judges imposed sentences on African Americans that were 12% longer than those imposed on comparable White defendants.<sup>32</sup> Research on capital punishment in the United States reveals that "killers of White victims are more likely to be sentenced to death than killers of Black victims".<sup>33</sup> Black defendants are also more likely than White defendants to receive the death penalty.<sup>34</sup>

To test whether these racial disparities might be ascribed to judges' implicit biases, legal and social cognition scholars have conducted experimental studies holding everything constant except for race. Blair and her colleagues<sup>35</sup> took photographs from a database of criminals convicted in Florida and asked participants to judge how Afrocentric both Black and White defendants look on a scale from one to nine. The goal was to determine whether race correlated with actual sentencing. After controlling for the seriousness of the offences and other factors, the researchers found that the race of the defendant was statistically insignificant. Thus, White and Black defendants were sentenced without discrimination based upon race. However, they found another curious correlation: within each race, either Black or White, the more Afrocentric the defendant looked, the harsher his punishment.<sup>36</sup> The researchers concluded that, even when controlling for differences in criminal history, those defendants who possessed the most stereotypically Black facial features (relative to other members of their racial group) received, on average, sentences nearly eight months longer than those who possessed the least stereotypically Black features.<sup>37</sup>

The researchers postulated that implicit racial bias explained these results. If judges are motivated to avoid racial discrimination, they may be on guard against the danger of treating similarly situated Black and White defendants

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<sup>31</sup> Task Force on Race and the Criminal Justice System *Preliminary Report* 28.

<sup>32</sup> Mustard 2001 *J L & Econ* 300.

<sup>33</sup> US General Accounting Office "Death penalty sentencing: Research indicated pattern of racial disparities" *Report to the Senate and House Committees on the Judiciary* (2012) as cited in Banks, Eberhardt and Ross 2006 *Cal L Rev* 1175. This finding holds even when statistically controlling for a wide variety of non-racial factors that may influence sentencing, and has been characterised by the US General accounting office as "remarkably consistent across data sets, states, data collection methods and analytic technique". Banks, Eberhardt and Ross 2006 *Cal L Rev* 1175.

<sup>34</sup> Baldus *et al* 1998 *Cornell L Rev* 1710-1714.

<sup>35</sup> Blair, Judd and Chapleau 2004 *Psychol Sci* 675.

<sup>36</sup> Blair, Judd and Chapleau 2004 *Psychol Sci* 677.

<sup>37</sup> Blair, Judd and Chapleau 2004 *Psychol Sci* 677-678.

disparately. By contrast, judges have no conscious awareness that Afrocentric features might trigger implicit negative stereotypes of criminality and violence that could influence their judgment. Without such awareness, and with this bias operating automatically, they could not explicitly control for or correct the potential bias.<sup>38</sup>

Rachlinski *et al* recruited participants at judicial education conferences, which gave them a unique opportunity to test a participant pool of willing judges.<sup>39</sup> They administered to the judge participants the "Black/White and "Good/Bad" IAT. The researchers then asked them to make decisions in two hypothetical court scenarios in which the race of the legal actor was ambiguous and was subliminally primed. Lastly, they were asked to decide a hypothetical case in which the race of the legal actor was explicitly stated as either Black or White.<sup>40</sup>

The results of this research support three conclusions. Firstly, judges, like the rest of us, carry implicit biases concerning race. The researchers found a "strong white preference" among the White judges - in fact "significantly stronger" than that observed among White participants on the IAT generally.<sup>41</sup> The Black judges, by contrast, demonstrated no clear preference overall.<sup>42</sup> Secondly, these implicit biases can affect judges' judgment, at least in the context of the two scenarios in which race was only subliminally primed, and the judges were thus unaware of a need to monitor their own decisions for racial bias.<sup>43</sup> Thirdly, and conversely, in the third scenario, in which the race of the actor was stated explicitly and the judges were thus aware of the need to monitor their own responses for the influence of implicit racial bias, they seemed motivated to suppress that bias and appeared able to do so.<sup>44</sup> The authors of the study conclude:<sup>45</sup>

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<sup>38</sup> Blair, Judd and Chapleau 2004 *Psychol Sci* 677. Also see the discussion in Kang *et al* 2012 *UCLA L Rev* 1150.

<sup>39</sup> The 133 judges who participated in the study came from three jurisdictions. Rachlinski *et al* 2009 *Notre Dame L Rev* 1205.

<sup>40</sup> Rachlinski *et al* 2009 *Notre Dame L Rev* 1209, 1212, 1217.

<sup>41</sup> Among the 85 judges, 74 (or 87.1%) showed a White preference on the IAT. Rachlinski *et al* 2009 *Notre Dame L Rev* 1210-1211.

<sup>42</sup> Black judges carry a more diverse array of implicit biases, just like Black adults generally. Approximately one third exhibit a White preference similar to the White judges, approximately one third exhibit a Black preference, and approximately one third exhibit no preference at all. Rachlinski *et al* 2009 *Notre Dame L Rev* 1210.

<sup>43</sup> Rachlinski *et al* 2009 *Notre Dame L Rev* 1221.

<sup>44</sup> Rachlinski *et al* 2009 *Notre Dame L Rev* 1221.

<sup>45</sup> Rachlinski *et al* 2009 *Notre Dame L Rev* 1232.

The presence of implicit racial bias among judges ... should sound a cautionary note for those involved in the criminal justice system.

Indeed, the research findings with regard to the ways in which implicit racial bias might influence decision-making in criminal cases are substantial and robust. All these studies, in the aggregate, suggest that implicit racial bias in the trial process is a problem worth worrying about.<sup>46</sup>

### 3 Applicability of implicit bias research to South Africa

One might legitimately ask what the possible relevance would be for this - mostly American - research to the South African legal context. It is my hypothesis, which is of course subject to empirical verification in the course of time, that the research results in the United States would generally hold true for South Africa as well.

The empirical evidence of implicit biases in every country tested<sup>47</sup> clearly shows that these biases are not randomly oriented. Rather, people are systematically implicitly biased in favour of socially privileged groups, ie groups higher in the social hierarchy.<sup>48</sup> For example, in many societies, including those of North America and Europe, children of *both* higher and lower status racial groups show preferences for Whites over other races, because they prefer adults and other children of higher status and they view race as indicative of social standing.<sup>49</sup>

This is also the case in South Africa. A 2011 study reveals that Black, Coloured and White children showed highly similar race preferences: all preferred White and Coloured to Black South Africans, even though Blacks comprise the largest proportion of South Africa's population.<sup>50</sup> The reason for this phenomenon is not difficult to discern. Since the end of apartheid, South Africa has overcome great obstacles and made many strides in overcoming social injustices. However, demographic data reveal that, even post 1994, South Africa continues to be characterised by a pronounced social hierarchy in which Whites overwhelmingly have the highest social

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<sup>46</sup> See Kang *et al* 2012 *UCLA L Rev* 1168.

<sup>47</sup> Thus far, approximately 90% of test takers have been American. Lee 2008 *UC Davis L Rev* 539. However, implicit bias has also been found against "outgroups" in other countries, eg, Aborigines in Australia, Turkish immigrants in Germany (see Dasgupta 2004 *Soc Justice Res* 147) and Koreans in Japan (Kang *Implicit Bias* 3).

<sup>48</sup> Eg, young over old, light-skinned over dark-skinned, non-Arab non-Muslims over Arab Muslims, abled over disabled, thin over obese, and straight over gay. Kang *et al* 2010 *JELS* 887; Kang and Lane 2010 *UCLA L Rev* 474.

<sup>49</sup> Shutts *et al* 2011 *Dev Sci* 1289.

<sup>50</sup> Shutts *et al* 2011 *Dev Sci* 1285.

status. Although there are large income disparities in the United States as well, South Africa's racial hierarchy predicated on wealth is particularly extreme.<sup>51</sup> Whereas Black Americans' average annual income is approximately 60% of that of White Americans,<sup>52</sup> in South Africa the analogous figure is 13%.<sup>53</sup>

Thus, the economic stratification of latter-day South African society seems to continue to send overt messages about which groups are valued over others. In South Africa race appears to be a social category that is particularly deeply associated with differences in wealth. In addition to children's general tendency to associate higher status racial groups with higher value belongings, South African children tend to *prefer* individuals who are members of these higher status racial groups (ie White over Coloured and Coloured over Black).<sup>54</sup> Information that runs counter to this strong association between wealth (social status) and race - such as the increasing presence of the Black middle and upper class, the rise of Black political and social power, and the fact that Blacks are the statistical majority - is not enough to eliminate the perception of this association from the minds of young South Africans.<sup>55</sup> In sum, South African children of all racial groups - like children in North America and Europe - demonstrate preferences congruent with the *de facto* racial hierarchy in their societies.

This raises the question: why do members of socially disadvantaged groups often prefer members of other, more dominant or advantaged groups? One possible explanation for the link between historical and cultural discrimination and implicit racial biases is what social cognitionists refer to as "system justification theory" (SJT).

SJT posits that people are motivated to defend, justify, rationalise and perpetuate the social *status quo*, even if that *status quo* was arrived at accidentally, arbitrarily or unjustly.<sup>56</sup> SJT can, for example, be seen in the "paradox of the free market", ie the faith in the legitimacy of the free market system among the poor, despite the growing inequality between rich and poor.<sup>57</sup> Be it for reasons of uncertainty avoidance (consistency), intolerance

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<sup>51</sup> Newheiser *et al* 2014 *Dev Psychol* 3.

<sup>52</sup> US Census Bureau 2011 as cited in Newheiser *et al* 2014 *Dev Psychol* 3.

<sup>53</sup> Statistics South Africa 2008 as cited in Newheiser *et al* 2014 *Dev Psychol* 3. Also see Olson *et al* 2012 *Child Development* 1886.

<sup>54</sup> Olson *et al* 2012 *Child Development* 1896.

<sup>55</sup> Olson *et al* 2012 *Child Development* 1896. See also Dunham *et al* 2014 *Social Cognition* 16.

<sup>56</sup> Blasi and Jost 2006 *Cal L Rev* 1124; Jolls and Sunstein 2006 *Cal L Rev* 990.

<sup>57</sup> As another example, a number of studies have shown that women, as well as other individuals in low-paying jobs, come to feel that they deserve lower wages than men

of ambiguity (coherence), or the need for order, structure and closure (certainty), the evidence clearly indicates that many members of low-status groups find the devil they know to be less threatening than the devil they do not know.<sup>58</sup>

#### **4 Some normative issues surrounding implicit bias and the law**

Drawing on socio-biology and evolutionary psychology, some scholars have objected to any attempt by the law to address implicit biases, on the theory that implicit biases are hardwired and there is nothing that we can do about them.<sup>59</sup> Just as we may be hardwired to be averse to snakes and fond of our parents' smiles, so the argument goes, we may simply be hardwired through thousands of years of natural selection to dread other races and love our own.

Moreover, the law is society's effort to rationalise our relationships with one another; the system through which society attempts to define obligations and responsibilities.<sup>60</sup> If implicit racial bias is located so deeply in human cognition that we have, for the most part, no conscious awareness of it, why should the law take cognisance of these stereotype-driven phenomena that we, for the most part, do not personally endorse? As Banaji,<sup>61</sup> one of the inventors of the IAT, explains: "Mind bugs ... are not special things that happen in our heart because we are evil".

Firstly, as a normative matter, we should not conflate "is" and "ought". Even were it *arguendo* descriptively true that we are hardwired to be implicitly biased in favour of our "race", that does not in any way address what the law should do about it normatively. After all, the mere fact that we may not be aware of, much less consciously intend, such race-contingent behaviour does not magically erase the harm. Assumptions - even implicit ones - lead to attitudes, and attitudes in turn lead to choices with moral and political consequences. In *Price Waterhouse v Hopkins*,<sup>62</sup> Justice Brennan, writing

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or other more highly paid individuals. For example, even in a feminist environment - Yale University in the 1990s - when women were asked to assign a value to their work they "paid themselves" 18% less than men did for work that was indistinguishable in quality or content. Jost 1997 *Psychol Women Q* 387.

<sup>58</sup> Jost and Hunyady 2005 *Curr Dir Psychol Sci* 269.

<sup>59</sup> See Kang and Lane 2010 *UCLA L Rev* 509; Kang 2005 *Harv L Rev* 1531.

<sup>60</sup> Lawrence 1987 *Stan L Rev* 329.

<sup>61</sup> As quoted in Vedantam 2005 <http://www.washingtonpost.com/we-dyn/articles/A27067-2005Jan21.html>.

<sup>62</sup> *Price Waterhouse v Hopkins* 490 US 228 (1989).

for a plurality of the United States Supreme Court in the context of implicit gender discrimination, stated:

[U]nwinning or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination ... The fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it.

Secondly, most conceptions of justice argue that people are entitled to certain rights derived from their shared humanity. Two salient features of stereotypes are (i) that they mask individuality (the stereotyper fails to be sensitive to an individual's unique characteristics); and (ii) that they lead to "moral distancing". In moral distancing the stereotyper sees an individual as more "other" than he or she really is, and this corrodes the sense of a common, shared humanity.<sup>63</sup> History attests to the connection between dehumanisation and moral license - those who are dehumanised are pushed out beyond the scope of rights that would guard against the most egregious atrocities.

Studies demonstrating the link between implicit racial biases and dehumanisation provide forceful examples of implicit racial biases' moral and legal relevance. In this context, consider the following examples of the use of animal imagery in relation to Black defendants in actual court cases. In *Darden v Wainwright*,<sup>64</sup> the prosecutor referred to the Black defendant in closing argument as an "animal" that "shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash". And, in a Louisiana case in 2002<sup>65</sup> the prosecutor referred to the Black defendants as "animals like that" and implored the jury to "send a message to that jungle".

In a compelling empirical study Goff *et al*<sup>66</sup> investigated the implicit association between "Black" and "ape". To test for the implicit presence of this subjugating metaphor they subliminally primed participants with either Black or White faces and then asked them to identify, as fast as possible, perceptually degraded images of apes that slowly came into focus.<sup>67</sup> When primed with a consciously undetectable image of a Black face, participants were able to identify the ape in fewer frames. Conversely, when primed with

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<sup>63</sup> Kelly and Roedder 2008 *Philosophy Compass* 532.

<sup>64</sup> *Darden v Wainwright* 477 US 168 180 (1986) as cited in Smith and Levinson 2011 *Seattle U L Rev* 819-820.

<sup>65</sup> *S v Harris* 820 So 2d 471 (2002) as cited in Smith and Levinson 2011 *Seattle U L Rev* 820.

<sup>66</sup> Goff *et al* 2008 *J Pers Soc Psychol* 292.

<sup>67</sup> Goff *et al* 2008 *J Pers Soc Psychol* 303-305.

a consciously undetectable White face, participants required more frames to detect the ape than when they received no prime at all.<sup>68</sup> This study confirmed that people - most of whom explicitly claimed not to have even heard of the stereotype linking Blacks with apes - nonetheless implicitly associated Blacks with apes.

In a related study Goff and his colleagues performed a content analysis of the media coverage surrounding 600 death penalty-eligible criminal cases prosecuted in Philadelphia between 1979 and 1999. The study revealed that coverage of Black defendants in the *Inquirer*, Philadelphia's major daily newspaper, included on average four times the number of ape-like metaphors and imagery than coverage of White capital defendants.<sup>69</sup> Even more disconcertingly, the research found a strong correlation between the number of times a dehumanising animalistic reference was made and the likelihood that the defendant received the most severe punishment.<sup>70</sup>

## 5 Conclusion

Most of us would like to be free of biases and stereotypes that lead us to judge individuals based upon the social categories to which they belong, such as race. But wishing things do not make them so. The best scientific evidence suggests that most of us - regardless of how hard we try to be fair and objective and regardless of how deeply we believe in our own objectivity - harbour implicit mental biases that might very well alter our behaviour.<sup>71</sup> The accumulated hard data, collected from scientific experiments conducted with mathematical precision, objective measurements and statistical dissection, forces us - as Justice van der Westhuizen urged<sup>72</sup> - to see through the facile assumptions of our own "colour-blindness".

Confronted with robust research suggesting the pervasiveness of implicit bias on decision-making, should we, as lawyers and judges and legal scholars, strive to be behaviourally realistic, recognise our all-too-human frailties, and design systems and procedures to attempt to decrease the impact of implicit bias in the courtroom? I submit that our duty as faithful stewards of the judicial system demands no less. A judicial system that embraces a mission of social justice, while simultaneously being hamstrung

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<sup>68</sup> Goff *et al* 2008 *J Pers Soc Psychol* 303-305.

<sup>69</sup> Goff *et al* 2008 *J Pers Soc Psychol* 303-305.

<sup>70</sup> Goff *et al* 2008 *J Pers Soc Psychol* 303-305.

<sup>71</sup> See Kang *et al* 2012 *UCLA L Rev* 1186.

<sup>72</sup> *PER / PELJ* 2017(20) - DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20n0a1312>.

by decision-making processes that might be implicitly racially biased, is simply indefensible.

What then, can we do about implicit biases in the courtroom? The public should ideally view the court system as the single institution that is most unbiased, impartial, fair and just. Yet the typical trial courtroom mixes together many people, often strangers, from different social backgrounds, in an intense, stressful, emotional and often hostile social environment. In such an environment a complex jumble of implicit and explicit biases will inevitably be active. It is the primary responsibility of the judge to manage this complex and bias-rich environment to the end that fairness and justice be done - and be seen to be done.

The good news is that implicit biases are malleable, *ie* they are not impervious to change. On the personal level, one potentially effective strategy to alter implicit bias about race is to expose ourselves to counter-typical exemplars.<sup>73</sup> For example, in a longitudinal study, Dasgupta and Asgari<sup>74</sup> tracked the implicit gender stereotypes held by female subjects both before and after attending a year of college. One group of women attended a co-educational college, while the other attended a single-sex college. At the commencement of their college careers both groups had comparable levels of implicit stereotypes against women.<sup>75</sup> However, after one year, those who attended the women-only institution on average expressed no implicit gender bias, whereas the average gender bias of those who attended the co-educational college actually increased.<sup>76</sup> After carefully accounting for the other environmental variables of the two universities (e.g. coursework and extra-curricular activities), the researchers concluded that it was exposure to an environment in which women frequently occupied counter-stereotypic leadership roles (professors and administrators) that altered the implicit gender stereotypes of female college students.<sup>77</sup>

Research has also shown that when a person forms a new personal connection with a member of a previously devalued out-group, implicit attitudes and stereotypes towards that group may change rapidly and

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<sup>73</sup> Kang *et al* 2012 *UCLA L Rev* 1169.

<sup>74</sup> Dasgupta and Asgari 2004 *J Exp Soc Psychol* 642. Although the longitudinal field study explored implicit gender bias, Kang expresses the opinion that we should not be surprised to see similar results in the near future with regard to implicit racial bias. Kang 2005 *Harv L Rev* 1562.

<sup>75</sup> Both groups viewed women stereotypically as more "supportive" than "agentic".

<sup>76</sup> Dasgupta and Asgari 2004 *J Exp Soc Psychol* 651.

<sup>77</sup> Dasgupta and Asgari 2004 *J Exp Soc Psychol* 651-653.

dramatically.<sup>78</sup> Such evidence gives further impetus to efforts to increase the diversity of the Bench and courtroom.

On the legal institutional level, the implicit social cognition research bears out that the conditions under which implicit biases translate most readily into discriminatory behaviour are when people have wide discretion in making quick decisions with little accountability.<sup>79</sup> Judges function in just such an institutional environment. Courtrooms can be busy places, often requiring judges to make almost instantaneous decisions on motions, trial objections, witness credibility and the like in high-pressure situations. The research makes clear that unwanted prejudicial responses are most likely to occur under conditions of distraction or cognitive overload that do not afford judges the time necessary to actively engage in the corrective cognitive processes to control the "bigot in the brain".<sup>80</sup>

The evidence also suggests that believing ourselves to be objective puts us at particular risk for susceptibility to implicit biases and behaving in ways that belie our self-conception. This is precisely what Justice van der Westhuizen cautioned us about. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education and the robe.

Most judges view themselves as objective and especially talented at fair decision-making. For example in one survey Rachlinski *et al*<sup>81</sup> found that 97% of judges (35 out of 36) believed that they were in the top quartile "in avoid[ing] racial prejudice in decision-making" relative to other judges who attended the same conference. That is obviously statistically impossible. In another survey more than 97% of the administrative judges surveyed ranked themselves in the top 50% in terms of avoiding bias – again, this is mathematically impossible.<sup>82</sup>

Closely connected to doubting one's objectivity is the strategy of consciously increasing one's motivation to be fair. Social psychologists generally agree that motivation is an important determinant in checking biased behaviour.<sup>83</sup> It may be difficult to correct biases even when we do

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<sup>78</sup> Lowery, Hardin and Sinclair 2001 *J Pers Soc Psychol* 842.

<sup>79</sup> Kang *et al* 2012 *UCLA L Rev* 1142.

<sup>80</sup> Rachlinski *et al* 2009 *Notre Dame L Rev* 1225; Levinson 2007 *Duke LJ* 379; Lee 2008 *UC Davis L Rev* 543.

<sup>81</sup> Rachlinski *et al* 2009 *Notre Dame L Rev* 1210.

<sup>82</sup> Guthrie, Rachlinski and Wistrich 2009 *Duke LJ* 1519.

<sup>83</sup> Fazio and Towles-Schwen "The MODE model of attitude behaviour: The introspection illusion as a source of the bias blind spot" as cited in Kang *et al* 2012 *UCLA L Rev* 1174.

know about them. However, if we trust our own explicit self-reports about our biases - namely, that we have none - we will have no motivation to self-correct. Unfortunately, as far as biases are concerned, we often readily see the splinter in our neighbour's eye while ignoring the mote in our own.

A powerful way to increase judicial motivation would be for judges to gain scientific knowledge about implicit social cognition. This would require that judges become internally persuaded that a genuine problem exists. Judges in the United States are already studying what might be done. For example, the National Center for State Courts has a dedicated working group on implicit biases and it has produced a primer on the subject for judges.<sup>84</sup>

As part of judicial education, judges should be encouraged to take the IAT. It might assist newly appointed judges to understand the extent to which they have implicit racial biases and alert them to the need to correct for these biases when they take the Bench. It would also serve to counter the phenomenon that when a sense of power is bestowed on people, they tend to show greater bias than they did before.<sup>85</sup> To be clear, the suggestion is not that testing should be mandatory for judicial candidates or that their results should be disclosed. To be effective, judges should be "confronted" with their IAT results in a thoughtful and controlled manner that fosters introspection and avoids defensive responses.

In addition to providing training, the judicial system could also alter actual practices in the courtroom to minimise the untoward impact of implicit biases. In this regard, Rachlinski *et al* suggests the use of three-judge trial courts in all instances,<sup>86</sup> improving the diversity of appellate court panels,<sup>87</sup> and increasing the depth of appellate scrutiny by employing *de novo* review in cases in which particular trial court findings of fact might be tainted by implicit bias.<sup>88</sup>

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<sup>84</sup> See National Center for State Courts [http://www.ncsonline.org/D\\_research/ref/implicit/html](http://www.ncsonline.org/D_research/ref/implicit/html).

<sup>85</sup> Vedantam 2005 <http://www.washingtonpost.com/we-dyn/articles/A27067-2005Jan21.html>.

<sup>86</sup> The authors recognise that adopting such a measure would entail major structural changes. Also, having three judges decide cases that one might be able to decide could well be too inefficient and costly to be viable. Rachlinski *et al* 2009 *Notre Dame L Rev* 1231.

<sup>87</sup> One study found that adding a female judge to an appellate panel more than doubled the probability that a male judge would rule in favour of the plaintiff in sexual harassment cases and more than tripled this probability in sex discrimination cases. Peresie 2005 *Yale LJ* 1778.

<sup>88</sup> Rachlinski *et al* 2009 *Notre Dame L Rev* 1231.

I am mindful of the potential costs of these interventions. However, if there are cost-effective interventions I believe that they should be adopted, at least on an experimental basis. I recognise that these suggestions are starting points and that they may not all be effective. However, to render justice blind - as it is supposed to be - these reforms are worth considering.

The general goal of this contribution is not to take a position on how the discoveries in implicit social cognition research should inform the law. Rather it is to reveal to South African legal practitioners and scholars who are unfamiliar with implicit racial bias and its potential consequences (i) the robustness of the empirical evidence that much of human cognition can and does occur without introspective access; (ii) that such implicit mental processes nevertheless guide and influence decision-making; and (iii) that the costs incurred by individuals and social groups come at the hands not only of the malign, but also from the unaware and uncontrolled mental acts of well-intentioned people.

In short, this contribution suggests that the research findings surrounding implicit racial bias provide a more behaviourally accurate understanding of the continued perpetuation of racial disparities in the judicial system. It seeks to be useful to lawyers and judges of good faith who conclude that implicit racial bias in the courtroom is a problem worth worrying about, but do not know quite what to do about it. I also hope to provoke those who are more skeptical about the legal relevance of implicit racial bias to engage in substantive debate about implicit biases, "colour-blindness" and the law past caricatures.

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## List of Abbreviations

Ala L Rev	Alabama Law Review
Cal L Rev	California Law Review
Cornell L Rev	Cornell Law Review
Curr Dir Psychol Sci	Current Directions in Psychological Science
De Paul L Rev	De Paul Law Review
Dev Psychol	Developmental Psychology
Dev Sci	Developmental Science
Duke LJ	Duke Law Journal
Harv L Rev	Harvard Law Review

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IAT	Implicit Association Test
J Exp Soc Psychol	Journal of Experimental Social Psychology
J L & Econ	Journal of Law and Economics
J Pers Soc Psychol	Journal of Personality and Social Psychology
JELS	Journal of Empirical Legal Studies
L Soc Rev	Law and Society Review
Notre Dame L Rev	Notre Dame Law Review
Pers Soc Psychol Bull	Personality and Social Psychology Bulletin
Psychol Sci	Psychological Science
Psychol Women Q	Psychology of Women Quarterly
SJT	System justification theory
Seattle U L Rev	Seattle University Law Review
Soc Justice Res	Social Justice Research
Stan L Rev	Stanford Law Review
UC Davis L Rev	University of California, Davis, Law Review
UCLA L Rev	UCLA Law Review
Yale LJ	Yale Law Journal