

---

## Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes

Lu-in Wang

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DePaul L. Rev. 1013 (2004)

Available at: <https://via.library.depaul.edu/law-review/vol53/iss3/6>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# RACE AS PROXY: SITUATIONAL RACISM AND SELF-FULFILLING STEREOTYPES

*Lu-in Wang\**

## INTRODUCTION: RACE AS PROXY

In our society, race can act as a proxy for a long list of characteristics, qualities, and statuses. For people of color,<sup>1</sup> the most powerful of these associations have too often been negative, and have carried with them correspondingly negative consequences.<sup>2</sup> We often link color

---

\* Associate Professor of Law, University of Pittsburgh School of Law. I thank the members of the *DePaul Law Review*, and especially Mark Bradford, for organizing and inviting me to participate in this wonderful Symposium. I also thank Deborah Brake, Martha Chamallas, Richard Delgado, David Herring, Thomas Ross, Jean Stefancic, George Taylor, and Welsh White for their thoughtful comments on earlier drafts and Kay Marryshow, Maraleen Shields, Jessica Sommer, James Weaver, and Arthur Wolfson for their excellent research assistance. I also am thankful for the support this project received from the Dean's Scholarship program at the University of Pittsburgh School of Law.

1. This Article focuses on the ways in which people of color are affected when their race acts as a proxy for other, often negative, characteristics. It should not go unremarked, however, that race also can act as a proxy for whites—albeit generally with much different effect. Scholars have demonstrated, for example, that whiteness tends to be associated with positive qualities and privileged statuses, such as innocence (in cultural, religious, and sexual terms, as well as innocence of racism), see Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990); privilege, power, and the expectation of entitlement, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996); and even specific traits such as “discipline, restraint, quiet competence, and industry,” ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 159 (2001) (describing “prototypically White traits”). On the other hand, while whiteness tends to have these positive associations, whites generally are less apt to be stereotyped than members of other racial groups. See, e.g., Gregory M. Walton & Geoffrey L. Cohen, *Stereotype Lift*, 39 J. EXPER. SOC. PSYCHOL. 456, 464 (2003) (“Whites, men, and other majority groups are considered normal and typical in most sectors of society. They are thus less likely to be targets of either negative stereotypes or positive ones.”) (citations omitted).

2. Some have argued that race is used as a proxy that advantages blacks and other racial minorities in the context of affirmative action. Judge Richard A. Posner, for example, has written that, in law school admissions processes that take account of race, “blackness . . . is a proxy for characteristics relevant to the educational process or to performance in the legal profession—characteristics such as a background of deprivation, empathy for the disadvantaged, etc.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 690 (6th ed. 2002). However, affirmative action policies are justified without using race as a proxy in the manner described by Judge Posner. In the recent United States Supreme Court decision upholding the use of race as a factor in admissions at the University of Michigan Law School, for example, the Court held that the law school “has a compelling interest in attaining a diverse student body,” *Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003), and went on to note that “[t]he Law School [did] not premise its need for

with undesirable personal qualities such as laziness, incompetence, and hostility,<sup>3</sup> as well as disfavored political viewpoints such as lack of patriotism or disloyalty to the United States.<sup>4</sup> Race even acts as a proxy for susceptibility to some diseases.<sup>5</sup> Medical professionals so often diagnose schizophrenia in blacks,<sup>6</sup> for example, that the association has come full circle, and the diagnosis now acts as a proxy for race.<sup>7</sup> The association with perhaps the most far-reaching effects is that of race as a proxy for criminality and deviance,<sup>8</sup> an association

critical mass [of minority students] on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students." *Id.* at 2341 (citation omitted).

3. See, e.g., ENTMAN & ROJECKI, *supra* note 1, at 28-31, 33-45 (describing views of blacks revealed through telephone surveys and interviews with white subjects from Indianapolis who were categorized as either "high" in their denial of continuing discrimination against blacks or as part of "the ambivalent majority," the "largest and most politically important" group); Tom Smith, *Ethnic Images*, National Opinion Research Center, GSS Topical Report No. 19 (1990), at <http://cload9.norc.uchicago.edu/dlib/t-19.htm> (last visited Sept. 29, 2003) (reporting results of extensive survey of Americans' ratings of six ethnic groups—Whites, Jews, Blacks, Asian Americans, Hispanic Americans, and Southern Whites—on six characteristics: wealth, work ethic, violence, intelligence, dependency, and patriotism).

4. See, e.g., Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003); Smith, *supra* note 3.

5. See, e.g., René Bowser, *Racial Profiling in Health Care: An Institutional Analysis of Medical Treatment Disparities*, 7 MICH. J. RACE & L. 79, 109, 115-22 (2001) (describing assumptions that link race to a greater susceptibility to certain diseases and influence doctors' diagnosis and treatment decisions).

6. The degree to which blacks are diagnosed as schizophrenic "is generally thought to be the result of misdiagnosis rather than any racial difference in prevalence." William B. Lawson et al., *Race as a Factor in Inpatient and Outpatient Admissions and Diagnosis*, 45 HOSP. & COMMUNITY PSYCHIATRY 72, 72 (1994). See also Thomas W. Pavkov et al., *Psychiatric Diagnoses and Racial Bias: An Empirical Investigation*, 20 PROF. PSYCHOL.: RES. & PRAC. 364 (1989) (reporting on study finding that being black was predictive of a diagnosis of schizophrenia).

7. See Arthur L. Whaley, *Racism in the Provision of Mental Health Services: A Social Cognitive Analysis*, 68 AM. J. ORTHOPSYCHIATRY 47, 52 (1998) (noting a 1977 study that "found that being black was associated with . . . inadequacies in service delivery independent of diagnosis," and pointing out that today, given that more severe diagnoses and more restrictive interventions are assigned to blacks, "[t]he diagnoses of schizophrenia or psychotic disorders . . . serve the function that race alone served nearly two decades ago").

8. See, e.g., Regina Austin, "A Nation of Thieves": *Securing Black People's Right To Shop and To Sell in White America*, 1994 UTAH L. REV. 147, 148 (1994) (noting that mundane activities such as engaging in consumption and commerce are construed as deviant when black people undertake them); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 319 (1999) (noting that Supreme Court decisions concerning racial profiling in law enforcement have freed police to "use blackness as a proxy for criminal propensity") (citation omitted); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 136 (1997) (describing the use of "color as a proxy for dangerousness"); Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 806 (1999) ("Police officers are particularly notorious for using race as a proxy for criminal propensity.").

that carries into not just the criminal justice system through practices such as racial profiling in law enforcement,<sup>9</sup> but also has implications for how people of color are treated in contexts as mundane as retail transactions<sup>10</sup> and as consequential as health care.<sup>11</sup> The use of race as a proxy for criminality even supports the converse notion that people of color are suitable *targets* for crime.<sup>12</sup>

The *DePaul Law Review* chose an apt phrase in titling this Symposium “Race as Proxy,” for the word “proxy” captures the offhand, unthinking, “default” manner in which race often influences decision making. Accordingly, the term also highlights a basic problem with which legal standards have, so far, not come to terms. Despite the wealth of antidiscrimination laws that would seem to prohibit the use of race as a proxy<sup>13</sup> in a wide range of contexts,<sup>14</sup> much race-based

9. See generally DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); Harris, *supra* note 8; Roberts, *supra* note 8; KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* (1998).

10. See generally Austin, *supra* note 8; Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 287-302 (2001) (noting similarities between consumer discrimination and racial profiling in law enforcement, and providing examples).

11. See, e.g., Michael S. Shin, Note, *Redressing Wounds: Finding a Legal Framework To Remedy Racial Disparities in Medical Care*, 90 CAL. L. REV. 2047, 2072-76 (2002) (describing ways in which racial stereotypes, including stereotypes of African American patients as “more likely to engage in unhealthy behaviors (such as drug use)” or as criminal, can affect medical professionals’ decision making); Whaley, *supra* note 7, at 51-52 (discussing ways in which stereotypes of black patients as aggressive or violent affect mental health diagnosis and treatment decisions). Cf. Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1605, 1607 (2002) (reporting on study that found “a significant difference in the evaluation of skull and long-bone fractures for abusive injury between minority and nonminority children,” which, if a result of racial bias, “may lead to abuse being overlooked in nonminority children and/or overidentified in minority children”). For fuller discussion of the use of race as a proxy in medical care, see *infra* Part IV.

12. See, e.g., Lu-in Wang, *Suitable Targets? Parallels and Connections Between “Hate” Crimes and “Driving While Black,”* 6 MICH. J. RACE & L. 209, 226-27 (2001) (“[T]he myth that certain groups are prone to criminality or deviance promotes the practice of hate crimes as well as racial profiling, for . . . it . . . justifies the perpetration of violence against those groups, then providing example of anti-black lynching.”).

13. Deborah Hellman has pointed out that discrimination can take two broad forms: “proxy discrimination,” under which one identifying characteristic is used as a proxy for another, and “non-proxy discrimination,” under which “the classification is its own end.” Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CAL. L. REV. 315, 318 (1998) (illustrating “proxy” discrimination through example of a law firm’s using sex as a “screening device [in hiring] on the theory that women are less assertive than men and consequently make less effective lawyers,” and “non-proxy” discrimination through the example of “the admissions practice of a women’s college”). Hellman argues that the two types of discrimination use classifications differently and for different purposes—thereby necessitating different types of “moral inquiry”—but that the law (specifically, the Supreme Court’s Equal Protection doctrine) has developed around the former and, consequently, “lacks the appropriate analytical tools to ad-

decision making escapes legal sanction. Recent legal scholarship has been particularly critical of the prevailing model of intentional discrimination.<sup>15</sup> Scholars have pointed out the inadequacy of individual adjudication under that model to account for the largest share of modern-day discrimination by illuminating the complex and subtle means by which race has come to carry its significant and pernicious associations.<sup>16</sup>

---

dress" the latter. *Id.* at 316. As might be obvious from its title, this Article focuses on what Hellman would call "proxy discrimination." *Id.*

14. An incomplete list of such protections would include constitutional and statutory provisions prohibiting racial and other forms of discrimination in government action, U.S. CONST. amends. V, XIV; employment, 42 U.S.C. § 2000(e) (2000); housing-related activities, 42 U.S.C. § 3601 (2000); the making and enforcement of contracts, 42 U.S.C. § 1981 (2000); programs or activities receiving federal financial assistance, 42 U.S.C. § 2000(d); and public accommodations, 42 U.S.C. § 2000(a).

15. Although the letter of the constitutional or statutory provision in question might be read more broadly, *see, e.g.,* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 748-53 (2001) (pointing out the potential for legal recognition of theories such as stereotyping and disparate impact in antidiscrimination law), judicial interpretations of antidiscrimination law and the practical difficulties of pursuing an alternative cause of action have made the intentional model of discrimination the sole or predominant model for individual adjudication of claims of discrimination in many contexts. *See, e.g.,* *Washington v. Davis*, 426 U.S. 229, 237 (1976) (holding disparate impact not actionable under Equal Protection clause; requiring proof of "discriminatory purpose"); *Whren v. United States*, 517 U.S. 806 (1996) (holding Fourth Amendment inapplicable to claims of racial discrimination in law enforcement; relegating such claims to Equal Protection analysis); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (holding disparate impact not actionable under Title VI of Civil Rights Act of 1964, 42 U.S.C. § 2000(d), which requires a showing of intentional discrimination); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding disparate impact not actionable under Title VI regulations); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (holding that liability under 42 U.S.C. § 1981 requires proof of intent to discriminate). *See also* Chamallas, *supra*, at 748-49 (noting that "[t]he legal construction used most consistently to address discrimination is 'intentional disparate treatment,' which tends to require proof of a conscious intent to discriminate, often based upon animus or hostility"); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 n.57 (1991) (reporting on American Bar Foundation survey that found that less than 1.84% of employment discrimination cases filed between January 1, 1985 and March 31, 1987 were disparate impact cases).

This Article does not focus on a specific setting or doctrinal context (but see discussion *infra* Part IV on medical care), but instead points out inadequacies of individual adjudication under the intentional model of discrimination as means of redressing discrimination generally.

16. Scholars have noted and criticized the dominance of the intentional discrimination model in a wide range of contexts. *See, e.g.,* Chamallas, *supra* note 15; Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998) [hereinafter Krieger, *Civil Rights Perestroika*]; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) [hereinafter Krieger, *The Content of Our Categories*]; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

For example, legal scholarship drawing from cognitive and social psychological research has shown the inadequacy of the intentional discrimination model to account for the ways in which racial and other group-based biases are most likely to infect individuals' decisions in contemporary times.<sup>17</sup> In an era that is characterized by the widespread, explicit adoption of nonracist, egalitarian ideals and the general decline of old-fashioned, overt racial bigotry, fewer individuals than in the past are likely to be motivated by discriminatory animus.<sup>18</sup> Most of us are afflicted instead with unconscious cognitive and motivational biases that lead us to reflexively categorize, perceive, interpret the behavior of, remember, and interact with people of different races differently. These unconscious biases, in turn, can lead us to treat people differently based on race, but without intending to or even being aware that we are doing so.<sup>19</sup>

Legal scholars also have shown that the intentional discrimination model fails to provide for the context in which a decisionmaker operates. A theory of institutional racism<sup>20</sup> offers an account of individual decision making within the cultural context that "nicely dovetail[s]"

17. Krieger has pointed out that the law has not kept pace with developments in social scientists' understanding of discrimination, as current legal standards reflect the state of psychological research on discrimination from the 1920s into the 1980s. Krieger, *The Content of Our Categories*, *supra* note 16, at 1174.

18. See generally John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3* (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998); Lawrence, *supra* note 16.

19. See generally Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995); Krieger, *The Content of Our Categories*, *supra* note 16; Thompson, *supra* note 16.

20. This theory was developed by Ian Haney López, who drew upon New Institutionalism, "a genre within organizational sociology." Haney López, *supra* note 16, at 1723. Haney López explains that the focus of institutional racism is on

[h]ow racial institutions, whether followed in a script or path form, operate as taken-for-granted understandings of the social context that actors must adopt to make sense of the world, as well as to be accepted as bona fide members of that milieu. Under the sway of institutional racism, persons fail to recognize their reliance on racial notions, and indeed may stridently insist that no such reliance exists, even while acting in a manner that furthers racial status hierarchy.

*Id.* at 1827. He illustrates this theory through an examination of the grand juror nominating process in Los Angeles, a process that in the 1960s resulted in "the near total exclusion of Mexican Americans from service on grand juries in Los Angeles," although each nominating judge claimed to have "harbored no intention to discriminate," and which did little better at nominating Mexican Americans by the 1990s. *Id.* at 1722, 1728.

Building upon the work of Haney López, René Bowser has applied the theory of institutional racism to show how racialized medical research contributes to racial disparities in medical decision making. See Bowser, *supra* note 5. See also *infra* notes 426-435 and accompanying text.

with cognitive theory.<sup>21</sup> This theory shows how the cultural context produces (and reproduces) unintentional discrimination when “frequently repeated but largely unexamined social practices or patterns”<sup>22</sup> become so familiar that they form uncontested, taken-for-granted, background understandings that come to define what is “normal,” and, in turn, what is “real” and even “natural.”<sup>23</sup> These social<sup>24</sup> practices, norms, and processes thereby promote and perpetuate discriminatory decisions without any individual intending to discriminate and without the discrimination being noticed.<sup>25</sup> As a result, racially disparate outcomes are expected and regarded as inevitable.<sup>26</sup>

This Article supplements those accounts of cognitive, motivational, and cultural influences on discrimination by examining the influence of the immediate situation in producing racially biased conduct, with a particular focus on one-on-one social interactions. It describes two lines of social psychological research that highlight the capacity of situations to both promote and obscure discrimination, thereby reinforcing the expectation and acceptance of racially disparate treatment and outcomes. The first, which has been developed in conjunction with the theory of aversive racism,<sup>27</sup> demonstrates the power of ambiguous situations to channel discrimination even while masking it. This research shows, in other words, that individuals are most likely to discriminate in situations in which their behavior is least likely to be viewed as discriminatory—thereby providing “cover” for their racially biased conduct. The second line of research shows how racial bias can actively create such situations, by showing that stereotypes do not just influence how individuals categorize and perceive others based on race, but also can play a role in eliciting *from the target* objective “evi-

---

21. Haney López, *supra* note 16, at 1812 n.357 (discussing connections and differences between New Institutionalism, upon which he builds his theory of institutional racism and cognitive psychology).

22. *Id.* at 1723.

23. *Id.* at 1724.

24. Although Haney López focuses his analysis on individual decision making within organized settings, when its “explanatory power is particularly pronounced,” he notes that “[a]ll of social life depends on background routines and understandings, making institutional racism theory widely applicable.” *Id.* at 1823.

25. *Id.*

26. *Cf.* Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 *Geo. L.J.* 667, 674-78 (1997) (discussing ways in which the “wretched conditions” suffered by some groups come to seem “normal and ordinary” to others and citing example of conditions suffered by poor Mexicans living in shanty towns, or *colonias*, on the Texas border).

27. See generally Dovidio & Gaertner, *supra* note 18; Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in *PREJUDICE, DISCRIMINATION, AND RACISM* 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986). See also *infra* notes 172-174 and accompanying text.

dence” to simultaneously confirm the stereotype and obscure its influence.

The situation-sensitive, contingent nature of these dynamics produces a state of affairs in which, as Linda Hamilton Krieger has written:

[W]e can predict that intergroup bias will cause discrimination. But we cannot say that intergroup bias will *always* cause discrimination to occur, nor can we predict exactly *when* discrimination will occur. We might not even be able to identify when discrimination *has* occurred.<sup>28</sup>

The failure to appreciate the interacting influences of unconscious bias, institutional norms, and situational channeling results, as Krieger also has written, in “a fundamental ‘lack of fit’ between the jurisprudential construction of discrimination and the actual phenomenon it purports to represent”<sup>29</sup>—the direct consequence of which is the inability of individuals to secure legal redress for their injuries when they have suffered losses as the result of discrimination that does not fit the traditional mold. A less obvious but no less serious consequence of the conventional model is that it stands in the way of meaningful social change and itself becomes a link in a feedback loop that perpetuates an artificial conception of bias. Traditional legal standards, in other words, are themselves part of the problem, to the extent that they direct attention to the search for invidiously motivated individual decisionmakers and away from the need and potential for institutional change—altering the “situation”—as a means of disrupting the noninvidious, “normal,” but no less problematic routes by which we perpetrate and perpetuate discrimination.

Moreover, when we limit our focus—and indeed, our condemnation—to discrimination that can be characterized as deviant and invidiously motivated, we construct discrimination that was influenced by the social context as being legitimate and even desirable or, alternatively, as regrettable but inevitable. Even worse, we justify that discrimination on “moral” grounds. As Charles Lawrence has explained: “[I]f there is no discrimination, there is no need for a remedy; if blacks are being treated fairly yet remain at the bottom of the socioeconomic ladder, only their own inferiority can explain their subordinate position.”<sup>30</sup> In other words, the traditional, “perpetrator”-focused per-

28. Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1313.

29. Krieger, *The Content of Our Categories*, *supra* note 16, at 1217.

30. Lawrence, *supra* note 16, at 325. See also Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 312 (1990). Ross notes that, conversely, “[t]he existence of unconscious racism undermines the rhetoric of innocence. The ‘innocent white victim’ is no longer quite so innocent.” *Id.* See also SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 86



spective itself perpetuates discrimination, for it institutionalizes the notion that much of the differential treatment of people of color is acceptable and appropriate.<sup>31</sup>

This Article makes the case for institutional change as a means of disrupting the processes by which we come to expect and accept that state of affairs. It argues for lessening our emphasis on individual wrongdoers and increasing our attention to the context in which individuals operate.

Part II begins the argument by showing that individual adjudication under the intentional model of discrimination is inadequate to redress the largest share of modern discrimination, because the situations in which discrimination is easy to see are not the ones in which it is most likely to be found. Part II examines social psychological research showing not only that racially biased conduct is situation sensitive, but also that the very same “normatively ambiguous” situations that promote discrimination are those that tend to obscure it. Furthermore, the individual who discriminates in such a situation may well do so without intention or awareness, because the situation can conceal the influence of racial bias from the perpetrator as well as the observer. As a result, the actor and observer—and even the victim of discrimination—may not realize what has happened and may view the actor’s conduct not as racially biased, but as appropriate or justified.

Part III builds upon the points developed in Part II by showing that situations are not purely “given.” That is, individuals themselves can actively (although often unwittingly) construct the very situations that channel, seem to justify, and thereby mask racially biased conduct. Specifically, Part III examines the power of people, acting on racial stereotypes, to define situations in normatively ambiguous terms by eliciting from the target of the stereotype the very “evidence” that appears to confirm, and that thereby strengthens, the stereotype. It will point out, however, that the real power of racial stereotypes lies not so much in their ability to define situations in this way, but in their ability to do so while concealing the role that they played.

Part IV brings together the situational account elaborated in Parts II and III with the unconscious bias and institutional accounts of discrimination that have been developed by other legal scholars. It shows how these dynamics interact in one context that has raised serious concern in recent years—racial bias in medical care—to produce

---

(1991) (discussing tendency of individuals to blame victims for their misfortunes, thereby maintaining belief in a just world).

31. Cf. Haney López, *supra* note 16, at 1723-24.

an invisible, self-fulfilling, and self-perpetuating prophecy of racial disparity.

Part IV, as well as the Article itself, ends on a more optimistic note by pointing out the potential for institutional change to disrupt the seemingly inexorable processes that channel and mask the use of race as proxy. In other words, it argues that we can, if we so choose, alter situations in ways that unmask and disrupt the self-fulfilling prophecy, so that racial discrimination no longer seems either inevitable or justified.

## II. SITUATIONAL RACISM

Traditional legal standards for discrimination reflect the influence of lay psychology on how the law understands human behavior and assesses responsibility.<sup>32</sup> The intent requirement itself mirrors lay concepts of responsibility for negative outcomes, which center on the question of whether the actor intended to produce that result.<sup>33</sup> Associated assumptions about the kind of person who discriminates and his decision-making process<sup>34</sup> reflect the even more fundamental lay assumption that an individual's behavior is largely determined by his character, including his attitudes and beliefs.<sup>35</sup> The conventional pro-

---

32. Legal and lay conceptions of discrimination are often equivalent, for the legal standards that have been developed tend to reflect "lay psychology" or "folk theories" of prejudice and discrimination, or to invite their application through the fact-finding process. See generally Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1242-46, 1266-72 (2002) (discussing "folk theories" of prejudice and stereotyping that are incorporated into legal scholarship and advocacy); Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, in UNINTENDED THOUGHT 253, 268-75 (James S. Uleman & John A. Bargh eds., 1989) (comparing "intent as viewed by lay psychology" and as viewed by "legal psychology"—including intent to discriminate—and noting that many of the same principles are used to infer intent in both lay and legal settings; noting also, however, that "to some extent, these principles overlap with what scientific psychologists have written about intent"); Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1309-11 (describing standard "discrimination schema" likely to be employed by jurors).

33. See FISKE & TAYLOR, *supra* note 30, at 83-84 (discussing role of causal attribution in assigning blame or responsibility and stating that "[b]lame attributions tend to be made only when an actor is seen as intending to produce an outcome, and achieving a negative outcome was the actor's purpose").

34. Some of these assumptions have been captured in the "discrimination schema" described by Krieger, see Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1309-11, and the "folk theories" of prejudice and discrimination described by Blasi, see Blasi, *supra* note 32, at 1242-46, 1266-72.

35. This focus on character-based, internal explanations leads us to equate, and even to conflate, discrimination with bad character. Conversely, when we attribute disparate treatment to external or situational factors, we tend—as with other negative outcomes that are attributed to the situation—to view it as justified or understandable. Indeed, we may not even label it "discrimination" at all, but characterize it simply as a rational reaction to a particular set of objective facts. Thus, for example, a criminal who targets Asian immigrants for violence because of his

tototype of discrimination thus does not just equate discrimination with an intent to discriminate, but also assumes that someone who discriminates has a “taste for discrimination”<sup>36</sup> that “functions like a personality trait: it is something that exists inside the discriminator. It is relatively stable and expresses itself consistently over time and across different situations.”<sup>37</sup> Accordingly, lay and legal observers both tend to disregard the influence of the situation on another person’s behavior, believing that only someone who “is” prejudiced or racist would discriminate on the basis of race, and to expect that someone who discriminated in one set of circumstances would do so in another—or, conversely, that someone who did not discriminate in one situation would not in another.<sup>38</sup>

We make a big mistake when we focus on the decisionmaker’s character and disregard the situation in defining and understanding dis-

hostility toward foreigners is considered to have committed a discriminatory “hate” crime, but one who targets Asian immigrant shopkeepers for robbery because he views them as easy targets or as unlikely to report the crime is viewed not as discriminating, but instead as behaving as a rational robber naturally would. *See, e.g.,* Lu-in Wang, *The Complexities of “Hate,”* 60 OHIO ST. L.J. 799, 823-24 (1999) (discussing view that a perpetrator who targets a particular social group not out of animus but based on a cost-benefit analysis does not act with a punishable biased motivation).

The tendency to draw sharp distinctions between character- and situation-based explanations for others’ behavior also introduces circularity into assessments of the acceptability of that behavior. People’s expectations of how others typically behave in particular situations tend to bias their explanations for and judgments of others’ behavior. Behavior that is unexpected or considered extreme tends to be attributed to the actor’s character and judged to be inappropriate or unjustified, while behavior that is expected or viewed as typical tends to be attributed to the situation and judged as appropriate or justified. *See* Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 26 (1995) (discussing role of expectations in causal attribution). (Even the referenced assessments of typicality may be biased by unrealistic expectations of how both we and others would behave in various situations. *See id.* at 27 (discussing causes of biased assessments of typicality).) The former bias may explain why people generally do condemn extreme acts of discrimination such as hate crimes, which they tend to attribute to the perpetrators’ deviant characters but not to situational influences. The converse tendency, in contrast, may explain why more mundane forms of discrimination are seen as acceptable. People may overlook the biased beliefs or attitudes that contribute to more ordinary kinds of discrimination such as racial profiling in law enforcement, and instead see the practice as responsive to the situation and therefore not discriminatory.

36. Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1310 (quoting the term used by economists) (citations omitted).

37. *Id.* at 1311.

38. Krieger illustrates this line of reasoning using the “same actor” doctrine in employment discrimination law:

[T]he same actor doctrine[ ] hold[s] that if the same person who hired an employee makes the decision to fire him, a strong inference or presumption of nondiscrimination arises. This inference is seen as justified because it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.

*Id.* at 1310 (citations omitted).

crimination, however, because the most basic error people make in assessing human behavior lies in drawing this distinction. We tend to see someone else's conduct as being mostly or even exclusively determined by character (the kind of person she is) while overlooking the context in which the person is acting. This fundamental attribution error<sup>39</sup> or correspondence bias<sup>40</sup> is "[p]erhaps the most commonly documented bias in social perception" in Western cultures,<sup>41</sup> and causes us to attribute another person's behavior to his or her enduring *dispositional* qualities (such as personality, beliefs, or attitudes) while overlooking the influence of *situational* factors (such as constraints or expectations introduced by the social context).<sup>42</sup> (And, as later sections will discuss, the fundamental attribution error does not just distort perceptions of *why* people discriminate, but also is itself an important contributor to discrimination.)<sup>43</sup> The fundamental attribution error, along with related biases,<sup>44</sup> causes us to draw erroneous inferences about people's characteristics and qualities from their behavior and to have unrealistic expectations for their behavior.<sup>45</sup> It

39. FISKE & TAYLOR, *supra* note 30, at 67; LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 125 (1991).

40. Some writers prefer the term "correspondence bias." See, e.g., Gilbert & Malone, *supra* note 35. I use the terms interchangeably.

41. The fundamental attribution error is "a ubiquitous part of Western causal inference, but is not as dominant in non-Western cultures." FISKE & TAYLOR, *supra* note 30, at 68. A number of explanations have been offered for the relationship between Western culture and the belief that character determines behavior, including "the Judeo-Christian insistence on individual moral responsibility [and] the intellectual underpinnings of capitalism and democracy in terms of the imperative of freedom of action." ROSS & NISBETT, *supra* note 39, at 142. See also Gilbert & Malone, *supra* note 35, at 35 (discussing influence of capitalism).

42. See, e.g., FISKE & TAYLOR, *supra* note 30, at 67; ROSS & NISBETT, *supra* note 39, at 129-33. See also Gilbert & Malone, *supra* note 35, at 21 (colorfully describing the correspondence bias as our tendency to focus on "the meaty side" of the person's skin (internal or personal forces), rather than on the "sunny side" (external or situational forces)).

This bias has significant, far reaching implications for antidiscrimination law and policy for, as Krieger has stated, "At its core, our antidiscrimination law and policy suffers [sic] from a cognitive bias known . . . as the fundamental attribution error." Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1329.

43. See *infra* notes 220, 232, 235, 379-380, 476-477 and accompanying text for examples of how the fundamental attribution error contributes to discrimination. See also Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1327 (stating that "[a]ttributing the causes of employment decisions implicates the very processes of social perception and judgment bound up in the challenged employment decisions themselves.")

44. Gilbert and Malone have explained that the correspondence bias actually "comprises a number of distinct phenomena that only pose as one." Gilbert & Malone, *supra* note 35, at 22. They have described four separate causes of the general phenomenon: "(a) lack of awareness, (b) unrealistic expectations, (c) inflated categorizations, and (d) incomplete corrections." *Id.* at 24-25.

45. See generally FISKE & TAYLOR, *supra* note 30, at 67-72 (providing examples); ROSS & NISBETT, *supra* note 39, at 125-38.

leads us both to overemphasize the importance of character in determining another person's behavior and to expect people to behave consistently in different situations.<sup>46</sup> Internally focused, disposition-based inferences often are not warranted, however, especially when the person's behavior is consistent with incentives, constraints, pressures, or expectations introduced by the situation.<sup>47</sup> For example, a teacher may be stern and business-like in the classroom because he or she needs to cover assigned course material within the allotted time, rather than because of a generally no-nonsense personality. Nor do people always behave consistently across contexts, for different situations present different opportunities and limitations.<sup>48</sup> The same teacher who is stern in the classroom may be kind and solicitous during office hours, when he or she is free of time pressure.

---

46. According to Ross and Nisbett, the fundamental attribution error comprises two more specific biases: "an overeager dispositionism and an underdeveloped situationism," both of which have been empirically demonstrated. ROSS & NISBETT, *supra* note 39, at 130. *See also id.* at 126. The fundamental attribution error also leads to a third tendency, to "(3) make overly confident predictions when given a small amount of trait-relevant information." *Id.*

47. In one experimental setting, for example, observers failed to appreciate the influence of financial incentives in motivating people to volunteer for special projects, instead viewing their willingness or unwillingness to do so as a reflection of their helpful or unhelpful dispositions and, therefore, as predictive of whether or not the person observed would volunteer to help in a different situation. Richard E. Nisbett et al., *Behavior as Seen by the Actor and as Seen by the Observer*, 27 J. PERSONALITY & SOC. PSYCHOL. 154, 157 (1973). In fact, the actors' willingness to volunteer was directly related to the amount of payment offered. *Id.* The actors themselves seemed to appreciate the influence of the financial incentive on their decision, for they "explained their behavior in terms of the sum of money they were offered." ROSS & NISBETT, *supra* note 39, at 140 (discussing this experiment).

This divergence between observers' and actors' explanations illustrates another tendency: for the converse of the correspondence bias to influence people's explanations of their own conduct. That is, while individuals tend to attribute *other* people's behavior to dispositional factors, they are keenly aware of how the situation affects *their own* behavior. *See FISKE & TAYLOR, supra* note 30, at 72-73, 75 (noting, however, that this effect is modest in size and can be reversed); ROSS & NISBETT, *supra* note 39, at 140-41. Not surprisingly perhaps, actors also have a tendency to see their own positive behaviors as reflecting their personal qualities, but their negative behaviors as responsive to external pressures. *See FISKE & TAYLOR, supra* note 30, at 74, 78-79. (Similarly, there is a tendency to take credit for success and deny responsibility for failure, by attributing ones' own success to dispositional factors and failure to situational factors.) This self-serving bias extends beyond one's self, to include groups with which one is allied. *See FISKE & TAYLOR, supra* note 30, at 80-81. A "group serving" or "ethnocentric" double standard in perception and understanding—which, again, has been found to be more pervasive and robust in Western than in non-Western cultures—may help to explain why interpretations can vary so widely between groups as to whether particular conduct is based in biased attitudes or merely responsive to the situation, and therefore whether or not it is discriminatory. *See id.* at 81.

48. *See generally* ROSS & NISBETT, *supra* note 39, at 3-6, 27-58 (discussing power of situational influences on human behavior). For example, as social psychologist Ziva Kunda has noted, the polite, unassuming neighbor sometimes turns out to be a serial killer. *See ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 426-27 (1999).

Likewise, an individual's decision to treat people of different races differently does not necessarily reflect a basically racist personality, and an individual who discriminates on the basis of race in one setting may not do so in another. Whether a person discriminates may—and as this Article will discuss, often does—depend upon the situation.<sup>49</sup>

Moreover, if we tend generally to overlook situational influences on human behavior, we are especially prone to under-appreciate the existence and effect of precisely the kinds of factors that most strongly influence discrimination. Social constraints, such as roles, expectations, norms, and stereotypes, can be powerful influences on a person's behavior, and may be no less a feature of the situation than physical or temporal constraints, such as bad lighting or time pressures.<sup>50</sup> But, because they exist in the actor's brain and affect the actor's interpretation of the situation,<sup>51</sup> these forces often are invisible to the observer.<sup>52</sup>

Social psychological research has shown that situations play a far greater role in driving behavior than we tend to appreciate.<sup>53</sup> More specifically, and as this section will elaborate, it has shown that some situations can promote discrimination even while (and perhaps by) allowing it to escape notice, thus leading us to miss seeing it in precisely those situations in which it is most likely to occur.<sup>54</sup> Furthermore, as Part III will discuss, research also shows that group-based biases themselves can actively create such situations by channeling the target's behavior in a way that appears to warrant a racially differential response, while simultaneously concealing their own influence on the situation. In other words, discriminatory behavior sometimes has the

---

49. See, e.g., Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1312-16 (discussing "the situation-dependent nature of biased decision making").

50. See Gilbert & Malone, *supra* note 35, at 25 (discussing invisibility of some situational influences, including social norms).

51. Observers may perceive the situation differently from how the actor understands it, when it is the actor's version of the situation that is relevant for purposes of explaining her behavior. See *id.* at 26. This is most likely to be the case when psychological constraints, such as social pressures or incentives, are at work. *Id.*

52. See *id.* at 25. Thus, for example, observers often fail to recognize that a person's role in a given situation restricts the range of behavioral options available to him or her, and will unjustifiably judge a person's disposition or abilities without taking those limitations into account. They might, for example, view clerical workers who perform low-skilled, repetitive tasks as lacking in leadership, assertiveness, and intelligence, while viewing managerial workers who have more autonomy possessing these qualities—without recognizing that their jobs largely determine whether or not people have the opportunity to demonstrate particular traits. See Ross & Nisbett, *supra* note 39, at 128 (summarizing findings of Ronald Humphrey, *How Work Roles Influence Perception: Structural-Cognitive Processes and Organizational Behavior*, 50 AM. SOC. REV. 242 (1985)).

53. See discussion *infra* subpart II(A).

54. See discussion *infra* subpart II(B).

power to generate its own, apparently nondiscriminatory, justifications.

A. “*The Power of the Situation*”:<sup>55</sup> *Channel Factors, Helping and Harming*

We often respond more readily to contextual circumstances, and less readily to internal guides such as attitudes or beliefs, than might be expected. Moreover, seemingly trivial or subtle differences in the situation can produce substantial differences in behavior. Whether or not we get a flu shot as recommended each winter may depend more on the location and hours of the vaccination clinic than on our awareness of the benefits of receiving the inoculation,<sup>56</sup> and our decision to donate to a particular charity may depend more on whether we receive a direct, personal request than on our agreement with the organization’s cause.<sup>57</sup> Even how much we eat can be influenced more strongly by external factors, such as how food is packaged, presented, or priced, than by internal factors such as hunger or lack of will power.<sup>58</sup> Social psychologists call these small but mighty influences “channel factors” because of the critical role they play in directing behavior. First, a channel factor determines how an individual defines a situation—what kind of a situation it is, what interests are at stake, and so forth; then, it “channels” his or her behavior by indicating the appropriate conduct for that situation, essentially opening or closing pathways for action.<sup>59</sup>

Even how we treat other people can be influenced more strongly by the situation than by our own dispositions. In a collection of now classic experimental studies, social psychologists discovered that what seem to be insignificant features of a situation can influence people to refrain from helping and even to actively mistreat others. Indeed, sometimes very mild constraints can lead people to engage in abusive

---

55. ROSS & NISBETT, *supra* note 39, at 27.

56. *See id.* at 10-11 (discussing substantial effect on medical compliance of simple situational factors, in contrast to small effect of beliefs and attitudes).

57. *See id.* at 47-48 (discussing the use of social psychological insights to promote purchases of U.S. bonds during World War II and to increase the success of charitable and business solicitations).

58. *See* Erica Goode, *The Gorge-Yourself Environment*, N.Y. TIMES, July 22, 2003, at D1 (Social scientists’ findings show that “people do not gorge themselves solely because they lack self-control. Rather . . . a host of environmental factors—among them portion size, price, advertising, the availability of food and the number of choices presented—can influence the amount the average person consumes.”).

59. “Channel factors” are apparently minor but actually important details of the situation that function as “critical facilitators or barriers” to action by either opening or blocking a “channel” for behavior. ROSS & NISBETT, *supra* note 39, at 10.

conduct even when they do not wish to cause the other person harm and are distressed by the knowledge that they are doing so.

A variety of contextual factors can inhibit or promote helping behavior. In a famous study inspired by the biblical parable of the "Good Samaritan," seminary students were much more likely to help a stranger in distress if they were not in a hurry than if they were late for an appointment and therefore in a rush.<sup>60</sup> (Sixty-three percent of students in the former situation helped, while only ten percent of students in the latter situation did.<sup>61</sup>) While the existence or absence of time pressure determined whether a seminarian would stop and help, the students' own religious beliefs had no significant effect,<sup>62</sup> nor did it matter much whether they had specifically been reminded of the helping behavior of the Good Samaritan just prior to encountering the hapless stranger.<sup>63</sup> The students who were in a hurry and did not stop were not just being callous, however. In some cases those students moved on without helping simply because they did not have or take time to observe what was happening around them and therefore did not appreciate the victim's need for help.<sup>64</sup> Some students actually stepped over the victim in their rush to get to their destination.<sup>65</sup> In other cases, students in a hurry did not stop to help the victim because they felt a sense of obligation to get to the appointment for which they were running late and at which another person was depending on them *to help him*.<sup>66</sup> (Conversely, it has been suggested that the students who were not in a hurry because they were running *early* for their appointments may have stopped in part because they were looking for a way to fill the time.)<sup>67</sup>

Another classic set of studies on helping behavior was inspired by the infamous Kitty Genovese case, in which a woman was stabbed repeatedly over a period of thirty minutes with at least thirty-eight people within earshot, none of whom came to her aid or even called the police.<sup>68</sup> These studies also demonstrated the importance of situa-

---

60. John M. Darley & C. Daniel Batson, *From Jerusalem to Jericho: A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY & SOC. PSYCH. 100 (1973).

61. *Id.* at 105.

62. *Id.* at 106 (reporting no significant correlation between "types of religiosity" and helping).

63. *Id.* at 105.

64. *Id.* at 107-08.

65. *Id.* at 107.

66. Darley & Batson, *supra* note 60, at 108. For discussion of the ethical implications of such a scenario, see Geoffrey C. Hazard, Jr., *Dimensions of Ethical Responsibility: Relevant Others*, 54 U. PITT. L. REV. 965, 971-73 (1993).

67. See ROSS & NISBETT, *supra* note 39, at 49.

68. John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377 (1968).



tional variables—this time, the presence or absence of other bystanders. They showed that people were highly likely to help a stranger who was in danger if no other bystanders were available to help, but were less and less likely to intervene as the number of other bystanders increased.<sup>69</sup> The presence of other potential helpers is believed to channel unhelpful behavior in part because it dilutes or diffuses each person's sense of responsibility to help.<sup>70</sup> An individual bystander might reason, for example, that someone else is likely to help or that others would be more competent to help.<sup>71</sup> In addition, the inaction of others constructs the situation as one in which the victim's plight is not so serious and intervention would be both unwarranted and inappropriate.<sup>72</sup>

Harming behavior, too, can be greatly influenced by the situation. A disturbing set of eighteen studies by psychologist Stanley Milgram between 1960 and 1963 revealed the ease with which individuals can be manipulated to hurt others.<sup>73</sup> Milgram's studies showed the literally shocking lengths to which people of different ages and education levels and from different walks of life<sup>74</sup> would go in knowingly harming others when the social context led them to feel as if they had no choice but to do so—even when it should have been clear to them that they did. At the same time, however, the studies showed that the subjects' actions in inflicting harm were not consistent with their values, not expressions of aggression, nor even simply the consequence of their having especially weak characters. Instead, their actions were a product of how the situation and their options for responding to it were presented to and perceived by the subjects. Here again, seemingly mild features of the situation played an important role in both defining the situation and signaling to the actor the appropriate course of conduct—or, to be more precise, in failing to provide the actor with a “way out” of harming another.

---

69. *Id.* at 379-80.

70. *Id.* at 382.

71. See Samuel L. Gaertner & John F. Dovidio, *The Subtlety of White Racism, Arousal, and Helping Behavior*, 35 J. PERSONALITY & SOC. PSYCHOL. 691, 703 (1977).

72. See Darley & Latané, *supra* note 68, at 382 (speculating that subjects were “concerned not to make fools of themselves by overreacting,” among other worries).

73. Milgram described and analyzed these experiments in STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974). The ways in which the studies illuminate the “power of the situation” are discussed in ROSS & NISBETT, *supra* note 39, at 53-58.

74. See MILGRAM, *supra* note 73, at 14-16 (describing demographic diversity of participants in study). In all but one of the studies the subjects all were men. When women were subjects, their level of obedience “was virtually identical to the performance of men,” although women showed higher levels of conflict about their actions. *Id.* at 63 (citations omitted).

The basic experiment was presented to subjects as a study of the effect of punishment on memory and learning. Each subject was assigned, apparently randomly, the role of “teacher,” in which he was to conduct a paired-associate word learning task that required responses of another volunteer, the “learner.” The learner was strapped into an “electric chair”<sup>75</sup> in a separate room from the teacher, and the chair appeared to be connected to a shock generator that the subject would control.<sup>76</sup> The experimenter told the subject to give the learner a shock each time the learner gave a wrong answer, and to increase the level of shock given with each wrong answer.<sup>77</sup> The thirty lever switches on the shock generator had been marked with voltage designations (in increments of fifteen, from 15 to 450 volts) and with descriptive designations for groups of four switches, going from left to right and from lower to higher voltage levels: Slight Shock, Moderate Shock, Strong Shock, Very Strong Shock, Intense Shock, Extreme Intensity Shock, and Danger: Severe Shock. The two switches after that were labeled simply “XXX.”<sup>78</sup> Subjects were told that the shocks “could be extremely painful” but would “cause no permanent tissue damage.”<sup>79</sup>

Milgram, other behavioral scientists, and lay people whom Milgram surveyed before he conducted the studies all had predicted that almost no one, including themselves, would apply the highest levels of shock.<sup>80</sup> Their predictions were based upon the assumptions that people generally do not wish to hurt others and are motivated by “empathy, compassion, and a sense of justice.”<sup>81</sup> Further, they believed that individuals’ actions are driven by their personal values and that they will not act in contradiction of those values unless they are threatened or physically forced to do so.<sup>82</sup>

What Milgram found when he put these assumptions to the test was startling. The learner expressed discomfort at seventy-five volts, then, as the shock levels rose, protested verbally and increasingly vehemently, demanded to be released, eventually screamed in agony and

---

75. Thus restrained, the learner was apparently unable to escape. An electrode had been attached to his wrist after electrode paste was applied “to avoid blisters and burns,” and the subject was told that the shock generator was connected to the electric chair. The subject also was given a sample shock of forty-five volts. *Id.* at 19.

76. *Id.* at 19-20.

77. *Id.* at 20-21. In fact, although unbeknownst to the subject, the learner would not actually receive these shocks. *Id.* at 3.

78. MILGRAM, *supra* note 73, at 20.

79. *Id.* at 19.

80. *Id.* at 28-31.

81. *Id.* at 30, 31.

82. *Id.* at 31.

pounded the wall with each shock, and, finally, stopped responding to the memory test and fell silent, even as he continued to “receive” shocks for failing to respond.<sup>83</sup> Nevertheless, most subjects continued to raise the voltage to the highest level,<sup>84</sup> frequently to their own psychological discomfort and even physical distress. Several subjects became so distraught that they began shaking, sweating, and stuttering, and some developed uncontrollable cases of nervous laughter.<sup>85</sup> While many subjects expressed no verbal resistance to continuing the experiment, a number did state their reluctance to continue, protested against continuing the experiment, or denounced the exercise as “stupid and senseless.”<sup>86</sup> Surprisingly, however, few subjects—even among those who protested—actually terminated their participation. Most continued to the end without the application of any force or compulsion other than the experimenter’s calm instructions, repeated as necessary, that they had no choice but to do so because the experiment required them to go on.<sup>87</sup> In fact, all subjects should have known that they did have the choice whether or not to continue, for each knew that a failure to obey would result in no punishment—not even the loss of the fee the subject had been paid to participate.<sup>88</sup>

What explains these breathtaking results? Milgram sought to answer that question by testing a series of small variations on the basic experimental set up—altering, for example, the institutional context,<sup>89</sup> the physical proximity of the learner or the experimenter to the subject,<sup>90</sup> the number of teachers,<sup>91</sup> the number of experimenters and their instructions to the subject,<sup>92</sup> the choices of shock level available to the subject-teacher,<sup>93</sup> and the role of the recipient of the shocks.<sup>94</sup> Some contextual changes had no significant effect on subjects’ obedi-

---

83. *Id.* at 22-23.

84. MILGRAM, *supra* note 73, at 40-41.

85. *See id.* at 33, 41-42, 53-54, 80, 161. Some subjects, on the other hand, did not show signs of distress. *See id.* at 46-47 (obedient subject), 49-50 (obedient subject), 84-85 (disobedient subject).

86. *Id.* at 41, 161-62.

87. *Id.* at 9, 21-22, 74-76.

88. *Id.* at 41.

89. Milgram changed it from the impressive environs of Yale University to the shabbier offices of a purportedly private research firm. *Id.* at 66-70 (describing Experiment 10).

90. *See infra* note 110 (describing Experiments 2, 3, and 4) and text accompanying notes 115-18 (describing Experiment 7).

91. *See* MILGRAM, *supra* note 73, at 116-22 (describing Experiments 17 and 18).

92. *See infra* text accompanying notes 111-14 and (describing Experiment 15).

93. *See* MILGRAM, *supra* note 73, at 70-72 (describing Experiment 11).

94. In these variations, Milgram had the subject administer shocks to an experimenter rather than to another lay volunteer. *See id.* at 99-104 (describing Experiment 14).

ence,<sup>95</sup> while others produced significantly higher levels of disobedience.<sup>96</sup>

Based on these results, Milgram ruled out the explanation that most closely conforms to “common sense”<sup>97</sup> (meaning correspondence bias-influenced<sup>98</sup>) interpretations of the behavior observed: that the subjects, taking advantage of a situation in which their conduct was socially acceptable, were acting out feelings of aggression, pent-up anger, or sadism. Milgram noted that, in experimental variations in which subjects did not receive unambiguous instructions to administer increasingly higher levels of shock or could get away without raising the level, they did not do so.<sup>99</sup> He further pointed out that subjects in the other variations displayed distaste toward their task, with many

---

95. For example, changing the institutional setting made no difference. *Id.* at 69. Other changes that had no significant effect included: changing the location to a basement lab and having the learner mention that he had a heart problem (Experiment 5), *id.* at 57; changing the personalities of the experimenter and learner (Experiment 6), *id.* at 58-59; having women as subjects (Experiment 8), *id.* at 63; having the victim condition participation on his being released “when I say so” (Experiment 9), MILGRAM, *supra* note 73, at 66; having two authorities, one of whom became the victim (Experiment 16), *id.* at 109-10; and having a peer, rather than the subject, administer the shocks (Experiment 18), *id.* at 121-22.

In a few experiments, most subjects ceased administering shocks, but not because they were defying the authority figure. In Experiment 12, for example, the learner demanded to be shocked and the experimenter forbade it; the subjects obeyed the experimenter. *Id.* at 93. In Experiment 13, an “ordinary man,” rather than an experimenter, gave the order to continue, and “there was a sharp drop in compliance.” *Id.* at 97. In Experiment 13a (a variation on 13 that was introduced when the subject refused to continue), the ordinary man would take over the administration of the shocks. Almost all subjects in this condition protested his doing so, and some even took physical action to prevent it. *Id.* at 97-98. In Experiment 14, the experimenter was the recipient of the shocks and an ordinary man gave the orders. “At the first protest of the shocked administrator, every subject broke off, refusing to administer even a single shock beyond this point.” *Id.* at 103 (emphasis added).

96. Changes that had a significant effect on subjects’ behavior included: giving the subject a choice of what level of shock to administer; placing the learner nearby or even in physical contact with the subject, locating the experimenter in a different room from the subject; or having two experimenters give the subject conflicting instructions on whether he could or could not stop the test. For further discussion of these changes see *infra* notes 110-118 and accompanying text.

97. MILGRAM, *supra* note 73, at 166 (describing view that the subject, “in shocking the learner . . . is satisfying instinctually rooted destructive tendencies” as “the typical common-sense interpretation of the observed obedience”).

98. For discussion of the correspondence bias or fundamental attribution error, see *supra* notes 39-52 and accompanying text.

99. In one variation in particular, subjects were given the freedom to choose what level of shock to administer, with the experimenter being careful to indicate that all levers legitimately could be used. Despite being given permission and even justification for inflicting high level shocks, almost all subjects (with one or two exceptions) used only the lowest levels available; the mean shock level used was 3.6, lower even than the level (5) at which a learner would begin to express discomfort. MILGRAM, *supra* note 73, at 70-72 (describing Experiment 11), 166-67.

protesting it—all the while, however, complying with instructions to continue.<sup>100</sup>

Instead, Milgram determined that *the social structure of the testing situation* played a critical role in channeling harming behavior *despite* the individual actors' wishes. People respond to socially determined definitions of a situation. The testing situation that subjects encountered was unfamiliar to them and, thus, subjects came to it without a stable "definition of the situation"—and with the events that ensued, the testing situation did not make sense to them.<sup>101</sup> They therefore were highly influenced by the definition provided by the experimenter, whom they identified as a legitimate authority figure.<sup>102</sup> That authority prescribed the appropriate behavior for the situation. Further, with the authority directing the subjects to act in a particular way—though, again, with no real power to compel obedience—the subject's "moral focus" was not on the learner, but on the authority's expectations of him, and so the subject assessed his performance according to how well he had carried out his duty to the authority.<sup>103</sup> This sense of duty to authority, in turn, allowed the subject to separate his actions from his "self," and thereby to shift responsibility for those actions to the authority.<sup>104</sup>

The sequential, incremental nature of the prescribed actions reinforced the subject's compliance, for as he continued delivering increasingly painful shocks, the subject felt the need to justify what he had done. As Milgram explained, "one form of justification is to go to the end. For if he breaks off, he must say to himself: 'Everything I have done to this point is bad, and I now acknowledge it by breaking off.' But, if he goes on, he is reassured about his past performance."<sup>105</sup> Moreover, in order to end his pattern of conduct, the subject would have to breach the "situational etiquette" that had been established by the testing context: "[T]he subject must breach the implicit set of understandings that are part of the social occasion. He made an initial promise to aid the experimenter, and now he must renege on this commitment."<sup>106</sup> To do so, the subject would have to violate the experimenter's definition of the situation and risk appearing "arrogant, untoward, and rude."<sup>107</sup> Milgram found that most peo-

---

100. *Id.* at 165-68.

101. ROSS & NISBETT, *supra* note 39, at 57-58; *see also* MILGRAM, *supra* note 73, at 145.

102. MILGRAM, *supra* note 73, at 145.

103. *Id.* at 8, 143-45.

104. *See id.* at 149.

105. *Id.*

106. *Id.*

107. *Id.* at 150.

ple would prefer to continue inflicting severe pain on the learner than to contend with the awkwardness and embarrassment of disrupting the well defined social situation.<sup>108</sup>

Yet, changing even an apparently small feature of the testing situation produced dramatically different results—much more disobedience—if the change was one that altered the definition of the situation or opened up a “disobedience channel.”<sup>109</sup> For example, making the learner more salient to the subject, and the experimenter comparatively less so, produced significantly more disobedience.<sup>110</sup> Altering the testing situation to undermine the stability of its authority-determined definition produced the same results. Milgram did this by conducting a variation in which, instead of facing one experimenter who conveyed unequivocally the appropriate behavior, the subject faced two experimenters who gave conflicting instructions on how to behave when he balked at continuing: one experimenter told him he must continue, while the other directed him to stop.<sup>111</sup> The results of this conflict were dramatic: every subject abruptly ended the shocks at or near the point of the authorities’ disagreement. Milgram explained that the contradictory instructions “paralyzed” the action—“stopped [it] dead in its tracks”—by destroying the hierarchical structure of the situation.<sup>112</sup> (Indeed, some subjects tried to reconstruct the hierarchy by trying to determine which of the two experimenters was the *higher* authority.<sup>113</sup>) Notably, this confusion produced an immediate end to the test, whereas, in cases in which the authority’s instructions were unequivocal, nothing the learner did, no matter how insistent his pleading or dire his apparent condition, was nearly as effective. Further, no subject in the conflicting authorities experiments took advantage of the justification for inflicting pain that the instruction to continue would have provided.<sup>114</sup>

---

108. MILGRAM, *supra* note 73, at 150-51. But when other participants broke off, the subjects also were willing to do so. See *id.* at 116-21 (describing Experiment 17).

109. ROSS & NISBETT, *supra* note 39, at 57.

110. Milgram achieved these results in a series of variations in which he moved the learner increasingly closer to the subject. In one such variation, the subject was further required to place his hand over the learner’s in order to shock him. The closer proximity of the learner in these experiments produced higher levels of disobedience because, in conjunction with making the victim more prominent to the subject and the authority less so, their closeness made clearer to the subject the connection between his actions and the victim’s pain and allowed the subject to form an alliance with the victim, rather than with the experimenter. See MILGRAM, *supra* note 73, at 32-40 (describing Experiments 2, 3, and 4).

111. *Id.* at 105 (describing Experiment 15).

112. *Id.* at 107.

113. *Id.*

114. *Id.*

Milgram further discovered that offering the subject a “way out” of complying with instructions—especially a way to disobey without openly defying the authority’s directive—also produced a high degree of disobedience. Milgram created this condition by placing the experimenter in a remote location, a separate room, from which the subject perceived that the experimenter was unable to monitor the subject’s actions.<sup>115</sup> The experimenter still was able to communicate with the subject by telephone, and by phone gave the same instructions as in the basic experiment. This variation produced interesting results: First, a much higher number of subjects disobeyed the experimenter when he gave orders by telephone than when he was physically present.<sup>116</sup> Second, several subjects kept up a pretense of following instructions—reporting in their phone conversations that they were raising the shock level as directed—while actually subverting the authority by giving the lowest shock available.<sup>117</sup> Notably, the experimenter was able to restore obedience when he reappeared in the testing room.<sup>118</sup>

Milgram’s studies demonstrated the power of the social context to induce individuals, contrary to their own values or wishes, to knowingly harm innocent people.<sup>119</sup> The studies suggest the potential, in particular, for authorities to induce subordinates to commit deeds of extraordinary evil and have been cited to explain the complicity of ordinary Germans in the atrocities of the Holocaust and the actions of American soldiers in torturing and massacring civilian villagers during the Vietnam War.<sup>120</sup> At a more general level, the studies illustrate the power of small, seemingly insignificant features of a situation to channel behavior in a dramatic direction and the error in trying to interpret individuals’ actions without appreciating their understanding of

---

115. *Id.* at 59-62 (describing Experiment 7).

116. MILGRAM, *supra* note 73, at 59-62.

117. *Id.* at 62.

118. *Id.*

119. The studies also highlighted the double standard that individuals apply in explaining their own actions. Displaying the divergent biases typical of individuals in explaining their own negative and positive behavior, subjects who had complied to the end in administering the most severe shocks tended to place responsibility for their actions with the experimenter or even the “stupid” learner—that is, they attributed it to the situation—while those who disobeyed tended to attribute their decisions to their own strong values and characters. *See id.* at 7-8, 10, 203-04. *See also supra* note 47 (discussing self-serving attributional biases).

120. *See* MILGRAM, *supra* note 73, at 5-10, 175-89; ROSS & NISBETT, *supra* note 39, at 52-53. *Cf.* Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 944-46 (1991) (pointing out the power of “the mere pronouncement of something as normatively good or bad [to change] our perception of it,” and citing examples from Milgram’s experiments to public opinion of civil rights laws, the proper role of the judiciary, and professional societies’ standards of behavior).

the situation and the influence of social expectations on their perceptions of appropriate behavior.

### B. Normative Ambiguity and Modern Discrimination

These insights have particular relevance for understanding modern-day racial discrimination, which is marked by an apparent mismatch between values and behavior. Even as white Americans<sup>121</sup> are increasingly likely to report holding egalitarian, nondiscriminatory views,<sup>122</sup> Americans of color continue to report that racial discrimination is a regular, pervasive part of their daily experience.<sup>123</sup> To be sure, the discrimination of today is less likely to be as blatant or crude as the racism of the (not so) distant past, and it is sometimes so ambiguous and subtle that one cannot be entirely sure it has occurred.<sup>124</sup> Racial disparities in objective measures of well-being (including economic, educational, and health status measures),<sup>125</sup> however, would

121. Most of the psychological research on racial bias to date has focused on white Americans' racial bias against black Americans. See Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 202 (2001) ("[I]n psychology there is a substantial body of theory and research on prejudice against minority groups and on White Americans' racial bias against Black Americans in particular. By comparison, minority group prejudice against the majority has received almost no theoretical or empirical attention, and there is little reason to believe that the same psychological processes are involved."). This Article draws on social psychological research that, likewise, focuses primarily on the bias of white Americans against black Americans. See discussion *infra* subpart II(B) and Parts III and IV.

122. See, e.g., Dovidio & Gaertner, *supra* note 18, at 4 (citing survey results indicating decline in overtly bigoted opinions among whites; noting, for example, that whereas "in 1933, 75% of white respondents described blacks as lazy[,] in 1993 that figure declined to just 5%," and that "[i]n 1958, the majority of whites reported that they would not be willing to vote for a well-qualified black presidential candidate; in 1994, over 90% said that they would") (citations omitted).

123. See, e.g., Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101 (1991); Sommers & Ellsworth, *supra* note 121, at 208.

124. See, e.g., Dovidio & Gaertner, *supra* note 18, at 8, 25; Feagin, *supra* note 123, at 102-03, 108-09. See also Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565-68 (1989).

Of course, as someone who has studied and written about hate crimes, see, e.g., Wang, *The Complexities of "Hate," supra* note 35; Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47 (1997), I do not mean to suggest that overt and even violent bigotry does not continue to present a significant and serious problem. (Indeed, even as they note the general improvement in whites' attitudes toward blacks and other minorities, Dovidio and Gaertner point out that "10-15% of the white population still expresses the old-fashioned, overt form of bigotry."). See Dovidio & Gaertner, *supra* note 18, at 4. I assert merely that its acceptability and prominence have lessened over the years and that the more subtle and ambiguous discrimination on which this Article focuses is more prevalent and problematic than we might realize.

125. For data showing and discussion of black-white disparities in income, employment, and education, see generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 99-183 (1993). For discussion of racial disparities in medical treatment and outcomes, see discussion *infra* Part IV. For discussion and evidence of racial (and gender) dis-



suggest that racial discrimination persists despite the widespread social acceptance and legal institutionalization of the view that it is clearly wrong.

Of course, the reasons for the entrenchment of racial discrimination are numerous and complex, and they operate at the societal, institutional, social, and individual levels. One factor that owes its influence to the fact that it is both ubiquitous and not readily apparent lies in the channeling power of situations. In particular, social psychologists who study contemporary discrimination have discovered, much as Milgram did, the power of *ambiguity* or the lack of definitional clarity in a situation to open a channel to behavior that otherwise would seem clearly wrong.<sup>126</sup> The situational ambiguity that promotes discrimination, moreover, also serves to mask it, by shifting the actor's "moral focus" and alleviating his sense of responsibility for his behavior, much as the social structure of Milgram's basic experimental set up supported the subjects' decisions to continue shocking their partners.

Yet even as social psychologists have shown how situation-dependent and elusive racial discrimination can be, they also have shown that it is resilient. Racially biased expectations are both omnipresent and invisible, and can act as powerful channel factors in directing racially biased conduct. Like Milgram's authority figure, they can define a situation in a way that makes racially disparate treatment seem appropriate and even justified. The real power of biased expectations, however, lies not so much in their ability to define situations and channel discriminatory behavior, but in their ability to do so while concealing their own influence.

This section will examine the power of ambiguity to open the channel to discriminatory behavior, and Part III will discuss the situation-defining (and discrimination-obscuring) power of racial stereotypes.

The situations that might be expected to promote racial discrimination are not necessarily those in which it is most likely to occur. Nor are the situations in which discrimination is easy to see the ones in which it is likely to be found. One might assume that racial bias is most likely to be triggered in situations in which racial issues are prominent, such as in a criminal trial when the prosecution or defense "plays the race card" by drawing attention to racial differences be-

---

crimination in three distinct markets (retail car sales, bail bonding, and kidney transplantation), see IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001).

126. See *supra* notes 101-104 and accompanying text.

tween the defendant and victim.<sup>127</sup> For example, in a case in which a black defendant is charged with assaulting a white victim, one might expect that drawing attention to the defendant's race or presenting evidence of racial tensions between the parties would lead white jurors to judge the defendant more harshly than if racial differences were downplayed.<sup>128</sup> Such an expectation might have been warranted with respect to white juries of the past, when overtly racist norms were more acceptable than they are today.<sup>129</sup> However, as explicit racial norms have changed, so have the situational factors that are likely to cue racially discriminatory decisions and behavior.

Social psychological research shows that, today, making racial issues *salient*, rather than obscuring them, can actually reduce the racial bias exhibited by whites. Studies of white juror bias in mock trials, for example, have revealed that discrimination occurs less frequently when racial issues are highlighted than when they are downplayed. Those studies compared white subjects' decisions in cases of interracial crime involving black or white defendants when racial issues were explicitly mentioned to decisions in cases involving the same facts but no mention of race-related issues.<sup>130</sup> The subjects tended to judge black defendants more harshly than whites, and also to view the evidence against black defendants as stronger and their defenses weaker, when racial issues were not explicitly mentioned in the trial summary.<sup>131</sup> When racial issues were explicitly raised, how-

---

127. See, e.g., Armour, *supra* note 19, at 734-38 (discussing and questioning this assumption); Sommers & Ellsworth, *supra* note 121, at 203, 211 (discussing this assumption).

128. Sommers & Ellsworth, *supra* note 121, at 211 (discussing examples).

129. See *id.* at 203. On the other hand, racial issues probably did not have to be highlighted in order for racial bias to affect white jurors' deliberations during that time period. See *id.*

130. Specifically, half of the jurors read trial summaries that involved a defendant who was identified as white and a victim (a member of the same basketball team as the defendant) who was identified as black, and half read a version with a black defendant and white victim. Half of each respective set of jurors read a *race-salient* version of the trial, in which a defense witness testified "that the defendant was one of only two Whites (or Blacks) on the team, and had been the subject of racial remarks and unfair criticism through the season from many of his Black [White] teammates." The other half read a *non-race-salient* version that made no reference to the defendant's race but instead included testimony of the same defense witness that "the defendant had only one other friend on the team and had been the subject of obscene remarks and unfair criticism from many of his teammates." *Id.* at 215-16.

131. Black defendants had a significantly higher conviction rate than whites (90% to 70%) and were sentenced to significantly longer terms. In addition, jurors viewed the prosecution's case as the black defendant as stronger (though only marginally significantly) than its case against the white defendant and the black defendant's case as significantly weaker than the white defendant's (again, only marginally so), in the non-race-salient version. See *id.* at 217-19 (describing results). See also Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000) (reporting similar findings in study involving domestic assault fact pattern and use of racially-charged statement by defendant as means of making racial issues salient).

ever, jurors reached comparable decisions for black and white defendants.<sup>132</sup>

These results show that situations characterized by normative clarity—that is, situations that include clear indications of right and wrong behavior—tend to lessen the likelihood of discrimination. In particular, they suggest that, in situations in which racial issues are conspicuous, people are mindful of their egalitarian ideals<sup>133</sup> and are more likely to make an effort to avoid acting on racial prejudice.<sup>134</sup> When racial issues are obscured, on the other hand, they do not guard against, but instead act upon, racial bias.<sup>135</sup>

While salience and clarity tend to reduce discrimination, “normative ambiguity” has been found to promote it—and, significantly, the power of ambiguity to channel discrimination goes hand-in-hand with its ability to mask it. Normative ambiguity can arise in a couple of different ways. The situation may be one in which appropriate (and, accordingly, inappropriate) behavior is not clearly identified. In such a context, choosing to act indifferently or unhelpfully toward a black person does not necessarily mark one as a racist because it is not clear that what one has done is wrong.<sup>136</sup> A situation also may be ambiguous if clearly negative behavior can be justified on some basis other

---

132. See Sommers & Ellsworth, *supra* note 121, at 217-19 (reporting that jurors reached comparable decisions for white and black defendants in the race-salient version of the trial). See also Sommers & Ellsworth, *supra* note 131, at 1373-76 (reporting similar findings in study involving domestic assault fact pattern and use of racially-charged statement by defendant as means of making racial issues salient).

Sommers and Ellsworth contend that other researchers' studies that have purported to find no evidence of white juror racial bias are not inconsistent with their own findings and interpretations regarding the influence of situational cues on the manifestation of such bias, because, in those other studies, racial issues were salient. See Sommers & Ellsworth, *supra* note 121, at 210-11 (discussing studies).

133. Of course, although such values may be more widely shared than in the past, not everyone shares them. See *supra* note 124. Some individuals' tendency to discriminate may not, therefore, be as situation-sensitive as others'. See also Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 13-14 (reporting different results, in study described at *infra* note 134, for low- and high-prejudice subjects).

134. See Sommers & Ellsworth, *supra* note 121, at 220-21. Similarly, social psychologist Patricia G. Devine found in her well-known studies that both high- and low-prejudiced subjects evaluated ambiguous behaviors consistently with racial stereotypes when they did not have the opportunity to monitor those responses, but when racial issues were made salient and they were able to think about their responses, low-prejudice subjects controlled their stereotype-consistent thoughts and instead expressed views reflecting egalitarian values and negating racial stereotypes. See generally Devine, *supra* note 133.

135. See Sommers & Ellsworth, *supra* note 121, at 220. See also Devine, *supra* note 133, at 15-16.

136. See Gaertner & Dovidio, *supra* note 27, at 67-68 (defining normative ambiguity; describing helpful behavior in ambiguous situations as “prosocial”).

than race because, again, a person who chooses to behave that way did not necessarily choose to do so for racist reasons.<sup>137</sup> Social scientists have demonstrated the channeling power of both kinds of ambiguity in studies that included variations on the helping behavior studies discussed earlier.<sup>138</sup>

A number of experimental studies have confirmed the effect of the first type of situational ambiguity in promoting discrimination.<sup>139</sup> A fairly recent study found racially disparate responses when it tested simultaneously the effects of two different types of factors on helping behavior: the perceived *reason* why the victim needed help (that is, whether the victim was to blame for needing help because she did not try hard enough on an assigned task or whether, instead, an external factor had caused her problem) and the *source of the request* for help from the bystander (the victim herself or a third party).<sup>140</sup> Discrimination against black victims occurred in situations in which the victims both appeared to have caused their own problems and asked for help from the bystander.<sup>141</sup> Conversely, black victims were treated just as favorably as, or even more favorably than, whites when bystanders perceived that the victims' plight was caused by factors outside of their control (regardless of who asked for help)<sup>142</sup> or when a third party requested that the bystander help (regardless of the cause of the victims' predicament).<sup>143</sup> The researchers pointed out that, in this experiment, normative clarity discouraged racial bias, but normative ambiguity channeled it: subjects chose to discriminate when they could rationalize a failure to help by viewing the help as "undeserved."<sup>144</sup>

---

137. *See id.* at 67.

138. *See supra* notes 60-72 and accompanying text. Similar results have been obtained in variations on Milgram's aggression studies, discussed at *supra* notes 73-118 and accompanying text. *See also* Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 *PSYCHOL. BULL.* 546, 552-55 (1980) (reviewing aggression studies).

139. In addition to the study discussed in the text, other studies by the same and other researchers—some in naturalistic settings rather than the laboratory—have obtained similar results. *See, e.g.*, Samuel L. Gaertner, *Helping Behavior and Racial Discrimination Among Liberals and Conservatives*, 25 *J. PERSONALITY & SOC. PSYCHOL.* 335 (1973); Lauren G. Wispe & Harold B. Freshley, *Race, Sex, and Sympathetic Helping Behavior: The Broken Bag Caper*, 17 *J. PERSONALITY & SOC. PSYCHOL.* 59 (1971). For a review of studies of race and helping behavior, see Crosby et al., *supra* note 138, at 548-52.

140. David L. Frey & Samuel L. Gaertner, *Helping and the Avoidance of Inappropriate Interracial Behavior: A Strategy That Perpetuates A Nonprejudiced Self-Image*, 50 *J. PERSONALITY & SOC. PSYCHOL.* 1083 (1986).

141. *Id.* at 1086-87.

142. *Id.* at 1087.

143. *Id.* at 1086-87.

144. Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1324 (discussing this study).

but not when such a characterization was unwarranted or another party signaled that it was not appropriate to withhold assistance.<sup>145</sup>

Experiments also have confirmed the discrimination-promoting effect of the second type of normative ambiguity, under which clearly negative behavior can be justified on some basis other than race.<sup>146</sup> They have shown, moreover, that different rationales can be constructed to fit different situations.

Once again, researchers used a series of helping studies to test the responsiveness of bystanders to the misfortunes of black and white victims under various conditions and thereby to study the effect of nonracial justifications on spontaneous decision making. They found no discrimination in the simplest—and only normatively *unambiguous*—scenario, involving one victim and one bystander-subject. In those situations, bystanders helped black victims equally as or more frequently and quickly than white victims.<sup>147</sup> When researchers introduced complications that could form a nonracial basis for rationalizing a failure to help, however, the subjects did discriminate against black victims, helping them significantly less frequently or less quickly than white victims.

First, in a study modeled closely on the classic bystander intervention studies discussed above,<sup>148</sup> a bystander's awareness that others were nearby, and the attendant diffusion of her sense of responsibility to help, put black victims at a significant disadvantage compared to white victims: black victims were helped only half as often as whites, and when they did receive help it was significantly slower in coming.<sup>149</sup> A second study showed that people were more susceptible to social pressure not to intervene when the victim was black than when the victim was white. In that study, although almost all bystanders ultimately did help both black and white victims, they were significantly slower to help black than white victims if they were in the face-to-face presence of others who made no move to help.<sup>150</sup>

The researchers determined that subjects in the two studies had constructed different rationalizations to suit their respective situations and support the decision to treat the black victim negatively: whereas

---

145. See Frey & Gaertner, *supra* note 140, at 1088.

146. See *supra* note 137 and accompanying text.

147. See Gaertner & Dovidio, *supra* note 71, at 696; Samuel L. Gaertner et al., *Race of Victim, Nonresponsive Bystanders, and Helping Behavior*, 117 J. SOC. PSYCHOL. 69, 73-74 (1982).

148. See *supra* notes 68-72 and accompanying text.

149. Gaertner & Dovidio, *supra* note 71, at 696-97.

150. Gaertner et al., *supra* note 147, at 73-74. Although almost all victims received help in the end, the researchers pointed out that the speed of assistance can have a substantial effect on the outcome of an emergency. *Id.* at 73.

a diffused sense of responsibility channeled discrimination in the first study, social pressure to conform produced a similar effect in the second.<sup>151</sup> Key differences in the design and results of the two studies supported these differing interpretations. First, as noted, in the second study, subjects were in the immediate presence of the other bystanders, not merely told that others were in rooms nearby.<sup>152</sup> Also, in the second study, the subjects' post-emergency evaluations of the severity of the victim's injury showed no differences in their perceptions based upon the presence of others.<sup>153</sup> Finally, measures of subjects' heart rates in the two studies indicated that different levels of "arousal" accompanied the different situations tested.

Subjects in the first study showed a *lower* level of arousal when the emergency occurred if others were available than if they were alone (indicating that they interpreted the situation as not requiring their involvement),<sup>154</sup> while subjects in the second study had *higher* heart rates—were *more* aroused—if others were present than if they were alone when the emergency occurred.<sup>155</sup> This heightened level of arousal indicated that subjects in the face-to-face presence of nonresponsive bystanders did not feel a lesser sense of responsibility, but instead were contending with a dilemma: whether to help the victim or to conform to the behavior of the others.<sup>156</sup> The racially disparate results showed that pressure to conform exerted a stronger influence on subjects when the victim was black than when the victim was white.<sup>157</sup>

Researchers observed similar channeling effects when they examined decision making in more deliberative contexts, such as mock jury deliberations in criminal cases. In such settings, subjects reached conclusions that were significantly harsher toward black than white defendants—but, again, only when the decision was not likely to be seen as racist because a nonracial justification was available to support the negative decision.

For example, in a study of juror deliberations in the sentencing phase of a mock death penalty case in which all other jurors spoke in favor of death, low-prejudice jurors favored the death penalty more strongly for black than for white defendants—if the otherwise all-

---

151. Gaertner & Dovidio, *supra* note 71, at 697; Gaertner et al., *supra* note 147, at 74.

152. Compare Gaertner et al., *supra* note 147, at 72-73, with Gaertner & Dovidio, *supra* note 71, at 695.

153. Gaertner et al., *supra* note 147, at 74.

154. Gaertner & Dovidio, *supra* note 71, at 697-98.

155. Gaertner et al., *supra* note 147, at 75.

156. *Id.* at 74-76.

157. *Id.*

white jury included one black juror who advocated death.<sup>158</sup> When the jury comprised solely white jurors, on the other hand, low-prejudice subjects did not discriminate against black defendants, but, instead, treated them more favorably than white defendants.<sup>159</sup>

Subjects' responses to a postdeliberation questionnaire evaluating the other jurors eliminated a possible substantive basis for the effect of the black juror's advocacy of death in the case of the black defendant: namely, that subjects perceived the black juror's views as being more credible and persuasive because he stated a position that was against the interests of his own racial group.<sup>160</sup> Instead, the disparate outcomes appeared to result from subjects' ability to avoid an attribution of racial bias in their decisions favoring death when a black juror also advocated death.<sup>161</sup> In other words, the black juror's advocacy seems to have provided "cover" for the subject on that score.

Similarly, the availability of a nonracial justification increased discrimination against black defendants in a study examining the influence of race on the use of inadmissible evidence of guilt in reaching a verdict.<sup>162</sup> In that study, jurors reached similar verdicts for black and white defendants when the evidence at issue was either omitted (the "control" condition) or admissible.<sup>163</sup> However, results differed significantly when subjects were presented with the evidence of guilt but later told to disregard it because it had been ruled inadmissible. Subjects reached significantly harsher verdicts for black than for white defendants in that condition.<sup>164</sup> Further, when compared with verdicts reached in the control condition, the effect of the inadmissible

---

158. John F. Dovidio et al., *Racial Attitudes and the Death Penalty*, 27 J. APPLIED SOC. PSYCHOL. 1468 (1997).

159. High-prejudice subjects consistently discriminated against black defendants regardless of the racial composition of the jury. *Id.* at 1478.

160. The questionnaire sought subjects' ratings of how knowledgeable, sincere, likable, trustworthy, and persuasive they perceived the other jurors to be, and the rating patterns did not conform to jurors' pattern of recommendations for the death penalty. *Id.* at 1479-81.

161. *Id.* at 1481.

162. James D. Johnson et al., *Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893 (1995). The evidence that served as the focus of the experimental manipulation was a taped conversation, obtained through a wiretap, in which a third party made strong and unequivocal statements that directly contradicted the suspect's defense in a bank robbery case. The suspect claimed that he had lawfully obtained the cash that the police found on him when they arrested him, because he had borrowed it from a loan shark. In the taped conversation, the loan shark declared that he "would never loan [the suspect] any money." *Id.* at 895.

163. *Id.* at 896.

164. *Id.*

evidence was significantly greater for black than for white defendants.<sup>165</sup>

Paradoxically, jurors *perceived* themselves as being significantly *less* influenced by the inadmissible evidence in cases involving black defendants than in those involving whites.<sup>166</sup> The researchers explained the greater influence of inadmissible evidence on decisions involving black defendants as likely being the result of subjects' rationalizing their verdicts as not being racist but instead as decisions to do "the right thing" by not permitting a guilty person to go free.<sup>167</sup> The researchers also speculated that the subjects' perception that they were less influenced by inadmissible evidence of black defendants' guilt was a reflection of the subjects' predisposition to believe that black defendants were guilty.<sup>168</sup>

Perhaps the most interesting point to emerge from the studies of both spontaneous and deliberative decision making is the researchers' explanation of why the existence of a justification for a negative decision disadvantaged black victims and defendants to a greater degree than it did whites. The nonracial justification for a negative decision—that is, the factor that made each situation normatively ambiguous—could have supported equally negative decisions for white victims and defendants as for blacks. However, the racially disparate results in each study showed that such factors were *more powerful* when subjects had to make decisions affecting blacks than when their decisions affected whites.<sup>169</sup> In other words, in addition to introducing ambiguity into the situation, the nonracial justification became more salient and potent when it supported the negative treatment of blacks.<sup>170</sup>

At least three explanations might account for the power of ambiguous situations to channel discrimination or, more generally, for the seeming mismatch between attitudes and actions that emerges in such situations. First, the mismatch may be more apparent than real: Discrimination in ambiguous situations might actually provide a truer indication of an individual's beliefs than does his behavior in normatively clear contexts, when he would avoid discriminating in or-

---

165. *Id.*

166. *Id.*

167. James D. Johnson et al., *supra* note 162, at 896.

168. *Id.* at 897.

169. See Gaertner & Dovidio, *supra* note 27, at 73 (describing "an indirect attitudinal process that operates differentially as a function of another person's race to enhance the salience and potency of *non-race-related* elements in a situation that would justify or rationalize a negative response even if a white person were involved").

170. See *id.*



der to present and preserve a nonracist public image. That is, the actor might simply have been looking for an excuse or opportunity to discriminate that would allow him to indulge his “taste for discrimination” while appearing to conform to popular social norms.<sup>171</sup>

Alternatively, the mismatch between attitudes and actions may indeed be real, at least at some level—the result of a genuine conflict between an individual’s sincere egalitarian ideals and his unacknowledged, largely unconscious, negative feelings toward and beliefs about blacks.<sup>172</sup> The desire to maintain an egalitarian *self*-image might prevent him from discriminating in situations when it clearly would be inappropriate, but his hidden negative feelings prompt him to discriminate in “subtle, indirect, and rationalizable ways”—that is, by ambiguous means or in ambiguous situations—because he can do so without seeing himself as racist.<sup>173</sup> In this case, the actor most likely does not intend to discriminate and is fooling himself as much as he fools others in striving to maintain a nonracist self-image.<sup>174</sup>

Finally, the explanation might lie not in the actor’s racist *feelings* or *beliefs*, but in her unconscious *cognitive* biases.<sup>175</sup> This account would distinguish between an actor’s personal beliefs and values, which direct her conscious decisions of how to behave, and her unconsciously held stereotypes, which she absorbed from childhood, which are constantly being reinforced through social and cultural influences, and which, like a “bad habit,” direct her behavior when she is not con-

171. In other words, situational ambiguity might provide the actor with the opportunity to engage in “impression management,” whereby he acts upon but “cover[s] up truly believed but socially undesirable attitudes.” Devine, *supra* note 133, at 15 (citing Crosby et al., *supra* note 138).

172. This account is the theory of aversive racism that has been offered by social psychologists Samuel L. Gaertner and John F. Dovidio. See generally Gaertner & Dovidio, *supra* note 27.

173. Accordingly, an apparently race-neutral justification for negative treatment is more salient to such an actor when the target is black because the subject is motivated (albeit perhaps unconsciously) to *find* a reason to justify a negative decision that would at the same time allow him or her to avoid being seen as racist. See Dovidio et al., *supra* note 158, at 1480-81.

174. See Dovidio & Gaertner, *supra* note 18, at 7.

175. See Devine, *supra*, at 15-16 (distinguishing between an individual’s “stereotype structure” and his or her “personal belief structure,” *id.* at 16, as well as between automatic stereotype activation, which “is equally strong and equally inescapable for high- and low-prejudice subjects,” and intentional, controlled processes, which can inhibit prejudiced responses if an individual has the inclination and resources to engage them). See also JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 126-39 (1997) (distinguishing between “stereotypes”—culturally transmitted knowledge structures that can be automatically activated like a bad habit—and “prejudice”—beliefs that, for example, whites are superior to blacks—and therefore also between Devine’s account of “ubiquitous unconscious bias” and the “aversive racism” explanation offered by Gaertner and Dovidio, see notes 172-74 *supra*).

sciously monitoring it.<sup>176</sup> When normative clarity cues the need to be mindful—and assuming she has the requisite “intention, attention, and time”<sup>177</sup>—an individual can control her response and act in a nonprejudiced way that is consistent with her nonracist beliefs. However, she is likely to discriminate in ambiguous situations despite her egalitarian values and lack of prejudice, because she may not be aware of the need to monitor her response and because racial stereotypes are always accessible and automatically activated, and will lead her to discriminate despite her best intentions.<sup>178</sup> Of these three explanations, only the first conforms to the conventional discrimination schema<sup>179</sup> and might result in liability under the traditional intent requirement.<sup>180</sup> The other two explanations, on the other hand, are more likely to capture most contemporary racial discrimination.<sup>181</sup> But whatever the underlying basis for the power of situational ambiguity to channel discrimination, the point remains that the situations that are most likely to lead to discrimination are also those that tend to mask it, making the legal question of whether the actor intended to discriminate—that is, whether race was the “real” reason for her decision—both difficult to answer and unlikely to arise.

The normative ambiguity studies show that racially biased treatment and legitimate, nondiscriminatory justifications are likely to co-exist in many cases. More specifically, they show that the existence of a legitimate justification for a negative decision does not necessarily discredit racial bias as an explanation for that decision. The presence of such a justification may, instead, be cause to suspect that the decision in fact was racially biased, because racial discrimination today seems most likely to occur through the *racially biased application* of a *nondiscriminatory reason*.

This likelihood presents two significant challenges to the use of traditional, individual adjudication as a means of redressing discrimination. First, it suggests that discrimination can easily occur in individual cases without being detected, because the existence of a legitimate reason can mask the fact that the neutral reason was ap-

---

176. See Devine, *supra* note 133, at 15-16.

177. *Id.* at 16.

178. See *id.* at 15-16.

179. For discussion of the conventional discrimination schema, see *supra* notes 34-38 and accompanying text.

180. See *infra* notes 184-189 and accompanying text.

181. See generally ARMOUR, *supra* note 175, at 128-39 (discussing ubiquity of unconscious cognitive bias); Gaertner & Dovidio, *supra* note 18, at 4-6 (discussing prevalence of aversive racism).

plied in a racially biased manner.<sup>182</sup> In the experiments discussed, the researchers themselves were able to identify the racially discriminatory effect of nondiscriminatory justifications because they replicated the same situation numerous times and could see the pattern that emerged when the cases were viewed in the aggregate. Rarely in life will the same situation be repeated, with nothing changed but the races of the targets, in this fashion. As a result, even the victims of discrimination may not realize what has happened, many cases of discrimination are likely to escape notice, and a large share of modern discrimination is likely to go unremedied.<sup>183</sup>

Second, the studies cast doubt on the intentional discrimination model's assumption that the unlawful, discriminatory reason can be disentangled from the lawful, nondiscriminatory reason that could support the same conclusion. The intentional discrimination model requires the fact finder to engage in an exercise in causal attribution<sup>184</sup>—to answer the question, “Why did the defendant treat the plaintiff negatively?”—by making a choice between alternative accounts: Did the plaintiff's race affect the decision, as she alleges—or was it, as the defendant claims, based entirely on some legitimate, nondiscriminatory reason?<sup>185</sup> Did the employer fail to hire the candidate because of her race or because another candidate was better qualified?<sup>186</sup> Did the police officer stop the driver because of his race

---

182. See Gaertner & Dovidio, *supra* note 27, at 67, 73 (pointing out the masking effect of each kind of normative ambiguity).

183. Krieger has offered similar reasons why “reliance on . . . individual disparate treatment adjudications will result in the significant underidentification of discrimination, not only by decisionmakers . . . but by victims and factfinders as well.” Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1304. She points out, for example, that people have more difficulty identifying discrimination when they examine case-by-case as opposed to aggregated data and that rarely is aggregated data available, even in litigation. *Id.* at 1305-07. Further, when cases are examined in isolation, “differences in treatment are too easily attributed to observed differences in one or another input variable.” *Id.* at 1308.

184. *Id.* at 1327 (“Determining in any given case whether discrimination has occurred is fundamentally an exercise in causal attribution. The employer has taken some negative action, most frequently a termination of employment, against the plaintiff. The jury's role is to determine why that negative action was taken.”).

185. To further complicate the question, we should recognize that, in some cases, racial bias influences the way a decisionmaker processes and interprets objective information. Therefore, a decisionmaker might judge the objective behavior of different individuals differently based on race, and racial bias itself may thereby produce an apparently unbiased justification for her decision. See, e.g., Krieger, *The Content of Our Categories*, *supra* note 16, at 1202-07 (describing effect of cognitive biases on interpretation of ambiguous behavior and attribution of cause for that behavior); Thompson, *supra* note 16, at 983-91 (describing effect of cognitive bias on law enforcement officers' interpretation of behavior).

186. Krieger has explained that, in cases requiring the fact finder to compare two candidates, “plaintiffs often fail . . . to convince courts that the more favorable treatment of an employee of a different race or gender evidences intergroup bias,” because the two candidates are rarely identi-

or because he committed a minor traffic violation?<sup>187</sup> While the law requires the fact finder to select a decisive reason for the defendant's decision,<sup>188</sup> the truth may be that the two possibilities—race and some other reason—are not really distinct. To be more precise, the truth may be that the decisionmaker relied on the nondiscriminatory reason in making her decision—but saw that reason as persuasive only because of the plaintiff's race.<sup>189</sup>

---

cally situated and “because differences in treatment are easily attributed to these differences rather than to discrimination.” Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1308.

187. As David A. Harris has noted, “[N]o one can drive for even a few blocks without committing a minor violation—speeding, failing to signal or make a complete stop, touching a lane or center line, or driving with a defective piece of vehicle equipment.” Harris, *supra* note 8, at 311 (footnote omitted). Police officers therefore can find a reason to “stop any driver, any time they are willing to follow the car for a short distance.” *Id.* (noting that the Supreme Court's Fourth Amendment jurisprudence, as articulated in *Whren v. United States*, 517 U.S. 806 (1996), allows such a result even if an officer subjectively chose to stop a particular driver because of the driver's race).

188. See Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1327.

As Krieger also has explained in the context of disparate treatment doctrine in employment discrimination jurisprudence, the legal framework only “knows how to tell” two stories. Krieger, *The Content of Our Categories*, *supra* note 16, at 1170. Even the disparate treatment doctrines that recognize that discriminatory and nondiscriminatory justifications can appear in the same case—pretext and mixed motives doctrines—ultimately require the fact finder to make a choice between two competing explanations. Under pretext doctrine, notes Krieger, “it is simply not possible for an employment decision to be both motivated by the employer's articulated reasons and tainted by intergroup bias; the trier of fact must decide between the two.” *Id.* at 1179. See also *id.* at 1177-79, 1213 (describing the pretext model of discrimination first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981), as setting up a “true reason/phony reason” dichotomy). Mixed motives doctrine, too, assumes that the fact finder can determine whether the same decision would have been made for a legitimate reason wholly without regard to the plaintiff's race, because it assumes that the decision maker himself is sufficiently self-aware that he drew that distinction at the moment he made the crucial decision. See *id.* at 1183, 1213 (discussing mixed motives analysis under cases following *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). See also 42 U.S.C. § 2000e-2(m) (2000) (amending Title VII so that a violation is established when race was a “motivating factor . . . even though other factors also motivated” the decision); 42 U.S.C. § 2000e-5(g)(2)(B) (limiting remedies in a mixed motives case in which the defendant proves that it “would have taken the same action in the absence of the impermissible motivating factor”).

Similarly, Anthony C. Thompson has pointed out that the Supreme Court's Fourth Amendment jurisprudence reflects the view that the world can be “essentially divided . . . into two neat, straightforward categories: those in which there clearly is and those in which there clearly is not ‘probable cause.’” Thompson, *supra* note 16, at 982. As a result, the Court's decisions

treat race as a subject that can be antiseptically removed from a suppression hearing judge's review of whether a police officer had probable cause for an arrest or warrantless search or reasonable suspicion for a stop or frisk. The decisions imagine a world in which some officers are wholly unaffected by racial considerations and in which even biased officers may make objectively valid judgments that courts can sustain despite the underlying racial motivations of the officer.

*Id.* at 983. As Thompson goes on to demonstrate through an examination of cognitive psychology, however, “mental states do not break down into such neat categories.” *Id.*

189. See *supra* notes 169-170 and accompanying text.

At the same time as it reveals the difficulty of determining why, and even whether, an individual has discriminated in a particular case, however, our realization of the power of the situation to channel discrimination should give us hope for change, because situations are not purely "given." They can be altered in ways that reduce the potential for normative ambiguity and hence for subtle and rationalizable, but nonetheless real, discrimination to occur. Before I pursue that optimistic thought,<sup>190</sup> however, a few more pessimistic points are in order. The following section will discuss the ways in which individuals can, and often do, actively construct normatively ambiguous, discrimination-promoting situations, whether or not they realize that they are doing so. In particular, it will discuss the potential for individuals to act on racial stereotypes in a way that generates the apparently neutral justifications that both promote and justify discrimination.

### III. "SELF-FULFILLING STEREOTYPES"<sup>191</sup>

Not only does the existence of a nondiscriminatory justification fail to rule out discrimination as the explanation for a decision, but sometimes that apparently neutral factor is itself the *product* of discrimination. This section explains how this might be so by elaborating upon another means by which discriminatory decisions are both promoted and obscured. It also provides an account of how discriminatory patterns of interaction are reinforced, because it shows how stereotypes can be "confirmed" and strengthened, despite their inaccuracy.

The phenomenon that produces these results is the "self-fulfilling prophecy": a process by which people, acting on the basis of an assumption or prediction, and regardless of its truth or falsity, actually

---

Devon W. Carbado points out that, in such a case, "[o]ne could argue" that the decision was based on race. Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032 (2002). Using *Whren v. United States*, 517 U.S. 806 (1996), as an example, he explains:

The claim would be that, but for Whren's race (he is black), the officers' suspicions would not have been aroused, and they would not have stopped the vehicle. Put another way, if Whren were white, the police likely would not have noticed [his vehicle] and Whren would have escaped the encounter altogether.

Carbado, *supra*, at 1032. Carbado goes on to explain, however, that such a claim is not only difficult to prove, but also is not cognizable under Fourth Amendment law, for which "race does not matter." *Id.* at 1032-33. Nor would such a claim appear to satisfy the "discriminatory purpose" requirement of an equal protection analysis, to which the Court has relegated claims of racial profiling in law enforcement. See *Whren*, 517 U.S. at 813. For discussion of the difficulty of establishing a denial of equal protection in this context, see COLE, *supra* note 9, at 39-40 and Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 436-38 (1997).

190. See *infra* subpart IV(D) for discussion of how altering the situation might reduce racial discrimination.

191. Mark Snyder, *Self-Fulfilling Stereotypes*, in SELF AND SOCIETY 30 (Ann Branaman ed., 2001).

cause that assumption to be verified or prediction to occur—thereby “confirming” the “accuracy” of the belief. This process in interracial interactions is simply one variation of a long-recognized, though continually surprising, phenomenon by which expectations influence, and then become, “reality.”<sup>192</sup> In an influential 1948 essay, sociologist Robert K. Merton pointed out the resiliency and power of this “basic process of society”<sup>193</sup> when he wrote that “[t]he specious validity of the self-fulfilling prophecy perpetuates a reign of error. For the prophet will cite the actual course of events as proof that he was right from the very beginning. . . . Such are the perversities of social logic.”<sup>194</sup>

The self-fulfilling prophecy is a familiar phenomenon. A typical scenario occurs when an individual who expects to do well or poorly at a task (for example, an athletic feat) ends up performing at the predicted level.<sup>195</sup> Frustrated market watchers will recognize the common pattern in which predictions of a sluggish economy lead consumers and investors to reduce their spending and investing—thereby causing the economy actually to slow down, in confirmation of the prediction.<sup>196</sup> Another example is the California gas “shortage” of 1979, when newspapers’ predictions of an impending gasoline shortage caused motorists to fill up their gas tanks and to keep them full—which surge in demand exhausted the reserves and “so brought about the predicted shortage practically overnight. . . . After the excitement died down, it turned out that the allotment of gasoline to the state of California had hardly been reduced at all.”<sup>197</sup>

---

192. The self-fulfilling prophecy has been described as a “reversal of cause and effect,” in which “what is supposed to be a *reaction* (the effect) turns out to be an action (the cause),” or a situation in which “the ‘solution’ produces the problem” and “the prophecy of the event causes the event of the prophecy.” Paul Watzlawick, *Self-Fulfilling Prophecies*, in *THE PRODUCTION OF REALITY: ESSAYS AND READINGS ON SOCIAL INTERACTION* 425, 426 (Jodi O’Brien & Peter Kollock eds., 2d ed. 1997).

193. Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 *ANTIOCH REV.* 193, 196 (1948).

194. *Id.* at 195-96.

195. This and numerous other examples are explored in RUSSELL A. JONES, *SELF-FULFILLING PROPHECIES: SOCIAL, PSYCHOLOGICAL, AND PHYSIOLOGICAL EFFECTS OF EXPECTANCIES* (1977).

196. Similarly, Merton offered as a case-in-point the actions of depositors in a financially sound bank who, upon hearing rumors of the bank’s impending insolvency, rush to withdraw their deposits, thereby causing the bank to become insolvent. Merton, *supra* note 193, at 194-95.

197. Watzlawick, *supra* note 192, at 425.

### A. Stereotypes as Channel Factors

The idea that “expectations have consequences because they exist, regardless of whether they are accurate or inaccurate”<sup>198</sup> has significant implications for the perpetuation of biased treatment of certain groups. Because group-based stereotypes and prejudice are simply expectations about people,<sup>199</sup> they, too, can be “confirmed” through a self-fulfilling process. Indeed, Merton declared in 1948 that “[i]t is the self-fulfilling prophecy which goes far toward explaining the dynamics of ethnic and racial conflict in the America of today.”<sup>200</sup> Both historically and in contemporary times, the self-fulfilling effect of negative group-based expectancies has operated at many levels—in societal structures, public policies, social interaction, and even within the stereotyped individual himself or herself—to provide putative justification for the biased treatment of disfavored social groups.<sup>201</sup> In these contexts, stereotypes act not only as erroneous judgments of those groups, but also lead to the production of objective facts to support their own accuracy.

At the highest of these levels, institutional structures in society that incorporate stereotypes have contributed to the false “confirmation” of those stereotypes. As R.D. Ashmore pointed out in 1970:

At a societal level, the self-fulfilling prophecy works by creating a political, economic, and social structure which dooms outgroup members to an inferior position. This structure in America has aptly been called *institutional racism*. . . . For example, in the days of slavery black people were regarded as intellectually inferior and consequently were seldom taught to read and write. Without education, the slaves were indeed less intellectually sophisticated than the masters. In short, the stereotype of the black person led to discriminatory practices which produced black people congruent with that stereotype.<sup>202</sup>

Contemporary policies and practices based on social group stereotypes also generate their own statistical justification through their very enforcement. Legal scholars have identified this phenomenon in the

---

198. JONES, *supra* note 195, at 58; see also Steven L. Neuberg, *Expectancy-Confirmation Processes in Stereotyped Tinged Social Encounters: The Moderating Role of Social Goals*, in 7 *THE PSYCHOLOGY OF PREJUDICE*, THE ONTARIO SYMPOSIUM, 103, 105-06 (Mark P. Zanna & James M. Olson eds., 1994).

199. See JONES, *supra* note 195, at 62.

200. Merton, *supra* note 193, at 196.

201. For a discussion of a number of “sociological self-fulfilling prophecies,” see Lee Jussim et al., *Stigma and Self-Fulfilling Prophecies*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 374, 403-10 (Todd F. Heatherton et al. eds, 2000).

202. R.D. Ashmore, *Prejudice: Causes and Cures*, in *SOCIAL PSYCHOLOGY* (B. Collins ed., 1970), *quoted in* JONES, *supra* note 195, at 58.

use of racial profiling in policing. Katheryn K. Russell, among others, has explained that “[r]ace based policies pit law enforcement against minorities and create an unbreakable cycle: racial stereotypes may motivate police to arrest Blacks more frequently. This in turn generates statistically disparate arrest patterns, which in turn form the basis for further police selectivity by race.”<sup>203</sup> Similarly, Chief Justice William Rehnquist recently described the subtle way in which the stereotype of women as caregivers is perpetuated through employment practices that rest on, reinforce, and obscure the discriminatory stereotype:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, . . . lead to subtle discrimination that may be difficult to detect on a case-by-case basis.<sup>204</sup>

(As Krieger has pointed out, the converse—a self-fulfilling process whereby ingroup favoritism produces its own justifications—also may occur: in an employment context, for example, an ingroup member who has “profited over time from a series of subtle, incremental advantages is apt to be objectively better situated”<sup>205</sup> than outgroup

203. RUSSELL, *supra* note 9, at 45. As David A. Harris has written:

[T]he belief that blacks are disproportionately involved in drug crimes will become a self-fulfilling prophecy: Because police will look for drug crime among black drivers, they will find it disproportionately among black drivers. More blacks will be arrested, prosecuted, convicted, and jailed, thereby reinforcing the idea that blacks constitute the majority of drug offenders. This will provide a continuing motive and justification for stopping more black drivers as a rational way of using resources to catch the most criminals. At the same time, because police will focus on black drivers, white drivers will receive less attention, and the drug dealers and possessors among them will be apprehended in proportionately smaller numbers than their presence in the population would predict.

Harris, *supra* note 8, at 297. See also Roberts, *supra* note 8, at 818 (“Racial profiling becomes a self-fulfilling prophecy: targeting Blacks for police surveillance results in higher rates of arrests, reinforcing the presumption of Black criminality. If police stopped and frisked whites as frequently as they do Blacks, white arrest rates would increase.”). Cf. Davis, *supra* note 189, at 442 (noting that “[i]n a sense, discriminatory police stops are the first in a chain of racially lopsided decisions by officials in the criminal justice process.”).

204. Nev. Dep’t of Human Resources v. Hibbs, 538 U.S. 721 (2003) (discussing legislative rationales for enacting the Family and Medical Leave Act of 1993).

205. Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1326.



members who have not so profited when the time comes for a hiring or promotion decision to be made.)

Moreover, members of stigmatized groups themselves may be vulnerable to negative expectations of their group—and, ironically, the very fear of serving as a source of confirmation of those expectations may *cause* group members to perform consistently with expectations. In a series of experiments, social psychologists Joshua Aronson, Claude Steele, and their colleagues have documented a phenomenon they call “stereotype threat.”<sup>206</sup> This process causes members of groups that are stereotyped as being less able (intellectually) to perform more poorly on standardized tests when that stereotype is made salient to them than when the stereotype is not invoked. Specifically, the researchers found that African-American, Latino, and female students performed significantly worse than Caucasian male students on standardized tests in areas such as verbal or math ability in which their group is stereotyped as having lesser ability—but *only* when they were tested after somehow being “reminded” of the negative stereotype.<sup>207</sup> When researchers did not induce stereotype threat, members of these groups performed just as well as white males on the relevant tests.<sup>208</sup>

Through various experimental refinements, the researchers were able to identify the cause of poor performance in the stereotype threat condition as a *situational factor* based in “domain identification.”<sup>209</sup> That is, when an individual from a stereotyped group cares enough about the ability supposedly being measured to want the stereotype of low ability to be untrue, the test becomes a “high-stakes endeavor.”<sup>210</sup> The individual then feels apprehensive, anxious, and distracted—emotions that interfere with performance on the test. In other words, even when an individual’s abilities do not conform to the stereotype—and especially when he or she wants to prove that the stereotype is

---

206. These studies are described in Joshua Aronson et al., *The Effect of Stereotype Threat on the Standardized Test Performance of College Students*, in READINGS ABOUT THE SOCIAL ANIMAL 403 (Elliot Aronson ed., 8th ed. 1999). See also Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995).

207. The researchers used different methods to induce stereotype threat in the various experiments. For example, in one experiment they told a group of subjects that the standardized test would be used to obtain a precise measure of their ability, while in another experiment a group of subjects were simply asked to indicate their race, among other information, on a brief questionnaire. In yet another experiment, a group of subjects were asked several questions, including whether they thought that standardized tests were biased against certain groups such as women or ethnic minorities. In all experiments, subjects in the “no stereotype threat” condition were not exposed to such a manipulation. See Aronson et al., *supra* note 206, at 405-06, 408-10.

208. *Id.* at 406-09, 411.

209. *Id.* at 411.

210. *Id.* at 405.

invalid—making the stereotype salient alters the *testing situation* by placing an extra psychological burden on the individual.<sup>211</sup> As the researchers explained, “The predicament is this: the mere existence of a devaluing stereotype means that anything one does, or any of one’s features that conform to it, makes the stereotype more plausible as a self-characterization, in the eyes of others, and perhaps even in one’s own eyes.”<sup>212</sup>

Aronson, Steele, and their colleagues further supported this situational conception of stereotype threat by providing compelling evidence that the psychological burden of stereotype vulnerability is not unique to members of stigmatized groups but, to the contrary, can affect anyone under the right circumstances. In an experiment designed to test the effect of stereotype threat on the math performance of white male students (who, presumably, were not subject to any negative stereotypes about math ability)<sup>213</sup> the experimenters found that students who had previously identified themselves as caring about their math abilities performed significantly worse than students who did not so identify—but only when they were reminded of the stereotype that *Asian* students consistently outperform other groups on standardized tests of math ability!<sup>214</sup> From this experiment, the researchers concluded that “one need not be a minority to be bothered by stereotypes,”<sup>215</sup> and that underperformance in this situation apparently results from “trying too hard.”<sup>216</sup>

These examples demonstrate that stereotypes constitute more than just inaccurate over-generalizations about groups of individuals. Stereotypes also operate as *channel factors*—they define situations in a

211. *Id.* at 404.

212. *Id.*

213. Aronson et al., *supra* note 206, at 413.

214. *Id.* at 412-13. The converse effect—“stereotype lift”—can work to “boost” the performance of members of groups that are not subject to stereotypes about their intellectual abilities, such as white males. Through a meta analysis of stereotype threat studies, Gregory M. Walton and Geoffrey L. Cohen have shown that men and whites receive a performance boost when they are reminded (whether explicitly or implicitly) of the negative stereotypes associated with other social groups before taking evaluative tests. See generally Walton & Cohen, *supra* note 1. Walton and Cohen explain stereotype lift as the result of “downward social comparisons with a denigrated outgroup” that elevate the ingroup member’s “self-efficacy or sense of personal worth” and enhance performance by contributing to the individual’s confidence and motivation. *Id.* at 456. Walton and Cohen view stereotype lift as complementary to stereotype threat, and note its significant implications: “[A]lthough the effects of stereotype lift may be subtle on any given test, its impact on the achievement of the nonstereotyped may be dramatic when its effects accumulate either within a large group of test-takers or across numerous performance opportunities for a single individual.” *Id.* at 465.

215. Aronson et al., *supra* note 206, at 413.

216. *Id.*

way that limits the potential outcomes by directing a particular path for performance or behavior.<sup>217</sup> As Merton said of self-fulfilling prophecies generally, "public definitions of a situation (prophecies or predictions) become an integral part of the situation and thus affect subsequent developments."<sup>218</sup>

Moreover, the real power of stereotypes as self-fulfilling prophecies lies in the failure of people to recognize the situation-defining role they play, and their tendency instead to see the outcome of the situation as objective evidence of the truth of (or "kernel of truth" in) the stereotype. As Merton put it:

As a result of their failure to comprehend the operation of the self-fulfilling prophecy, many Americans of good will are (sometimes reluctantly) brought to retain enduring ethnic and racial prejudices. They experience these beliefs, not as prejudices, not as prejudgments, but as irresistible products of their own observation. "The facts of the case" permit them no other conclusion.<sup>219</sup>

This failure is simply another example of the correspondence bias or fundamental attribution error that leads people to attribute an individual's behavior solely to his or her disposition or personal qualities, and prevents them from seeing that the individual's behavior was also influenced by the situation.<sup>220</sup> In the case of stereotypes, observers fail to recognize that a stereotyped individual's options in a situation often are limited by biased institutions or policies, or even simply by the ways in which others act toward him based upon their stereotyped view of him. Instead, they think it obvious that the person's stereotype-consistent actions are an accurate reflection of who he "is," and the stereotype is therefore ascribed validity that it does not merit.

### *B. Behavioral Confirmation of Stereotypes in Social Interaction*

Self-fulfilling prophecies also have been shown to occur through social interaction in a number of settings that are critical to individuals' access to equal opportunity for social and economic advancement, and in ways that have serious implications for members of negatively stereotyped groups. This unnoticed process may prevent members of disfavored groups from even getting in the door to a program or job. A classic study in 1974, which will be discussed in greater detail below,<sup>221</sup> showed that interviewers acted more coldly and less receptively to-

---

217. For discussion of channel factors, see *supra* notes 56-59 and accompanying text.

218. Merton, *supra* note 193, at 195.

219. *Id.*

220. For discussion of the fundamental attribution error or correspondence bias, see *supra* notes 39-52 and accompanying text.

221. See *infra* notes 260-279 and accompanying text.

ward black candidates than toward whites. When reproduced in interviews with white candidates, the type of distancing behaviors adopted by those interviewers contributed to less favorable interview performances by the white candidates, indicating that interviewer behavior influences interviewee performance. In other words, an interviewer's initially negative attitude toward a black candidate can "doom" their interaction in a way that causes the candidate to perform poorly and thereby to provide confirmation for the interviewer's unfavorable pre-judgment and a neutral reason for making a negative decision about the candidate.

In addition, once an individual is on the job, or in the classroom, self-fulfilling stereotypes may present a further obstacle to his or her advancement. A number of experimental studies have demonstrated that teachers' and supervisors' expectations or attitudes toward students and workers can have a strong self-fulfilling effect on those individuals' performances. In one famous experiment, for example, social psychologists Robert Rosenthal and Lenore Jacobson found that, when teachers were told that certain students (actually selected by the researchers at random) had the potential to achieve greater intellectual development, those children actually did show greater intellectual development later in the school year.<sup>222</sup> The researchers hypothesized that the teachers' behavior toward the identified students communicated their expectations of improved intellectual performance and that those communications, coupled with changes in teaching technique, contributed to changes in the children's self-concepts, expectations and motivation, and even the children's cognitive skills.<sup>223</sup> This "Pygmalion effect" also can operate among adults in the workplace, where supervisors' experimenter-induced expectations of high performance from designated workers have been shown to result in confirmation by supervisors' evaluations, peers' ratings, and objective tests of subjects' performance.<sup>224</sup> As will be examined further below,

---

222. This experiment is discussed at Robert Rosenthal & Lenore Jacobson, *Pygmalion in the Classroom: Teacher Expectation and Pupils' Intellectual Development*, in *THE PRODUCTION OF REALITY: ESSAYS AND READINGS ON SOCIAL INTERACTION*, *supra* note 192, at 443. See also ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPILS' INTELLECTUAL DEVELOPMENT* (1968).

223. See Rosenthal & Jacobson, *supra* note 222, at 446-47.

224. See Albert S. King, *Self-Fulfilling Prophecies in Training the Hard-Core: Supervisors' Expectations and the Underprivileged Workers' Performance*, 52 *SOC. SCI. Q.* 369-78 (1971) (confirming operation of self-fulfilling prophecy in program designed to train disadvantaged workers as welders, pressers, and mechanics). See also Dov Eden & Abraham B. Shani, *Pygmalion Goes to Boot Camp: Expectancy, Leadership, and Trainee Performance*, 67 *J. APPLIED PSYCHOL.* 194-99 (1982) (confirming "Pygmalion hypothesis" in fifteen-week combat command course at an Israeli military training base).

racial and other social stereotypes can work, similarly to these experimenter-manipulated expectations, to create behavior in the target that confirms the initially erroneous expectations of the perceiver.<sup>225</sup>

Self-fulfilling prophecies operate to “confirm” and reinforce stereotypes in surprising and subtle ways in one-on-one interactions. Despite the subtlety of its operation, however, this process, operating within such contexts, has a real, cumulative impact on individuals and society. As social psychologist Steven L. Neuberg has explained:

[E]ach day, the outcomes of social encounters determine friendship choices, educational opportunities, job hirings, housing decisions, the ability of people to get along peacefully with each other, and so forth. When stereotypes and prejudices color such encounters, leading people to form mistaken impressions of others, the personal consequences of these encounters can be momentous for all parties involved.<sup>226</sup>

### 1. *The Process of Behavioral Confirmation: The Studies*

The behavioral confirmation of expectancies is a well established phenomenon in social interactions. The literature examining this process is one line of recent work in social psychology that shows that individuals are not just passive recipients and processors of information, but play an active role in constructing their own social reality.<sup>227</sup> The interaction itself cements that construction when parties to the exchange accept the designated script for their respective roles.

Social psychologist Mark Snyder and his colleagues have illustrated the process by which expectations are confirmed and reinforced in social interactions using the example of a “perceiver” (Jim) who has been told by a third person that another individual, the “target” (Chris) is cool and aloof.<sup>228</sup> Snyder and his colleagues explain that, when Jim meets Chris, he will tend to notice Chris’s expressions of coolness and aloofness, and then will overestimate the extent to which those expressions are attributable to Chris’s cool and aloof disposition and underestimate the extent to which they are attributable to Jim’s own cool and aloof behavior toward Chris—which in turn was in-

225. See *infra* subparts III(B)(1), III(B)(2). See also Snyder, *supra* note 191, at 32.

226. Neuberg, *supra* note 198, at 104.

227. As Edward E. Jones has stated, “We act while we see, and what we see is in part affected by our own actions.” EDWARD E. JONES, *INTERPERSONAL PERCEPTION* 237 (1990), quoted in Mark Chen & John A. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 *J. EXPERIMENTAL SOC. PSYCHOL.* 541, 542 (1997).

228. Mark Snyder et al., *Social Perception and Interpersonal Behavior: On The Self-Fulfilling Nature of Social Stereotypes*, 35 *J. PERSONALITY & SOC. PSYCHOL.* 656, 658 (1977).

duced by his preconceived notions about Chris.<sup>229</sup> Another perceiver, however (Snyder and colleagues call him “Tom”), might have been told that Chris was warm and friendly, and have seen *that* impression of Chris confirmed through their interaction.<sup>230</sup> Snyder and his colleagues explain:

The perceiver (either Jim or Tom) is not aware that his original perception of the target individual (Chris) is inaccurate. Nor is the perceiver aware of the causal role that his own behavior (here, the enactment of a cool or warm expressive style) plays in generating the behavioral evidence that erroneously confirms his expectations. Unbeknownst to the perceiver, the reality that he confidently perceives to exist in the social world has, in fact, been actively constructed by his own transactions with and operations upon the social world.<sup>231</sup>

As this example suggests, the fundamental attribution error is a key facilitator of the self-fulfilling prophecy in social interactions, because it leads the perceiver to overlook the role that his or her own behavior played in “causing” the other person’s behavior, and to assign too much significance to the other’s behavior.<sup>232</sup> Jim and Tom attribute Chris’s behavior to his cool or warm disposition, rather than recognizing that their own expectations of him led them to define the situation in a particular way and to tailor their treatment of Chris accordingly.<sup>233</sup> Their own behavior then constrained Chris’s options for how to respond to them, leading him to reciprocate their overtures and thereby to act consistently with, and in confirmation of, their initial impressions of him.<sup>234</sup> In other words, the perceivers’ expectations acted to “channel” the interaction so as to actively create their own confirming evidence.

And it is not just parties to the interaction whose judgments of the target are affected. Nonparticipant observers will judge the target’s character in accordance with his behavior as well, due to their own tendency to overlook the ways in which his behavior may have been affected by the constraints imposed by the situation.<sup>235</sup>

---

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* See also FISKE & TAYLOR, *supra* note 30, at 74-75 (noting that “active observers,” who are simultaneously interacting with and observing an actor, may be more inclined than passive observers to attribute the actor’s behavior to dispositional factors); KUNDA, *supra* note 48, at 442-43 (noting that people often fail to recognize the effect of their own behavior on the behavior of others).

233. Snyder et al., *supra* note 228, at 658.

234. *Id.*

235. See Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 187, 199 (2003).

A number of social psychological experiments have demonstrated the channeling power of erroneous or constructed expectations in social interactions. In these experiments, individuals' expectations of others—for example, that the other was hostile,<sup>236</sup> extroverted,<sup>237</sup> sociable,<sup>238</sup> or even guilty of a crime<sup>239</sup>—actually induced those others to behave in conformity with expectations, thereby “confirming” them, even when the expectations were wholly created by the experimenters. The experiments have further shown that this behavioral confirmation process is reciprocal, as both perceiver and target act in accordance with the perceiver's expectations and the corresponding signals that the perceiver's behavior sends to the target. (Indeed, the falsely perceived individual may even come to see himself or herself, or continue to behave, consistently with the perceiver's originally erroneous belief.<sup>240</sup>)

Group-based stereotypes also can act as powerful channel factors in one-on-one interactions, especially between individuals who do not have prior experience with one another and therefore must make judgments on the basis of first impressions that are influenced strongly by the other person's most visible characteristics, such as race, color, gender, age, or physical appearance.<sup>241</sup> In these situations, it can be expected that the initial impressions of people who have had no opportunity to learn about one another will incorporate general stereotypes that may lead to a grossly inaccurate impression of a particular individual.<sup>242</sup> Further, cognitive biases often contribute to “perceptual confirmation” of the erroneous prejudgment, because people tend to “see” what they expect to see.<sup>243</sup> What is surprising, however,

---

236. See Mark Snyder & William B. Swann, Jr., *Behavioral Confirmation in Social Interaction: From Social Perception to Social Reality*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 148 (1978).

237. See Mark Snyder & William B. Swann, Jr., *Hypothesis-Testing Processes in Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 1202 (1978).

238. See Dana Christensen & Robert Rosenthal, *Gender and Nonverbal Decoding Skill as Determinants of Interpersonal Expectancy Effects*, 42 J. PERSONALITY & SOC. PSYCHOL. 75 (1982).

239. See Kassin et al., *supra* note 235.

240. See, e.g., Smith et al., *Target Complicity in the Confirmation and Disconfirmation of Erroneous Perceiver Expectations: Immediate and Longer Term Implications*, 73 J. PERSONALITY & SOC. PSYCHOL. 974 (1997); Snyder & Swann, *supra* note 236, at 151, 156-57.

241. See Mark Snyder & Julie A. Haugen, *Why Does Behavioral Confirmation Occur? A Functional Perspective on the Role of the Perceiver*, 30 J. EXPERIMENTAL SOC. PSYCHOL. 218, 220-21 (1994).

242. See Mark Snyder, *When Belief Creates Reality: The Self-Fulfilling Impact of First Impressions*, in THE PRODUCTION OF REALITY: ESSAYS AND READINGS ON SOCIAL INTERACTION, *supra* note 192, at 438.

243. See Mark Snyder & Julie A. Haugen, *Why Does Behavioral Confirmation Occur? A Functional Perspective on the Role of the Target*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 963 (1995).

is that rather than disconfirming the perceiver's erroneous impression, the stereotyped individual's own behavior during the interaction often serves to confirm and strengthen the inaccurate expectation.

Two classic studies in the 1970s demonstrated the power of stereotypes to act as self-fulfilling prophecies and illuminated the interactive process by which behavioral confirmation of stereotypes occurs. In 1977, Mark Snyder, Elizabeth Decker Tanke, and Ellen Berscheid documented the channeling effect on interactions of the stereotype that physically attractive people are more friendly and likable, showing that this expectation elicits its own behavioral confirmation from the stereotyped individual without regard to that individual's actual physical appearance.<sup>244</sup> To do so, the researchers set up a controlled "getting acquainted" telephone interaction between a male perceiver and a female target who did not know one another. Before the telephone conversation they gave each perceiver a photograph that he was told depicted his female interaction partner but that actually did not.<sup>245</sup> The photos had been prepared in advance and depicted the target as either physically attractive or physically unattractive.<sup>246</sup> A photo was assigned randomly to each set of partners, who did not otherwise see one another.<sup>247</sup> They engaged in an unstructured, ten-minute telephone conversation, each side of which was tape recorded separately.<sup>248</sup> Afterward, judges listened to separate tapes of either the perceivers' or the targets' side of the conversations and assessed the participants' behavior.<sup>249</sup>

The judges, who were completely unaware of the perceived attractiveness of the female targets, assessed those targets who had been randomly assigned to the "attractive" condition consistently with the stereotypical expectations. Specifically, they found them to "manifest greater confidence, greater animation, greater enjoyment of the conversation, and greater liking for their partners than those women who interacted with men who perceived them as physically unattrac-

---

244. This study appears in Snyder et al., *supra* note 228, and is also discussed in Snyder, *supra* note 242.

Snyder and his colleagues relied on experimental evidence that physically attractive people are stereotyped as "possess[ing] more socially desirable personality traits and are expected to lead better lives than their unattractive counterparts," Snyder et al., *supra* note 228, at 658.

245. *Id.* at 659. The female participants were not told of these photographs, nor did they receive photographs of their male partners. *Id.*

246. *Id.* The photos had been rated earlier by a different group of men. *Id.*

247. *Id.*

248. Snyder et al., *supra* note 228, at 660.

249. *Id.*



tive.”<sup>250</sup> As Snyder and his colleagues put it, “the ‘beautiful’ people became ‘good’ people.”<sup>251</sup>

Just how did the “‘beautiful’ people” *become* “‘good’ people”? The researchers used the judges’ ratings of each participant’s voice to track the process of behavioral confirmation of stereotype-based expectations, and uncovered the reciprocal nature of the behavioral confirmation process. First, they had clear evidence that the male perceivers formed their first impressions of the female targets based on the stereotype linking physical attractiveness with socially desirable personality traits, because each perceiver had been asked to characterize his initial impression of the target after seeing “her” photograph but before engaging in the telephone conversation.<sup>252</sup> Perceivers who had been assigned “attractive” targets said that they expected their partners to be “comparatively sociable, poised, humorous, and socially adept,” while those who had been assigned “unattractive” targets anticipated their partners would be “rather unsociable, awkward, serious, and socially inept.”<sup>253</sup>

Second, the researchers found that these expectations set off a “chain of events” that led to the confirmation of the perceivers’ initially erroneous, artificially created expectations. The judges’ ratings of the male perceivers’ parts of the conversations indicated that the perceivers interacted differently with targets who had been assigned to different attractiveness conditions. Those perceivers who conversed with “attractive” targets presented *themselves* as “more sociable, sexually warm, interesting, independent, sexually permissive, bold, outgoing, humorous, obvious, and socially adept” than those men who spoke with “unattractive” partners.<sup>254</sup> The judges also assessed the perceivers in the attractive target condition as being more animated, confident, and comfortable in their conversations, and judged them as both seeing their partners and being seen by their partners as more attractive.<sup>255</sup>

This study demonstrates that one reason why stereotypes are so resilient lies in their power to shape the context in which individuals get to know one another. Stereotypes act as situational factors that channel behavior and thereby define the terms of the parties’ interaction. In this experiment specifically, the perceivers first formed erroneous

---

250. *Id.* at 662.

251. Snyder, *supra* note 242, at 440.

252. Snyder et al., *supra* note 228, at 659-60.

253. *Id.* at 661.

254. *Id.* at 663.

255. *Id.*

impressions of the targets based on their general stereotypes of physically attractive people. Then, the perceivers presented themselves to their partners and interacted with them in a style that was shaped by those stereotypical expectations. The partners responded consistently with the way they were being treated, so that those who were believed to be physically attractive, and therefore more likeable, “actually came to behave in a friendly, likable, and sociable manner.”<sup>256</sup> Thus, the perceivers’ stereotypical but erroneous expectations became real.<sup>257</sup>

Having witnessed the power of stereotypes to constrain targets’ behavioral options and to elicit stereotype-consistent behavior, Snyder and his colleagues wondered about the larger societal implications of their findings: “Might not other important and widespread social stereotypes—particularly those concerning sex, race, social class, and ethnicity—also channel social interaction in ways that create their own social reality?”<sup>258</sup> The researchers further speculated that “[a]ny self-fulfilling influences of social stereotypes may have compelling and pervasive societal consequences.”<sup>259</sup>

Indeed, in a slightly earlier study, Carl O. Word, Mark P. Zanna, and Joel Cooper had found that a self-fulfilling prophecy did operate in interracial encounters, and in a context that could have wide-ranging implications for an important social issue—black unemployment.<sup>260</sup> Word and his colleagues conducted two related experiments to examine whether poor performances by black persons in job interviews might sometimes be the result of a self-fulfilling prophecy, by which a white interviewer’s negative attitude toward a black applicant elicited a less favorable performance from the applicant. Specifically, they hypothesized that a white interviewer might convey negative evaluations toward blacks through nonverbal behavior, and that a black interviewee might reciprocate these nonverbal cues in a way that resulted in a negative assessment of the interview performance—thus confirming the interviewer’s initial expectation.<sup>261</sup> In order to

256. *Id.*

257. See also Mark Snyder & Arthur A. Stukas, Jr., *Interpersonal Processes: The Interplay of Cognitive, Motivational, and Behavioral Activities in Social Interaction*, 50 ANN. REV. PSYCHOL. 273, 277 (1999) (identifying four crucial steps in the behavioral confirmation process: perceiver’s adopting beliefs about the target, perceiver’s behaving toward the target as if the beliefs were true, target’s fitting behavior to perceiver’s overtures, perceiver’s interpreting target’s behavior as confirming perceiver’s beliefs).

258. Snyder et al., *supra* note 228, at 664.

259. *Id.*

260. Carl O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109 (1974).

261. *Id.* at 111.

determine whether such a dynamic might indeed be the result of a self-fulfilling prophecy, the researchers first tested for differences between the interaction styles of white subjects interviewing black candidates and those interviewing whites.<sup>262</sup> In a second study, they compared the interview performances of a different group of white subjects, some of whom were treated similarly to the black candidates and others of whom were treated similarly to the white candidates from the first study.<sup>263</sup>

Earlier studies had found that individuals tended to avoid and cut short interaction with "stigmatized" persons, such as those with a physical disability, and that individuals' attitudes toward another person were reflected in their nonverbal behavior toward that person.<sup>264</sup> More positive attitudes toward a target person resulted in an individual's maintaining more "immediate" behaviors—including "closer interpersonal distances, more eye contact, more direct shoulder orientation, and more forward lean."<sup>265</sup> In the first interview experiment, Word and his colleagues used these and related behaviors as measures of the degree of "immediacy" that white interviewers employed in interacting with white and black interviewees. All of the interviewees had been trained beforehand to act in a standardized way, both as to the content of their answers and their nonverbal behavior, and they were monitored to ensure that they maintained standard behaviors throughout the interviews.<sup>266</sup> As each white interviewer-subject interviewed a white and then a black applicant (or vice versa), two judges scored the interviewers' immediacy behaviors.<sup>267</sup>

Overall, the results indicated that black applicants received less immediate behaviors from white interviewers than did white applicants. Specifically, the interviewers physically placed themselves farther away from the black applicants, interviewed them for shorter periods of time, and committed a higher rate of speech errors (such as sentence changes, repetitions, stuttering, incomplete sentences, and "intruding, incoherent sounds") with black than with white applicants.<sup>268</sup> From these results, the researchers concluded that black applicants

---

262. *Id.* at 112-15.

263. *Id.* at 115-19.

264. *Id.* at 110.

265. *Id.* (citing A. Mehrabian, *Inference of Attitudes from the Posture, Orientation, and Distance of a Communicator*, 32 *J. CONSULTING & CLINICAL PSYCHOL.* 296 (1968)).

266. Word et al., *supra* note 260, at 112-13.

267. *Id.* at 113.

268. *Id.* at 114-15.

were treated with less immediacy than white applicants, consistent with blackness being viewed as a “stigmatizing” trait.<sup>269</sup>

In the second experiment, the researchers examined the effect on a job applicant’s performance of being treated with less immediate behaviors.<sup>270</sup> They removed the applicant’s race as a factor in performance by using only white subjects in this experiment.<sup>271</sup> Because this time they were interested in examining the interviewees’ behavior in response to being treated with or without immediacy, the researchers trained two interviewers to act differently with respect to the factors on which the interviewers in the first experiment had shown significant differences (speech error rate, length of interview, and physical distance from applicant): one behaved precisely as the interviewers had behaved toward white applicants (the “immediate” condition), and one behaved precisely as the interviewers had behaved toward black applicants (the “nonimmediate” condition).<sup>272</sup> On all other behaviors they were trained to act similarly.<sup>273</sup> Then, interviews with subjects in the two conditions were rated by both nonparticipant judges and the subjects themselves.<sup>274</sup>

The results confirmed the operation of a self-fulfilling prophecy, for the applicants who were treated more negatively were judged both to perform more poorly than the other applicants and to respond to the interviewers with less favorable behaviors of their own. The judges rated the applicants in the nonimmediate condition as performing less adequately and being less calm and composed than applicants in the immediate condition.<sup>275</sup> In addition, applicants in the nonimmediate condition reciprocated the interviewer’s negative nonverbal behaviors by moving their chairs farther away from the interviewer’s when given the opportunity to move through a contrived interruption in the interview.<sup>276</sup> In contrast, applicants in the immediate condition moved their chairs closer to the interviewer’s, committed fewer speech errors, and generally responded with more immediate behaviors, such as forward lean, eye contact, and direct shoulder orientation.<sup>277</sup> Finally, applicants in the nonimmediate condition rated their interviewers as less

---

269. *Id.* at 115.

270. *Id.*

271. *Id.*

272. Word et al., *supra* note 260, at 116.

273. *Id.*

274. *Id.* at 116-17.

275. *Id.* at 117-18.

276. *Id.* at 118.

277. *Id.*

friendly and less adequate overall than did applicants in the immediate condition.<sup>278</sup>

Word and his colleagues pointed out the important implications of this two-stage experiment: "The present results suggest that analyses of black-and-white interactions, particularly in the area of job-seeking Blacks in white society, might profit if it were assumed that the 'problem' of black performance resides not entirely within the Blacks, but rather within the interaction setting itself."<sup>279</sup>

Subsequent studies have reproduced this behavioral confirmation process, further documenting the situation-defining and self-fulfilling nature of social stereotypes associated with race<sup>280</sup> and gender.<sup>281</sup> Recent experiments have even shown that behavioral confirmation of stereotypes can occur when the stereotype is not consciously activated—for example, when a stereotype is cued subliminally, by a stimulus outside of the perceiver's awareness.<sup>282</sup>

Collectively, these studies suggest that the behavioral confirmation process can have a significant effect in social interactions when racial and other group-based stereotypes come into play. Specifically, they show that stereotypes can define the terms of an interaction by inducing the perceiver to treat the target in a way that "boxes in" the target by giving him or her little choice but to act according to, and therefore in confirmation of, the stereotype. The target might even see advantages to behaving in conformity with the perceiver's expectations—if, for example, he or she anticipates a positive response to such behavior or, conversely, a negative response to attempts to disconfirm the perceiver's expectations.<sup>283</sup> Thus, stereotypes can be perpetuated and even strengthened *despite* their inaccuracy, because the perceiver and observers fail to recognize the power of biased expectations to define situations and channel behavior and because the behavioral confirmation process produces ostensibly objective evidence to support the stereotype. This "evidence" in turn serves to justify the continued differential treatment of the stereotyped group.

---

278. Word et al., *supra* note 260, at 119.

279. *Id.* at 119-20.

280. See, e.g., Chen & Bargh, *supra* note 227.

281. See, e.g., Berna J. Skrypnik & Mark Snyder, *On the Self-Perpetuating Nature of Stereotypes About Women and Men*, 18 J. EXPERIMENTAL SOC. PSYCHOL. 277-91 (1982); Carl L. von Baeyer et al., *Impression Management in the Job Interview: When the Female Applicant Meets the Male (Chauvinist) Interviewer*, 7 PERSONALITY & SOC. PSYCHOL. BULL. 45-51 (1981). See also Mark P. Zanna & Susan J. Pack, *On the Self-Fulfilling Nature of Apparent Sex Differences in Behavior*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 583-91 (1975).

282. See Chen & Bargh, *supra* note 227.

283. See discussion *infra* notes 321-328 and accompanying text.

## 2. *The Potential for Behavioral Confirmation of Racial Stereotypes in Authentic Interactions*

Although it is well established in the literature and has been consistently produced in the laboratory, some might point out that the behavioral confirmation of expectancies is not inevitable.<sup>284</sup> People sometimes are surprised by others who act inconsistently with their expectations, and may themselves even seek out disconfirming information. Even in laboratory contexts, behavioral confirmation of expectations does not occur in every perceiver-target interaction,<sup>285</sup> and a few experiments have even produced evidence of self-disconfirming (or “suicidal”) prophecies.<sup>286</sup> Outside of the laboratory we may expect behavioral confirmation to be even less consistent.

For one thing, real-life interactions often bear little resemblance to the neatly arranged, highly artificial encounters produced in an experimental setting. In daily life, people’s expectations about others are not usually supplied or triggered by an outside party’s manipulations; nor do people’s dealings proceed in as isolated or orderly a fashion as in researcher-contrived interactions. In addition, individuals are not relegated to simple roles as either “perceiver” or “target”; in authentic interactions, both participants play both roles, and thus each person’s expectations of the other will come into play.<sup>287</sup> Further, in day-to-day interactions the participants may be motivated by various goals that determine what they hope to get out of the encounter and influence how they deal with one another. For example, someone who is motivated to make an accurate judgment about another person—perhaps because he depends on her to work with him on a project,<sup>288</sup> knows that he will later be required to justify his assessment,<sup>289</sup> or

---

284. See, e.g., Edward E. Jones, *Interpreting Interpersonal Behavior*, 234 *SCI.* 41, 46 (1986) (stating that self-fulfilling prophecies are “by no means inevitable,” but going on to state, “there are a number of reasons why they might be widely expected in a variety of settings with different kinds of behavioral expectancies”); Neuberg, *supra* note 198, at 110.

285. See, e.g., Snyder & Haugen, *supra* note 241, at 234 (describing results in the “basic” and “adjustive” conditions of their experiment).

286. See, e.g., Dale T. Miller & William Turnbull, *Expectancies and Interpersonal Processes*, 37 *ANN. REV. PSYCHOL.* 233, 234 (1986).

287. See Snyder & Stukas, *supra* note 257, at 287-88 (addressing the “frequently asked question”: “Aren’t Both Parties to the Interaction Really Perceivers and Targets?”).

288. See Steven L. Neuberg & Susan T. Fiske, *Motivational Influences on Impression Formation: Outcome Dependency, Accuracy-Driven Attention, and Individuating Processes*, 53 *J. PERSONALITY & SOC. PSYCHOL.* 431, 431-38 (1987) (reporting results of study in which subjects’ “short-term, task-oriented outcome dependency” on target resulted in their evaluating targets with respect to their actual characteristics as opposed to manipulated expectancies).

289. See Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 *J. PERSONALITY & SOC. PSYCHOL.* 700 (1987) (reporting on study that found that subjects who knew they would be held accountable for their assessments of another

simply has been prompted to form an accurate impression<sup>290</sup>—may consciously refrain from imposing his expectations on the other person, may be more attentive to the effect of the situation on, as well as disconfirming evidence in, her behavior, and may seek more individuating information about her, all of which behaviors give the other person the opportunity to behave inconsistently with the perceiver's expectations.<sup>291</sup> Similarly, someone who is motivated to get another person to like him will behave in a more open, even ingratiating way that tends “not [to] elicit self-fulfilling outcomes.”<sup>292</sup>

Even the random particulars of the situation—such as whether or not the parties are in a hurry, whether they are focused on one another or distracted by some other concerns—may affect whether their interaction follows the textbook pattern.<sup>293</sup> Moreover, although the behavioral confirmation model stresses the power of the perceiver in defining the situation and limiting the target's options for how to respond, we should not underestimate the desire, and sometimes even the power, of an individual in the target position to “disconfirm” the perceiver's expectations.<sup>294</sup> Someone who becomes aware of another's negative impression of her and feels threatened by that view may choose to behave in ways that visibly disconfirm expectations.<sup>295</sup>

These means for disrupting the process are supported in the literature and suggest that human interaction is not hopelessly mired in a

person (by having to justify them to others) formed more complex impressions and made more accurate predictions than subjects who were not placed in this condition).

290. See Neuberg & Fiske, *supra* note 288, at 440-41 (reporting results of study in which telling subjects that it was “extremely important that [they] make every effort to form as accurate an impression as possible” encouraged subjects' use of individuating processes in attending to information); Steven L. Neuberg, *The Goal of Forming Accurate Impressions During Social Interaction: Attenuating the Impact of Negative Expectancies*, 56 J. PERSONALITY & SOC. PSYCHOL. 374 (1989) (reporting results of similar study in which motivating subjects to form accurate impressions influenced them to interact in a way that enabled them to gather more, and higher quality, target information).

291. See, e.g., Neuberg, *supra* note 198, at 114; Neuberg & Fiske, *supra* note 288, at 441-42.

292. Snyder & Stukas, *supra* note 257, at 283 (citing Steven L. Neuberg et al., *Perceiver Self-Presentation Goals as Moderators of Expectancy Influences: Ingratiation and the Disconfirmation of Negative Expectancies*, 64 J. PERSONALITY & SOC. PSYCHOL. 409 (1993)).

293. See Neuberg, *supra* note 198, at 120-22.

294. The target's own desire for verification of his self-concept often competes with the process that promotes behavioral confirmation of the perceiver's expectations about him. See generally William B. Swann, Jr. & Robin J. Ely, *A Battle of Wills: Self-Verification Versus Behavioral Confirmation*, 46 J. PERSONALITY & SOC. PSYCHOL. 1287, 1299 (1984).

295. See, e.g., James L. Hilton & John M. Darley, *Constructing Other Persons: A Limit on the Effect*, 21 J. EXPER. SOC. PSYCHOL. 1 (1985) (discussing experiment in which behavioral confirmation did occur when perceivers who expected targets to be cold interacted with naive targets, but did not occur when targets were told that perceivers expected them to be cold).

vicious circle of self-fulfilling prophecy.<sup>296</sup> Nevertheless, behavioral confirmation of negative expectations is highly reliable in the types of interactions that may have the most far-reaching effects on racial minorities' access to opportunity and vulnerability to discrimination, as well as on the perpetuation and entrenchment of the negative stereotypes that influence both. Interactions in a range of such settings in which racial discrimination is a perpetual concern—such as employment, health care, and the criminal justice system—tend to be characterized by the presence of factors that promote behavioral confirmation and the absence of factors that might disrupt the process.<sup>297</sup> In these settings, the types of expectations at issue, the typical power differences between the parties, the parties' respective roles in and goals for their interaction, the circumstances under which they interact, and the institutional practices that structure their encounter, all come together to limit the target's options for acting other than in confirmation of negative stereotypes.

First, while some expectations of the kind tested in laboratory settings (for example, that a random target is hostile or extroverted) might be harder to create and more easily dashed, negative cultural and social stereotypes are the very kind of expectancies that have the strongest influence on interactions and the most likelihood of being behaviorally confirmed.<sup>298</sup> They tend to be held with more certainty than other interpersonal expectancies, because they are shared and validated by others—often by society at large.<sup>299</sup> In addition, group-based stereotypes are often both automatically activated and “chronically accessible,”<sup>300</sup> and therefore are insidious and powerful in coloring perceivers' interpretations of interactions.

Further, negative stereotypes of minority groups tend to come into play within interactions that are structured to favor their behavioral confirmation, because “the same people who are typically the targets of social and cultural stereotypes are often those who have less power in our society (e.g., members of minority groups).”<sup>301</sup> The mere existence of a power differential plays a significant role in behavioral confirmation, because it structures the real-life interaction similarly to a

---

296. See Neuberg, *supra* note 290, at 385 (“optimistically” suggesting “that people are not hopelessly limited by their expectancies, stereotypes, and prejudices”).

297. See *infra* subparts III(B)(3), IV(C).

298. See Snyder & Stukas, *supra* note 257, at 278 (noting the “greater potential for the confirmation” of stereotypes that are “generalizations based on characteristics associated with group membership”).

299. See Swann & Ely, *supra* note 294, at 1299.

300. See Snyder & Stukas, *supra* note 257, at 279. See also Devine, *supra* note 133.

301. Snyder & Stukas, *supra* note 257, at 287.



laboratory setup, in which one party clearly functions as perceiver and the other as target.<sup>302</sup> While both parties literally bring their own expectations of one another into their interaction, the more powerful of the two tends to set the tone for the interaction, thereby functioning as the perceiver.<sup>303</sup> Further, in the settings that raise the most concern, the roles of perceiver and target are designated consistently with the power differential: The interviewer evaluates the interviewee's suitability for employment, the doctor diagnoses and formulates treatment options for the patient, and the police officer assesses the suspect's likely guilt or innocence.<sup>304</sup>

In addition to structuring the interaction in a way that promotes textbook behavioral confirmation, the power differential influences the parties' goals for the encounter, and therefore each party's choice of an interaction strategy.<sup>305</sup> The perceiver's goals play an important part in determining whether she gives the target opportunities to disconfirm expectancies or whether she instead boxes the target in to behaving so as to confirm her expectations.<sup>306</sup> For example, a perceiver who seeks to intimidate the target or to establish her superior position might treat the target in an unfriendly or contemptuous manner, thereby constraining the target's options for responding and setting off a confirmatory chain of events.<sup>307</sup> Further, the more powerful perceiver may not be aware of her biased expectations, may not be motivated to form an accurate impression of the target, or may even be motivated to confirm her preformed judgment of the target.<sup>308</sup>

These motivations can promote behavioral confirmation even in situations in which the perceiver's goal is to learn about the target for purposes of making a decision about him, for the goal of acquiring

---

302. *Id.* at 288.

303. *See id.*

304. *See id.* at 286 (pointing out designated functions of teachers-students, employers-employees, and therapists-clients, and noting "the *power differences* inherent in the roles of perceiver and target").

305. *Id.* at 283; Swann & Ely, *supra* note 294, at 1300.

306. *See, e.g.,* John T. Copeland, *Prophecies of Power: Motivational Implications of Social Power for Behavioral Confirmation*, 67 *J. PERSONALITY & SOC. PSYCHOL.* 264 (1994) (reporting on study finding that the relative power of perceiver affected his or her goals and choice of interaction strategy, as well as the likelihood of behavioral confirmation).

307. *See* Neuberg, *supra* note 198, at 116 (noting that the perceiver might trigger an accommodating or deferential response from the target or limit the target's opportunities to reveal disconfirming information by asking questions that focus on the target's flaws or by cutting short the interaction).

308. *Id.* at 111. *See also* Snyder & Haugen, *supra* note 241 (finding that behavioral confirmation occurred when experimenters triggered in perceivers the motivation to acquire knowledge that enabled them to view the world as stable and predictable, but not when perceivers were motivated to ensure a smooth and coordinated interaction by being responsive to their partners).

knowledge is not necessarily the same as the goal of making an accurate assessment (which, as discussed above,<sup>309</sup> tends to allow for disconfirmation of expectations).<sup>310</sup> As Mark Snyder and Julie A. Haugen have explained and demonstrated, sometimes knowledge-seeking perceivers strive to obtain a “stable and predictable” impression of the target, rather than an accurate one.<sup>311</sup> Some settings—for example, interviewing or counseling situations or teacher-student relationships<sup>312</sup>—might activate a perceiver’s desire to get a stable and predictable view of the target so she can perform her duties of assessment.<sup>313</sup> Further, people may sometimes simply desire “a sense that the world is a stable and predictable place in which their beliefs, expectations, preconceptions, hunches, and stereotypes are reliable predictors of events in their dealings with other people.”<sup>314</sup> In such cases, the powerful perceiver tends to find her expectations confirmed, and it is not hard to see why: a person in this position will tend to limit the amount of information that she gathers and therefore needs to process (perhaps by asking the target biased and leading rather than open-ended questions),<sup>315</sup> to focus on information that is consistent with her expectations, to interpret ambiguous information as confirming those expectations, and to elicit expectation-confirming behavior from the target.<sup>316</sup> Moreover, even if the target’s behavior is ambiguous, the perceiver (and third parties) may view it as consistent with expectations due to the general tendency of observers to inter-

309. See *supra* notes 288-291 and accompanying text.

310. See Copeland, *supra* note 306, at 275 (speculating that “perceivers operating with an accuracy goal may differ from knowledge-oriented perceivers in that accuracy-oriented perceivers are fairer and more equitable in their information search . . . [and] may supplement their information search with questions they would not have otherwise asked if fairness was not important—questions that can lead to an absence of behavioral confirmation”) (citations omitted).

311. See Snyder & Haugen, *supra* note 241, at 239 (making this point, but also noting that, while the two motivations are “not necessarily the same,” neither are the “two facets of beliefs . . . necessarily mutually exclusive”).

312. See *id.* at 241.

313. See *id.* As Snyder and Haugen explain:

[T]herapists and counselors need to know what to expect from their clients, typically having to make assessments of their clients’ well-being and their prognosis for improvement in treatment. Employers also seek a predictable view of job candidates, often-times trying to decide during the job interview what they are like and how they will perform on the job. Similarly, teachers often are tempted to make quick judgments of their students and get an idea of what kinds of learning curves they can expect from them.

*Id.*

314. *Id.* at 222 (speculating on perceivers’ motivations in acquiring and using social knowledge).

315. Neuberg, *supra* note 290, at 375 (citing studies).

316. See Snyder & Haugen, *supra* note 241, at 234-36.

pret the ambiguous behavior of another person in accordance with the observer's expectations,<sup>317</sup> and the specific tendency to interpret ambiguous behavior in conformity with racial stereotypes.<sup>318</sup>

In turn, a lower status, less powerful target realistically has fewer options in choosing an interaction strategy. Assuming he is aware of the perceiver's expectations,<sup>319</sup> a target sometimes can disconfirm expectancies by failing or refusing to accommodate the perceiver's definition of the situation.<sup>320</sup> However, a target who is subordinate to the perceiver is not likely to even try to do so,<sup>321</sup> especially if he determines that it is not in his self-interest to respond inconsistently with the perceiver's overtures.<sup>322</sup> A target may have a number of reasons for choosing to defer to the perceiver's script. Sometimes a target simply feels that it is not worth making the effort to challenge the perceiver's views because the consequences of being misperceived are trivial.<sup>323</sup> However, in many situations involving a more powerful perceiver, the target may determine that he has little choice but to defer, because he has too much to lose by challenging the perceiver's script.<sup>324</sup> Social norms generally discourage disconfirming behavior, and a target sometimes pays a heavy social price for violating the rules.<sup>325</sup> Especially if the target depends upon the perceiver's goodwill in order to avoid a negative outcome, the wiser course may be simply to take "the line of least resistance"<sup>326</sup> by responding in accordance with her overtures, even if it results in confirming her expectations about him.<sup>327</sup> A lower status target also may see an advantage to behaving in conformity with the perceiver's expectations, because he

317. See, e.g., Mark Snyder, *Motivational Foundations of Behavioral Confirmation*, 25 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 67, 79 (1992).

318. See, e.g., Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 *J. PERSONALITY & SOC. PSYCHOL.* 590 (1976); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 590 (1980).

319. See Snyder & Stukas, *supra* note 257, at 296 (noting that targets may never become aware of perceivers' negative expectations).

320. See Snyder & Haugen, *supra* note 243, at 971; Swann & Ely, *supra* note 294, at 1288, 1298.

321. Even the mere belief that the perceiver is of higher status than he can lead a target to behave consistently with expectations. See Neuberg, *supra* note 198, at 119-20.

322. See Swann & Ely, *supra* note 294, at 1299.

323. Neuberg, *supra* note 198, at 119.

324. *Id.*

325. JONES, *supra* note 227, at 45.

326. *Id.*

327. See Miller & Turnbull, *supra* note 286, at 242-43.

may anticipate being rewarded for so complying.<sup>328</sup> Furthermore, the target in such a situation may not be able to avoid being perceived consistently with the stereotype no matter how he behaves, because his actions may be interpreted in a biased fashion by the other anyway.<sup>329</sup>

Other aspects of the situation may reinforce these tendencies or add new pressures toward behavioral confirmation. Sometimes the situation simply does not present the opportunity for disconfirming behavior, because it is not the type of setting in which the target has a chance to act in ways that challenge the perceiver's expectations.<sup>330</sup> Sometimes the parties lack the cognitive or behavioral resources to do more than resort to stereotype-confirming patterns of behavior and interpretation by default.<sup>331</sup> For example, the perceiver may be under too much stress or too busy to do much more than rely on cognitive and behavioral shortcuts. People who are aroused<sup>332</sup> or under greater cognitive load<sup>333</sup> may rely more heavily on expectations and stereo-

328. For example, in studies of gender role stereotypes, female *subjects* presented themselves as more traditionally "feminine" when interacting with a male job interviewer or an attractive, "desirable" male partner whom they expected to hold a more traditional view of women. See, e.g., Carl L. von Baeyer et al., *Impression Management in the Job Interview: When the Female Applicant Meets the Male (Chauvinist) Interviewer*, 7 PERSONALITY & SOC. PSYCHOL. BULL. 45-51 (1981); Mark P. Zanna & Susan J. Pack, *On the Self-Fulfilling Nature of Apparent Sex Differences in Behavior*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 583-91 (1975).

329. Snyder & Stukas, *supra* note 257, at 281, 296; Miller & Turnbull, *supra* note 286, at 245-47.

330. See Miller & Turnbull, *supra* note 286, at 243 ("A student may be motivated to resist a teacher's unflattering perception, but unless the student has the resources to compensate for the lack of support he or she is receiving from the teacher, behavioral confirmation may be unavoidable."); *id.* at 248 (pointing out that some attributes can be expressed only in specific situations or are internal and unobservable).

331. See Neuberg, *supra* note 198, at 121.

332. See Hai-Sook Kim & Robert S. Baron, *Exercise and the Illusory Correlation: Does Arousal Heighten Stereotypic Processing?*, 24 J. EXPERIMENTAL SOC. PSYCHOL. 366 (1988) (reporting results of study in which high physiological arousal (produced through a cycling exercise and not eliciting any significant effect on mood) increased stereotypic information processing; speculating, at 378, that "overload, fatigue, low task confidence, intoxication, as well as conditions that make processing difficult (i.e., sensory distraction, lack of structure, or temporal constraints) all may exacerbate stereotypic bias").

333. See Snyder & Stukas, *supra* note 257, at 280. Cognitive busyness does not affect stereotype use in the straightforward way that many have tended to assume, however. Experiments have shown that the effect of cognitive load on stereotyping can cut in different directions, depending on *when* during the encounter the perceiver labors under it. Gilbert and Hixon have found that "the timing of the onset of busyness" makes a significant difference in the effect of stereotyping: If the perceiver is occupied with other mental tasks when she comes upon the target, that busyness may actually prevent her from activating stereotypes. Once the stereotype is activated, however, cognitive busyness does tend to promote its application. Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509 (1991). This finding has implications for common practices in a number of areas. For example, in medical care it calls into question the standard

types. One study even found that “morning people (i.e., those who reach their peak of cognitive functioning early in the day) are more likely to rely on their stereotypes at night,” while the opposite was the case with “night people.”<sup>334</sup> Time pressures also limit the ability and motivation of both parties to avoid stereotype confirmation.<sup>335</sup> Under these constraints, perceivers will find it easier to both see and treat the target consistently with expectations,<sup>336</sup> and the target likewise may find it easier to get through the interaction by complying with the perceiver’s script for their interaction.<sup>337</sup>

### 3. *Behavioral Confirmation in Context: “Creating Suspects”<sup>338</sup> in Criminal Interrogations*

Behavioral confirmation of erroneous expectations can have especially dire consequences in some situations that are almost ideally structured for such a result. One example of such a context is police interrogations of criminal suspects, which can determine whether a person goes free or is prosecuted, and ultimately may influence whether he is acquitted or convicted and the severity of his sentence. There is good reason to believe, and initial experimental evidence to support the belief,<sup>339</sup> that these interactions have great potential to produce behavioral confirmation of erroneous expectations of guilt. An interrogation that does elicit false confirmation of guilt—particularly one that results in a false confession<sup>340</sup>—has serious conse-

practice of noting the patient’s race as a routine part of examination and recitation of case. See *infra* notes 422, 451-452 and accompanying text.

334. Neuberg, *supra* note 198, at 121 (describing findings in Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 *PSYCHOL. SCIENCE* 319 (1990)).

335. See Neuberg, *supra* note 198, at 121.

336. Neuberg explains that “when resources are scarce,” perceivers will tend to: gather less information, and focus on gathering expectancy-consistent information; attend to and interpret information consistently with expectations; and behave in a way that expresses their expectations because “to monitor one’s expressive behaviors and to control the leakage of sentiments is not always a simple task.” *Id.*

337. See *id.* (noting that “it is typically easier to accommodate the script of another than it is to coax another into a script of one’s own”).

338. Lucy Akehurst & Aldert Vrij, *Creating Suspects in Police Interviews*, 29 *J. APPLIED SOC. PSYCHOL.* 192 (1999).

339. See Kassir et al., *supra* note 235 (reporting on experimental study of behavioral confirmation of expectation of guilt in mock interrogations).

340. The frequency with which police induce false confessions is unknown. See Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 *MICH. L. REV.* 1211, 1229 (2001) [hereinafter White, *Miranda’s Failure*] (noting that “[i]t remains disputed whether the documented cases of proven or probable police-induced confessions are aberrations or the ‘tip of the iceberg’”) (footnote omitted). However, in recent decades “a significant number of suspects have claimed that standard interrogation techniques have led them to give false confessions.” Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustwor-*

quences for the suspect. Not only does the encounter fail to bring an end to the criminal investigation, but the suspect's behavior tends to be viewed as especially persuasive evidence of his guilt.<sup>341</sup> Furthermore, the behavioral confirmation of erroneous expectations of guilt would compound, and certainly would not check, the effect of racial bias in the criminal justice system to the extent that race already acts as a proxy for criminality in decisions that are made at various points throughout the criminal justice process.<sup>342</sup>

Whether or not the interrogator intends to produce false evidence of guilt,<sup>343</sup> the interrogation process provides a nearly textbook exam-

thy Confessions, 32 HARV. C.R.-C.L. L. REV. 105, 108-09 & n.26 (1997) [hereinafter White, *False Confessions*] (collecting examples). See, e.g., Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 433 (1998) (reporting "a study of sixty cases of police-induced false confessions in the post-Miranda era").

341. See *infra* notes 366, 369-80 and accompanying text. A false confession is particularly harmful, because confessions are considered to be the most persuasive evidence of a suspect's guilt. See, e.g., Leo & Ofshe, *supra* note 340, at 429 ("[A] confession is universally treated as damning and compelling evidence of guilt . . . A false confession is therefore an exceptionally dangerous piece of evidence to put before anyone adjudicating a case."). Confession evidence is so powerful because the confessor is assumed to have first-hand knowledge of the event in question and "people find it difficult to believe that anyone would confess to a crime that he or she did not commit." Saul M. Kassir & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 481-82 (1997) (confirming through experimental studies that confessions are "devastating to a defendant," and "uniquely potent").

342. The literature on racial bias in the criminal justice system is voluminous, and a single footnote cannot do it justice. For a sampling of this literature, see generally COLE, *supra* note 9; Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); KENNEDY, *supra* note 10; RUSSELL, *supra* note 9; and sources cited *supra* notes 8-9, 187-189, 203.

343. The standard interrogation manual, FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (4th ed. 2001), explicitly condemns such an approach. See *id.* at xii ("[W]e are opposed to the use of any interrogation tactic or technique that is apt to make an innocent person confess."). See also *id.* at 8 ("The purpose of an interrogation is to learn the truth."). Accordingly, the manual distinguishes between the "interview," which is nonaccusatory and designed to provide an opportunity for the investigator to assess the suspect's credibility and likelihood of guilt, and the subsequent "interrogation," which is accusatory and to be conducted "only when the investigator is reasonably certain of the suspect's guilt." *Id.* at 5-9.

The intent to obtain a false confession is not necessary for behavioral confirmation to occur, or even a false confession to be elicited, if the interrogator believes the suspect is guilty. As Ofshe and Leo have stated:

Although there is little evidence that American police intend to extract confessions from the innocent, they too frequently become so zealously committed to a preconceived belief in a suspect's guilt or so reliant on their interrogation methods that they mistakenly extract an uncorroborated, inconsistent, and manifestly untrue confession. Too often interrogations appear to give no thought to the possibility that the confession they have extracted could be false.

Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUDIES IN L., POLITICS & SOC'Y 189, 193 (1997).

ple of an interaction that is set up to allow such a result. First, the interrogator enters the interaction with a strong expectation—"predisposed and reasonably certain of the suspect's guilt"<sup>344</sup>—because standard practice<sup>345</sup> is to interrogate only those suspects whom investigators have determined are likely to be guilty based upon a preliminary interview.<sup>346</sup> The strength with which this belief is held may not be warranted, however. The determination of guilt often is based on an officer's assessment that the suspect is lying when he denies the allegations against him,<sup>347</sup> and may not be supported by external evidence.<sup>348</sup> Moreover, studies have shown that "even experienced detectives" may not achieve better than "chance-level" accuracy in distinguishing between true and false denials of guilt, although they may be quite confident in their judgments.<sup>349</sup>

Second, the interrogation of a criminal suspect may be the epitome of the goal-driven social interaction, for the primary objective of an interrogator typically is to obtain a confession,<sup>350</sup> and interrogators

344. Kassin et al., *supra* note 235, at 189.

345. The *Inbau Manual*, *see supra* note 343, is the most influential police interrogation manual in the United States and throughout the world. *See, e.g.*, WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 25 (2001) ("Of all the interrogation manuals, the *Inbau Manual*, as it is commonly known, has been the most influential[,] . . . has played a major role in shaping modern interrogation practices[,] . . . [and] [o]ver the past four decades has remained the predominant interrogation manual, exerting great influence not only in this country but throughout the world."). Therefore, descriptions of standard interrogation practice commonly rely on the recommendations of the *Inbau Manual*. *See, e.g.*, Kassin et al., *supra* note 235, at 188; WHITE, *supra*, at ch. 3 (entitled "The Evolution of Modern Police Interrogation Tactics").

346. *See INBAU ET AL.*, *supra* note 343, at 8 ("An interrogation is conducted only when the investigator is reasonably certain of the suspect's guilt.").

347. *See* Kassin et al., *supra* note 235, at 188 (noting that police officers claim to "initiate interrogation only after an initial interview during which time they analyze the suspect's verbal and nonverbal behavior to determine that he or she is deceptive and, hence guilty").

348. *See id.*

349. Kassin et al., *supra* note 235, at 188-89 (citing studies); *id.* at 199 ("Thus, the pivotal decision to interrogate a suspect is based on prejudgments of guilt confidently made but frequently in error"). *See also* Christian A. Meissner & Saul M. Kassin, "He's Guilty!": *Investigator Bias in Judgments of Truth and Deception*, 26 *LAW & HUM. BEHAV.* 469 (2002) (reporting on study that found evidence that training in interviewing and interrogation increases the likelihood of false positives in judgments of deception).

350. While the interrogator's explicit purpose may be to get a truthful statement, *see INBAU ET AL.*, *supra* note 343, at 8 (stating that this is the purpose of an interrogation), if she believes that the suspect is guilty the interrogator will view the interrogation as successful if it results in a confession. *See, e.g.*, Kassin et al., *supra* note 235, at 189 ("[A]n interrogation is a theory-driven social interaction led by an authority figure who holds a strong a priori belief about the target and who measures success by his or her ability to extract an admission from that target."); Ofshe & Leo, *supra* note 343, at 195 ("Accusatory interrogation (as distinct from interviewing) . . . has only one goal: to obtain a confession from whomever is selected for processing."); WHITE, *supra* note 345, at 26 ("[T]he *Inbau Manual* has always been primarily directed toward obtaining truthful confessions from guilty suspects."). *But see INBAU ET AL.*, *supra* note 343, at 8 (stating that

may use a number of strategies to achieve that goal (and, by definition, to deny the suspect the opportunity to disconfirm the expectation of guilt).<sup>351</sup> The interrogator uses this goal to set the tone of the interaction, as the standard interrogation manual advises interrogators to “convince the suspect that [s]he has no doubt as to the suspect’s guilt.”<sup>352</sup> Techniques designed to prod the suspect toward confessing include suggesting that forensic evidence of his guilt exists when in fact none has been found,<sup>353</sup> pretending to sympathize with the suspect, perhaps by minimizing the “moral seriousness” of the offense or suggesting a more palatable motivation for the crime than the one that is presumed.<sup>354</sup> Interrogators are advised to “communicate[ ] to the suspect the futility of maintaining his innocence”<sup>355</sup> and to resist the suspect’s attempts to deny his guilt.<sup>356</sup>

Moreover, the social structure of the interrogation is ideal for behavioral confirmation of the interrogator’s expectations, because she is both the perceiver and the more powerful of the two parties. Not only does her role require her to question and evaluate the suspect,<sup>357</sup> but she also has the ability to control both the course of the interrogation itself<sup>358</sup> and the fate of the suspect<sup>359</sup>—and may play up those abilities whenever it seems strategically expedient to do so.<sup>360</sup> The

---

the idea that “the purpose of an interrogation is to elicit a confession” is “a common misperception”).

351. See generally Kassin et al., *supra* note 235, at 188; Ofshe & Leo, *supra* note 343, at 197-206; WHITE, *supra* note 345, at 26-36.

352. WHITE, *supra* note 345, at 27 (citing INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 81-82 (earlier edition of the Inbau Manual)).

353. See WHITE, *supra* note 345, at 28-29.

354. See *id.* at 28.

355. *Id.* See also Ofshe & Leo, *supra* note 343, at 197.

356. Interrogators may, in fact, become so fixated on obtaining a confession that they ignore disconfirming evidence that the suspect offers. See Ofshe & Leo, *supra* note 343, at 197 (noting that interrogator may become “insensitive to and ignore the evidence the suspect offers to support his protestations of innocence” because the interrogator is focused on moving the suspect closer to giving a confession).

357. Such a role designates the questioner as the more powerful party to the interaction. See *supra* note 304 and accompanying text.

358. See, e.g., WHITE, *supra* note 345, at 27 (noting that interrogators are trained to interrogate the suspect “under circumstances where [they are] in complete control of the situation”).

359. See Ofshe & Leo, *supra* note 343, at 200 (noting that “the interrogator wields the power of the state to take the suspect into custody, detain him against his will, and subject him to a trial that can lead to severe punishment”).

360. See Ofshe & Leo, *supra* note 343, at 200 (noting that “[t]he initial structure of an interrogation (both as to its physical characteristics and psychological aspects) is designed . . . to create the impression that the interrogator has the power to radically alter the suspect’s life”); *id.* at 204-05 (describing ways in which interrogator might lead suspect to believe that interrogator will act to procure a benefit for the suspect if he confesses); WHITE, *supra* note 345, at 27 (summarizing Inbau Manual’s advice to the interrogator to conduct the interrogation in private; “emphasize his complete control of the situation [by] requir[ing] the suspect to wait alone in the



suspect, on the other hand, may tend to be deferential and accommodating, *especially* if he is innocent and believes that he should continue responding to questions in order to clear up the interrogator's mistaken belief that he is guilty.<sup>361</sup> However, because she has been trained to ignore the suspect's protestations, to maintain her attitude of certainty, and to systematically break down the suspect's resistance, the interrogator is not likely to relent in pursuing a confession. Instead, she is likely to continue to try to convince the overborne suspect that it is in his best interest to confess.<sup>362</sup>

As Richard J. Ofshe and Richard A. Leo have explained, even an innocent suspect may end up believing that he is better off confessing if the interrogator is successful at creating the impression that he has little chance of "surviving police questioning without being arrested and punished."<sup>363</sup> Even if the suspect continues to maintain his innocence, moreover, the interrogator may continue to believe he is guilty, because she may interpret his denials as being deceptive or defensive.<sup>364</sup> However, as Welsh S. White has pointed out, although inter-

---

interrogation room for a brief period before meeting with him"; "invade the suspect's body space, direct him to be seated if he attempts to stand, and prohibit him from smoking or fidgeting"). Welsh S. White has pointed out, moreover, that the interrogator's assertion of dominance may discourage the suspect from invoking his rights, under *Miranda v. Arizona*, 384 U.S. 436 (1966), to remain silent or to have an attorney present. See White, *Miranda's Failure*, *supra* note 340, at 1215 (stating that "the practices employed by seasoned interrogators will often have the effect of undermining a suspect's ability or inclination to assert rights"; explaining that interrogators may control pace and substance of discussion to provide suspect with "no practical opportunity" to assert rights or may establish relationship with suspect that suspect is reluctant to disrupt by asserting his rights).

361. See Ofshe & Leo, *supra* note 343, at 199-200. The suspect may even synchronize his physical movements with those of the interrogator, perhaps increasing his movement in the presence of a "lively" interrogator. Ironically, such an increase in movement tends to be viewed as deceptive or "guilty" behavior. See Akehurst & Vrij, *supra* note 338 (reporting on study finding that suspects engaged in "interactional synchrony" with police interviewers, becoming more "lively" when interviewed by a lively officer, and that suspects interviewed by a lively officer were judged as less credible than those interviewed by a nonlively officer).

362. See generally Ofshe & Leo, *supra* note 343, at 204-07 (describing incentives such as "moral or self-image benefits," "different sentencing outcomes," or "systemic benefits," including the interrogator's "help" (with the offer left "deliberately vague")); WHITE, *supra* note 345, at 32-33 (discussing difficulty in drawing the line between permissible and impermissible incentives to confess).

363. Ofshe & Leo, *supra* note 343, at 207. Ofshe and Leo explain that both guilty and innocent suspects may come to view confessing as a rational choice, because interrogators are trained to manipulate a suspect's perception of his situation, convincing him "either that he has been caught (if he is guilty) or that his situation is hopeless (if he is innocent), that further denial is pointless and that it is in his self-interest to confess." *Id.* at 194.

364. See Kassin et al., *supra* note 235, at 194, 200, 201 (reporting that interrogators in study could not distinguish between truth and deception, did not stop to re-evaluate their expectations of guilt when faced with "innocent suspects who issued plausible denials," and "interpreted the denials as proof of a guilty person's resistance—and redoubled their efforts to elicit a confes-

rogators may believe that they can distinguish between truthful and deceptive suspects, few people—including law enforcement officers—are able to do so.<sup>365</sup> Moreover, some supposed indications of deception are equally consistent with the anxiety that an innocent suspect would display because he is “overwhelmed by the dynamics of the interrogation process.”<sup>366</sup>

A recent experimental study by Saul M. Kassin and his colleagues found that, when interrogators employed standard practices, the potential for confirmation of erroneous expectations of guilt was high.<sup>367</sup> Regardless of the guilt or innocence of the suspects they questioned, interrogators who entered the interrogation believing that most suspects were guilty chose to ask more guilt-presumptive questions, used more interrogation techniques, and more frequently perceived suspects as being guilty than did interrogators who believed that most suspects were innocent.<sup>368</sup> Regardless of their actual guilt or innocence, moreover, suspects who were expected to be guilty behaved consistently with expectations, for they became “noticeably more defensive.”<sup>369</sup> Further—and, as the researchers noted, “paradoxical[ly]” and “disturbing[ly]”<sup>370</sup>—interrogators with an expectation of guilt exerted the most pressure to confess on suspects who were actually innocent and therefore provided plausible accounts of their activities during the relevant time period.<sup>371</sup> Indeed, the *innocent* suspects

[b]rought out the worst in the guilt-presumptive interrogators . . . Interrogators who approached the task with a guilty base-rate expectation never stopped to reevaluate this belief—even when paired with innocent suspects who issued plausible denials. Rather,

---

sion”; and speculating that the study’s “results may underestimate the risks incurred in criminal justice settings in which police are trained to have confidence, unfounded as it is, in their ability to divine guilt from a suspect’s interview behavior” and other contextual factors aggravate guilt-confirmation biases).

365. See WHITE, *supra* note 345, at 30-32 (discussing difficulty of distinguishing between truthful and deceptive denials of guilt and empirical evidence showing that, “in most instances, people are not able to detect deception from behavioral clues, and that, with rare exceptions, law enforcement officers have no more skill than others in this area”). See also *supra* note 349.

366. WHITE, *supra* note 345, at 31.

367. Kassin et al., *supra* note 235.

368. *Id.* at 193-94 (describing results of study of behavioral confirmation of expectations of guilt in mock interrogations). In the Kassin study, subjects’ expectations of guilt were manipulated through the experimenters’s telling them either that 80% of the suspects in the study had actually committed the crime or that only 20% had. *Id.* at 191.

369. *Id.* at 199.

370. *Id.*

371. *Id.* at 194, 197, 199 (reporting that interrogators themselves, suspects, and third-party observers all viewed interrogators’ behavior this way). Interrogators also “used more interrogation techniques overall” when interviewing innocent suspects. Kassin et al., *supra* note 235, at 194.

it appears that they interpreted the denials as proof of a guilty person's resistance—and redoubled their efforts to elicit a confession.<sup>372</sup>

Finally, neither interrogators nor third-party observers were able to distinguish between truthful (innocent) and deceptive (guilty) suspects:<sup>373</sup> “In short, a presumption of guilt triggered aggressive interrogations, which constrained the behavior of suspects and led others to infer their guilt—thus confirming the initial presumption”<sup>374</sup>—regardless of whether that presumption was correct.

The researchers pointed out that the *observers'* inability to determine that an innocent suspect was telling the truth has the “most devastating”<sup>375</sup> implications. First, the observers *were* able to distinguish between interrogators with guilty and innocent expectations, and perceived the former as putting more pressure on suspects and working harder to get a confession.<sup>376</sup> Second, observers considered the innocent suspects' denials to be more plausible than those of the guilty suspects.<sup>377</sup> Nevertheless, observers still were more likely to consider a suspect's behavior defensive and judge him to be guilty if the interrogator expected him to be guilty.<sup>378</sup> In other words, despite being aware of the situational constraints under which the suspects labored, observers failed to consider how those constraints might have influenced the suspects' behavior and ultimately judged them in accordance with the presumptions of the interrogator.<sup>379</sup> The observers thus “committed the fundamental attribution error,”<sup>380</sup> by failing to correct the impressions they drew from the suspect's behavior to account for the chain of events set in motion by the interrogator's initial presumption of guilt.

Nor are existing legal controls likely to account for the behavioral confirmation process through which erroneous expectations can con-

---

372. *Id.* at 200.

373. *See id.* at 194 (reporting that only 30% of interrogators judged their suspects guilty, that the results were “marginally consistent with the hypothesis that preinterrogation expectations would bias judgments,” and that actual guilt did not affect interrogators' ultimate judgments of guilt or innocence); *id.* at 198 (reporting that observers (who were not informed of the interrogators' expectations or the suspects' guilt or innocence, *see id.* at 196) viewed suspects in the guilty expectations condition as more defensive than those in the innocent expectations condition, but that “[n]o differences emerged as a function of the suspect's actual guilt or innocence”).

374. Kassir et al., *supra* note 235, at 199.

375. *Id.* at 200.

376. *See id.* at 197, 200.

377. *See id.* at 198, 200.

378. *See id.*

379. *See id.* at 199.

380. Kassir et al., *supra* note 235, at 199. For discussion of the fundamental attribution error, see *supra* notes 39-52 and accompanying text.

tribute to legal determinations of guilt. The standard psychological interrogation techniques described above are not, generally speaking, unlawful,<sup>381</sup> so law enforcement agencies have no incentive not to employ them and are unlikely to face sanctions (such as the inadmissibility of the statement obtained) if they do.<sup>382</sup> Guilt-consistent responses of suspects in such interrogations—perhaps even including false confessions—are likely to be taken by law enforcement officers at face value,<sup>383</sup> and therefore will promote the decision to prosecute and perhaps be used to press the suspect for a guilty plea. If the case goes to trial and the defendant's statement is admitted into evidence, Kassins's study suggests that jurors are unlikely to factor into their assessments of guilt the extent to which the suspect's apparently guilty behavior might have been influenced by the conditions of the interrogation.<sup>384</sup> This may be the case even if the court instructs the jury to consider the conditions of the interrogation in evaluating the defendant's statement.<sup>385</sup> Furthermore, the mock juror study discussed above in subpart II(B) suggests that jurors may be even less willing or able to discount inculpatory but potentially faulty evidence when the

---

381. See generally White, *Miranda's Failure*, *supra* note 340, at 1217-21 (explaining that neither *Miranda v. Arizona*, 384 U.S. 436 (1996), nor the due process voluntariness test—two standards that courts have conflated, although they are theoretically distinct—prohibits standard psychological interrogation practices, even some that are quite “pernicious”).

382. See also *id.* at 1218-19 (discussing law enforcement's inclination to err on side of enforcement interests when techniques in question are not expressly prohibited).

383. Further, the suspect's behavior may be read as consistent with guilt even if it is ambiguous or includes plausible denials of guilt. See *supra* notes 369-380 and accompanying text.

384. For discussion of observers' tendency to commit the fundamental attribution error and, therefore, to fail to take into account the interrogator's behavior in assessing the suspect's response, see *supra* notes 375-380 and accompanying text.

385. The court might, for example, instruct the jury to consider, in determining how much weight to give the defendant's statement, how the defendant was treated while he was under interrogation or the circumstances under which the defendant's statement was made. See, e.g., KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.03 (5th ed. 2000) (collecting federal jury instructions to this effect). Jurors may be unable to disregard a statement once they have heard it, however—even if they are told to take into account the circumstances under which it was obtained or to disregard it altogether. In another experimental study, Kassins and Sukel found that “[t]he mere presence of a confession was . . . sufficient to turn acquittal into conviction, irrespective of the contexts in which it was elicited and presented.” Saul M. Kassins & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 42 (1997). Jurors who were exposed to a defendant's confession “did not sufficiently discount” the confession in reaching their verdicts, “even when they saw the confession as coerced, even when the judge ruled the confession inadmissible, and even when participants said that it did not influence their decision-making.” *Id.* See also Saul M. Kassins & Lawrence S. Wrightsman, *Prior Confessions and Mock Juror Verdicts*, 10 J. APPLIED PSYCHOL. 133 (1980) (finding that jurors failed to discount confessions obtained through promises of leniency, although they did discount confessions obtained through threats of harm or punishment).

suspect is not white.<sup>386</sup> The “danger[ ] of presuming guilt,”<sup>387</sup>—especially for suspects of color—is that, even in the absence of an officer’s intent to convict an innocent person, an erroneous expectation of guilt sometimes both creates its own confirmation and conceals its effect in producing that confirmation, leaving only objective “evidence” on which to base final judgment.

#### IV. RACE AS PROXY IN MEDICAL CARE

The foregoing sections support legal scholars’ arguments that individual adjudication under the predominant legal model is inadequate to address the most prevalent forms of racial bias.<sup>388</sup> In particular, these sections have shown the difficulty of identifying cases in which racially disparate treatment has *occurred*—not to speak of determining whether it was *intended*—because the same situations that tend to promote discriminatory behavior also tend to obscure it. These points have their most important implications in contexts that are characterized by both normative ambiguity and conditions that promote rather than disrupt the behavioral confirmation of expectations. The worst such contexts would be settings in which decision making is complex and subjective (and, accordingly, in which decisionmakers tend to be granted a great deal of discretion and deference), race-based expectations are institutionally accepted and reinforced, and decisionmakers have greater power than the subjects of their decisions but lack the incentive or resources to disrupt the influence of erroneous expectations on their behavior and decisions.

Medical care is one context that is characterized by all of these factors and in which the potential for racial bias has received great attention recently. We know that substantial race-based disparities in health care status and medical treatment exist because they have been documented.<sup>389</sup> On the other hand, and as the following sections will discuss, pinpointing the cause, or even identifying the existence, of racial bias in an individual case is a more complex and controversial proposition. One generalization that can be asserted with some confidence, however, is that it is not so much the “person” (that is, the medical decisionmaker) as it is the situation that produces the large share of racial disparities in medical care. As medical professionals, social scientists, and legal scholars have shown, the medical decision

---

386. See *supra* notes 162-168 and accompanying text.

387. Kassir et al., *supra* note 235, at 187.

388. See *supra* notes 15-26 and accompanying text, discussing criticisms of the intentional discrimination model.

389. See *infra* subpart IV(A).

making context is shaped by conditions that promote racial bias, including institutional knowledge, practices, and constraints that channel medical decisionmakers to think in terms of race and lead patients, sometimes, to respond accordingly.

After briefly reviewing the institutional and cognitive accounts of how racial bias infects medical decision making, this section supplements those accounts by describing the ways in which social interaction in clinical encounters can interact with and exacerbate those influences.

### A. *Racial Disparities in Medical Outcomes and Treatment*

Recent statistics document significant differences in mortality and health status between blacks and whites.<sup>390</sup> Those numbers show, for example, that blacks have a shorter life expectancy and higher death rate,<sup>391</sup> higher rate of infant mortality,<sup>392</sup> and higher prevalence of many diseases than whites.<sup>393</sup> Moreover, numerous studies indicate that patients from racial and ethnic minority groups receive an inferior level of medical care compared to white patients.<sup>394</sup> For example, African-American patients tend to undergo fewer expensive or ad-

390. Because most of the empirical studies have focused on disparities between blacks and whites, see Bowser, *supra* note 5, at 80 n.4, and because of the unique history of African-Americans and medicine in this country, see, e.g., *infra* subpart IV(B), this discussion focuses on differences between the health outcomes and medical treatment of blacks and whites. Some of the points made in this section, however, undoubtedly apply to other social groups. See, e.g., discussion *infra* note 443.

391. See, e.g., W. MICHAEL BYRD & LYNDA A. CLAYTON, *AN AMERICAN HEALTH DILEMMA: A MEDICAL HISTORY OF AFRICAN AMERICANS AND THE PROBLEM OF RACE* 29 (2000) (reporting, based on data through the early 1990s, that the black life expectancy was 69.2 years, compared to 76 years for whites, and that the "Black death rate of 783.1/10<sup>5</sup> is 1.6 x the White rate").

392. See *id.* (reporting that "Black IMR of 17.7 per 1000 live births is 2.2 x the White rate").

393. See *id.* at 31-33 (reporting black-white comparisons of prevalence of several diseases).

394. While these differences may take the form of "more" or "less" care for blacks as compared with whites, the real issue is that the disparities suggest that "minorities may have health care services *poorly matched* to their needs." INST. OF MED., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* 176 (2002) (emphasis added).

The literature on racial disparities in medical care is large, and I offer in the text just few of the many examples that have been found. For fuller discussion and more detailed examination of the empirical evidence of racial disparities in health care, see, for example, Bowser, *supra* note 5, at 83-91 (discussing studies providing empirical evidence of racial discrimination in medical treatment); Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 VILL. L. REV. 195, 201-17 (2003) (discussing difficulty in isolating relationship between patient characteristics such as race and differences in medical treatment and studies that provide evidence of bias based on race); INST. OF MED., *supra*, at app. B (summarizing selected literature documenting racial and ethnic disparities in health care); Barbara A. Noah, *Racial Disparities in the Delivery of Health Care*, 35 SAN DIEGO L. REV. 135, 138-56 (1998) (discussing studies finding racial disparities in the delivery of health care); Michael S. Shin, *Redressing Wounds: Finding a Legal Framework To Remedy Racial Disparities in Medical Care*, 90 CAL. L. REV. 2047, 2054-58 (2002) (discussing studies finding racial differences in medical treatment); and Sidney D. Watson, *Race*,

vanced medical procedures<sup>395</sup> and to receive a lower level of pain relief than whites,<sup>396</sup> while also being subjected more frequently to medical hardships, such as amputations.<sup>397</sup> In addition, black patients with psychiatric disorders often are given more severe diagnoses and prescribed more restrictive treatment than white patients exhibiting similar symptoms, or, alternatively, are not treated for their mental illnesses because they are misdiagnosed as having substance abuse problems.<sup>398</sup>

Many experts believe that at least part of this disparity can be attributed to racial bias in the delivery of medical care. For example, in its 2002 report, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care*, the Institute of Medicine concluded that “[b]ias, stereotyping, prejudice, and clinical uncertainty on the part of health care providers may contribute to racial and ethnic disparities in healthcare” and called for “greater understanding” of and research into “the prevalence and influence of these processes.”<sup>399</sup> Other prominent physicians and organizations have expressed similar concerns.<sup>400</sup> Some commentators, on the other hand, have asserted that

---

*Ethnicity and Quality of Care: Inequalities and Incentives*, 27 AM. J.L. & MED. 203, 205-09 (2001) (discussing studies finding racial differences in health outcomes, resources, and care).

395. See, e.g., Kevin A. Schulman et al., *The Effect of Race and Sex on Physicians' Recommendations for Cardiac Catheterization*, 340 NEW ENG. J. MED. 618 (1999).

396. See, e.g., Roberto Bernabei et al., *Management of Pain in Elderly Patients with Cancer*, 279 JAMA 1877 (1998); Knox H. Todd et al., *Ethnicity and Analgesic Practice*, 35 ANNALS EMERGENCY MED. 11 (2000). See also Carmen R. Green et al., *The Unequal Burden of Pain: Confronting Racial and Ethnic Disparities in Pain*, 4 PAIN MED. 277 (2003) (reviewing literature on racial and ethnic disparities in pain care across different types of pain and settings, as well as literature on patient, health care provider, and health care system factors that contribute to those disparities); Knox H. Todd et al., *Ethnicity as a Risk Factor for Inadequate Emergency Department Analgesia*, 269 JAMA 1537 (1993) (reporting differences in Hispanic patients and similarly situated non-Hispanic white patients' receipt of pain medication).

397. See, e.g., Edward Guadagnoli et al., *The Influence of Race on the Use of Surgical Procedures for Treatment of Peripheral Vascular Disease of the Lower Extremities*, 130 ARCH. SURGERY 381 (1995).

398. Mental health diagnosis and treatment decisions may be even more likely to reflect the influence of racial bias than other medical decisions, because the kinds of judgments that must be made can implicate a wide range of racial stereotypes (including the stereotypes of blacks as aggressive or violent, as less complex intellectually or psychologically, or as more likely to engage in substance abuse than whites) and because mental health professionals may feel less empathy or optimism for black patients. See generally Erica Goode, *Disparities Seen in Mental Care for Minorities*, N.Y. TIMES, Aug. 27, 2001, at A1; Lawson et al., *supra* note 6; Pavkov et al., *supra* note 6; Steven P. Segal et al., *Race, Quality of Care, and Antipsychotic Prescribing Practices in Psychiatric Emergency Services*, 47 PSYCHIATRIC SERVICES 282 (1996); Jay C. Wade, *Institutional Racism: An Analysis of the Mental Health System*, 63 AM. J. ORTHOPSYCHIATRY 536 (1993); Whaley, *supra* note 7.

399. INST. OF MED., *supra* note 394, at 140.

400. See, e.g., Council on Ethical & Judicial Affairs of the Am. Med. Ass'n, *Black-White Disparities in Health Care*, 263 JAMA 2344, 2346 (1990) (noting the possibility that disparities in

the focus on physician bias is itself “divisive” and “worrisome,”<sup>401</sup> or that more important explanations for racial disparities lie elsewhere, such as in differential resources and access to health care<sup>402</sup> or differential patient preferences.<sup>403</sup>

Undoubtedly, a complicated set of factors play a role in producing disparities in health care and outcomes.<sup>404</sup> Disparities in access and resources alone do not account for the documented inequalities in health status, however, for racially disparate outcomes persist even when studies control for access to health care and socioeconomic status.<sup>405</sup> Nor can an explanation based in patient preferences be viewed as negating that of racial bias in treatment. Proponents of the “patient preference” explanation suggest that patients’ own cultural preferences play a role in health disparities, for some members of groups receiving inferior care may prefer the types of treatment they receive.<sup>406</sup> To be sure, patients’ preferences generally should be taken into account in prescribing treatment,<sup>407</sup> and patients may decline to submit to particular interventions for a range of reasons, such as cultural beliefs favoring nontraditional treatment or individual aversion to risky or invasive procedures. Yet patient preference cannot be considered a sound *alternative* explanation for racial disparities, because it ignores the potential for racial bias on the part of the physician to

treatment decisions reflect subconscious bias and describing it as “a serious and troubling problem”); Editorial, *Racial Disparities in Medical Care*, 344 *NEW ENG. J. MED.* 1471 (2001) (noting potential for undetected racial bias in medical decision making).

401. SALLY SATEL, *HOW POLITICAL CORRECTNESS IS CORRUPTING MEDICINE* 5 (2000).

402. See, e.g., Ana I. Balsa et al., *Clinical Uncertainty and Healthcare Disparities*, 29 *AM. J.L. & MED.* 203, 217 (2003) (“Whether or not a patient has medical coverage, it should be stressed, is a much more powerful determinant of the healthcare she receives than is her race or ethnicity.”); M. Gregg Bloche, *Race and Discretion in American Medicine*, 1 *YALE J. HEALTH POL’Y, L. & ETHICS* 95, 97-99 (2001) (arguing that greater political attention should be focused on socio-economic inequalities that lead to racial gaps in health status).

403. See SATEL, *supra* note 401, at 166-70. See also Bloche, *supra* note 402, at 105 (noting and refuting this argument, characterizing it as a “reductionistic account”); Bowser, *supra* note 5, at 92-95 (citing studies in which this explanation is offered for racial differences in treatment, and refuting that claim).

404. See Bloche, *supra* note 402, at 96-97.

405. See, e.g., *INST. OF MED.*, *supra* note 394, at 127 (“When differences in treatment attributable to insurance, access to care, health status, and other factors are eliminated, however, racial and ethnic health care disparities still remain.”); Watson, *supra* note 394, at 208-09 (stating that race-based treatment differences cannot be attributed to other factors such as “biology, age, gender, clinical condition, severity of disease,” insurance status or income, and citing studies). For a review of such studies, see *INST. OF MED.*, *supra* note 394, at 38 (summarizing studies from peer-reviewed journals within the ten years prior to publication of the report “that assess racial and ethnic variation in health care while controlling for differences in access to healthcare . . . and/or socioeconomic status,” among other criteria); *id.* at app. B.

406. See SATEL, *supra* note 401, at 166.

407. See Bloche, *supra* note 402, at 103 (discussing the ethical ideal of patient autonomy).



influence the patient's view of his or her choices.<sup>408</sup> (In other words, and as will be examined further below,<sup>409</sup> differential patient preferences may in some cases constitute another example of a self-fulfilling prophecy that provides false confirmation of the expectation of difference.)

Further, some patient "preferences" are themselves a product of race discrimination.<sup>410</sup> They may, for example, be a reaction to the patient's experience or expectation of being treated poorly within a biased system and reflect the patient's mistrust of health care professionals.<sup>411</sup> Their awareness of the history of racial discrimination in medicine—including medical experimentation and other discriminatory practices<sup>412</sup>—may lead black patients to fear abuse or to feel an aversion toward aggressive treatment.<sup>413</sup> Differential preferences also may mirror racial disparities in treatment. Some studies have traced differential preferences to differences in patterns of referral for treatment or to perceived chances of positive outcome. For example, black patients sometimes are not referred as frequently as whites for advanced procedures or are referred at a later point in their illness, when the suggested procedure is less likely to be helpful.<sup>414</sup> Other studies have found that patients' resistance to a proposed treatment sometimes is based in a lack of familiarity with procedures that may be related to race. That is, patients are disinclined to agree to procedures that have not been explained to them, and sometimes patients of color

---

408. Bloche, *supra* note 402, at 105.

409. See *infra* notes 511-512 and accompanying text.

410. See Bowser, *supra* note 5, at 94-95 (explaining apparent patient preferences as being "a product of racial disparities in medical treatment" rather than an explanation for them); Crossley, *supra* note 394, at 222-23 (similar).

411. See, e.g., Bloche, *supra* note 402, at 105.

412. For a comprehensive discussion of the historical abuses and contemporary disparities that have engendered African Americans' fear and distrust of the American health system, see Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting the Health Care System Ain't Always Easy! An African American Perspective on Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 191 (1996). See also *infra* notes 427-430 and accompanying text.

413. As Crossley explains, this cycle may be self-perpetuating:

[T]he history of racial abuses in American medicine may have had the effect of putting into motion a vicious cycle: The history of discrimination causes blacks, as a group, to distrust white doctors; because blacks distrust doctors, they are generally more likely to decline aggressive or risky medical treatment; since blacks as a group are more likely to decline aggressive treatments, doctors (employing stereotypes) assume that individual black patients will prefer less aggressive treatment; and because doctors make this assumption, they are less likely to offer aggressive treatment to their black patients.

Crossley, *supra* note 394, at 222.

414. See Bowser, *supra* note 5, at 93-94 (providing examples).

do not receive the relevant information.<sup>415</sup> Alternatively, resistance to a course of treatment may reflect patients' belief that the suggested procedures tend to result in greater complications for patients in communities that receive a lower level of care.<sup>416</sup>

Moreover, to assert that racial bias influences the delivery of health care is not to suggest that individual medical professionals intentionally deliver inferior care to people of color.<sup>417</sup> Indeed, those who cite bias as a cause of disparate outcomes have been careful to explain that inequities in health care cannot, for the most part, be attributed to individual, ill-intentioned "perpetrators" and can occur despite individual practitioners' good intentions.<sup>418</sup> In the health care context, no less than in other areas of life, racial discrimination can best be understood as a product of the "symbiotic relationship"<sup>419</sup> among a number of forces. The medical context is characterized by factors that both promote and obscure the influence of racial bias, such that "racial profiling"<sup>420</sup> can occur "unreflectively, even unconsciously, as a matter of routine."<sup>421</sup>

### *B. Channeling Racially Disparate Care: Institutional and Cognitive Influences on Medical Decision Making*

Medical institutions themselves actually reward and perpetuate race-based diagnosis and treatment when they transmit and sustain

415. See, e.g., Jeff Whittle et al., *Do Patient Preferences Contribute to Racial Differences in Cardiovascular Use?*, 12 J. GEN. INTERNAL MED. 267, 271 (1997) (reporting on study finding that patients' level of familiarity with coronary revascularization procedures was the most important predictor of racial differences in patients' attitudes toward the procedures).

416. Thus, as Dr. Jeffrey N. Katz has noted, "patient 'preference' for less intensive treatment may in fact represent resignation to the perceived status quo—that interventions are unavailable, unaffordable, ineffective, or unduly risky—even if those perceptions are not accurate." Jeffrey N. Katz, Commentary, *Patient Preferences and Health Disparities*, 286 JAMA 1507-08 (2001). See also Balsa et al., *supra* note 402, at 213 (pointing out that "different behaviors by members of different racial and ethnic groups need not stem from different underlying 'preferences' about healthcare, but simply from different perceptions of the costs and benefits of participation in the healthcare system").

417. While some individual practitioners may do so, intentional discrimination is not thought to be a significant explanation for racial disparities in health care. See, e.g., INST. OF MED., *supra* note 394, at 166 (noting lack of evidence "that any significant proportion of healthcare professionals in the United States harbors overtly prejudicial attitudes"); Noah, *supra* note 394, at 165 ("No matter how compelling the evidence of racial inequities in the health care context, nothing convincingly suggests a pattern of widespread *intentional* discrimination.").

418. See, e.g., Bloche, *supra* note 402, at 98; Crossley, *supra* note 394, at 218. See also Ana I. Balsa & Thomas G. McGuire, *Prejudice, Clinical Uncertainty and Stereotyping as Sources of Health Disparities*, 22 J. HEALTH ECON. 89, 111 (2003) (analyzing, through economic models, explanations for race-based healthcare disparities other than provider prejudice).

419. Bowser, *supra* note 5, at 97.

420. *Id.* at 115-24 (discussing use of racial profiles in medical decision making).

421. Bloche, *supra* note 402, at 121.

the view that race is an important, “natural,” scientific category, and therefore a relevant factor in health care through a number of standard practices. For example, a doctor presenting a case to colleagues is expected to identify the patient’s race and will be questioned for failing to do so.<sup>422</sup> This practice, along with “a mixed bag of notions, views and attitudes”<sup>423</sup> about correlations between race and disease, are part of the “silent curriculum” that is transmitted from each generation of practitioners to the next,<sup>424</sup> and contributes to a culture in which thinking about patients in terms of race has become both expected and invisible—simply “the way that it is done.”<sup>425</sup>

In recent law review articles, René Bowser has shown that the idea that race is relevant was created, and continues to be developed and transmitted, through medical research that uses race as a variable, linking race to biological difference and perpetuating the notion that biological inferiority, rather than other factors such as differences in resources or care, accounts for the inferior health outcomes of blacks.<sup>426</sup> The tradition of racialized medical research had shameful origins, having begun with an agenda to justify slavery<sup>427</sup> and having

422. See Bowser, *supra* note 5, at 119; Steven H. Caldwell & Rebecca Popenoe, *Perceptions and Misperceptions of Skin Color*, 122 ANNALS INTERNAL MED. 614 (1995); Thomas Finacune & Joseph A. Carnese, *Racial Bias in Presentation of Cases*, 5 J. GEN. INTERNAL MED. 120 (1990) (reporting on study finding that “[r]ace was specified more often during presentations of black than of white patients”).

423. Delthia Ricks, “*Silent Curriculum*”: *Racial, Ethnic Bias Hazardous to Health*, PITTSBURGH POST-GAZETTE, Jan. 5, 1999, at D3.

424. *Id.* (quoting Dr. Judith Gwathmey). See also Balsa et al., *supra* note 402, at 209 (describing the “statistical discrimination” that doctors are taught and even urged to apply as a way of coping with clinical uncertainty); Caldwell & Popenoe, *supra* note 422, at 616 (noting that the practice of citing patient’s race is common in U.S. medical schools, as it is “either passed along as oral tradition or formally taught”).

425. Bowser, *supra* note 5, at 98.

426. See *id.* at 110-11 (noting failure of medical researchers to explain reasons for associations between race and health outcomes once such associations are found, as if such differences are inherent and require no further explanation) (citing Mindy Thompson Fullilove, *Deconstructing Race in Medical Research*, 148 ARCHIVES PEDIATRICS ADOLESCENT MED. 1014, 1014-15 (1994)); René Bowser, *Racial Bias in Medical Treatment*, 105 DICK. L. REV. 365, 374-75 (2001). Some scholars have argued, on the other hand, that including race as a variable in medical research is an important means of identifying the role that racial discrimination plays in producing health disparities. Stephen B. Thomas, for example, argues that race-related medical data are needed in order to “monitor progress or setbacks” in addressing inequalities. Stephen B. Thomas, *The Color Line: Race Matters in the Elimination of Health Disparities*, 91 AM. J. PUB. HEALTH 1046, 1047 (2001). He also warns, however, that “[w]e must be cautious . . . in our use of race as a variable, taking care to define what race means in our research, avoiding assumptions of biological differences, and accounting for distinctions between race and socioeconomic status.” *Id.*

427. See, e.g., Bowser, *supra* note 5, at 104-05. See also BYRD & CLAYTON, *supra* note 391, at 106-08, 207-08, 258-59; JOHN HOBERMAN, *DARWIN’S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE* 171-72 (1997); DAVID BARTON SMITH, *HEALTH CARE DIVIDED: RACE AND HEALING A NATION* 21-22 (1999).

included the use of African Americans as “clinical material in teaching and research”<sup>428</sup>—perhaps the most famous example of such being the Tuskegee syphilis experiment of 1932-1972.<sup>429</sup> But that history<sup>430</sup> has largely been overlooked or forgotten, and the belief that blacks are biologically, as well as culturally, different from whites has become part of the unquestioned, “background” knowledge of the profession.<sup>431</sup> “Evidence” derived from such research is incorporated into “racial profiles” on which doctors may, consciously or not, rely in making decisions about diagnosis and treatment. These profiles include the assumptions that blacks are genetically predisposed to certain diseases,<sup>432</sup> better able to tolerate pain and suffering,<sup>433</sup> and culturally disinclined to take an active role in their health care or to comply with treatment plans.<sup>434</sup> As commentators have noted, medical decisions that rely on race as a diagnostic factor when it may not be warranted nevertheless contribute to the perpetuation of racial profiles in medicine by creating a self-fulfilling prophecy whereby physicians’ racially biased diagnoses are incorporated into epidemiological data that, in turn, are used as objective, empirical “evidence” of race-related biological difference.<sup>435</sup>

428. SMITH, *supra* note 427, at 24.

429. *See id.* at 25-26 (describing the Tuskegee experiment, including biological and cultural assumptions about blacks held by health professionals involved in the study that “still exert a powerful hold on the organization of services and on treatment decisions”). The Tuskegee Study—perhaps more than any other event—has engendered widespread and lasting feelings of distrust of the medical community among African Americans. *See generally* Vicki S. Freimuth et al., *African Americans’ Views on Research and the Tuskegee Syphilis Study*, 52 SOC. SCI. MED. 797 (2001). Although Freimuth and her colleagues focused their inquiry in African Americans’ distrust of medical research, they found that African Americans were cautious about “all aspects of involvement with the medical community, including treatment and initiatives designed to promote the health and wellbeing of African Americans through appropriate preventive care and behaviors.” *Id.* at 802.

430. The history of race and medicine also includes the racial segregation of medical care and the outright denial of medical care to black people. *See, e.g.*, SMITH, *supra* note 427, at 9-33; Watson, *supra* note 394, at 210-13. *See also infra* notes 523-524 and accompanying text.

431. *See* Bowser, *supra* note 5, at 102-15 (tracing the history and institutionalization, and continuing perpetuation, of race-based medical research).

432. *See, e.g., id.* at 109 (stating that “racialized research suggests that Blacks are genetically disposed to a host of chronic diseases, including hypertension, obesity, prostate cancer, low-birth weight infants, left ventricular dysfunction, nicotine addiction, asthma, and Alzheimer’s disease,” and citing studies).

433. *See, e.g.*, Bloche, *supra* note 402, at 104-05; Bowser, *supra* note 5, at 109.

434. *See, e.g.*, Bloche, *supra* note 402, at 104-05 (describing assumptions as including “expectations and suspicions concerning therapeutic compliance and the presence of such co-morbid factors as substance abuse, poor living conditions, and lack of family and social support [and] [s]uppositions about patients’ truthfulness, self-discipline, laziness or industry, level of suffering, tolerance for pain, and intelligence”); Bowser, *supra* note 5, at 109.

435. Bowser, *supra* note 5, at 108-10; Balsa et al., *supra* note 402, at 212; Crossley, *supra* note 394, at 204-05.

These racial profiles, coupled with practitioners' own racial biases, potentially play a large role in medical decision making. There is no reason to think that medical professionals are immune to the influence of racial and other group-based stereotypes that affect everyone else and good reason to believe both that such stereotypes do influence doctors' perceptions of patients and that these stereotypes affect the quality of care they deliver.<sup>436</sup> Although, consistent with professional ideals, physicians had long denied being influenced by patients' personal characteristics in their interactions with or treatment decisions for them,<sup>437</sup> several studies over the past few decades have found that medical professionals do in fact behave differently with different patients. Studies have found, for example, that physicians, nurses, and medical students evaluate or treat patients differently based upon such characteristics as the patient's physical appearance (such as body weight), perceived "social worth" (such as the extent to which the patient is seen as contributing to society), age, disability, sexual orientation, and perceived deviance (such as alcoholism).<sup>438</sup>

In one recent study, doctors themselves reported having more negative perceptions of their African-American patients than of their white patients.<sup>439</sup> The doctors in this study (all cardiac care physicians

---

436. Indeed, it would be unrealistic to assume that physicians would be unaffected by the stereotypes that affect everyone else. See Michelle van Ryn & Jane Burke, *The Effect of Patient Race and Socio-Economic Status on Physicians' Perceptions of Patients*, 50 SOC. SCI. MED. 813, 814 (2000).

437. See John M. Eisenberg, *Sociologic Influences on Decision-Making by Clinicians*, 90 ANALS INTERNAL MED. 957, 957 (1979); Barbara Gerbert, *Perceived Likeability and Competence of Simulated Patients: Influence on Physicians' Management Plans*, 18 SOC. SCI. MED. 1053, 1053-54 (1984); Elizabeth M. Hooper et al., *Patient Characteristics That Influence Physician Behavior*, 20 MED. CARE 630, 630 (1982).

438. See generally Eisenberg, *supra* note 437, at 959 (discussing studies); Hooper et al., *supra* note 437, at 630 (discussing recent acceptance of view that patients' characteristics and behavior influence physicians' behavior and reporting on study finding differences in physician behavior that correlated with age, ethnicity, sex, and appearance of patient). See also Crossley, *supra* note 394, at 231-36 (discussing evidence that "patient characteristics unrelated to a patient's medical need—such as age, sexual orientation, disability or obesity—may influence physicians' treatment decisions"); Saif S. Rathone et al., *The Effects of Patient Sex and Race on Medical Students' Ratings of Quality of Life*, 108 AM. J. MED. 561 (2000) (reporting on study in which medical students assessed differently the quality of life and severity of condition of a white male patient and a black female patient with identical symptoms of angina).

439. See generally van Ryn & Burke, *supra* note 436. In this study, cardiac care physicians reported their perceptions of individual patients and their responses were analyzed to determine separately the effects of patient race and socioeconomic status on physician perceptions, controlling for such variables as (when appropriate) patient age, sex, race, income, education, frailty/sickness, depression, mastery, social assertiveness, and physician characteristics. *Id.* at 814-19.

and most of them white<sup>440</sup>) reported that they regarded their African-American patients as less intelligent, less educated, and less rational than their white patients.<sup>441</sup> They also expected their African-American patients to be less likely than their white patients to participate in cardiac rehabilitation or to comply with medical advice, but more likely than the white patients to abuse alcohol or other drugs.<sup>442</sup> In addition, the doctors expressed lesser feelings of “affiliation” toward their African-American patients, for they less frequently rated them as being “very pleasant” or expressed feeling about them that “[t]his patient is the kind of person I can see myself being friends with.”<sup>443</sup>

---

440. *Id.* at 815 (stating that, of the 618 encounters in the study sample, 84% were with white physicians, 11% involved Asian physicians, 1% involved African American physicians, 3% involved Hispanic physicians, and 1% involved physicians of other races or ethnicities).

The low numbers of encounters with doctors of color reflects yet another institutional problem, the low minority representation among medical professionals. *See infra* notes 474-475 and accompanying text.

441. *See* van Ryn & Burke, *supra* note 436, at 818, 821.

442. *Id.* at 818, 820.

443. *Id.* The authors speculated that physicians’ “lower feelings of affiliation toward Black patients may be connected to their beliefs about the degree to which patients are rational/intelligent.” *Id.* at 823.

For some patients, physicians’ negative race-based expectations merge with similarly negative perceptions of patients who are poor or not well educated. *See* van Ryn & Burke, *supra* note 436, at 824 (noting that “[r]ace is highly correlated with SES [socioeconomic status] . . . thus, physicians’ negative attributions towards Blacks and those of lower SES may have a powerful cumulative effect in the clinical setting”). *Cf.* Whaley, *supra* note 7, at 48 (discussing studies whose findings “suggest that white people’s stereotypes of blacks in general—and of those who reside in poor urban areas in particular—are basically negative, and that status or power interacts with race to produce stereotyping and prejudice toward low-status black people”). In the study of cardiac care physicians’ race-based perceptions, the researchers analyzed separately whether doctors’ attitudes were influenced by patients’ income and education levels. (In this part, the researchers controlled for race, among other variables.) *See* van Ryn & Burke, *supra* note 436, at 815-16; *see also supra* note 439. While results did not differ for patients in the middle and highest SES groups, patients in the lowest SES group did fare worse in physicians’ assessments: the doctors were more likely to perceive those patients as being dependent, irresponsible, irrational, and unintelligent. They also viewed the lower SES patients as being less likely to participate in cardiac rehabilitation if it were prescribed. *See* van Ryn & Burke, *supra* note 436, at 821-22. Other studies have found that, in the mental health care setting, lower class patients are “diagnosed as aberrant more frequently than middle-class patients.” Eisenberg, *supra* note 437, at 958.

Women, too, are often held in low regard by health care professionals. One study found, for example, that physicians “like” male patients more than they like female patients. *See* Judith A. Hall et al., *Physicians’ Liking for Their Patients: More Evidence for the Role of Affect in Medical Care*, 12 HEALTH PSYCHOL. 140, 142 (1993) (“liking” was defined to include “warmth, respect, interest, and enthusiasm for seeing” the patient.). In another study, the vast majority of physicians referred to a woman when they were asked to describe “the typical complaining patient,” while yet another study found that doctors applied the label “crock” (meaning a patient who is likely to give unreliable information) more often to women than to men. Linda S. Fidell, *Sex Role Stereotypes and the American Physician*, 4 PSYCH. WOMEN Q. 313, 322 (1980). Studies also have found that “physicians believe women to be more mentally disturbed, to have more social problems and other vague symptoms, and to be less stoic than men during illness.” *Id.* *See also*

Attitudes such as these, whether explicit or implicit,<sup>444</sup> can lead to an “attenuation of empathy across racial lines” that leads to the “unconscious devaluation of minority patients’ hopes, fears, and life prospects.”<sup>445</sup>

The clinical context is ripe for the influence of such biases on decision making.<sup>446</sup> The inherent uncertainty of diagnosis and treatment decisions,<sup>447</sup> the ambiguity of patient symptoms and behavior,<sup>448</sup> and the wide discretion accorded medical professionals<sup>449</sup> all create a situation in which “provider (and patient) presuppositions, attitudes, and fears that engender racial disparities have wide space to operate.”<sup>450</sup> The standard practice of noting a patient’s race as part of her case<sup>451</sup> exacerbates these tendencies by not only transmitting the idea that race is a relevant factor but also activating automatic stereotyping processes.<sup>452</sup> Additional constraints built into the situation—including time pressure, resource limitations, lack of complete and accurate

Crossley, *supra* note 394, at 230 (noting that expectations of women include “physicians’ assumptions that women are less likely to choose aggressive interventions, assumptions that women are less likely to have demanding social or career roles, attributions of women’s physical complaints to emotional or mental causes, and devaluations of women’s contributions to society”) (footnotes omitted).

444. See Shin, *supra* note 11, at 2065 (defining attitudes as “positive or negative dispositions toward objects in one’s social environment” and implicit attitudes as those that “operate outside of conscious awareness” and “are automatically activated by the mere presence of the attitude object”).

445. Bloche, *supra* note 402, at 104.

446. See INST. OF MED., *supra* note 394, at 136. For more detailed discussions of the operation of unconscious racial bias in medical decision making in recent law reviews, see generally Bloche, *supra* note 402, at 103-06; Crossley, *supra* note 394, at 218-21; and Shin, *supra* note 11, at 2064-76.

447. See Balsa et al., *supra* note 402, at 206-07; Crossley, *supra* note 394, at 204, 206-07. For an economic analysis of the potential for clinical uncertainty to cause disparity in treatment, see Balsa & McGuire, *supra* note 418, at 96-103 (discussing two models of clinical uncertainty the “miscommunication” model, under which the doctor has greater difficulty interpreting symptoms from different racial groups, and the “racial profiling” model, under which “the doctor believes that the underlying distribution of severity [of disease] differs across races, and hence is willing to use the ‘category’ race as an aid to improve his diagnosis when making an inference about the underlying severity of the patient”).

448. See Shin, *supra* note 11, at 2074-75.

449. See Bloche, *supra* note 402, at 99-106.

450. *Id.* at 97. See also Balsa et al., *supra* note 402, at 207.

451. See *supra* note 422 and accompanying text.

452. For discussion of automatic stereotype activation and cognitive busyness, see *supra* notes 331-334 and accompanying text. A study by Gilbert and Hixon, discussed at *supra* note 333, suggests that the timing of this cue might have an effect on whether it results in stereotyping. Gilbert and Hixon found that, although cognitive busyness promotes the *application* of a stereotype once it is activated, it might actually prevent stereotype *activation* if the perceiver is occupied with other mental tasks when she comes upon the target. It seems possible, therefore, that delaying the point at which a patient’s race is mentioned during case presentations and conferences until they have already begun thinking about the patient’s case could allow doctors the

information, heavy clinical (and hence cognitive) loads, lack of a pre-existing relationship between doctor and patient, rotating staffs, and physical stresses such as sleeplessness—increase the use of “mental shortcuts” such as racial stereotypes and profiles and, accordingly, the probability that physicians will interpret patients’ symptoms or prescribe treatment plans differentially based on race.<sup>453</sup> As the Institute of Medicine explained in its 2002 report, given the situational constraints under which they function,<sup>454</sup>

[d]octors must depend on inferences about severity based on what they can see about the illness and on what else they observe about the patient (e.g., race). The exact same symptom information can lead the physician to make different clinical decisions depending on the other characteristics of the patient. Physicians can therefore be viewed as operating with prior beliefs about the likelihood of their patients’ conditions, “priors” that will be different according to age, gender, SES, and possibly race/ethnicity. These priors—which are taught as a cognitive heuristic to medical students—as well as the information gained in a clinical encounter both influence medical decisions.<sup>455</sup>

### C. *Behavioral Confirmation in the Clinical Encounter: Medical Treatment as a Social Act*

Even those clinical encounters, which might seem to present an opportunity to check the influence of race-based assumptions by allowing the patient to provide individualized information, may actually exacerbate rather than reduce the use of racial stereotypes. The doctor-patient relationship can be an important determinant of the quality of care a patient receives, for the diagnosis and treatment of disease are not just technical processes, but are also social acts.<sup>456</sup> Studies have shown that the quality of interaction between doctor and patient can have a significant effect on patients’ health. In particular,

---

opportunity to prevent the activation and application of racial stereotypes. Gilbert & Hixon, *supra* note 333.

453. See, e.g., Balsa et al., *supra* note 402, at 210; Bloche, *supra* note 402, at 104-05; Shin, *supra* note 11, at 2074. See also Joan J. Mathews, *The Communitarian Process in Clinical Settings*, 17 SOC. SCI. MED. 1371, 1375 (1983) (describing lack of continuity in professional-patient relationships).

Balsa and her colleagues also point out that doctors may have greater difficulty communicating with patients from minority racial and ethnic groups, may interpret the “signals” they emit (such as reports of pain) differently from the signals emitted by white patients, and may make different decisions about diagnosis and treatment based upon those signals despite having equal regard for each patient. Balsa et al., *supra* note 402, at 210.

454. See generally INST. OF MED., *supra* note 394, at 128, 132 (describing constraints on and uncertainty of medical decision making).

455. *Id.* at 132.

456. Eisenberg, *supra* note 437, at 957.



higher quality care and better medical outcomes have been associated with a more participatory, team-like style of medical decision making involving give-and-take between doctor and patient.<sup>457</sup> In that ideal relationship, the doctor involves the patient in treatment decisions by “providing treatment options, a sense of control over treatment decisions, and a sense of responsibility for care.”<sup>458</sup>

Whether this relationship is achieved depends in large part upon the doctor’s perceptions of and feelings toward the patient. Generally, physicians’ perceptions of patients’ “likeability” and competence have been found to influence their treatment of patients.<sup>459</sup> For example, physicians tend to give less time, attention, and follow-up care to those whom they consider deviant or less likeable.<sup>460</sup> In addition, doctors give less information to, seek less information from, and are less likely to attend to information offered by patients whom they regard as less intelligent or rational.<sup>461</sup> Furthermore, the same kinds of “immediate” behaviors that have been found to produce more positive performances in job interviews<sup>462</sup>—sitting at the patient’s level, maintaining eye contact, having a relaxed posture, nodding, and making encouraging sounds<sup>463</sup>—also correlate with a better quality of health

---

457. See, e.g., Jozien Bensing, *Doctor-Patient Communication and the Quality of Care*, 32 *SOC. SCI. MED.* 1301, 1305-06 (1991) (finding positive relationship between doctor-patient communication and quality of “psychosocial” care as defined by physicians); Sherrie Kaplan et al., *Patient and Visit Characteristics Related to Physicians’ Participatory Decision-Making Style: Results from the Medical Outcomes Study*, 33 *MED. CARE* 1176, 1177 (1995) (noting connection between participatory decision making style and health outcomes); Mathews, *supra* note 453 (noting connection between information giving and quality and outcomes of health care); Howard Waitzkin, *Information Giving in Medical Care*, 26 *J. HEALTH & SOC. BEHAV.* 81 (1985).

458. Kaplan, *supra* note 457, at 1177 (defining participatory decision making style).

459. See, e.g., Gerbert, *supra* note 437 (reporting on study that found significant differences on some (but not all) treatment dimensions studied, such as patient education, frequency of medication, and encouragement of follow-up contact, depending upon patient’s perceived likeability or competence).

460. See, e.g., Eisenberg, *supra* note 437, at 962; Gerbert, *supra* note 437, at 1057 (finding that patients who were perceived as more likeable and competent “would more frequently be encouraged to contact the office and would be more likely to receive medication”); van Ryn & Burke, *supra* note 436, at 823 (collecting and summarizing studies finding treatment differences).

461. See, e.g., Waitzkin, *supra* note 457, at 93 (finding that doctors tended to give more information to patients with higher levels of education and of higher social class); cf. van Ryn and Burke, *supra* note 436, at 823 (drawing this conclusion from the results of their study finding that doctors regard minority and low socioeconomic status patients as less intelligent and rational and results of studies finding differences in information giving based on patient characteristics).

462. See *supra* notes 264-278 and accompanying text for description of immediate behaviors and effect on performance in interviews.

463. These and similar behaviors are identified as positive aspects of physician nonverbal behavior. See, e.g., C. KNIGHT ALDRICH, *THE MEDICAL INTERVIEW: GATEWAY TO THE DOCTOR-PATIENT INTERVIEW* 21-22 (2d ed. 1999); Bensing, *supra* note 457, at 1305.

care.<sup>464</sup> (Indeed, these nonverbal behaviors may be both more important indicators of a doctor's regard for the patient and harder to fake than verbal friendliness.)<sup>465</sup> When physicians feel uncomfortable with or dislike a patient, not only are they less likely to behave in that immediate, patient-centered fashion, but they may even cut off the encounter prematurely, before a thorough interview or examination can be completed.<sup>466</sup>

Moreover, patients' satisfaction with their medical care affects their medical outcomes and is positively related to how much their doctors like them.<sup>467</sup> As in other social interactions,<sup>468</sup> patient satisfaction and physician liking appear to have a "mutually reinforcing effect" within the medical encounter, as the patient and doctor send and respond to cues that increase their liking for one another.<sup>469</sup> Likewise, feelings of discomfort or distrust between patient and doctor can be reciprocated and reinforced through interaction. For example, patients who feel that their doctors do not respect or are not interested in them may react by providing the doctor with less information about their symptoms or asking fewer questions about their conditions.<sup>470</sup> Such behavior in turn may reinforce the doctor's perception that the patient is not intelligent or rational and discourage the doctor from asking questions of or sharing information with the patient.<sup>471</sup> Similarly, patients who do not trust or feel affiliation with their doctors may be less inclined to comply with a prescribed treatment plan.<sup>472</sup>

While these studies suggest the operation of a self-fulfilling prophecy in doctor-patient relationships generally, there is good reason to believe that behavioral confirmation of prior expectations is especially problematic in interracial clinical encounters.<sup>473</sup> It bears emphasizing that most encounters between patients of color and their physicians

---

464. See Bensing, *supra* note 457, at 1307-08 (noting that, in physicians' assessments of the quality of psychosocial care, affective behavior—especially the nonverbal aspects of affective behavior, such as "eye-contact and shown interest"—was a powerful factor).

465. See *id.* at 1308 (noting that "it is much easier to control your verbal behaviour than your nonverbal behaviour").

466. See Whaley, *supra* note 7, at 51-52.

467. See Hall et al., *supra* note 443, at 144.

468. See *supra* subpart III(B)(1). for discussion of reciprocal relationship between parties' overtures and responses.

469. Hall et al., *supra* note 443, at 144.

470. See, e.g., van Ryn & Burke, *supra* note 436, at 823-24; cf. Mathews, *supra* note 453, at 1374 (suggesting that "patients rely on cues from the physician about the degree of disclosure which is expected").

471. See van Ryn & Burke, *supra* note 436, at 822-23 (citing studies).

472. See *id.* at 823 (citing studies).

473. See, e.g., Shin, *supra* note 11, at 2074-75 (describing potential for behavioral confirmation of stereotypes in clinical encounters).

will be interracial, for the medical profession historically has failed to achieve a proportionate representation of racial and ethnic minorities and continues to fall short in this regard.<sup>474</sup> Greater racial and ethnic diversity among health care providers that reflects the diversity of the patient population could promote stronger doctor-patient relationships and reduce the influence of stereotypes within clinical encounters for, as the Institute of Medicine report observed, “[r]acial concordance of patient and provider is associated with greater patient participation in care processes, higher patient satisfaction, and greater adherence to treatment.”<sup>475</sup>

A number of factors—the kinds of stereotypes and suspicions doctors hold of minority patients, patients’ stereotypes of doctors, the structure and constraints of the interaction, and the institutional context in which it occurs—can all converge in an encounter that convinces both doctor and patient of the accuracy of their negative expectations and results in the provision of inadequate care. Moreover, because racial expectations can channel and constrain interaction in a confirmatory direction without providing evidence of their influence,<sup>476</sup> the doctors’ decisions or patients’ choices that result can often be supported with neutral, nonracial justifications.<sup>477</sup>

First, recent studies based on patient reports and third-party observations suggest a specific connection between doctors’ negative views of racial minorities<sup>478</sup> and a lower quality of interaction with patients from those groups. Rather than engaging them in the ideal, “participatory” or team-like style of decision making that has been connected to greater patient satisfaction and better health outcomes, doctors tend to spend less time with, ask fewer questions of, and offer less information to such patients.<sup>479</sup>

---

474. See generally Stanley S. Bergen, Jr., *Underrepresented Minorities in Medicine*, 284 JAMA 1138 (2000); David M. Carlisle & Jill E. Gardner, *The Entry of African American Students into U.S. Medical Schools: An Evaluation of Recent Trends*, 90 J. NAT’L MED. ASS’N 466 (1998).

475. INST. OF MED., *supra* note 394, at 146 (citing Lisa Cooper-Patrick et al., *Race, Gender, and Partnership in the Patient-Physician Relationship*, 282 JAMA 583 (1999)).

476. See *supra* subpart III(B).

477. See, e.g., Barbara A. Noah, *The Invisible Patient*, 2002 U. ILL. L. REV. 121, 143-44 (reviewing SALLY SATEL, *HOW POLITICAL CORRECTNESS IS CORRUPTING MEDICINE* (2000)); cf. Shin, *supra* note 11, at 2074-75 (discussing effect of stereotypes on physicians’ interpretations of ambiguous information).

478. See *supra* notes 439-445 and accompanying text.

479. See, e.g., Cooper-Patrick et al., *supra* note 475 (reporting on study finding that “African American patients had significantly less participatory visits with their physicians than white patients” and that patients with a graduate school education had more participatory visits than patients with a high school education or less); Hall et al., *supra* note 443, at 140 (citing studies showing that “physicians deliver less information, less supportive talk, and less proficient clinical performance to Black and Hispanic patients and patients of lower economic class than they do to

One explanation for this tendency may be the lack of feelings of affiliation with the patient, for discomfort often leads people to turn to familiar scripts for their interaction. In examining his own struggle to overcome feelings of racial prejudice toward his minority patients, Dr. Neil S. Calman has described the relief with which he has resorted to “the well-practiced scripts that have become part of [his] standard doctoring repertoire”<sup>480</sup> at times when he has felt distracted or uncomfortable with a patient. Imposition of a script would tend to channel discussion in conformity with the doctor’s preconceived notions and discourage the patient from offering individuating information.<sup>481</sup> Implicit prejudice may show up in the doctor’s nonverbal behavior as well, even if the doctor does not recognize it.<sup>482</sup> When a patient senses or suspects that the doctor feels unfavorably toward him or her, a “chain reaction” may be set off whereby the patient responds disagreeably or unhelpfully to the doctor’s overtures—thereby maintaining the poor dynamic and “confirming” the physician’s negative expectations.<sup>483</sup>

Members of groups with a history or expectation of being treated poorly by medical professionals may place an especially high value on camaraderie with and respectful treatment by their doctors, and therefore may react especially negatively to physicians whose behavior suggests that they do not like, are not interested in, or do not respect

---

more advantaged patients, even in the same care settings”; though noting that the path of causation is not clear and that the differences might be explained by either physicians’ stereotypes or minority patients’ seeking less information); Kaplan et al., *supra* note 457, at 1179-80 (reporting on study finding that minority patients had significantly less participatory visits than nonminority patients and that patients with a high school education or less had significantly less participatory visits than patients with post-graduate college education); van Ryn and Burke, *supra* note 436, at 823 (finding that cardiac care physicians had significantly shorter post-angiogram encounters with black than with white patients); Waitzkin, *supra* note 457, at 93 (reporting on study finding that patients with less education and from lower-middle or working class backgrounds received less information from and time with physicians).

480. Neil S. Calman, *Out of the Shadow: A White Inner-City Doctor Wrestles with Racial Prejudice*, 9 HEALTH AFF. 170 (2000).

481. See *supra* notes 306-307 and 315-316 and accompanying text for discussion of the role of this dynamic in promoting behavioral confirmation of expectations.

482. See INST. OF MED., *supra* note 394, at 129 (“Socially conditioned implicit prejudice may be manifested in healthcare providers’ nonverbal behaviors reflecting anxiety (e.g., increased rate of blinking), aversion (e.g., reduced eye contact) or avoidance (e.g., more closed postures) when interacting with minority rather than white patients”); Shin, *supra* note 11, at 2071-72 (discussing research that found that whites’ negative implicit attitudes toward African-Americans, which are “governed by automatic, unintentional processes,” tend to be manifested in spontaneous, nonverbal behaviors of which whites are unaware but to which African-Americans are “especially attuned”). For discussion of the importance of nonverbal behavior in clinical encounters, see *supra* notes 462-465 and accompanying text.

483. See, e.g., Bloche, *supra* note 402, at 105; Shin, *supra* note 11, 2073-75.

them.<sup>484</sup> Moreover, the operative stereotypes in patient-doctor relationships are not all on one side; patients of color may also hold negative expectations of physicians: "These stereotypes may paint the physician as an arrogant clinician, or as 'the white man who experiments on minority patients,' or as a person who cannot be trusted to provide the whole truth."<sup>485</sup> In one study using patient focus groups, African-American patients expressed a greater desire for camaraderie with their doctors than did white patients, but at the same time—and unlike white patients—also expressed mistrust of and disdain for the health care system, based in part on their suspicions of racial and economic discrimination.<sup>486</sup> An earlier study had similarly found that African Americans often are dissatisfied with outpatient care, based partly on distrust of whites and the perception that physicians are not warm and friendly.<sup>487</sup> These suspicions can lead patients to misinterpret common medical practices as being intended to insult or degrade them. For example, African-American patients may become offended when white health care professionals wear plastic gloves for a physical examination, believing that they do so because they are unwilling to touch a black person's skin.<sup>488</sup>

Furthermore, just as situational constraints on medical decision making generally promote reflexive reference to racial profiles and stereotypes, so do the conditions of the typical medical interview promote the behavioral confirmation of such expectations. In addition to the time and resource limitations and cognitive "busyness" with which physicians generally must contend, the roles and respective goals of doctor and patient, the power differential between them, and common institutional practices and procedures help to create conditions that are almost ideal for the behavioral confirmation of erroneous expectations.<sup>489</sup>

The roles designated for each party, coupled with the power differential that characterizes doctor-patient interactions, compound the effects of physicians' negative stereotypes by placing the doctor firmly in the position of the situation-defining "perceiver" and the patient in

---

484. See Jeffrey A. Ferguson et al., *Racial Disparity in Cardiac Decisionmaking: Results from Patient Focus Groups*, 158 ARCH. INTERN. MED. 1450, 1452 (1998).

485. INST. OF MED., *supra* note 394, at 128.

486. Ferguson et al., *supra* note 484, at 1451-53.

487. See *id.* at 1453 (citing Theodore R. Brooks, *Pitfalls in Communication with Hispanic and African-American Patients: Do Translators Help or Harm?*, 84 J. NAT'L MED. ASS'N 941 (1992)).

488. See John Hoberman, *Culture Watch: A Medical Prescription for More Racial Sensitivity*, NEWSDAY, Jan. 10, 1999, at B6; see also Ferguson et al., *supra* note 484, at 1451 (quoting patient who said, "Some doctors don't want to touch you because of the color of your skin").

489. See *supra* notes 301-337 and accompanying text for discussion of situational constraints that promote behavioral confirmation of expectations.

that of the responding "target."<sup>490</sup> As the social psychological literature has shown, power differences promote both perceptual and behavioral confirmation of the more powerful party's stereotypes of the other party, because the more powerful party tends to function as the perceiver in the pair and therefore to have greater influence on the interaction.<sup>491</sup> Further, a more powerful perceiver often has less incentive to seek disconfirming information at the same time as the less powerful target feels constrained to accommodate the perceiver's overtures by following that person's chosen "script" and declining to provide disconfirming information.<sup>492</sup>

The doctor-patient relationship is inherently one of unequal power and status for the simple reason that the doctor is the party with the expertise and authority in the interaction, while the patient occupies a vulnerable position by virtue of coming to the doctor in a less knowledgeable, help-seeking posture.<sup>493</sup> Because "[o]ne person's ignorance is often the basis of another's power," this "competence gap" between doctor and patient helps to support the doctor's institutionalized privilege and maintain the "basic asymmetry in the doctor-patient relationship."<sup>494</sup> Aggravating this knowledge differential is the tendency of physicians to believe that patients "are unable to make [medical] . . . decisions in a knowing, competent manner."<sup>495</sup> Doctors also have the ability to enlarge their power by limiting the information that they disclose to the patient<sup>496</sup> or by controlling the patient's access to other medical resources.<sup>497</sup> Moreover, the patient who is sick is almost by

490. The doctor functions as the perceiver and the patient functions as the target, because the doctor must assess the patient and make judgments about the patient's condition and care. Therefore, as Whaley has pointed out, the doctor asks the questions that shape the interaction and, while the patient must respond to these questions, the doctor's own behavior is comparatively unconstrained. See Whaley, *supra* note 7, at 51. Cf. Snyder, *supra* note 317, at 93-94 (describing roles and relative power and status of counselors, employers, and teachers).

491. See *supra* notes 301-304 and accompanying text.

492. See *supra* notes 305-329 and accompanying text.

493. See Whaley, *supra* note 7, at 50.

494. Waitzkin, *supra* note 457, at 82.

495. Cathy J. Jones, *Autonomy and Informed Consent in Medical Decisionmaking: Toward a New Self-Fulfilling Prophecy*, 47 WASH. & LEE L. REV. 379, 407 (1990). This sentiment that has been traced to the Hippocratic Corpus, which states: "lacking professional training the client is too ignorant to be able to comprehend what information he gets and . . . he is, in any case, too upset at being ill to be able to use the information he does get in a manner that is rational and responsible." Mathews, *supra* note 453, at 1376 (quoting ELIOT FRIEDSON, PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE 142 (1970)) (internal quotation marks omitted).

496. See Mathews, *supra* note 453, at 1375; Waitzkin, *supra* note 457, at 82-83.

497. Cf. Bloche, *supra* note 402, at 105-06 (describing difficulty minority patients may experience in navigating "clinical bureaucracy"); Calman, *supra* note 480, at 172-73 (describing his efforts to help "one of [his] favorite patients," an African American man, to receive the services

definition cast in the role of a social deviant.<sup>498</sup> As with other kinds of deviance or stigma, the patient's illness is another basis upon which he or she may be accorded less respect and a lower status than the doctor.<sup>499</sup>

Institutional norms and practices cement the status and power differential by establishing the organizationally appropriate behavior for the respective roles of patient and professional.<sup>500</sup> Joan J. Mathews has described the specific ways in which medical institutions structure activities and program people to accept their roles, thereby enhancing the divide between patients and staff. She notes, for example, that the patient's "freedom of action and decision" is blocked through institutionally legitimate "means of social control,"<sup>501</sup> including the staff's discretion to dispense or deny privileges to or withhold information from patients while legitimizing their decisions to do so by framing them as "medical decisions."<sup>502</sup>

In addition, by defining a "good" patient as one who "is cooperative and makes few requests of the staff" and a "bad" patient as the opposite, the institution subtly "maintain[s] social distance between the patient and staff."<sup>503</sup> As Mathews has noted, even routine procedures to which a patient is subjected—being assigned and identified by a number rather than a name, providing information that "become[s] part of a quasi-public patient record," submitting to examinations, being

---

and care he needed, by interceding with service providers in the hope that his introduction would "enable them to see [his] patient as [Calman saw him]").

Further, Balsa et al. point out that managed care creates "navigational challenges for patients" that can contribute to racial and ethnic healthcare disparities. See Balsa et al., *supra* note 402, at 215.

498. See Eisenberg, *supra* note 437, at 957.

499. Cf. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 7-9 (1963).

Specific contexts may aggravate the power differential. Linda S. Fidell has vividly described how the gynecological examination—"an almost archetypal occasion for the expression of sex-stereotypic behavior"—may incorporate dynamics that compound the status and power differences inherent in the structure of the patient-doctor interaction:

Power differences exist between the individuals not only because the physician is likely to be a man, but also because he is a high-status person with an advanced education and plentiful income. The woman comes seeking help or information from an acknowledged expert who is familiar with both the jargon and the routine. Further, during the examination she will be undressed, touched, and required to assume what is considered by many to be a humiliating posture. If, in addition, she is referred to as "honey" while he is addressed by surname and title, the power difference may be increased.

Fidell, *supra* note 443, at 318-19.

500. Cf. Bowser, *supra* note 5, at 98.

501. Mathews, *supra* note 453, at 1372 (quoting ERVING GOFFMAN, *ASYLUMS* 84 (1961)) (internal quotation marks omitted).

502. *Id.*

503. *Id.*

“prevented from performing simple body functions without the assistance of others”—diminish the patient’s sense of self and lower his or her status to make it compatible with the institution’s interests.<sup>504</sup>

Furthermore, the power differential is often mutually accepted:<sup>505</sup> Several studies have found that health care professionals and patients alike “view the ideal patient as a cooperative, acquiescent person who plays an essentially deferential role.”<sup>506</sup>

The goals of the typical medical encounter, combined with the constraints under which they must be met, encourage the individual practitioner to structure interactions in ways that play into the power differential to further promote behavioral confirmation of the doctor’s expectations. A doctor’s functions in a medical interview are similar to those of other professionals whose goals tend to promote the behavioral confirmation process. Like therapists, counselors, employers, and teachers, doctors must assess their interaction partners in an attempt to get a “predictable view” of them, so they can evaluate “their prognosis for improvement in treatment.”<sup>507</sup> Given the time pressures under which they operate, the ambiguity and complexity of their tasks, and the amount of information they need to manage,<sup>508</sup> doctors would be expected to adopt approaches to clinical encounters that both exacerbate the effects of the power differential and increase their reliance on stereotypes. A doctor who is called upon to make a quick judgment after only a brief encounter with a patient may be motivated to structure the interaction and to process the information derived from it so as to confirm his or her preformed judgments, rather than to form an accurate impression. The goal of forming a quick impression has been found to cause perceivers to ask leading rather than open-ended questions, to focus on expectation-consistent information, and to interpret ambiguous information as confirming expectations.<sup>509</sup>

Collectively, these situational pressures can affect not just the doctor’s behavior, but also the patient’s responses to the doctor’s overtures and the doctor’s interpretation of that response. A doctor may

---

504. *Id.* at 1375.

505. See Jones, *supra* note 495, at 425.

506. Mathews, *supra* note 453, at 1375 (citing studies).

507. Snyder, *supra* note 317, at 93-94 (describing functions of therapists and counselors assessing clients, employers assessing job candidates, and teachers assessing students, and how those functions place them in the role of “knowledge-oriented perceivers” and contribute to the target’s behavioral confirmation of the perceiver’s expectations). For discussion of how the knowledge function contributes to behavioral confirmation, see *supra* notes 310-318 and accompanying text.

508. See *supra* notes 446-455 and accompanying text.

509. See *supra* notes 335-336 and accompanying text.



even elicit from the patient behavior that confirms a stereotypical diagnosis. In the mental health context, for example, Arthur L. Whaley has described the self-fulfilling process by which a white mental health professional, feeling uncomfortable with a black patient and expecting that patient to be aggressive or hostile, behaves in a racially prejudiced manner, leading the patient to act in conformity with the stereotype and the clinician to make a more severe diagnosis or to recommend a more restrictive intervention than might actually be warranted.<sup>510</sup> Doctors also can unwittingly encourage patients to make treatment choices that are consistent with the doctor's race-based expectations, because physicians have great power to shape patient preferences through their ability to control how options are presented, as well as how much information is disclosed,<sup>511</sup> and because patients are unlikely to go against doctors' advice due to their greater knowledge and power.<sup>512</sup> Finally, a doctor's expectation that the patient will not comply with a demanding treatment regimen may produce its own confirmation as well, because the doctor may present the recommendation in a perfunctory or unassertive way or may convey negative expectations that "dampen" the patient's interest in and compliance with the recommended care.<sup>513</sup>

The expectation that race is relevant is confirmed and reinforced when the predicted outcomes materialize but doctors fail to see the role that their race-related expectations played in producing their own supposed confirmation. The belief that race is relevant is perpetuated when statistics showing racially disparate medical outcomes provide

---

510. See Whaley, *supra* note 7, at 51.

511. See Bloche, *supra* note 402, at 103; Noah, *supra* note 477, at 143-44.

512. See, e.g., Jones, *supra* note 495, at 387 ("[N]either the law nor medicine encourages or fosters, let alone requires, such [autonomous] decisionmaking by individuals. Instead, both law and medicine encourage patients to let their doctors make decisions for them."); *id.* at 402-05 (providing examples from observations from practice, including how physicians slant their presentations of information to patients based upon what the doctor thinks is best for the patient); Mathews, *supra* note 453, at 1372 (noting that "[i]n clinical matters patients generally rely on on [sic] the practitioners' knowledge for decision-making since they lack the medical science knowledge necessary to judge the accuracy and relevance of information they receive and moreover they may be unable to articulate appropriate questions about their situation").

513. See Bloche, *supra* note 402, at 105; Shin, *supra* note 11, at 2075. Cf. Balsa et al., *supra* note 402, at 212 (noting that "[s]ome patient behavior associated with disparities, such as lower rates of compliance, might be a rational response to patients' perceptions of their likelihood of gain from medical care").

For an economic analysis of how the expectation that black patients "can't be relied upon to comply with treatment recommendations"—can become a self-fulfilling prophecy and lead to disparities in treatment," see Balsa & McGuire, *supra* note 418, at 103-06.

“objective,” empirical evidence of that fact. As a result, “[i]nstitutional bias in medicine is an unseen, self-sustaining force.”<sup>514</sup>

#### D. Prescription for Change: Altering the Situation

Racially biased medical treatment is predictable, but we cannot predict exactly *when* it will occur and “[w]e might not even be able to identify when . . . [it] has occurred.”<sup>515</sup> As a result, individual adjudication under the currently dominant legal model is simply not suited to addressing the most common reasons for racially biased medical decision making. The prevailing intentional discrimination standard<sup>516</sup> would not apply in most cases, because medical decisionmakers are, by and large, unlikely to be motivated by an explicit desire to deliver inferior care to patients of color.<sup>517</sup> Furthermore, as the preceding sections have shown, medical decision making is inherently complex and uncertain, and institutional, cognitive, and social influences interact with that ambiguity to both promote and obscure racially disparate medical treatment. Racial bias therefore can infect diagnosis and treatment decisions, not only without the decisionmaker’s intending to discriminate on the basis of race, but also without leaving evidence that it has affected the care delivered.<sup>518</sup> In deference to medical professionals’ expertise and the complexity of

---

514. Bowser, *supra* note 426, at 370.

515. Krieger, *Civil Rights Perestroika*, *supra* note 16, at 1313.

516. Under the federal laws that potentially create a private cause of action for racial discrimination in medical care, such as the equal protection clause and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2001) (prohibiting any program or activity that receives federal funds from discriminating based on race, color, or national origin), the plaintiff is required to prove that the defendant intended to discriminate. See *Alexander v. Sandoval*, 532 U.S. 275 (2000) (interpreting Title VI disparate treatment provision to prohibit only explicit, intentional discrimination). See also Crossley, *supra* note 394, at 280-91 (discussing elements of federal claims of discrimination in medical treatment); Noah, *supra* note 394, at 163-65 (discussing elements of equal protection claim in health care context); Shin, *supra* note 11, at 2076-79 (discussing Title VI and the requirement of intentional discrimination, and noting that “*Sandoval* effectively precludes private claims that allege racial disparities in clinical treatment”).

Moreover, even these exceedingly narrow avenues for redress might not be available to some plaintiffs who seek to sue individual practitioners, for Title VI’s requirement that the defendant receive federal financial assistance has been interpreted to exclude Medicare payments from that category, “put[ting] private physicians out of Title VI’s reach,” Bloche, *supra* note 402, at 111, and an equal protection claim would require the plaintiff to establish “state action”—a difficult element to prove in a claim that focuses on a practitioner’s clinical decisions, see Noah, *supra* note 394, at 164.

517. See *supra* notes 417-418 and accompanying text.

518. Thus, in addition to being unable to prove that the defendant discriminated intentionally, the plaintiff may be unable to prove another essential element: “that discrimination in fact occurred—that he received different medical treatment because of his race . . . and not for some other reason.” Crossley, *supra* note 394, at 281. See also Noah, *supra* note 394, at 164 (“Health care providers making individualized medical decisions . . . can always offer a medical justifica-

their tasks, moreover, courts are reluctant to second-guess the nondiscriminatory reasons defendants offer for their decisions.<sup>519</sup> Therefore, determining whether race was the “real” reason for a medical decision may be even more daunting a task than determining the real reason a candidate was not hired or a motorist was pulled over.<sup>520</sup>

Citing the inadequacy of individual adjudication under current legal standards to identify, redress, and eliminate racial disparities in medical care, legal experts have asserted that real reform will come, instead, through efforts that focus on altering the institutions and systems in which medical decisions are made and care is delivered.<sup>521</sup>

---

tion for their decision, even if the decision in fact arose from a conscious or unconscious reaction to the patient’s race.”).

519. See, e.g., Crossley, *supra* note 394, at 280-96 (discussing difficulty of proving intentional discrimination and courts’ reluctance to second-guess decisions of medical professionals).

520. See *supra* notes 184-189 and accompanying text.

In addition, and again because medical decision making is complex and inherently uncertain and medical decisionmakers are accorded a great deal of discretion, diagnosis and treatment decisions that have been influenced by racial bias (and therefore that might have come out differently were the patient of a different race) are not likely to be unacceptable under non-civil rights causes of action that might otherwise apply. In a medical malpractice case, for example, the patient must establish both causation and the defendant’s failure to conform to the applicable standard of care. It is extremely difficult to establish causation because the requisite data comparing the efficacy of alternative treatments often does not exist. Furthermore, even if a decision has been influenced by the patient’s race and is not ideal for that individual, it is unlikely to fall outside the acceptable limits of clinical discretion. See, e.g., Bloche, *supra* note 402, at 109 (pointing out difficulty of proving causation without the proper data and stating, “Disparities in clinical resource use ensuing from physician discretion and the influences [of, *inter alia*, unconscious bias and situational constraints] tend to fall within the bounds of tacitly accepted clinical variation”); Crossley, *supra* note 394, at 244-48, 261-63 (discussing difficulty of proving physician’s failure to conform to standard of care, causation, and damages); Shin, *supra* note 11, at 2079 (noting that “disparities resulting from clinical discretion tend to fall within the bounds of generally accepted clinical variation” and, further, that plaintiffs may have difficulty “proving causation-in-fact absent well maintained data concerning the efficiency of alternative approaches that would resolve racial disparity in clinical outcomes”). See also Crossley, *supra* note 394, at 248-63 (considering, but also pointing out the difficulty of maintaining and prevailing in, claims of liability for failure to obtain informed consent and breach of fiduciary duty).

521. This statement is not intended to suggest that commentators advocate abandoning traditional civil rights approaches altogether. They do, however, view traditional civil rights litigation as inadequate, on its own, to reduce or eliminate racial bias in medical care. Sidney D. Watson, for example, has stated, “Civil rights litigation, like medical malpractice, can redress some race-based medical errors. However, racial disparities in medical treatment . . . are often not amenable to the proof format—and blame laying—required by civil rights laws.” Watson, *supra* note 394, at 204. Watson therefore proposes adoption of “a systemic approach.” *Id.* at 205. See also Bloche, *supra* note 402, at 117 (pointing out need for intervention at multiple levels and making suggestions for how “health care institutions and law might respond pragmatically to the problem of racial disparity even as they pursue other important policy goals”); Bowser, *supra* note 5, at 125-32 (stating that “the more complex and intangible violations created by racial profiling present formidable challenges” for civil rights enforcement and proposing systematic data collection and financial incentives as ways of addressing intangible institutional racism); Crossley, *supra* note 394, at 296-302 (noting difficulties of maintaining individual claims of liability but pointing out “the importance of the potential for liability in these areas”; suggesting, in addition,

Sidney D. Watson, in particular, has made a compelling case for systemic reform as our best hope for achieving racial equality in medical care. As an example of the power of institutional change to achieve results, Watson cites the desegregation of American hospitals in the 1960s.<sup>522</sup> He explains that the racial segregation of medical facilities and care was deeply entrenched in the United States from the days of slavery through the middle of the twentieth century.<sup>523</sup> Efforts within the African-American community, such as developing their own hospitals, medical and nursing schools, and having individual physicians obtain admitting privileges to white hospitals, brought some measure of improvement, but were not sufficient to address the basic deficiencies in care and stigmatization of black patients that segregation entailed.<sup>524</sup>

An equal protection challenge in 1963, *Simkins v. Moses H. Cone Memorial Hospital*,<sup>525</sup> was the first step in the surprisingly smooth desegregation of hospitals nationwide, an achievement that was realized in 1966. According to Watson, “Health care desegregation—at least in hospitals—occurred quickly, quietly and voluntarily”<sup>526</sup> following that decision, once Title VI of the 1964 Civil Rights Act and the Medicare and Medicaid programs of 1965 were adopted. The key to the accomplishment was not, however, Title VI’s mere prohibition against racial discrimination, but the decision of President Lyndon B. Johnson to tie a hospital’s receipt of Medicare funds (a “substantial infusion of federal dollars”)<sup>527</sup> to its signing “an assurance of Title VI compliance certifying that it did not discriminate or segregate on the basis of race, color, or national origin and that the facility was in compliance with

---

the use of standards, data collection, and financial incentives); Noah, *supra* note 394, at 169-70 (“[P]atient-specific treatment choices are the least amenable to scrutiny under statutory or constitutional standards”). *But see* Shin, *supra* note 11, at 2096-100 (predicting that policy-level actions are “unlikely [to be] sufficient” and suggesting that a liability scheme based on implicit cognitive bias is “not necessarily . . . unworkable”).

522. Watson, *supra* note 394, at 213-16. *See also* SMITH, *supra* note 427, at 96-142 (discussing, in chapter entitled “The Federal Offensive,” the history of hospital desegregation).

523. Watson, *supra* note 394, at 210-13.

524. *See id.* at 211.

525. 323 F.2d 959 (4th Cir. 1963). Watson describes that case—a ruling that racial segregation of care in a private hospital that received federal funds violated the equal protection clause—as “health care’s *Brown v. Board of Education*.” Watson, *supra* note 394, at 212-13 (citing SMITH, *supra* note 427, at 82).

526. *Id.* at 213.

527. *Id.* at 214. *See also* SMITH, *supra* note 427, at 115 (stating that Medicare funds “would mean the difference for most hospitals between comfortable financial surpluses and insolvency”).

Title VI guidelines.”<sup>528</sup> Although President Johnson was warned that his goal of obtaining Title VI compliance and implementing the Medicare program within one year was “seemingly impossible”<sup>529</sup> and that his plan might backfire, “[t]he boldness paid off”: within four months, “over [ninety-two] percent of American hospitals were integrated.”<sup>530</sup> And, in contrast to the slow and painful process of school desegregation, all of this occurred “without massive resistance, public demonstrations or protests.”<sup>531</sup>

Watson identifies several factors that came together to produce this quick and dramatic result:

First, the financial incentives were clear, strong, and unambiguous. Federal Medicare dollars began flowing only after hospitals integrated and the federal agency certified compliance with Title VI guidelines. . . .

Second, the . . . effort involved no blaming and no sanctioning. The effort was entirely forward looking. . . . No questions were asked about past behavior and no justifications were needed.

Third, all hospitals were subject to the same financial pressure. . . . White patients would simply have to adapt because there were few, if any, segregated hospitals to which to flee.<sup>532</sup>

Fourth, the goal, dismantling overt segregation, was a visible one that was easily verifiable. . . . The goal was obvious. Hospitals understood what was expected of them . . . .<sup>533</sup>

In other words, the government’s use of financial incentives promoted straightforward decisions to integrate while it eliminated factors that might reward or justify decisions to do otherwise. First, the government created a goal—eliminate racial segregation in order to get Medicare funds—that directed the hospitals’ behavior in the desired direction, and it provided an objective and visible means of measuring a hospital’s attainment of that goal. Second, by putting that

528. Watson, *supra* note 394, at 214. Watson goes on to note, however, that financial incentives in medical care also can—and today often do—give medical institutions and professionals reason to “avoid minority patients,” and thereby “undermine civil rights efforts.” *Id.* at 217-20 (describing ways in which Medicaid programs do so, as well as the inadequacy of Title VI litigation to challenge institutional decisions with disproportionate adverse impact on minorities that defendants justify on economic grounds).

529. *Id.* at 214. See also SMITH, *supra* note 427, at 124 (describing as “mind-boggling” the idea of attempting to enforce Title VI via Medicare).

530. Watson, *supra* note 394, at 215. See also SMITH, *supra* note 427, at 141.

531. Watson, *supra* note 394, at 215.

532. *Id.* at 215-16. Watson explains that, had the effort instead relied on individual hospitals to integrate, the effort would—as it had in the past—have “stalled,” because the hospitals would fear losing white patients to those hospitals that did not integrate. *Id.* at 216.

533. *Id.* Watson also notes a fifth factor: “that most hospitals were private entities not subject to the political pressures that buffeted public schools and colleges during the school desegregation efforts.” *Id.* at 216.

goal in “clear, strong and unambiguous” terms,<sup>534</sup> it eliminated the potential for ambiguity that might mask racial disparities. Third, it offered no “out” or attractive alternative to compliance, because its incentives were appealing to all hospitals and no hospital stood to gain by remaining segregated in order “to accommodate white prejudice.”<sup>535</sup> Finally, the plan did not rely on determinations of individual “fault” and hence, did not create the need—or, more important, provide the opportunity—for past decisions with racially disparate impact to be justified on some purportedly legitimate ground.<sup>536</sup>

The story of hospital desegregation through Medicare funding incentives is, at its most obvious, a story of incentives at the institutional level altering behavior at the institutional level. Perhaps less obvious is the potential for change at the highest level to motivate and channel change at lower levels—even at the levels of the social and cognitive processes that, as we have seen, join with institutional processes to produce widespread racial disparities in medical care. As M. Gregg Bloche has suggested, institutional reform has the potential to “channel *clinical discretion* in ways that reduce racial disparity.”<sup>537</sup>

Institutional reform, in other words, can alter the direction of medical decision making by altering the context in which medical decisions are made. Of course, these institutional changes should include examining, redressing, or eliminating practices that teach racially biased thinking and interaction. Important examples of such changes would include eliminating the “silent curriculum” by which racial myths are transmitted and reinforced,<sup>538</sup> recruiting a more diverse group of medical professionals to serve the diverse population of patients,<sup>539</sup> and

---

534. *Id.* at 215.

535. *See supra* note 532.

536. *See Watson, supra* note 394, at 215-16.

537. Bloche, *supra* note 402, at 121 (emphasis added).

538. For discussion of the “silent curriculum,” *see supra* notes 423-425 and accompanying text. Similarly, Barbara A. Noah recommends that medical education include teaching about racial disparities in the delivery of health care and training in communication skills with a focus on understanding and communicating with patients from diverse social groups. *See Noah, supra* note 394, at 169-70.

539. *See, e.g., INST. OF MED., supra* note 394, at 12 and 146 (stating, in Recommendation 5-3, “increase the proportion of underrepresented U.S. racial and ethnic minorities among health professionals”); Bloche, *supra* note 402, at 119 (advocating “robust commitment to affirmative action in medical school admissions, residency recruitment, and professional hiring”); Bowser, *supra* note 5, at 122-24 (advocating that medicine “becom[e] more inclusive” by increasing number of minority medical practitioners and researchers); Noah, *supra* note 394, at 171-72 (advocating efforts to encourage and train “minorities to enter the health care professions in greater numbers” as a way of helping “to create a culture of trust between the health care system and its minority patients”).

interrogating the practice of racialized medical research.<sup>540</sup>

Institutional reforms need not stop at those, however, for invisible situational factors could continue to channel medical decision making in a racially biased direction. To eliminate factors that promote and mask racial bias, therefore, institutions should follow the example of hospital desegregation by first creating means to evaluate racial equality in medical treatment and outcomes in the aggregate, rather than on an individual basis when racial bias might escape notice or be explained away.<sup>541</sup> Second, they should reduce the ambiguity of medical decision making and limit the potential for seemingly nondiscriminatory factors to provide justification for racially biased care. Finally, they should alter the goals, structure, and conditions of doctor-patient interactions in order to disrupt the potential for the behavioral confirmation of both parties' erroneous expectations of one another to influence their care and compliance.

A number of legal scholars have advocated the use of financial and other institutional incentives<sup>542</sup> based on objective measures of racial equality in care—a proposal that mirrors the successful hospital desegregation initiative of the 1960s. They have proposed, for example, that federal funding,<sup>543</sup> insurance payments,<sup>544</sup> or hospital accreditation<sup>545</sup> decisions be tied to an institution's delivery of racially equitable health care, as measured by data on the use of services and choice of therapeutic alternatives<sup>546</sup> or other performance criteria, "including patient satisfaction, rates of childhood immunization," and use of specified procedures.<sup>547</sup> These suggestions have the potential to both unmask racial disparity and channel racial equality in care because they measure racial disparities in the aggregate, making the disparities visible to both the institution and outside observers, such as regulatory bodies, patients, and other medical institutions.<sup>548</sup> The result of this

---

540. For views on this issue, see generally Bowser, *supra* note 5; and Thomas, *supra* note 426.

541. See *supra* notes 182-189 and accompanying text.

542. Such incentives could be positive (e.g., the payment of a "bonus" for achieving desired results) or negative (e.g., withholding federal funds from an institution that reports statistically significant racial disparities in treatment or outcomes). See, e.g., Bowser, *supra* note 5, at 127-28 (suggesting withholding of federal funds as sanction); Crossley, *supra* note 394, at 299 (noting health insurer incentive systems that use financial rewards to encourage desired outcomes); Watson, *supra* note 394, at 223-24 (suggesting use of "bonus" payments as incentive).

543. See Bowser, *supra* note 5, at 126-28; Crossley, *supra* note 394, at 298.

544. See *id.* at 299; Watson, *supra* note 394, at 223-24.

545. See Crossley, *supra* note 394, at 299; Noah, *supra* note 394, at 174-75.

546. Bowser, *supra* note 5, at 126.

547. Watson, *supra* note 394, at 222, 223-24.

548. See Bowser, *supra* note 5, at 130; Crossley, *supra* note 394, at 299; Noah, *supra* note 394, at 173; Watson, *supra* note 394, at 223.

openness should, according to its advocates, create internal incentive and peer pressure for the institution to rethink its policies and practices. As René Bowser puts it, data collection would compel institutions to “think about race” and to begin an “internal dialogue” examining their assumptions and decisions.<sup>549</sup> Similarly, Watson predicts that data collection would create a climate that “encourages education, change and improvement.”<sup>550</sup>

Making racial equity a goal for the institution, and therefore a goal for individual professionals within the institution, also should affect the dynamics of doctor-patient interactions in a way that encourages doctors to seek individualized information from the patient and reduces the potential for behavioral confirmation of their stereotype-based expectations. As social psychologists have found, perceivers tend to pay more attention to individualized information about the target and to consider how external factors might be affecting their conduct in situations in which they are motivated to make accurate judgments (as opposed to confirming their predictions) and when they are aware that their decisions will be compared to objective criteria.<sup>551</sup> Furthermore, monitoring patient satisfaction as well as clinical decisions and outcomes should have a positive effect on clinical encounters and reduce the potential for behavioral confirmation to the extent that it gives the patient greater power in the interaction and engages the doctor’s “facilitative” or “adjustive” functions—in other words, encourages the doctor to try to get along with the patient or to make the patient “like” him or her.<sup>552</sup>

In addition to proposing that racial disparities be made more visible and the achievement of racial equity be rewarded, legal scholars have advocated altering the situation in which doctors interact with patients and make decisions. Their suggested reforms would channel those interactions and decisions to reduce racial disparity by limiting the ambiguity of medical decision making and reducing the situational constraints that promote racially biased decisions. For example, M. Gregg Bloche and Mary Crossley propose that institutions reduce the opportunities for undetected bias to infect clinical decisions by limiting the amount of discretion accorded doctors in their treatment choices. Both Bloche and Crossley recognize that a balance must be struck between “the goal of reducing racial disparities and the virtues

---

549. Bowser, *supra* note 5, at 128-29.

550. Watson, *supra* note 394, at 223.

551. See *supra* notes 288-291 and accompanying text.

552. See *supra* note 292 and accompanying text.



of greater clinical flexibility,"<sup>553</sup> but also point out that variations that are not based on scientific evidence are the kind most likely to produce unwarranted racial disparity.<sup>554</sup> Therefore, Bloche suggests that health plans publish clinical practice protocols, "with supporting evidence and argument" that would be "open to professional and consumer review,"<sup>555</sup> while Crossley proposes that "professional medical societies, government bodies, or health care payers" disseminate "clinical practice guidelines [that] . . . give individual practitioners the ability to practice evidence-based medicine."<sup>556</sup>

Institutions also can adopt measures to alter the conditions of the doctor-patient interaction, through the use of "more nuanced" financial incentives than they currently employ.<sup>557</sup> These reforms could be directed at encouraging participatory decision making between doctor and patient, as well as at reducing the time pressures and cognitive load placed on doctors.<sup>558</sup> For example, Bloche proposes that insurers cover desirable practices, such as using language translation services or spending more time with patients and their families, or reward measures of patient satisfaction.<sup>559</sup> In addition, he suggests that government standards for Medicaid managed care plans incorporate requirements for "the stability of patients' assignments to primary care

553. Bloche, *supra* note 402, at 117. See Crossley, *supra* note 394, at 301 ("Concededly, because it is impossible for clinical guidelines to account for and address all the possible variations in the clinical details of specific patients, clinical guidelines will never entirely eliminate physician discretion."). Cf. Balsa et al., *supra* note 402, at 207 (Clinical discretion "is not inherently negative. It is, however, a *necessary condition* for the indulgence of stereotypes and biases by physicians in a manner that engenders racial and ethnic disparities.").

554. As Crossley writes:

[D]isparities in the medical services rendered to different patient groups are particularly likely when the treatment for a particular condition is discretionary, i.e., when it is not clear what treatment is appropriate for the condition. Through the development of guidelines incorporating the best available scientific evidence, however, the number of conditions for which the choice of treatment is discretionary is reduced, and thus the opportunities for bias to influence the choice of treatment are similarly decreased.

Crossley, *supra* note 394, at 301. Cf. Bloche, *supra* note 402, at 117 (pointing out desirability of detailed rules in connection with the goal of reducing racial disparities in medical care).

555. Bloche, *supra* note 402, at 117.

556. Crossley, *supra* note 394, at 300-01.

557. Bloche, *supra* note 402, at 118. Bloche points out that existing cost control measures already create financial incentives and disincentives, and that those existing resource allocation decisions "amplif[y] the social impact of . . . stereotypes and failures of empathy." *Id.* See also Balsa et al., *supra* note 402, at 215-16.

558. For discussion of desirability of participatory decision making, see *supra* notes 456-464 and accompanying text; for discussion of situational constraints that promote operation of unconscious bias, see *supra* notes 446-455 and accompanying text; and for discussion of situational constraints that promote the behavioral confirmation of racial stereotypes, see *supra* notes 489-513 and accompanying text.

559. Bloche, *supra* note 402, at 118.

providers (and these providers' accessibility), reasonable maximum patient loads per primary physician, and minimum time allotments for patient visits."<sup>560</sup> Reforms such as these have the potential to reduce the small, unnoticed situational factors that, in the aggregate, channel behavioral confirmation of, as well as the exercise of clinical discretion based on, racial stereotypes.

As Watson has pointed out, we cannot make substantial progress toward racial equity in medical care unless we "move from a backward looking focus on blame"<sup>561</sup> and adopt multiple, creative approaches to change "old patterns of behavior."<sup>562</sup> The proposed reforms discussed above have the potential to challenge the "unseen, self-sustaining force"<sup>563</sup> of racial bias in medical care by disrupting the processes by which it operates. We must, as Merton wrote, "cut[ ] off their sustenance"<sup>564</sup> through "deliberate institutional change."<sup>565</sup>

#### V. CONCLUSION: "BY NO MEANS INEVITABLE"<sup>566</sup>

The initial definition of the situation which has set the circle in motion must be abandoned. Only when the original assumption is questioned and a new definition of the situation introduced, does the consequent flow of events give the lie to the assumption. Only then does the belief no longer father the reality.<sup>567</sup>

The multiple, symbiotic processes by which situations channel racism and stereotypes confirm themselves also serve to obscure and entrench the use of race as proxy and could justify our despair that society can ever break out of this "tragic, often vicious, circle."<sup>568</sup> But as Merton wrote in 1948, and as this Article has argued, we can, and we must, thwart the self-fulfilling prophecy of racial disparity by altering the situations in which and disrupting the processes by which it is realized.

---

560. *Id.* at 119 (footnotes omitted).

561. Watson, *supra* note 394, at 204.

562. *Id.* at 224.

563. Bowser, *supra* note 426, at 370.

564. Merton, *supra* note 193, at 210.

565. *Id.* at 209. See also *id.* at 210 ("The self-fulfilling prophecy, whereby fears are translated into reality, operates only in the absence of deliberate institutional controls.").

566. Jones, *supra* note 284, at 46.

567. Merton, *supra* note 193, at 197.

568. *Id.*

