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Article 3

Race, Death and the Complicitous Media

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RACE, DEATH, AND THE COMPLICITOUS MIND

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INTRODUCTION

Despite the historical racial imbalance in capital punishment,[1] interdisciplinary scholarship has failed to investigate fully how the human mind may automatically and systematically facilitate racial bias against African-American defendants in capital cases. Considered in the legal context, well-developed social science principles may help reveal how people's automatic and unintentional cognitive processes may either propagate racial disparities in the death penalty or serve as a masking agent in covering up those disparities. As social science research continues to demonstrate the power and pervasiveness of implicit racial bias in American society,[2] it is important to consider how

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1. *See generally* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) [hereinafter FROM LYNCH MOBS]; STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997). *See also* Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1559 (2004) (stating that "between 1930 and 1982, African Americans constituted between 10% and 12% of the United States population but 53% of those executed" (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment 1982*, Aug. 1984, at 9)); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 18 (2002) (noting that "the racially disproportionate application of the death penalty can be seen as being in historical continuity with the long and sordid history of lynching in this country").

2. *See generally* Brian Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2008) [hereinafter Nosek et al., *Pervasiveness and Correlates*]. *See infra* notes 32–89 and accompanying text. As I discuss in Part II, these biases have been demonstrated using a variety of methodologies. The most famous of these methodologies is the Implicit Association Test. *See* Project Implicit, https://implicit.harvard.edu/implicit (last visited Feb. 18, 2009). Before implicit social cognition research became prominent, legal scholars often referred to "unconscious" bias rather than "implicit" bias, sometimes relying upon Freudian conceptions of the unconscious. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331–36 (1987). Legal scholarship relying upon implicit social cognition now more frequently uses the term "implicit" to describe attitudes, memories, and stereotypes that are outside of "conscious,

automatic and unintentional cognitive processes may foster racial bias in the legal system.[3] This Article pursues three goals related to this endeavor: first, to introduce implicit social cognition research to death penalty scholars and scholar advocates; second, to propose new hypotheses that help explain why capital cases may be automatically infused with racial bias and why research to date may cover up existing racial disparities; and third, to stimulate interdisciplinary collaboration and empirical examination of a wide range of social cognitive factors in capital punishment.

Since the 1990s, social scientists have demonstrated that many Americans harbor implicit racial biases that frequently conflict with their self-reported racial attitudes.[4] These biases manifest automatically and without conscious awareness in a variety of basic circum-

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attentional control." Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 947 (2006); *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–1539 (2005) (explaining the foundations of scientific research on implicit attitudes). Although the words "implicit" and "unconscious" describe similar processes, some psychologists have cautioned against using them interchangeably. *See* Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297, 303 (2003). In this Article, I generally use the term "implicit" rather than "unconscious," except when discussing scholarship in which the authors specifically use the term "unconscious."

3. These efforts should be combined with long-standing efforts to measure statistically overall systemic inequalities. *See, e.g.*, Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 809 (2008); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003) [hereinafter Baldus & Woodworth, *Race Discrimination in the Administration of the Death Penalty*]; DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) [hereinafter BALDUS ET AL., EQUAL JUSTICE]; SAMUAL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989). *See also* David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004) [hereinafter Baldus & Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment*]; Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976–1991*, 20 AM. J. CRIM. JUST. 1 (1995); U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (GAO/GGD-90-57, Feb. 1990).

4. *See* Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117 (Henry L. Roediger III et al. eds., 2001) [hereinafter Banaji, *Implicit Attitudes*]; Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS 101 (2002) [hereinafter Nosek et al., *Harvesting Implicit Group Attitudes*]; Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998) [hereinafter Greenwald et al., *Measuring Individual Differences*]; Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 15 (1995).

stances, such as when people categorize information,[5] remember facts,[6] and make decisions.[7] Furthermore, these automatic cognitive processes work predictably and powerfully despite conflicting with people's frequently egalitarian reports of their own racial attitudes.[8] As legal scholars have become more aware of these powerful biases and their implications for law and society, many have argued that the new empirical understanding of discrimination warrants shifting legal regimes.[9] Legal scholarship in a variety of areas now thoughtfully incorporates knowledge on implicit bias into disciplines such as employment law,[10] communication law,[11] affirmative action,[12] and legal

5. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (2001) (finding that people can more quickly identify guns after having seen, but not noticed, flashing photos of Black people); Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 510 (1991) (finding that simply seeing a member of a certain ethnic group can influence stereotype-driven word completion tasks); Greenwald et al., *Measuring Individual Differences*, *supra* note 4, at 1474 (showing that people are faster at grouping together, for example, Black names with negative words than with positive words, relative to White names); Nosek et al., *Pervasiveness and Correlates*, *supra* note 2 (reviewing the results of hundreds of thousands of these tests taken on Project Implicit's website and elsewhere).

6. *See generally* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) [hereinafter Levinson, *Forgotten Racial Equality*] (reviewing several of these studies and exploring how memory biases may function in legal decision making); Alison P. Lenton et al., *Illusions of Gender: Stereotypes Evoke False Memories*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 3 (2001). *See also* C. Neil Macrae et al., *Creating Memory Illusions: Expectancy-Based Processing and the Generation of False Memories*, 10 MEMORY 63, 64 (2002).

7. *See, e.g.*, Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 368 (2007).

8. *See* Kang, *supra* note 2, at 1505 n.70 (explaining research on this process of "dissociation" (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989))).

9. *See* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1007 (2006); Levinson, *Forgotten Racial Equality*, *supra* note 6, at 348; Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 236–57 (2005); Kang, *supra* note 2, at 1493–97. *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). *But see* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1028, 1032–33 (2006) (arguing for caution in assuming that the results of the implicit association test apply in legal contexts).

10. *See generally* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000); 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) (arguing for a qualified evidentiary privilege to encourage unconscious-bias testing).

11. *See* Kang, *supra* note 2, at 1539–89.

decision making.[13] Despite this meaningful progress, legal scholars in other areas have yet to examine how stereotype-driven cognitive processes may affect a broad range of laws and legal processes.[14] Interdisciplinary work identifying how law itself propagates bias is even rarer.[15] One area of discourse in particular need of exploration is death penalty scholarship.[16]

Social cognition theory[17] can help generate new hypotheses relating to race and capital punishment.[18] This Article presents and develops two preliminary hypotheses that apply social cognition theory to the capital context: (1) Death Penalty Priming Hypothesis, which posits that the supposedly race-neutral death qualification of jurors unintentionally and automatically elicits implicit racial bias in the final jury panel, and (2) Racial Bias Masking Hypothesis, which proposes that complex empirical studies examining race and the death penalty may unintentionally cover up racial bias because they rely on racially biased case facts.

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12. *See generally* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006).

13. *See generally* Levinson, *Forgotten Racial Equality*, *supra* note 6; Page, *supra* note 9.

14. *See* Kang, *supra* note 2, at 1536–38 (describing a broad range of legal areas for future research). Similarly, scholars who have already incorporated an understanding of implicit social cognition should seek to tighten the nexus between the legal principles and scientific phenomena they discuss.

15. *See generally* Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How "Legal Priming" Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059 (2005) [hereinafter Levinson, *Suppressing Community Values*]; Kang, *supra* note 2, at 1592 (challenging the FCC's policies encouraging more local news).

16. In the 2004 *Race to Execution* Symposium at DePaul University College of Law, Theodore Eisenberg and Sheri Lynn Johnson began the examination of implicit racial attitudes in the context of the death penalty, and found that capital defense lawyers display implicit racial bias. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1556 (2004).

17. Generally, the field of social cognition studies how people think about themselves and others, "often using methods from cognitive psychology to investigate how the human mind works." Levinson, *Forgotten Racial Equality*, *supra* note 6, at 354 (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 2, 19 (2d ed. 1991)).

18. These new hypotheses, which focus on the automatic and often unintentional nature of discrimination, are part of a broader effort to recognize the shared cultural responsibility for the continuing racial disparities in criminal justice and beyond. *See* 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, 959–60 (2008) (arguing that if scholars focus narrowly on automatic cognitive processes, there is a risk that such scholarship will minimize cultural and individual responsibility for racism); *see also* Levinson, *Forgotten Racial Equality*, *supra* note 6, at 417–18 (acknowledging that the only permanent solution for implicit racial biases is cultural change). The hypotheses I present provide potential pathways for understanding how a culture that has always discriminated has continued to do so in ways that are perhaps just as dangerous but are now harder to detect. If these hypotheses are confirmed, they would not only call into question the continued use of capital punishment, but also would reflect a discriminatory race-based cultural ideology that has infected legal processes. *See generally* Lawrence, *supra* note 2.

Death Penalty Priming Hypothesis proposes that the death qualification process elicits implicit racial biases in most capital jurors. This hypothesis is based on the social cognition concept of priming, a phenomenon that explains how even seemingly race-neutral conversations can elicit automatically racially biased cognitive processes in jurors. This automatic activation results from both deep historical associations between capital punishment and race and the continuing propagation of racial stereotypes in the media and American culture generally.

Racial Bias Masking Hypothesis posits that influential studies examining racial bias in the death penalty have unintentionally covered up racial bias against African-American defendants because these studies rely upon sources of case information that are tainted by implicit bias. Social cognition studies have demonstrated that people store and retrieve information in stereotype-driven ways,[19] and that transmission of information from one source to another can unintentionally transform a non-biased story into a racially biased one.[20] As a result of the unintentional fact-based errors that occur when racial stereotypes are present, even the most thoughtful and complex empirical studies on race and capital punishment may use statistical techniques that unintentionally mask racial bias.

Part II first introduces the science of social cognition and provides several specific examples of empirical studies that explain how the human mind automatically facilitates racially biased decision making.[21] In order to contextualize how these unintentional biases affect legal discourse, Part II next describes how scholars in a variety of areas outside the death penalty arena have explored the close connection between implicit bias and the law.[22] Part III builds upon this prior research in social cognition and the law, and introduces two new hypotheses: Death Penalty Priming Hypothesis[23] and Racial Bias Masking Hypothesis.[24] These hypotheses, although preliminary and still in need of empirical exploration, examine first how the death qualification process may itself bias capital jurors against African-American defendants, and second, how implicit biases that affect the perception, description, and later recording of case facts may serve to cover up disparities based on the defendant's race. Part IV briefly

19. *See* Levinson, *Forgotten Racial Equality*, *supra* note 6, at 376–78 (describing this process).

20. *See* GORDON W. ALLPORT & LEO POSTMAN, THE PSYCHOLOGY OF RUMOR 65–68 (Russell & Russell 1965) (1947).

21. *See infra* notes 26–89 and accompanying text.

22. *See infra* notes 90–134 and accompanying text.

23. *See infra* notes 135–219 and accompanying text.

24. *See infra* notes 220–273 and accompanying text.

discusses potential pathways for further exploration and concludes that focused interdisciplinary collaboration will provide the most meaningful path for progress in understanding the complexities of race and the death penalty.[25]

II. IMPLICIT SOCIAL COGNITION OUTSIDE AND INSIDE OF LAW

Understanding how people process and store information, categorize data, and make decisions is central to understanding decision making in any legal context. In capital cases, little is known about the cognitive processes whereby prosecutors, judges, and jurors make decisions.[26] In particular, very little is known about how attorneys', judges', and jurors' automatic and unintentional cognitive processes influence the way they think about case facts, defendants, aggravating and mitigating circumstances, verdict, and punishment.[27] Investigat-

25. *See infra* notes 274–277 and accompanying text.

26. There have been quite a few studies of decision making in the death penalty setting, but these studies tend not to have focused on implicit cognitions. *See, e.g.*, Robert M. Bohm, *Capital Punishment in Two Judicial Circuits in Georgia: A Description of the Key Actors and the Decision-Making Process*, 18 LAW & HUM. BEHAV. 319 (1994); Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 LAW & HUM. BEHAV. 151 (1994); *see also* Cynthia K.Y. Lee, *Race and the Victim: An Examination of Capital Sentencing and Guilt Attribution Studies*, 73 CHI.-KENT L. REV. 533 (1998) (describing a variety of studies both in capital and non-capital contexts).

27. Several legal scholars have alluded generally to the ways in which "subconscious" or "unconscious" biases may affect various aspects of capital trials. Most of these projects, however, do not explicitly connect psychological theory and research to their claims. As discussed in Part IV *infra*, these articles might be a good place to start when initiating empirical interdisciplinary collaborations. *See, e.g.*, Lucy Adams, Comment, *Death by Discretion: Who Decides Who Lives and Dies in the United States of America?*, 32 AM. J. CRIM. L. 381, 389–90 (2005) (stating "a white prosecutor may—consciously or subconsciously—perceive a crime to be more 'outrageously or wantonly vile, horrible, or inhuman' if it is alleged to have been committed against a white victim, and if the outrage of the community and its desire for vengeance is palpable"); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2094–2106 (2004) (reviewing several areas where unconscious discrimination may manifest, including the extreme deference give to prosecutors); Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1599–1600 (2004) (considering the "unconscious race empathy" that white prosecutors might have with white defendants or white victims); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 140–41 (2003) (proposing that it "is likely that unconscious racism influences a prosecutor even more than it affects others."); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1819 (1998) (alluding to unconscious biases produced due to similarities between prosecutors and victims); *see also* Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 12–15; Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV.

ing the connection between social cognition and legal decision making is important in any legal case, but the stakes make it crucial in capital cases. Although there are few efforts to connect implicit social cognition and the death penalty,[28] other legal scholarship can inform a social cognition based critique of the death penalty.

This Part first discusses a selected few social cognition projects that may not be known to death penalty scholars and scholar-advocates.[29] Beyond the two hypotheses proposed in this Article, understanding social cognition research may help death penalty scholars and scholar-advocates generate their own hypotheses.[30] The empirical studies described in this Part underscore two basic themes of implicit social cognition: first, the human mind makes unintentional, but powerful and biased, associations based on gender, race, and ethnicity; and second, these automatic associations are meaningful, and influence decision making and behavior. After describing these studies, this Part turns to existing legal scholarship on social cognition, highlighting legal scholarly work that may serve to stimulate theory development and collaboration in the capital context.[31] These legal-theory-based projects demonstrate that understanding the workings of the human mind is an important ingredient in achieving justice.

A. Automatic Associations, Bias, and the Human Mind

Implicit social cognition researchers investigate how cognitive processes operate "without conscious awareness or conscious control but nevertheless influence fundamental evaluations of individuals or groups."[32] As Anthony Greenwald and Linda Hamilton Krieger describe, "the science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their

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1016, 1016–17 (1988). *See generally* Julian A. Cook, Jr. & Mark S. Kende, *Color-blindness in the Rehnquist Court: Comparing the Court's Treatment of Discrimination Claims by a Black Death Row Inmate and White Voting Rights Plaintiffs*, 13 T.M. COOLEY L. REV. 815 (1996).

28. *See, e.g.*, Eisenberg & Johnson, *supra* note 16, at 1556.

29. For detailed summaries of scholarship discussing implicit bias and the law, see Levinson, *Forgotten Racial Equality*, *supra* note 6; Kang & Banaji, *supra* note 12, at 1073–75 (reviewing studies that document racial bias in hiring behavior and medical diagnoses); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 444 (2007) (summarizing scholarship in implicit social cognition). *See generally* Kang, *supra* note 2; Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

30. For more on scholar advocates and political lawyers, see Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 833–34 (1997).

31. *See infra* notes 90–134 and accompanying text.

32. Kang & Banaji, *supra* note 12, at 1064; *see also* Fazio & Olson, *supra* note 2.

actions."[33] In the 1990s, social scientists began to discover more fully the complex pattern of automatic cognitive networks that people harbor. To learn how these networks function systematically, predictably, and largely outside of people's conscious awareness, psychologists devised and tested several different valid methodologies. This Section briefly describes a few of the reliable ways that social scientists have measured people's implicit[34] cognitions.[35] These studies show first that people harbor automatic attitudes and racial stereotypes that frequently deviate from their explicitly stated beliefs and, second, that these implicit associations and stereotypes predict people's behavior.[36]

1. *Ease of Stereotype Activation: Word Games and Identifying Objects*

Researchers have demonstrated the ease and power of stereotype activation by showing how simply seeing a stereotyped group member can activate a person's negative ethnic stereotypes related to that group.[37] In one simple and elegant study, participants watched a video in which a research assistant held cue cards containing word fragments.[38] All participants watched identical videos, except that half of the participants saw a video in which the research assistant was Asian and half of the participants saw a video in which the research assistant was Caucasian.[39] In the video, the assistant held cue cards containing incomplete words, including words that were potentially stereotypic of Asians, such as "RI_E," "POLI_E," "S_ORT," and "S_Y."[40] Participants were asked to generate as many word completions as possible for each card during a fifteen-second period.[41] Results of the study showed that simply seeing an Asian research assistant was enough to activate ethnic stereotypes of Asians. Participants who watched a videotape with an Asian assistant completed

33. Greenwald & Krieger, *supra* note 2, at 946.

34. *See* Fazio & Olson, *supra* note 2, at 303 & n.1 (discussing the inexact use of the terms "implicit" and "unconscious" in social science literature, and suggesting that scientists might instead use the term "indirect").

35. *See infra* notes 37–89 and accompanying text.

36. *See* Rudman & Ashmore, *supra* note 7, at 368–69.

37. *See* Gilbert & Hixon, *supra* note 5. As Gilbert and Hixon point out, "[s]tereotypes are forms of information and, as such, are thought to be stored in memory in a dormant state until they are activated for use." *Id.* at 509.

38. *Id.* at 510.

39. *Id.*

40. *Id.* The stereotyped completions of these words were RICE, POLITE, SHORT, AND SHY.

41. *Id.*

more stereotype words than participants who watched a videotape with a Caucasian assistant.[42]

Racial stereotypes, similar to the ones in the word completion study, can be activated in just milliseconds.[43] Furthermore, research demonstrates that even lightning-fast stereotype activation affects task performance in racially biased ways.[44] A study by Keith Payne examined how merely showing participants a photograph of a White or Black face for 200 milliseconds could affect the speed at which they could subsequently identify weapons.[45] In the study, Payne showed participants photos of Black or White faces followed immediately by photos of objects.[46] The participants' only task, Payne told them, was to identify the objects as quickly as possible when they were displayed on the screen.[47] Payne also told participants that the flashing photograph of faces only served to alert the participant that a photograph of an object was about to appear.[48] Results of the study demonstrated that when participants saw photos of Black faces immediately before photos of guns, they were significantly faster at identifying the guns than when they saw photos of White faces before photos of guns.[49] Similarly, when participants saw photos of White faces immediately before photos of tools, they were significantly faster at identifying the tools than when they saw photos of Black faces before photos of tools.[50] In a follow-up study that measured the participants' error rates rather than response speed when a time deadline was imposed, Payne found that participants who saw Black faces before photos of tools were more likely to misclassify the tools as guns compared to participants who saw White faces before photos of tools.[51] Taken together, Payne's studies show that racial stereotypes can be elicited automatically in a number of milliseconds, and that these stereotypes can affect the speed and accuracy of meaningful object classification tasks.

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42. *Id.* In this study, the researchers also tested how cognitive busyness affects stereotype activation. The comparison reported above (for purposes of simplicity in describing the concept of stereotype activation) only focuses on participants in the non-cognitive busyness condition. Interestingly, the researchers found that cognitive busyness inhibits stereotype activation, but increases its application once it has been activated. *Id.* at 512.

43. Payne, *supra* note 5.

44. *Id.* at 184–85.

45. *Id.* at 184.

46. *Id.*

47. *Id.* The objects consisted of guns and non-gun objects (the non-gun objects were hand tools, such as a socket wrench and an electric drill).

48. *Id.*

49. Payne, *supra* note 5, at 185.

50. *Id.*

51. *Id.* at 189.

2. Stereotype Primes: Test Taking, Walking Speed, and Beyond

Similar to the studies on stereotype activation, priming studies demonstrate the simplicity and power of stereotypes on decision making. Priming describes "the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context."[52] Simply put, priming studies show how causing someone to think about a particular domain can trigger associative networks related to that domain.[53] Activating these associative networks, which can include stereotypes, can affect people's decision making and behavior, often without their conscious awareness.

Some of the most famous priming experiments have studied the effect of racial, ethnic, and gender stereotypes on students' test-taking performance. For example, Claude Steele and Joshua Aronson first identified the concept of "stereotype threat" by priming college students in test-taking situations.[54] Steele and Aronson primed Caucasian and African-American college students by asking them to identify their race just before they took a test.[55] The researchers found that such a simple priming task had profound effects on African Americans' test performance. African-American participants took longer to answer questions and achieved lower overall scores relative to Caucasian participants, but only when they were primed.[56] Thus, Steele and Aronson found that priming a participant's racial constructs related to the self likely implicated a complex relationship between African-American identity and negative stereotypes relating to ability. They called this phenomenon "stereotype threat."

In a related study, Steele and Aronson found that stereotype threat could be elicited even by indirectly priming the racial stereotype.[57] In this study, when they told half of the participants that the test results would be used to evaluate performance but did not ask participants to identify their race, they found results similar to those obtained when they primed race directly: African-American students in the indirect prime condition performed worse than Caucasian students in the same condition, whereas African-American and Caucasian students per-

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

53. Death Penalty Priming Hypothesis, which is introduced and discussed, *infra* Part III, relies upon the concept of priming to explain how death qualification automatically primes racial stereotypes related to the death penalty. *See infra* notes 135–219 and accompanying text.

54. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 799 (1995).

55. *Id.* at 806.

56. *Id.* at 807.

57. *Id.* at 799.

formed similarly in the non-prime condition.[58] This study demonstrates the ease and influence of indirect racial priming. Simply priming a non-explicit but related stereotype, even without mentioning race, can cause profound results. Although it would not be intuitive to many that using race-neutral concepts can elicit powerful racial stereotypes, social cognition research shows that priming can occur as long as historical, cultural, or popular associations connect the concept with a racial stereotype. In the case of stereotype threat, African-American student participants associated the evaluation instruction as implicating stereotypes relating to African Americans and intellectual ability. Similarly, Death Penalty Priming Hypothesis, which is introduced in Part III, relies upon the concept of indirect priming to argue that death qualification primes racial stereotypes and biases.[59]

In a fascinating study that showed how non-conscious and indirect priming of stereotypes can affect seemingly unrelated behavior, John Bargh and his colleagues found that participants actually walked more slowly after being subliminally primed with stereotypes of the elderly.[60] In this study, participants performed a scrambled-sentence task that asked them to read groups of words and form their own sentences using those words.[61] Half of the participants in the study read word groupings that consisted of neutral words mixed with words associated with the elderly, such as "worried," "wise," "stubborn," "helpless," and "bingo."[62] The other half of participants read word groupings unassociated with elderly, such as "thirsty," "clean," and "private."[63] After completing the sentence-creation task, participants were told they had completed the study, thanked for their participation, and directed to exit through a bank of elevators down the hall.[64] As soon as participants exited the room, a confederate of the experimenter started a hidden stopwatch and timed the amount of time it took for the participants to walk the length of the corridor, ending at a strip of tape placed on the floor nine-and-three-quarter meters from the starting point.[65]

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58. *Id.* at 801.

59. *See infra* notes 135–219 and accompanying text.

60. Bargh et al., *supra* note 52, at 237.

61. *Id.* at 236 (citing T.K. Srull & R.S. Wyer, *The Role of Category Accessibility in the Interpretation of Information about Persons: Some Determinants and Implications*, 37 J. PERSONALITY & SOC. PSYCHOL. 1660 (1979)).

62. *Id.* Note that words related to slowness were not used in the study.

63. *Id.*

64. *Id.*

65. *Id.*

As predicted, the study's results indicated that participants who had been primed with elderly stereotype words took longer to walk down the hall compared to participants who had been primed with neutral words.[66] Furthermore, participants in the elderly word prime condition reported almost no awareness of the stereotyped content of the sentence creation task.[67] This study builds upon the Steele and Aronson study by employing a different type of indirect priming and measuring its impact on a novel behavior. Here, merely seeing themed but otherwise neutral words such as "wise," "worried," and "bingo," affected participants' own behavior, even without awareness of the stereotype activation. Generally, these priming studies highlight the susceptibility of the human mind to the interference of both direct and indirect stereotypes. In the legal setting, it should not be surprising if stereotype primes are frequently activated or if legal processes themselves act as primes.[68]

3. *Reaction Time Measures: The Implicit Association Test*

Thus far, this Section has explained the ease of automatically activating stereotypes and described how stereotypes, whether directly or indirectly primed, can influence a broad range of decisions. The described studies are similar because they all activate implicit constructs, such as stereotypes, and measure the effects of this activation. They are different because scientists measure how the implicit constructs manifest in different ways: in identifying language, in academic test performance, and in walking speed. Each of these studies shows the dynamic nature of implicit cognitive processes—processes that are important components of human decision making.

Within legal discourse, the most frequently discussed example of implicit social cognition is the Implicit Association Test (IAT).[69] As described elsewhere, the IAT

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66. Bargh et al., *supra* note 52, at 237.

67. *Id.*

68. *See infra* notes 135–219 and accompanying text. *See generally* Levinson, *Suppressing Community Values*, *supra* note 15 (arguing that simply placing citizens on juries automatically changes the way they think and make decisions).

69. *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1250, 1269–70 (2002); Levinson, *Forgotten Racial Equality*, *supra* note 6, at 356; Greenwald & Krieger, *supra* note 2, at 952–56; Kang & Banaji, *supra* note 12, at 1072; Page, *supra* note 9, at 237–38. *See generally* Kang, *supra* note 2 (thoroughly discussing the IAT and other implicit social cognition studies); Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395 (2003). The IAT is not the only meaningful reaction time measure. Another important line of studies measured reaction times in the shoot/no-shoot decisions of participants. In these studies, often called "shooter bias" studies, participants typically participated in a video-

> pairs an attitude object (such as a racial group) with an evaluative dimension (good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes. In the computerized version of the IAT, participants sit at a computer and keyboard and are asked to pair an attitude object (for example, Black or White, man or woman, fat or thin) with either an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts) by pressing a response key as quickly as they can. For example, in one task, participants are told to quickly pair together pictures of African-American faces with positive words from the evaluative dimension. The speed at which the participants can pair the words together signifies the strength of the attitude (or in the case of attributes, the strength of the stereotype).[70]

Nilanjana Dasgupta and Anthony Greenwald summarize, "when highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty."[71] Laurie Rudman and Richard Ashmore add, "The ingeniously simple concept underlying the IAT is that tasks are performed well when they rely on well-practiced associations between objects and attributes."[72]

Scores of studies have found that people harbor implicit associations that are biased against stereotyped group members.[73] According

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game-like experience, where they were told to shoot when they saw a person with a gun, but hit the safety button when they saw a person with no weapon. These studies frequently showed that participants were faster to pull the trigger when the armed person was Black and that participants were faster to hit the safety when the unarmed person was White. Participants also typically made more errors by "shooting" when the unarmed person was Black relative to White. *See* Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 122 (2006); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1321 (2002); Payne, *supra* note 5, at 185–86. Other authors have described shooter bias in more detail. *See* Levinson, *Forgotten Racial Equality*, *supra* note 6, at 356–61; Kang, *supra* note 2, at 1525–28. Other reaction time studies, such as the Go-NoGo Association Task (GNAT) are conceptually similar to the IAT, but were designed for greater flexibility. *See* Brian A. Nosek & Mahzarin R. Banaji, *The Go/No-Go Association Task*, 19 SOC. COGNITION 625, 625 (2001).

70. Levinson, *Forgotten Racial Equality*, *supra* note 6, at 355 (citing Greenwald & Banaji, *supra* note 4, at 14–19, 14–19); Banaji, *Implicit Attitudes*, *supra* note 4, at 123–24; Greenwald et al., *Measuring Individual Differences*, *supra* note 4, at 1466.

71. Levinson, *Forgotten Racial Equality*, *supra* note 6, at 355 (quoting Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001)).

72. Rudman & Ashmore, *supra* note 7, at 359.

73. *See* Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta Analysis of Predictive Validity*, J. PERSONALITY & SOC. PSYCHOL. (forthcoming 2009)

to Brian Nosek and his colleagues, who reviewed hundreds of thousands of IATs taken on the Project Implicit website and elsewhere, the IAT has consistently shown that a majority of test takers exhibit implicit racial bias[74]—and other, non-racial biases—on a variety of measures.[75] For example, sixty-eight percent of participants demonstrated an implicit preference for "White people" versus "Black people" (or "light skin" versus "dark skin"),[76] seventy-five percent of participants showed an implicit preference for "pro-abled people" versus "disabled people,"[77] and sixty-nine percent of participants showed an implicit preference for "thin people" versus "fat people."[78]

IAT results are both compelling and meaningful. Research has found that implicit associations and stereotypes, measured by the IAT, predict discriminatory decision making and behavior.[79] For example, a 2007 study by Rudman and Ashmore tested whether the IAT predicted discrimination in economic decision making.[80] In that study, student participants first took a series of IAT tests, including those testing negative stereotypes related to Jews (relative to Christians) and Asians (relative to Whites).[81] On a separate occasion, the same participants completed a survey designed to test economic discrimination.[82] Participants were told that their input was needed in determining how to administer a mandatory twenty percent budget cut to university student organizations.[83] They were then provided a list of current student organizations along with funding levels, and were asked to allocate the new budget across the various groups.[84] The researchers then compared participant IAT scores with recommended budget cuts.[85] The results of the study showed that scores on the ster-

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[hereinafter Greenwald et al., *Understanding and Using*] (including over 100 studies in the meta-analysis); Nosek et al., *Pervasiveness and Correlates*, *supra* note 2.

74. In implicit social cognition, the word "bias" means "a displacement of people's responses along a continuum of possible judgments." Greenwald & Krieger, *supra* note 2, at 950. "Response bias need not indicate something unwise, inappropriate, or even inaccurate." *Id.*

75. Nosek et al., *Pervasiveness and Correlates*, *supra* note 2.

76. *Id.* at 17. These results aggregated IATs testing Black versus White and Dark Skin versus Light Skin.

77. *Id.* at 19.

78. *Id.*

79. Rudman & Ashmore, *supra* note 7, at 359. *See generally* Greenwald et al., *Understanding and Using*, *supra* note 73.

80. Rudman & Ashmore, *supra* note 7, at 363.

81. *Id.* at 363–64.

82. Participants had no reason to believe that the two studies were connected. *Id.* at 364–65.

83. *Id.* at 364.

84. *Id.* at 365.

85. *Id.*

eotype IAT predicted economic discrimination.[86] Specifically, "people who associated minority group members with negative attributes and majority group members with positive attributes were also likely to recommend budget cuts for the target minority group's student organization."[87] Rudman and Ashmore's study adds to the literature demonstrating the connection between implicit racial bias and biased decision making and behavior. A meta-analysis of IAT studies concluded that IAT scores predicted a variety of behaviors, such as voting, consumer choice, and Scholastic Aptitude Test (SAT) scores.[88] The meta-analysis also found that when measuring prejudice and stereotypes, the IAT, compared to self reports, served as a better predictor of hiring decisions, verbal and non-verbal pro-social indicators, and other behaviors.[89] Taken together, these studies demonstrate the importance of investigating the connection between implicit cognitive processes and legal decision making.

B. Legal Applications of Implicit Bias Research

Legal scholars have begun to incorporate research on implicit social cognition into legal discourse. Since the 1990s, scholars have discussed social cognition work in several areas of legal discourse, with employment discrimination law emerging as the most frequent venue for discussions of implicit racial bias and implicit gender bias. This Section describes some of the more focused examples of scholarship linking social cognition and law, with the purpose of orienting a non-interdisciplinary audience to the breadth of this discourse.[90] Before doing so, however, it must be acknowledged that based upon the numerous areas of law where social cognition theory has yet to be explored, this emerging interdisciplinary work remains in its infancy.[91]

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86. Rudman & Ashmore, *supra* note 7, at 368.

87. *Id.* at 367.

88. *Id.* at 360 (citing T.A. Poehlman et al., Measuring and Using the Implicit Association Test: III. Meta-analysis of Predictive Validity (unpublished manuscript, 2004)); *see also* Greenwald & Krieger, *supra* note 2, at 954 (discussing Poehlman and colleagues' meta-analysis and the IAT's predictive validity generally).

89. Rudman & Ashmore, *supra* note 7, at 360.

90. *See infra* notes 92–134 and accompanying text.

91. In various instances, courts have discussed implicit racial bias with a level of sophistication. *See, e.g.*, Chin v. Runnels, 343 F. Supp. 2d 891, 905–08 (N.D. Cal. 2004). Law review articles have discussed this element of the *Chin* case. *See* Darren Seiji Teshima, *A "Hardy Handshake Sort of Guy": The Model Minority and Implicit Bias About Asian Americans in* Chin v. Runnels, 11 UCLA ASIAN PAC. AM. L.J. 122 (2006); Sara R. Benson, *Reviving the Disparate Impact Doctrine to Combat Unconscious Discrimination: A Study of* Chin v. Runnels, 31 T. MARSHALL L. REV. 43, 61 (2005). Despite the progress seen in individual cases like *Chin*, for the most part courts have been hesitant to rely upon this research in published decisions. *See*

Employment law scholarship on implicit bias shows how established legal principles must be reexamined when new social science evidence conflicts with the law. For example, Title VII of the Civil Rights Act of 1964 prohibits intentional discrimination in the workplace.[92] Under the "disparate treatment" branch of Title VII analysis, an employee or potential employee claiming discrimination must demonstrate that the employer intended to discriminate based upon the employee's group membership.[93] Proving such intent to discriminate was never easy, but it has become harder as the nature of discrimination has changed.[94] Finding evidence that an employer made discriminatory remarks or wrote biased notes in a written employment evaluation, for example, has become rarer and rarer. Until the 1990s, however, the subjective intent standard in employment discrimination largely remained unchallenged based upon psychological reality. With the emergence of social cognition research, a compelling number of scholars have recognized that implicit bias, which many of these scholars term "unconscious" discrimination,[95] likely operates in a variety of employment contexts. Although courtroom arguments of implicit bias have been met with mixed results,[96] scholars have increasingly called for a judicial recognition of implicit bias in the employment context.[97] Linda Hamilton Krieger, for example, argued that the intent standard should be changed to a causation standard.[98]

Scholars have examined other areas of the law in light of social cognition theory, although with less frequency compared to employment discrimination law. Discourse on legal decision making has, for example, examined how attorneys, judges, and juries may unintentionally make a variety of decisions in racially biased ways.[99] I have previously

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infra notes 129–133 and accompanying text (discussing a New Hampshire court's rejection of a fair trial motion based on Banaji's testimony).

92. Krieger & Fiske, *supra* note 9, at 1009.

93. *Id.* at 1009–10.

94. *See, e.g.*, Krieger, *supra* note 9 (arguing that Title VII jurisprudence constructs discrimination inadequately to address subtle, often unconscious, forms of bias).

95. *See, e.g.*, Lee, *supra* note 10, at 483.

96. Kee Campbell, Inferring Implicit Bias: Not Necessarily a Leap of Faith (May 1, 2007) (unpublished manuscript) (on file with author).

97. Several employment discrimination scholars have addressed this issue. *See, e.g.*, Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005); Hart, *supra* note 10; Lee, *supra* note 10; Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013 (2004); McGinley, *supra* note 10; Pollard, *supra* note 10 (encouraging testing for unconscious bias in the employment context); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999).

98. Krieger, *supra* note 9, at 1242.

99. *See* Levinson, *Forgotten Racial Equality*, *supra* note 6, at 347. *See generally* Page, *supra* note 9.

argued that judges and jurors automatically misremember case facts in racially biased ways.[100] When case facts are consistent with judges' and jurors' explicit or implicit racial stereotypes—for example, the stereotype that African Americans are aggressive—these judges and jurors will find it easier to remember facts that are consistent with these stereotypes.[101] To test this hypothesis, I conducted a simple empirical study designed to examine whether people misremember stereotype-consistent case facts in racially biased ways.[102] In the study, participants read about a physical altercation that occurred after a bar confrontation.[103] All participants read the same facts, although some read about an African-American actor, others read about a Native Hawaiian actor, and still others read about a Caucasian actor.[104] After reading the story and being distracted by a short task, participants were asked to identify whether certain facts had appeared in the story they read.[105] Results of the study indicated that participants who read about an African-American actor remembered that actor's aggressive actions more frequently than participants who read about a Caucasian actor.[106]

Other scholars have focused on how implicit bias may affect attorney decision making during jury selection. Because of the importance of jury selection in capital cases, these projects have direct relevance to death penalty scholarship. In an article that examined how attorneys use peremptory challenges, Antony Page argued that the peremptory challenge process provides a ready forum for implicit bias to manifest.[107] Page posited that even well-intentioned attorneys may use their peremptory challenges in implicitly biased ways.[108] An empirical study by Samuel Sommers and Michael Norton tested a similar hypothesis and found that study participants who acted as lawyers consistently made race-neutral explanations for striking jurors even when the study was designed so that the only difference between potential jurors was race.[109] Adding credibility to these two projects in

100. Levinson, *Forgotten Racial Equality*, *supra* note 6, at 350.

101. *Id.*

102. *Id.* at 394–95.

103. *Id.* at 394.

104. *Id.* Participants were randomly assigned to the three different conditions based on actor's race. The race of these actors was identified explicitly in the stories. *Id.* at 394–95.

105. *Id.* at 350.

106. Levinson, *Forgotten Racial Equality*, *supra* note 6, at 350.

107. *See* Page, *supra* note 9, at 160.

108. *Id.*

109. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2007).

the area of capital cases, an empirical study by Theodore Eisenberg and Sheri Lynn Johnson found that even capital defense attorneys, a group of people who would be expected to resist racial bias, systematically displayed implicit racial bias when they took race IATs.[110]

One of the first major projects exploring implicit social cognition and law together examined the potentially harmful effects of Federal Communications Commission (FCC) policies that favored local news broadcasts.[111] After outlining the FCC policies favoring local news as part of the "public interest," Jerry Kang connected these policies to implicit racial bias, and argued that local news acts as a "Trojan Horse" that spreads biases rapidly to unsuspecting viewers.[112] Kang meticulously linked this claim to implicit social cognition, and introduced legal scholars to studies psychologists had been developing over the previous decade.[113] Recognizing that the impact of social cognition spreads beyond communication law, Kang called for broad research agendas incorporating social cognition into law and policy, as well as for increasing interdisciplinary collaborations.[114]

Kang later joined Mahzarin Banaji, one of the creators of the IAT, to provide new perspective on the affirmative action debate.[115] Recasting the affirmative action debate in terms of implicit bias and a concept they called "behavioral realism,"[116] Kang and Banaji argued that the pervasive nature of implicit biases demonstrates that inequality is alive and well. Relying upon a wide range of studies in implicit social cognition, Kang and Banaji claimed that taking "fair measures" (a term they preferred to use instead of "affirmative action") might one day help to disable the powerful effects of implicit racial bias in society.[117] For example, one "fair measure" would be to hire more "countertypical exemplars," people who are typically underrepresented in certain positions.[118] Hiring a countertypical exemplar might mean hiring a female construction worker or a male nurse.[119] Kang and Banaji specifically connected their suggested fair measures

110. Eisenberg & Johnson, *supra* note 16, at 1556.

111. Kang, *supra* note 2, at 1497.

112. *Id.* at 1553–54.

113. *Id.*

114. *Id.* at 1536–39, 1591–92.

115. Kang & Banaji, *supra* note 12, at 1065.

116. According to Kang, "behavioral realism" refers to "a new school of thought" in which "legal analysts, social cognitionists [and more] . . . cooperate to deepen our understanding of human behavior generally and racial mechanics specifically, with an eye toward practical solutions." Kang, *supra* note 2, at 1591–92.

117. Kang & Banaji, *supra* note 12, at 1078.

118. *Id.* at 1105.

119. *Id.* at 1109.

with implicit social cognition research on "debiasing."[120] Research has shown that exposing people to countertypical exemplars can at least temporarily reduce implicit bias.[121]

Scholars of the death penalty have sometimes discussed the ways in which implicit bias might manifest in capital cases.[122] Although these projects typically have not specifically connected implicit bias to decision making in death penalty cases, they have proposed a variety of hypotheses worthy of investigation. Specifically, there appears to be a convergence of interest among commentators that focuses on prosecutors as perpetrators of biased decision making. Jeffrey Pokorak, Rory Little, Scott Howe, Lucy Adams, and Yoav Sapir have all asserted that implicit biases among prosecutors may lead to racial disparities in capital cases.[123] Specifically, Pokorak claimed that similarities between prosecutors and victims may lead to unconscious bias and racially disproportionate prosecutorial decisions.[124] Little termed this similarity between prosecutors and victims "unconscious race empathy."[125] Howe pointed out that extreme deference to prosecutors heightens the stakes for prosecutors' unconscious biases.[126] Adams asserted that prosecutors' judgments of aggravating factors may specifically relate to prosecutors' unconscious biases.[127] Finally, Sapir argued that unconscious bias likely affects prosecutors even more than others.[128] These scholars and others have generated meaningful hypotheses relating to implicit bias and the death penalty. The next step, as Kang and others have argued more generally, is for interdisciplinary collaborations to empirically examine their claims.

Despite the early stage of research combining social cognition and death penalty discourse, one indicator of interdisciplinary progress in capital cases has been expert witness testimony on the IAT and its possible effects in capital trials. In a 2008 New Hamphire pre-trial hearing, Banaji testified that implicit racial bias might make it impossible for a Black defendant (who, in that case, was accused of murder-

120. *Id.* at 1111. Debiasing refers to the process of using interventions to reduce or eliminate implicit biases. Levinson, *Forgotten Racial Equality, supra* note 6, at 345–46; *see also* Kang, *supra* note 2, at 121; Kang & Banaji, *supra* note 12, at 1111.

121. *See* Kang, *supra* note 2, at 1561.

122. *See supra* note 28 and accompanying text.

123. Most of these commentators use the word "unconscious" to describe the bias.

124. Pokorak, *supra* note 27, at 1819.

125. Little, *supra* note 27, at 1599–1600.

126. Howe, *supra* note 27, at 2096.

127. Adams, *supra* note 27, at 389–90.

128. Sapir, *supra* note 27, at 140.

ing a White police officer) to receive a fair trial.[129] According to a newspaper account of the testimony, "Judge Kathleen McGuire asked Banaji . . . 'Can a black defendant get a fair trial in New Hampshire because of the largely white population we have?' . . . 'I want to say yes,' Banaji said. 'But I know too much to say yes.'"[130] She then referred to the compelling results of the IAT and other implicit social cognition research she had presented to the court on racial bias.[131]

Despite Banaji's testimony, Judge McGuire rejected the defense's pre-trial motion and ruled that implicit bias in society did not prohibit the particular defendant from getting a fair trial.[132] Judge McGuire wrote: "[T]hese studies concerning implicit racial bias do not establish that any such bias will infect this case. Preliminarily, only one unpublished dissertation has linked IAT scores with mock jurors' individual decisions, and no studies have examined the IAT in jury deliberations in real trials."[133] This rejection of the alleged connection between implicit bias and a particular defendant's right to a fair trial highlights the need for the development of new interdisciplinary theories that apply social cognition specifically in the capital context.[134] The next Part proposes two areas where social cognition theory may help develop a more focused understanding of implicit bias in the context of capital punishment.

III. NEW HYPOTHESES: SOCIAL COGNITION AND THE DEATH PENALTY

This Part introduces two hypotheses that apply social cognition theories directly to the death penalty context. It first discusses Death

129. Melanie Asmar, *Professor: Racism Will Mar Trial*, CONCORD MONITOR, Apr. 15, 2008, *available at* http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20080415/FRONTPAGE/804150335.

130. *Id.*

131. *Id.*

132. *Special Report: Addison Capital Murder Trial Set to Begin*, WMUR, Oct. 3, 2008, *available at* http://www.wmur.com/addisontrial/17514509/detail.html#-.

133. Order (Defendant's Motion to Bar Death Penalty No. 25) at 18, New Hampshire v. Addison, No. 07-S-0254 (N.H. Super. Ct. June 5, 2008).

134. This statement is also true for non-capital cases. Implicit associations and stereotypes must be investigated in contexts that will prove more relevant using standards of traditional legal analysis. Striving for this type of relevancy, a few legal scholars used the approach of critiquing very particular aspects of the law in light of psychological research. *See generally* Kang, *supra* note 2 (focusing specifically on communications law); Justin D. Levinson, *Mentally Misguided: How State of Mind Inquiries Ignore Psychological Reality and Overlook Cultural Differences*, 49 How. L.J. 1 (2005) (focusing on criminal law's *mens rea* requirement); Justin D. Levinson & Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries*, 13 S. CAL. INTERDISC. L.J. 195 (2004) (examining tort law in light of cultural psychological knowledge).

Penalty Priming Hypothesis, and then explores Racial Bias Masking Hypothesis. Before proceeding, it must be cautioned that these hypotheses are preliminary and have not yet been empirically examined. Future research should pursue these hypotheses further.

A. Death Penalty Priming Hypothesis

Death Penalty Priming Hypothesis proposes that death qualification, instead of providing a fair and meaningful system of empanelling capital jurors, systematically elicits implicit racial bias in capital jurors. As proposed, Death Penalty Priming works as follows: when jury venire members are "death qualified," the supposedly race-neutral line of questioning acts as an indirect prime that triggers stereotypes of African Americans, including criminality, dangerousness, and guilt. These largely implicit stereotypes, which most Americans likely possess,[135] become activated during the death qualification process, and subsequently affect the way jurors process information, deliberate, and render verdicts when African-American defendants are on trial.

To understand Death Penalty Priming Hypothesis, one must consider what happens in the minds of jurors during the death qualification process.[136] One might assume that jurors grapple with their feelings about life, death, and justice, and rely on their personal morals, values, and perceptions of civic responsibility.[137] These intu-

135. Data on the IAT, for example, thus far indicates that most American participants who have been tested display implicit racial stereotypes. *See supra* notes 73–78 and accompanying text.

136. *See, e.g.*, Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984).

137. These intuitive assumptions also underlie scholarship and cases focusing on the ways in which death qualified jurors differ from excludable jurors. Research has shown, for example, that because of differing values, the death qualification process tends to create juries that are more Caucasian, more male, and more likely to convict. *See, e.g.*, Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46–48 (1984); *see also* Richard Salgado, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in* United States v. Green, 2005 BYU L. REV. 519, 530–31; William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 109 (1984); Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ ST. L.J. 769, 784–85 (2006) ("The death qualification process today still seats juries uncommonly willing to find guilt, and uncommonly willing to mete out death. 'Capital jurors hold disproportionately punitive orientations toward crime and criminal justice, are more likely to be conviction-prone, are more likely to hold racial stereotypes, and are more likely to be pro-prosecution.'"); Salgado, *supra* note 137, at 520 (summarizing, "Thanks to death-qualification, 'capital juries are more likely to be white, older, predominantly male, Protestant, and less educated than other criminal juries, and than the society from which they were picked.'" (citing David Lindorff, *Aiming for a Conviction*, NATION, at http://www.thenation.com/doc.mhtml?i=20020513&s=lindorff20020502 (May 2, 2002))).

itions, however, rely only on inquiries into the juror's conscious cognitive processes, and are therefore incomplete. A more complete inquiry requires asking what happens in jurors' non-conscious minds during death qualification. Instead of focusing only on explicit values and beliefs, one must ask: What cognitive associations are being formed automatically? What stereotypes are being indirectly triggered? One possibility worth pursuing is the hypothesis that death qualification activates predictable, meaningful, and racially biased implicit cognitions in a majority of empanelled capital jurors.

This Section's preliminary exploration of Death Penalty Priming Hypothesis pursues four related topics that help explain why the process of death qualifying jurors might unintentionally trigger racial stereotypes. This Section first briefly summarizes the death qualification process.[138] It then explores how the death qualification process, compared to voir dire alone, alters the way people think and make decisions.[139] It then investigates how indirect primes, such as the seemingly race-neutral death qualification process, can activate racial stereotypes.[140] Next, it addresses the issue of why death qualification primes race in particular.[141] Finally, it explores whether the death penalty prime, once activated by death qualification, can affect the way jurors process information and make decisions.[142]

1. Death Qualification: A Quick Summary

Death qualification is "the process by which prospective jurors are questioned at voir dire regarding their attitudes toward the death penalty."[143] Prospective jurors may be excused for cause if they would not convict a defendant who might receive the death penalty "regardless of the evidence,"[144] or "would not consider death as a possible

138. *See infra* notes 143–147 and accompanying text.

139. *See infra* notes 148–153 and accompanying text.

140. *See infra* notes 154–173 and accompanying text.

141. *See infra* notes 174–211 and accompanying text.

142. *See infra* notes 212–219 and accompanying text.

143. Susan D. Rozelle, *The Utility of* Witt*: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 677 (2002).

144. *Id.* As the Supreme Court has stated, "A 'death-qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that "would 'prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath.'" Buchanan v. Kenucky, 483 U.S. 402, 407–08 n.6 (1987) (alteration in original) (citing Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980))). The prosecutor may remove such potential jurors according to the guidelines set out in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), as refined by the decision in *Wainright v. Witt*. As Susan Rozelle explains:

> Some people oppose the death penalty so fervently that they would go to almost any length to avoid contributing to a death sentence. If their opposition is so strong that

sentence regardless of the circumstances of the crime."[145] Although empirical evidence has indicated that the death qualification process results in juries that are more conviction prone, more likely to impose the death penalty, and are less racially diverse, to date the Supreme Court has rejected challenges to its use based on these empirical findings.[146] As Justice Rehnquist reasoned for the majority in *Lockhart v. McCree*:

> "Death Qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.[147]

Death qualification thus involves questioning jurors about their attitudes related to the death penalty, their willingness to convict a defendant who could potentially be executed, and their willingness to consider sentencing the defendant to death. Although the Court has assumed that asking jurors questions about the death penalty serves as a legitimate way to determine jury excusals, it is possible that asking jurors these seemingly race-neutral questions evokes a complex network of related cognitive associations. The Subsections that follow explore this possibility.

2. *Death Qualification Changes the Way Jurors Think*

It may not be intuitive that death qualification temporarily changes the way jurors think and make decisions. Yet studies that specifically focus on death qualification have already demonstrated that people exposed to the death qualification process make different decisions as

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> they are unwilling to risk any possibility that someone may be sentenced to death, they are what are known as 'nullifiers.' These are individuals who would refuse to convict of a death-eligible crime despite evidence at trial convincing them beyond a reasonable doubt of the defendant's guilt on that score.

Rozelle, *supra* 137, at 775–76; *see also* Lockhart v. McCree, 476 U.S. 162, 173 (1986). There are additional, though less common circumstances, that would warrant the excusal of a juror for cause. For example, the Supreme Court has held that jurors who would always vote to impose the death penalty may be excused for cause. Morgan v. Illinois, 504 U.S. 719, 728 (1992).

145. Rozelle, *supra* note 143, at 677.

146. *See* Lockhart v. McCree, 476 U.S. 162 (1986). It is worth noting that unlike challenges to death qualification based on differences between the venire and the empanelled jury, Death Penalty Priming Hypothesis posits that the final members of the empanelled jury (rather than only the excluded venire members) have had racial bias triggered.

147. *Id.* at 175–76. Justice Rehnquist did not consider or address the possibility that the death qualification process itself causes the juries to be unable to impartially apply the law to the facts of the case.

a result of it.[148] In a 1984 study, Craig Haney examined the "process effects" of death qualification and hypothesized that death qualification "may predispose [jurors] to receive and interpret evidence in certain ways, and influence the verdict and sentencing decisions they may be called upon to make."[149] In Haney's empirical study, participants who were jury eligible citizens of California viewed videotapes of a voir dire in a supposed murder trial.[150] Half of the study participants watched a voir dire that included a thirty-minute segment of death qualification, and the other half watched a voir dire that included no death qualification.[151] After watching the videotapes, all participants completed a questionnaire asking them about the trial.

Results of the study showed that participants who watched death qualification answered questions differently than participants who watched no death qualification.[152] More specifically, compared to participants who only watched voir dire, participants who watched death qualification were more likely to predict that the defendant would be convicted of first-degree murder and receive the death penalty, more likely to predict that the prosecutor, defense attorney, and judge believed the defendant to be guilty, and more likely to predict that the prosecutor and judge had personal attitudes that favored the death penalty.[153] Overall, these results showed that viewing a death qualification altered the way the participants thought about major elements of the trial. Although Haney's study relied on videotaped death qualification, and thus did not death qualify the participants themselves, the study is nonetheless compelling. It demonstrates that death qualification generates clear process effects: it affected the way participants thought about the case, the evidence, and the participants in the legal process. Haney's study, however, did not examine race in the context of death qualification. The next inquiry, then, should be to ask whether death qualification, other than changing the way jurors think generally, indirectly triggers jurors' racial attitudes and stereotypes.

148. *See* Haney, *supra* note 136.

149. *Id.* at 122.

150. *Id.* at 124. The videotapes were reenactments conducted in a courtroom by experienced attorneys who relied upon facts from an actual murder trial. Other attorneys then reviewed the videotapes and confirmed their realistic nature. *Id.* The jurors in the trial consisted of both jury eligible citizens and confederates of the researcher. *Id.*

151. *Id.*

152. *Id.* at 126.

153. *Id.* at 126–27.

3. *Indirect Primes Can Activate Racial Stereotypes*

Death qualification may activate jurors' implicit racial stereotypes by indirectly priming racial constructs.[154] This Subsection will first briefly recap how priming works and then explain how indirect primes can activate racial stereotypes. "*[P]riming* refers to the process by which recently activated information about a group (e.g., stereotypes) is used in making subsequent judgments of group-related stimuli. This information is part of an associative network of related schemas that are linked in memory."[155] When meaningful stimuli are primed, simple exposure to them elicits a network of related associations, even though the participant may be entirely unaware that there has been a prime at all. Priming studies thus show that "[m]ere exposure to . . . aspects of a group stereotype itself can be sufficient to activate stereotypic associations, often without attention or awareness."[156]

When examining the hypothesis that death qualification primes racial stereotypes, it is important to emphasize that stereotypes can be indirectly primed. After all, death qualification requires that jurors are asked not about race, but about their attitudes related to the death penalty. Part II explained two studies that demonstrated how indirect priming can activate related stereotypes. First, Steele and Aronson's study showed that simply telling participants that a test was evaluative of ability primed racial stereotypes of African Americans relating to intelligence.[157] Similarly, Bargh and his colleagues' study demonstrated that simply having participants read elderly stereotype words like "wise," "worried," and "bingo" activated the unrelated elderly stereotype of slowness and even caused participants to behave according to that stereotype.[158] There are two more indirect prime examples that support the claim that asking someone about the death penalty generally can prime concepts that are associated with the death pen-

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154. Recall that Part II introduced the concept of priming. *See supra* note 52 and accompanying text.

155. Travis L. Dixon & Keith B. Maddox, *Skin Tone, Crime News, and Social Reality Judgments: Priming the Stereotype of the Dark and Dangerous Black Criminal*, 35 J. APPLIED SOC. PSYCHOL. 1555, 1556 (2005). For a discussion of stereotypes, memory, and racial bias in legal decision making, see Levinson, *Forgotten Racial Equality*, *supra* note 6.

156. James D. Johnson & Sophie Trawalter, *Converging Interracial Consequences of Exposure to Violent Rap Music on Stereotypical Attributions of Blacks*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 233, 233 (2000). Interestingly, these stereotypic associations can become activated "regardless of [a person's] level of prejudice or personal endorsement of the stereotype." *Id.* at 236.

157. *See* Steele & Aronson, *supra* note 54, at 798.

158. *See* Bargh et al., *supra* note 52, at 237.

alty.[159] The first of these examples follows up Steele and Aronson's stereotype threat priming study by using entirely different indirect primes, and the second investigates how priming indirect and non-aggressive stereotypes of African Americans, like athleticism, will nonetheless prime stereotypes of African-American hostility.

Follow-up studies of stereotype threat have shown that it can be elicited even by using more indirect (proxy) primes. Margaret Shih, Todd Pittinsky, and Nalini Ambady used an indirect method of priming student-participants' ethnic identity, but found similarly powerful results.[160] In that study, the researchers asked Asian-American female participants to fill out questionnaires prior to taking a math test.[161] Some of these questionnaires asked the participants about their roommate and dormitory living situations (this condition was designed to prime gender identity), while others received questionnaires asking them about their family, including asking what languages were spoken at home, and how many generations of their family had lived in the United States (this condition was designed to prime ethnic identity).[162] Results of the study showed that this method of indirect priming significantly affected the participants' test performance.[163] Participants who had their Asian identity primed performed best on the test, while participants who had their female identity primed performed worst on the test.[164]

A study by Patricia Devine found that subliminally priming some racial stereotypes, such as lazy and athletic, activated other unrelated racial stereotypes of African Americans, such as hostility.[165] Devine used a visual priming task that required participants to identify the location of quickly flashing projected words. The location of the words was evident, but the words flashed so quickly and were masked

159. This Subsection only asserts that the death penalty can be an indirect prime for associated concepts. The next Subsection explains why the death penalty primes racial stereotypes. *See infra* notes 174–211 and accompanying text.

160. Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80 (1999).

161. *Id.* at 81.

162. *Id.* A third group received questionnaires asking them about their telephone and cable television service. This condition was designed not to prime ethnic or gender identity. *Id.*

163. *Id.* at 82. As in the other studies described, the participants were unaware that they had been primed. *Id.* at 81.

164. *Id.* at 81. Participants who were not primed for ethnicity or gender performed second best. *Id.*

165. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 9 (1989) (citing J.C. Brigham, *Ethnic Stereotypes*, 76 PSYCHOL. BULL. 15 (1971)).

such that participants only unconsciously recognized their content.[166] The flashing words were coded so that, even without participants' conscious awareness, racial stereotypes were activated.[167] The flashing words included category words that the experimenters associated with African Americans, such as "Blacks" and "Negroes," and stereotype words that the experimenters also associated with African Americans, such as "poor" and "athletic."[168] After the priming was accomplished, participants read a story about a person engaging in ambiguously hostile behaviors—such as demanding money back from a store clerk—and were asked to make judgments about the person engaging in these behaviors.[169] The results of the study indicated that participants who were primed with more stereotyped words judged the actor's ambiguous behavior as more hostile than participants who were primed with fewer stereotyped words.[170] As Devine summarized, "the automatic activation of the racial stereotype affects the encoding and interpretation of ambiguously hostile behaviors for both high- and low-prejudice subjects."[171] Although traits such as "lazy" and "athletic" are unrelated to the trait of "hostile," the stereotype congruity between the primed stereotypes and the trait of hostility made participants more likely to judge a behavior as hostile.[172]

Applied to the death qualification context, these priming studies show that in order to prime racial stereotypes in jurors, one need not do so directly with those particular stereotypes. So long as the prime is connected to the relevant stereotype through an associative network of stereotypes, it can become activated.[173] The next Subsection pursues the question of why discussions of the death penalty during death qualification trigger racial stereotypes.

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166. *Id.* The researchers confirmed that participants did not immediately recognize the content of the words. *Id.* The mask referred to was a series of jumbled letters that appeared immediately after each stimuli word.

167. *Id.* Devine used the same priming procedure previously used by Bargh and Pietromonoco. *See* John A. Bargh & Paula Pietromonaco, *Automatic Information Processing and Social Perception: The Influence of Trait Information Presented Outside of Conscious Awareness on Impression Formation*, 43 J. PERSONALITY & SOC. PSYCHOL 437, 441 (1982).

168. *See* Devine, *supra* note 165, at 9–10.

169. *Id.* at 10.

170. *Id.* at 11–12.

171. *Id.* at 11.

172. *Id.* at 12. These associations appeared to operate entirely implicitly, as results of the study were not related to participants' explicit racial prejudices.

173. It is also important to note that in Devine's study, as in the other studies previously described, the prime was activated prior to the presentation and encoding of social information, and yet still affected judgments of that social information. This initial priming, followed by presentation of information requiring judgment, mirrors the process of death qualification and the subsequent trial.

4. Why Death Qualification Primes Race

Now that it is established that indirect primes can trigger racial stereotypes of aggression and hostility, it must be inquired specifically whether the death qualification process primes similar racial stereotypes. If people do not automatically associate the death penalty and race, the Death Penalty Prime will not harm any particular group. The inquiry into whether people automatically associate the death penalty and race requires examining the history of racial disparities in the death penalty, as well as studies that demonstrate the racialized portrayal of crime and the death penalty in the media.

a. Historical Relationship between Race and the Death Penalty

History demonstrates that if there is one salient theme related to the death penalty—other than death itself—that theme is race.[174] According to Charles Ogletree, Jr. and Austin Sarat, the death penalty has been "a tool that has been used, throughout history, to oppress racial minorities, and specifically, African-Americans."[175] Stuart Banner described two ways in which the death penalty has been used throughout American history as a tool of oppression: by defining capital crimes unequally based on race and reinforcing the racial hierarchy through the manner of executions.[176] The first tool of oppression, defining crimes unequally based on race, refers to colonial and early state penal codes that listed specific capital crimes for African-American defendants. There are numerous examples. In New York, a slave convicted of attempted murder or attempted rape was specifically eligible for the death penalty.[177] South Carolina targeted slaves and "free Blacks" in a law that provided death as the sentence for burning or destroying grain or commodities.[178] Georgia made it a capital offence for slaves or free Blacks to strike Whites twice, or once if it caused a bruise.[179]

The second tool of oppression Banner described, reinforcing racial hierarchy through the manner of executions, refers both to the way

174. *See generally* FROM LYNCH MOBS, *supra* note 1; BANNER, *supra* note 1; KENNEDY, *supra* note 1.

175. FROM LYNCH MOBS, *supra* note 1, at 3.

176. Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS, *supra* note 1, at 96, 97.

177. *Id.* at 98. Banner described several statutory schemes specifically identifying slaves as eligible for the death penalty. He also noted that preambles to statutes contained legislators' beliefs that "noncapital penalties were not stiff enough to deter slaves from committing crimes." *Id.*

178. *Id.*

179. *Id.*

African-American defendants were put through painful and degrading methods of execution, and to the way executions often included specific racial messages of racial subservience.[180] Common methods of execution for convicted slaves and free Blacks included burning them alive, and subsequently displaying the corpses in public places. Displaying of the corpse in a metal cage designed for viewing carried the purpose "an extra dose of terror" directed at "other slaves in communities where crime had occurred."[181] In addition to the execution methods themselves, the ceremonies surrounding the executions frequently incorporated messages of subservience. According to one story retold by Banner:

> [A]t the 1819 hanging of Rose Butler, a New York City slave convicted of setting fire to her owner's house, the Baptist minister John Sandford directed his remarks to the black spectators. . . . In this inestimable privilege, our fellow citizens of *color* enjoy a mutual share with us; and this unquestionably should dictate to them a correspondent spirit of gratitude and the practice of every social virtue. It is therefore deeply to be regretted that persons of color should either envy or attempt to destroy the safety and comfort to which we are justly entitled.[182]

Banner argued that the history of the death penalty, which for centuries was used as "a means of racial control," continues to influence the way people think about the death penalty.[183] He summarized, "When we think about the death penalty, we think, in part, in race-tinged pictures—of black victims lynched by white mobs, of black defendants condemned by white juries, of slave codes and public hangings."[184] This notion specifically supports an underlying claim of Death Penalty Priming Hypothesis: asking prospective jurors to consider and discuss the death penalty automatically triggers racial associations.

b. Death, African-American Stereotypes, and the Media

No empirical studies have examined directly whether supposedly race-neutral discussions of the death penalty activate racial stereotypes. However, research on the continuing media portrayal of African Americans as aggressive criminals, sometimes examined particularly in coverage of death penalty cases, supports the argument that when people think about the death penalty, they think about African Americans. As empirical evidence will demonstrate: (1) the

180. *Id.* at 101–07.
181. *Id.* at 104.
182. Banner, *supra* note 176, at 101–02 (internal quotation marks omitted).
183. *Id.* at 107–08.
184. *Id.* at 97.

media relies on African-American stereotypes when discussing death penalty cases, (2) the stereotypicality of African-American defendants is related to death penalty conviction rates; and (3) race-specific and non-race-specific crime portrayals activate stereotypes of the aggressive African American, which in turn affect emotional reactions, policy judgments, and decision making.

In a compelling study, Phillip Goff and his colleagues showed that newspaper coverage of death penalty trials included racial stereotypes of African Americans.[185] The researchers reviewed newspaper coverage of murder cases in the Philadelphia area from 1979 to 1999.[186] Employing a coding methodology, researchers compared the number of times "bestial or sub-human" references were made in *Philadelphia Inquirer* articles related to death penalty cases, and compared references for Black defendants versus White defendants.[187] As they hypothesized, the number of "ape-like" words used in cases with Black defendants (approximately 8.5 mentions per article) was significantly higher than in cases with White defendants (approximately 2.2 mentions per article).[188] Interestingly, the researchers also found a direct relationship between the articles' "bestial or subhuman" content and the trial outcome: Black defendants who were put to death were portrayed with a greater number of ape-like representations in articles than Black defendants who were not put to death.[189] This study powerfully demonstrates that even supposedly race-neutral portrayals of death penalty crimes incorporate harmful racial stereotypes of African Americans.

Jennifer Eberhardt and her colleagues have also demonstrated the strong association between racial stereotypes of African Americans and the death penalty.[190] Using data from Baldus and his colleagues' database of Philadelphia death penalty cases, the researchers examined the relationship between the stereotypicality of Black defendants' facial features and the trial outcome.[191] Supporting the contention that there is an inextricable link between stereotypes of

185. Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 303 (2008).

186. *Id.*

187. *Id.*

188. *Id.* at 304.

189. *Id.*; *see also* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006) (finding that in capital cases with White victims in Philadelphia, Black defendants who looked stereotypically Black were more likely to receive the death penalty than Black defendants who looked less stereotypically Black).

190. Eberhardt et al., *supra* note 189, at 384.

191. *Id.* at 383–84.

African Americans and the death penalty, the researchers found that Black defendants whose faces exhibited more stereotypically Black facial features received the death penalty significantly more than Black defendants with less stereotypic features.[192]

Empirical studies have shown that when people have race-salient associations between concepts, such as African Americans and crimes of aggression, discussing one of these concepts in race-neutral terms will nonetheless prime racial stereotypes. Travis Dixon and Christina Azocar, for example, found that local news contributed to a "chronically accessible" stereotype of Blacks as criminals.[193] In two studies, Dixon and Azocar examined the "chronic accessibility" hypothesis.[194] In both studies, participants watched a video that contained local news stories of several murders.[195] Some participants watched videos that portrayed White suspects, some watched videos that portrayed Black suspects, and others watched videos that portrayed race-unidentified suspects.[196] In the first study, the researchers found that heavy television news-watching participants who saw videos with race-unidentified suspects were more likely to support the death penalty.[197] According to Dixon and Azocar, "Apparently, when exposed to a number of unidentified suspects, heavy news-viewing participants were more likely to apply a schematic representation of Blacks. This schema increased support for the death penalty. . . ."[198]

In the second study, the researchers found that participants who viewed news stories featuring mostly Black suspects were more likely to make later harsh culpability judgments of a race-unidentified criminal.[199] The researchers interpreted these results to support their hypothesis of the chronic activation of stereotypes.[200] According to Dixon and Azocar, in violent crime scenarios, race need not be specifically mentioned in order to activate racial stereotypes: "[A]fter exposure to a majority of Black criminals in the news, the Black criminal

192. *Id.* at 385. This finding was strongest when examining cases where victims were White. *Id.*

193. Travis L. Dixon & Christina L. Azocar, *Priming Crime and Activating Blackness: Understanding the Psychological Impact of the Overrepresentation of Blacks as Lawbreakers on Television News*, 57 J. COMM. 229, 233 (2007).

194. *Id.* at 230.

195. *Id.* at 235–36. The videos were edited so that they contained seven murder stories and eight human interest stories. *Id.* at 235.

196. *Id.* at 236.

197. *Id.* at 240.

198. *Id.* at 241 (internal citations omitted). The researchers also found that stereotypes of Black laziness were activated. *Id.*

199. Dixon & Azocar, *supra* note 193, at 244.

200. *Id.* at 246.

stereotype may become automatically activated and subsequently used to make relevant judgments regarding both race and crime."[201] This conclusion supports the hypothesis of Death Penalty Priming: simply asking jurors about their views of the death penalty can prime racial biases against African Americans.[202]

A study conducted by Frank Gilliam and Shanto Iyengar provides more evidence demonstrating the inseparability of race and murder.[203] The researchers tested how participants remembered a local news story they saw depicting a murder.[204] All participants saw the same local news portrayal of a murder except for one element: whether or not they saw a photo of the suspect.[205] The researchers found that sixty percent of the participants who saw no suspect falsely recalled having seen a photo of a suspect, and of those participants, seventy percent falsely remembered seeing a Black suspect.[206] This false memory effect can be best explained by reference to what the researchers call "scripts," story-based expectations relating to murderers.[207] This finding demonstrates that simply thinking about a murder can trigger racially relevant constructs based upon stereotypes of African Americans.

The link between race and murder can even trigger heightened emotional reactions in people learning about the murders. Travis Dixon and Keith Maddox showed participants a fifteen-minute video of local news, the relevant part of which was a twenty-two second

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201. *Id.* at 232.

202. As I explain in note 207, this study could indicate that racial stereotype priming could occur in non-capital cases.

203. Frank D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 561 (2000). The results I discuss here were part of a pre-test for a larger study.

204. *Id.* at 564.

205. One-third of the participants saw a photo of a White male, one-third of the participants saw a photo of a Black male, and one-third of the participants saw no picture of a suspect at all. *Id.* at 563.

206. *Id.* at 564.

207. *Id.* at 561. Interestingly, these story-based "scripts" are reminiscent of the way jurors have been shown to think about cases. *See* Jill E. Huntley & Mark Costanzo, *Sexual Harassment Stories: Testing a Story-Mediated Model of Juror Decision-Making in Civil Litigation*, 27 LAW & HUM. BEHAV. 29 (2003); Reid Hastie, *The Role of "Stories" in Civil Jury Judgments*, 32 U. MICH. J.L. REFORM 227 (1999); Nancy Pennington & Reid Hastie, *Practical Implications of Psychological Research on Juror and Jury Decision Making*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 90, 95 (1990); Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 521 (1988).

story about the murder of a police officer.[208] In the video, the researchers varied the race and skin tone of the perpetrator's photo, which was shown for three seconds, and separately asked the participants to report on their television news watching habits.[209] The results indicated that participants expressed more emotional concern about the murder when the suspect was portrayed as a dark-skinned black man compared to a white man.[210]

Taken together, these studies show that, among other things: (1) the media incorporates African-American stereotypes when discussing death penalty cases; (2) the stereotypicality of African-American defendants is related to death penalty conviction rates; and (3) both race-specific and race-neutral crime portrayals activate stereotypes of the aggressive African American, which in turn affect emotional reactions, policy judgments, and decision making. As a result, one might predict that there is an implicit association between the death penalty and race that becomes activated during the supposedly race-neutral death qualification process.[211]

5. *Death Penalty Priming and Jury Decision Making*

Once a prime has been activated, it can affect decision making and behavior. In the context of the death penalty, priming racial stereotypes during death qualification can affect subsequent jury decision making. This Article has discussed studies that have shown how priming can affect decision making and behavior. For example, Steele and Aronson found that priming race in African-American students affected subsequent test performance.[212] Shih, Petinsky, and Ambady found that indirectly priming ethnicity and gender in Asian-American women similarly affected test performance.[213] Bargh found that priming elderly stereotypes affected the speed at which participants

208. Dixon & Maddox, *supra* note 155, at 1561. In many jurisdictions, murdering a police officer serves as an aggravating factor that can make a defendant death eligible. *See, e.g.*, ALA. CODE § 13A-5-40(a)(5) (1975); IND. CODE § 35-50-2-9(b)(6) (2008).

209. Dixon & Maddox, *supra* note 155, at 1560–61.

210. *Id.* at 1562. Interestingly, this effect was related to the participants' television news viewing habits. Participants who frequently watched television news were more concerned about the murder when they saw a dark-skinned black suspect than a white suspect. However, participants who watched only a little television news did not display this bias. Heavy news viewers also rated the victims of Black perpetrators more positively than victims of White perpetrators. *Id.* at 1563.

211. Although it is most likely that death qualification activates the Death Penalty Prime, it is also possible that other parts of a capital trial (including eyewitness testimony, voir dire, and more) might trigger implicit racial biases. As with Death Penalty Priming Hypothesis, these possibilities should be examined empirically.

212. Steele & Aronson, *supra* note 54, at 808..

213. Shih et al., *supra* note 160, at 82.

walked.[214] Finally, Devine found that priming unrelated racial stereotypes, such as lazy and athletic, affected the way people interpreted ambiguously hostile behaviors.[215] An additional example of priming's effects on decision making helps support the hypothesis that activating racial stereotypes at trial will likely affect juror decision making. This research has demonstrated that the stereotype of the aggressive and violent African American can affect judgments of job qualifications, disposition, and more.

James Johnson and his colleagues primed participants by playing segments of either a violent or non-violent rap song.[216] Participants later read supposedly unrelated stories of ambiguous behavior and were asked to make judgments about people in the stories.[217] Results showed that participants who listened to the violent rap music, compared to other participants, judged a Black male's aggressive behavior as caused by dispositional factors (for example, a violent personality) rather than situational factors (for example, stress related to a relationship break-up).[218] Further, results showed that participants who listened to the violent rap music were more likely than the other participants to judge a Black job applicant as less qualified for a job requiring intelligence.[219] This study shows dramatically that racial stereotype primes (here, rap music) can influence seemingly unrelated judgments (here, job qualification) so long as they are broadly related (both are stereotypes of African Americans). Taken in the context of capital cases, if death qualification primes racial stereotypes, those stereotypes could affect juror decision making.

In sum, research on race, priming, and decision making supports the hypothesis that the supposedly race-neutral process of death qualification primes racial stereotypes of African Americans. Further research should continue to evaluate this hypothesis.

B. Racial Bias Masking Hypothesis

Implicit racial bias may even affect the accuracy of the most rigorous studies of race and capital punishment. These studies use sophisticated statistical methods to evaluate the role of race in capital

214. Bargh et al., *supra* note 52, at 237.

215. Devine, *supra* note 165, at 9.

216. Participants in the control condition did not listen to music. Johnson & Trawalter, *supra* note 156, at 239; *see also* Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 138–39 (2002).

217. Johnson & Trawalter, *supra* note 156, at 240–41.

218. *Id.* at 242–43.

219. *Id.* at 244.

punishment, but typically make important statistical adjustments based on information that may already have been tainted by racial stereotypes. One basic finding of social cognition research is that the human mind can unintentionally incorporate stereotypes into the way people remember situations and tell stories.[220] If the case facts and summaries relied upon in empirical studies of the death penalty already contain racial biases before statistical analysis begins, then the statistical analysis relying on these facts can unintentionally mask racial bias. As a result, studies that find little or no effects of capital defendants' race on trial outcome may unintentionally mask disproportionate treatment based on defendants' race.[221]

1. Statistical Adjustments: Attempting to Equalize Culpability

Since the 1970s, David Baldus, George Woodworth, and other scholars have conducted rigorous examinations of death penalty prosecutions and convictions in a variety of jurisdictions.[222] As their now famous results consistently display, "[t]he race of the victim has a consistent and robust influence on capital punishment,"[223] but "race-of-defendant discrimination is not an inevitable feature of all post-*Furman* death sentencing systems."[224] In the context of capital cases, researchers have used a range of statistical methodologies and varying

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220. *See* Levinson, *Forgotten Racial Equality*, *supra* note 6, at 381 (citing ALLPORT & POSTMAN, *supra* note 20, at 65–68); Richard L. Marsh et al., *Gender and Orientation Stereotypes Bias Source-Monitoring Attributions*, 14 MEMORY 148, 157–58 (2006); Yoshihisa Kashima, *Maintaining Cultural Stereotypes in the Serial Reproduction of Narratives*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 594, 594 (2000).

221. Similarly, even studies that find such disparities based on a defendant's race may be diminishing the actual severity of these disparities.

222. *See, e.g.*, Phillips, *supra* note 3; Baldus & Woodworth, *Race Discrimination in the Administration of the Death Penalty*, *supra* note 3; David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1971–1999)*, 81 NEB. L. REV. 486 (2002) [hereinafter Baldus et al., *Arbitrariness and Discrimination*]; David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) [hereinafter Baldus et al., *Racial Discrimination and the Death Penalty*]; BALDUS ET AL., EQUAL JUSTICE, *supra* note 3; GROSS & MAURO, *supra* note 3; Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984). *See generally* Lee, *supra* note 10 (analyzing several of these studies and discussing future research directions).

223. Phillips, *supra* note 3, at 814 (describing systematic studies conducted by Baldus and Woodworth, as well as by the United States General Accounting Office); *see generally* Baldus & Woodworth, *Race Discrimination in the Administration of the Death Penalty*, *supra* note 3; U.S. GENERAL ACCOUNTING OFFICE, *supra* note 3.

224. Baldus & Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment*, *supra* note 3, at 1412–13.

levels of statistical sophistication.[225] The least statistically sophisticated studies have used what Baldus and others called "unadjusted" data. These studies have compared conviction rates based on the defendant's race without making systematic attempts to control for culpability, the victim's race, and aggravating and mitigating factors.[226] Because relying on unadjusted data assumes that potentially confounding variables—everything other than the measured variables—are equal, the most statistically sophisticated studies have employed adjustment methodologies, designed to make better comparisons between groups.[227] For example, Baldus and colleagues' studies of Georgia, Nebraska, Pennsylvania, and more, attempted to statistically control for factors such as defendant culpability, as well as aggravating and mitigating factors.[228] According to Baldus and Woodworth, the purpose of adjusting data is to "minimize the risk that the influence of race and defendant culpability will be confounded and lead to faulty

225. *See* Baldus & Woodworth, *Race Discrimination in the Administration of the Death Penalty*, *supra* note 3; Phillips, *supra* note 3, at 819–20.

226. In experimental studies, researchers can create functional equivalence between two groups by randomly assigning study participants to two groups. *See* J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW (2005). However, in non-random situations, such as when comparing capital defendants, an assumption of equivalence cannot be made. Baldus and Woodworth give the following examples of "unadjusted" studies, *supra* note 3, at 215–25: State v. Cobb, 663 A.2d 948 (Conn. 1995); Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39 (2002); Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS 33 (1991); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991); PEG BORTNER & ANDY HALL, ARIZONA CAPITAL CASE COMMISSION, ARIZONA FIRST-DEGREE MURDER CASES SUMMARY OF 1995–1999 INDICTMENTS: DATA SET II RESEARCH REPORT TO ARIZONA CAPITAL CASE COMMISSION (2002); MARY ZIEMBA-DAVIS & BRENT L. MYERS, INDIANA CRIMINAL JUSTICE INSTITUTE, THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW: A REPORT TO GOVERNOR FRANK O'BANNON AND THE INDIANA GENERAL ASSEMBLY (Jan. 10, 2002) (on file with the Indiana Criminal Justice Institute, Indianapolis, Indiana).

227. Phillips lists the following jurisdictions as those where "reasonably well-controlled" studies have been conducted: California, Colorado, Georgia, Kentucky, Maryland, Mississippi, Nebraska, New Jersey, North Carolina, Philadelphia, and South Carolina. Phillips, *supra* note 3, at 808 (citing David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 501, 517–19 (James R. Acker et al. eds., 2d ed. 2003)). Reasonably well-controlled studies are those "including statistical controls for 10 or more legitimate non-racial case characteristics." *Id.* According to Baldus & Woodworth, a significant amount of research "is not well controlled, and the results appear to be very dependent on local politics, crime rates, public opinion about crime and punishment, jury selection procedures, capital charging and sentencing processes, and the presence or absence of measures developed to limit the risk of racial discrimination." Baldus & Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment*, *supra* note 3, at 1419.

228. *See generally* BALDUS ET AL., EQUAL JUSTICE, *supra* note 3; Baldus et al., *Arbitrariness and Discrimination*, *supra* note 222; Baldus et al., *Racial Discrimination and the Death Penalty*, *supra* note 222.

inferences about the impact of race on decision-making."[229] Thus, the goal of making adjustments is to eliminate confounds by controlling "for legitimate case characteristics."[230]

Empirical researchers who employ sophisticated adjustment methodologies must bear a heavy fact-finding burden, as case facts are crucial in statistically determining how one can compare theoretically alike groups of cases. These researchers have relied on a variety of fact sources, including media reports, pre-sentencing reports, supplemental homicide reports, trial records, judicial opinions, and more. A 2008 study of death penalty cases in Houston, Texas, by Scott Phillips relied solely on *Houston Chronicle* newspaper accounts of murders to determine the aggravating and mitigating circumstances of the murders examined.[231] Relying on Baldus and Woodworth's complex framework for coding and adjusting statistics, Phillips systematically coded the *Houston Chronicle* stories into facts that described the nature of the killings.[232] For example, Phillips classified whether the stories described the defendant using physical or mental torture (an aggravating factor under Baldus and his colleagues' framework) or whether they described provocation of the defendant (a mitigating factor).[233] Baldus and colleagues have used a variety of fact-gathering techniques, but have also sometimes relied upon media sources in deciding how to weigh aggravating versus mitigating factors. In their study of Pennsylvania, for example, in addition to using various other sources, Baldus and colleagues relied upon newspaper accounts to supplement other factual sources.[234]

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229. Baldus & Woodworth, *Race Discrimination in the Administration of the Death Penalty*, *supra* note 3, at 196. Because the researchers seek to test like cases against one another and then measure for race effects, the purpose of the statistical adjustments are to equalize non-equal facts. If White Defendant A has three aggravating factors and one mitigating factor, and Black Defendant A has five aggravating factors and no mitigating factors, statistics can provide for a hypothetical equalization of the White defendant case with Black defendant case, even if the aggravating and mitigating factors are different. The problem, however, is that due to implicit racial bias in the case facts, Black defendant cases may now contain erroneously high measures of aggravating facts and erroneously low measures of mitigating facts relative to White defendant cases.

230. *Id.* at 197.

231. Phillips, *supra* note 3, at 825. Phillips described his methodology:

> [N]ewspaper articles about each case were collected from *The Houston Chronicle* online archive (an average of 6.75 articles per case, for a total of more than 3,400 articles). The aggravating and mitigating circumstances in each case were coded based on a list drawn from Baldus and colleagues' research on race and capital punishment.

Id. (citing BALDUS ET AL., EQUAL JUSTICE, *supra* note 3, at 526–35).

232. *Id.* (citing BALDUS ET AL., EQUAL JUSTICE, *supra* note 3, at 526–35).

233. *Id.*

234. According to the authors, "newspaper accounts, obtained on-line, were often helpful." Baldus et al., *Racial Discrimination and the Death Penalty*, *supra* note 222, at 1671.

Not all of the studies that have employed adjustment methodologies rely on media sources for case facts. Baldus and colleagues' study of Nebraska, for example, did not rely on the news media for fact gathering. Instead, the researchers relied largely upon "pre-sentence investigation reports," which, according to the researchers, "include[] a detailed description of the defendant that is generated by a probation officer following a criminal conviction" and contain "a description of the crime that is generated from the trial record, police reports, and interviews with the defendant."[235] Michael Songer and Isaac Unah used supplemental homicide reports[236] and court case reports to determine case facts.[237] Samuel Gross and Robert Mauro relied almost exclusively on supplemental homicide reports.[238] Regardless of which particular sources of facts the researchers select, scholars recognize that fact gathering is one of the most important stages of empirical research. As Baldus and colleagues cautioned separately in several articles, "a major challenge in this type of research is obtaining reliable data on the cases."[239]

Empirical researchers, and most prominently Baldus and his colleagues, have explicitly recognized that even the most sophisticated statistical analyses make assumptions that can later be challenged. One goal in devising a study that measures anything complex, and certainly in designing a study that measures racial disparities in capital cases, is to avoid ignoring data or variables that might change the results in a meaningful way. As Baldus and his colleagues explained,

> one danger of overlooking relevant variables would be a distortion of our comparative-excessiveness analysis because we incorrectly estimated the relative culpability of the cases. . . .
>
> An omitted variable could also bias the results of our race-of-victim and race-of-defendant analyses in both [studies] if the variable omitted from the analysis influenced the decisions of prosecutors and juries and if certain values of that variable occurred more frequently in one racial subgroup than in the other.[240]

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235. Baldus et al., *Arbitrariness and Discrimination*, *supra* note 222, at 689.

236. Supplemental homicide reports are "local police agencies file with the Uniform Crime Reporting section of the FBI." Gross & Mauro, *supra* note 222, at 49.

237. Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 184–86 (2006).

238. Gross & Mauro, *supra* note 222, at 49.

239. Baldus et al., *Arbitrariness and Discrimination*, *supra* note 222, at 689. It is worth noting that other than the potential influence of implicit racial bias in the case facts, the methodology employed by Baldus and his colleagues is impressive, sound, and convincing. Every reasonable step was taken to avoid human error.

240. BALDUS ET AL., EQUAL JUSTICE, *supra* note 3, at 430.

Racial Bias Masking Hypothesis proposes that implicit racial bias in case facts may be such an omitted variable.

Baldus and colleagues also specifically noted the possibility of a "reporting bias." One reporting bias

> might be a tendency by those who provided information to parole board investigators to describe the circumstances of the white-victim and black-defendant cases in an aggravated direction. This bias would cause such cases in our study to appear to be more aggravated than they actually were, thus reducing the observed race-of-victim and race-of-defendant effects.[241]

Although Baldus and colleagues were likely referring to intentional skewing of facts by prosecutors and law enforcement officers, this "reporting bias" could also describe an implicit bias that disproportionately includes stereotypes in the underlying case facts. More specifically, if implicit racial bias affects the way case facts are perceived, remembered, told, retold, and recorded, these case facts may systematically cause crimes involving African-American defendants to appear more aggravated than they actually were. Such an unintentional "implicit aggravation effect" would cause later statistical analysis to mask or reduce racial disparities in case outcomes, because it would falsely assume that African-American defendants committed more aggravated crimes than they actually did.

2. *Stereotypes Bias Case Facts*

There are two primary reasons why the underlying case facts relied upon by researchers might be biased: first, facts are selectively enhanced by law enforcement officers and prosecutors to make prosecutorial decisions seem reasonable in retrospect; and second, these facts become skewed unintentionally due to implicit biases in the way witnesses, law enforcement officers, attorneys, judges, and news reporters perceive, encode, store, retrieve, and transmit information. This Subsection briefly addresses the first possibility, and then shifts to the second, social-cognition-based explanation.

a. Intentionally Biased Facts

Micheal Radelet and Glenn Pierce have provided one explanation that would account for racial bias in the underlying case facts.[242] They claim that prosecutors may initially select certain cases they wish to pursue for the death penalty, and then selectively enhance the way

241. *Id.* at 444–45.

242. Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 593 (1985).

they discuss these cases, such that a later analysis would make the decision seem justifiable.[243] Radelet and Pierce summarize the hypothesis:

> [S]ome cases, which initially do not appear to be among the most serious, are first selected for harsh treatment and then characterized so as to *appear* similar to cases that were classified as most serious from the time they entered the criminal justice process. The ability of prosecutors or other criminal justice decision makers to develop or minimize evidence in order to justify the results desired in particular cases may create an appearance of similarity among initially dissimilar cases that reach the later stages of the criminal justice system.[244]

Summarizing the importance of this hypothesis, Radelet and Pierce state, "if the process of selectively developing or ignoring evidence in cases is related to extra-legal factors, such as race, then this process will help create the illusion of even-handed justice at later stages in the criminal justice system."[245]

Radelet and Pierce pursued their hypothesis empirically by comparing facts presented in police reports to facts later discussed by prosecutors:

> If a comparison of the police description of a homicide with the subsequent description of the same homicide in the court records reveals differences that parallel differences in the racial characteristics of defendants and victims, then evidence suggesting selective manipulation or amassing of evidence and racial bias would be found.[246]

Thus, Radelet and Pierce compared how prosecutors presented cases in ways that were more or less serious than police had originally documented, and then tested whether these differences were related to the race of the defendant or victim. Specifically, they focused on whether or not police and prosecutors classified a defendant's actions in a murder case as being in the process of committing another felony. This factor serves as an aggravating factor in most capital jurisdictions, and can therefore lead to the death penalty. Results of their study demonstrated that prosecutors were more likely to "upgrade"—and less likely to "downgrade"—the seriousness of the crime, relative to police reports, in situations when Black defendants killed White victims.[247]

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243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 594.

247. *Id.* at 606.

It further showed that such "upgrading" increased the probability of a death sentence by twenty-two percent.[248]

Radelet and Pierce's study supports the contention that the facts underlying various studies of the death penalty may be biased. Many of the facts relied upon by researchers, such as jury determinations, court transcripts, judicial opinions, and pre-sentencing reports are generated after the prosecutor has become involved in the case.[249]

b. Automatic and Unintentionally Biased Facts

Crucial case facts, such as descriptions of aggravating factors, may also be racially biased, because automatic cognitive processes frequently work to incorporate racial stereotypes in the perception, encoding, storage, and transmission of factual information. This unintentional transmission of stereotypes can take place easily, and can affect everything from simple storytelling to media accounts of murders. Taken together, social cognition studies indicate that the factual sources underlying empirical studies of the death penalty may contain already racially biased information.

i. Propagation of bias in storytelling

A famous social psychological study on racial bias in storytelling was conducted by Allport and Postman.[250] Their study elegantly demonstrates that people's minds can work automatically and in subtle ways to incorporate incorrectly stereotypes of African Americans into stories. In Allport and Postman's study,

> participants viewed a picture of passengers on a streetcar (one of whom was Black). In the picture, one White passenger holds a razor blade and the Black passenger is empty-handed. After viewing the picture, participants were then asked to describe the picture to other participants who had not seen the picture. As participants told and retold the story to others, the story changed. After the story had been retold several times, some participants reported that the Black passenger—not the White passenger—held a razor blade.[251]

More recent studies have followed up Allport and Postman's groundbreaking work, and have confirmed that stereotypes tend to be trans-

248. Radelet & Pierce, *supra* note 242, at 614.

249. Studies that rely primarily on reports of law enforcement officers, generated prior to prosecutor involvement, would presumably avoid the problems that Radelet and Pierce discuss. *See, e.g.*, GROSS & MAURO, *supra* note 3, at 35 (relying on supplemental homicide reports provided by local law enforcement agencies to the FBI).

250. ALLPORT & POSTMAN, *supra* note 20.

251. Levinson, *Forgotten Racial Equality*, *supra* note 6, at 831.

mitted as stories are retold multiple times. Yoshihisa Kashima, for example, found that when stories are retold by multiple individuals, stereotype-consistent information tended to remain in the stories but stereotype-inconsistent information tended to drop out.[252] Applied to the context of capital cases, this phenomenon would tend to indicate that the earlier stage in which the information is gathered, the fewer stereotype-consistent errors it is likely to have. Practically speaking, such a conclusion would mean that police reports and eyewitness accounts are less likely than court transcripts or pre-sentencing reports to include racial stereotypes that are propagated through storytelling transmission biases.[253] It is worth noting, however, that by the time factual sources such as court opinions and pre-sentencing reports are generated, many of the underlying facts have been told and retold numerous times.

ii. Encoding, storing, and retrieving stereotypes

In addition to biases caused by errors in storytelling, case facts may be unintentionally biased due to memory errors. Social cognition research demonstrates that the human mind can automatically misremember facts in racially biased ways. These memory errors could easily become incorporated into various descriptions of case facts that researchers rely upon to make statistical comparisons. A study by Alison Lenton and her colleagues found that stereotypes influenced false memories.[254] That is, when stereotypes were present, people could actually believe that they remembered something that never happened. In their empirical study, the researchers presented participants with word lists that included female stereotypes, such as secretary and nurse, and male stereotypes, such as lawyer and soldier.[255] After giving participants a brief distraction task, Lenton and her colleagues administered a recognition test. Results of this recognition task indicated that participants often had false memories of having seen gender-stereotyped words they had not seen, and "that these false memories were elicited implicitly."[256] In fact, most participants

252. Kashima, *supra* note 220 at 601.

253. Other research, however, has demonstrated that eyewitness accounts, for example, are themselves suspect, particularly when the eyewitness sees a perpetrator from another race. For a discussion of "own-race bias," see Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984). *See also* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001).

254. *See* Lenton et al., *supra* note 6, at 5.

255. *Id.*

256. Much of the language of this paragraph, including citations, is taken more or less verbatim from an earlier work. *See* Levinson, *Forgotten Racial Equality*, *supra* note 6, at 379.

were completely unaware of the word lists' gender stereotype theme. The researchers expressed concern that the implicit creation of stereotype-consistent false memories may help to explain the "self-perpetuating nature of stereotypes and their resistance to change."[257] Applied to the capital context, Lenton and her colleagues' study demonstrates that people can unwittingly and inaccurately recast situations to conform with stereotypes. In the capital context, it might be possible that people responsible for transmitting case facts—such as witnesses, law enforcement officers, and attorneys—could fail to accurately recall case information and unintentionally incorporate racial biases into their recollections.

Part II described a project in which I argued that judges and juries unintentionally misremember facts in racially biased ways.[258] Recall that in that study, participants read short stories of facts relating to a fight between men after a bar altercation. Results of the study showed that participants who read about an African-American actor were more likely to remember aggressive actions taken by the actor.[259] Building on Lenton's study of false memories, this study demonstrates that the human mind can be quickly and automatically influenced by stereotypes in subtle yet racially biased ways. If similar biases influence the way facts are recorded and summarized prior to their incorporation in empirical studies of the death penalty, then relying on those facts as accurate can lead to disproportionately biased results.

These studies explain how errors in case facts may be generated both from individuals misremembering stereotype-relevant information, and through the unintentional propagation of misinformation through storytelling. These fact-based errors could affect the factual sources underlying empirical studies of the death penalty.

iii. Biased media reports

Because some empirical studies of the death penalty rely specifically on media sources, this Subsection focuses specifically on the media's role in mischaracterizing facts in racially biased ways. Empirical studies have shown generally that the media systematically overrepresents African-American crimes, and specifically that the media includes racial stereotypes in accounts of capital cases. Recall from Part III.A that a study by Goff and his colleagues demonstrated that

257. *Id.* (quoting Lenton et al., *supra* note 6, at 12).

258. *See generally* Levinson, *Forgotten Racial Equality*, *supra* note 6.

259. *Id.* at 350.

media accounts of murders can be tainted by racial bias.[260] That study found that *Philadelphia Inquirer* stories contained a disproportionate amount of "ape-like" and "bestial" references when describing death penalty cases of African-American defendants, compared to stories describing death penalty cases of White defendants.[261] In addition to these findings of media bias in the factual and descriptive reporting of death penalty cases, the study found a direct connection between the news article bias (the ape-like representations) and the outcome (defendants put to death).

Other empirical studies confirm the deep connection between media fact reporting and the propagation of racial stereotypes, findings that call into question certain results of empirical studies relying on media sources for case facts.[262] Several studies have found that television news overrepresents the criminality of African Americans.[263] Travis Dixon and Daniel Linz researched television news in the greater Los Angeles area and compared news media coverage with crime statistics.[264] The researchers aggregated television news coverage from several different channels, and undertook a systematic coding scheme designed to measure the portrayal of perpetrators based upon race.[265] They found that African Americans and Latinos were portrayed as lawbreakers, but that European Americans were portrayed as defenders of the law. When looking only at portrayal of perpetrators in felonies, such as murder, African Americans were almost two-and-a-half times more likely to be portrayed as felons than Whites.[266] Importantly, the overrepresentation of African Americans as perpetrators existed even when accounting for arrest rates.[267] For example, African Americans were portrayed as felons forty-four percent of the time, but accounted for only twenty-five percent of felony arrests.[268]

Other studies have found similar results. A study by Robert Entman of local television in the Chicago area focused on the media's

260. Goff et al., *supra* note 185, at 302.

261. *Id.* at 304.

262. For a thorough discussion of how local news may serve to propagate racial bias, see Kang, *supra* note 2.

263. Travis L. Dixon & Daniel Linz, *Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News*, 50 J. COMM. 131, 132 (2000).

264. *Id.*

265. *Id.*

266. *Id.* at 142.

267. *Id.* at 145.

268. *Id.* at 146.

role in depicting African-American criminality.[269] Entman's study, which examined local news broadcasts over a fifty-five day period, found that African Americans charged with crimes were more likely than European Americans to be pictured "in the grip of a restraining police officer" and less likely to be named.[270] Another study by Daniel Romer examined Philadelphia local news coverage and found that African Americans were more likely to be pictured as perpetrators than as victims.[271] Gilliam and Iyengar found that minorities accounted for a disproportionately high fifty-nine percent of suspects in violent crime cases reported by Los Angeles news stations from 1996 to 1997.[272] In light of these studies, one might ask whether empirical studies that rely on the media for case facts are unintentionally including biased facts that serve to minimize or mask racial disparities.

Considered in the aggregate, social cognition research demonstrates that implicit bias in case facts can skew statistical analysis in such a way as to reduce or completely mask racial disparities. Because people misremember information and retell stories in automatically stereotyped ways, one can hypothesize that murder summaries might contain factual errors that systematically increase the reported culpability and aggravated nature of African-American defendants' crimes. Such fact-based errors would ultimately mean that despite researchers' good faith attempt to "control for legitimate characteristics," studies might be misaligning statistically. Such a misalignment would, as Baldus and colleagues acknowledged, reduce observed race-of-defendant effects.[273]

IV. CONCLUSION

The primary goal of this Article is to demonstrate the potential for interdisciplinary collaboration in law and social science that will help locate and understand how racial biases manifest at various stages of

269. Robert M. Entman, *Blacks in the News: Television, Modern Racism and Cultural Change*, 69 JOURNALISM Q. 341 (1992).

270. Dixon & Linz, *supra* note 263, at 133 (citing Entman, *supra* note 269, at 351).

271. Daniel Romer et al., *The Treatment of Persons of Color in Local Television News: Ethnic Blame Discourse or Realistic Group Conflict?*, 25 COMM. RES. 286, 294 (1998).

272. Gilliam & Iyengar, *supra* note 203, at 562.

273. It must be noted that I am not an expert in the complex statistical models used by Baldus and others. The purpose of this discussion is not to prove the absolute existence of error in some of the most impressive interdisciplinary studies in history. Rather, the purpose of this discussion is to advance a preliminary hypothesis grounded in social cognition theory that could help explain how even groundbreaking studies displaying massive societal inequality might even be holding back the complete truth about racial discrimination in the death penalty. Perhaps an understanding of social cognition in the context of these studies can help inform future methodology and statistical analysis.

capital cases. The hypotheses proposed in this Article have theoretical grounding and empirical support and deserve further examination. Yet, as is the nature of hypotheses, neither Death Penalty Priming Hypothesis nor Racial Bias Masking Hypothesis has been tested empirically. Thus, this Article urges caution in relying upon the accuracy of these hypotheses until they have been explored more systematically. For this reason, it is premature to discuss meaningful solutions to the potential problems discussed in this Article.[274]

However, a few concluding points should be made regarding the continued need for interdisciplinary collaboration that combines law and social science. Collaboration between legal scholars and social scientists is needed now more than ever.[275] Despite tremendous collaborative successes in the capital context beginning in the 1970s,[276] avenues remain unexplored. Social cognition research in particular provides opportunities to engage in thoughtful, targeted studies of various stages in the death penalty process. Research on priming, in addition to the particular hypothesis advanced in this Article, might alone account for several novel hypotheses that have yet to be examined. In addition, many of the hypotheses previously asserted by scholars of the death penalty have not yet been empirically explored.[277] The best hypotheses will likely come from advocates and scholar-advocates engaged deeply in the struggle for racial justice in criminal law and capital cases. The other articles in this Symposium issue are therefore another great place to start.

274. Other projects discussing implicit bias in law have made a variety of arguments. These arguments, applied to Death Penalty Priming Hypothesis, could range from debiasing strategies to abolition of the death penalty. *See generally* Kang & Banaji, *supra* note 12, (arguing for "fair measures"); Page, *supra* note 9; Levinson, *Forgotten Racial Equality*, *supra* note 6 (claiming that the best solution is cultural change).

275. *See, e.g.*, Justin D. Levinson, *Culture, Cognitions, and Legal Decision-Making*, *in* HANDBOOK OF MOTIVATION AND COGNITION ACROSS CULTURES 423, 423–39 (Richard M. Sorrentino & Susumu Tamaguchi eds., 2008) (summarizing social cognition, cultural psychology, and discussing a variety of legal projects in these areas).

276. *See, e.g.*, Fitzgerald & Ellsworth, *supra* note 137; BALDUS ET AL., EQUAL JUSTICE, *supra* note 3.

277. For example, many legal scholars have focused on potential "unconscious" bias by prosecutors. *See* Radelet & Pierce, *supra* note 242.