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# Introduction

By Pōhaikau'ilani Nu'uhiwa & Sean Wong[1]

In addition to publishing two issues each year, the Hawai'i Law Review hosts a biennial symposium that brings together scholars, practitioners, distinguished jurists, and students to share knowledge and perspectives regarding relevant legal issues. The symposium aims to capture the interest and support of the community at the University of Hawai'i and the State of Hawai'i at large, as well as the interest and support of scholars and practitioners worldwide.

This year's symposium, "Exploring Implicit Bias in Hawai'i," brought together many prominent scholars, jurists, and attorneys from Hawai'i and abroad to discuss issues of implicit biases in various areas, including criminal law, local discrimination, indigenous peoples' law, and land use. The purpose of the symposium was to promote awareness and encourage discussion of implicit bias and how it impacts application of the law.

Implicit bias refers to the attitudes or stereotypes that affect our understandings, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for social or political purposes. These implicit associations that are harbored in the subconscious affect one's feelings and attitudes based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages in community life and media.

There are many individuals and organizations who were essential to making this symposium and issue a success that we would like to recognize.[2] We would like to express our deepest mahalo to our advisors, Professors David Callies and Justin Levinson for your support and guidance; to Deans Aviam Soifer, Denise Antolini, and Ronette Kawakami for donating the law facilities for this event and for your constant support of the Hawai'i Law Review; to Julie Suenaga for your continuous help and administrative

[1] Class of 2015, University of Hawai'i at Mānoa, William S. Richardson School of Law, Volume 37, University of Hawai'i Law Review, Co-Editors-in-Chief.

[2] Thank you to our generous sponsors who helped fund the symposium: The Student Activity and Program Fee Board at the University of Hawai'i at Mānoa; The Office of Hawaiian Affairs; The Student Bar Association of the William S. Richardson School of Law; The University of Hawai'i Diversity & Equity Initiative's SEED Grant; LexisNexis; and Bloomberg Law.

assistance; and to the editorial board of Volume 37 for your generous time and efforts, in particular, to our Managing Editors, Jordan Inafuku and Kelsey Anderson, who spearheaded the organization of the symposium. Additionally, we would like to express our deepest appreciation to each panelist and moderator who graciously donated their time to present their ideas at the symposium and write insightful and thought provoking papers for this issue.[3] The editorial board is proud to present this symposium issue.

E walea, e nanea. Please enjoy.

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[3] Thank you to **Prof. Linda Hamilton Krieger**, University of Hawai'i at Mānoa, William S. Richardson School of Law (WSRSL); **Prof. Justin D. Levinson**, WSRSL; **Prof. L. Song Richardson**, Univ. of California, Irvine School of Law; **Kenneth Lawson**, WSRSL; **Hon. (ret.) Simeon R. Acoba, Jr.**, Hawai'i Supreme Court; **Prof. Robert J. Smith**, Univ. of North Carolina School of Law; **Prof. Charles R. Lawrence III**, WSRSL; **Breann Y.S. Nu'uhiwa**, Reed Smith LLP; **Tawnee Sakima**, Circuit Court, First Circuit; **Scott Schmidtke**, The Law Offices of John W. Schmidtke, Jr.; **Prof. Eric K. Yamamoto**, WSRSL; **Prof. Rachel D. Godsil**, Seton Hall Univ. School of Law; **Prof. James S. Freeman**, Saint Francis College; **Prof. Andrea Freeman**, WSRSL; **Jelani Madaraka**, U.S. Housing and Urban Development; **Susan Serrano**, WSRSL; **Hon. Sabrina S. McKenna**, Hawai'i Supreme Court.

# Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?

Robert J. Smith[*]

## I. INTRODUCTION

While public defenders, civil rights organizations, and academics have long championed the reduction of racially disparate policing outcomes, their chorus has added some transformational actors recently. Attorney General Eric Holder, for instance, has called for "rigorous new standards" to "help end racial profiling."[1] The police chief of Richmond, California, Chris Magnus, recently joined a protest against police brutality—carrying a sign that read "Black Lives Matter."[2] "We get the conversation about use of force," the deputy Richmond police chief later explained, "This is an opportunity for all police departments, including ours, to look inward and examine our approaches and get better."[3]

Racial disparities also are increasingly salient. Consider three events that occurred within a matter of weeks last year. First, a grand jury in Staten Island, New York failed to indict a white NYPD officer that choked to death an unarmed black man during a botched attempt to arrest the man, Eric Garner, for selling loose cigarettes.[4] A few days earlier, a white police officer in Cleveland, Ohio shot a twelve-year old black child, Tamir Rice, who was holding a toy gun.[5] These two incidents occurred on the heels of a

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[*] Assistant Professor of Law, University of North Carolina School of Law. Thank you to all of the symposium participants, and especially to the editors of the Hawai'i Law Review.

[1] Emily Badger, *The Long, Halting, Unfinished Fight to End Racial Profiling in America*, WASH. POST, Dec. 4, 2014, http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/04/the-long-halting-unfinished-fight-to-end-racial-profiling-in-america/.

[2] Robert Rogers, *Richmond Police Chief a Prominent Participant in Protest Against Police Violence*, CONTRA COSTA TIMES (Dec. 9, 2014, 2:38 PM), http://www.contracostatimes.com/west-county-times/ci_27102218/richmond-police-chief-prominent-participant-local-protest-against.

[3] *Id.*

[4] *See, e.g.*, J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0.

[5] *See, e.g.*, Emma G. Fitzsimmons, *Video Shows Cleveland Officer Shot Boy in 2 Seconds*, N.Y. TIMES, Nov. 26, 2014, http://www.nytimes.com/2014/11/27/us/video-shows-

grand jury decision not to indict a white police officer in Ferguson, Missouri who had shot to death Michael Brown, an unarmed black teenager.[6] Protests spread from St. Louis and Cleveland and New York to cities and towns across America.[7]

The increased interest in racially disparate outcomes has spawned renewed efforts to find practical solutions.[8] This Article, part of a symposium on implicit bias hosted by the University of Hawai'i Law Review, focuses on one prominent solution: implicit racial bias training. The immediate goal of implicit bias training is to reduce biased policing.[9] On that score the training seems moderately promising, though more research into its effectiveness is needed.[10] The ultimate goal, though, is to reduce disparate policing outcomes. There is reason to be skeptical that implicit bias training will deliver significant results on that measure.

This Article situates implicit bias training as one small step towards racial equality in law enforcement. But it cautions against overselling implicit bias training. Part II documents the rise of implicit bias as an explanation for racially disparate policing outcomes. Part III explores implicit bias training. It documents the form and aims of the training, tracks evaluations of the training, and measures the hype of the training against scholarly understanding of how implicit biases can be reduced and for how long. Part IV assumes for the sake of argument that implicit bias

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cleveland-officer-shot-tamir-rice-2-seconds-after-pulling-up-next-to-him.html.

[6] *See, e.g.*, Jonathan Cohn, *Darren Wilson Walks: No Indictment for Michael Brown's Killer*, NEW REPUBLIC (Nov. 24, 2014), http://www.newrepublic.com/article/120395/ferguson-grand-jury-makes-issues-no-charges-officer-wilson.

[7] *See, e.g.*, Andrew Soergel, *Ferguson Protests Snarl Streets Across the Country*, U.S. NEWS & WORLD REP., Dec. 1, 2014, http://www.usnews.com/news/articles/2014/12/01/ferguson-protests-snarl-streets-across-the-country.

[8] In addition to implicit bias training, discussed below, the most popular proposal is to require police officers to sport wearable cameras. *See, e.g.*, J. David Goodman, *New York Police Officers to Start Wearing Body Cameras in a Pilot Program*, N.Y. TIMES, Sept. 4, 2014, http://www.nytimes.com/2014/09/05/nyregion/new-york-police-officers-to-begin-wearing-body-cameras-in-pilot-program.html; Richard Winton & Kate Mather, *L.A. Will Buy 7,000 Body Cameras for Police Officers*, L.A. TIMES (Dec. 14, 2014, 2:30 PM), http://www.latimes.com/local/lanow/la-me-ln-mayor-to-announce-onbody-camera-rol-lout-for-lapd-20141216-story.html; Jessica Contrera, *In the Future, Will Everyone Be Wearing Body Cameras?*, WASH. POST, Dec. 30, 2014, http://www.washingtonpost.com/lifestyle/style/in-the-future-will-everyone-be-wearing-body-cameras/2014/12/30/24ffab7c-84a3-11e4-b9b7-b8632ae73d25_story.html.

[9] *See* Lorie Fridell & Anna T. Laszlo, *Reducing Biased Policing Through Training*, COMMUNITY POLICING DISPATCH (Feb. 2009), http://www.cops.usdoj.gov/html/dispatch/February_2009/biased_policing.htm (explaining that "law enforcement departments need to provide training that makes personnel aware of their unconscious biases so that they are able and motivated to activate controlled responses to counteract them").

[10] *See infra* Part III (describing implicit bias debiasing research).

training does result in long-term reductions in biased policing. It then queries how debiasing fares as a mechanism for reducing racially disparate policing outcomes.

## II. IMPLICIT RACIAL BIAS AS AN EXPLANATION FOR DISPARATE POLICING OUTCOMES

Racially disparate outcomes pervade policing.[11] Non-whites, and especially young black men, are disproportionately stopped, searched, and arrested.[12] Non-whites also bear the brunt of excessive use of force.[13] Sorting out the causal mechanisms of these disparities is prohibitively difficult, especially in a brief Article. One clear trend, though, is the shift in describing how disparities propagate from an intentional racism framework to one of implicit racial bias.[14]

Over the past two decades, social psychologists have shown that Americans, especially white Americans, tend to implicitly prefer white Americans over black Americans.[15] For instance, people are faster to pair

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[11] *See, e.g.*, Ian A. Mance, *Racial Profiling in North Carolina: Racial Disparities in Traffic Stops 2000 to 2011*, TRIAL BRIEFS, June 2012, at 23-27, *available at* http://www.unc.edu/~fbaum/papers/Trial_Briefs_Ian_Mance_2012.pdf (analyzing almost fourteen million traffic stops and finding "black drivers are more likely to be stopped by police than white drivers" and also finding "significant disparities in *treatment* once these motorists are in police control" (emphasis in original)). *See generally* AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 9 (June 2013), *available at* https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf (analyzing marijuana arrest data nationally and concluding that "a [b]lack person was 3.73 times more likely to be arrested for marijuana possession than a white person—a disparity that increased 32.7% between 2001 and 2010").

[12] *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013) (documenting that "within any area [of New York City], regardless of its racial composition, blacks and Hispanics are more likely to be stopped than whites" and "blacks who were subject to law enforcement action following their stop were about 30% more likely than whites to be arrested (as opposed to receiving a summons) after a stop for the same suspected crime, even after controlling for other relevant variables").

[13] *See, e.g.*, *id.* (stating that "blacks who were stopped were about 14% more likely—and Hispansics 9% more likely—than whites to be subjected to the use of force").

[14] *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1125, 1126 (2012) (explaining that "researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects" and these "fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law's fundamental understandings of discrimination and fairness").

[15] See generally Kristin Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007), for an excellent overview of implicit bias scholarship through a legal lens.

positive evaluations (e.g., good) with white faces and negative evaluations (e.g., bad) with black faces.[16] Moreover, when shown a consciously imperceptible image of a black person, people rate ambiguous shoves as more hostile and find ambiguous evidence to be more probative of guilt than when they are shown a consciously imperceptible image of a white person.[17] Relevant to the policing context, after being primed with a black face instead of a white face, participants were faster to identify a degraded image as a weapon (e.g., a gun).[18] More broadly, Americans tend to associate black people, and especially young black men, with criminality, dangerousness, and hostility.[19]

Police officers are not immune to the unintentional activation of stereotypes and attitudes that advantage white people over black people. Indeed, as Professor Song Richardson has argued, the association between black men and criminality can lead "people [to] evaluate ambiguous actions performed by non-whites as suspicious and criminal while identical actions performed by whites go unnoticed."[20] Professors Lorie Fridell and Anna Laszio describe how "[i]mplicit bias might lead the line officer to automatically perceive crime in the making when she observes two young Hispanic males driving in an all-Caucasian neighborhood" or how "it may manifest among agency command staff who decide (without crime-relevant evidence) that the forthcoming gathering of African-American college students bodes trouble, whereas the forthcoming gathering of white undergraduates does not."[21] Professor Jerry Kang and his colleagues have noted that these implicit bias driven disparities can continue throughout the police-citizen encounter: "Biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning."[22]

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[16] *See* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 52 (2007) (reviewing findings from implicit bias studies and finding that 68% of people show white over black preference).

[17] Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 337-39 (2010).

[18] *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

[19] *See id.* ("The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years." (citations omitted)).

[20] *See* L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L. J. 1143, 1145 (2012).

[21] Fridell & Laszlo, *supra* note 9.

[22] Kang et. al, *supra* note 14, at 1135 (citation omitted).

Experimental studies bolster the claim that police officers are susceptible to implicit biases. One study, for example, found that police officers rate stereotypically black faces as more "criminal" than stereotypically white faces.[23] Another study found that police officers primed with words meant to activate the concept of crime (e.g., arrest, shoot) were faster to identify a dot-probe on a computer screen when it was located next to a black face as opposed to a white face.[24] Or consider the shooter bias studies, which are time-pressured videogames of varying sophistication that ask participants—including police officers—to "shoot" when they see an armed suspect and hit the safety on the gun when the suspect is holding an object that is not a weapon (e.g., a cell phone).[25] Civilians and police officers alike make the decision to shoot more rapidly when a black suspect is holding a gun.[26]

To be clear, the importance of implicit bias research for policing is not limited to the implicit derogation of black citizens. For instance, when primed with a white face, study participants took longer to identify a degraded object as a gun than did the participants who received no prime.[27] This suggests that whites are disassociated with weapons. Or, in other words, white is not a neutral baseline. Indeed, as Zoe Robinson, Justin Levinson, and I have argued, even if black derogation ceased immediately, white favoritism would still push us towards inequality: "Since police officers disassociate white faces with criminality," we wrote, "a police officer might be more likely to let the broken taillight or expired plate slide if the driver is white than if the officer had not noticed the race of the driver as the car sped past."[28]

In the real world of policing, bias in its derogation and favoritism forms operate simultaneously to skew how events and people are perceived. In the wake of the tragic deaths of Michael Brown, Eric Garner, and Tamir Rice, identifying and reducing these biases has become a priority of police

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[23] Eberhardt et al., *supra* note 18, at 878 (finding that when researchers showed police officers white and black faces, and when asked which faces "looked criminal," "[t]he more stereotypically [b]lack a face appears, the more likely officers are to report that the face looks criminal").

[24] *Id.*

[25] Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1327 (2002).

[26] *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1015 (2007). Though, unlike civilians, police officers do not erroneously shoot suspects more often based on the race of the suspect. *See id.*

[27] *See* Eberhardt et al., *supra* note 18, at 880.

[28] Robert J. Smith et al., *Bias in the Shadows of Criminal Law: The Problem of Implicit White Favoritism*, 67 ALA. L. REV. (forthcoming 2015).

departments across America. The next Part explores the increasingly popular world of implicit bias training for the police.

## III. THE PROMISE AND LIMITATIONS OF IMPLICIT RACIAL BIAS TRAINING

Implicit bias training is an ascendant idea in policing and scholarly circles. Captain Tracey Gove of the West Hartford, Connecticut Police Department argues that "an understanding that biased police behavior could be manifested by even well-intentioned officers who have human biases can reduce police defensiveness around this issue and motivate change."[29] Professor John Powell urges police departments to "measure, track, and address implicit bias, enhance officer supervision, and create accountability measures."[30] These efforts, Powell writes, "can repair and strengthen the relationship between law enforcement and communities of color that will ultimately prevent the senseless deaths of boys like Michael Brown."[31]

A typical implicit bias training runs between five and six hours.[32] The purpose of these trainings is to ensure that "[o]fficers can learn skills to reduce and manage their own biases" and to promote the "unlearning" of the association between black Americans and criminality.[33] For a line police officer, the training might consist of a section that explains the nature of bias and highlights contemporary research on implicit bias; a section that provides examples of how biased policing has a negative impact on communities and leads to inefficient policing; and a final section that seeks to provide officers with tools for avoiding biased policing through better control of their automated behavioral responses.[34]

The section that deals with tools for controlling behavioral responses is especially important. Police academy recruits "consistently respond to calls for service based on their biases and stereotypes," Professor Fridell has

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[29] Tracey G. Gove, *Implicit Bias and Law Enforcement*, POLICE CHIEF, Oct. 2011, at 44, 50 (citation omitted), *available at* http://www.nxtbook.com/nxtbooks/naylor/CPIM1011/index.php#/44.

[30] John A. Powell, *On Ferguson: A Deep Divide and Systemic Failure*, BERKELEY J. SOC. (Nov. 25, 2014), http://berkeleyjournal.org/2014/11/ferguson-response-deep-divide-in-our-society-systematic-failure/.

[31] *Id.*

[32] LORIE A. FRIDELL, FAIR AND IMPARTIAL POLICING 8, *available at* http://static.squarespace.com/static/547228l8e4b0b3ef26cdc085/t/5478bbd4e4b045935f33df73/1417198548003/overview-program.pdf.

[33] *Id. See generally* Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, *in* RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM 39 (Michael J. Lynch, Britt E. Patterson & Kristina K. Childs eds., 2008) [hereinafter *Racially Biased Policing*].

[34] FRIDELL, *supra* note 32, at 3-4.

explained: the "woman with a gun is not frisked, the sex crime committed by a female against a male is not uncovered, the law-abiding young men of color on the corner are arrested."[35] The controlled responses portion of the training engages officers in role-playing scenarios that feature counter-stereotypical facts; and thus, it permits officers to observe their own biases in action and to glean tips for how to react in the future.[36]

Police departments across the country have undergone implicit bias training. In the wake of Eric Garner's death, the NYPD announced a new training program geared towards equitable policing that includes a unit on implicit bias.[37] The St. Louis Metropolitan Police Department also provided implicit bias training to its senior command staff following Michael Brown's death in suburban Ferguson, Missouri.[38] Chief Sam Dotson explained, "recent events in our region have made it more important then [sic] ever to recognize issues such as implicit bias and work toward solutions."[39] The U.S. Department of Justice provided a separate training for police officers in St. Louis County "designed to enhance officers' understanding of how bias—including implicit or unconscious bias—affects officer behavior, and the impact that biased policing has on officers and the community."[40]

Not only are police departments requiring the training, the overwhelming majority of officers who have received the DOJ-sponsored training evaluate the program as useful and relevant.[41] Indeed, many officers enthused about the course. One patrol officer in Berkeley, California wrote: "Most relevant discussions on the topic of race relations that I've heard in 14 years."[42] Other comments included: "I will better recognize bias and be able to address it with officers;"[43] "It changed my perception;"[44] "Very

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[35] *Racially Biased Policing*, *supra* note 33, at 53.

[36] *Id.* at 53-54.

[37] *See* Bill Chappell, *NYC Police Will Be Retrained, De Blasio Says at News Conference*, NPR (Dec. 4, 2014, 2:23 PM), http://www.npr.org/blogs/thetwo-way/2014/12/04/368515762/nyc-police-will-be-retrained-de-blasio-to-hold-news-conference.

[38] Joe Millitzer, *St. Louis Police Complete "Implicit Bias" Training*, FOX 2 NOW ST. LOUIS, (Oct. 21, 2014, 5:18 PM), http://fox2now.com/2014/10/21/st-louis-police-complete-implicit-bias-training/.

[39] *Id.*

[40] Ryan J. Reilly, *Feds Train Cops Around Ferguson On 'Impartial Policing'*, HUFFINGTON POST (Nov. 6, 2014, 4:20 PM), http://www.huffingtonpost.com/2014/11/06/ferguson-doj-training_n_6117052.html.

[41] *See* FRIDELL, *supra* note 32, at 4.

[42] *Id.*

[43] *Id.* at 5.

[44] OFFICERS: RACIAL PROFILING, FAIR AND IMPARTIAL POLICING, UNIVERSITY OF CALIFORNIA BERKELEY POLICE DEPARTMENT (2013), *available at* http://static.squarespace.com/static/547228l8e4b0b3ef26cdc085/t/5472b245e4b081a2addcb9a9/14168028851

effective . . . As a 33 yr. veteran, I enjoyed the class;"[45] "Helped me realize my own biases and will help me to better train those officers working under my supervision;"[46] "Could see doing training like this in my retirement—would feel proud and honored to be involved in a program like this."[47]

### *A. Does Implicit Racial Bias Training Work?*

Implicit bias training is popular among academics and the police community. But does implicit bias training reduce racial biases—and, if so, for how long? Do reductions in implicit bias translate into decreased racial disparities in policing? These questions are critical for understanding the promise that implicit bias training holds for policing. Unfortunately, though, empirical support is lacking.

A number of experimental interventions document short-term decreases in implicit biases. After exposure to counter-stereotypical exemplars—for instance, Dr. Martin Luther King as an admired black man and Charles Manson as a disliked white man—study participants show reduced implicit white-over-black bias.[48] Another study showed that increased contact with a black college roommate could reduce implicit biases.[49] Relatedly, external motivation not to act in a prejudiced manner when in the presence of a diverse group of people is associated with a reduction in implicit biases.[50] Other researchers have purposely paired the category "white" with negative evaluations and "black" with positive evaluations; and, after repeated conditioning, participants displayed lower white-over-black bias.[51]

Reductions in implicit racial biases are plausible. The more important question, though, is how long the positive effects of an intervention last. Most studies measure reductions in bias within seconds or minutes after the intervention is applied. These "one-shot strategies" probably do not result in lasting reductions.[52] Instead, most of the existing research relies on

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01/rberka.pdf (displaying course evaluations by the University of California Berkeley Police Department recruits and patrol officers).

[45] *Id.*

[46] FRIDELL, *supra* note 32, at 4.

[47] *See* OFFICERS: RACIAL PROFILING, *supra* note 44.

[48] Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXP. PSYCHOL. GEN. 1765, 1772 (2014).

[49] Calvin K. Lai et al., *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCHOL. COMPASS 315, 317 (2013).

[50] *Id.* at 321-22.

[51] Lai et al., *supra* note 48, at 1772-73.

[52] Patricia G. Devine et al., *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXP. SOC. PSYCHOL. 1267, 1268 (2012).

findings of reduced bias that are "likely to be highly contextual and short-lived."[53]

Professor Patricia Devine and her colleagues posit that reducing implicit biases over a period of time is analogous to breaking a bad habit.[54] To "break the prejudice habit" a person must do four things: First, she must be aware of her prejudice.[55] Second, she must desire to reduce her prejudice.[56] Third, she must understand the times and places where her prejudices might operate.[57] Fourth, she must understand how to consistently use tools that help replace biased responses with egalitarian responses.[58]

Two published studies have tested longer-term reductions in implicit biases using the habit-breaking model. The first study, authored by Devine and her colleagues, included ninety-one non-black undergraduate students randomly assigned either to the intervention group or a control group.[59] Both groups took the IAT and received feedback tailored to their particular score—e.g., your score indicates a strong preference for white over black.[60] The intervention group also received information about implicit racial bias, the harm that it can cause, and five strategies that they could use to help reduce their biased associations.[61]

After learning the five strategies, participants in the intervention group were asked to write down a specific instance in which they could envision themselves using each of the strategies.[62] They were asked to rate both how likely they were to use the strategies and how frequently they thought they might have the opportunity to use the strategies.[63] Finally, throughout the

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[53] *Id.*

[54] *See id.* (citation omitted).

[55] *See id.*

[56] *See id.*

[57] *See id.*

[58] *See id.*

[59] *See id.* at 1269.

[60] *See id.*

[61] *See id.* at 1270-71. The five habit-breaking strategies included the counter-stereotype imagining and increased contact strategies described above, as well as three other strategies. (1) Stereotype Replacement: The participant recognizes that her response is stereotype-consistent. *See id.* She then acknowledges that her response is stereotypical; ponders why she responded in a stereotypical fashion; creates a plan for how she will respond to a similar prompt in the future, and finally she replaces the biased response. *See id.* (2) Individuating: The participant obtains specific details about a person so that she can be evaluated as a person as opposed to a member of a group. *See id.* (3) Perspective Taking: The participant envisioning himself as a member of a stereotyped group considers how she might think, feel, etc. *See id.*

[62] *See id.* at 1269.

[63] *See id.*

study, participants were told to think about and report on how they used the strategies.[64]

The intervention succeeded at reducing implicit biases relative both to baseline scores and to the control group.[65] More importantly, the reduction persisted for two months.[66] The results also lent support to Devine and her colleagues' habit-breaking framework.[67] Specifically, the results showed that people with increased concern about discrimination had reduced IAT scores at the end of the experiment.[68] The study also demonstrated the importance of envisioning oneself using the tools;[69] a finding which led the authors to conclude that sustained reductions in implicit bias scores require people "not only to perceive opportunities to implement the strategies and view the strategies as effective, but also to believe that they were likely to use them."[70]

The second study focused on the analogous context of gender bias.[71] The participants included over 2,000 STEM faculty-members across ninety-two academic departments at the University of Wisconsin.[72] Departments were paired to each other based on a number of criteria, and within each pair one department received the intervention (a two and a half hour "interactive workshop"), and the other served as the control.[73] The intervention included an exploration of "bias as habit" scholarship;[74] an introduction to the various forms of gender-bias (e.g., prescriptive gender norms);[75] and a list of the five strategies for reducing implicit gender bias.[76] The participants engaged with the workshop material "through paired discussions, audience response, case studies conducted as readers' theater, and a written commitment to action."[77] Finally, the participants left the workshop with "a folder containing workshop materials, a bibliography,

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[64] *See id.* at 1268.
[65] *See id.* at 1271.
[66] *See id.*
[67] *See id.* at 1268.
[68] *Id.* at 1274.
[69] *See id.*
[70] *Id.*
[71] *See* Molly Carnes et al., *The Effect of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial,* 90 ACAD. MED. (forthcoming Feb. 2015).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

and a bookmark listing the six forms of bias discussed and the five bias-habit-changing strategies."[78]

Most participants revealed male over female bias on the IAT measure that the study employed, and the intervention did not significantly alter IAT scores either three days or three months after the intervention.[79] Thus, the two habit-breaking studies produced mixed results; one study found a long-term reduction in implicit bias, and the other demonstrated no statistically significant decrease in implicit bias as demonstrated through IAT scores. More robust evidence is needed before we can conclude that long-term decreases in implicit biases are achievable.

Assuming that durable decreases in implicit biases are plausible, though, we still do not know enough to conclude definitely that implicit bias training of police officers is an effective strategy. The point of reducing implicit biases is to decrease the incidents of biased behavior. Therefore, it is not enough to know that implicit biases are subject to prolonged change. First, we need to know *how much* experimental interventions reduce bias. For instance, in the long-term racial bias study, when comparing participants with high-concern over discrimination in the control group versus high-concern participants in the intervention group, the decreased bias reflected in the intervention group is enough to move a moderate preference for white over black on the IAT to a slight preference for white over black.[80] The bias is neither gone nor trivial, though it is difficult to assess *how much* of a decrease matters for behavioral change. Future studies need to capture that information. More broadly, if we care about biased behavior, we need to know that decreases in implicit biases result in decreases in biased behavior. When it comes to long-term changes, no evidence linking reductions with real-world behavioral change exists.[81]

This analysis has assumed that reductions in implicit bias are a prerequisite for behavioral change. But, what if behavioral change is plausible without a corresponding reduction in implicit bias? Though the long-term gender bias study found no significant post-intervention reduction in implicit biases, the intervention did result in "immediate boosts" in personal awareness, internal motivation, perception of benefits, and self-efficacy to engage in gender-equity-promoting behaviors.[82]

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[78] *Id.*

[79] *Id.*

[80] *See* Devine et al., *supra* note 52, at 1274.

[81] *See, e.g.*, *id.* at 1277 ("Although many scholars have argued that implicit bias plays a pivotal role in the perpetuation of discrimination, it will be important to demonstrate that reductions in implicit bias lead to reductions in discriminatory outcomes." (citations omitted)).

[82] Carnes et al., *supra* note 71.

Moreover, the intervention "helped individual faculty members change their gender bias habits," which "led to positive changes in perception of department climate: increased perceptions of fit, valuing of research, and comfort in raising personal and professional conflicts."[83] Thus, as the authors concluded, "gender bias habit reduction can occur and department climate can be improved even in the face of persistent implicit gender/leadership bias as measured with an IAT."[84]

Future research needs to explore whether implicit bias trainings are a pathway to positive behavioral change independent of whether it succeeds at long-term reductions in implicit biases. While the intervention in the gender bias study resulted in positive behavioral change, the mechanisms and conditions under which such changes are possible without reduction in implicit bias are unknown. It is also unknown how these changes translate into the policing context. For instance, future research needs to mimic the time-pressure and overall stress of real-world law enforcement. It also must contend with the possibility that officers relearn negative associations, especially when those officers patrol predominately minority-group populated areas that happen to have high crime rates.

## IV. THE COMPARATIVE EFFECTIVENESS OF DEBIASING THE POLICE

Empirical support for the idea that implicit bias training reduces racially disparate outcomes—directly or indirectly—is underdeveloped. Let us assume, though, that implicit bias training successfully reduces biases or otherwise leads to long-term positive behavioral change. What might we expect in terms of reductions in disparate policing outcomes?

It is unlikely that reductions in implicit bias will contribute significantly to unnecessary incidents of lethal force. In other words, implicit bias training probably is not the best solution to prevent the death of the next Eric Garner or Michael Brown. Recall the finding from the shooter bias study, in which police officers were quicker to shoot armed black suspects. Unlike civilian participants, the officers did not mistakenly shoot unarmed black suspects more frequently than unarmed white suspects.[85]

If not implicit racial bias, then what? Professor Philip Goff blames masculinity threat; the condition of feeling threatened when one's manliness is being challenged.[86] Sociologists posit "men react to masculine

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[83] *Id.*

[84] *Id.*

[85] Correll et al., *supra* note 26, at 1015-17.

[86] Mikhail Lyubansky, *Studies of Unconscious Bias: Racism Not Always by Racists*, PSYCHOL. TODAY, BETWEEN THE LINES BLOG (Apr. 25, 2012), http://www.psychologytoday.com/blog/between-the-lines/201204/studies-unconscious-bias-

insecurity by enacting extreme demonstrations of their masculinity."[87] In support of this overcompensation thesis, researchers told participants that femininity and masculinity are at two ends of a spectrum, and then they randomly assigned men to receive feedback that they fell either slightly on the femininity side of the spectrum or squarely within the masculinity side. Relative to men who were told that they fell solidly within the masculinity side of the spectrum, men told that they fell slightly on the femininity side of the spectrum showed "greater support for [the Iraq] war, more negative views of homosexuality, and greater interest in purchasing an SUV."[88] The men whose masculinity was threatened also showed "significantly greater negative affect on multiple emotion survey items" and evidenced stronger dominance attitudes.[89]

Not all men respond equally to potential threats to their masculinity. Men with high testosterone levels are particularly likely to overcompensate.[90] Research shows that high testosterone is correlated with "emotional arousal, increased heart rate, and greater focus on status and power concerns."[91] In the study that provided random feedback to men about being either solidly within the masculinity range or else slightly within the femininity range, "higher-testosterone men were more likely to react to masculinity threats by adopting more masculine attitudes."[92] Interestingly, though, this finding applied only to the men who received the masculinity-threatening feedback.[93] In other words, when masculinity is threatened, higher levels of testosterone are correlated with increased overcompensation.[94] Especially relevant to the policing context, high-testosterone men also tend to stare longer at faces that they perceive as threatening.[95]

The ease with which masculinity is threatened, as well as the finding that high-testosterone men in particular tend to overcompensate, are made worse by the reality that masculinity is not static. As Professor Robb Willer and

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racism-not-always-racists ("Over 80% of incidents that involved police use of deadly force were preceded by threat to the officers' masculinity. . . . Goff's research suggests that threats to masculinity were much more predictive of deadly use of force (in highly realistic simulation exercises) than explicit measures of racial prejudice.").

[87] Robb Willer et al., *Overdoing Gender: A Test of the Masculine Overcompensation Thesis*, 118 AM. J. SOC. 980, 981 (2013).

[88] *Id.* at 993.

[89] *Id.*

[90] *Id.* at 987.

[91] *Id.* (citation omitted).

[92] *Id.* at 1010.

[93] *See id.* at 1010-11.

[94] *See id.* at 1011.

[95] *See id.* at 987 (citation omitted).

his colleagues put the point, "masculinity is not easily attained but rather must be continually pursued in the face of threats and challenges."[96] Indeed, study participants could instantaneously name multiple events that could emasculate a man, though the same participants struggled to name femininity-stripping events.[97] The need to contest masculinity, and the ease with which the construct is threatened, leads effortlessly to masculinity contests between men.[98] As Willer and colleagues have explained, "one way to establish one's own masculinity is by insulting that of another man," which can initiate "a self-reinforcing dynamic in which men feed the social pressure that compelled their own masculinity striving in the first place."[99]

Taken together, these masculinity threat findings make less interesting the fact that Michael Brown was black and Darren Wilson is white. The more interesting fact becomes Wilson's grand jury testimony that Michael Brown called him "too much of a fuckin' pussy to shoot me."[100] To be clear, I am not arguing for masculinity threat training instead of implicit bias training. The point is simply that racial debiasing probably would not be sufficient to significantly reduce fatal use-of-force incidents. Yet, since the police disproportionately police non-whites (more on this below), solving the masculinity threat problem would have the effect of decreasing racially disparate outcomes. For instance, police departments might screen new officers for masculinity threat and testosterone levels to help make both hiring decisions and shift assignments.

Reducing implicit racial bias is similarly unlikely to satisfactorily reduce incidents of non-lethal use of force. Here too, there is something more at work. Consider, for example, a problem that arose when the Las Vegas Police Department discovered that officers too often used force against suspects *after* a foot chase had ended.[101] Most of the incidents occurred in majority non-white neighborhoods.[102] Professor Philip Atiba Goff, who consulted with the Las Vegas Police Department on the issue, has explained, "You're an officer, you're pumping adrenaline, you don't have time to evaluate whether your implicit bias is driving your behavior."[103]

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[96] *Id.* at 984.

[97] *See id.*

[98] *See id.*

[99] *Id.*

[100] Conor Friedersdorf, *Witnesses Saw Michael Brown Attacking—And Others Saw Him Giving Up*, ATLANTIC (Nov. 25, 2014, 6:18 AM), http://www.thetic.com/national/archive/2014/11/major-contradictions-in-eyewitness-accounts-of-michael-browns-death/383157/.

[101] *See* Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014, 6:00 AM), http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice.

[102] *See id.*

[103] *Id.*

Sociologist Randall Collins refers to this phenomenon as *forward panic*—the idea that tension builds and fear escalates in antagonistic interpersonal interactions.[104] When the momentum shifts and the tension is released, the surge results in actions that would not have happened under ordinary conditions (e.g., beating a suspect already in custody immediately following a chase).[105]

If I had to bet on whether implicit racial bias or forward panic is more of a factor in serious non-lethal use of force incidents, I would bet on forward panic. Regardless of the theory of causation, though, Professor Goff separated the cause of the disparity from the solution: He suggested a rule whereby the officer who chased the suspect cannot be the person to put handcuffs on the suspect once the suspect is apprehended.[106] The department implemented the new rule and use of force claims are down, especially among non-white suspects, which is yet another reminder that race-neutral solutions can significantly decrease racially disparate outcomes.[107]

### *A. Policing Presence Baselines*

The effort to decrease implicit biases stems from the desire for police to interact with citizens in a race-neutral fashion. The idea is that more race-neutral interactions will translate into fewer racially disparate outcomes. This is true on the margins. It misses the bigger point, though: There is too much policing of non-white people.

Police tend to concentrate their resources in areas where the most crime, and especially violent crime, is perceived to occur.[108] These geographic areas are disproportionality occupied by non-white residents.[109] One big driver of racial disparities, then, is that the police—biased or not—often come into contact with a higher percentage of black and brown populations than they do white populations. Even if white and non-white citizens use

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[104] *See* RANDALL COLLINS, VIOLENCE: A MICRO-SOCIOLOGICAL THEORY 85 (2008).

[105] *See id.*

[106] Mooney, *supra* note 101.

[107] *Id.*

[108] *See generally* Lawrence Sherman, *Policing for Crime Prevention, in* PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING (University of Maryland & Department of Criminology and Criminal Justice eds., 1997) (explaining that police departments use "computerized crime analysis . . . . to focus patrol resources on the times and places with the highest risks of serious crime").

[109] Lance Hannon & Robert DeFina, *Violent Crime in African American and White Neighborhoods: Is Poverty's Detrimental Effect Race-Specific?*, 9 J. POVERTY 49, 49-50 (2005) (noting that "high crime rate areas usually have pronounced levels of socioeconomic disadvantage, and they tend to be disproportionately African American").

drugs at the same rate, for instance, disproportionate contact with the police would predict that black citizens would be stopped, searched, and arrested for drug crimes more often.

The best way to reduce racially disparate stops, searches, and arrests is to change how neighborhoods are policed. The dominant theory of policing posits that disorderliness (e.g., public intoxication, loitering) invites more serious criminal activity (e.g., robbery, assault) by signaling a breakdown in informal social controls.[110] Many police departments have translated this *broken windows* theory into a zero-tolerance mandate.[111] Low-level offenders—those convicted of marijuana possession, public intoxication—go to jail under zero-tolerance regimes. Yet, evidence supporting the idea that these policies reduce serious crime is hotly disputed.[112]

Consider one example of a low-level crime that should not lead to arrest. Between 2001 and 2010, America registered over eight million marijuana possession arrests.[113] Though black and white Americans use marijuana at roughly the same rate, blacks are nearly four times (3.73) more likely to be arrested for marijuana possession.[114] Consider the effect on racially disparate outcomes if more cities treated possession of personal amounts of marijuana as a ticket-worthy, as opposed to arrest-worthy, offense. At the time of this writing, the New York City Police Department is set to adopt a ticket-focused policy to marijuana enforcement.[115] Given that roughly eighty-five percent of marijuana arrestees are non-white, the ticket-only policy is another example of an ostensibly race-neutral policy modification poised to do more to remedy racially disparate outcomes than we could ever expect a reduction in implicit racial biases to achieve.[116]

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[110] *See* George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC (Mar. 1, 1982, 12:00 PM), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/2/.

[111] *See* Matthew C. Scheider, *Broken Windows and Community Policing*, COMMUNITY POLICING DISPATCH (Jan. 2009), http://cops.usdoj.gov/html/dispatch/January_2009/nugget.htm.

[112] *See, e.g.*, Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006).

[113] *See* AM. CIVIL LIBERTIES UNION, *supra* note 11, at 4.

[114] *Id.*

[115] *See* Harry Bruinius, *NYPD May Soften Approach to Small-Scale Marijuana Possession*, CHRISTIAN SCI. MONITOR (Nov. 10, 2014), http://www.csmonitor.com/USA/Justice/2014/1110/NYPD-may-soften-approach-to-small-scale-marijuana-possession.

[116] *See id.*

### *B. Traffic Stops*

Reducing racially biased outcomes in traffic stops would be a huge deal. Consider a recent study of thirteen million traffic stops in North Carolina.[117] Professors Frank Baumgartner and Derrick Epps found that "Black and Hispanic citizens are subject to consistently higher rates of search and arrest than Whites."[118] The researchers noted that though the "disparities are consistent across various reasons for the motorist stop . . . . the disparities appear greatest when the level of officer discretion is highest—seat belts, vehicle equipment, and vehicle regulatory issues."[119] Even more troubling: once the vehicle has been stopped, black and brown people are more likely to be searched.[120] For instance, when the officer cited a "seat belt violation" as the reason for the stop, "Blacks are 223 percent and Hispanics 106 percent more likely than Whites to be searched."[121]

If reduced implicit racial biases would be helpful anywhere, it has to be in the traffic stop context. Unlike the split-second decision to shoot, conducting a vehicle stop tends to be a less stressful calculation for officers to make. Hence, an officer pulling over a vehicle for speeding likely has more time to check her decisions for implicit racial bias than the officer who needs to decide whether to shoot her gun. Moreover, unlike the decision to shoot, the decision to conduct a traffic stop is subject to an ambiguous and forgiving legal standard. It is in these points of discretion that associations between black and criminality, for instance, can skew an officer's perception.

Before I would bet too much money on the benefits of reducing implicit biases for the purpose of reducing disparate traffic stops, though, I would want to know what other factors might be causing the disparities. Are non-whites disproportionately driving older model cars? Are most of the stops occurring in areas where the most crime is perceived to occur? The

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[117] FRANK BAUMGARTNER & DEREK EPP, NORTH CAROLINA TRAFFIC STOPS STATISTICS ANALYSIS: FINAL REPORT TO THE NORTH CAROLINA ADVOCATES FOR JUSTICE TASK FORCE ON RACIAL AND ETHNIC BIAS 2, *available at* http://www.unc.edu/~fbaum/papers/Baumgartner-Traffic-Stops-Statistics-1-Feb-2012.pdf.

[118] *Id.*

[119] *See id.*

[120] *Id.* at 5-6.

[121] *Id.* Even here, however, reducing implicit biases is not likely to be the most effective strategy for dropping disparities in searches incident to traffic stops. As Professor Richardson has argued, tying promotions and salary increases to *hit rates* is a promising solution. *See* Richardson, *supra* note 20, at 1145. Because officers are more likely to find nothing as a result of searching non-whites, evaluating officers on the percentage of time they are correct in their hunch that a search is warranted is likely to make the officer more careful on the front end. *See id.*

answers to these questions do not justify the stops—sometimes quite the opposite. Yet, even in the traffic stop context, a discretionary point where implicit bias reduction has its strongest analytical footing, we still need to know more about the mechanisms driving racially disparate outcomes before we can assess the relative value of focusing on implicit bias training.

## V. CONCLUSION

Implicit bias training is flashy, relatively inexpensive, and somewhat uncontroversial—in other words, it is politically saleable. Perhaps these are good things. The goal of this Article, though, is to provoke thought on how much we know about the relative benefits of implicit bias training; and, more generally, the benefits of reducing implicit racial biases for the goal of reducing racially disparate policing outcomes.

Implicit bias training is not a panacea. It is, however, a useful first step. To determine how useful, and to understand how much to expect from reforms that focus on reducing implicit biases, more research is needed. Even if implicit bias training does not significantly reduce implicit bias, or if reduced implicit biases do not translate into significant reductions in disparate outcomes, the trainings themselves are still valuable as a palatable entryway into discussing disparities and the need for reform. Indeed, the positive evaluations from officers who have undergone the training strongly suggest that implicit bias trainings are effective at illustrating that bias continues to flourish and that bias continues to produce negative outcomes. In a world where the discussion of racial disparities often feels difficult and counter-productive, implicit bias training is a promising way to ignite and sustain conversations about reducing racial disparities in policing.

# Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems

Rachel D. Godsil* and James S. Freeman**

> The concept of wahi pana merges the importance of place with that of the spiritual . . . . [T]his value links [Hawaiians to our past and our] future.
>
> Edward L. H. Kanahele[1]

> You are where you came from. There are no disembodied selves. There are only humans embedded in practices, places, and cultures.
>
> Adrian McKinty[2]

We are constituted in significant part by our relationship to places. Where we live, learn, work, worship, and play are central to our "place identity,"[3] the "dimensions of the self that develop in relation to the physical environment by means of a pattern of beliefs, preferences, feelings, values, and goals."[4] While individuals develop "place identities" based upon their particular relationship to the physical environment, these relationships are mediated through other aspects of their identities, with race, ethnicity, religion, and class playing crucial roles.[5] Place identities may differ in their degree of significance to individuals based upon these other aspects of identity. Historian Edward Kanahele writes:

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[1] Edward L. H. Kanahele, *Foreword* to VAN JAMES, ANCIENT SITES OF O'AHU: A GUIDE TO HAWAIIAN ARCHAEOLOGICAL PLACES OF INTEREST ix (1st ed. 1991).

[2] ADRIAN MCKINTY, FALLING GLASS 149 (2011).

[3] Lynne C. Manzo & Douglas D. Perkins, *Finding Common Ground: The Importance of Place Attachment to Community Participation and Planning*, 20 J. PLAN. LITERATURE 335, 337 (2006).

[4] *Id.* (citation omitted).

[5] *See id.* at 340.

> As a native Hawaiian, a place tells me who I am and who my extended family is. A place gives me my history, the history of my clan, and the history of my people . . . . A place gives me a sense of well-being and of acceptance of all who have experienced that place.[6]

This Article explores the overlap of place with race and ethnicity in our current era in which most agree that discrimination based upon race and ethnicity is wrong. We query the fact that, despite this consensus, access to particular places has been restricted based upon racial or ethnic identity and uses of land continue to benefit some racial and ethnic groups and burden others.[7] Implicit biases—stereotypes or attitudes that operate without an individual's conscious awareness[8]—may explain the seeming disjuncture between values and actions; or in the highly charged context of land use and housing, people may be more apt to make conscious decisions based upon stereotypes and assumptions. The research suggests some combination of both. Other research in the mind sciences may also be useful, particularly the findings that "racial anxiety" often leads both whites and people of color to seek to avoid or limit inter-racial interactions.[9] While the research is less developed, there is reason to believe that racial anxiety—the concern that racial or ethnic difference will result in difficult inter-group interaction—may come into play in the housing choices individual home-seekers make and may also affect interactions in real estate transactions and government land use decisions.[10]

These issues are of particular importance as the Supreme Court considers whether the Fair Housing Act empowers individuals to bring suit for housing discrimination under a disparate impact standard rather than the discriminatory intent standard required under the Equal Protection Clause.[11] In light of the complexity of uncovering "intent" in housing and land use

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[6] Kanahele, *supra* note 1, at ix.

[7] *See* Manzo & Perkins, *supra* note 3, at 338, 340 (explaining that "the sharing of a common neighborhood space by diverse groups does not inevitably lead to a sense of community; therefore it is essential to understand the diverse meanings that a neighborhood holds for its residents").

[8] *See* Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 429 (2007), *available at* http://www.fas.harvard.edu/~mrbworks/articles/2007_ARLSS.pdf.

[9] *See* Rachel Godsil et al., *Addressing Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Health Care*, SCI. EQUALITY, Nov. 2014, at 3, 18-19, *available at* http://perception.org/app/uploads/2014/11/Science-of-Equality-111214_web.pdf.

[10] *See id.* at 27, 28 (stating that "[m]embers of both racial minority and majority groups may experience racial anxiety . . . in cross-race interactions").

[11] *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 46 (2014) (No. 13-1371) (limiting certiorari to this specific issue).

decisions, civil rights plaintiffs have had enormous difficulty. The obstacle stems from challenging facially neutral decisions that lead to outcomes, which fall disproportionately upon minorities. Thus, many have filed amicus briefs[12] urging the Court to follow the long-standing practice of maintaining disparate impact claims under the Fair Housing Act as done in each federal circuit and the Department of Housing and Urban Development's regulatory instructions.[13]

This Article describes the extant social science literature supporting the contention that implicit biases and other forms of racial bias play a significant role in housing and land use decisions. The Article also considers the role of implicit bias in the housing and land use disputes in Hawai'i as part of this symposium's intention of delving into the role of implicit bias in Hawai'i more specifically.[14] Our inquiry considers the similarities and differences of the experience of Native Hawaiians and Pacific Islanders in Hawai'i with people of color found more generally in the continental United States. Some aspects of the experience of Native Hawaiians and Pacific Islanders appear similar: homelessness rates, rent burdens, and instances of the location of locally unwanted land uses.[15] However, the literature about land use disputes in Hawai'i raises a distinct set of concerns about the underlying presumption that land should be altered from its natural state for some particular human use.[16] These disputes recognize the degree to which land use decisions are constitutive and are not readily understood by the lens of implicit bias. Rather, these disputes are rooted in competing belief systems about the role of land itself.

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[12] One of the authors is a co-author of an amicus on behalf of plaintiffs. *See* Brief of Sociologists, Social Psychologists, and Legal Scholars as Amici Curiae Supporting Respondent, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 46 (2014) (No. 13-1371), 2014 WL 7405800. This Article draws on the research used in the amicus brief, and therefore, we note the contributions of co-authors of the brief to this Article.

[13] *See, e.g.*, *id.*

[14] The University of Hawai'i Law Review hosted its biennial symposium on January 16, 2015. The topic for the symposium was "Exploring Implicit Bias in Hawai'i."

[15] *See, e.g.*, U.S. CENSUS BUREAU, AREAS WITH CONCENTRATED POVERTY: 1999, at 8 (2005), *available at* http://www.census.gov/prod/2005pubs/censr-16.pdf.

[16] As every first-year law student who begins a Real Property course is taught, altering land from its natural state for human use is central to John Locke's concept of property rights. *See* ERIC T. FREYFOGLE, AGRARIANISM AND THE GOOD SOCIETY: LAND, CULTURE, CONFLICT, AND HOPE 10 (2007) (explaining that under Locke's labor theory of land use, man must endeavor to change the land in order to reap its true value).

## I. OVERVIEW OF IMPLICIT BIAS AND RACIAL ANXIETY

As has been described in a large body of legal academic literature,[17] social scientists use the term "implicit bias" to refer to stereotypes or attitudes that operate without an individual's conscious awareness.[18] Research shows that people experience these implicit biases toward a broad range of outgroups based upon: race, ethnicity, nationality, gender, social status, and other distinctions.[19] The presence of implicit bias has been established using a wide variety of instruments, including measuring cardiovascular responses,[20] brain scans using functional magnetic resonance imaging,[21] and most widely known, the Implicit Association Test ("IAT").[22]

According to these measures, implicit bias is widely held and large in magnitude, particularly toward African Americans.[23] The extant research shows that implicit biases against minorities are held by people throughout the country and in virtually every profession. For example, in a study of federal district judges from three different judicial districts, researchers found that, consistent with the general population, 87.1% of white judges showed strong implicit attitudes favoring whites over blacks.[24] Researchers

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[17] *See, e.g.*, Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22(9) J. GEN. INTERNAL MED. 1231, 1231-38 (2007), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2219763/pdf/11606_2007_Article_258.pdf; Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010).

[18] Lane et al., *supra* note 8, at 429.

[19] John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, RES. ORG. BEHAV., Nov. 2009, at 39, 44.

[20] *See, e.g.*, Jim Blascovich et al., *Perceiver Threat in Social Interactions with Stigmatized Others*, 80 J. PERSONALITY & SOC. PSYCHOL. 253 (2001).

[21] *See, e.g.*, Jason P. Mitchell et al., *Thinking About Others: The Neural Substrates of Social Cognition*, *in* SOCIAL NEUROSCIENCE: PEOPLE THINKING ABOUT THINKING PEOPLE 63, 66 (John T. Cacioppo, Penny S. Visser & Cynthia L. Pickett eds., 2006); Elizabeth A. Phelps et. al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000).

[22] *See, e.g.*, Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998); Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265 (John A. Bargh ed., 2007).

[23] *See* Lane et al., *supra* note 8, at 436-37.

[24] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009). It is notable that not every racial or ethnic group

studying explicit and implicit racial bias among doctors also found that levels of bias largely mirrored those of the general population, with doctors showing a more favorable bias toward white Americans over black Americans.[25] For example, Green and colleagues found that white physicians with implicit biases against black patients were less likely to refer black than white patients with identical symptoms of acute coronary distress for thrombolysis, the preferred treatment.[26] While implicit, these biases do not remain in the unconscious, but rather have been found to be more predictive of certain kinds of behavior, such as discriminatory actions toward African Americans, than self-reports.[27] As discussed below, racial bias and stereotyping have been found to be directly linked to decisions about housing and land use where implicit bias is at play.

Along with implicit bias, social psychology researchers have also identified "racial anxiety" as a phenomenon that offers insight into the continued salience of race in many domains.[28] As the Article suggests below, such anxiety seems highly likely to play a role in the link between race, land use, and housing. Racial anxiety is experienced as physiological threat when anticipating or engaging in an inter-racial interaction.[29] Racial anxiety not only manifests itself physiologically with higher cortisol and

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shows the same level of implicit bias. African Americans, for example, are far less likely to show an implicit preference for blacks. *See id.*

[25] *See* Green et al., *supra* note 17, at 1233-35.

[26] *See id.*

[27] *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19-20 (2009) ("[I]mplicit measures of attitudes and beliefs may predict spontaneous actions more effectively than do explicit measures.").

[28] *See generally* Godsil et al., *supra* note 9 (surveying the literature); John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002) (examining how implicit racial associations affect interracial interactions with whites); Elizabeth Page-Gould et al., *With a Little Help from My Cross-Group Friend: Reducing Anxiety in Intergroup Contexts Through Cross-Group Friendships*, 95 J. PERSONALITY & SOC. PSYCHOL. 1080 (2008) (testing the effects of cross-group friendship on anxiety in intergroup contexts); Jennifer A. Richeson & J. Nicole Shelton, *When Prejudice Does Not Pay: Effects of Interracial Contact on Executive Function*, 14 PSYCHOL. SCI. 287 (2003) (examining the influence of interracial interaction on the cognitive functioning of members of dominant racial groups); Jennifer A. Richeson et al., *An fMRI Investigation of the Impact of Interracial Contact on Executive Function*, 6 NATURE NEUROSCIENCE 1323 (2003) (investigating how interracial contact affects executive functions); Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316 (2007) (reviewing research regarding why interracial interaction continues to be awkward within an increasingly diverse world).

[29] *See* Blascovich et al., *supra* note 20, at 258.

heart rates, but it also often manifests behaviorally.[30] For example, people experiencing the physical symptoms of anxiety during a cross-racial interaction often distance themselves, engage in less eye contact, appear less friendly and engaging, and may cut short the interaction.[31]

Both whites and people of color may experience racial anxiety—but with different underlying causes. People of color often are concerned that they will be subject to bias or discrimination, while whites worry that they will be assumed to be biased or racist.[32] Racial anxiety is uncomfortable for both groups, but can be highly consequential for people of color given that whites continue to be over-represented in positions of power.[33] Research suggests, for example, that a black patient may suffer the effects of her own experience of inter-racial anxiety with a white doctor, but may also suffer the effects of the doctor's anxiety if the doctor's anxiety results in a shorter visit with less rapport and less opportunity for the doctor to obtain necessary information about the patient and to share information about the patient's condition.[34] Little research has been done to identify the salience of racial anxiety on housing and land use outcomes, but we will suggest some areas that would benefit from further research.

## II. BIAS IN LAND USE AND HOUSING DECISIONS

The extant research literature offers ample evidence that biases play a role in decision-making and behavior generally,[35] and social science

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[30] *See* Godsil et al., *supra* note 9, at 23 (discussing the psychological tools used to measure implicit responses to race).

[31] *See id.* at 27-28 (citation omitted).

[32] *See id.* at 28.

[33] *See id.* Even though people of color "feel a greater sense of efficacy interacting with whites," the general societal dominance of whites still causes some people of color to become anxious with expectations of being discriminated against on the basis of race or ethnicity. *Id.*

[34] *Id.* at 40-41.

[35] *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006) ("[I]mplicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions."); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746 (2005) ("[B]iases and prejudices—[are] not a function of an aberrational mind, but instead an outcome of 'normal cognitive processes associated with simplifying and storing information of overwhelming quantity and complexity that people encounter daily.'" (citation omitted)); Curtis D. Hardin & Mahzarin R. Banaji, *The Nature of Implicit Prejudice: Implications for Personal and Public Policy*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 13 (Eldar Shafir ed., 2014) ("[P]rejudice is often . . . unwitting, unintentional, and uncontrollable—even amongst the most well-intentioned people." (citation omitted)).

research demonstrates the pervasiveness of racially discriminatory treatment of minorities by landlords, realtors, and institutions.[36] While much of this research does not utilize implicit measures, there is significant reason to conclude that implicit bias rather than animus may often be the animating cause of the differential treatment.[37] Researchers have also concluded that the discriminatory treatment of minorities by housing providers and lending institutions may be primed by stereotypes and implicit perceptions of minority home-seekers rather than conscious discrimination.[38] Finally, because the process of seeking a home involves relational dynamics between home-seekers and "gate-keepers" such as housing agents, realtors, and lenders, racial anxiety may be playing a role as well.[39]

### *A. Biases Limit Minority Home-Seekers' Ability to Access the Housing Market*

Minority home-seekers often encounter bias from the moment they begin their search if a name or voice signifies belonging to a non-dominant group.[40] Researchers have observed: "Applicants making initial inquiries as to the availability of an apartment . . . may have their ethnicity, character, competence, and attractiveness evaluated before they ever meet their prospective landlord, and the results may be tangible in the loss of an opportunity to find suitable housing."[41]

As has been shown in the employment context,[42] names are often associated with a host of social and demographic characteristics including

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[36] *See generally* Margery Austin Turner & Stephen L. Ross, *How Racial Discrimination Affects the Search for Housing*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 81 (Xavier de Souza Briggs ed., 2005).

[37] *See id.* at 82 (discussing the frequency of racial discrimination in housing despite the passage of the Fair Housing Act of 1968).

[38] *See* J. Rosie Tighe, *How Race and Class Stereotyping Shapes Attitudes Toward Affordable Housing*, 27 HOUSING STUD. 962, 965 (2012) (discussing how racial stereotyping has a significant influence on public attitudes toward minorities, race-targeted policies, and social welfare policies).

[39] *See* Turner & Ross, *supra* note 36, at 96 (discussing realtors' practice of geographic steering as it relates to the victimization of both minority and white homebuyers).

[40] *See* Douglas S. Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 URB. AFF. REV. 452, 455 (2001) (explaining the occurrence of landlord discrimination based on the sound of prospective tenants' voices).

[41] Adrian G. Carpusor & William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. APPLIED SOC. PSYCHOL. 934, 937 (2006).

[42] *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*,

ethnicity, gender, age, and socioeconomic status.[43] Consequently, the "[c]ultural and semantic attributes associated with names have the potential to activate stereotypes" in housing providers.[44] For example, research shows that given identical e-mail inquiries, housing providers demonstrate preferences for home-seekers with "white-sounding" names.[45] In a 2006 study, Adrian Carpusor and William Loges found that a "white-sounding name" received a response to 89% of the inquiries, with 79% of those positive, while the non-white-sounding names received a reply to 65% of their inquiries, with only 40% positive.[46] This study also found that inquiries sent from Arab and black-sounding names were, respectively, three and four times more likely to be discouraged from visiting an apartment for rent than their counterpart with a white-sounding name.[47]

In another study of responses to emails, researchers found that discrimination occurs via the encouragement of white tenants through positive language, but not necessarily the discouragement of African Americans through negative language.[48] Housing providers respond more quickly, write longer emails, and use more positive and descriptive language with home-seekers with white-sounding names.[49] Further, they are more likely to invite follow-up correspondence, use a formal greeting and polite language, provide contact information, and offer showings when responding to "white" home-seekers' inquiries.[50] This differential treatment—with whites receiving more enthusiastic responses while African-Americans receive more neutral responses—is consistent with the "in-group" theory of bias, which suggests that in our current era, people in dominant groups often feel greater preference or positive regard for their own group as opposed to active animus or disregard for less dominant groups.[51] This phenomena helps explain how those in the dominant

94 AM. ECON. REV. 991, 991 (2004) ("White names receive 50 percent more callbacks for interviews.").

[43] Similar associations exist with regard to an individual's manner of speech. *See* Massey & Lundy, *supra* note 40, at 467 ("Being identified as black on the basis of one's speech pattern clearly reduces access to rental housing, but being black and female lowers it further, and being black, female, and poor lowers it further still.").

[44] Carpusor & Loges, *supra* note 41, at 935.

[45] *Id.* at 943-44.

[46] *See id.* at 944.

[47] *See id.* at 947.

[48] *See* Andrew Hanson, et al., *Subtle Discrimination in the Rental Housing Market: Evidence from E-mail Correspondence with Landlords*, 20 J. HOUSING ECON. 276, 282-83 (2011).

[49] *See id.* at 279-82

[50] *See id.*

[51] *See* Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 429 (1999) (citation omitted) ("Findings from both cross-

group—whites in American culture—can consider themselves non-racist even while their behavior favors one group over the other.[52]

*1. Race-based information asymmetries*

Housing agents have been found to provide less information and offer less assistance to non-white home-seekers.[53] Minorities are not told about available properties in mainly white neighborhoods; even if they are told about properties, they are not given the opportunity to inspect the available units and are provided with less financing help than a comparable white home-seeker.[54] These "information asymmetries" are causally linked to the continued residential segregation that exists even between whites and minorities with similar incomes and credit scores.[55]

The practice of providing information to some and not to others seems likely to be linked to implicit assumptions and stereotypes about the link between race and class: Whites are assumed to be more affluent and as a

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cultural research and laboratory experiments support the alternative view that ingroup identification is independent of negative attitudes toward outgroups and that much ingroup bias and intergroup discrimination is motivated by preferential treatment of ingroup members rather than direct hostility toward outgroup members."); Linda R. Tropp & Ludwin E. Molina, *Intergroup Processes: From Prejudice to Positive Relations Between Groups*, *in* OXFORD HANDBOOK OF PERSONALITY & SOCIAL PSYCHOLOGY 545, 546 (Kay Deaux & Mark Snyder eds., 2012) ("[M]uch of contemporary prejudice is based in favoritism toward the ingroup."); Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONT. SOC. 319, 321-22 (2000) (explaining that although we tend to think of racial discrimination primarily as treating a person or a group worse, treating a favored racial group better results in the same outcome); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1, 4 (2004) (discussing that studies show how whites generally will not overtly rate blacks negatively—they will simply rate similarly situated whites more positively).

Obviously, to the extent these biased evaluations and preferences have tangible implications in real-world contexts, they matter. Contrary to popular belief, in-group bias is not static and not all "groups" feel or show the same degree of in-group bias. *See id.* at 4-7. It depends upon the dynamics of a particular culture. *See id.* For example, whites in our society tend to show a greater degree of in-group bias than blacks or members of other races. *See id.* In-group bias is also most prevalent when in-group members perceive a threat to resources that benefit the in-group or norms that legitimize the status quo. *See* Blake M. Riek et al., *Intergroup Threat and Outgroup Attitudes: A Meta-Analytic Review*, 10 PERSONALITY & SOC. PSYCHOL. REV. 336, 345 (2006) (explaining how in-group threats are related to outgroup attitudes); *see also* Tropp & Molina, *supra*, at 546.

[52] *See* Godsil et al., *supra* note 9, at 21.

[53] *See* Turner & Ross, *supra* note 36, at 82-83.

[54] *See id.* at 86.

[55] *See id.* at 94; *see also* Maria Krysan et al., *Pathways to Residential Segregation*, *in* CHOOSING HOMES, CHOOSING SCHOOLS 27, 46 (Annette Lareau & Kimberly Goyette eds., 2014).

result are encouraged to consider more affluent neighborhoods than comparable minorities.[56] Other research has shown that realtors may undersell integrated neighborhoods by "posting fewer advertisements, using fewer positive terms to describe the neighborhood, and including photographs of white real estate agents less often. Realtors also resist showing homes in integrated neighborhoods."[57]

The reasons for the differential treatment are likely to vary. Some housing agents may still consciously have the notion that housing values suffer when neighborhoods become integrated, while others are acting according to a set of implicit associations they are not aware they possess. Racial anxiety may also play a role. Ironically, to the extent that a white realtor is anxious about seeming racist when interacting with a home-seeker from another racial or ethnic group, the racial anxiety literature suggests the realtor may be less apt to engage which may lead the realtor to share less information.[58]

### 2. *Race and lending patterns*

The role of race in the search for housing is particularly harmful when it affects the availability and terms of housing loans. Research has demonstrated that it affects both.[59]

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[56] *See* Turner & Ross, *supra* note 36, at 94-95.

[57] Richard Moye, *Neighborhood Racial–ethnic Change and Home Value Appreciation: Evidence from Philadelphia*, 35 URB. GEOGRAPHY 236, 237 (2014) (citations omitted).

[58] *See* Godsil et al., *supra* note 9, at 27 ("When people experience the physical symptoms of anxiety during a cross-racial interaction, they often distance themselves, are less apt to share eye contact, and use a less friendly and engaging verbal tone—behaviors which can obviously undermine an interaction." (citation omitted)).

[59] *See* Vincent J. Roscigno et al., *The Complexities and Processes of Racial Housing Discrimination*, 56 SOC. PROBS. 49, 60 (2009) (discussing how race influences the availability and terms of home financing); *see also* William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA, *supra* note 36, at 101, 113 (discussing the disproportionate representation of blacks and Hispanics in the subprime refinancing market); Ira Goldstein & Dan Urevick-Ackelsberg, *Subprime Lending, Mortgage Foreclosure and Race: How Far Have We Come and How Far Have We to Go*, *in* WHERE CREDIT IS DUE: BRINGING EQUITY TO CREDIT AND HOUSING AFTER THE MARKET MELTDOWN 117, 120 (Christy Rogers & John A. Powell eds., 2014) (examining racial discrimination in the Boston, Massachusetts metropolitan lending market); Katrin B. Anacker & Kristen B. Crossney, *Analyzing CRA Lending During the Tsunami in Subprime Lending and Foreclosure in the Philadelphia MSA*, 28 HOUSING STUD. 529, 532 (2013) (reviewing studies regarding the effect of race and ethnicity on the rejection rate of minority loan applicants); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 189 (2008) ("[A]vailable evidence suggests that blacks and Hispanics face

Some argue that the differential access and terms of credit are fully attributable to "differences in the economic and credit characteristics across race and ethnicity."[60] Numerous studies belie this argument and strongly support the conclusion that the economic profile of applicants fails to explain the disparities.

The data is deeply distressing: African Americans and Latinos with a FICO score over 660 "received a high interest rate loan more than three times as often as white borrowers."[61] With respect to prime loans, research shows that "the racial gap in *prime* lending persists even after controlling for borrower income."[62] In addition to differential treatment of individuals, neighborhood composition has also been shown to alter loan terms. For example, researchers have found lenders "charge borrowers in neighborhoods that are predominantly black significantly more than can be rationalized by their subsequent termination behavior."[63] Other researchers have utilized testers and have found "that black testers are less likely to receive a quote for a loan than are white testers and that they are given less time with the loan officer, are quoted higher interest rates, and are given less coaching and less information than are comparable white applicants."[64]

The research cannot, with certainty, determine precisely how race comes into play—and it is likely not always the same. The quote of higher interest rates seems likely to be the result of either explicit or implicit bias—however, some aspects of the relational dynamics, such as the amount of time spent, coaching, and sharing information, may be the result of racial anxiety.

### *B. Race and Neighborhoods*

In addition to affecting treatment of those seeking new housing options, research indicates that people have a tendency to view neighborhoods differently based purely upon the race of the inhabitants. This racialization

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higher rejection rates and less favorable terms in securing mortgages than do whites with similar credit characteristics." (citation omitted)).

[60] Brief for The Am. Fin. Servs. Assoc. et al. as Amici Curiae Supporting Petitioners, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 747 F.3d 275 (2014) (No.13-1371), 2014 WL 6706832, at 28 (citation omitted).

[61] Debbie Gruenstein Bocian et al., *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*, CTR. FOR RESPONSIBLE LENDING, Nov. 2011, at 1, 5, *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf.

[62] Apgar & Calder, *supra* note 59, at 110 (emphasis added).

[63] James B. Kau et al., *Racial Discrimination and Mortgage Lending*, 45 J. REAL EST. & FIN. ECON. 289, 302 (2012).

[64] Pager & Shepherd, *supra* note 59, at 190 (citation omitted).

of space[65] creates impediments to integration. White or affluent home-seekers are less likely to seek housing in neighborhoods based upon race.[66] Moreover, government decision makers and developers treat predominantly minority neighborhoods differently, presuming that they are appropriate for affordable housing units, refraining from providing amenities.[67] These decisions have a cascading effect; they ensure that predominantly minority neighborhoods are less attractive. Much of this research is focused on understanding whether peoples' perceptions about neighborhood conditions differ depending upon the racial composition of the neighborhood. While this research does not address government decision makers directly, it is still salient for two reasons: first, government decision makers are often responsive to the views of their constituents,[68] and second, we have little reason to think that government decision makers hold perceptions that differ significantly from the public at large.[69]

The race of residents has been found in a multitude of studies to affect evaluations of the attractiveness of a home even when the home itself is clearly middle-class and suburban.[70] In a recent study, researchers asked subjects to rate a home's value, whether they liked it, and the desirability of the neighborhood in which the home was located—keeping all the characteristics of the house constant except for whether the family photograph in the living room of the house showed a black or white family.[71] Race mattered. When the prospective home was owned by a black family the study participants estimated a lower value for the house, liked the house less, and rated the neighborhood as less desirable.[72] The researchers concluded that the mere presence of black people in a physical space activated images of blight, including less well-maintained property, lower quality schools and municipal services, less access to shopping and

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[65] *See generally* Elise Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010).

[66] Camille Zubrinsky Charles, *Who Will Live Near Whom?*, *in* AMERICA'S GROWING INEQUALITY: THE IMPACT OF POVERTY AND RACE 328, 328-35 (Chester Hartman ed., 2014).

[67] *See generally* Rachel D. Godsil, *Environmental Justice and the Integration Ideal*, 49 N.Y.L. SCH. L. REV. 1109 (2005).

[68] *See* NAT'L DEMOCRATIC INST. FOR INT'L AFFAIRS, CONSTITUENT RELATIONS 6-7 (2008), *available at* http://leg.mt.gov/content/For-Legislators/orientation/constituent-relations-ndi.pdf (explaining why relations between government officials and their constituents are important).

[69] *See* Russell J. Dalton et al., *Public Opinion and Direct Democracy*, J. DEMOCRACY, Oct. 2011, at 141, 141-42 (2001) ("Voters want to run the show directly and are impatient with all forms of intermediaries between their opinions and public policy." (citation omitted)).

[70] *See* Courtney M. Bonam, Jennifer L. Eberhardt & Hilary B. Bergsieker, Polluting Black Space 9 (June 30, 2013) (unpublished manuscript) (on file with authors).

[71] *See id.* at 17-18.

[72] *See id.*

financial institutions, and lower perceived safety, causing a single photographic image to alter the subject's evaluation of the home and the neighborhood in which it was understood to be located.[73]

In a similar study, participants were shown a video of either a middle-class or working-class neighborhood with actors of different races playing its inhabitants.[74] White participants were asked to give impressions and predictions about neighborhood conditions such as property upkeep, housing cost, safety, future property values, and quality of schools.[75] The results showed that simply seeing black (as opposed to white) residents in a neighborhood elicited significantly more negative evaluations of neighborhood conditions—even though the neighborhoods were identical in all respects other than race.[76] The researchers concluded that:

> In the absence of any other information, Whites assume that neighborhoods where Blacks live have less expensive housing, are less safe, are less likely to appreciate in value, and have lower-quality schools than do identical neighborhoods with White residents. . . . Respondents are told nothing about these features, but they make negative presumptions. These presumptions do not derive from visible social-class characteristics, but from merely the observed presence of African Americans in the neighborhood.[77]

In studies determining whether people perceive crime differently based upon race, researchers found that controlling for actual crime rates, the percentage of young black men in a neighborhood is positively related to *perceptions* of crime and the believed severity of a neighborhood crime problem.[78]

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[73] *See id.* at 19-20.

[74] Maria Krysan, Reynolds Farley & Mick P. Cooper, *In the Eye of the Beholder: Racial Beliefs and Residential Segregation*, 5 DU BOIS REV.: SOC. SCI. RES. ON RACE 5, 5-22 (2008).

[75] *See id.* at 13.

[76] *See id.* at 15-16.

[77] *Id.* at 16; *see also* Krysan et al., *supra* note 55, at 45 ("[T]his body of research points to the conclusion that racial preferences are not merely social class preferences in disguise."); Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527, 548-52 (2009) ("Residential preferences are not simply a reaction to class-based features of a neighborhood; they are shaped by the race of the people who live there.").

[78] *See* Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 25, 32-33 (Justin D. Levinson & Robert J. Smith eds., 2012); *see also* Bonam et al., *supra* note 70, at 2, 36 (finding that black neighborhoods are "highly associated with crime, disorder, neglect, and poverty" and "are perceived as under-resourced, dirty, and crime-ridden"); Rebecca Wickes et al., *"Seeing" Minorities and Perceptions of Disorder: Explicating the Mediating and Moderating Mechanisms of Social Cohesion*, 51 CRIMINOLOGY 519, 519-60 (2013).

These findings are relevant in real-world decisions—by understanding that people are apt to judge the same conditions differently depending upon the race of the residents, we again have a window into the disjuncture between the generally egalitarian views people have and their housing decisions. If people assume that their perceptions of neighborhood conditions are based upon legitimate factors, then they have a false sense of legitimacy that their decisions are "rational" rather than the result of racial stereotypes.[79]

### *1. Negative race-space associations and affordable housing*

This systematic and incorrect over-association of black residents with higher crime rates, public disorder, and other negative neighborhood characteristics has been found to be linked to public opposition to affordable housing—which is assumed to be primarily for people of color generally, and in some areas, black people particularly.[80] The perceived link between race and neighborhood conditions then translates into a set of assumptions about the value of properties located in neighborhoods with minority residents. Thus, studies show that, although participants often supported affordable housing in theory, they justified opposition to siting affordable housing near their own neighborhoods in part due to concern about property values.[81]

The research described above provides ample evidence that, even in the absence of overt discrimination, implicit bias causes people to view houses and neighborhoods more negatively when more black families live in those neighborhoods. In light of this research, there is reason to be concerned when discretionary decisions are made that continue the link between race and land uses considered less desirable.

Implicit biases not only affect residential valuations and desirability, but can also guide municipal decisions about land use that negatively impact minority communities. A recent study asking white participants to determine in which neighborhood the city should place a chemical plant found that the racial composition of a neighborhood was the decisive factor

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[79] Maria Krysan, *Whites Who Say They'd Flee: Who Are They, and Why Would They Leave?*, 39 DEMOGRAPHY 675, 694 (2002).

[80] *See* BELDEN RUSSONELLO & STEWART, VALUING HOUSING: PUBLIC PERCEPTIONS OF AFFORDABLE HOUSING IN THE CHICAGO REGION, HOUSING ILLINOIS 8 (2003), *available at* http://www.chicagorehab.org/resources/docs/valuing/summaryresearchreport.pdf; *see also* Anderson & Plaut, *supra* note 78.

[81] *See* Tighe, *supra* note 38, at 963 (citation omitted) (discussing research demonstrating that homeowners' concerns for property value are really a pretext for racial discrimination).

in determining the location of the plant.[82] Study participants were less likely to oppose the construction of a chemical plant in a residential area when the neighborhood was predominantly black, even controlling for perceptions of house values, environmental concerns, and participants' explicit feelings toward blacks.[83] While it may be unlikely that the average person would intentionally choose to make someone suffer from the adverse effects of a chemical plant solely based on that person's race, implicit biases can and do "produce behavior that diverges from a person's avowed or endorsed beliefs or principles."[84]

The significance of implicit bias in housing and land use data tracks outcomes throughout the United States. The concentration of polluting land uses in communities of color has been well documented for several decades.[85] A report based on national data collected over a twenty-year period shows an overconcentration of industrial and toxic waste facilities in communities of color.[86] People of color comprise a majority in communities where commercial hazardous waste facilities are sited, and make up much larger majorities—over two thirds of the population—in communities with multiple, clustered hazardous waste facilities.[87] Researchers have concluded that "[r]ace continues to be an independent predictor of where hazardous wastes are located, and it is a stronger predictor than income, education and other socioeconomic indicators."[88] Unsurprisingly, dramatic disparities in exposure to environmental hazards along racial lines have negative health consequences for residents of minority communities.[89] Housing discrimination and its resultant segregation "contributes to dramatic racial disparities in exposure to environmental hazards, access to healthy food choices, and exposure to crime and other sources of environmental stress, thereby helping to produce profound and persistent racial disparities in health."[90]

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[82] *See* Bonam et al., *supra* note 70, at 31.

[83] *Id.* at 34.

[84] Greenwald & Krieger, *supra* note 35, at 951.

[85] *See, e.g.*, THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard & Sheila Foster eds., 2012); Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 398-400 (1992); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios?: A Longitudinal Analysis of Environmental Justice Claims*, 24 ECO. L.Q. 1 (1997).

[86] *See generally* ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987-2007 (2007), *available at* http://tinyurl.com/ohs83c8.

[87] *See id.* at 54.

[88] *Id.* at 155.

[89] *See id.*

[90] Krysan et al., *supra* note 55, at 35 (citations omitted).

*2. Stereotypes perpetuate racial segregation and isolate minorities from access to resources, capital, and social networks, and therefore, opportunity*

While segregation has decreased slightly from the 2010 census and data analyses of the 2000 census, racial groups still experience high rates of racial isolation.[91] The data reveals that the average white resident lives in a census tract that is 79% white (though whites represent 64% of the general population); the average black person resides in a tract that is 46% black (compared to blacks' 13% of the general population); and the average Hispanic lives in a tract that is 45% Hispanic (compared to Hispanics' 16% of the general population).[92] Research shows that there was a slight increase in segregation levels for Asian-Americans from 1980 to 2010.[93] Minority preferences account for some segregation but research indicates that these preferences are largely the result of fear of white hostility.[94]

In addition to being racially or economically more segregated, blacks and Hispanics are much more likely to live in neighborhoods with high rates of poverty. Despite representing only a quarter of the general population, 69% of the eight million people living in census tracts with the highest poverty rates (above 40%) were black or Hispanic.[95] By contrast, more than 72% of whites live in higher income communities where the poverty rate is below the national average.[96] "Evidence of raced space also captures material conditions in people's neighborhoods, including housing standards; access to basic services like water, wastewater disposal, sidewalks, and streetlights; access to amenities like parks, open space, and transportation; and proximity to locally undesirable land uses ("LULUs") like freeways and industrial facilities."[97] All of these factors contribute to racial isolation

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[91] Anderson & Plaut, *supra* note 78, at 26-27 (citation omitted).

[92] *See generally* JOHN ICELAND ET. AL, THE RESIDENTIAL SEGREGATION OF DETAILED HISPANIC AND ASIAN GROUPS IN THE UNITED STATES: 1980-2010 (2014), *available at* http://www.demographic-research.org/volumes/vol31/20/31-20.pdf.

[93] *See generally id.*

[94] *See* Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 182 (2003); Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 SOC. FORCES 937, 937 (2002).

[95] *See, e.g.*, U.S. CENSUS BUREAU, *supra* note 15, at 8.

[96] *See id.*

[97] Anderson & Plaut, *supra* note 78, at 27-28. *See generally* Pascale Joassart-Marcelli, *Leveling the Playing Field? Urban Disparities in Funding for Local Parks and Recreation in the Los Angeles Region*, 42 ENV. & PLAN. 1174 (2009) (listing case studies of specific locales, which reveal deteriorated housing conditions in minority communities while amenities such as parks are concentrated in whiter communities).

and inequity, suggesting strongly that equality norms have not yet been achieved.

### 3. *Implicit biases can affect discretionary government decision making*

"[T]he potential for unconscious stereotypes and biases to intrude . . . is greatest when subjective judgments are involved."[98] Indeed, at least one federal court has recognized that public officials' "subjective decision-making processes . . . are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of—hence the difficulty of ferreting out discrimination as a motivating factor."[99]

## III. ROLE OF ETHNICITY IN LAND USE DISPUTES IN HAWAI'I

A majority of Native Hawaiians (55%) reside in Hawai'i.[100] While the number of Native Hawaiians (either those who self-identify as solely Native Hawaiian or as in combination with another ethnic or racial group) has grown since 2000 from approximately 262,000 to 356,000, Native Hawaiians make up slightly more than 10% of the population, with Asians (30%) and whites (25%) at significantly higher numbers.[101] Native Hawaiians live primarily in a few counties.[102]

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[98] Hart, *supra* note 35, at 744 (citations omitted).

[99] *Id.* at 742-43 (quotation omitted).

[100] *See* U.S. CENSUS BUREAU, THE NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER POPULATION: 2010, at 18 (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf.

[101] *See id.*

[102] *See id.*

Table 3.

**Ten Counties With the Largest Number of Native Hawaiians and Other Pacific Islanders: 2010**

(For information on confidentiality protection, nonsampling error, and definitions, see *www.census.gov/prod/cen2010/doc/pl94-171.pdf*)

| County | Total population | Native Hawaiian and Other Pacific Islander | | | | | |
|---|---|---|---|---|---|---|---|
| | | Alone or in combination | | Alone | | In combination | |
| | | Rank | Number | Rank | Number | Rank | Number |
| Honolulu County, HI | 953,207 | 1 | 233,637 | 1 | 90,878 | 1 | 142,759 |
| Hawaii County, HI | 185,079 | 2 | 62,487 | 3 | 22,389 | 2 | 40,098 |
| Los Angeles County, CA | 9,818,605 | 3 | 54,169 | 2 | 26,094 | 3 | 28,075 |
| Maui County, HI | 154,834 | 4 | 42,264 | 4 | 16,051 | 4 | 26,213 |
| San Diego County, CA | 3,095,313 | 5 | 30,626 | 6 | 15,337 | 5 | 15,289 |
| Clark County, NV | 1,951,269 | 6 | 27,088 | 9 | 13,628 | 6 | 13,460 |
| Sacramento County, CA | 1,418,788 | 7 | 24,138 | 8 | 13,858 | 8 | 10,280 |
| King County, WA | 1,931,249 | 8 | 23,664 | 7 | 14,486 | 11 | 9,178 |
| Alameda County, CA | 1,510,271 | 9 | 22,322 | 10 | 12,802 | 10 | 9,520 |
| Salt Lake County, UT | 1,029,655 | 10 | 20,824 | 5 | 15,781 | 19 | 5,043 |
| Kauai County, HI | 67,091 | 12 | 17,374 | 18 | 6,060 | 7 | 11,314 |
| Orange County, CA | 3,010,232 | 11 | 19,484 | 13 | 9,354 | 9 | 10,130 |

Source: U.S. Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File*, Table P1.

*Id.*

Hawai'i, Honolulu, Kaua'i, and Maui are the counties in which Native Hawaiians (alone and in combination) constitute the highest percent of the population, but only in Hawai'i County do they exceed 30% of the population.[103] A significant majority of Native Hawaiians (70%) report multiple races.[104]

"Hawaiian home lands are public lands held in trust by the State of Hawai'i for the benefit of Native Hawaiians."[105] Only 31,000 people live on the home lands, 86% of whom are Native Hawaiians, alone or in combination.[106] "Overall, 9[%] of all Native Hawaiian[s] . . . [reside] on the home lands."[107] While the standard measures of housing segregation do not appear readily in the literature, recent research on the distinct challenges affecting Native Hawaiians provide data suggesting that Native Hawaiians are concentrated in some locations.[108]

Images of Native Hawaiians in the continental United States are largely filtered through media representations, which tend to be caricatured and thin.[109] Media images matter—and social psychological research has shown the significance particularly for children's sense of self of being "invisible" in books, movies, and other standard media content.[110] However, more salient for the land use and housing decisions and experiences in Hawai'i are stereotypes that are prevalent within the islands of Hawai'i.

### *A. Role of Native Hawaiian Religious Traditions and Land Use*

Discussions of Native Hawaiian religious traditions and their approach to land use usually begin with a broad statement that outlines the differences from Western concepts of land ownership.[111] Their main thrust is the

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[103] *See id.* at 11.

[104] *Id.* at 5.

[105] *Id.* at 19.

[106] *Id.*

[107] *Id.*

[108] OFFICE OF HAWAIIAN AFFAIRS, INCOME INEQUALITY AND NATIVE HAWAIIAN COMMUNITIES IN THE WAKE OF THE GREAT RECESSION: 2005 TO 2013: HO'OKAHUA WAIWAI (ECONOMIC SELF-SUFFICIENCY) FACT SHEET, VOL. 2014, NO. 2 (2014).

[109] NEW REPORT CHALLENGES INVISIBILITY OF GROWING U.S. NATIVE HAWAIIAN AND PACIFIC ISLANDER POPULATION (2014).

[110] *See generally* RACHEL D. GODSIL & BRIANNA GOODALE, TELLING OUR STORIES: THE ROLE OF NARRATIVE IN RACIAL HEALING (2013), *available at* http://perception.org/app/uploads/2014/11/Telling-Our-Own-Story.pdf.

[111] *See* D. Kapua'ala Sproat, *Avoiding Trouble in Paradise: Understanding Hawai'i's Law and Indigenous Culture*, 18 BUS. L. TODAY 29, 29 (2012) ("Land was not an object to be bought or sold, but was a responsibility to be cared for in perpetuity. This relationship is best reflected in Mary Kawena Pukui's traditional proverb: He ali'i ka 'āina, he kaua ke

distinction that land, in the Native Hawaiian framework, is not owned privately by individuals, but held in trust by the people as a whole and used by different individuals in different ways.[112]

Alongside statements of these different conceptions of land ownership are articulations of the difference in the relationship between land and people.[113] In the typical Western conception, land is a nonliving object that stands in a certain contractual relationship to its owner or user within a secular legal system.[114] In Native Hawaiian religion, the relationship between land and people is a familial one, as a child to a respected elder, and this relationship has important religious, communal, and increasingly, political aspects.[115]

This familial relationship is based on a set of interlocking beliefs in Native Hawaiian religion that delineate "an interdependent, reciprocal relationship between the gods, the land, and the people."[116] These beliefs start with the mythic tradition that Native Hawaiians and the Hawaiian islands themselves share a common ancestry: born of the same group of gods and goddesses.[117] This belief is not simply a historical artifact: for modern believers, the land continues to be understood as part of the living physical body, or manifestation, of a deity.[118] In common with other indigenous religions, Native Hawaiian religion views land and the nonliving environment as "alive," infused with mana, or spiritual energy.[119]

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kanaka (The land is a chief, people are the stewards).").

[112] *See id.* at 30-31.

[113] *See id.* at 29.

[114] See *id.* (discussing the imposition of a more formalized fee simple system of land tenure).

[115] *See id.* at 29.

[116] Melody Kapilialoha MacKenzie, Susan K. Serrano & Koalani Laura Kaulukukui, *Environmental Justice for Indigneous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RESOURCES & ENV'T 37, 37 (2007).

[117] *See* Sproat, *supra* note 111, at 29 ("(Native Hawaiians) are descendants of Papa and Wākea, the Earthmother and Skyfather, and are closely related to the gods who created the Hawaiian Islands. Native Hawaiians, therefore, have *kuleana*: the cultural obligation to care for the land and its resources, as one would care for a close relative." (emphasis in original)).

[118] *See id.* at 30 (recognizing the codification of traditional and customary rights and practices in the Hawai'i Constitution).

[119] "'Life', in Hawaiian thought, is not restricted to animated, corporeal life (*ola*), because "life" as emerging invigoration is spirit (*ea*) in both inanimate and animate forms." DEP'T OF THE INTERIOR, NATIVE HAWAIIANS STUDY COMMISSION: REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS, PURSUANT TO PUBLIC LAW 96-565, TITLE III, at 228 (1983) (emphasis in original), *available at* http://files.eric.ed.gov/fulltext/ED254608.pdf. "Mana is either dormant and residual in the inanimate forms of life or energy (if we see *mana* as 'potential' energy) and also dynamic and active in the animate forms of life (or 'kinetic' energy)." *Id.* (emphasis in original).

As a result, the connection between land and people cannot be fully encapsulated within a purely contractual legal framework because that framework fails to include the genealogical and spiritual dimensions that create a shared identity between Native Hawaiians and their land.

While this relationship may be relatively easy to understand as an intellectual concept, accepting it as a legitimate spiritual and cultural position requires the recognition and valuation of a world perspective that significantly departs from both secular scientific and Western monotheistic understandings of land and the natural world.[120] It requires, in other words, a departure from a number of the standard cognitive schema of non-Native Hawaiians, and a measure of cognitive and psychological elasticity to avoid conflicts with other non-Native Hawaiian fundamental cultural and religious beliefs and values. In terms of implicit bias, the disjuncture between Native Hawaiians and Western spiritual frameworks creates an extra dimension of potential bias that operates alongside the domains of race and culture. As such, it has particular salience in the ongoing struggle against environmental degradation and unwanted land uses in Hawai'i.

Indigenous Hawaiian religious and cultural traditions, having been nearly eradicated during the period of Western colonialism and missionary activity, have been revived and revitalized by the modern resurgence of Native Hawaiian culture and political activism, a movement that coincided with the rise of the environmental movement in the late 1960s and 1970s.[121] The resultant mix of indigenous revival, environmental advocacy, and political activism makes land use disputes in Hawai'i, like the Hawaiian islands themselves, unique.[122]

Native Hawaiian religion in modern Hawai'i is in a state of constant evolution: it appears to be a growing force in Hawaiian culture and politics, yet it is far from universally adopted by Native Hawaiians. The very diversity of Hawai'i—religious, ethnic, and political—makes it impossible to fix the present or future position of Native Hawaiian religion with any lasting precision.[123]

Most Native Hawaiians today espouse some form of Christianity, and various forms of syncretism between the two are practiced by some

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[120] "In stark contrast to the Western notion of privately held property, Hawaiians did not conceive of land as exclusive and alienable, but instead communal and shared." *See* MacKenzie, Serrano & Kaulukukui, *supra* note 116, at 37.

[121] Mansel G. Blackford, *Environmental Justice, Native Rights, Tourism, and Opposition to Military Control: The Case of Kaho'olawe*, 91 J. AM. HIST. 544, 570-71 (2004).

[122] *See id.*

[123] *See* Mary Kaye Ritz, *Hawaiian Culture, Christianity Still at Odds*, HONOLULU ADVERTISER, Aug. 4, 2002, *available at* http://the.honoluluadvertiser.com/article/2002/Aug/04/il/il01a.html.

congregations.[124] Reconciling Christian faith with traditional religious beliefs—or whether reconciliation is either possible or desirable—is an ongoing debate among scholars and advocates on both sides.[125] Due to intermarriage, a significant number of Native Hawaiians identify themselves as members of more than one race or ethnicity,[126] complicating the picture of cultural and religious identity and raising issues of definition in how the Native Hawaiian community constitutes itself.[127] To a considerable extent, modern Native Hawaiian religion is enmeshed with the unresolved political issues of federal recognition for Native Hawaiians, and native sovereignty or outright independence from the United States.[128] Any future gains or losses in the drive for greater political status will likely be reflected in the visibility and energy of the religious expression of Native Hawaiian culture.

However, the lack of uniformity and precision in the meaning of, and the evolving social and political expression of this Native Hawaiian religious culture does not detract from its legitimacy as a system of spiritual belief and communal identity. Rather, it highlights two key concepts in fully understanding Hawaiian environmental justice disputes: 1) the fundamental role of land as a spiritual touchstone in Native Hawaiian identity; and 2) the cultural and spiritual trauma done to the Native Hawaiian community by both historical changes in land use and ownership patterns, and by modern land use developments during the age of commercial tourism.

### *B. Environmental Justice, Land, and Native Hawaiian Beliefs*

This section briefly outlines the connection between land or place, and community or soul, in Native Hawaiian religious and cultural beliefs. It then summarizes three recent environmental justice claims in light of this connection. The land areas in all three disputes suffered significant degradation before legal and political opposition to development commenced in earnest; all three displayed the peculiar hallmarks of the

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[124] *See id.*

[125] *See id.*

[126] *See Demographic Statistics: Hawai['] i*, INFOPLEASE, http://www.infoplease.com/us/census/data/hawaii/demographic.html (last visited Feb. 16, 2015).

[127] Shawn Malia Kana'iaupuni & Nolan Malone, *This Land Is My Land: The Role of Place in Native Hawaiian Identity*, *in* RACE, ETHNICITY AND PLACE IN A CHANGING AMERICA, 287, 294-96 (John W. Frazier & Eugene Tetty-Fio eds., 2006).

[128] *See* Anita Hofschneider, *The Coming Debate of Federal Recognition for Native Hawaiians*, CIVIL BEAT, June 23, 2014, http://www.civilbeat.com/2014/06/the-coming-debate-on-federal-recognition-for-native-hawaiians/ (analyzing the issues concerning federal recognition for Native Hawaiians).

transition of Hawaiian land from traditional ownership and use to modern public development. In each case, the connection between the land, its spiritual status, its physical use, and the soul of the Hawaiian people, was explicitly asserted by Native Hawaiian advocates. In these and in other cases, Native Hawaiians are re-establishing the existence of this sacred relationship between the land, the people, and the realm of the divine.

The most famous environmental justice case in Hawai'i, and arguably the issue that crystallized the resurgence of Native Hawaiian culture and traditional religion, is the opposition to the decades-long occupation of the island of Kaho'olawe by the U.S. Navy for use as a bombing range and training ground. Professor Mansel G. Blackford's article on the Kaho'olawe case properly puts the religious dimension of the conflict front and center in his introduction, quoting two important Native Hawaiian leaders describing the bombing practices as wounds to the soul of the Hawaiian people.[129] However, he also charts the unusual development of the opposition to the bombing.[130] Ironically, the opposition began as an effort to promote the development of tourism on nearby Maui.[131] Other loci of opposition included grassroots environmental groups, and most tellingly, Hawaiian politicians' antipathy towards federal land control regulations that impinged upon local governmental authority, and a more general resentment of outside decision-making.[132] Blackford quotes Haunani-Kay Trask on the growth of Native Hawaiian environmental activism from local land disputes during the 1970s to "a larger struggle for native Hawaiian autonomy" in the 1980s that reached internationally to link up with similar movements among American Indians and other indigenous Pacific peoples.[133] These disparate threads of opposition coalesced dramatically in a series of illegal landings on Kaho'olawe by Native Hawaiian activists, public protests, and skillful legal proceedings. These measures succeeded in gathering enough public support and political pressure to ultimately force the U.S. Navy to stop its bombing practices and return the island to the

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[129] *See* Blackford, *supra* note 121, at 544-45.

> George Helm, a major native Hawaiian leader, claimed that it was his 'moral responsibility to attempt an ending to this desecration of our sacred ['ā]ina [land] . . . for each bomb dropped adds further injury to an already wounded soul.' Similarly, Dr. Noa Emmett Aluli—like Helm an important native Hawaiian leader—observed, 'The work to heal the island will heal the soul of our people. Each time we pick up a stone to restore a cultural site on the island, we pick up ourselves, as Hawaiians.'

*Id.* (alteration in original).

[130] *See id.* at 552.

[131] *See id.*

[132] *Id.* at 552-53.

[133] *Id.* at 555 (citation omitted).

State of Hawai'i with an agreement to clean up unexploded ordnance and aid in ecological restoration.[134] In his conclusion, Blackford re-emphasizes the differing goals of the mainly white, middle class environmentalists and the Native Hawaiian activists. The latter "thought of the island first as a spiritual and cultural home and only second as a place for hunting, fishing, and picnicking. They sought cultural renewal as well as environmental restoration . . . ."[135] While Blackford acknowledges the potential romanticization of pre-contact Hawaiian culture, he concludes that Native Hawaiian activists "partially mythologized the pasts of their groups as a way of understanding, and achieving goals in, the present."[136] In other words, through retelling the story of their history, Native Hawaiian activists were able to challenge the dominant narrative of land use with their own alternative one, and boost their communal identity.[137]

Professor Melody Kapilialoha MacKenzie, Susan Serrano, and Koalani Laura Kaulukukui discuss the case of Kaho'olawe and two other environmental justice cases involving the Wao Kele o Puna rainforest on the Big Island of Hawai'i and Waimea Valley on O'ahu.[138] They present these cases as primarily land reclamation actions in support of preserving the traditions and customs of Native Hawaiians as well as avoiding disproportionate environmental burdens.[139] In doing so, they offer a restorative environmental justice framework as an alternative to traditional models of environmental justice, arguing that "[f]or many indigenous peoples, environmental justice is thus largely about cultural and economic self-determination as well as about belief systems that connect their history, spirituality, and livelihood to the natural environment."[140]

The case of Wao Kele o Puna involved, at the initial stage of the controversy, a plan to develop geothermal energy on a large parcel of land called Kahauale'a, adjacent to the actual land ultimately at issue.[141] When lava flows made the original project unfeasible, the state proposed exchanging the Kahauale'a parcel with the Wao Kele o Puna—"the last intact large native lowland rainforest in Hawai'i"—even though the latter

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[134] *Id.* at 550, 558.

[135] *Id.* at 570.

[136] *Id.* at 571 (citations omitted).

[137] See GODSIL & GOODALE, *supra* note 110, at 11, for a fuller discussion of the ways in which storytelling can become a means of redefining social or political discourse ("While the conventional stories of our history and our social roles provide a powerful gravitational pull, storytelling has always played a significant part in challenging the status quo.").

[138] *See* MacKenzie, Serrano & Kaulukukui, *supra* note 116, at 37-38.

[139] *See id.* at 38.

[140] *Id.* (citation omitted).

[141] *See id.* (citation omitted).

had been designated as a Natural Area Reserve.[142] While the environmental risks to indigenous flora, fauna, and the island's largest aquifer were obvious, Blackford points out that many environmentalists favored geothermal drilling as an alternative to oil-based energy.[143] However, to many Native Hawaiians, particularly those who still practiced the worship of or were genealogically connected to Pele, the goddess of the nearby volcano, "geothermal drilling desecrates Pele's body and takes her energy and lifeblood."[144] The spiritual and cultural harm represented by the damage to the land could not be more clear: cutting into the earth damaged the divine body and violated the sacred relationship between the land and the people.[145] Subsequent First Amendment Free Exercise claims and challenges under the state constitution failed, but brought recognition of customary and traditional rights of subsistence, cultural, and religious practices on undeveloped lands in the Wao Kele o Puna area.[146] Ultimately, the developers were unable to make the geothermal project successful, and when the owners announced their intention to sell, the nonprofit Trust for Public Land ("TPL"), the State Department of Land and Natural Resources ("DLNR"), and the Office of Hawaiian Affairs ("OHA") combined resources to buy the property.[147] This unique combination will continue to manage the forest with assistance from the surrounding communities: "[The] concept is that DLNR will teach OHA about modern land-management practices, while OHA will educate DLNR about traditional Hawaiian ones."[148] Wao Kele o Puna represents "the first return of ceded lands to Native Hawaiian ownership since the 1893 overthrow of the Hawaiian kingdom, and, for Native Hawaiians, holds promise as the beginning of a land base for a future Hawaiian nation."[149]

The Waimea Valley on O'ahu's north shore represents an "intact *ahupua'a*, a traditional Hawaiian mountain-to-sea land division that encompassed all of the resources needed by its residents and was managed to ensure sustainable use of resources."[150] It also contains temples, burial caves, and cultural sites, and has been recognized as a sacred place for centuries.[151] During the twentieth century, it was developed as an

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142 *Id.*
143 *See* Blackford, *supra* note 121, at 558.
144 MacKenzie, Serrano & Kaulukukui, *supra* note 116, at 38.
145 *See* Blackford, *supra* note 121, at 545.
146 *See* MacKenzie, Serrano & Kaulukukui, *supra* note 116, at 39.
147 *See id.* at 39-40.
148 *Id.*
149 *Id.* at 40.
150 *Id.*
151 *Id.*

agricultural resource, housed military installations during World War II, then turned into a tourist attraction that included stagecoach rides, trolley tours and a restaurant/gift shop.[152] It thus recapitulates all the major economic phases of the colonialist period in Hawaiian history: plantation farming, military occupation, and tourism.[153] Similar to the Wao Kele o Puna case, the latest commercial owner ran into financial difficulties and attempted to sell it.[154] During subsequent bankruptcy negotiations, a settlement offer was put forward that would allow for the possible development of luxury residences in part of the valley.[155] Finally, an alliance that eventually included the City of Honolulu, DLNR, OHA, the U.S. Army, and the Audubon Society purchased the land in order to "ensure the protection and preservation of the valley's native and endangered species and cultural and historic resources."[156] In announcing the preservation agreement, Haunani Apoliona emphasized the "robust cultural and genealogical connection to the Hawaiian people."[157]

These success stores demonstrate that the unique genealogical and spiritual relationship between the land of Hawai'i and the Native Hawaiian people has not been lost or depleted, and can successfully challenge the dominant Western narrative of land use. It remains to be seen how this relationship will appear in and influence future land use disputes, especially regarding urban or suburban plots outside of relatively undeveloped natural areas.

## IV. CONCLUSION

This symposium provided an opportunity to consider the role of implicit bias in the particular context of Hawai'i. Implicit bias generally relies upon associations and stereotypes that have been explicitly rejected but continue to lurk in our minds as unwanted and unwelcome associations that drive behavior we would otherwise reject. With respect to land use disputes in Hawai'i, the role of difference involves conflicting cultural and religious belief systems which operate alongside racial and ethnic differences to create an additional dimension of bias. Several recent successful challenges to land development projects suggest the potential power of revitalized cultural and spiritual identity working together with political and

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152 *Id.*

153 *See id.* at 40-41.

154 *See id.* at 41.

155 *See id.*

156 *Id.* (citation omitted).

157 *Id.*

environmental advocacy to rewrite dominant land use and economic development paradigms.

# Police Shootings Of Black Men and Implicit Racial Bias: Can't We All Just Get Along

Kenneth Lawson*

## I. INTRODUCTION

> I am an invisible man. No, I am not a spook like those who haunted Edgar Allen Poe; nor am I one of your Hollywood movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.[1]
>
> – Ralph Ellison, *Invisible Man*

In 2013, the nation witnessed the trial and acquittal of George Zimmerman, who shot and killed an unarmed Black teenager named Trayvon Martin.[2] Then in 2014, there was extensive media coverage of

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From 1989 to 2007 Lawson litigated numerous murder, civil rights, and police misconduct cases in both federal and state courts and had an active appellate practice. His high-profile clientele included NFL star Elbert "Ickey" Woods, NFL star and professional baseball player Deion Sanders, and entertainer Peter Frampton. Lawson also represented many "everyday" people, including a single mother whose sixteen-year-old juvenile son, incarcerated in an Ohio prison for adults, had died after being stabbed sixteen times by the leader of a racist hate group, the Aryan Nation. Approximately one fourth of Ken's cases were done *pro bono*.

Since moving to Hawai'i with his family in 2008, Ken has made hundreds of presentations, including the judiciary's juvenile drug court program, training programs for prosecutors, the government lawyers section of the bar, the Hawai'i Supreme Court's mandatory professionalism program, the Hawaii State Bar Association annual convention, disciplinary board of the Hawai'i Supreme Court, local law firms of all sizes, and numerous community groups. Ken was selected by the Law School's Class of 2014 to deliver the graduation address.

[1] RALPH ELLISON, INVISIBLE MAN 3 (Vintage Books, 2nd ed. 1995).

[2] Greg Botelho & Holly Yan, *George Zimmerman Found Not Guilty in Trayvon*

police killings of unarmed Black men and boys, including Eric Garner, Michael Brown, John Crawford, Tamir Rice, and Levar Jones.[3] Eric Garner's arrest and death was caught on video by a bystander, allowing the country to watch a team of police officers take down Garner and to hear his last words: "I can't breathe."[4]

Michael Brown, an unarmed Black teenager, was shot by a police officer in Ferguson, Missouri following a confrontation that was the subject of conflicting accounts. Several of the eyewitnesses to the shooting said Brown was holding his hands in the air, trying to surrender, when the officer fired the fatal shots into his body and head.[5]

John Crawford picked up an air gun from the shelves of a Wal-Mart and was standing alone in a store aisle, talking to someone on his cell phone, when he was shot and killed by police responding to a 911 call.[6]

Tamir Rice was a twelve-year-old Black boy who had been playing with a toy gun in a city park in Cleveland, Ohio. Responding to a 911 call, a city police officer shot and killed Rice within seconds of confronting him in the park. Initial reports indicated that when the police officer arrived on the scene, Rice pulled the toy gun out of his waistband and pointed it at the officer, but surveillance video later revealed that not to be the case.[7]

Levar Jones, a young, unarmed Black man, was shot by a South Carolina state trooper when, at the trooper's request, Jones reached into his SUV to retrieve his driver's license. The trooper claimed that Jones had behaved in a threatening way, but a video later contradicted the trooper's description.[8]

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*Martin's Death*, CNN (July 14, 2013, 11:50 AM), http://www.cnn.com/2013/07/13/justice/zimmerman-trial/index.html?hpt=hp_t1.

[3] Elizabeth Nolan Brown, *Families of Eric Garner, Michael Brown, Tamir Rice, and Other Recent Victims of Police Violence Gather for "Justice for All March" in D.C.*, REASON (Dec. 13, 2014, 8:30 PM), http://reason.com/blog/2014/12/13/march-against-police-violence-dc.

[4] Nick Bryant, *Eric Garner Death: U.S. Orders Civil Rights Inquiry*, BBC NEWS (Dec. 4, 2014, 5:05 PM), http://www.bbc.com/news/world-us-canada-30323750.

[5] *What Happened in Ferguson?*, N.Y. TIMES (Nov. 25, 2014), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=1.

[6] Treye Green, *John Crawford Shooting: Ohio Man Shot Dead by Police While Holding Toy Rifle in Walmart*, INT'L. BUS. TIMES (Aug. 11, 2014, 5:59 PM), http://www.ibtimes.com/john-crawford-shooting-ohio-man-shot-dead-police-while-holding-toy-rifle-walmart-1655416.

[7] Tom McCarthy, *Tamir Rice: Video Shows Boy, 12, Shot "Seconds" After Police Confronted Child*, THE GUARDIAN (Nov. 26, 2014, 2:55 PM), http://www.theguardian.com/us-news/2014/nov/26/tamir-rice-video-shows-boy-shot-police-cleveland.

[8] Tony Santaella & Steven Dial, *Trooper on Shooting: "He Kept Coming Towards Me"*, WLTX (Sept. 27, 2014, 1:55 AM), http://www.wltx.com/story/news/local/2014/09/26/sean-groubert-gives-his-account-of-shooting-levar-jones/16295527/.

Following each of these shootings, Black communities erupted in outrage and civil rights leaders from all over the country gathered. Across the country, from Los Angeles to New York, there were related protests of various kinds, some involving violence and looting.[9] Meanwhile, police departments, police unions, business leaders, and some politicians expressed support for the police.[10] The police and their supporters argued that race had nothing to do with the shootings.[11] They expressed sadness that lives had been lost, but contended that a suspect had threatened a police officer or resisted arrest in each of these cases.[12] Many of them tried to divert attention from the issue of police killing unarmed Black men and getting away with it, by suggesting that, instead of focusing on such isolated cases, the Black community should be doing something about disproportionately high violent-crime rates by young Black males.[13] The suggestion that Blacks are doing nothing about crime by Blacks is unfair. Many Black communities have active programs aimed at decreasing such crime and violence, but these efforts are seldom covered by the mainstream media, and most Whites do not pay attention to Black media.[14] Black communities acknowledged that none of the recent police shootings of unarmed Black males were random or premeditated, but that White suspects in similar circumstances would not have been shot.[15]

Race can be a sensitive topic, even under the best of circumstances. But at a time when White police officers are killing unarmed Black men and boys, it is difficult to discuss the role of race and other underlying issues

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[9] *Latest Updates: Protests Nationwide as More Troops are Called to Ferguson*, N.Y. TIMES (Nov. 25, 2014), http://news.blogs.nytimes.com/2014/11/25/live-updates-grand-jury-decision-darren-wilson-ferguson.

[10] Mark Gillispie, *Police Supporters to Hold Rally in Cleveland*, OHIO.COM AKRON BEACON JOURNAL (Dec. 24, 2014, 8:52 PM), http://www.ohio.com/news/break-news/police-supporters-to-hold-rally-in-cleveland-1.552813; *see also Things Heat Up as Pro-Police Demonstrators Hold "All Lives Matter" Rally*, CBS LOS ANGELES (Dec. 26, 2014, 6:09 PM), http://losangeles.cbslocal.com/2014/12/28/things-get-heated-as-pro-police-demonstrators-hold-all-lives-matter-rally/.

[11] *FBI: No Evidence Zimmerman was Racist*, WND POLITICS (July 14, 2013, 10:46 PM), http://www.wnd.com/2013/07/fbi-no-evidence-zimmerman-was-racist/.

[12] *See* Bryant, *supra* note 4; *see also What Happened in Ferguson?*, *supra* note 5; McCarthy, *supra* note 7; Santaella & Dial, *supra* note 8.

[13] John Perazzo, *Police Shooting & Race, in an Age of Lies*, FRONTPAGE MAG (Dec. 10, 2014), http://www.frontpagemag.com/2014/john-perazzo/police-shootings-race-in-an-age-of-lies/.

[14] Tim Wise, *Crime, Race and the Politics of White Deflection* (July 22, 2013), http://www.timwise.org/2013/07/crime-race-and-the-politics-of-white-deflection/.

[15] Jaeah Lee, *Exactly How Often Do Police Shoot Unarmed Black Men?*, MOTHER JONES (Aug. 15, 2014, 5:00 AM), http://www.motherjones.com/politics/2014/08/police-shootings-michael-brown-ferguson-black-men.

calmly, logically, and cohesively, regardless of the specific circumstances of each killing.[16] (To the Black community in particular) The specific facts of each killing are not the primary issue.[17] The primary problem is more complicated and nuanced than the individual police officer pulling the trigger in each case.[18] Each of these officers needs to be held accountable for their actions, especially if they acted unreasonably under the circumstances, but there are larger issues that need to be faced. Professional athletes and others have attempted to make the point that Black lives matter in various ways by holding up their hands in mock surrender, as some witnesses claimed that Michael Brown was doing at the time of his shooting, and by wearing t-shirts inscribed with Eric Garner's last words: "I can't breathe."[19]

Demonstrators in New York were videotaped in December 2014 chanting, "What do we want? *Dead cops*. When do we want it? *Now*!"[20] Within days, two NYPD police officers were shot and killed by a Black man.[21] Media coverage described the shooter as deranged,[22] but that did not stop the head of the NYPD police union from blaming not just the anti-police protesters but also New York's Mayor, Bill de Blasio, for allegedly showing too much sympathy for the protestors and too little support for the police.[23] Fox News made matters worse when its Baltimore affiliate aired

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[16] *See* Jaclyn Kelley, *Black Males' Relationship with Police a Hot Topic Locally*, WWLTV (Dec. 3, 2014, 11:03 PM), http://www.wwltv.com/story/news/local/orleans/2014/12/03/police-chief-talks-race-relations-at-suno/19874339/.

[17] *See* Bruce Drake, *Ferguson Highlights Deep Divisions Between Blacks and Whites in America*, PEW RESEARCH CENTER (Nov. 26, 2014), http://www.pewresearch.org/fact-tank/2014/11/26/ferguson-highlights-deep-divisions-between-blacks-and-whites-in-america/.

[18] *Id.*

[19] Ashahed M. Muhammad, *A New Era of Social and Political Consciousness for Black Athletes?*, THE FINAL CALL (Dec. 16, 2014, 8:47 PM), http://www.finalcall.com/artman/publish/National_News_2/article_102000.shtml.

[20] *Video Shows NYC Protesters Chanting For "Dead Cops"*, NBC N.Y. (Dec. 15, 2014, 8:56 AM), http://www.nbcnewyork.com/news/local/Eric-Garner-Manhattan-Dead-Cops-Video-Millions-March-Protest-285805731.html (emphasis added).

[21] Joshua Berlinger et al., *2 NYPD Police Officers "Assassinated"; Shooter Dead*, CNN (Dec. 20, 2014, 11:43 PM), http://www.cnn.com/2014/12/20/us/new-york-police-officers-shot/.

[22] Dick Polman, *A Deranged Thug, Not Obama, Killed Those New York Cops*, NEWS WORKS (Dec. 23, 2014), http://www.newsworks.org/index.php/local/national-interest/76618-a-deranged-thug-not-obama-killed-those-new-york-cops; *see also Cop Killer's Family: Ismaaiyl Brinsley Had Troubles, Didn't Get Help He Needed*, CBS N.Y. (Dec. 22, 2014, 11:07 PM), http://newyork.cbslocal.com/2014/12/22/cop-killers-family-ismaaiyl-brinsley-had-troubles-didnt-get-help-he-needed/ (reporting that Brinsley's family described him as an angry, troubled man whose life had spiraled out of control).

[23] Andrew Hart, *NYC Police Union Chief Blames Mayor, Protesters for Police Killings*, THE HUFFINGTON POST (Dec. 21, 2014, 12:59 AM), http://www.huffingtonpost.com/2014/

an improperly edited video in which protestors appeared to be chanting, "Kill a cop."[24] Fox's national show "Fox and Friends" also aired the misleading video and tied the "kill a cop" chant to civil rights activist Al Sharpton.[25] The actual footage showed the protestors chanting, "We won't stop! We can't stop! Till killer cops are in cell blocks!"[26] In short, there was outrage and outrageous accusations on both sides of the national discussion, leaving many to wonder, "can we all get along?"[27]

As this article is being written, there are two very different ongoing conversations regarding police-community relations. On one side are those who see race as a major factor—if not the sole factor—each time an unarmed Black man or boy is shot by law enforcement. This side acknowledges the existence of many "good" cops, but they view some in law enforcement as subject to explicit bias and racism against Blacks and the system as overly protective of "bad" cops.[28] This side tends to distrust law enforcement's presentation of the "facts" when the alleged perpetrator is a Black male.[29]

The other side of this national debate tends to believe that police often come down hard on Black males simply because Black males commit so many crimes. That is, they see both themselves and law enforcement across the country as being "colorblind," and any race problem as directly and inexorably linked to criminal tendencies by Black males.[30]

Each side tends to talk past the other rather than to the other, and neither is listening very well. The gap between the two sides is significant. For example, fifty-nine percent of White Americans have confidence in the police as an institution and do not view them as racist while most Blacks

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12/20/new-york-police-union-mayor_n_6361046.html.

[24] Nick Wing, *Local News: Protesters Didn't Actually Chant "Kill a Cop." Sorry for the "Misunderstanding"*, THE HUFFINGTON POST (Dec. 24, 2014, 10:59 AM), http://www.huffingtonpost.com/2014/12/23/baltimore-news-kill-a-cop_n_6372468.html.

[25] *Id.*

[26] *Id.*

[27] This is a quote made famous by Rodney King, himself a victim of police brutality which will be discussed later in this paper. *See* Jesse Washington, *Rodney King Death: "Can We All Get Along?" Plea Measures His Lasting Meaning*, THE HUFFINGTON POST (Aug. 17, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/06/17/rodney-king-death-can-we-all-get-along_n_1604450.html.

[28] *See* Kareem Abdul-Jabbar, *Kareem Abdul-Jabbar: The Police Aren't Under Attack. Institutionalized Racism Is*, TIME (Dec. 21, 2014), http://time.com/3643462/kareem-abdul-jabbar-nypd-shootings-police/.

[29] *See* LZ Granderson, *Why Black People Don't Trust the Police*, CNN (Mar. 23, 2012, 11:30 AM), http://www.cnn.com/2012/03/22/opinion/granderson-florida-shootings/.

[30] Jason L. Riley, *The Other Ferguson Tragedy*, WALL ST. J. (Nov. 25, 2014), http://www.wsj.com/articles/jason-riley-the-other-ferguson-tragedy-1416961287.

view police as racist with only thirty-seven percent of Black Americans having confidence in the police as an institution.[31]

Although there are undoubtedly some racist police officers,[32] many police shootings of unarmed Black males are the result of implicit racial bias. For example, in finding that the Seattle Police Department engaged in an unconstitutional pattern and practice of discrimination against Blacks, the U.S. Department of Justice ("DOJ") noted that biased policing "is not primarily about the ill-intentioned officer but rather the officer who engages in discriminatory practices subconsciously."[33] Other police departments may be engaging in racially biased policing while still thinking of themselves as unbiased.[34]

Implicit racial bias is at work in most police shootings of unarmed Black males, not only at the time of the initial encounter, but also through the investigation of the shooting and the entire judicial process that follows the investigation. Implicit bias can be found in good people of every racial background. The tendency for police officers to view their own actions in the best light possible, or to shade or stretch the truth to protect their personal interests, reflects the human condition.[35]

This paper defines and explains implicit racial bias, demonstrates that implicit racial bias against Black males has been rooted in American culture since slavery, and then spotlights the role played by implicit racial bias in police shootings of unarmed and sometimes innocent Black males.

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[31] Frank Newport, *Gallup Review: Black and White Attitudes Toward Police*, GALLUP (Aug. 20, 2014), http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx.

[32] *See, e.g.*, Ben Tuft, *Five Ohio Police Officers Investigated for Sending Each Other Racist Text Messages*, THE INDEPENDENT (Dec. 7, 2014), http://www.independent.co.uk/news/world/americas/five-ohio-police-officers-investigated-for-sending-each-other-racist-text-messages-9908922.html (reporting that five Ohio police officers were recently investigated for sending racist text messages, such as "I hate niggers. That is all," and "What do apples and black people have in common? They both hang from trees").

[33] *See* U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 34 (Dec. 16, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf.

[34] *Id.*

[35] This has been demonstrated in cases where a video recording could be compared to the officer's account of the shooting—that is, the officer shoots a Black suspect, perhaps because of subjective fear (implicit racial bias), but then instead of telling the truth and admitting he may have shot the victim by mistake, he makes up a story to support his own actions. *See, e.g.*, Frank Serpico, *Serpico: Incidents Like Eric Garner's Death Drive Wedge Between Police and Society*, N.Y. DAILY NEWS (Dec. 5, 2014, 10:30 AM), http://www.nydailynews.com/new-york/serpico-wedge-driven-police-society-article-1.2034651.

The last section of this article explores the unfortunate results of implicit racial bias in select cases and concludes with an analysis of the following three recommendations for reducing implicit bias shootings and increasing the chances of justice being served when a police officer shoots an unarmed Black male: (1) police training should include the nature and implications of implicit racial bias, (2) jurors and judges should be educated on implicit racial bias and shooter bias, and (3) police departments and their communities should sincerely engage in a collaborative effort to develop a meaningful Community Problem Oriented Policing (CPOP) program where police officers and community members become proactive partners in crime problem solving and community relations.

As New York City Police Commissioner William Bratton said so eloquently at slain NYPD Officer Ramos's funeral:

> The police, the people who are angry at the police, the people who support us but want us to be better, even a madman who assassinated two men because all he could see was two uniforms, even though they were so much more. We don't see each other. If we can learn to see each other, to see that our cops are people like Officer Ramos and Officer Liu, to see that our communities are filled with people just like them, too. If we can learn to see each other, then when we see each other, we'll heal. We'll heal as a City. We'll heal as a country.[36]

### *A. Nothing Changes if Nothing Changes*

My personal journey in learning to be more open-minded regarding relations between law enforcement and the Black community took place in Cincinnati, where I was raised and practiced law for seventeen years. That relationship in 2001 may have foreshadowed the riots that occurred in places like Ferguson, Missouri in 2014.

There had been a series of police shootings of unarmed Black males in Cincinnati over a relatively short period of time, which culminated in four straight days of violent riots.[37] The events that set things off began on an unusually warm spring night on April 7, 2001,[38] when an off-duty police

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[36] The Editorial Board, *Respect for NYPD Squandered in Attacks on Bill de Blasio*, N.Y. TIMES (Dec. 29, 2014), http://www.nytimes.com/2014/12/30/opinion/police-respect-squandered-in-attacks-on-de-blasio.html?_r=0.

[37] *Timeline of Roach-Thomas Case*, THE CINCINNATI ENQUIRER (Mar. 20, 2002), http://www.enquirer.com/editions/2002/03/20/loc_timeline_of.html.

[38] John Larson, *Behind the Death of Timothy Thomas*, DATELINE NBC (Apr. 10, 2004), http://www.nbcnews.com/id/4703574/ns/dateline_nbc-dateline_specials/t/behind-death-timothy-thomas/#.VKCxw4DmA.

officer spotted Timothy Thomas, a nineteen-year-old Black male, walking in a downtown neighborhood.[39] As the officer approached, Thomas ran and Officer Stephen Roach took off after him.[40] Thomas was wanted on fourteen misdemeanor warrants, twelve of which were traffic violations—none involved violence.[41] Officer Roach, running with his gun out, safety off, and finger on the trigger, shot Thomas when he saw Thomas running around the corner of the building.[42] Roach fired his gun, fatally wounding Thomas.[43] Immediately after the shooting, Officer Roach told other officers that the gun "just went off."[44] Later, after Roach met with his union attorney and union representative,[45] his story changed. Instead of saying that his gun "just went off," he said that he thought he saw Thomas reaching into his pants, as if to draw a gun.[46] Three days later, already suspicious of Roach's story, investigators got Roach to admit that he had shot Thomas because he had been startled.[47]

Roach was indicted for negligent homicide.[48] His case was heard by a White judge, with no jury.[49] In finding Roach not guilty of negligently killing Thomas, the judge reasoned that "Timothy Thomas put police officer Roach in a situation where he believed he had to shoot Timothy Thomas or he would be shot by Timothy Thomas when Timothy Thomas did not show his hands as ordered."[50] According to the judge, "this shooting was a split-second reaction to a very dangerous situation created by Timothy Thomas . . . . Officer Roach's reaction was reasonable on his part, based upon the contact between himself and Timothy Thomas and the information he had at that time in that dark Cincinnati alley."[51]

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[39] *Id.*

[40] *Id.*

[41] Gregory Korte, *Police Inquiry Scorches Roach*, THE CINCINNATI ENQUIRER (Mar. 20, 2002), http://www.enquirer.com/editions/2002/03/20/loc_1police_inquiry.html.

[42] *Id.*

[43] *Id.*

[44] Jane Prendergast, *Video Showed Officer Lied*, THE CINCINNATI ENQUIRER (Mar. 20, 2002), http://www.enquirer.com/editions/2002/03/20/loc_2video_showed_officer.html.

[45] *Id.*

[46] Larsen, *supra* note 38.

[47] Korte, *supra* note 41.

[48] *Id.*

[49] *Id.*; *see also Common Pleas Judge Ralph Winkler for Probate Court 2014*, http://www.judgeralphwinkler.com/ (last visited Dec. 28, 2014) (describing the judge's background).

[50] *Excerpts from Cincinnati Judge's Statement in Court*, USA TODAY (Sept. 26, 2001), http://usatoday30.usatoday.com/news/nation/2001/09/26/cinci-excerpts.htm [hereinafter Cinn. Judge Stmt.].

[51] *Id.*

The family of Timothy Thomas retained me as their lawyer. On their behalf, I filed a lawsuit and eventually combined that case with lawsuits that I had previously filed on behalf of other victims of police shootings into one federal class action lawsuit alleging racial profiling.[52] The ACLU eventually joined this lawsuit.[53] Rather than pursue a routine § 1983 civil rights action, the lead plaintiffs entered into a collaborative process with specific stakeholders that included the police department, the police union, the Black community through a non-profit organization named the Cincinnati Black United Front, representatives of the city's White community, local churches and businesses, and the DOJ.[54] The parties used the information gathered from the stakeholders to reach the "Cincinnati Collaborative Agreement" ("the Collaborative").[55]

Simply put, the Collaborative was the product of an alternative dispute resolution effort not just to resolve the lawsuit but also to mediate major ongoing social conflict between the police department and Black community in Cincinnati. Each participant in the Collaborative process had to agree to stop blaming others and work towards a solution that would serve the best interests of all the people of Cincinnati.[56] A Bloomberg News report in December of 2014 suggested that the Collaborative has withstood the test of time.[57] The Collaborative plays a major role in my assessment of recent clashes between law enforcement and Black communities and my recommendations for "getting along."

## II. DEFINING IMPLICIT RACIAL BIAS

### *A. Implicit Associations*

Underlying the theory of implicit bias are implicit associations. These are "the subconscious relationships our minds draw between nouns and

[52] The original class action racial profiling lawsuit was *Bomani Tyehimba, et al. v. City of Cincinnati*, *available at* http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/1263.pdf;jsessionid=DB5307CB2B05859C8BAE3FB699A079D8?m=1205. The case was then renamed *In Re Cincinnati Policing*, Case No. C-1-99-317, *available at* http://www.cincinnati-oh.gov/police/linkservid/27A205F1-69E9-4446-BC18BD146CB73DF2/showMeta/0/.

[53] Civil rights attorneys Al Gerhardstein and Scott Greenwood, representing the ACLU, joined me as co-counsel.

[54] *See generally In re Cincinnati Policing*, *supra* note 52, at 2.

[55] *Id.*

[56] *Id.* at 2.

[57] *They Killed 15 Black Men. Now They're a Model Police Dept.*, BLOOMBERG TV (Dec. 11, 2014), http://www.bloomberg.com/video/how-to-build-a-better-police-department-tYehWAcnR9~DUgXgAhoqZA.html [hereinafter They Killed 15 Black Men].

adjectives. . . . [They] are the categories into which humans place the people, places and things in our lives to help our brains make sense of the world."[58] Over time, these categorizations become so imprinted into our subconscious minds that we do not need to intentionally think about them in order for them to influence our actions.[59] For example, red means stop, green means go, fire means hot, and ice means cold. Our brains make these connections without having to think about them, at least not consciously. It is as though these connections have been hardwired into our brains.

Implicit associations are not necessarily problematic. By facilitating automatic decision-making on routine matters, they free up the mind to deal with more complex everyday life experiences,[60] such as engaging in everyday problem solving at work or at school, planning our day, communicating with friends and associates, as well as many other experiences. In fact, we cannot function normally and effectively without them.[61] But faulty associations, such as "female and frail" and "Black and dangerous" can become the basis of implicit prejudice.[62] One reason for such associations is that we humans are wired to view our own groups as superior to others and to exaggerate differences between our own group and outsiders.[63] Unfortunately, many implicit associations about social groups form at a young age, with some research showing implicit racial bias emerging by age six.[64] These associations are the result of deep-rooted cultural stereotypes in our country that we can pick up from almost every aspect of our environment: homes, schools, playgrounds, athletic teams, churches, television, newspapers, and movies, to name a few. Being exposed to racial stereotypes continuously from a young age inevitably leads to implicit associations and implicit racial bias.[65]

It is important to note that many implicit associations do not necessarily reflect our motives, morals, and convictions, resulting in automatic actions that are inconsistent with our conscious beliefs and values.[66] The reflexive

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[58] John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 692 (2014).

[59] Siri Carpenter, *Buried Prejudice*, SCI. AM. MIND, 34 (Apr./May 2008), *available at* http://siricarpenter.com/wp-content/uploads/2010/02/Buried-Prejudice1.pdf.

[60] Clemons, *supra* note 58.

[61] Carpenter, *supra* note 59.

[62] *Id.*

[63] *Id.* We are also more likely to remember the faces of people of our own race more readily than the faces of others.

[64] *Id.* at 35.

[65] *See* Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations From Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53 (2006).

[66] Carpenter, *supra* note 59.

nature of these automatic associations should not be confused with the explicit attitudes and beliefs everyone has on certain subjects. Research suggests that "people can have dual attitudes, which are different evaluations of the same attitude object, one of which is an automatic, implicit attitude and the other of which is an explicit attitude."[67] One implication of this theory is that although people feel strongly about their explicit attitudes and beliefs, previously established implicit attitudes may still control their reactions, especially in circumstances requiring fast responses.[68] Civil rights leader Jesse Jackson offers a compelling example of this. At a conference in 1993, Reverend Jackson stated, "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody White and feel relieved."[69]

Research suggests that implicit attitudes are closely associated with a person's overall mindset and may often win or take precedence over new, explicit attitudes.[70] Thus, the development of new attitudes may demand more effort and patience than formerly thought.[71] Because implicit associations have such power over the subconscious mind, they are the key to understanding underlying racial bias in police shootings.

### *B. Implicit Association Tests*

Implicit bias has been accurately measured for years through the Implicit Association Test ("IAT").[72] The IAT evaluates how quickly people categorize stimuli,[73] which can be used to show how racial bias based on learned stereotypes translates into automatic decision-making. The Race IAT is particularly relevant to the study of implicit racial bias. This test indicates that most Americans have an automatic preference for Whites over Blacks.[74]

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[67] Timothy D. Wilson, Samuel Lindsey, & Tonya Y. Schooler, *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101, 102 (2000).

[68] *Id.* at 121.

[69] Bob Herbert, *In America: A Sea Change On Crime*, N.Y. TIMES (Dec. 12, 1993), *available at* http://www.nytimes.com/1993/12/12/opinion/in-america-a-sea-change-on-crime.html (quoting Jesse Jackson, remarks at a meeting of Operation PUSH in Chicago on Nov. 27, 1993).

[70] Wilson et al., *supra* note 67, at 121.

[71] *Id.*

[72] Carpenter, *supra* note 59, at 39 (describing the Implicit Association Test, introduced in 1998 and used in more than 500 studies of implicit bias, as the most prominent method for measuring implicit bias).

[73] *Id.*

[74] PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/selectatest.html (last visited

> The test asks you to rapidly categorize images of faces as either "African American" or "European American" while you also categorize words (like "evil," "happy," "awful," and "peace") as either "good" or "bad." Faces and words flash on the screen, and you tap a key, as fast as you can, to indicate which category is appropriate.
>
> Sometimes you're asked to sort African American faces and "good" words to one side of the screen. Other times, black faces are to be sorted with "bad" words. As words and faces keep flashing by, you struggle not to make too many sorting mistakes.[75]

One author explained the experience as "both extremely simple and pretty traumatic," adding, "you think of yourself as a person who strives to be unprejudiced, but you can't control these split-second reactions."[76] This individual's reaction to the test is not uncommon—51% of online test takers show a moderate to strong bias.[77] The author further commented: "Suddenly, you have a horrible realization. When Black faces and 'bad' words are paired together, you feel yourself becoming faster in your categorizing—an indication that the two are more easily linked in your mind."[78] In order to both acknowledge and attempt to counteract such implicit racial bias, it is important to understand some of the racial stereotypes that have permeated the American psyche for over 300 years.

## III. CULTURALLY IMBEDDED RACIAL STEREOTYPES

### *A. The Dehumanizing of Black Men*

No matter how open-minded people might perceive themselves to be, implicit racial bias is present in nearly everyone. Such widespread yet implicit bias is a product of stereotypes that have been deeply embedded within American culture.[79] The police shootings of unarmed Black men today have roots in stereotypes that began centuries ago.[80] Although a complete history of racial stereotypes goes beyond the scope of this paper,

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Dec. 31, 2014) (explaining that the Race IAT requires the ability to distinguish faces of European and African origin--this and other IATs can be taken at this website).

[75] Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014), http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1557-1610 (2013).

[80] *See* Nicole Hipp, *Historical Beginnings and Development of Black Men Stereotypes in American Society*, STEREOTYPES ON THE BLACK MALE IN REALITY TV http://stereotypeproject.wordpress.com/nicole-hipps-paper/ (last visited Jan. 1, 2015).

it is important to touch on some of these stereotypes in order to add context to the killing of Black males by law enforcement. These stereotypes can easily be traced back to the era of legalized slavery.[81]

*1. Characterization of Blacks during slavery and the Jim Crow era*

Negative racial stereotypes about Black men grew deep roots during the legal institution of slavery in the United States, which lasted for 240 years, from 1620 to 1865.[82] Blacks were property, and in many states it was a crime to educate Blacks.[83] They were viewed by Whites as childlike and as needful of the guidance of the superior White race.[84] This myth allowed many slave owners and Whites to accept slavery as a system that was the most humane thing a superior race could do for their inferiors, while slave owners conveniently reaped the economic benefit of free labor. But slavery persisted only because so many people had convinced themselves that it was not inherently immoral. As long as slave masters "took good care" of their slaves, those slaves were expected to remain docile and be good workers.[85]

The Dred Scott case demonstrates how Blacks were viewed during slavery. Scott, upon being taken by his owners from a slave state to a state that had abolished slavery, sued for his freedom.[86] In ruling that a Black man, whether he be free or a slave, was not a citizen and thus could not sue in federal court, Chief Justice Roger B. Taney of the United States Supreme Court stated:

> [Blacks] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the White man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually

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[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *See* RANDALL M. MILLER & JOHN DAVID SMITH, DICTIONARY OF AFRO-AMERICAN SLAVERY 565 (1997) (describing the comic Sambo slave imagery present in the South in the 1800s).

[85] *See id.* at 452 (describing the paternalistic master-slave relationship).

[86] Scott v. Sandford, 60 U.S. 393, 397-98 (1856).

> acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[87]

The characterization of Blacks as simple-minded and childlike evolved slowly after the abolishment of slavery. Shortly after the Emancipation Proclamation, newspapers and books continued to traffic propaganda that portrayed Black males as brutes and animals.[88] These efforts assured the White public that, although slavery had been abolished, Blacks were still an inferior race of people who needed to be taken care of and controlled. Jim Crow laws kept Blacks from voting, owning land or otherwise becoming equals under the Constitution.[89] Portraying Black men as beasts, apes, and monkeys encouraged fear of Black men, which made it easier to justify lynching and terrorizing the supposedly dangerous black man.[90] Between Reconstruction and the Second World War, from 1882 to 1951, approximately 4,700 Black people were lynched in the United States.[91] Fear of Blacks coupled with rhetoric from the Ku Klux Klan sparked numerous lynchings.[92]

### *2. Portrayal of Blacks in pop culture*

The stereotypical image of the brutish, animalistic Black buck, with a craving for raping White women, made its Hollywood debut in the 1915 D.W. Griffith film, "The Birth of a Nation."[93] The story took place in a small southern town named Piedmont shortly after the Civil War and the emancipation of slaves.[94] Gus, the Black brute, sets out to rape a White girl, who jumps off a cliff rather than be touched by the brute.[95] A mulatto

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[87] *Id.* at 407.

[88] *See Caricatures of African Americans: The Brute*, http://www.authentichistory.com/diversity/african/4-brute/ (last visited Jan. 23, 2015).

[89] *See* Danny Brooke, *The African Americans: Many Rivers to Cross: Making a Way Out of No Way, 1897-1940*, PBS, https://www.youtube.com/watch?v=JIOH8QvaLS0 (last visited Jan. 4, 2014).

[90] *Id.*

[91] HELEN TAYLOR GREENE & SHAUN L. GABBIDON, ENCYCLOPEDIA OF RACE AND CRIME 248-49 (2009).

[92] Brooke, *supra* note 89.

[93] Tim Dirks, *The Birth of a Nation (1915)*, AMC FILMSITE, http://www.filmsite.org/birt.html (last visited Jan. 23, 2015). This stereotype was also used to keep Black men and White women from engaging in consensual sex. Many states went as far as passing laws making it illegal for Blacks and Whites to marry and it was not until 1967 that the Supreme Court of United States finally ruled it unconstitutional. *See* Loving v. Virginia, 388 U.S. 1 (1967).

[94] Tim Dirks, *The Birth of a Nation (1915)*, AMC FILMSITE http://www.filmsite.org/birt.html (last visited Jan. 23, 2015).

[95] *Id.*

named Silas Lynch attempts to force a White woman to marry him.[96] The only hope for this town, if it is to save its good people from the Blacks, is the Ku Klux Klan.[97] The film's "happy ending" occurs when the Klan comes in, kills the Black bucks, and restores the town to White supremacy.[98] This film, which was advertised as an authentic and accurate depiction of life in America, was wildly successful at the box office.[99]

Around the turn of the twentieth century, postcards, books, and newspaper comics depicted Blacks as apes and monkeys.[100] Even cartoons were not off limits. "Scrub Me Mamma with a Boogie Beat," a 1941 cartoon, portrayed Black men as slow, lazy, attracting flies, moving in slow motion, and with facial features like those of monkeys and apes.[101] Even Disney's all-American mouse, Mickey, was also active in portraying Blacks as savages and cannibals with apelike features.[102] A 1968 Hollywood film, "Planet of the Apes," was viewed by White supremacists and perhaps some others as an example of how Blacks will rise up against Whites if given the opportunity to do so.[103]

Racist depictions are not just a thing of the past. Numerous racist cartoons of President Obama and the First Lady portray them as monkeys or apes. The *New York Post* published a cartoon by famed political cartoonist Sean Delonas on February 18, 2009, showing two officers looking over a bleeding, shot, rabid chimpanzee with the caption reading "[t]hey'll have to find someone else to write the next stimulus bill."[104] The *New York Post* eventually apologized for the racist cartoon.[105] Such imagery of Blacks, especially Black men being portrayed as apes, has become even more prevalent since the dawn of the Internet. A simple Google search of the phrase "racist images of Blacks and apes" during the writing of this article produced 607,000 results, including numerous images

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[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *See The Coon Caricature: Blacks as Monkeys*, http://www.authentichistory.com/diversity/african/3-coon/6-monkey/ (last visited Jan. 23, 2015).

[101] SCRUB ME MAMA WITH A BOOGIE BEAT (Universal Pictures 1941), *available at* http://youtu.be/UacUR7bPnMM.

[102] TRADER MICKEY (Disney 1932), *available at* http://youtu.be/AvEwkFhB_Qo.

[103] *See* ERIC GREENE, PLANET OF THE APES AS AMERICAN MYTH (2006).

[104] Oliver Burkeman, *New York Post in Racism Row Over Chimpanzee Cartoon*, THE GUARDIAN (Feb. 18, 2009, 1:58 PM), http://www.theguardian.com/world/2009/feb/18/new-york-post-cartoon-race.

[105] Sewell Chan, *New York Post Apologizes for Chimp Cartoon*, N.Y. TIMES (Feb. 19, 2009, 9:47 PM), http://cityroom.blogs.nytimes.com/2009/02/19/new-york-post-apologizes-for-chimp-cartoon/.

of Blacks photoshopped as monkeys and apes—including President Barack Obama and the First Lady.[106]

Recent research regarding dehumanization of Blacks has indicated that people subconsciously and automatically associate Blacks with apes.[107] Other studies have produced similar evidence of stereotypes associating Blacks with animals. In one such study, an IAT was used to determine the degree to which police officers associate Blacks and apes.[108] The officers who demonstrated a high degree of association between these two concepts were then shown photos of White, Black and Latino juveniles.[109] The officers who closely associated Blacks with apes grossly overestimated the age of the Black juveniles.[110] This misidentification of Black children as adults by officers who implicitly associate Blacks with apes may be a troubling predictor of an officer's likelihood of using deadly force when confronting a young Black male. In the police shooting of Tamir Rice (discussed in detail *infra*), the officer thought the twelve-year-old boy was an adult at the moment of the fatal shooting.[111]

### *B. The Black Athlete: How super-humanization actually dehumanizes Black males*

> The Black is a better athlete to begin with because he's been bred to be that way, because of his high thighs and big thighs that goes up into his back, and they can jump higher and run faster because of their bigger thighs and he's bred to be the better athlete because this goes back all the way to the Civil War when during the slave trade . . . the slave owner would breed his big Black to his big woman so that he could have a big kid.[112]

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[106] Google Search, https://www.google.com/search?q=racist+images+of+Blacks+and+apes&ie=utf-8&oe=utf-8 (last visited Jan. 2, 2014).

[107] *See* Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292-306 (2008).

[108] Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 306 (2012).

[109] *Id.*

[110] *Id.*

[111] Associated Press, *Cleveland Cop Who Killed 12-year-old Tamir Rice Not Told Boy's Age, That Gun Might Be Fake: Union,* DAILY NEWS http://www.nydailynews.com/news/national/12-year-old-tamir-rice-shot-cleveland-autopsy-article-1.2043229 (last updated Dec. 13, 2014, 1:15 PM) (reporting the officers thought they were confronting someone around twenty years old).

[112] *ESPN 30 for 30: The Legend of Jimmy the Greek* (ESPN television broadcast Nov. 10, 2009); *see also*, Jonathan Rowe, *The Greek Chorus, Jimmy the Greek Got it Wrong But so Did His Critics*, WASHINGTON MONTHLY COMPANY (1998), http://www.thefreelibrary.com/The+Greek+chorus,+Jimmy+the+Greek+got+it+wrong+but+so+did+his+critics.-

– Jimmy "The Greek" Snyder

The idea that Blacks dominate in sports because of innate abilities, which can be traced to slavery or back to Africa, is a stereotype that further dehumanizes Black men. According to psychologist Harry Edwards, this type of thinking perpetuates the myth that Blacks, like animals, excel physically but lack the intellectual ability to think and reason at the level of other humans.[113] Throughout the past few decades, statements such as the one made by Jimmy "The Greek" have been echoed by many. Such public utterances have usually been quickly followed by a public apology for the indiscretion, but the candid nature of these comments exposes how the idea that Black bodies are engineered for strong physical performance is sometimes regarded as fact, even in the minds of well-known and respected individuals. Three examples come from three high-profile figures in the sports world, each of whom is widely regarded as a genuinely good person: Al Campanis, Jack Nicklaus, and Jon Gruden.

Al Campanis, who played major league baseball alongside Jackie Robinson, made headlines in 1987 when he appeared on the TV show "Nightline," then hosted by Ted Koppel.[114] The show celebrated the 40-year anniversary of Jackie Robinson breaking Major League Baseball's ("MLB") color barrier by becoming its first Black player. During the show, Ted Koppel asked Campanis why there were no Black managers of MLB teams. Campanis' response was honest but ignorant when he stated that Blacks "may not have some of the necessities to be a field manager or general manager" of an MLB team.[115] Campanis explained that Blacks were physically different from other races, stating that Blacks "are gifted athletically," and then adding: "[W]hy aren't Blacks good swimmers? Because they don't have buoyancy."[116] Even though Campanis had been Jackie Robinson's roommate decades earlier and was arguably not racist, his statements revealed underlying discriminatory beliefs about Black athletes.[117]

In 1994, Professional golfer Jack Nicklaus explained why there were so few Black professional golfers: "[Blacks have] different muscles [that]

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a06536853.

[113] JON ENTINE, TABOO: WHY BLACK ATHLETES DOMINATE SPORTS AND WHY WE'RE AFRAID TO TALK ABOUT IT 4 (2000).

[114] *See* Grahame L. Jones, *Dodgers Fire Campanis Over Racial Remarks*, L.A. TIMES (Apr. 9, 1987), http://articles.latimes.com/1987-04-09/news/mn-366_1_black-leaders.

[115] *Id.*

[116] *Id.*

[117] *The Night Al Campanis Shocked the World*, SPORTS IN BLACK AND WHITE (Mar. 5 2013), http://www.sportsinblackandwhite.com/2013/03/05/the-night-al-campanis-shocked-the-world/ (last visited Dec. 20, 2014).

react in different ways. . . . People gravitate to the sports [depending] on how their bodies develop."[118] Nicklaus later apologized for the remark.[119] Yet, his statement shows how deeply ingrained stereotypes are and how a well-respected, intelligent man can think it rational to believe that the relatively low number of professional Black golfers is due to genetic and anatomical differences, rather than lack of exposure or access to golfing opportunities, due to social structural inequality.

On January 1, 2013, while announcing a college bowl game, television football commentator Jon Gruden referred to Jadeveon Clowney, who is Black and at that time was the future number one draft choice in the NFL, as a "beast" after Clowney made a particularly hard tackle during the game.[120] There is little doubt that Gruden intended his comment to be a compliment to Clowney's athletic ability. Nevertheless, it portrays an intelligent, young Black man as little more than an animal. Granted, the term "beast" has been adopted by many as slang for someone with great skill and intensity. However, during the same game, Gruden commented on the play of a White linebacker with long blond hair by saying, "Jake Ryan is a fine player from St. Ignatius High School in Ohio. I know exactly what kind of stock he comes from."[121] The difference in the type of language used to characterize the performance of these two players suggests a discrepancy in the ways their skill sets are being assessed. Gruden regards Clowney's performance as animalistic but attributes Ryan's excellence to a good upbringing by inherently good people. The comments of such individuals cannot be brushed aside as the sentiments of a few ignorant outliers; rather, they are public expressions of popular, though inaccurate, beliefs.

These beliefs may seem flattering at some level, but studies suggest that this "super-humanization" of Blacks, rather than a form of admiration, implies that Blacks lack normal human capacities and attributes.[122] For example, a recent study indicates that Whites who implicitly attribute superior physical qualities to Blacks consequently believe that Blacks have

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[118] Mike Kern, *Nicklaus: Quotes Not Meant to be Racist* (Aug. 10, 1994), http://articles.philly.com/1994-08-10/sports/25840807_1_position-and-feelings-initial-comments-andy-o-brien.

[119] *Id.*

[120] *Jon Gruden's "Beast" Comment Reflects Disparities in Media Coverage of Black Athletes*, CULTUREGEIST (Jan. 1, 2013), http://theculturegeist.blogspot.com/2013/01/i-am-not-animal-jon-grudens-beast.html (last visited Dec. 26, 2014).

[121] *Id.*

[122] Adam Waytz et al., *A Superhumanization Bias in Whites' Perceptions of Blacks*, J. SOC. PSYCHOL. & PERSONALITY SCI. (Oct. 8, 2014), http://www.academia.edu/9506154/A_superhumanization_bias_in_Whites_perceptions_of_Blacks.

a relatively high tolerance for pain.[123] This belief may help explain why Blacks are routinely undertreated for pain.[124] Researchers also suggest that this particular misperception plays a role in police brutality against Black males because officers believe their bodies can withstand greater amounts of violence.[125] The distortion of the Black male body as a superhuman vessel is a form of dehumanization that may encourage police to use excessive force when dealing with Black suspects.

### *C. The Scary Black Man*

> Scary stories are very much about the idea of truth. What is truth, what is a lie, and what happens when you lie? For me the greatest horror out of anything you do is to lie, and so in any instance of great scary storytelling, there's a lie.[126]
>
> – Brad Falchuk, co-creator of *American Horror Story*

Implicit and explicit racial bias in the United States runs deep,[127] and the myth of the scary Black man, like Michael Myers from the movie Halloween, just won't stop.[128] Numerous cases in which White assailants have successfully raised the Black "boogie man" as a scapegoat demonstrate how relatively quickly many Americans will attribute violent crimes to Black men without delving into the facts.

An infamous example is the case of Charles Stuart, who, in 1989, shot and killed his pregnant wife Carol, then blamed the shooting on a Black man—not a specific person who happened to be Black, but a Black man.[129]

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Joe Berkowitz, *How to Tell Scary Stories, From the Co-Creator of "American Horror Story"*, FAST COMPANY, http://www.fastcocreate.com/3020837/how-to-tell-scary-stories-from-the-co-creator-of-american-horror-story (last visited Jan. 23, 2015).

[127] *See, e.g.*, Braden Goyette & Alissa Scheller, *15 Charts That Prove We're Far From Post-Racial*, THE HUFFINGTON POST (July 2, 2014), http://www.huffingtonpost.com/2014/07/02/civil-rights-act-anniversary-racism-charts_n_5521104.html (describing racial disparities that still exist 50 years after the Civil Rights Act was signed into law. The data includes neighborhood poverty rates; share of wealth and wealth gap; subprime lending rates and home mortgage denial; school funding, segregation and punishment; perceptions of innocence, drug arrests and prison sentencing; and employment discrimination).

[128] *See* HALLOWEEN (Compass International Pictures, 1978).

[129] Roberto Scalese & Hilary Sargent, *The Charles Stuart Murders and the Racist Branding Boston Just Can't Seem to Shake,* BOSTON.COM (Oct. 22, 2014, 10:02 PM), http://www.boston.com/news/local/massachusetts/2014/10/22/the-charles-stuart-murder-and-the-racist-branding-boston-just-can-seem-shake/RJpeNkL6EQbi8JCAMgfQPN/story.html.

The abstract Black man immediately was seen as a more plausible suspect than Stuart. The community of Boston was in an uproar. There was even talk amongst some politicians of renewing the death penalty.[130] Black men throughout Boston were subject to police harassment, including illegal arrest, searches, and seizures.[131] Eventually, Charles Stuart killed himself when his story began to unravel and his brother came forward with the truth.[132] What is significant about this case is not that Stuart blamed someone else for his wife's murder, but the quickness with which the public was willing to latch onto the prospect of an unknown, scary Black man having committed this crime, with the true criminal hiding in plain sight.

A similar case unfolded in 1994 when Susan Smith drowned her little boys, aged three and fourteen months, by strapping them into their car seats and letting the car slowly roll into a lake.[133] She then reported to the police that her car had been stolen by a Black man with her children still inside.[134] Within twenty-four hours, the story was national news, and a regional manhunt for the Black man had begun. Nine days later, Smith confessed to killing her children, and she is now serving a life sentence.[135]

Shortly after Smith confessed to killing her own boys, *The New York Times* noted that "Mrs. Smith had chosen the right-colored monster to generate the most sympathy and fear for her plight, especially in the hearts of Whites."[136] A White school psychologist was quoted in the article: "It did make her story seem more likely. I wouldn't like to think we're all prejudiced, but I guess there's that typical profile of the old bad Black guy. We're just too ready to accept that."[137] Police officers are not immune to these myths and stereotypes.

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[130] *Id.*

[131] After holding homeless Black man Alan Swanson for three weeks, police focused on new suspect William Bennett, who was roughly the right age and height as the alleged gunman and had a history of committing violent crimes. The mayor subsequently apologized to Bennett, who sued the Boston Police Department in 1995 for violating his civil rights. *Id.*

[132] *Id.*

[133] Charles Montaldo, *Susan Smith – Profile of a Child Killer*, CRIME.COM (updated Dec. 15, 2014), http://crime.about.com/od/murder/a/susan_smith_2.htm (last visited Dec. 21, 2014).

[134] *Id.*

[135] *Id.*

[136] Don Terry, *A Woman's False Accusation Pains Many Blacks*, N.Y. TIMES (Nov. 6, 1994), *available at* http://www.nytimes.com/1994/11/06/us/a-woman-s-false-accusation-pains-many-blacks.html.

[137] *Id.*

## IV. IMPLICIT BIAS AND POLICE SHOOTINGS

### *A. Implicit Shooter Bias*

Racial bias in police shootings—that is, police shooting unarmed Black men at a significantly higher rate than Whites—has been well documented. For example, an analysis of federally collected data on police shootings shows young Black males were twenty-one times more likely of being shot dead by police than their White counterparts in recent years.[138] The details of the following selected cases help to illustrate and begin to explain this phenomenon.

In 1999, four New York City police officers, in unmarked cars and street clothes, shot and killed Amadou Diallo claiming that they thought he was reaching for a gun when in fact he was just reaching for his wallet.[139] The officers shot Diallo forty-one times striking him with nineteen bullets.[140] After a trial in a different venue,[141] the officers were acquitted of all charges.[142] The jury agreed with the defense lawyer who "assert[ed] that the shooting was justified because [the officers] had believed Mr. Diallo was grabbing a gun."[143] The Diallo shooting as well as the jury's not-guilty verdict caught the attention of the entire nation, and caused a graduate student named Joshua Correll to wonder if the officers would have responded differently had it a been a White man reaching for his wallet.[144] Following up on research showing that people perceive the same mildly aggressive behavior as more threatening when it is performed by a Black person than by a White person, Correll investigated the effect of a target's race/color on the participants' decision to shoot that target.[145]

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[138] Ryan Gabrielson, Ryan Grochowski Jones, & Eric Sagara, *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014), http://www.propublica.org/article/deadly-force-in-black-and-white (reviewing a compilation of federal data from 2010 to 2012).

[139] Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html.

[140] *Id.*

[141] *Id.* ("The trial was moved to Albany after lawyers for the officers persuaded an appeals court that the 'public clamor' over the shooting made a fair trial impossible in the Bronx.").

[142] *Id.*

[143] *Id.*

[144] *See* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002).

[145] *Id.* at 1314-15.

Correll's study used a simplified video game to present Black and White male targets, each holding either a gun or a nonthreatening object.[146] Participants were instructed to shoot only armed targets, but to make each decision immediately after seeing each target.[147] The results pointed to racial bias in shoot/don't shoot decisions: participants fired on an armed target more quickly when he was Black than when he was White,[148] and they decided not to shoot the unarmed targets more quickly when the target was White than when he was Black.[149] In another study, participants failed to shoot an armed target more often when the target was White than when he was Black, and if the target was unarmed, they mistakenly shot him more often when he was Black than when he was White.[150] Further inquiry into these results found that if a target was Black, the participants required less certainty that he was, in fact, holding a gun before they decided to shoot.[151]

Correll's study also found that White and Black participants had equal levels of shooter bias.[152] The race/color of the shooter does not matter. All Americans are subject to the same "[c]ultural influences, including television, movies, music, and newspapers [that] provide a constant barrage of information that often depicts [Blacks] as violent."[153] Even when a person does not endorse them, such cultural stereotypes can be subconsciously triggered.[154] Indeed, Correll's study confirmed that shooter bias was related to perceptions of the cultural stereotype of Blacks.[155] The bias was not necessarily related to prejudice or personally endorsed stereotypes—mere knowledge of the stereotype was enough to induce the bias.[156] Correll's shoot/don't-shoot studies suggest that no matter the race/color of the shooter, Black targets are shot at a higher rate than their White counterparts. His research supports the theory that although a person's explicit, aspirational attitude may be non-racist, their implicit associations influence their immediate decisions.

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[146] *Id.* at 1315.

[147] *Id.* at 1324.

[148] *Id.* at 1325.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.* at 1323 (citing CAMILLE O. COSBY, TELEVISION'S IMAGEABLE INFLUENCE: THE SELF-PERCEPTION OF YOUNG AMERICANS (1st ed. 1994)).

[154] *Id.*

[155] *Id.* at 1325; *see, e.g.*, Banaji & Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 2 (1995).

[156] *Id.*

Quite frequently, police officers are confronted with a situation that may require the use of deadly force. The way they view the suspect and assess the need for deadly force occurs in a matter of seconds. Often a police shooting of an unarmed Black man appears to be influenced by the stereotypical fear of the Black man. To demonstrate that a stereotype of Black men as violent and criminal affects policing, a 2004 study presented 182 police officers with Black and White faces.[157] The officers were asked to indicate whether they thought each face "looked criminal."[158] As predicted, Black faces looked more criminal to police officers, and the darker the face, the more criminal the officer tended to think the person was.[159] These results reveal that police associate Blacks with crime.

In 2007 Correll tested the shooter bias of police officers.[160] The results showed that police officers were overall less "trigger happy" than the community sample: they were faster to make correct responses and better able to detect the presence of a weapon.[161] This makes sense given their training. However, the officers still showed "robust racial bias in the speed with which they made shoot/don't-shoot decisions."[162] It took the officers significantly longer to respond to situations that went against stereotypes (i.e., unarmed Black targets and armed White targets) than it did to respond to situations that align with cultural stereotypes (i.e., armed Black targets and unarmed White targets).[163] So although officers performed better than civilians, the shoot/don't-shoot data still clearly indicates that the race/color of the suspect is a factor when officers make the decision to shoot.

### *B. How to Tell a Scary Story*

In police shootings of unarmed Black men, there seems to be a common storyline that often emerges, with the officer insisting the situation necessitated the use of deadly force. In cases of questionable shootings, officers come up with all kinds of reasons, sometimes absurd, to justify shooting unarmed suspects.[164] A common excuse for shooting unarmed

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[157] Jennifer L. Eberhardt, *Seeing Black: Race, Crime, and Visual Processing*, 86 J. PERSONALITY & SOC. PSYCHOL. 876, 888 (2004).

[158] *Id.* at 888.

[159] *Id.* at 889.

[160] *See* Joshua Correll, et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007).

[161] *Id.* at 1020.

[162] *Id.*

[163] *Id.*

[164] *See, e.g.*, Jessica Dickerson, *9 Absurd Justifications for Police Killings of Unarmed Black Males*, THE HUFFINGTON POST (Dec. 15, 2014, 7:59 PM), http://www.huffingtonpost.com/2014/12/15/police-killing-black-men_n_6277020.html.

Black men, as noted in the Cincinnati police shooting of Timothy Thomas, is "he moved his hands towards his waistband."[165] In those instances where there happens to be a video recording or objective witnesses, it often turns out that the officer's account was exaggerated or, in some cases, fabricated.[166] The officer often wants time "to get his story straight," before being questioned about the details of the shooting, and then describes the unarmed Black victim as the aggressor, to justify the shooting as a proper use of deadly force. Unlike other murder suspects, officers in such cases are generally given substantial time and opportunity to "get their story right."

It is imperative that the police try to get a statement from the suspect and witnesses to a shooting as soon as possible and to keep the suspect isolated.[167] The more time that goes by between the crime and the interrogation, the greater the chance the suspect has to create a story that will exculpate him from criminal liability, so confessions by suspects are extremely important in a homicide investigation.[168] Yet investigators have actually compromised investigations of officers in shooting and excessive use of force cases, "by investigators' apparent bias in favor of clearing the officer instead of objectively pursuing all of the available facts."[169]

The Fifth Amendment to the United States Constitution generally allows persons accused of a crime the right to remain silent when questioned by law enforcement.[170] Police officers involved in shootings may have additional protections because of collective bargaining contracts between their police union and their employer. For example, according to the International Association of Chiefs of Police's Officer-Involved Shooting Guidelines, "[w]henever possible, officers should be educated on the protocol of the investigation as well as any potential actions by the media,

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[165] Arthur Delaney & Diane Jeanty, *Police Shootings of Unarmed Men Often Have Something in Common: The Waistband Defense*, THE HUFFINGTON POST (Dec. 10, 2014, 9:59 PM), http://www.huffingtonpost.com/2014/12/10/police-shootings_n_6303846.html; John Larson, *Behind the Death of Timothy Thomas*, DATELINE NBC (Apr. 10, 2004, 12:36am), http://www.nbcnews.com/id/4703574/ns/dateline_nbc-dateline_specials/t/behind-death-timothy-thomas/#.VMLm3cY-Aag.

[166] *See, e.g.*, Jay Hathaway, *Lawyer: Video Shows Cops Shot John Crawford "On Sight" at Walmart*, GAWKER (Aug. 28, 2014, 1:50 PM), http://gawker.com/lawyer-video-shows-cops-shot-john-crawford-on-sight-1627942888; *see also* Santaella & Dial, *supra* note 8.

[167] Saul M. Kassin et al., *Interviewing Suspects: Practice, Science, and Future Directions*, 15 LEGAL & CRIM. PSYCHOL. 39, 42 (2009).

[168] David D. Tousignant, *Why Suspects Confess*, FBI LAW ENFORCEMENT BULLETIN, 1 (Mar. 1991).

[169] U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 34 (Dec. 4, 2014).

[170] U.S. CONST. amend. V.

grand jury, or review board *prior* to any formal investigative interviews."[171] This means the officer is usually allowed time to meet with an attorney or union representative prior to being questioned, and the interview may not even occur the same day as the shooting.[172] Contrast this with the routine practice in homicide cases, where officers obtain and document statements by suspects as soon as possible—limited only by the reading of the suspect's *Miranda* warning.[173]

Even when a police officer makes a statement to his employer or union, the statement cannot always be used against him criminally. Under the *Garrity* rule, public employees—including police officers—can be compelled to give a statement to an employer, but those statements cannot be used against them in criminal proceedings. In *Garrity*, police officers who were under investigation found themselves between a rock and hard place when compelled by their department to talk or be fired.[174] The officers spoke, then were indicted and convicted.[175] They appealed, arguing that compelling them to speak under threat of being fired was coercive.[176] The Supreme Court agreed and held that "the protection of individuals under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat or removal from office."[177] Thus, officers who incriminate themselves for employment purposes may still be able to invoke their Fifth Amendment right against self-incrimination in criminal proceedings. Because of *Garrity*, employees who are subject to an internal investigation are generally advised of these rights prior to questioning.[178]

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[171] *International Association of Chiefs of Police, Officer-Involved Shooting Guidelines* (2013), http://www.theiacp.org/portals/0/documents/pdfs/Psych-OfficerInvolvedShooting.pdf (emphasis added).

[172] *See Documents Describe Ferguson Officer's Version of Fatal Shooting*, CBS NEWS (Nov. 25, 2014), http://www.cbsnews.com/news/documents-describe-ferguson-officers-version-of-fatal-shooting/ (detailing how Officer Darren Wilson fatally shot Michael Brown on Aug. 9, 2014 and did not have a conversation with a police detective about the shooting until Aug. 10, 2014 with his attorney present).

[173] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[174] Garrity v. State, 385 U.S. 493, 494 (1967).

[175] *Id.* at 495.

[176] *Id.*

[177] *Id.* at 500.

[178] GARRITY "WARNINGS", http://www.garrityrights.org/garrity-warnings.html (last visited Dec. 26, 2014) (including the right to be informed of the allegations involved; that statements made during any interviews may be used as evidence of misconduct or as the basis for seeking disciplinary action; that any statements made during the interviews cannot be used against the employee in any subsequent criminal proceeding, nor can the fruits of any of the statements be used against the employee in any subsequent criminal proceeding; and if the employee requests, a person of their choice may be present to serve as a witness).

However, the United States Department of Justice has recently found that some police departments are improperly applying *Garrity,* and thus jeopardizing criminal prosecutions of officers. While investigating the Seattle and Cleveland police departments, the DOJ found that officers were given *Garrity* warnings for any allegation of use of force, even when not required to do so.[179] The improper use of *Garrity* may severely interfere with the investigations and misconduct by officers.[180] In such cases, police officers are able to delay the interrogation and have a representative present—nothing said during the interrogation can be used in the criminal prosecution of the officer. By misusing *Garrity* in this way, officers can admit to wrongful conduct and their statements cannot be used against them in a criminal proceeding. The improper use of *Garrity* also allows the officers and their union attorneys or representatives more time to develop an exonerating account of the incident because the officer is allowed to confer with his or her representative prior to any questioning.

### *C. Implicit Racial Bias in the Judicial System*

Prior to the 2014 riots in Ferguson and the 2001 riots in Cincinnati, the nation witnessed riots in Los Angeles in 1992 after a not-guilty verdict in the Rodney King case. King was a Black man who had been beaten by the police after leading them on a high-speed chase.[181] The brutal beating was caught on videotape.[182] Police used a Taser gun to bring King to the ground then struck him fifty-six times with their batons and kicked him in the head and body six times, mostly while King was on the ground.[183] The four officers who beat King were indicted by a grand jury.[184]

The trial was moved out of racially mixed and culturally diverse Los Angeles to Simi Valley, a predominantly White, conservative area described by media as a "police officers' bedroom community with a

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[179] U.S. DEPT. OF JUSTICE, United States' Investigation of the Seattle Police Department – *Garrity* Protections (Nov. 23, 2011); *see also* U.S. DEPT. OF JUSTICE, Investigation of the Cleveland Division of Police, 36-37 (Dec. 4, 2014).

[180] U.S. DEPT. OF JUSTICE, Investigation of the Cleveland Division of Police, 34 (Dec. 4, 2014).

[181] Independent Commission on the Los Angeles Police Department, *Report of the Independent Commission on the Los Angeles Police Department*, 6-7 (July 9, 1991), http://www.parc.info/client_files/special%20reports/1%20-%20chistopher%20commision.pdf [hereinafter Ind. Comm. on the L.A.P.D.].

[182] *Id.* at 3.

[183] *Id.* at 6-7.

[184] *See* Linda Deutsch, *Rodney King's Death: Reporter Remembers Trial That Sparked Riots*, THE HUFFINGTON POST (June 18, 2012, 7:22 AM), http://www.huffingtonpost.com/2012/06/18/rodney-kings-death-report_n_1605085.html.

majority White population."[185] There were no Blacks on the jury.[186] The defending officers and their lawyers forged a defense that would appeal to the implicit racial bias of the jurors. One defendant, Officer Koon, said he "felt threatened" when the "big and muscular" King (6'3" and 225 lbs.) stepped out of the car and that he believed King was under the influence of PCP.[187] The defendants and their counsel argued that King had not complied with their commands, which was why they continued using "power strokes" with their batons.[188]

On April 29, 1992, the jury found all four officers not guilty of assault and was deadlocked on just one of the charges.[189] Soon after the verdicts were announced, riots began in Los Angeles.[190] Several months after the trial, legal journalist D.M. Osbourne interviewed some of the Simi Valley jurors.[191] Osborne found that the jurors had a "reverence for the police officers as guardians of social order" and their "low regard for the likes of King—a paroled felon, driving drunk and resisting arrest—made it inconceivable that they could sympathize with him as the victim of the alleged crime."[192]

The Cincinnati case of Timothy Thomas illustrates how implicit racial bias can also play a role in a non-jury trials. Announcing his decision from the bench, Judge Winkle stated: "Timothy Thomas put Police Officer Roach in a situation where he believed he had to shoot[.] Police Officer Roach's history was unblemished until this incident. Timothy Thomas' history was not unblemished."[193] In both the *King* case and the *Thomas* case, the victim's character ended up playing a role in the determination of whether the police used excessive force.

Implicit racial bias in police shooting cases can pervert the justice system to the point that the fact finder ends up making decisions on what has greater value—the career of a White police officer who protects and serves society every day, or the life of a dead Black male who was either a troublemaker or potential troublemaker. Implicit bias can also color how

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[185] *Id.*

[186] *Id.*

[187] Ind. Comm. on the L.A.P.D., *supra* note 181, at 6.

[188] *Id.* at 7.

[189] Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 30, 1992), http://www.nytimes.com/books/98/02/08/home/rodney-verdict.html.

[190] *Id.*

[191] Bob Sipchen, *Analysis Backs Jury in Rodney King Trial*, L.A. TIMES (Sept. 24, 1992), http://articles.latimes.com/1992-09-24/news/vw-1191_1_rodney-king-trial.

[192] *Id.*

[193] Cinn. Judge Stmt., *supra* note 50.

others view these cases, including the general public, grand juries and investigative bodies.

*1. The shooting of Trayvon Martin*

> This guy looks like he's up to no good, or he's on drugs or something. It's raining and he's just walking around, looking about.[194]
>
> – George Zimmerman's 911 call

On July 13, 2013, a jury acquitted George Zimmerman of second-degree murder and manslaughter charges for killing Trayvon Martin, an unarmed Black teenager who was walking down the street wearing a "hoodie."[195] Zimmerman followed Martin, reportedly because he thought the unarmed Black teenager looked "real suspicious,"[196] and fatally shot him after a confrontation.[197] Many critics of the verdict pointed to Florida's "Stand Your Ground" law as having influenced the jury's verdict,[198] but criticism was legally flawed and served only to distract from the core issue, which was why Zimmerman viewed Martin as suspicious when all Martin was doing was walking home from a store, armed only with Skittles and a can of iced tea.[199]

Enacted in 2005, the Florida Stand Your Ground Law, as codified in sections 776.012 and 776.013 of Florida Statutes, provides that a person is justified in the use of deadly force and has no duty to retreat if either (1) the person reasonably believes that "such force is necessary to prevent imminent death or great bodily harm to himself or herself, or another or to prevent the imminent commission of a forcible felony;"[200] or (2) the person acts under and according to the circumstances set forth in Section 776.013

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[194] *Transcript: George Zimmerman's Call to Police*, MOTHER JONES, http://www.documentcloud.org/documents/326700-full-transcript-zimmerman.html (last visited Jan. 23, 2015).

[195] Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?pagewanted=all&_r=0).

[196] Zimmerman Transcript, *supra* note 194.

[197] Alvarez & Buckley, *supra* note 195.

[198] Pete Williams & Tracy Connor, *Holder Speaks Out Against "Stand Your Ground" Laws After Zimmerman Verdict*, NBC NEWS (July 17, 2013, 5:13 AM), http://www.nbcnews.com/news/other/holder-speaks-out-against-stand-your-ground-laws-after-zimmerman-f6C10654061.

[199] Trayvon had a bag of Skittles and a can of iced tea. Zimmerman had a 9-millimeter handgun. *See* Charles M. Blow, *The Curious Case of Trayvon Martin*, N.Y. TIMES (Mar. 16, 2012), http://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html?_r=2.

[200] *See* FLA. STAT. ANN. § 776.012 (West 2014).

(pertaining to the use of force in the context of a home or vehicle invasion).[201]

Florida's Stand Your Ground Law, the notion of self-defense, and the duty to retreat are certainly important concepts in the abstract, but changing self-defense laws, in my opinion, will not prevent police shootings of unarmed Black men or lead to more indictments of officers.[202] Song Richardson and Phillip Atiba Goff have contended, "the best way to safeguard against mistaken judgments caused by the suspicion heuristic is to impose a duty to retreat when it is safe to do so."[203] Even U.S. Attorney General Eric Holder spoke out against Florida's Stand Your Ground Law following the killing of Martin.[204] Many shootings of unarmed Black males occur because of implicit racial bias (subjective fear). Thus, proposed changes to self-defense laws are unlikely to prevent acquittals in cases involving the shootings of unarmed Black males. For example, I have successfully defended homicide cases on claims of self-defense in Ohio, a state that, unlike Florida, has a duty to retreat.[205] Imposing a duty retreat is not the solution in cases like Trayvon Martin. The defendants in some of these cases had killed unarmed victims, yet self-defense was successfully argued each time—despite a state law that imposes a duty to retreat anywhere but in your home or business. Even states that require a person to retreat before using deadly force do so *only* when it is safe for the person to do so.[206] When a person reasonably believes that he is confronted with the threat of death or great bodily harm, there often is insufficient time for a safe retreat.

To establish self-defense in Ohio, a defendant must prove all of the following elements by a preponderance of the evidence: (A) that he was not at fault in creating the situation giving rise to the event; (B) that he had reasonable grounds to believe (an honest belief) that he was in imminent danger of death or great bodily harm; (C) that his only means of escape

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[201] *See id.* § 776.013.

[202] *See, e.g.*, Richardson & Goff, *supra* note 108, at 332.

[203] *Id.*; *see also id.* at 307 (defining "suspicion heuristic" as a construct that relies upon the mind science of heuristics and biases on the one hand, and implicit racial associations on the other hand, to explain how merely perceiving race—even absent racial animus—can influence judgments of criminality beyond conscious awareness).

[204] Williams & Connor, *supra* note 198.

[205] *See* State v. Coad, No. B0108935 (Hamilton County Ct. Com. Pl, Ohio, 2002); *see also* Ohio V. Hakim Kent, No. B-9803756 (Hamilton County Ct. Com. Pl, Ohio, 1998); Dan Horn, *Self-Defense Claim Wins Bar Employee Acquittal in Killing*, THE CINCINNATI ENQUIRER (Oct. 23, 1998), http://enquirer.com/editions/1998/10/23/loc_acquit23.html.

[206] *See, e.g.*, State v. Robbins, 388 N.E.2d 755, 755 (Ohio 1979).

from such danger was by use of deadly force; and (D) that he did not violate a duty to retreat.[207]

In June 2002, I defended Darrell Coad, a young black man charged with the murder of Michael James.[208] James initiated and beat Coad in a fistfight because James believed that his car had been broken into by Coad while he was in jail.[209] Shortly after the beating, Coad purchased a gun for protection.[210] As Coad was attempting to leave the neighborhood, he again encountered James.[211] Convinced that James would kill him, Coad shot at the unarmed James three times, fatally striking him in the back with two of the bullets.[212] My defense of Coad was simple: when he unexpectedly crossed paths with James, he did not have time to retreat; he reasonably feared that the faster James would catch him and kill him if he did not kill James first. The judge properly instructed the jury on the duty to retreat in Ohio, yet Coad was acquitted of murdering the unarmed James.[213]

The judge in the Zimmerman trial instructed the jury as follows: "[y]ou must judge him by the circumstances by which he was surrounded *at the time* the force was used."[214] Zimmerman's defense, in part, was that he had no idea that he would have to use deadly force until Trayvon Martin was already on top of him, slamming his head into the concrete sidewalk.[215] Zimmerman successfully argued that, at the time he decided he had to use deadly force, it was impossible for him to retreat safely, [216] so it did not

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[207] *Id.*

[208] *See* Coad, *supra* note 205.

[209] Dan Horn, *Jury Agrees Shooting Was Self-Defense*, THE CINCINNATI ENQUIRER (June 29, 2002), http://enquirer.com/editions/2002/06/29/loc_jury_agrees_shooting.html.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] Jury Instructions at 12, State v. Zimmerman (Fla. Cir. Ct.) (No. 2012 CF 1083 AXXX), http://www.flcourts18.org/PDF/Press_Releases/Zimmerman_Final_Jury_Instructions.pdf (emphasis added).

[215] While I do not personally agree with this defense, it is what Zimmerman's attorneys argued at trial. *See* Lizette Alvarez, *In Zimmerman Case, Self-Defense Was Hard to Topple*, N.Y. TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/us/in-zimmerman-case-self-defense-was-hard-to-topple.html?pagewanted=all&_r=0 (reporting that Zimmerman shot Mr. Martin only after the teenager knocked him to the ground, punched him, straddled him and slammed his head into the concrete—"a weapon," according to his attorney).

[216] The Zimmerman verdict may have been different if Florida and states with similar self-defense laws had the added element that Ohio law requires in deadly force and self-defense cases. For a defendant who has used deadly force to successfully argue self-defense in Ohio, that defendant must prove he "was not at fault in creating the situation giving rise to the event." *Robbins*, 388 N.E.2d at 755. In other words, to successfully argue self-defense, a person cannot start a fight or create a situation that gives rise to an altercation that ends in death. A similar requirement in Florida law would have allowed the prosecution to argue

matter that there was a Stand Your Ground law in Florida. Again, this illustrates why proposed changes to self-defense laws are unlikely to prevent acquittals in cases where citizens and police shoot unarmed Black males.

Zimmerman did not testify,[217] but at trial he put an expert on the stand to testify about the concept of self-defense and the use of deadly force.[218] Defense expert Root said, "Zimmerman did the best he could, when he chose to kill Trayvon."[219] Root reasoned, "Zimmerman wasn't an athlete and lacked capabilities, ability and training in self-defense."[220] Root further claimed that Zimmerman lacked a "warrior mentality,"[221] perhaps implying that the seventeen-year-old Martin had a "warrior" mentality, and that Zimmerman was a victim. Unable to speak for himself, the defense portrayed the deceased teenager as a man who had possessed extraordinary strength and was "physically active,"[222] while the grown, fully armed adult who had stalked him through the neighborhood, had been at a disadvantage and needed to resort to deadly force to avoid becoming a victim of the Skittles-toting teenager.

Implicit fear of Black males plays a large role not only in how they become suspects but also how they are viewed by those in the criminal justice system on issues of innocence or guilt and credibility.[223] The

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that Zimmerman, after being warned by the 911 dispatcher not to follow Martin, created the situation that gave rise to his using deadly force. Secondly, it would have allowed the prosecution to demonstrate that it was Zimmerman's explicit racial bias that allowed him to perceive the innocent actions of Trayvon as suspicious and criminal, which is what motivated his actions to stalk the teenager.

[217] Michael Pearson & Greg Botelho, *Zimmerman Opts Not to Testify as His Defense Team Rests Case*, CNN (July 11, 2013 1:38 AM), http://www.cnn.com/2013/07/10/justice/zimmerman-trial/.

[218] *See* Andrea Torres, *George Zimmerman Trial: Defense Expert Witness Dennis Root*, LOCAL 10.COM, http://www.local10.com/news/george-zimmerman-trial-defense-expert-witness-dennis-root/20921516 (last updated July 10, 2013, 8:00 PM). How Root was ever allowed to testify as an expert witness on deadly force and on what Zimmerman was probably thinking that night goes beyond the parameters of this paper but is a subject that deserves further inquiry from a Rules of Evidence perspective.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] Ashleigh Barfield, *Prosecutor Uses Dummy in Zimmerman Case; Zimmerman Case Continues*, CNN (July 10, 2013 11:30 AM), http://transcripts.cnn.com/TRANSCRIPTS/1307/10/cnr.06.html (providing the transcript of Dennis Root's testimony).

[223] A study found that participants estimated Black boys to be older and less innocent than White boys of the same age. When participants were told that the boys, both Black and White, were suspected of crimes, the disparity in perceptions of age and innocence became more stark. Phillip Goff, *Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds*, AM. PSYCHOL. ASS'N (Mar. 6, 2014), http://www.apa.org/

authors of the book *Pursing Trayvon Martin*, posed the following question: "In U.S. society, as it is actually configured, can we imagine an armed Black man pursing a young White Boy, killing him because, allegedly, he felt threatened by the White Boy[?]"[224]

*2. The police shooting of Michael Brown*

> We are outraged to see that separate and unequal codes of conduct, nightmares we hoped were relegated to our forefathers' generations, persist today. We are outraged because somehow, it is permissible in a legal proceeding in 2014 to describe an unarmed young black man as "a demon," reviving the same racialized stereotypes[.] This description stripped Michael Brown not only of his humanity, even in his death, but also of the justice due to him.[225]
>
> – Yale Law School's Black Law Students Association

Until August 9, 2014, many Americans had never heard of the small, predominantly black town of Ferguson, Missouri. On that day, while walking in the middle of the street with a friend, Michael Brown, a Black teenager, was approached by Officer Wilson, a White policeman, driving in a marked police vehicle.[226] A struggle ensued between Brown and Wilson while Wilson was still in the vehicle.[227] After emerging from his vehicle,

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news/press/releases/2014/03/black-boys-older.aspx. Separate research suggests that these kinds of racialized perceptions of innocence contribute to non-white juvenile offenders receiving harsher sentences than their white peers. Braden Goyette & Alissa Scheller, *15 Charts That Prove We're Far From Post-Racial*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/07/02/civil-rights-act-anniversary-racism-charts_n_5521104.html (last updated July 2, 2014, 10:59 AM).

[224] PURSUING TRAYVON MARTIN: HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS 141 (George Yancy & Janine Jones eds., 2013).

[225] Ryan Grim, *Yale Black Law Students: Michael Brown Case "Made a Mockery of Our So-Called Post-Racial Society"*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/12/01/yale-black-law-students_n_6250736.html (last updated Dec. 2, 2014, 2:59 PM) (quoting the Black Law Student Association at Yale Law School's statement denouncing the failure to indict Darren Wilson).

[226] Terrence McCoy, *Darren Wilson Explains Why He Killed Michael Brown*, WASH. POST (Nov. 25, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/11/25/why-darren-wilson-said-he-killed-michael-brown/.

[227] Officer Wilson told the authorities that Mr. Brown had punched and scratched him repeatedly, leaving swelling on his face and cuts on his neck and that during the scuffle, Brown reached for the gun. Wilson's gun was fired twice inside the vehicle and Brown fled. Michael S. Schmidt et al., *Police Officer in Ferguson is Said to Recount a Struggle*, N.Y. TIMES (Oct. 17, 2014), http://www.nytimes.com/2014/10/18/us/ferguson-case-officer-is-said-to-cite-struggle.html?_r=0.

Wilson fired at Brown twelve times.[228] Brown was killed after being shot by eight bullets from Wilson's gun.[229]

When Wilson testified in front of the grand jury the next month, he described his encounter with Michael Brown as follows: "[W]hen I grabbed him, the only way I can describe it is I felt like a five-year-old holding onto Hulk Hogan. [T]hat's just how big he felt and how small I felt just from grasping his arm."[230] Wilson also told the grand jurors that "the only way" he could describe Brown's "intense aggressive face" was that he looked "like a demon."[231] Such descriptions feed into the stereotypical portrayal of the Black man as a brutish, animalistic character. When such "code" words trigger the implicit racial bias in jurors, it can become automatic to view the Black male as an animalistic brute with such great strength that deadly force was required in order to preserve the life of the officer.

### 3. *The police shooting of Levar Jones*

A police officer's dashboard camera captured another example of implicit racial bias in shoot/don't-shoot decision-making on September 4, 2014.[232] In broad daylight, South Carolina State Trooper Sean Groubert approached Levar Jones, a Black man, at a gas station for a seat belt violation.[233] Jones had just stepped out of his vehicle and was standing next to the still-open door when Groubert pulled up, approached Mr. Jones, and asked to see his license.[234] As Jones reached into his car to get his license, Groubert began yelling at Jones and immediately fired several shots, with one hitting Jones in the hip.[235] After being shot, Jones can be heard on the

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[228] Ryan J. Reilly, *Ferguson Officer Darren Wilson Not Indicted in Michael Brown Shooting*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/11/24/michael-brown-grand-jury_n_6159070.html (last updated Nov. 24 2014, 10:39 PM).

[229] AJ Vicens & Jaeah Lee, *Here's the Pentagon Report of Michael Brown's Autopsy*, MOTHER JONES (Dec. 8, 2014, 7:36 PM), http://www.motherjones.com/politics/2014/12/heres-dods-report-michael-browns-autopsy (referencing the Department of Defense's Armed Forces Medical Examiner System autopsy performed at the request of the U.S. Department of Justice).

[230] *Transcript: State of Missouri v. Darren Wilson Grand Jury Volume V*, at 212 (Sept. 16, 2014), http://www.documentcloud.org/documents/1370494-grand-jury-volume-5.html.

[231] *Id.* at 225.

[232] Live Leak, *SC State Trooper Shoots Unarmed Man – Officer Fired From Job*, YOUTUBE (Sept. 25, 2014), http://youtu.be/KeT_oSLtI-o.

[233] Santaella & Dial, *supra* note 8.

[234] *Id.*

[235] *Id.*

video's soundtrack asking the trooper, "Why did you shoot me? . . . I just got my license: you said get my license."[236]

Soon after the shooting, and evidently not realizing that the camera in his vehicle had recorded the entire incident, Groubert came up with a "scary Black guy" story.[237] Groubert told his supervisor, "I pulled him over for a seat belt violation. Before I could even get out of my car he jumped out, stared at me, and as I jumped out of my car and identified myself, as I approached him, he jumped head-first back into his car."[238] Groubert added,

> I started retracting back towards the rear of the vehicle telling him 'Look, get out of the car, let me see your hands.' He jumped out of the car. I saw something black in his hands. I ran to the other side of the car yelling at him, and he kept coming towards me. Apparently, it was his wallet.[239]

Even a cursory review of the video makes clear that Jones was not a threat and that Groubert lied to build a case of self-defense.[240] Thanks to the video, Groubert was charged with aggravated assault and battery.[241] Without video of the incident, he probably would have escaped all charges based on his made-up story of a scary Black man.

#### *4. The police shooting of John Crawford III*

On August 5, 2014, John Crawford was shopping at Wal-Mart in Beavercreek, Ohio, close to the city of Dayton, Ohio.[242] Crawford, talking on his cell phone to the mother of his two children, picked up a toy rifle from the Wal-Mart shelf and carried it with him as he continued to shop.[243] In the meantime, a customer called 911 and reported that a Black man was "walking around with a gun in the store," saying, "he's, like, pointing it at people."[244] Officers were dispatched to the Wal-Mart and within seconds

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[236] *Id.*

[237] *Id.*

[238] *S.C. Trooper Charged in Shooting of Unarmed Man,* ASSOCIATED PRESS (Sept. 25, 2014), *available at* www.cbsnews.com/news/sean-groubert-former-south-carolina-trooper-charged-in-shooting/.

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] Hathaway, *supra* note 166.

[243] Green, *supra* note 6.

[244] Jon Swaine, *Doubts Cast on Witness's Account of Black Man Killed by Police in Walmart*, THE GUARDIAN (Sept. 7, 2014, 10:37 AM), http://www.theguardian.com/world/2014/sep/07/ohio-black-man-killed-by-police-walmart-doubts-cast-witnesss-account.

had pounced on Crawford and shot him twice.[245] Crawford later died at a hospital.[246]

When comparing the video of these events to the officers' statements, several things are clear. At the time the officers come into contact with Crawford, the toy gun is pointed down and no one else is around.[247] Although the officers' statements made it sound as though they gave Crawford ample warning to drop the gun and he refused to do so, the video revealed that they shot him within two seconds of spotting him in the store and that they did not give Crawford a chance to comply before killing him.[248]

Despite the video, however, a "special prosecutor"[249] presented the case to a grand jury that refused to indict the officers. In announcing the grand jury's decision not to indict, the special prosecutor said, "The law says police officers are judged by what is in their mind at the time. You have to put yourself in their shoes at that time with the information they had."[250] In other words, never mind the facts as long as the police claim to have perceived circumstances requiring deadly force, then the shooting is justified.

What makes this case even more troubling is that it is legal in Ohio to carry a rifle openly in public.[251] At least one expert noted that "officers have an obligation to reassess what they [have] been told, by a dispatcher or a citizen, once they [are] on the scene of what they have been told is a crime."[252] These officers should have realized something was not adding

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[245] *Id.*; *see also* Green County Dailies, *Wal-Mart Surveillance Video of John Crawford III Shooting* (Sept. 24, 2014), http://youtu.be/S9FtNOV6Qhk [hereinafter *Surveillance Video*].

[246] Swaine, *supra* note 244.

[247] *Surveillance Video*, *supra* note 245.

[248] *Id.* Police said an officer to Crawford's left twice shouted "put it down." The official police statement said responding officers confronted the suspect inside the store and the subject was shot after failing to comply with verbal commands. Swaine, *supra* note 244.

[249] Special prosecutor Mark Piepmeier was not a prosecutor in the jurisdiction where the shooting occurred but he was assigned to the case by the Ohio Attorney General Mike DeWine. Kim Palmer, *Ohio Appoints Special Prosecutor for Fatal Police Shooting at Walmart*, REUTERS (Aug. 26, 2014, 2:00 PM), http://www.reuters.com/article/2014/08/26/us-usa-ohio-shooting-police-idUSKBN0GQ1U420140826.

[250] Sheila McLaughlin, *Family of Man Shot at Wal-Mart "Disgusted,"* CINCINNATI.COM (Sept. 25, 2014, 7:24 PM), http://www.cincinnati.com/story/news/courts/2014/09/21/grand-jury-convenes-beavercreek-walmart-police-involved-shooting-john-crawford-iii/16030327/.

[251] Ohio only has one law making it illegal to carry a weapon concealed and without a permit. *See* OHIO REV. CODE § 2923.11-12 (2013). Yet John Crawford was shot dead for holding a pellet gun that had been sitting on the shelf for shoppers to buy. McLaughlin, *supra* note 250.

[252] Thomas Gnau, *Officer: "I Fired Two Shots Center-Mass at (John Crawford III)"*,

up when, upon arriving at the store, they did not observe or hear any gunfire, nor did they observe any shoppers or bystanders screaming, running out of the store, or otherwise expressing concern about Crawford.[253] There is no record of what these officers discussed on their way to Wal-Mart after hearing that a Black man was seen in the store pointing a gun at people, but what one of them told investigators after the shooting may provide a hint: "I knew one thing, and that was there was no way we could allow him to get out."[254]

### 5. *The police shooting of Tamir Rice*

On November 22, 2014, a twelve-year-old Black boy was playing with a toy gun in a city park in Cleveland, Ohio.[255] Someone called 911 and reported that there was a guy in the park pointing a gun at people, but told the dispatcher twice that the gun was "probably a fake" and the suspect was "probably a juvenile."[256] Two Cleveland police officers responded, and one of them jumped out of the squad car and shot the boy twice within approximately 1.5 seconds of their arrival.[257] Tamir Rice died the next day.[258]

On the day of the shooting, Cleveland police representatives told the press the officers' account of what led to the shooting:

> A rookie officer and a 10-15 year veteran pulled into the parking lot and saw a few people sitting underneath a pavilion next to the center. The rookie officer saw a black gun sitting on the table, and he saw the boy pick up the gun and put it in his waistband . . . The officer got out of the car and told the boy to put his hands up. The boy reached into his waistband, pulled out the gun and the rookie officer fired two shots.[259]

At the time this article is being written, the investigation into the shooting of Tamir Rice is still pending. Already it is clear, however, that

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DAYTON DAILY NEWS, http://www.daytondailynews.com/news/news/local/officers-describe-moments-before-john-crawford-sho/nhhft/ (last updated Oct. 13, 2014, 1:02 PM).

[253] *Id.*

[254] *Id.*

[255] David Knowles, *Police Shot Tamir Rice Immediately, Despite Warning Gun Was 'Probably Fake'*, BLOOMBERG (Nov. 26, 2014, 11:35 AM), http://www.bloomberg.com/politics/articles/2014-11-26/cleveland-police-shot-tamir-rice-immediately-despite-warning-toy-gun-was-probably-fake.

[256] *Id.*

[257] *Id.*

[258] McCarthy, *supra* note 7.

[259] Cory Shaffer, *Cleveland Police Officer Shoots 12-Year-Old Boy Carrying BB Gun*, CLEVELAND.COM, http://www.cleveland.com/metro/index.ssf/2014/11/cleveland_police_officer_shoot_6.html (last updated Nov. 23, 2014, 1:57 PM).

the officers' initial story does not match up with a video of the shooting. Similar to the officers involved in the shootings of Levar Jones and John Crawford, the officers involved in Tamir's shooting evidently were not aware that there was a video of the shooting when they told their horror story of a scary Black male who would not obey their commands after being told three times to put his hands up, and who appeared to be drawing a gun.[260] The surveillance video shows that Rice was not seated at a table with another person as the police reported; he was by himself.[261] The video also showed that the officer shot Tamir less than two seconds after pulling up in the squad car, making it virtually impossible for him to have told Tamir to put his hands up three times.[262] Furthermore, the video makes clear that Tamir did not pull the air gun out of his waistband or brandish it, as reported by the officers.[263]

Within two days of shooting Tamir, but before the video had been made public, the media started running stories about Tamir's father, who had a criminal history of domestic violence.[264] Perhaps the intended message was that Tamir might still be alive if he had better parents.[265] In any event, it undoubtedly made it easier to believe the officers' incorrect description of Tamir's actions at the time of the shooting.

According to the police version of Tamir's shooting, a menacing Black man ignored three commands to put his hands up and was about to draw his

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[260] *Id.*

[261] McCarthy, *supra* note 7.

[262] *Id.*

[263] *Id.* Two other significant issues surround the shooting as well. First, officers waited four minutes to deliver first aid to Tamir after shooting him. *See* Brandon Blackwell, *Cleveland Police Officers Waited Minutes To Give First Aid to Tamir Rice,* CLEVELAND.COM (Nov. 26, 2014, 3:50 PM), http://www.cleveland.com/metro/index.ssf/2014/11/cleveland_police_officers_wait.html. Secondly, Officer Loehmann was previously employed by another police department that was prepared to release him but allowed him to resign first. An Independence police official had "questioned Loehmann's ability to handle the duties of a police officer after an emotional breakdown during firearms training and other incidents that caused concern for his superiors." Questions remain as to why the Cleveland Police Department never looked at Loehmann's Independence personnel file and his fitness for duty. Adam Ferrise, *Cleveland Police Never Reviewed Independence Personnel File Before Hiring Officer Who Shot Tamir Rice*, CLEVELAND.COM, http://www.cleveland.com/metro/index.ssf/2014/12/cleveland_police_never_reviewe.html (last updated Dec. 4, 2014, 12:28 PM).

[264] Brandon Blackwell, *Tamir Rice's Father Has History of Domestic Violence,* CLEVELAND.COM, http://www.cleveland.com/metro/index.ssf/2014/11/tamir_rices_father_has_history.html (last updated Nov. 28, 2014, 11:05 PM).

[265] *See id.* (stating that an update to the article was added to give insight into the motivation to investigate his parent's background and that people from across the region have been asking whether Rice grew up around violence).

weapon, presumably to kill the police officers.[266] Had it not been for the videotape, many in the community may have felt sorry for Tamir but believed that the officer had no choice but to shoot.

## V. CONCLUSION

Each shooter in the above-described shootings of unarmed Black males made a split-second decision that was influenced by implicit racial bias. Fear was magnified to some degree because the victims were Black. They probably looked older than they actually were, bigger and stronger than they actually were, and more menacing than they actually were. The legal system perpetuates this bias when judges and juries agree that the shooter's impressions and fears were reasonable under the circumstances.

Implicit bias has little to do with a person's explicit values and beliefs. Because implicit bias is subconscious, it can produce actions that are totally inconsistent with explicit attitudes—and take a great deal of effort and time to overcome.[267] If implicit racial bias in police shootings is to be minimized, there must be increased focus on police training, jury education, and collaboration between police departments and their Black communities.

Police officers must learn that implicit racial bias has little to do with explicit racial bias. That is, they can be good people with the very best of explicit intentions and still be strongly influenced—especially in stressful situations—by implicit racial bias. Additionally, police should undergo significantly more shoot/don't-shoot training. Research shows that such training can reduce implicit shooter bias.[268]

The justice system must also be better equipped to provide a fair, unbiased outcome in each police shooting case. To better accomplish this, judges could allow attorneys to *voir dire* potential jurors on implicit racial bias. As evidenced by jurors' comments following their verdict in the Rodney King case,[269] such training could mean the difference between an acquittal and a conviction. Perhaps judges should even allow jurors to take the IAT when undergoing orientation, so jurors are more aware of their

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[266] *See* Shaffer, *supra* note 259; *see also* McCarthy, *supra* note 7.

[267] *See* Wilson et al., *supra* note 67, at 121.

[268] E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180, 183 (2005). Law enforcement officers in this study participated in a shooter simulation similar to the one used by Correll. Although they mistakenly shot unarmed Black suspects more than unarmed White suspects at first, the racial bias was completely eliminated after extensive practice with the program. One explanation for such an outcome may be that by bringing attention to the implicit bias, the officers place greater focus on their explicit, unbiased attitudes, thus overcoming the subconscious bias.

[269] Sipchen, *supra* note 191.

implicit biases. Judge Mark Bennett authored an excellent article concerning this issue.[270]

Officers' productive interactions with Blacks outside of the work environment can also play a significant role in overcoming implicit racial bias.[271] This is especially significant as it relates to police officers whose exposure to Blacks is currently limited primarily to negative encounters they experience while on the job.[272] It is both problematic and dangerous for an officer's experience with Blacks to be limited to inherently stressful, perhaps even hostile situations, as these officers may be conditioned to have negative expectations of all Black males.[273]

In an effort to combat negative assumptions about all Black suspects, it has been suggested that police departments make an effort to increase their involvement in uplifting community events,[274] such as neighborhood block parties or community forums. This would allow for greater opportunities for police to enjoy positive experiences with Blacks in their neighborhoods. Such involvement might gradually combat racial bias. It is crucially important that police officers and community members are comfortable interacting with each other, and that they see each other's humanity.

Law enforcement and Black communities must learn how to "see each other." This cannot come simply from reading books or watching TV shows like "Law and Order,"[275] or even compelling productions such as "Roots,"[276] but by developing meaningful relationships in the communities in which they live and work. Everyone benefits when police take the time and make the effort to "see" the people they have vowed to protect and serve, and Black communities make the time and the effort to "see," and to appreciate the service and protection provided by the police.

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[270] *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010). Bennett asserts that everyone involved in the criminal justice legal system should be educated on implicit racial bias and required to take the IAT to better understand the issue of how race automatically plays a critical role in many cases and jury decisions. He has even created PowerPoint slides that he allows attorneys to use in helping to educate potential jurors about implicit racial bias and "shooter bias" studies.

[271] Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers' Automatic and Controlled Race-Based Responses to Criminal Suspects*, 28 BASIC & APPLIED SOC. PSYCHOL. 197 (2006).

[272] *Id.*

[273] *Id.* at 197-198.

[274] *Id.* at 198.

[275] LAW & ORDER (NBC, 1990-2010).

[276] ROOTS (ABC, 1977).

The changes implemented in Cincinnati under the Collaborative Agreement provide a good model for lasting reform in any city.[277] Two of the most important goals of the Collaborative were police officers and community members becoming proactive partners in problem solving, and greatly improved relationships of respect, cooperation, and trust within and between police and their communities.[278]

After the 2001 riots in Cincinnati, as part of the Collaborative process, stakeholders from the community were surveyed, including the police and their spouses. Uniformly, the citizens of Cincinnati expressed their desire to see the parties design police and community programs that would "promote positive interaction between the police and the public,"[279] such as Community Problem-Oriented Policing ("CPOP").

The Collaborative reforms were implemented in Cincinnati slightly more than 10 years ago.[280] After the much more recent riots and protests of 2014, the media revisited the Collaborative and the City of Cincinnati to see if that process and agreement had produced any lasting results.[281] In describing how Cincinnati police changed after the Collaborative, Former Cincinnati Police Chief Tom Streicher said,

> There's no one single thing you can point to. There's an improved approach to how we conduct business and it starts with training. We've continued to ask ourselves: Even if an action is right, is there a better way to do business?[282]

The Cincinnati police department now boasts fewer police shootings and greater cultural competency.[283] Officers are now trained in low-light situations, like the alley where Timothy Thomas died.[284] There also have been changes to the department's foot-pursuit policy, and officers now carry, and receive training in the use of tasers as an alternative to guns.[285]

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[277] *See* Jane Prendergast, *2001 Riots Led to Top-Down Change for Cincinnati Police*, THE CINCINNATI ENQUIRER (Apr. 3, 2011, 2:02 PM), http://usatoday30.usatoday.com/news/nation/2011-04-03-cincinnati-riots-anniversary_N.htm.

[278] While the goals, process, and implementation of the Collaborative are too extensive to discuss in this article, I mention them briefly to show that the solutions have worked in Cincinnati and can be used as a model for the law enforcement and communities throughout the entire nation. *See In Re Cincinnati Policing, supra* note 52.

[279] *Id.*

[280] Prendergast, *supra* note 44.

[281] They Killed 15 Black Men, *supra* note 57.

[282] Prendergast, *supra* note 44.

[283] *Id.*

[284] *Id.*

[285] *Id.*

The Citizens Complaint Authority reviews all use-of-force cases, and complaints against officers have decreased.[286]

These positive outcomes from a deliberate and expansive collaboration process and agreement provide hope for the rest of the nation. The way to learn how to see one other is to spend time with one another, and march towards a common goal: safe communities with bias-free policing.[287]

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[286] *Id.*

[287] I owe a great debt of gratitude to University of Hawai'i William S. Richardson School of Law Dean Avi Soifer and the entire Richardson 'ohana for giving this disbarred lawyer another opportunity to use my training and experience to serve others. I also am indebted to the Hawai'i and Ohio Lawyers Assistance Programs for assistance in my recovery and allowing me to assist other recovering addicts and alcoholics. A special thanks goes to Professors Hazel Beh and Randall Roth, colleagues who commented extensively on early drafts of this article, and to law student Sharon Paris Cacurak, who along with my daughter Kirby Lynn Lawson, provided excellent research and editing assistance. Finally, I want to thank the University of Hawai'i Law Review for encouraging this old trial lawyer to organize his thoughts and experiences on such an important topic, and for their superb assistance. As detailed in this article, I now believe that police shootings of unarmed Black males generally occur because of implicit racism that is deeply imbedded in almost all of us. Hopefully, by better understanding the science of implicit bias, we can all "get along" on a much higher level and develop better and more effective police-community relations.

# "Language Is Never About Language"[1]: Eliminating Language Bias in Federal Education Law to Further Indigenous Rights

Breann Nu'uhiwa[2]

> Language is power, life and the instrument of culture, the instrument of domination and liberation.
>
> –Angela Carter[3]

Before infants utter their first words or learn to assign meaning to speech, they develop preferences for those who speak their native languages in native accents.[4] As children move into the preschool environment, language differences begin to guide their inferences about social group differences, and they start to "consider language to be an index of the kind of person someone is."[5] By the time children reach kindergarten, language preferences factor so prominently into social preferences that they generally "trump" racial preferences in guiding friendship choices.[6] In adolescence

[1] *See* Associated Press, *Debate over English About More than Words: Cultural Fears, Search for Cultural Identity Seen at Heart of Language Bills*, LIFE ON NBCNEWS.COM (May 20, 2006, 5:41 PM), http://www.nbcnews.com/id/12889022/ns/us_news-life/t/debate-over-english-about-more-words/#.VNS2R0tsClI.

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[3] THE ROUTLEDGE LANGUAGE AND CULTURAL THEORY READER 221 (Lucy Burke et al. eds., 2000) (citation omitted).

[4] *See* Katherine D. Kinzler, et al., *The Native Language of Social Cognition*, 104 PROC. NAT'L. ACAD. SCI. 12577, 12579 (2007) (finding that five-month-old infants preferred looking at a speaker of their native language with a native accent rather than a speaker of a foreign language or with a foreign accent).

[5] Lawrence A. Hirschfeld & Susan A. Gelman, *What Young Children Think About the Relationship Between Language Variation and Social Difference*, 12 COGNITIVE DEV. 213, 219 (1997).

[6] *See* Katherine D. Kinzler et al., *Accent Trumps Race in Guiding Children's Social Preferences*, 27 SOC. COGNITION 623 (2009) (discussing experiments exploring the effect of speakers' accent, language, and race on children's social preferences).

and adulthood, these language preferences crystallize into prejudices, and individuals come to correlate language traits with personality characteristics such as intelligence, warmth, honesty and friendliness.[7]

Behavioral research has barely begun to investigate the extent to which these language biases function implicitly, but initial studies indicate that implicit biases do prompt negative immediate responses to language differences.[8] In particular, research is beginning to show that in the context of implicit language biases, "irrespective of [specific] nationality attributions . . . *foreignness* [or otherness] is a key component of the in-group/out-group distinction."[9]

Whether by coincidence or design, federal law and policy have consistently capitalized on and reinforced implicit language biases and their attendant in-group/out-group distinctions to further English language hegemony in the name of "national unity." During the formative years of the union, the United States promoted the English language as a purported means of creating "unity" and a "community of feeling" between Native Americans and the non-Native American majority. For example, in the late 1800s, the Commissioner of Indian Affairs asserted that:

> ["True Americans"] should understand that by the spread of the English language will [the United States'] laws and institutions be more firmly established and widely disseminated. Nothing so surely and perfectly stamps upon an individual a national characteristic as language. . . . No unity or community of feeling can be established among different peoples unless they are brought to speak the same language, and thus become imbued with like ideas of duty.[10]

Decades later, the United States repurposed the same arguments for use in the immigration context, claiming that:

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[7] *See* Wallace E. Lambert et al., *Evaluational Reactions of Jewish and Arab Adolescents to Dialect and Language Variations*, 2 J. PERSONALITY & SOC. PSYCHOL. 84 (1965); Wallace E. Lambert et al., *Judging Personality Through Speech: A French-Canadian Example*, 16 J. COMM. 305 (1966); Wallace E. Lambert et al., *Evaluational Reactions to Spoken Languages*, 60 J. ABNORMAL & SOC. PSYCHOL. 44 (1960); Mosche Anisfeld et al., *Evaluational Reactions to Accented English Speech*, 65 J. ABNORMAL & SOC. PSYCHOL. 223 (1962); Rene M. Dailey et al., *Language Attitudes in an Anglo-Hispanic Context: The Role of the Linguistic Landscape*, 25 LANGUAGE & COMM. 27 (2005).

[8] *See* Andrew J. Pantos & Andrew W. Perkins, *Measuring Implicit and Explicit Attitudes Toward Foreign Accented Speech*, 32(1) J. LANGUAGE & SOC. PSYCHOL. 3, 12 (2012).

[9] *Id.* (emphasis in original).

[10] 2 DEP'T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 19-20 (1887).

> [Equality] is predicated upon the [immigrant's] becoming in very fact an American, and nothing but an American .... Any man who says he is an American but something else also, isn't an American at all. We have room for but one flag, the American flag .... We have room for but one language here and that is the English language . . . and we have room for but one, soul [sic] loyalty, and that loyalty is to the American people.[11]

These arguments are still used in the contemporary immigration context by proponents of "Official English" who seek to "declare English as the official language of the United States"[12] in order to "reinforce America's *historic* message to new immigrants—that we expect them to learn English as the first step in their assimilation."[13]

Forced linguistic assimilation and official language designations are not, however, sociopolitically benign acts. As Professor Steven May explains, "those who advocate the 'benefits' of English largely fail to address the relationship between English and wider inequitable distributions and flows of wealth, resources, culture and knowledge."[14] In reality, when the establishment promotes English language dominance and continuously reconstitutes structural and cultural inequalities between English and other languages, it "legitimate[s], effectuate[s] and reproduce[s] an unequal division of power and resources (both material and immaterial) between groups that are defined on the basis of language."[15] The formal privileging of English over other languages places English speakers at an advantage in "accessing and benefiting from the civic culture of the nation-state," which empowers them to control "the crucial authority in the areas of administration, politics, education and the economy."[16] French scholar

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[11] Letter from Theodore Roosevelt, President, United States of America, to Richard K. Hurd, President, American Defense Society (Jan. 3, 1919) (on file with the Library of Congress).

[12] *See, e.g.*, English Language Unity Act of 2013, H.R. 997, 113th Cong. (2013).

[13] WHAT IS OFFICIAL ENGLISH?: IT'S NOT "ENGLISH ONLY", https://www.proenglish.org/official-english/english-only.html (last visited Feb. 6, 2015) (emphasis added).

[14] Stephen May, LANGUAGE AND MINORITY RIGHTS, ETHNICITY, NATIONALISM AND THE POLITICS OF LANGUAGE 228 (2008).

[15] *Id.* at 215 (citations omitted) (describing the process as "English linguistic imperialism" or, more broadly, "linguicism").

[16] *Id.* at 161. A number of legal scholars have explored the discriminatory impacts of the sociolinguistic phenomenon described by Professor May. *See, e.g.*, William Lynch, *A Nation Established by Immigrants Sanctions Employers for Requiring English to Be Spoken at Work: English-Only Work Rules and National Origin Discrimination*, 16 TEMP. POL. &

Pierre Bourdieu describes this type of language domination as "symbolic violence" and, invoking the same theme, Professor May explains that the "battle for nationhood" is, in essence, a "battle for linguistic and cultural hegemony."[17]

The battle for nationhood through linguistic and cultural hegemony often begins in the field of education because "education—and, crucially, the language(s) legitimated in and through education—plays a key role in establishing and maintaining the subsequent cultural and linguistic shape of the nation-state."[18] For indigenous peoples, especially, "education has now come to be seen as a key arena in which indigenous peoples can reclaim and revalue their languages and cultures."[19] Yet in the United States, the process of reclaiming and revaluing indigenous language and culture through education is currently being impeded by biased federal education laws and policies that were built upon and continue to promote principles of English language dominance. Immediate, concerted efforts must be made to debias these laws and policies because language revitalization is an issue of cultural survival and political sovereignty for indigenous nations.

This Article employs the current campaign for fair and equitable standardized testing of Hawaiian Language immersion students as a vehicle for understanding the relationship between language and nationhood and exploring the possibility of reclaiming indigenous culture and sovereignty through the debiasing of federal education law and policy.

Part I of this Article explains why "language is never about language,"[20] and "language and justice connect" in the context of Native Hawaiian nationhood.[21] Specifically, Part I examines the relationship between the language shift toward English away from ʻōlelo Hawaiʻi,[22] the indigenous language of the Native Hawaiian people between the 18th and 19th

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CIV. RTS. L. REV. 65 (2006); Susan Serrano, Comment, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 U. HAW. L. REV. 221 (1997); Wendy Olson, *The Shame of Spanish: Cultural Bias in English First Legislation*, 11 CHICANO-LATINO L. REV. 111 (1991).

[17] *See* May, *supra* note 14, at 132.

[18] *See id.*

[19] *See id.* at 302.

[20] Associated Press, *supra* note 1 (quotation omitted).

[21] Colleen M. Fitzgerald, *Remembering Martin Luther King, Jr: Social Justice Is Linguistic Justice*, HUFFPOST IMPACT (Jan. 20, 2015, 10:59 AM), http://www.huffingtonpost.com/colleen-m-fitzgerald/remembering-martin-luther_2_b_6501778.html.

[22] Words in ʻōlelo Hawaiʻi (the Hawaiian Language) are not italicized in this Article because ʻōlelo Hawaiʻi is not a foreign language, but rather, is the indigenous language of Hawaiʻi.

centuries, and the contemporaneous "sovereignty shift" away from Native Hawaiian self-governance.

Part II explores the legal action taken by the governments of the so-called Republic of Hawai'i and Territory of Hawai'i to establish English language hegemony in Hawai'i after the illegal overthrow of the Hawaiian Kingdom. This part pays specific attention to the manner in which language laws were used to suppress all non-English languages in Hawai'i in furtherance of an assimilationist agenda, thereby suppressing the legitimate claims of 'ōlelo Hawai'i speakers to indigenous rights beyond those afforded other disenfranchised minority groups. This part further explores how that framework continues to impede Native Hawaiian efforts to express self-governance and self-determination in the present.

Part III analyzes the ongoing efforts of the Native Hawaiian community, Hawaiian language immersion community, and Hawai'i state government to debias federal education law and policy to further Native Hawaiian language rights. In particular, Part III examines the current efforts to correct English-biased requirements in the federal Elementary and Secondary Education Act ("ESEA") that prevent fair and accurate standardized testing of students learning in 'ōlelo Hawai'i as a medium.

Part IV posits that there is a close relationship between the campaign to debias the ESEA in furtherance of Native Hawaiian language rights and the future of Native Hawaiian political sovereignty. In doing so, Part IV explains the connection between political sovereignty and cultural sovereignty and analyzes the role that 'ōlelo Hawai'i may play in the reclamation of both cultural and political sovereignty by the Native Hawaiian people.

## PART I

> The role that native language repression played in the political oppression of Native Americans and the federal expansion into Indian-held land . . . . is a particularly brutal history, but one that all language minorities need to be aware of if they want to know the true nexus between language, politics, and power.
>
> -Sandra Del Valle[23]

[23] SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES 6-7 (2003).

Between 1778 and 1978, Native Hawaiians endured the gradual attrition of their mother tongue at the hands of those who established and reinforced English as the primary and "official" language of Hawai'i.[24] Concurrently, Native Hawaiian political sovereignty was steadily appropriated until the community was left without even the limited measure of recognized self-governing power exercised by other indigenous communities living within what is now the United States.[25] It is self-evident that a connection exists between these two processes. In order to understand this connection, however, one must first examine the processes of language shift and sovereignty shift and the historical, political, and socioeconomic circumstances that triggered and advanced those processes in Hawai'i.

### *A. Understanding Language Shift*

"Language shift" describes the transition of an individual or a speech community from the habitual use of one language to the habitual use of another.[26] The typical result of this process is the loss or attrition of the first language, which in extreme circumstances can ultimately result in the death of the first language.[27] A prime example of this phenomenon is the language death of one third of the Native American languages spoken in the United States as the direct result of forced language shift away from indigenous languages to English.[28]

According to Professor Joshua Fishman, language shift occurs "where the stresses and strains of cross-cultural contact have eroded the ability of the smaller and weaker to withstand the stronger and larger."[29] In order to

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[24] *See infra* notes 56-88, 85-137, 140-193 and accompanying text.

[25] *See* discussion *infra* notes 69-74, 85-193 and accompanying text.

[26] SANDRA D. KOURITZIN, FACE[T]S OF FIRST LANGUAGE LOSS 12 (1999) (internal citations omitted).

[27] *See id.* at 13. The initial stage of the shift is called "assimilation"—the process through which the speech community of the original language becomes bilingual in the second language, and gradually shifts its allegiance to the second language. When the assimilation stage is so complete that the linguistic community ceases to use the original language, it is called language death. Professor Kouritzin explains that the term "language death" is used almost exclusively in reference to "those languages spoken by indigenous minority-language communities that, when they are no longer used as the languages of schooling, bureaucracy, or government, lose their 'primary language' function." *Id.*

[28] *See, e.g.*, ATLAS OF THE WORLD'S LANGUAGES IN DANGER, http://www.unesco.org/languages-atlas/index.php?hl=en&page=atlasmap (last visited Mar. 12, 2015) (search "United States" in the country field).

[29] JOSHUA A. FISHMAN, REVERSING LANGUAGE SHIFT: THEORETICAL AND EMPIRICAL FOUNDATIONS OF ASSISTANCE TO THREATENED LANGUAGES 55 (1991).

facilitate understanding of this process, Professor Fishman developed what is known among sociolinguists as the Graded Intergenerational Disruption Scale (GIDS).[30] The GIDS measures language interference and indicates the prospects for intergenerational continuity and language maintenance.[31] A high rating on the GIDS corresponds to a high level of interference and dim prospects for maintenance and continuity (e.g., Stage 8 languages suffer from the highest level of interference and are, therefore, in danger of extinction), while a low rating on the GIDS corresponds to a low level of interference and promising prospects for maintenance and continuity (e.g., Stage 1 languages have experienced a low level of interference and, as a result, are likely to thrive across generations).[32]

A fundamental tenet of the GIDS is that the measure of interference with a language can be determined by evaluating the level of language use in the major domains of society (e.g., government, education, work, media).[33] Stage 1 languages are used in higher level educational, occupational, governmental, and media efforts without the added safety provided by political independence.[34] Stage 2 languages are used in lower governmental services and mass media, but not in the higher spheres of either.[35] Stage 3 languages are used in the lower work sphere outside the speaking community, and Stage 4 languages are used in lower education that meets the requirements of compulsory education laws.[36] Stage 5 languages enjoy literacy in homes, schools, and the general community, but do not enjoy reinforcement outside the community.[37] Stage 6 languages are limited to informal, spoken interaction between and within all three generations of the family, and Stage 7 languages are spoken by socially integrated and ethnolinguistically active individuals beyond their child-bearing years.[38] Stage 8 languages are used mostly by socially isolated elders and need to be reassembled from their mouths and memories and taught to demographically unconcentrated adults.[39]

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[30] *See id.* at 87.
[31] *See id.*
[32] *See id.* at 87-90.
[33] *See id.* at 87-107.
[34] *Id.* at 107.
[35] *Id.* at 105.
[36] *Id.* at 98, 103.
[37] *Id.* at 95.
[38] *Id.* at 89, 92.
[39] *Id.* at 88.

### *B. Conceptualizing Sovereignty Shift*[40]

Language shift is, at its core, the flow of favor and privilege between two languages.[41] In many ways, the flow of political power and authority between indigenous peoples and colonial powers in the United States mirrors this process. Namely, over the course of history, political power and authority have flowed away from indigenous peoples toward colonial powers, causing detriment to the indigenous communities and, in some extreme cases, resulting in the extinction of the communities.[42] Likewise, there have been moments where political power and authority have been repatriated to indigenous communities, mirroring the process of reverse language shift.[43] Accordingly, the flow of political power and authority between indigenous peoples and nation-states can be understood as a process of "sovereignty shift" between those entities.[44]

Like language shift, sovereignty shift can be viewed as a spectrum comprised of certain "stages" of political sovereignty interference that correspond to levels of political autonomy exercised by indigenous communities. In their treatise, *American Indian Law: Native Nations and the Federal System*, Professors Robert N. Clinton, Carole E. Goldberg, and Rebecca Tsosie describe various models of political relationships between Indian tribes and the United States federal government.[45] Although these models are discussed exclusively in the context of the history of the "tribal⇔federal relationship," they provide an excellent way to think about the stages of sovereignty shift. For example, on the high end of the sovereignty shift scale, one might find the Self-Determination Model,

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[40] Sovereignty is a nebulous concept that encompasses many different types of power and authority. What an indigenous community understands about its inherent rights to self-government and self-determination often cannot be fully articulated, much less objectively measured. Accordingly, the discussions of "sovereignty shift" throughout this Article are purposely limited to the shift of measurable "political sovereignty" (i.e., controlling authority supported by an articulated right and recognized by an external entity).

[41] Flow away from the first language to a second language is considered language shift, while the flow away from the second language back to the first language is considered reversing language shift. *See, e.g.*, FISHMAN, *supra* note 29.

[42] *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 19-49 (5th ed. 2007) (explaining how political sovereignty has flowed between Indian tribes and the United States federal government through the Colonial Period, Confederation Period, Trade and Intercourse Act Era, Removal Period, Reservation Policy, Allotment Period and Forced Assimilation, Indian Reorganization Act Period, Termination Era, Self-Determination Era, and the present).

[43] *See id.*

[44] *See supra* text accompanying note 40.

[45] *See* CLINTON ET AL., *supra* note 42, at 11-14.

according to which each sovereign totally controls its lands, its citizens and its destiny, and its political relationships are negotiated on the basis of mutual respect, comity, equality, and consent.[46] Moving slightly away from the high end of the scale, one might find the Treaty Federalism Model, according to which the political autonomy and sovereignty of the community is still recognized and protected, but is slightly diminished in exchange for guarantees of protection and other perceived benefits.[47] In the Treaty Federalism Model, the agreement to align with another entity is consensual, and any resulting loss of sovereignty results from a freely made choice.[48] Moving even farther down the sovereignty scale, one might find the Colonial Federalism Model, according to which communities are treated like states of a union (or something less) and retain limited sovereignty subject to the supervening power of another external entity, irrespective of their agreement or consent.[49] At the very low end of the scale, one might find the Colonial Domination Model, according to which a colonial government seeks to impose its policies on the indigenous community and to directly govern the group.[50] At the heart of the Colonial Domination Model is an expectation that the community will eventually be disbanded, its sovereignty will be terminated, and its members will assimilate into the majority culture, becoming completely subject to the colonial authority.[51]

In addition, just as the "health" of a language in the language shift context is gauged by evaluating the level of language use in the major domains of society, the strength of an indigenous community's political sovereignty can be gauged by measuring the community's exercise of autonomy and authority in the major domains of society. For example, as explained in detail below, the gradual erosion of Native Hawaiian autonomy and authority in the economic, education, and government domains of Hawaiian society marked the progression of a sovereignty shift away from Native Hawaiian self-determination toward colonial domination.[52] This sovereignty shift coincided and was inextricably intertwined with the steady supplanting of ʻōlelo Hawaiʻi by the English language.

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[46] *See id.* at 11.

[47] *See id.* at 11-12.

[48] *See id.*

[49] *See id.*

[50] *See id.* at 13-14.

[51] *See id.* at 14.

[52] *See* discussion *infra* notes 58-74, 85-193 and accompanying text.

### *C. Language and Sovereignty Shift in the Economic Domain of Hawaiian Society*

Although Britain's Captain James Cook was likely not the first foreigner to happen upon the Hawaiian Islands,[53] his impact on 'ōlelo Hawai'i and Native Hawaiian political sovereignty eclipsed that of any European who may have preceded him. On the eve of Captain Cook's arrival, Hawai'i was a monolingual society living in accordance with "an intricate and interdependent [land tenure] arrangement based on agricultural needs and hierarchical structure."[54] Following Captain Cook's arrival, Hawai'i became an unwitting player in the international mercantile economy and burgeoned into a busy port of call for foreign ships engaged in the fur, china, sandalwood, and whaling trades.[55] Hawai'i's "new focus on producing items for a monetary economy disrupted the balance ['of joint responsibility and accountability' between the ali'i (chiefs) and maka'āinana (commoners)] that had existed in pre-contact Hawaiian society."[56] It also prompted language shift away from 'ōlelo Hawai'i by privileging the English language in the society's newly-created economic domain.[57]

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[53] *See* NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 18 (2004). Silva explains that Samuel Kamakau tells:

> [A] different history, whose sources are the ancient mele and mo'okū'auhau (genealogies). According to those recordings of the past, which are epistemologically valid to Kamakau and other Kānaka, Cook was *not* the first white foreigner to arrive in Hawai'i nei. Kamakau contests at length the story that Cook and company were 'nā haole makamua ma Hawai'i nei' (the first haole in Hawai'i).

*Id.* (emphasis in original).

[54] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 11 (2008) (citation omitted).

[55] *See* DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA 30 (2007); VAN DYKE, *supra* note 54, at 21; *see also* SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW 22 (2000).

[56] MCGREGOR, *supra* note 55, at 30; SILVA, *supra* note 53, at 26; VAN DYKE, *supra* note 54, at 11, 21.

[57] Professor Fishman explains that a:

> [M]ajor dimension that characterizes [language shift] is the sociocultural context in which [the dying language] is being realized or implemented. Such contexts can be conceptualized . . . as all of the interactions that are rather unambiguously related (topically and situationally) to one or another of the major institutions of society: e.g. the family, the work sphere, education, religion, entertainment and the mass media, the political party, the government, etc. These are referred to as 'domains'.

FISHMAN, *supra* note 29, at 44 (citation omitted).

### *1. Language shift in the economic domain*

The privileging of English, and attendant marginalization of ʻōlelo Hawaiʻi, in the economic domain of 19th century Hawaiian society had a profound impact on ʻōlelo Hawaiʻi's socio-economic utility vis-à-vis English and, thus, its prospects for maintenance and intergenerational continuity. As Professor Salikoko S. Mufwene explains, language loss is a direct consequence of the "external ecology" surrounding a language (i.e., the socio-historical setting in which the language is spoken), and socio-economic factors often prompt linguistic communities to abandon their languages.[58] According to Professor Mufwene's reasoning, the dominant languages of the economic market endanger other languages because they lure speakers away with promises of socio-economic advancement and opportunity that other languages cannot offer.[59] In the context of indigenous language loss within the United States, specifically, Professor Mufwene describes this phenomenon as follows:

> [T]he current loss of Native American languages is undoubtedly a continuation of the same process that led earlier, or concurrently, to the death of European languages other than English, e.g., Dutch in New Netherland (New Jersey and New York) or French in Maine, and of African languages. . . . With English establishing itself as the language of the economic machinery and of the colonial and post-colonial administrative structure, everybody else that functioned or was involved within the evolving system (including the African slaves) had to learn it. Gradually the prevalence of English as a lingua franca and ultimately as a vernacular was at the expense of those who were integrated, willfully or not, in the system. . . . [W]e may argue that English has spread among Native Americans and endangered their ancestral languages not necessarily because of school systems which have dispensed knowledge in English but because of a socio-economic system in which it has been increasingly necessary to command English in order to function in the work place and interact with the larger population.[60]

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[58] *See* Salikoko S. Mufwene, *Language Endangerment: What Have Pride and Prestige Got to Do with It?*, *in* WHEN LANGUAGES COLLIDE: PERSPECTIVES ON LANGUAGE CONFLICT, LANGUAGE COMPETITION, AND LANGUAGE COEXISTENCE 324, 340-41, 342 n.2 (Brian D. Joseph et al. eds., 2003).

[59] *See id.* at 331-32.

[60] *Id.* at 329, 331-32.

Consonant with Professor Mufwene's logic, the initial development of an English-based economic system in Hawai'i played a significant role in the spread of English and the marginalization of 'ōlelo Hawai'i in Hawaiian society.

As Hawai'i became increasingly involved in the international mercantile economy, a small transient community of bilingual speakers of English and 'ōlelo Hawai'i formed around the fur trade.[61] Shortly thereafter, the sandalwood trade brought a resident merchant community of approximately 300 English-speaking Americans to Honolulu, and "[t]he whaling trade and the incipient agricultural and grazing industries brought in a white, or Haole, population which early reached a size sufficient to be of linguistic importance in Honolulu and perhaps in other centers" in Hawai'i.[62] It was not long before astute Native Hawaiians interested in economic advancement made the connection "between the English language and the power and material wealth displayed by those who spoke it."[63] As Professor Albert Schütz observes, "[t]he Hawaiians may have called English *namu haole* 'foreign gibberish', but they were quick to recognize the advantages of knowing how to use it."[64]

Native Hawaiian perceptions regarding the socio-economic utility of English likely caused some to abandon their ancestral language out of "practicality," pursuant to "the principle of least effort."[65] Additionally, the related perception that 'ōlelo Hawai'i lacked the socio-economic utility of English probably prevented intergenerational transmission of 'ōlelo Hawai'i in certain demographic groups. Because adults are more likely to transmit languages to their children that they perceive as economically useful or marketable,[66] English may have been perceived as a more desirable language for intergenerational transmission in 18th and 19th century Hawai'i because of the broader access it appeared to provide for economic prosperity.

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[61] JOHN E. REINECKE, LANGUAGE AND DIALECT IN HAWAII: A SOCIOLINGUISTIC HISTORY TO 1935, at 24-25 (Stanley M. Tsuzaki ed., 1969).

[62] *Id.* at 25-26. Reinecke estimates that "as early as 1853 the Haoles comprised nearly 2 percent of the total population of Hawaii." *Id.*

[63] ALBERT J. SCHÜTZ, THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES 340 (1994).

[64] *Id.*

[65] Mufwene, *supra* note 58, at 332.

[66] *See, e.g.*, Scott Palmer, *Language of Work: The Critical Link Between Economic Change and Language Shift*, *in* TEACHING INDIGENOUS LANGUAGES 263, 267 (Jon Reyhner ed., 1997) (asserting that "[s]ince parents are concerned with preparing their children for future life, the language they encourage children to learn will be influenced by their perceptions of what language skills are required to meet life's basic needs").

English's replacement of 'ōlelo Hawai'i in the economic domain of Hawaiian society was the first event of sociolinguistic significance to occur after sustained cross-cultural contact between Native Hawaiians, and foreigners began. It constituted the first interference with the intergenerational continuity and maintenance of 'ōlelo Hawai'i, and it marked the beginning of language shift away from the mother tongue. However, because 'ōlelo Hawai'i was still the primary language of the education and government domains of society,[67] and because it was still protected by political independence,[68] it would have maintained a low rating on the GIDS scale, even after it was marginalized in the economic domain.

### 2. *Sovereignty shift in the economic domain*

The increased involvement of foreign entities in the economic domain of Hawaiian society not only prompted language shift from 'ōlelo Hawai'i to English, it also sparked the beginning of sovereignty shift away from Native Hawaiians. At the time of Captain Cook's arrival in Hawai'i, Native Hawaiians were functioning firmly within the scope of the Self-Determination Model, exercising total control over their lands, resources, and citizenry.[69] When sustained interaction with foreigners began, Native Hawaiians continued to operate within the Self-Determination Model by forming political relationships with foreign nations on the basis of mutual respect and consent.[70]

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[67] *See infra* text accompanying notes 85-140.

[68] *See infra* text accompanying notes 85-140.

[69] VAN DYKE, *supra* note 54, at 11-18 (describing land tenure in Hawai'i on the eve of Western contact). On the eve of Western contact, Hawaiian society was led by the Ali'i (chiefs), who "exercised control and guidance over the 'Āina [(land)] and maka'āinana (the common people, tillers of the soil, or tenant class)." *Id.* at 12 (citation omitted).

> The Ali'i were obliged to manage the Hawaiian social hierarchy in accordance with the wishes of the Akua (gods). Under the careful guidance of spiritual and political advisors, the Ali'i directed the rituals and the flow of mana (spiritual power) to maintain a system that was pono (proper and just).

*Id.* at 15.

[70] Of Native Hawaiians' formation of political relationships in the early period of continuous contact with Europeans, Native Hawaiian historian Samuel Kamakau explained:

> Many foreigners of different races, the red, the black, the white, came in early days to Hawaii. Some were educated and some ignorant. Some came as merchants and traders, others as laborers, and some escaped from ships where they were serving as

However, the domination of Hawai'i's economy by foreign imperial powers who equated their economic influence with a right to assert governing authority made Hawai'i an open target for imperialist overtures.[71] This vulnerability was further exacerbated by Hawai'i's inability, at that time, to assert sovereignty in European or American terms.[72] Given these circumstances, it is hardly surprising that, by the time the first company of missionaries arrived in Hawai'i, Native Hawaiians had already endured two separate attempts by foreign nations (specifically, Great Britain and Russia) to hoist their flags over the islands and divest Native Hawaiians of their political sovereignty.[73]

Luckily, these attempts to divest Native Hawaiians of political sovereignty generally proved unsuccessful—even after the community had lost a significant amount of power in the economic domain—while it continued to assert controlling authority over other major societal domains.[74] Once the education and government domains came under foreign control, however the community's ability to resist appropriation of its political sovereignty by the United States was greatly compromised.

### *D. Language and Sovereignty Shift in the Education and Government Domains of Hawaiian Society*

In addition to mercantilism, Captain Cook also introduced Hawai'i to a variety of other foreign pestilences, such as gonorrhea, syphilis, leprosy, measles, whooping cough, tuberculosis, and ma'i 'ōku'u (crouching disease), which "ravaged the population, culture, and society of ka po'e Hawai'i"[75] (the Hawaiian people). Of the 400,000 to 1,000,000 Native Hawaiians living in Hawai'i at the time of Captain Cook's arrival, approximately 135,000 are believed to have survived the subsequent forty-five years.[76] Professor Noenoe K. Silva describes the post-traumatic stress disorder that resulted from this mass death as follows:

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> sailors. Some were received hospitably by the Hawaiians, taken under the care of chiefs, became favorites, and bequeathed to Hawaii their posterity. Some became advisers to the rulers of the country and worked for its good; others tried to enrich themselves, were proud, and trod the Hawaiians under their feet. The greater number came from the United States of America.

S. M. KAMAKAU, RULING CHIEFS OF HAWAI'I 245 (1961).

[71] *See* MERRY, *supra* note 55, at 36, 77.

[72] *See* VAN DYKE, *supra* note 54, at 4; MERRY, *supra* note 55, at 36.

[73] *See* VAN DYKE, *supra* note 54, at 4.

[74] *See infra* text accompanying notes 85-140.

[75] *See* VAN DYKE, *supra* note 54, at 19-22.

[76] *See* SILVA, *supra* note 53, at 24 (citation omitted).

> Their medicines and their medicine men and women had proven useless. Everything they had believed in had failed. Their ancient world had collapsed . . . from their inability to understand and dispel the disease, guilt was born into them. They had witnessed mass death—evil—in unimaginable and unacceptable terms.[77]

In the wake of the mass death, many Native Hawaiians abandoned their existing system of religious beliefs because they believed that their "akua [(gods)] had failed to protect them."[78] The abandonment created an emptiness that Professor Jon Van Dyke refers to as a "spiritual vacuum."[79] It was into this spiritual vacuum that Protestant missionaries from New England sailed in 1820, carrying with them Christianity, the written word, Western education, and the rule of law, all of which dramatically altered the sociolinguistic state of ʻōlelo Hawaiʻi and the political status of Native Hawaiians.[80]

Although it is difficult to discern the exact motivations behind the Protestant missionaries' decision to leave New England and travel "thousands of miles in small, leaky boats in rough weather to try to change a people,"[81] it is well-established that the intent of their mission to the Hawaiian Islands was to replace Native Hawaiian culture and knowledge with Christian practices and values.[82] This intent was consistent with the objectives of the American Board of Commissioners for Foreign Missions' larger campaign to "civilize," Christianize, and assimilate indigenous

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[77] *See id.* at 27 (quotation omitted).

[78] *Id.* at 30; *see* VAN DYKE, *supra* note 54, at 21-22.

[79] VAN DYKE, *supra* note 54, at 22 (citation omitted).

[80] *Id.* at 22-23.

[81] According to Hiram Bingham's memoir, the missionaries traveled to Hawaiʻi pursuant to the request of a Native Hawaiian named ʻŌpūkahaʻia, also known as Henry Obookiah. SILVA, *supra* note 53, at 31. Reflecting upon the arrival of New Englanders in Hawaiʻi, Sally Engle Merry observes:

> Some of the New Englanders came to do good, others to do well for themselves, and some to do both. But such lines are hard to draw clearly. Consequences were rarely foreseen by those who tried to make changes, and things that now seem self-evident were hardly clear to these people. . . . In many ways, understanding those who came to do good is more challenging than those who came to get rich. . . . The missionaries and lawyers often arrived with ideals of bringing civilization and improving the lot of the Hawaiians, including protecting commoners from the power of the chiefly class. Yet their doing good was premised on categories of personhood, on ideas about the meanings of race and culture, that denigrated those they came to help and their culture.

MERRY, *supra* note 55, at 26.

[82] *See* SILVA, *supra* note 53, at 31.

peoples in America and abroad.[83] Specifically, the Cherokee, Choctaw, Maumee, Osage, Mackinaw, Tuscarora, Seneca, Chickasaw, Stockbridge, Ojibwa, Creek, Pawnee, Abenaquis, and Dakota Indians of the North American continent were evangelized in much the same way as Native Hawaiians—through writing, education, and the establishment of religious law.[84]

#### *1. Language shift in the education and government domains of Hawaiian society*

##### *a. Reduction of 'ōlelo Hawai'i to written form*

The missionaries were aware of the central role that reading and writing played in conversion and assimilation and, for that reason, the first group of missionaries to Hawai'i carried a professional printer and a printing press in tow.[85] At that point in time, 'ōlelo Hawai'i had not yet been reduced to a written form, and one of the first undertakings of the missionaries was to learn to speak 'ōlelo Hawai'i.[86]

In January 1822, the missionaries printed a spelling book in the vernacular.[87] Shortly thereafter, the mission press began printing educational and religious materials in 'ōlelo Hawai'i, including portions of the Bible.[88] It was not long before a Hawaiian printing press was established and legal documents, government papers, historical accounts, and literature began to be produced in the written 'ōlelo Hawai'i.[89] Enthusiasm for epistolary correspondence spread quickly within the Native Hawaiian community, and "formal literacy became almost universal."[90]

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[83] *See* AM. BD. OF COMM'RS FOR FOREIGN MISSIONS, PAPERS OF THE AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS: UNIT 6, MISSIONS ON THE AMERICAN CONTINENTS AND TO THE ISLANDS OF THE PACIFIC 1811-1919, ABC 18-19 (1985).

[84] According to Board correspondence, the missionaries successfully converted the Choctaw and Tuscarora tribes, but were forced to discontinue the majority of their tribal conversion efforts because of the unique challenges posed by the United States federal government's Indian removal policy. *Id.* at ABC 18.3-18.8. *See generally* JOHN A. ANDREW III, FROM REVIVALS TO REMOVAL: JEREMIAH EVARTS, THE CHEROKEE NATION, AND THE SEARCH FOR THE SOUL OF AMERICA (2007).

[85] SILVA, *supra* note 53, at 32.

[86] *See* RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY FROM POLYNESIAN KINGDOM TO AMERICAN STATEHOOD 45 (1976).

[87] *Id.*; REINECKE, *supra* note 61, at 27.

[88] *See* KUYKENDALL & DAY, *supra* note 86, at 45; REINECKE, *supra* note 61, at 27.

[89] REINECKE, *supra* note 61, at 28, 30.

[90] *Id.* at 27, 28, 30.

Professor Lilikalā K. Kame'eleihiwa notes that the ali'i and maka'āinana "were delighted with the *palapala* [(writing)] because it allowed them to extend their great intellectual and poetic traditions."[91] Professor Silva further explains that the written 'ōlelo Hawai'i was of particular interest to the ali'i, who "already knew some of the power of writing" from the handful of Native Hawaiians "who prior to the arrival of the missionaries had learned to read and write English."[92]

Reducing 'ōlelo Hawai'i to written form made the language a better tool for broad and rapid dissemination of missionary teachings. However, the missionaries' crystallization of the previously fluid oral language had significant impacts on the nature of 'ōlelo Hawai'i, including the destruction of certain secret dialects and diminished attention to the continued cultivation and development of the poetic and religious special language.[93] Most significantly, giving 'ōlelo Hawai'i a written corpus dramatically altered Hawaiian society by relocating "truth" from the oral traditions of the people to external documents.[94] This relocation facilitated a paradigm shift within the community as the people came to understand truth as a fixed concept emanating from an external source, rather than a fluid concept emanating from relationships. This paradigm shift prepared Native Hawaiians to accept the notions of natural rights and moral truths, two central tenets of Christianity and the rule of law.

In light of the foregoing, it is clear that the reduction of 'ōlelo Hawai'i to written form was a momentous event in and of itself. In the context of language shift, however, it was even more significant, not because of what it did, but because of what it enabled—Western schooling.

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[91] LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 142 (1992) (emphasis in original).

[92] SILVA, *supra* note 53, at 32 (citation omitted). Two powerful and influential ali'i, in particular, were interested in learning to read and write: Keōpūolani, the highest-ranking ali'i and mother of the mō'ī, and Ka'ahumanu, the kuhina nui (a powerful official who shares executive power with the mō'ī). *Id.*

[93] REINECKE, *supra* note 61, at 29.

[94] *See id.* at 31 (stating that law took on a detached and impersonal character).

### *b. Establishment of Western educational institutions and English-medium schools*

Although it was the ultimate result, it was not the initial intent of the first missionaries in Hawai'i to supplant 'ōlelo Hawai'i.[95] The missionaries opened Western-style schools in order to teach Native Hawaiians the principles of Christianity, and the question of language medium was not initially given much thought. Professor Schütz explains that "[f]rom the missionaries' point of view, the only advantage to using English in the early 1820s was that it was a temporary way to communicate until they could speak Hawaiian well enough to handle the difficult topics of persuasion and conversion."[96]

Not only did the first missionaries believe that they could best achieve their objectives by using 'ōlelo Hawai'i as the medium of education, they purposely sought to withhold English from Native Hawaiians because they feared that there would be a loss of missionary control over Native Hawaiians if Native Hawaiians became proficient in English.[97] Specifically, the missionaries had achieved a proficiency in 'ōlelo Hawai'i that other English speakers in Hawai'i—i.e., the sailors and other "sinful foreigners" populating Hawai'i's ports—did not have.[98] Accordingly, the missionaries were best able to communicate their ideas and philosophies with Native Hawaiians, and they did not want to lose that position of privilege.[99] They feared that teaching Native Hawaiians to speak English would diminish missionary power and leave Native Hawaiians open to the influence of others.[100]

However, despite the first missionaries' best efforts, English quickly made its way into Native Hawaiian education. According to Professor Schütz:

> [M]any Hawaiians took their own language for granted and wished to be able to speak and understand English as well, for although they were still fascinated with the written word in Hawaiian, this type of literacy was not an

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95 *See* SCHÜTZ, *supra* note 63, at 339.

96 *See id.* at 341.

97 *See* LOIS A. YAMAUCHI, THE SOCIOCULTURAL CONTEXT OF HAWAIIAN LANGUAGE REVIVAL AND LEARNING FINAL REPORT: PROJECT 1.6 (2001), *available at* http://vocserve.berkeley.edu/research/CREDEarchive/research/llaa/1.6_final.html; *see also* SCHÜTZ, *supra* note 63, at 344.

98 *See* YAMAUCHI, *supra* note 97; *see also* SCHÜTZ, *supra* note 63, at 344.

99 *See* YAMAUCHI, *supra* note 97; *see also* SCHÜTZ, *supra* note 63, at 344.

100 *See* YAMAUCHI, *supra* note 97; *see also* SCHÜTZ, *supra* note 63, at 344.

immediate stepping-stone to success and power in the rapidly changing world that intruded on their own."[101]

Pursuant to the requests of the ali'i, missionaries from the Eighth Company of Missionaries founded a school designed to teach young ali'i "those things which would be required of them to properly lead their people in the difficult transitional days to come."[102] One of the stated objectives of this "Royal School" was to prompt language shift away from 'ōlelo Hawai'i within the young ali'i community.[103] Amos Cooke, co-founder of the Royal School, proudly reflected that because of their English-medium education at the Royal School, the ali'i children "now use very little native even among themselves in common conversation."[104]

The extension of English-medium education beyond the young ali'i to other Native Hawaiian children did not occur for many years after the Royal School was founded in 1839. However, it did eventually occur in response to a number of factors, including: (1) the continual dwindling of the Native Hawaiian population at the hands of foreign diseases; (2) the steady increase in the English speaking population "both relatively to the Hawaiian stock and absolutely;" (3) the increase in the population of immigrant laborers who were not proficient in 'ōlelo Hawai'i; (4) the difficulty of producing 'ōlelo Hawai'i educational materials; (5) the challenge of finding teachers who could offer quality education in 'ōlelo Hawai'i; and (6) the frustration of "second generation" missionaries who believed that their inability to deal effectively with the "resurgence of 'heathen' practices" in the Kānaka 'Ōiwi community was partially the result of the persistence of 'ōlelo Hawai'i.[105] Consequently, by 1888, only 15.7% of the total school population of Hawai'i was being educated in schools where 'ōlelo Hawai'i was the medium of instruction.[106]

As the prevalence of English-medium education increased, the language shift away from 'ōlelo Hawai'i that was already taking place in the economic sphere extended to the education sphere as well.[107] Hawaiian

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[101] SCHÜTZ, *supra* note 63, at 342.
[102] *Id.* (quotation omitted).
[103] *See id.* at 342-43.
[104] *Id.* at 342 (quotation omitted).
[105] REINECKE, *supra* note 61, at 30; *see* SCHÜTZ, *supra* note 63, at 346; YAMAUCHI, *supra* note 97, at 9.
[106] SCHÜTZ, *supra* note 63, at 352.
[107] REINECKE, *supra* note 61, at 33.

Language Professors William H. Wilson and Kauanoe Kamanā summarize the effect of Hawai'i's transition to English-medium schools as follows:

> There is no question that the *Pu'uhonua* editorial[108] was correct in stating that Hawaiians were about to lose their mother tongue. It was also correct in faulting the elimination of Hawaiian-medium education. The effect of maintaining a language as the medium of education can be seen throughout the world. Where a language has been maintained as the medium of education, it survives. Where it is banned or is just partially used for the first few grades, it disappears.[109]

Professors Teresa L. McCarty and K. Tsianina Lomawaima explain that the sociolinguistic process described by Professors Wilson and Kamanā is not an accidental effect, but rather, the pointed goal of English-medium education.[110] Reflecting on the imposition of English-medium education in other indigenous communities, Professors McCarty and Lomawaima observe that:

> Given the American infatuation with the notion that social change can best be effected through education, schools have been the logical choice as the institutions charged with the responsibility for Native American cultural genocide.
>
> In the last century-and-a-half, schools have purposefully and systemically worked to eradicate Native languages, religions, beliefs, and practices. American Indian children have been at the very center of the battleground

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[108] Willliam H. Wilson & Kauanoe Kamanā, *"For the Interest of the Hawaiian's Themselves": Reclaiming the Benefits of Hawaiian-Medium Education*, 3 HŪLILI: MULTIDISCIPLINARY RESEARCH ON HAWAIIAN WELL-BEING 15, 156 (2006), *available at* http://www.ulukau.org/elib/collect/hulili06/index/assoc/D0.dir/doc152.pdf. The Professors commented on the following excerpt from a 1917 editorial in KA PU'UHONUA, a Hawaiian language newspaper:

> *I keia la, ke hepa mai nei ka oleloia ana o ka kakou olelo makuahine. Aole keiki o ka 15 makahiki e hiki ke kamailio pololei i ka olelo makuahine o keia aina. A no keaha ke kumu i hiki ole ai? No ka mea, aole a'o ia i ka olelo pololei. A i ka hala ana o na la pokole wale no o ka pau no ia.*
>
> We now find that our mother tongue is being spoken in a broken manner. There are no children under the age of 15 who can speak the mother tongue of this land properly. And why is this the case? Because, the proper use of the language is not taught (in the schools). And in a very short period we will find that the language is gone.

*Id.*

[109] *Id.* (citations omitted).

[110] *See* Teresa L. McCarty & K. Tsianina Lomawaima, *When Tribal Sovereignty Challenges Democracy: American Indian Education and the Democratic Ideal*, 39 AM. ED. RES. J. 279, 282 (2002).

> between federal powers and tribal sovereignty; the war has been waged through them and about them . . . .[111]

Accordingly, the central role that education plays in the indoctrination and socialization of children makes it one of the most crucial domains for language presence. The gradual supplanting of ʻōlelo Hawaiʻi by English in Hawaiʻi's educational institutions privileged English in a way that immediately endangered ʻōlelo Hawaiʻi and almost entirely precluded its intergenerational continuity and language maintenance. The apparent death knell for ʻōlelo Hawaiʻi was not, however, sounded in the education domain, but rather, in government.

*c. Formation of a written legal system*

The missionaries' imposition of the written rule of law on Native Hawaiians had a strong and enduring impact on the viability of ʻōlelo Hawaiʻi and the political sovereignty of Native Hawaiians. Prior to sustained contact with Europeans and Americans, Native Hawaiians observed two types of kānāwai (laws or edicts): "the *kanawai akua*, or gods' laws; and the *kanawai kapu aliʻi*, or sacred chiefly laws."[112] However, as discussed above, the traditional laws and edicts were abolished shortly before the missionaries arrived in response to the mass death of Native Hawaiians. Therefore, when the missionaries arrived, they encountered a society uniquely receptive to the establishment of a new legal system.[113]

Within a few years of the missionaries' arrival, the older chiefs convened to develop a policy to maintain peace and order.[114] Shortly thereafter, a code of civil laws based on religious principles was proclaimed.[115] The code prohibited acts such as "murder, theft, fighting, and Sabbath-breaking,"[116] and had the general objective of creating "a self charged with making itself through discipline and self-control rather than defending the order of distinction and rank or maintaining connections within local

[111] *Id.*

[112] SAMUEL MANAIAKALANI KAMAKAU, KA POʻE KAHIKO: THE PEOPLE OF OLD 11 (Dorothy B. Barrère ed., 1964).

[113] *See* MERRY, *supra* note 55, at 61-62.

[114] KUYKENDALL & DAY, *supra* note 86, at 49.

[115] *See id.*

[116] *Id.*

communities."[117] In 1825, British Captain (George Anson) Lord Byron introduced the concept of trial by jury to Native Hawaiians and urged them to engage in the business of making and enforcing their own laws, which they proceeded to do.[118]

The push to develop a more defined written legal system intensified throughout the 1820s and 1830s, as Hawai'i suddenly found itself struggling with a changing body politic.[119] Foreign citizens who were uncertain about their ability to enter, reside, conduct business, and own and convey property in Hawai'i were placing increasing pressure upon Hawai'i's mō'ī (rulers) to establish a centralized government and firmly adopt the rule of law.[120] Concomitantly, "[t]he mō'ī and ali'i [(chiefs)] were engaged in a search for sovereignty in Euro-American terms," and "sought to form a 'civilized' society as that concept was understood in the nineteenth century by the European powers that created it."[121]

As a result of these sociopolitical pressures, in 1839, Hawai'i began to transition to a constitutional form of government that officially replaced the usage system that previously predominated.[122] The first Hawaiian Constitution—Ke Kumukānāwai o Ko Hawai'i Pae 'Āina (MH 1839)—went into effect on June 7, 1839 and contained the following declarations:

> God hath made of one blood all nations of men, to dwell on the face of the earth in unity and blessedness. God has also bestowed certain rights alike on all men, and all chiefs and all people of all lands.
>
> These are some of the rights which he has given alike to every man and every chief, life, limb, liberty, the labor of his hands and productions of his mind.
>
> God has also established governments and rule for the purposes of peace, but in making laws for a nation it is by no means proper to enact laws for the protection of rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to the enriching of their subjects also; and hereafter, there shall by no means be any law enacted which is inconsistent with what is above expressed, neither shall any tax be assessed, nor any service or labor required of any man in a manner at variance with the above sentiments.

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[117] MERRY, *supra* note 55, at 45.

[118] *See* KUYKENDALL & DAY, *supra* note 86, at 50.

[119] *See* MERRY, *supra* note 55, at 36-44.

[120] *See id.*

[121] *See id.* at 36.

[122] *See* HE KUMU KANAWAI A ME KE KANAWAI HOOPONOPONO WAIWAI NO KO HAWAII NEI PAE AINA NA KAMEHAMEHA III I KAU [CONSTITUTION] (1840).

> These sentiments are hereby proclaimed for the purpose of protecting alike, both the people and the chiefs of all these islands, that no chief may be able to oppress any subject, but that chiefs and people may enjoy the same protection under one and the same law.
>
> Protection is hereby secured to the persons of all the people, together with their lands, their building lots and all their property and nothing whatever shall be taken from any individual, except by express provision of the laws. Whatever chief shall perseveringly act in violation of this Constitution, shall no longer remain a chief of the Sandwich Islands, and the same shall be true of the governors, officers and all land agents.[123]

The motivation behind the mōʻī's promulgation of the 1839 Constitution was codification and protection of the rights of the Hawaiian people, who were being "exploited for their labor" and "disenfranchised from the ʻĀina" as foreigners increased their demands for land and the aliʻi fell deeper into debt.[124] However, the 1839 Constitution read more like a "Hawaiian Magna Charta" than a constitution, and it was not long before the document was superseded by the 1840 Constitution—Ke Kumukānāwai o Ko Hawaiʻi Pae ʻĀina (MH 1840).[125]

The 1840 Constitution formally established the Hawaiian Kingdom as a constitutional monarchy. It did so by: 1) affirming the mōʻī's role as administrator of Kingdom lands; 2) establishing a bicameral legislature consisting of an appointed House of Nobles and a democratically-elected representative body; and 3) forming a Supreme Court.[126] Prolific Native

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[123] CONSTITUTIONS OF THE WORLD FROM THE LATE 18TH CENTURY TO THE MIDDLE OF THE 19TH CENTURY: SOURCES ON THE RISE OF MODERN CONSTITUTIONALISM 27-28 (Horst Dippel ed., 2008) (citations omitted). There is some debate regarding whether the 1839 Constitution was Hawaiʻi's first constitution. However, the document was labeled a constitution, and therefore is considered a constitution by some experts. *See, e.g.*, *id.* at 20 (stating that "the sole, official title of the 1839 document was 'Kumu Kanawai' (today spelled Kumukānāwai; literally, fundamental law), the same title appearing on subsequent constitutions. As such, the document is included here.").

[124] VAN DYKE, *supra* note 54, at 25 (citations omitted).

[125] *See* KUYKENDALL & DAY, *supra* note 86, at 54; *see also* HAWAIIAN HISTORICAL SOCIETY, FIRST ANNUAL REPORT OF THE HAWAIIAN HISTORICAL SOCIETY, VOLUMES 1-21, at 34 (1893).

[126] *See* Hon. Jon J. Chinen (ret.), *The Hawaiian Land Revolution of the 1840s and 1850s*, 10 HAW. BAR J. 46, 48 (2006). The 1840 Constitution's affirmation that the land within the Kingdom "belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had management of the landed property" constituted "the first formal and written acknowledgment by the king that the people had some form of ownership in the land in

Hawaiian historian Samuel Kamakau lauded Hawai'i's transformation into a constitutional monarchy as a "unique historical example of a ruler agreeing to share power without 'war and bloodshed.'"[127] Yet Kamakau also noted that the new structure greatly empowered foreigners. To that end, Kamakau noted that "[t]he stranger has no more skill with the axe than the worn-out hewers of Hawaii, but not ten Hawaiians combined have the skill and wit to equal that of the stranger in the legislature."[128] A few years later, Kamakau would give an ominous account of the Western legal system that Native Hawaiians had appropriated:

> [T]hey were laws to change the old laws of the natives of the land and cause them to lick ti leaves like the dogs and gnaw bones thrown at the feet of strangers, while the strangers became their lords, and the hands and voices of strangers were raised over those of the native race. The commoners knew this and one and all expressed their disapproval and asked the king not to place foreigners in the office of government lest the native race become a footstool for the foreigners.[129]

As Professor Sally Engle Merry describes it, the reconstruction of the Kingdom's social and legal system required Native Hawaiians to draw foreigners "into the heart of the operation."[130] While the initial intent was to have foreigners "provide technical knowledge for the project,"[131] they "ultimately undermined and destroyed the conditions for independence."[132] The sociolinguistic effect of the foreigners' infiltration of the government domain of Hawaiian society is described by John E. Reinecke as follows:

> Official intercourse with the representatives of foreign governments of course required the rulers of Hawaii to use a European language. The administration of the machinery of the government was necessarily for the most part in the hands of English-speaking Haole advisers of the king. The native Hawaiian language was not well adapted to the exact uses of the law-makers and the courts, and even if it had been, several of the advisers were not masters of that tongue. At the same time the legislative enactments and other important papers had to be placed before the chiefs and people in their own language. Therefore bilingualism became the rule in the printing of government

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addition to an interest in the product of the soil." *Id.* (citation omitted); *see also* Gavin Clarkson, Recent Developments, *Not Because They Are Brown, But Because of EA:* Rice v. Cayetano, 528 U.S. 495 (2000), 24 HARV. J.L. & PUB. POL'Y 921 (2001).

[127] VAN DYKE, *supra* note 54, at 27 (citation omitted).

[128] KAMAKAU, *supra* note 70, at 377.

[129] MERRY, *supra* note 55, at 6 (quotation omitted).

[130] *Id.* at 13.

[131] *Id.*

[132] *Id.*

> documents, reports, laws, and papers generally. For a few years the translation was from Hawaiian to English, or no translation was made; but before the end of the Kamehameha dynasty, English became the original language of government papers, from which the Hawaiian was translated and which was referred to for the meaning.[133]

The main political consequence of ʻōlelo Hawaiʻi's departure from the highest levels of government was the creation of even greater political and economic opportunities for English speakers than had existed in the formative years of the constitutional monarchy. As Reinecke notes, part of the reason that Hawaiʻi's government operations transitioned to an English-based system was because ʻōlelo Hawaiʻi was perceived as being ill-adapted to the uses of the law-makers and the courts.[134] In other words, the legal and political system that Hawaiʻi had adopted was designed to be carried out in English, which naturally limited government participation by the ʻōlelo Hawaiʻi speech community and increased government participation by the English speech community. The increased participation by English speakers further entrenched the English language, thereby creating more opportunities for government participation by English speakers. This cycle continued throughout the drafting and abandonment of the Kingdom's subsequent constitutions, all of which reflected a struggle between the foreign legislators and the mōʻī about "what kind of society Hawaiʻi would become and who would control it."[135] Ultimately, the cycle culminated in the illegal overthrow of the Kingdom in 1893.[136]

The significance of language presence in government cannot be overstated. The signature feature of linguistic hegemony is assigning a language the sole legitimacy of governance.[137] To allow governance to occur in a language other than one's own is to agree to be governed by the cosmologies, epistemologies, and philosophies embedded in that other language. Contrastingly, to govern in one's own language is to lay claim to the authority to define the nature of governance and its tools.

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133 REINECKE, *supra* note 61, at 32.

134 *Id.*

135 *See* Amy K. Trask, *A History of Revision: The Constitutional Convention Question in Hawaiʻi, 1950-2008*, 31 U. HAW. L. REV. 291, 293 (2008) (citation omitted).

136 *See id.* at 296.

137 *See generally* Rodney Kofi Hopson, *The Paradox of English Only in Post-Independent Namibia*, *in* LANGUAGES OF INSTRUCTION FOR AFRICAN EMANCIPATION 93 (Birgit Brock-Utne & Rodney Kofi Hopson eds., 2005).

### *2. Sovereignty shift in the education and government domains of Hawaiian society*

Language shift and sovereignty shift in the education and government domains of Hawaiian society were simultaneous and symbiotic. The establishment of Western schools and a Western government system forced Native Hawaiians into a state of pupilage and subordination with respect to the foreigners who were their purported teachers and advisors. This structure privileged the knowledge of the foreigners, as well as the conduit of that knowledge—the English language. The obvious effect of this dynamic was the proliferation of the English language as a medium of education and government affairs. The subtler, and more pernicious effect, however, was the fabrication of a justification for Westerners' appropriation of political sovereignty from Native Hawaiians. Specifically, by defining Native Hawaiian knowledge and language as different from and inferior to Western knowledge and language in the education and government domains of Hawaiian society, Westerners created a false justification for their indoctrination of and attempts to control Native Hawaiians, and their eventual overthrow of the Hawaiian Kingdom government in 1893.[138] Professor Robert A. Williams, Jr. explains that the United States federal government has commonly employed the same discursive tactics in the context of federal Indian law and policy:

> [T]his strategy of stressing the Indian's difference has been frequently deployed throughout the history of public discourses on United States Indian policy, the modern United States Supreme Court also frequently cites tribalism's continuing difference from the norms of the dominant society in its opinions articulating the inherent limitations on tribal sovereignty.[139]

## PART II

After those who sought power and wealth at the expense of Native Hawaiians and 'ōlelo Hawai'i stratified Hawaiian society and placed themselves in a formal position of privilege, they quickly acted through legislation to secure that position. The governments of the Republic of

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[138] *See* Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 262 (1989). Citing Albert Memmi, Professor Williams explains that European-derived racist-imperialist discourse utilized the basic strategy of: (1) stressing differences; (2) assigning values to the differences; (3) making the differences seem absolute; and (4) justifying aggression or privilege. *See id.* (citation omitted).

[139] *Id.* at 263 (citation omitted).

Hawaiʻi and the subsequent Territory of Hawaiʻi enacted two pieces of legislation that had the intent and effect of privileging the English language and silencing non-English languages, including ʻōlelo Hawaiʻi. The first was the Act of June 8, 1896, which mandated that English be "the medium and basis of instruction in all public and private schools."[140] The second was the Organic Act of 1900, which required that all government business be conducted in English.[141] These language laws, like other restrictive language laws passed in the United States during the same era, were aimed at assimilating non-English speakers into the English speech community, thereby cultivating uniformity and national identity.

### *A. Hawaiʻi's English-only Laws and the United States' Attack on Native American Languages*

Hawaiʻi's "English Only" laws could be viewed as part of the United States' broader effort to eradicate indigenous languages between the late 1800s and early 1900s. When the 1896 and 1900 Acts went into effect in Hawaiʻi, the United States federal government was in the throes of a multi-faceted campaign to eradicate Native cultures and assimilate Native persons into mainstream American society.[142] That campaign, which was fueled by notions of social Darwinism and an imperialist spirit, produced Supreme Court cases like *United States v. Kagama*,[143] *Lone Wolf v. Hitchcock*,[144] and

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[140] Act of June 8, 1896, ch. 57, sec. 30 (codified at 1897 Haw. Comp. Laws § 123 (1897)).

[141] *See* Organic Act of April 30, 1900 ch. 339, § 44, 31 Stat. 141 (1900).

[142] The federal government's condescending notions about Native American Languages were memorialized in the following language from the Congressional Report on Indian Affairs (1887):

> It is also believed that teaching an Indian youth in his own barbarous dialect is a positive detriment to him. The first step to be taken toward civilization, toward teaching the Indians the mischief and folly of continuing in their barbarous practices, is to teach them the English language. . . . But it has been suggested that this order, being mandatory, gives a cruel blow to the sacred rights of the Indians. Is it cruelty to the Indian to force him to give up his scalping-knife and tomahawk? Is it cruelty to force him to abandon the vicious and barbarous sun dance, where he lacerates his flesh, and dances and tortures himself even unto death? Is it cruelty to the Indian to force him to have his daughters educated and married under the laws of the land, instead of selling them at a tender age for a stipulated price into concubinage to gratify the brutal lusts of ignorance and barbarism?

DEPT. OF THE INTERIOR, *supra* note 10, at 21-22.

[143] 118 U.S. 375 (1886).

*United States v. Sandoval*,[145] which created the notion of federal plenary power and gave the federal government almost unfettered authority over Native Americans. It also prompted legislation such as the Appropriations Act of March 3, 1871, the Major Crimes Act, and the Dawes General Allotment Act of 1887, which expanded federal control over Native Americans and tribal lands.[146] With respect to culture and language specifically, it also created institutions such as the Courts of Indian Offenses and "a series of boarding schools designed to remove Indian children from tribally-based child rearing and socialization and thereby stamp out all tribal influences, including language."[147]

With respect to Native languages specifically, the federal process of assimilating Native Americans through language began as early as the late 1860s, when the federal government established education programs that were designed to teach Native Americans to speak English as a second language.[148] By the 1880s, the Bureau of Indian Affairs took this course of action one step further by imposing an "English-only" policy, which required that all instruction, conversations, and communications in Indian schools be conducted exclusively in the English language.[149] The government's stated reasons for implementing this English-only policy included the assimilation of Native Americans, the eradication of Native American cultures, and the promotion of "national unity" through the creation of a "national character."[150] The government also asserted that the replacement of Native languages with English was in the best interests of Native Americans because mastery of English would allegedly protect them in their business dealings, make them good business people, and make them good citizens.[151] These specious arguments were the same reasons proffered for the restrictive English policies established in the Republic of Hawai'i and the Territory of Hawai'i.[152]

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[144] 187 U.S. 553 (1903).

[145] 231 U.S. 28 (1913).

[146] *See* CLINTON ET AL., *supra* note 42, at 30-35.

[147] *Id.* at 35.

[148] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 20.02[4] (2002).

[149] *See id.*

[150] *Id.*

[151] *See id.*

[152] *See* Paul F. Nahoa Lucas, *E Ola Mau Kākou I Ka 'Ōlelo Makuahine: Hawaiian Language Policy and the Courts*, 34 HAW. J. HIST. 1, 9 (2000) (remarking that "[t]he gradual extinction of a Polynesian dialect may be regretted for sentimental reasons, but it is certainly for the interest of the Hawaiians themselves" (citation omitted)).

### *B. Hawai'i's English-only Laws and the Marginalization of Native Hawaiian Political Identity*

Although there were obvious similarities between the local English-only laws that effectively banned ʻōlelo Hawaiʻi as a medium of instruction[153] and the federal government's English-only policy that prohibited the use of indigenous languages in Indian schools, there was also a major distinction between the two that revealed another facet of the relationship between ʻōlelo Hawaiʻi and Native Hawaiian political sovereignty. Unlike the English-only policy targeting Native American languages in the continental United States, Hawaiʻi's English-only laws did not exclusively target ʻōlelo Hawaiʻi.[154] Rather, they created a binary of English and non-English, and banned *all* non-English languages as a medium of instruction.[155] In the eyes of the law of that time, ʻōlelo Hawaiʻi was not uniquely situated vis-á-vis non-English immigrant languages in Hawaiʻi.[156] Rather, the law grouped ʻōlelo Hawaiʻi together with immigrant non-English languages in a general non-English category, in very much the same way that Native Hawaiians, having been unlawfully divested of political sovereignty, were suddenly grouped together with other disenfranchised communities in Hawaiʻi.[157] According to the law of the Republic and the Territory, Native Hawaiian language issues deserved no more attention than the language issues of any of Hawaiʻi's other disenfranchised groups.[158] In fact, despite the fact that ʻōlelo Hawaiʻi was the native language of the land comprising the territory, Native Hawaiian language issues received less attention from the territorial government than language issues arising from Hawaiʻi's immigrant communities.[159]

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[153] Technically, schools could use non-English languages as mediums of instruction, but under the Act, the choice to do so was a choice to forgo any financial support from the government. *See* Lucas, *supra* note 152, at 9. Naturally, the schools willing and able to survive without funding were few and far between. Accordingly, the Act had the effect of eliminating non-English medium schools. *See id.*

[154] *See id.*

[155] *See id.*

[156] *See id.*

[157] *See id.*

[158] *See id.*

[159] *See id.*

*1. Focus shifts to silencing growing speech communities*

Beginning in 1852, the immigration of plantation laborers from China, Japan, Portugal, and elsewhere created several additional speech communities in Hawai'i.[160] However, prior to the United States' annexation of Hawai'i, very little focus was placed on the language issues of those speech communities because their confinement on the plantations had prevented them from infiltrating the major domains of Hawaiian society where language, politics, and power were negotiated (i.e., business, government, education, media, etc.).[161] However, when the contract labor system was abolished in 1900, plantation workers were freed to leave the plantation as desired.[162] This new freedom led to increased interaction between Hawai'i's linguistic communities, and it drastically changed the language dynamics in the Hawaiian Islands.[163] In response to those changed dynamics, Hawai'i's English-speaking elite focused their language suppression efforts on the speech communities that they perceived as the greatest threat to their retention of wealth and power.

In 1925, the territorial government enacted the "Foreign Language School Act of the Territory of Hawaii."[164] Pursuant to the Act, any school conducted in a language other than English or 'ōlelo Hawai'i[165] (except Sabbath schools) was required to apply to the territorial government for permission—which the territorial government could give or withhold at its discretion—and pay multiple fees to the territorial government.[166] In addition, the Act required all persons wishing to teach or exercise administrative powers at such a school to first apply for and receive a permit from the territorial government after demonstrating "ideals of democracy, knowledge of American history and institutions" and the ability to read and write in English.[167] The Act also placed heavy restrictions on

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[160] *See generally* REINECKE, *supra* note 61.
[161] *See id.* at 40-41.
[162] *See id.* at 41.
[163] *Id.*
[164] REV. LAWS HAW. §§ 390-399 (1925).
[165] While this aspect of the law may appear to create a preferred status for 'ōlelo Hawai'i as compared to other non-English languages, it amounted to nothing more than lip service, as the number of schools conducted in 'ōlelo Hawai'i at that time was zero, due to the fact that such schools could not be funded. *See* Lucas, *supra* note 152, at 9. Moreover, even if the law did create a preferred status for 'ōlelo Hawai'i, it did so because of the cultural significance of the language to the territory, not because Native Hawaiians were perceived as being situated differently than other non-English speech communities politically.
[166] REV. LAWS HAW. §§ 390-399 (1925).
[167] *Id.* at § 392-3.

the ages at which children could attend foreign language schools and the length and timing of instruction in the schools.[168] Moreover, according to the Act, "no subjects of study shall be taught, nor course of study followed, nor entrance nor attendance qualification required, nor text books used, other than as prescribed or permitted by the department [of public instruction]."[169]

The impact of the Act was intended for, and primarily felt by, the over 145 Japanese language schools operating in Hawai'i at that time.[170] The stated reason for the Act was the territorial government's distrust of the large and culturally distinct Japanese population, which was expected to constitute a majority of the electorate within fifteen years of the passage of the Act.[171] According to the territorial government, Japanese language instruction needed to be restricted in Hawai'i because the Japanese "still adhere[d] to their own ideals and customs," "[we]re still loyal to their emperor," and "d[id] not readily assimilate with other races, and especially with the white race."[172] The territorial government's argument that language restrictions were necessary because the Japanese were beginning to constitute a larger percentage of the electorate was a blatant admission of the role that language suppression plays in the appropriation of political power. As Del Valle observes:

> Here, at least is one almost honest rationale for supporting English-only: it will help keep ethnic minorities from becoming powerful voting blocs. The possibility of the political power of ethnic minorities must be the overriding reason for this kind of restrictionist movement since no other makes sense . . . . Something more must be at work here.[173]

Ultimately, the Ninth Circuit Court of Appeals did not find the territorial government's xenophobic reasons for enacting the Foreign Language School Act sufficiently compelling to justify what the court viewed as an unconstitutional exercise of the police power in violation of the Fourteenth Amendment.[174] Echoing the reasoning of the United States Supreme Court in the seminal case of *Meyer v. Nebraska*, the Ninth Circuit Court of

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[168] *Id.* at § 395-6.
[169] *Id.* at § 396.
[170] *See* Farrington v. Tokushige, 11 F.2d 710, 712 (9th Cir. 1926).
[171] *Id.* at 714.
[172] *Id.*
[173] DEL VALLE, *supra* note 23, at 57.
[174] *See Farrington*, 11 F.2d at 713-14.

Appeals upheld the lower court's injunction against the territorial government and stated:

> That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all; to those who speak other languages, as well as to those born with English on the tongue."[175]

The Ninth Circuit Court of Appeals also asserted, in seeming contrast to the philosophy underlying over half a century of United States language policy, that "[y]ou cannot make good citizens by oppression, or by a denial of constitutional rights, and we find no such conditions there as will justify a departure from the fundamental principles of constitutional law."[176] The court of appeals' decision was later affirmed by the United States Supreme Court, who held that "[t]he Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."[177]

Not to be dissuaded, the territorial government attempted again in 1943 to impose a law severely restricting the teaching of foreign languages in Hawai'i.[178] The "Act regulating the Teaching of Foreign Languages to Children" mandated that non-English languages could only be taught to pupils meeting one of the following criteria: (1) completion of fourth grade and submission to periodic English language testing; (2) completion of the eighth grade; or (3) attainment of the age of fifteen.[179] In reviewing the constitutionality of the Act, a three-judge panel of the United States District Court for the District of Hawai'i was particularly taken aback by the gross overbreadth of the Act, which purportedly applied to "any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course

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[175] *Id.* at 714 (citation omitted).

[176] *Id.*

[177] Farrington v. Tokushige, 273 U.S. 284, 298 (1927).

[178] REV. LAWS HAW. § 39 (1945).

[179] *Id.* (setting forth "Sec. 1873. Requirements for pupil. No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years"); *see also* REV. LAWS HAW. § 1873 (1945).

of study, to two or more persons as a group, as a regular and customary practice."[180] The district court ultimately found the Act to be a violation of the due process clause of the Fifth Amendment and enjoined the territorial government from enforcing it, noting that "[t]he parents' right to have their off-spring taught a foreign language is one of the fundamental rights guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments," and that "in today's world of the United Nations there has been added an equally profound international need for understanding between the peoples of a world of different tongues."[181]

The ruling of the district court was later reversed on procedural grounds by the United States Supreme Court.[182] Nonetheless, it remains illustrative of the general disdain of the federal courts for the oppressive language laws of Hawai'i's territorial government and their underlying political purpose.

### 2. *'Ōlelo Hawai'i during the territorial period (1898-1959)*

The territorial government made "at best—farcical, and—at worst—insulting" efforts to address 'ōlelo Hawai'i language issues during the territorial period.[183] For the most part, 'ōlelo Hawai'i was cast to the margins of Hawaiian society and, like other non-English languages, left to battle with English for its survival. The failure of the territorial government to distinguish, in any meaningful way, 'ōlelo Hawai'i from other non-English languages reveals a deficient framework that failed to account for 'ōlelo Hawai'i's unique status as the indigenous language of Hawai'i, and Native Hawaiians' status as the indigenous people of Hawai'i. This framework, which classified 'ōlelo Hawai'i issues and other Native Hawaiian issues as cultural and racial issues rather than political issues, allowed the territorial government, and later the state government, to

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[180] REV. LAWS HAW. § 1872 (1945); *see* Mo Hock Ke Lok Po v. Stainback, 74 F. Supp. 852, 853-54 (D. Haw. 1947), *rev'd*, 336 U.S. 368 (1949) (stating that "[t]he striking provision of the Act is the extraordinary definition of what constitutes a school in which a foreign language is taught. Section 1872 provides, 'Definitions. As used in this chapter: 'School' means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice.'").

[181] *Mo Hock Ke Lok Po*, 74 F. Supp. at 854, 856.

[182] *See* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 383-84 (1949).

[183] SCHÜTZ, *supra* note 63, at 359.

discount and ignore Native Hawaiian claims to self-governance and political sovereignty. That framework persists to this day, and continues to impede the reclamation of formal political sovereignty by Native Hawaiians.

A pivotal Supreme Court case addressing Native Hawaiian self-governance issues demonstrates how this flawed framework has been used to deflect Native Hawaiians' legitimate claims to self-determination. In *Rice v. Cayetano*, the Supreme Court of the United States considered a caucasian Hawai'i resident's claims that the state violated the Fourteenth and Fifteenth Amendments of the United States Constitution by permitting only Native Hawaiians to vote for the trustees of the state's Office of Hawaiian Affairs.[184] Despite the fact that the Office of Hawaiian Affairs was established to manage Native Hawaiian assets and advocate on behalf of Native Hawaiians as an indigenous people,[185] the Court bypassed the issue of Native Hawaiian political sovereignty and analyzed the case as though it involved a simple question of race discrimination in voting.[186] In declining to consider whether Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes," the Court asserted that the proposition "would raise questions of considerable moment and difficulty."[187] The Court further reflected that it could "stay far of that difficult terrain" of considering "whether Congress may treat the native Hawaiians as it does the Indian tribes" when rendering its opinion.[188] Pushing those essential issues aside, the Court ultimately decided that the state's law regarding the election of trustees for the Office of Hawaiian Affairs violated the Fifteenth Amendment.[189]

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[184] Rice v. Cayetano, 528 U.S. 495, 498-99 (2000).

[185] *See also* Office of Hawaiian Affairs v. State, 31 P.3d 901 (2001) (explaining the role of OHA).

[186] *Cayetano*, 528 U.S. at 518-20.

[187] *Id.* at 518.

[188] *Id.* at 518-19.

[189] *Id.* at 499. The majority reasoned that, even if it were "to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort." *Id.* at 519. On this basis, it held that the Court's opinion in Morton v. Mancari, 417 U.S. 535 (1974), was inapposite. *See id.* at 519-20. However, for purposes of its discussion, the Court defined "a voting scheme of this sort" as a scheme that limits the electorate for state officials to a particular class of persons (tribal), to the exclusion of all persons outside of the class. *Id.* This definition disregarded the particular political status of Native Hawaiians (which the Court explicitly declined to clarify) and the specific responsibilities regarding Native Hawaiians that were delegated to the State of Hawai'i by the United States federal government. It also failed to provide a full analysis of the nature of the Office of Hawaiian Affairs, which, like the Bureau of Indian Affairs, is *sui generis*. The fact that the Court did

Disagreeing with the majority's conclusion that the Court could properly decide *Rice* without addressing questions of Native Hawaiian sovereignty, Justice Stevens asserted that it was "only by refusing to face this Court's entire body of Indian law . . . that the majority [was] able to hold that the OHA qualification denie[d] non-'Hawaiians' the right to vote 'on account of race.'"[190] Justice Stevens' statement was, in essence, a challenge to the majority's belief that the case could be decided using a civil rights framework that classified Native Hawaiians as a racial group, rather than using an indigenous rights or Indian law framework that could account for questions of Native Hawaiian self-determination and self-governance. A similar challenge was presented in the following commentary by Professors Eric Yamamoto, Susan Serrano, and Equal Justice Society President Eva Paterson, in the context of a separate lawsuit challenging the exercise of Native Hawaiian sovereignty in education:[191]

> As the U.S. District Court in Hawai'i recognized, the Kamehameha Schools admissions policy is about justice for Hawai'i's first people—a private effort (now also supported by government efforts) to redress the continuing economic and cultural harms to Hawaiians. It is not about violating civil rights by treating one group as superior. It is about combined private and public efforts to restore to Native Hawaiians that which American colonialism in the late 19th century nearly destroyed: Hawaiian education, culture and a measure of self-governance. The school's admission policy is about restorative justice and does not violate our, or anyone else's civil rights.[192]

As the Supreme Court of the United States made clear in *Morton v. Mancari*, native peoples are more than a racial group.[193] Native peoples are political entities with inherent rights to self-governance and political

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not address these issues in the course of its analysis seriously undermines the legitimacy and logic of its ultimate decision, as well as its contention that *Mancari* was inapplicable to the set of facts at bar.

[190] *Id.* at 538 n.12.

[191] *See* Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006) (involving a challenge to the Kamehameha Schools' policy of prioritizing Native Hawaiian children over non-Native children in the admissions process).

[192] Eric K. Yamamoto, Susan Kiyomi Serrano & Eva Paterson, *Kamehameha Admissions Don't Offend Our Civil Rights*, HONOLULU ADVERTISER, Nov. 1, 2004, http://the.honoluluadvertiser.com/article/2004/Nov/01/op/op05p.html.

[193] Morton v. Mancari, 417 U.S. 535, 553 n.24, 553 (1974); *see also* Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 UCLA L. REV. 169 (1991); Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 971-72 (2002).

sovereignty. The territorial government of Hawai'i did not, however, acknowledge this fact. Instead, it crafted an approach toward 'ōlelo Hawai'i that essentially placed it on par with non-English immigrant languages and swept questions of political sovereignty under the proverbial rug. This approach extended past language and marginalized the self-governance claims of Native Hawaiians for over half a century, and vestiges of it continue to impact law regarding Native Hawaiians in the present day.

## PART III

Given that the formal privileging of English contributed to language shift away from 'ōlelo Hawai'i and sovereignty shift away from the Native Hawaiian people, contemporary visionaries have identified the elimination of English language bias in applicable law and policy as a potential way to reverse language and sovereignty shift back toward 'ōlelo Hawai'i and Native Hawaiians.

### *A. Debiasing Hawai'i State Law and Policy*

The first major step in the debiasing process was taken in 1978, when the State of Hawai'i designated 'ōlelo Hawai'i a co-official language of the state and mandated that the state's public schools "provide for a Hawaiian education program consisting of language, culture and history."[194] Consistent with the spirit of these new constitutional provisions, in January 1983, a small group of teachers and native speakers of 'ōlelo Hawai'i gathered together on the island of Kaua'i to discuss the status of 'ōlelo Hawai'i which, at that point, had become "a matter of grave concern."[195] By the time this meeting took place, 'ōlelo Hawai'i had reached a critical level of attrition and was spoken almost exclusively by grandparents and the residents of the island of Ni'ihau.[196] The group concluded that concerted revitalization efforts would be necessary to reverse language shift and save what was, at that point, a dying language.[197] Using the Māori

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[194] HAW. CONST. art. X, § 4; *see also* HAW. CONST. art. XV, § 4.

[195] 'Aha Pūnana Leo, *E Ola Ka 'Ōlelo Hawai'i*, 'AHA PŪNANA LEO (Apr. 15, 2015), http://www.ahapunanaleo.org/index.php?/resources/cartoons/.

[196] *See* LARRY K. KIMURA & WILLIAM WILSON, U.S. DEP'T OF THE INTERIOR, I NATIVE HAWAIIAN STUDY COMMISSION MINORITY REPORT 173, 191 (1983), *available at* http://files.eric.ed.gov/fulltext/ED254608.pdf.

[197] *See id.* At that point in time, 'ōlelo Hawai'i was being taught as a subject of instruction at the University of Hawai'i and a few other educational institutions. *Id.*

Kohanga Reo program as a guide, the group prompted the development of ʻAha Pūnana Leo, a non-profit educational organization tasked with administering ʻōlelo Hawaiʻi immersion schools and other language revitalization activities.[198] Reflecting upon the journey in a 1997 interview, original group member ʻĪlei Beniamina explained the significance of the group's work by stating, "From the language we have a type of sovereignty. All that the Pūnana Leo is and stands for is a type of sovereignty."[199]

Although the Pūnana Leo model proved successful, parents and supporters quickly realized that Pūnana Leo graduates had no opportunities to continue ʻōlelo Hawaiʻi immersion education past preschool.[200] Accordingly, in 1986, proponents of ʻōlelo Hawaiʻi immersion education advocated for and obtained an amendment to Hawaiʻi Revised Statutes § 298-2, which effectively permitted the use of ʻōlelo Hawaiʻi as a medium of education in the public school system for the first time in nearly a century.[201] Shortly thereafter, the Hawaiʻi Board of Education and state superintendent launched Ka Papahana Kaiapuni Hawaiʻi ("Kaiapuni"), an ʻōlelo Hawaiʻi immersion pilot project.[202] The Kaiapuni program began in 1987 with small kindergarten and first grade classes at two elementary schools, and over the course of three decades, it has grown into a twenty-one-school, K-12 program that educates approximately 2000 students each year.[203] Demand for the Kaiapuni program is so high in some areas that administrators have been forced to consider controversial admissions lotteries and other measures to maintain appropriate student-teacher ratios and resource distribution.[204] In short, the Kaiapuni program is more

However, sociolinguists generally agree that offering a language as a subject of instruction does not allow students to acquire the level of fluency necessary to participate in the intergenerational transmission of language. *See* discussion *supra* Part I.D.1.b. Such intergenerational transmission is a prerequisite of language survival.

[198] Lucas, *supra* note 152, at 10-11.

[199] ʻAha Pūnana Leo, *supra* note 195.

[200] *See id.*; Lucas, *supra* note 152, at 11.

[201] *See* Lucas, *supra* note 152, at 11 n. 59 (citing HAW. REV. STAT. § 298-2(b) (1993)).

[202] *See id.* at 11 (citation omitted).

[203] *See id.*; Nanea Kalani, *Hawaiian Immersion Program Gets 'Teeth' With Policy*, STAR ADVERTISER, Feb. 19, 2014, at B1; Letter from Kamanaʻopono M. Crabbe, Ph.D., Ka Pouhana, Chief Executive Officer of the Office of Hawaiian Affairs, to Deborah S. Delisle, Assistant Secretary, Office of Elementary and Secondary Education, U.S. Department of Education (Jan. 22, 2015) (on file with author).

[204] *See* Wendy Osher, *Pāʻia School Conversion Stakeholder Meetings Planned*, MAUINOW.COM (Aug. 29, 2013, 6:53 AM), http://mauinow.com/2013/08/28/pa%ca%bbia-

successful than its creators could have imagined.[205] It is not, however, as successful as it could be if it were unconstrained by the English language biases embedded in state and federal education law.

On the state level, biased law and policy historically led to general underfunding and neglect of the Kaiapuni program. Financial data demonstrates that the Hawai'i Board of Education had historically been unwilling "to commit sufficient funds to develop curriculum materials and teacher training that will place Papahana Kula Kaiapuni on a level that equals or exceeds the instruction given in English."[206] Likewise, the administrative policies of the Hawai'i Department of Education had relegated the Kaiapuni program to a "pilot project" status for nearly thirty years, which in many ways prevented the development of sustainable long-term planning for the program.[207] These concerns about biased policies and decision making have been the subject of litigation and community activism, and they recently led to a change in the official policies of the Hawai'i Board of Education, including the creation of an Office of Hawaiian Education within the Department of Education.[208]

### *B. Debiasing Federal Education Law and Policy*

At the federal level, the proper functioning of the Kaiapuni program is currently being thwarted by language bias embedded in the standardized testing provisions of the Elementary and Secondary Education Act ("ESEA") (also known as "No Child Left Behind"). In particular, Title I of the ESEA requires participating states to use "the same academic assessments . . . to measure the achievement of all children" in subject matter areas such as reading and math.[209] As a result, the State of Hawai'i annually administers a uniform set of English-language assessments to all Hawai'i public school students.[210] In an effort to accommodate the needs of

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school-conversion-stakeholder-meetings-planned/#more-106510.

[205] *See* Lucas, *supra* note 152, at 11 (citation omitted).

[206] *Id.*

[207] *See* STATE OF HAW., BD. OF EDUC., HAWAIIAN EDUCATION PROGRAMS POLICY 2104 (2014), *available at* http://www.hawaiiboe.net/policies/2100series/Pages/2104.aspx (aiming to correct issues with prior administration of Hawaiian programs including the Kaiapuni program).

[208] *See, e.g.*, Office of Hawaiian Affairs v. Dep't of Educ., 951 F. Supp. 1484 (D. Haw. 1996); *see also* STATE OF HAW., BD. OF EDUC., *supra* note 207.

[209] 20 U.S.C. § 6311(b)(3)(C)(i).

[210] *See* L. Kaipoleimanu Ka'awaloa, Comment, *Translation v. Tradition: Fighting for Equal Standardized Testing ma ka 'Ōlelo Hawai'i*, 36 U. HAW. L. REV. 487, 497 (2014) (citations omitted).

the students enrolled in the Kaiapuni program, the state currently translates these English-language assessments into ʻōlelo Hawaiʻi.[211]

The ʻōlelo Hawaiʻi translations of the state's English-language assessments are highly controversial because they have not produced, and are not capable of producing, valid and reliable data regarding the proficiency of Kaiapuni students in the tested subject areas.[212] Accordingly, the state's effort to remain in compliance with the ESEA's procedural requirement that all students be measured with the same set of academic assessments has, in effect, forced the state out of compliance with the ESEA's more important substantive requirement that all students be measured by high-quality assessments that "provide coherent information about student attainment," "are valid and reliable," and "are of adequate technical quality."[213] Both the state and major stakeholders in the ʻōlelo Hawaiʻi community agree that the best potential solution to this untenable problem is the development and use of a set of parallel assessments created originally in ʻōlelo Hawaiʻi.[214]

In furtherance of this solution, the State of Hawaiʻi sought and obtained a one-year waiver from certain requirements of the ESEA for Kaiapuni students.[215] The waiver will enable the Hawaiʻi Department of Education to field test a parallel ʻōlelo Hawaiʻi assessment in the 2014-2015 school year for third and fourth grade Kaiapuni students.[216] Stakeholders are hopeful that the waiver represents the first of many steps toward the ultimate goal of debiasing federal education law to further the perpetuation of ʻōlelo Hawaiʻi.[217] Although the one-year waiver is a significant and important achievement, a long-term solution in the form of a sustainable administrative or congressional fix will be required to bring the state into compliance with the ESEA's requirements regarding the quality, validity, and reliability of its assessments, and to bring the federal government into

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[211] *See id.* at 504-08.

[212] *See id.*

[213] 20 U.S.C. § 6311(b)(3)(C)(ii)-(iv).

[214] *See* S. Res. Con. Resolution 147 (Haw. 2013).

[215] Letter from Deborah S. Delisle, Assistant Secretary, Office of Elementary and Secondary Education, U.S. Department of Education, to Kathryn S. Matayoshi, Superintendent, State of Hawaiʻi Department of Education (Feb. 12, 2015) (on file with author).

[216] *Id.*

[217] *See, e.g.*, OFFICE OF HAWAIIAN AFFAIRS, *E Ola ka ʻŌlelo Hawaiʻi: Assessment Tests in Hawaiian Language Granted Federal Waiver* (Feb. 20, 2015), http://www.oha.org/news/assessment-tests-in-hawaiian-language-granted-federal-waiver/.

compliance with applicable law and policy regarding Native language rights and protections.

*1. The ESEA requires technically sound assessments that produce valid, reliable, and coherent data regarding student achievement*

The clear purpose of the ESEA's assessment provisions is to require states to obtain valid and reliable data regarding student achievement in order to measure progress toward specified educational goals. In the Kaiapuni context, the procedural "same" assessment requirement creates an irreconcilable conflict that makes it impossible for the State of Hawai'i to obtain valid and reliable data in furtherance of the Act's fundamental substantive purpose. Where such an irreconcilable conflict exists, it is axiomatic that the procedural "same" assessment requirement should be adjusted as necessary to enable compliance with the fundamental substantive requirement that the State of Hawai'i use technically sound assessments that produce valid, reliable, and coherent student achievement data.

The Act expressly provides for this type of adjustment for Native American students, students with limited English proficiency, and students educated in Puerto Rico.[218] Given the unique aspects of Kaiapuni and the special legal and political relationship between the United States and Native Hawaiians, none of these exemptions offer a full and immediate resolution of the Kaiapuni assessment issue. Nonetheless, each is instructive to the extent it evidences and affirms the United States' general position that assessments that vary in language and form from a state's standard assessment should be permitted when they advance Native self-determination in education, accommodation of students whose primary language is not English, or the political autonomy of a state or territory that has designated a non-English language as an official language and desired medium of education.

*2. The ESEA affords autonomy to native-serving schools to define progress and develop appropriate assessments*

The ESEA explicitly acknowledges that schools serving Native peoples require greater autonomy to define progress and develop assessments because of their unique circumstances and needs.[219] Therefore, in certain

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[218] *See* 20 U.S.C. §§ 6311(b)(3)(C)(ii)-(iv), 6311(b)(3)(C)(x), 6311(m).

[219] *See, e.g.*, 20 U.S.C. § 6316(g)(1).

circumstances, the ESEA permits Native governing bodies or school boards to waive definitions of adequate yearly progress that they deem "inappropriate," and to propose alternative definitions that take "into account the unique circumstances and needs of such school or schools and the students served."[220] The ESEA also permits, in similar circumstances, qualifying schools accredited by a state to use alternative "appropriate" assessments in lieu of those developed and implemented by that state.[221] Such alternative assessments are also permitted when the qualifying schools are accredited by a regional accrediting organization or a Native accrediting agency or Native division of education.[222]

Like scores of other federal laws, the ESEA recognizes that Native Hawaiians stand shoulder-to-shoulder with American Indians and Alaska Natives as an indigenous people of the United States who face unique challenges and have rights under federal law to exercise self-determination in response to those challenges.[223] Therefore, while Kaiapuni schools are not expressly referenced in the Title I provisions that apply to Native schools, the public policy underlying these exceptions requires an extension of similar autonomy to Native Hawaiians to express their right to self-determination through the development and use of assessments that, in addition to being valid and technically sound, are responsive to the community's unique circumstances and the educational needs of the those students who are carrying its ancestral language into the future.

*3. The ESEA permits variation in the language and form of assessments when the variation(s) would yield more accurate data from students with limited English proficiency*

20 U.S.C. § 6311(b)(3)(C)(ix)(III) directs that students with limited English proficiency shall be assessed in a valid and reliable manner and afforded reasonable accommodations, "including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas."[224] Initially, this exception seems applicable to Kaiapuni students, but it does

[220] *Id.*
[221] *See* 20 U.S.C. § 6311(m)(1).
[222] *See id.* § 6311(m)(2), (3).
[223] *See id.* § 7512.
[224] *Id.* § 6311(b)(3)(C)(ix)(III).

not offer a full solution to Kaiapuni testing issue because it is designed as a temporary remedy for what is perceived as a temporary "deficiency."

More specifically, the limited English proficiency exception to the ESEA's assessment requirements limits the number of consecutive school years during which students may take non-English assessments to three years in most cases, and to five years in exceptional circumstances.[225] The notion underlying these time limits is that predominance of a non-English language, and limited proficiency in English, is a problem that should be "remedied" within a few years of a student's enrollment in the public school system. This notion is entirely inapplicable to Kaiapuni students, who are affirmatively encouraged to prioritize proficiency in ʻōlelo Hawaiʻi over proficiency in the English language for the duration of their immersion education. Meaningful support for the Kaiapuni program and the protection and perpetuation of ʻōlelo Hawaiʻi requires a long-term solution that treats ʻōlelo Hawaiʻi predominance as a desired educational outcome rather than a deficiency to be cured.

*4. The ESEA permits alternate testing in a subdivision's official language*

Because of the distinct historic and political circumstances surrounding education in Puerto Rico, the Puerto Rico Department of Education also enjoys an exception from the ESEA's assessment requirements.[226] This exception permits the Department to administer its yearly assessments in the Spanish language, which is an official language of the territory and a medium of instruction in the Department's schools.[227] Given its parallel status as an official language of the State of Hawaiʻi and a medium of instruction in the state's public schools, there is no justifiable reason for the federal government to deny ʻōlelo Hawaiʻi at least the same ESEA exceptions that are afforded to the Spanish language in Puerto Rico.

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[225] *See id.* § 6311(b)(3)(C)(x).

[226] *See* William (Pila) H. Wilson, *USDE Violations of NALA and the Testing Boycott at Nāwahīokalani'ōpu'u School*, 51(3) J. AM. INDIAN EDUC. 30, 35 (2012).

[227] *See id.*

### *C. Federal Law and Policy Support the Development and Use of ʻŌlelo Hawaiʻi Assessments Created Originally in ʻŌlelo Hawaiʻi*

#### *1. It is the official policy of the federal government to promote the protection and perpetuation of indigenous languages, including ʻōlelo Hawaiʻi*

Due in large part to the federal government's century-long effort to surpress Native American languages, the predicted statistics with respect to Native language death are staggering. It is estimated that, prior to contact with Europeans, over 300 Native languages were spoken in what is now the United States.[228] Of those 300 languages, 175 are still extant in the United States today.[229] Notwithstanding the apparent durability of these remaining languages in the face of overt and aggressive efforts to eradicate them, the prediction for their continued existence is not promising. Specifically, experts predict that, absent revitalization efforts, 155 of those 175 remaining languages will die by 2060.[230] This would leave Native peoples, and the global community, with only twenty indigenous Native languages in existence.[231]

There are a few rare examples of indigenous linguistic communities that are successfully reversing language shift and increasing their population of Native speakers. The ultimate success of these revitalization efforts, however, requires both significant community-based efforts and express government support and cooperation.

#### *2. The Native American Languages Act and the Esther Martinez Native American Languages Preservation Act of 2006*

The first major expression of federal government support for Native language revitalization came in 1990, when after more than a century of actively attempting to eliminate Native languages, the federal government finally shifted its policy toward protecting Native languages and passed the

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[228] *See, e.g.*, ATLAS OF THE WORLD'S LANGUAGES IN DANGER, *supra* note 28.

[229] *See id.*

[230] Michael E. Krauss, Director Emeritus, Alaska Native Language Center, University of Alaska Fairbanks, Statement at the Hearing on S. 2688, the Native American Languages Act Amendments Act of 2000, at 1 (July 20, 2000).

[231] *See id.*

Native American Languages Act ("NALA").[232] NALA provides that it is the policy of the United States to preserve, protect, and promote the rights of Native peoples to use, practice, and develop Native languages, including 'ōlelo Hawai'i, specifically in education, tribal affairs, and public proceedings.[233]

The Act sets forth the government's intention to support the use of indigenous languages in education and recognizes the right of Native governments to make their languages "official" and order instruction in their Native languages.[234] It also encourages the inclusion of Native language instruction, where appropriate, at all levels of education and states that students proficient in Native languages shall be given comparable academic credit to students proficient in other languages.[235] At the time of its passage, the Act also required the President to direct the heads of federal departments and agencies to evaluate the laws they were administering, along with their policies and procedures, and to identify amendments and changes necessary to bring those laws, policies, and procedures into compliance with the Act.[236]

In December 2006, presumably in an effort to allay criticisms and fill the gaps left by NALA, as amended in 1992, Congress enacted the Esther Martinez Native American Languages Preservation Act of 2006.[237] This Act authorized the Secretary of Health and Human Services, as part of the Native American languages grant program, to make three-year grants for educational Native American language nests, survival schools, and restoration programs.[238] The passage of this Act further evidenced the strong federal policy stance on the preservation and perpetuation of Native languages through educational programs, and immersion programs in particular.

Given the foregoing, the provisions of the ESEA that prevent fair and accurate testing of Kaiapuni students are in direct conflict with the federal policy articulated in NALA and the Esther Martinez Act, and they must be corrected to reflect the federal government's policy position on the perpetuation of Native American languages.

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[232] *See* 25 U.S.C. § 2901.
[233] *See id.* § 2903.
[234] *See id.*
[235] *See id.*
[236] *See id.* § 2905.
[237] Pub. L. No. 109–394, 120 Stat 2705 (2006).
[238] *See id.*

### *3. Kaiapuni students and their parents are entitled to fair and equitable testing as a matter of law*

In addition to being inconsistent with federal policy, the existing assessment requirements of the ESEA, as applied to Kaiapuni students, are also unlawful. First, they unconstitutionally infringe upon parents' fundamental right to direct the upbringing and education of their children, particularly with respect to their right to direct the values of their children and the linguistic medium of instruction.[239] Second, the existing requirements violate equal protection principles to the extent they impermissibly discriminate against Native Hawaiian students based on their membership in a protected class.[240] Third, federal law regarding the division of powers between states and the federal government directs a certain level of federal deference to the state's laws and policies regarding the provision of educational services to Native Hawaiians and the status of the Hawaiian language in state government, including the state's educational system.[241]

Standing alone, the ESEA's failure to comply with applicable federal law and policy with respect to Kaiapuni students would provide a sufficient basis for demanding change. There is, however, another reason that the ESEA and its implementation must be corrected to make space for the Kaiapuni program—the successful perpetuation of ʻōlelo Hawaiʻi is critical to the reclamation of Native Hawaiian political sovereignty through cultural sovereignty.

## PART IV

Professor Rebecca Tsosie and former Chairman of the Comanche Nation of Oklahoma, Wallace Coffey, explain "cultural sovereignty" as "the effort of [indigenous] nations and [indigenous] people to exercise their own

[239] Wilson, *supra* note 226, at 40-42.

[240] *See id.*

[241] As explained above, the Hawaiʻi constitution has recognized the Hawaiian language as one of two official languages of the state since 1978. *See* HAW. CONST. art. XV, § 4; HAW. CONST., art. X, § 4. It also states that the State of Hawaiʻi shall "promote the study of Hawaiian culture, history, and language" and "provide for a Hawaiian education program consisting of language, culture and history in the public schools." HAW. CONST. art. X, § 4. In addition, the use of community expertise shall be "encouraged as a suitable and essential means in furtherance of the Hawaiian education program." *Id.*

norms and values in structuring their collective futures."[242] This type of sovereignty, which includes indigenous language perpetuation and other assertions of cultural identity, "is not dependent upon any grant, gift or acknowledgment by the federal government," and is distinct from political sovereignty, which, by definition, is dependent upon acknowledgment from external entities.[243] However, while cultural sovereignty is a distinct concept, it is intimately connected to political sovereignty.[244] Cultural sovereignty is, at once, the key to achieving political sovereignty and the ultimate goal of political sovereignty.[245]

Cultural sovereignty is the ultimate goal of political sovereignty because, as W. Richard West of the Cheyenne-Arapaho explains, "the ultimate goal of political sovereignty is protecting a way of life."[246] According to West's perspective, the preservation of a community's way of life is the primary purpose for seeking external acknowledgment and affirmation of the community's power to govern itself and determine its own destiny. It suggests that the point of having political sovereignty is not simply to have the power and authority to assert a measure of independence against other governing entities, but to be able to use that power and authority to protect and nurture the community's collective vision about culture, society, and government. It also acknowledges the often frustrating fact that, while political sovereignty is in many ways a fallacy because it depends on external acknowledgment, it is extremely critical because it has a practical impact on the ability of Native communities to take action in furtherance of their goals.

Maintaining cultural sovereignty is integral to achieving political sovereignty because some measure of cultural sovereignty generally must exist before a claim for political sovereignty will be entertained and acknowledged. While a community may understand its own cohesiveness

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[242] Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001).

[243] *Id.* Whether the community is state-recognized, federally-recognized, or a fully independent nation, political sovereignty derives from acknowledgment by another entity, be it a state, the federal government, or other independent nations.

[244] *See id.* (suggesting that "cultural sovereignty may ultimately prove to be our most valuable legal tool" toward political sovereignty).

[245] *See id.*

[246] Michelle Hibbert, Comment, *Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment*, 23 AM. INDIAN L. REV. 425, 433 (1999) (citing FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY 171 (1997)).

and identity, other governments will generally look for a demonstration of cultural sovereignty in order to justify the acknowledgment of political sovereignty.[247] Given the long history of forced suppression of Native cultures in the United States, the ability of contemporary communities to achieve political sovereignty generally requires those communities to first revitalize and "repatriate" their cultures. As Professor Tsosie and former Chairman Coffey assert:

> The process of reclaiming history, tradition, and cultural identity is a process of repatriation. Within this process, culture forms a dynamic foundation for tribal political sovereignty, which depends both upon an understanding of where we have been (e.g. how we constitute 'tradition') and where we are going (our contemporary interpretation and use of those traditions to ensure the survival of our Indian people).[248]

They further point out that the repatriation of culture involves, among other things, the revitalization of language, which "constitute[s] an important repository of knowledge about tribal concepts of spirituality, values, and philosophy. By acquiring this foundation, [indigenous] people are able to regain their identity, which helps overcome the negative legacy of colonialism and promotes healing."[249]

For the foregoing reasons, the ongoing efforts to carve out a space for ʻōlelo Hawaiʻi in state and federal law and policy—and the important work being done by educators, administrators, families and students in that space—are simultaneously a means to Native Hawaiian political sovereignty and the ultimate goal of that political sovereignty. As ʻĪlei Beniamina wisely explained during the formative years of ʻAha Pūnana Leo, "[t]he language will be the one to revive caring for the loʻi [(taro patch)], dancing the dance, and restoring our water rights. All of this lies in the Hawaiian language."[250]

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[247] *See id.* (explaining that "[Native American tribes] recognized themselves as distinctive cultural and political groups, and that was the basis of their sovereign authority to reach agreements with each other, with the European sovereigns, and then the United States" (citation omitted)).

[248] Coffey & Tsosie, *supra* note 242, at 202.

[249] *Id.* at 207 (citation omitted).

[250] ʻAha Pūnana Leo, *supra* note 195.

# Implicit Bias in Hawai'i: An Empirical Study

Justin D. Levinson[•], Koichi Hioki[°] & Syugo Hotta[*]

## I. INTRODUCTION

More than twenty years after pervasive implicit racial bias began to be documented by social scientists, a tremendous body of scholarship teaches citizens and scholars alike about the power and breadth of implicit racial bias in America and beyond.[1] Hundreds of empirical studies have found, using wide-ranging methodologies, that people possess a vast range of implicit biases that largely function outside their conscious awareness and can act to corrupt decision-making processes.[2] These biases, for example, manifest in the way people consistently associate certain groups (e.g., Native Americans, Black Americans, the elderly, the disabled, the overweight) with negative traits (e.g., violent, immoral, lazy) and other groups (e.g., White Americans, the physically abled, the thin) with positive

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[1] *See, e.g.*, Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998) (introducing attitude and stereotype implicit association tests ("IATs") and concluding that the IAT is a useful measure of implicit racial bias); Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117 (Henry L. Roediger III et al. eds., 2001); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 *(2004);* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001); Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359 (2007).

[2] *See, e.g.*, John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881 (2004); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 5-7 (2007).

traits (e.g., hard-working, moral).[3] Studies demonstrate, for example, how even briefly seeing a member of a stereotyped group can activate a broad and complex network of stereotypes and lead to biased decision-making. The real-world decision-making implications of these social science findings have been well-documented. This line of research reveals how implicit biases can predict doctors' medical treatment decisions,[4] human resource officers' choice of job candidates,[5] and the way money is allocated to various social groups.[6] In the realm of law and policy, the impact of implicit racial bias has been considered in a wide range of domains, spanning from property law[7] to federal Indian law,[8] from employment law[9] to criminal law,[10] and beyond.[11] Although much of the implicit bias-

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[3] *See generally* Patricia G. Devine, *Stereotypes and Prejudice: Their Autonomic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989) (showing that the consequence of subconscious activation of negative black racial stereotypes is evaluating ambiguous behavior as aggressive); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004); Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008).

[4] *See* Alexander R. Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1237 (2007).

[5] *See* Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECON. 523, 529-30 (2010).

[6] *See* Rudman & Ashmore, *supra* note 1, at 368.

[7] *See, e.g.*, Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 25 (Justin D. Levinson & Robert J. Smith eds., 2012).

[8] *See, e.g.*, Susan K. Serrano & Breann Swann Nu'uhiwa, *Implicit Bias Against Native Peoples as Sovereigns*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 209 (Justin D. Levinson & Robert J. Smith eds., 2012).

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

[10] *See, e.g.*, Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1554 (2004) (questioning whether implicit racial bias influences trial judge decisionmaking); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 101, 109 (2013); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) [hereinafter Levinson, *Forgotten Racial Equality*]; Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010) [hereinafter Levinson et al., *Guilty by Implicit Racial Bias*]; Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009) [hereinafter Levinson, *The Complicitous Mind*]; L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in*

focused legal scholarship is confined to the United States, implicit bias methodology and findings have been influential around the world.[12] Scores of research laboratories worldwide employ methodologies from the field of implicit social cognition to measure biases on a global scale.[13]

In Hawai'i, a unique archipelago with a rich history and worldwide reputation for beauty and tranquility, social inequalities are pervasive.[14] Statistics regarding home and land ownership, employment, education, and incarceration reflect some of these social inequalities.[15] People of Native Hawaiian origin, for example, are overrepresented in the criminal justice system and have been shown to face disproportionate sentencing outcomes.[16] Other groups who have arrived more recently to the islands,

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*Public Defender Triage*, 122 YALE L.J. 2626 (2013) (examining implicit racial bias in the context of the public defender's office); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L. REV. 1143, 1145 (2012); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012); Danielle M. Young et al., *Innocent Until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence*, 9 PLOS ONE, Mar. 2014, at 1.

[11] *See, e.g.*, IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012) (discussing implicit racial bias in over a dozen legal contexts).

[12] *See Project Implicit Publications*, PROJECT IMPLICIT, https://www.projectimplicit.net/papers.html (last visited Mar. 1, 2015).

[13] *See id.*

[14] *See* JONATHAN Y. OKAMURA, ETHNICITY AND INEQUALITY IN HAWAI'I 190-96 (2008). For example, 51% of Hawai'i public school students come from low-income families. *See* Anita Hofschneider, *More than Half of Hawaii Public School Students Are Low-Income*, HONOLULU CIV. BEAT (Jan. 16, 2015), http://www.civilbeat.com/2015/01/more-than-half-of-hawaii-public-school-students-are-low-income/. Some argue that these inequalities can be traced back to the overthrow of the sovereign government of the nation of Hawai'i. *See Hawaii Is Diverse, But Far from a Racial Paradise*, NPR (Nov. 15, 2009, 8:00 AM), http://www.npr.org/templates/story/story.php?storyId=120431126.

[15] *See* SARAH YUAN & HONG VO, HOMELESS SERVICE UTILIZATION REPORT: STATISTICAL SUPPLEMENT HAWAI'I FY 2013, at 14 (2014), *available at* http://uhfamily.hawaii.edu/publications/brochures/e033b_HSUR_StatisticalSupplement2013.pdf (finding that 70.6% of all families receiving homeless shelter services were of Micronesian, Marshallese, Hawaiian, or part Hawaiian descent); *see also* OFFICE OF HAWAIIAN AFFAIRS, JUSTICE POLICY INSTITUTE, UNIVERSITY OF HAWAI'I AND GEORGETOWN UNIVERSITY, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 27-42 (2010); OKAMURA, *supra* note 14, at 65; Eugene Tian, *Social, Economic, and Housing Characteristics of Hawaii Population by Selected Races*, HAW. REP. (May 24, 2012), http://www.hawaiireporter.com/social-economic-and-housing-characteristics-of-hawaii-population-by-selected-races (reporting that between 2006 and 2010, Native Hawaiians had a poverty rate of 12.1% compared to the Japanese with a 5.3% poverty rate. Japanese had the highest home ownership rate at 74.6% and Samoans had the lowest home ownership rate at 26.3%).

[16] Although Native Hawaiians make up only 24% of the general population, Native

such as those from the Federated States of Micronesia and surrounding island nations, often struggle to cope with the challenges of life in Hawai'i, both economically and in the criminal justice system.[17] On the other side of

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Hawaiians accounted for 25% of all arrests, 39% of the incarcerated population, and the largest proportion (41%) of people who had their parole revoked in 2009. *See* OFFICE OF HAWAIIAN AFFAIRS, *supra* note 15, at 27-28, 42 (2010). Additionally, Native Hawaiians adjudged guilty are more likely to receive a prison sentence than all other ethnic groups and receive longer prison sentences and longer probation periods than most other racial or ethnic groups. *Id.* at 10-11, 40. As the disparate impact of the criminal justice system on Native Hawaiians is cumulative, beginning with more frequent arrests and ending with longer parole or higher parole revocations, the total effect of this disparate treatment is undoubtedly far-reaching. *Id.* at 28. In 2012, Native Hawaiians accounted for 22.2% of all murder arrests, 37.2% of all robbery arrests, 38.6% of all motor vehicle theft arrests, and 30.9% of all aggravated assault arrests compared to nine other ethnic groups. LYDIA SEUMANU FUATAGAVI & PAUL PERRONE, CRIME PREVENTION & JUSTICE ASSISTANCE DIVISION OF THE ATTORNEY GENERAL FOR THE STATE OF HAWAII, CRIME IN HAWAII 2012: A REVIEW OF UNIFORM CRIME REPORTS 102 (2013), *available at* http://ag.hawaii.gov/cpja/files/2013/12/Crime-in-Hawaii-2012.pdf. Native Hawaiians also accounted for 28.4% of fraud arrests, 27.4% of vandalism arrests, and 31.8% of nonnarcotic drug possession arrests in 2012. *Id.* at 108. This trend has also been studied in the juvenile justice system:

> While most ethnic groups see a decrease in representation as the cases penetrate into the juvenile justice system, the cases involving Native Hawaiian youth depart from this trend. At the point of arrest, 42% of all cases involve Native Hawaiian youth. As the cases progress deeper into the system, the proportion of Native Hawaiian involvement incrementally increases to 46% of the cases referred to Family Court, 49% of the cases petitioned to appear in court and subsequently adjudicated, then 50% of the cases sentenced to probation placement without incarceration and 54% of the cases sentenced to incarceration.

KAREN UMEMOTO ET AL., DEPARTMENT OF URBAN AND REGIONAL PLANNING AT THE UNIVERSITY OF HAWAI'I AT MANOA, DISPROPORTIONATE MINORITY CONTACT IN THE HAWAI'I JUVENILE JUSTICE SYSTEM 2000-2010: FINAL REPORT 29 (2012), *available at* http://ag.hawaii.gov/cpja/files/2013/01/DMC-FINAL-REPORT-2012.pdf.

[17] *See* Scott K. Okamoto et al., *Risk and Protective Factors of Micronesian Youth in Hawai'i: An Exploratory Study*, 35 J. SOC. & SOC. WELFARE 127 (2008). In 2010, while the overall poverty rate in Hawai'i was 9.6%, the poverty rate for Micronesians was 38% in 2012. EN H. YOUNG ET AL., STATE OF HAWAI'I DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, NEW DAY PLAN FOR IMPROVING LIVES AND STRENGTHENING COMMUNITIES 7 (2012), *available at* http://labor.hawaii.gov/ocs/files/2012/11/OCS-NEW-DAY-PLAN-10-03.pdf; *see also* FRANCIS X. HEZEL & MICHAEL J. LEVIN, SURVEY OF FEDERATED STATES OF MICRONESIA MIGRANTS IN THE UNITED STATES INCLUDING GUAM AND THE COMMONWEALTH OF NORTHERN MARIANA ISLANDS (CNMI) 22 (2012), *available at* http://www.healthypacific.org/uploads/1/0/0/6/10065201/combined_final_report.pdf. In 2012, Hawai'i Micronesians' average household income was $42,158 and less than 4% of Micronesian families "owned the place in which they lived." *See id.* at 21, 23. As recently as 2011, more than 10% of all Micronesians in Hawai'i were living in homeless shelters, comprising 24% of those living there, even though in 2012, Micronesians comprised a mere 0.6% of Hawai'i's population. *See* YOUNG ET AL., *supra*; *see also* HEZEL & LEVIN, *supra* at 17. Only 5% of Micronesians in Hawai'i had a college AB degree or higher. *See* HEZEL &

the spectrum, groups such as European Americans and Japanese Americans are better situated in terms of economic and educational success.[18]

Despite the inequalities of modern life in Hawai'i, scholarly accounts of the sources of this inequality typically have been qualitative in nature and large-scale empirical projects have yet to test empirically how implicit biases manifest with relation to some of the most engaging social and economic discussions of the modern era.[19] This Article presents the results of an empirical study that was conducted to test implicit and self-reported (explicit) attitudes and stereotypes toward four Hawai'i groups: Japanese Americans, European Americans, Native Hawaiians, and Micronesians.[20] Furthermore, for context, the study compared biases in Hawai'i with biases toward the same groups in U.S. states other than Hawai'i.

The topic of inequality in Hawai'i has been represented by substantial writings that trace back the island chain's interaction with Western nations and eventual overthrow by United States-backed annexationists.[21] Indeed, for many decades even after the first military threats from Western nations, Hawai'i was governed as a monarchy, with functioning international relations around the globe.[22] After the overthrow of the Hawaiian government, followed much later by statehood, intergroup relations evolved in a manner such that various groups ended up differently in terms of social

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LEVIN, *supra* at 18.

[18] *See* OKAMURA, *supra* note 14, at 49, 72-74, 89; *see also* Tian, *supra* note 15 (reporting that between 2006 and 2010, Whites and Japanese had the highest per capita and family incomes compared to Black, Chinese, Filipino, Korean, Vietnamese, Samoan, and Native Hawaiian groups).

[19] Various sources document and discuss the role of stereotypes in Hawai'i, but do not employ empirical methodologies. *See, e.g.*, OKAMURA, *supra* note 14; David Tokiharu Mayeda et al., *Talking Story with Hawaii's Youth: Confronting Violent and Sexualized Perceptions of Ethnicity and Gender*, 33 YOUTH & SOC'Y 99 (2001); Clifton S. Tanabe, *Educational Policy in the Post-Racial Era: Federal Influence on Local Educational Policy in Hawaii*, 19 PAIDEUSIS 59 (2010); Karyn R. Okada, Comment, *An Analysis of Hawai'i's Tradition of "Local" Ethnic Humor*, 30 U. HAW. L. REV. 219 (2007). These sources are valuable and represent an important contribution to the literature. Other empirical studies have focused on explicit rather than implicit bias. *See infra* note 83.

[20] By choosing these four groups, we do not mean to take a position with regard to which of Hawai'i's groups need to be studied. Rather, we were limited in resources and chose four groups to begin the empirical process of better investigating stereotypes in Hawai'i. Continuing research should seek to understand the dynamic role of stereotypes in Hawai'i that are important to the functioning of all groups living in the state.

[21] *See, e.g.*, LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY (1961); MICHAEL HAAS, INSTITUTIONAL RACISM: THE CASE OF HAWAI'I (1992); ANDREW W. LIND, HAWAII'S PEOPLE (1955); OKAMURA, *supra* note 14.

[22] *See* GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 1-285 (1968); FUCHS, *supra* note 21, at 3-35.

and economic status.[23] Some of those groups, especially European Americans, maintained economic success throughout Hawai'i's recent history.[24] Others, such as Japanese Americans and Chinese Americans, have overcome discrimination, low wages, and harsh working conditions, to rise to what is largely agreed to be a model of economic and political success.[25] The Native Hawaiian people, who had governed the islands for centuries with a well-developed and complex set of (non-Western) laws, bore much of the brunt of colonization.[26] Although there have been major successes in areas such as the revival of Native Hawaiian language and culture,[27] objective measures show continuing harms of the post-colonial era.[28]

Of the groups of immigrants who have arrived in Hawai'i over the past couple of centuries, some groups, including Samoans and Tongans,[29]

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[23] *See generally* 29 SOC. PROCESS HAW. (SPECIAL ISSUE) (1982).

[24] *See* OKAMURA, *supra* note 14, at 42-63; Thomas W. Maretzki & Jown F. McDermott, Jr., *The Caucasians*, *in* PEOPLE AND CULTURES OF HAWAII: A PSYCHOCULTURAL PROFILE 25 (John F. McDermott et al. eds., 1980).

[25] *See* OKAMURA, *supra* note 14, at 42-63; Walter F. Char et al., *The Chinese*, *in* PEOPLE AND CULTURES OF HAWAII: A PSYCHOCULTURAL PROFILE 53 (John F. McDermott et al. eds., 1980); Terence A. Rogers & Satoru Izutsu, *The Japanese*, *in* PEOPLE AND CULTURES OF HAWAII: A PSYCHOCULTURAL PROFILE 73 (John F. McDermott et al. eds., 1980). Korean Americans have also attained what many perceive to be a level of economic and political success in Hawai'i, but perhaps not to the same extent as Japanese Americans and Chinese Americans. *See* W. Edgar Vinacke, *Stereotyping Among National-Racial Groups in Hawaii: A Study in Ethnocentrism*, 30 J. SOC. PSYCHOL. 265 (1949) (providing a mid-twentieth century look at the perceptions of Korean Americans and other groups in Hawai'i and finding that Korean Americans were not perceived to have the same positive attributes as Japanese Americans and Chinese Americans in Hawai'i); *see also* SUZANNE MACARTNEY ET AL., POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011 app. at 13, 15-16 (2013), *available at* http://www.census.gov/hhes/www/poverty/publications/Appendix_Tables1-24.pdf (reporting that 16.5% of urban Honolulu's Korean population was impoverished between 2007 and 2011 compared to only 6.0% of Japanese and 10.5% of Chinese).

[26] *See generally* LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992).

[27] *See* Laurie D. McCubbin & Anthony Marsella, *Native Hawaiians and Psychology: The Cultural and Historical Context of Indigenous Ways of Knowing*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 374, 379-83 (2009).

[28] *See* MACARTNEY ET AL., *supra* note 25, app. at 7, 15 (reporting that 13.7% of urban Honolulu's Native Hawaiian only population was impoverished between 2007 and 2011, compared to, for example, only 6.0% of Japanese in urban Honolulu); Tian, *supra* note 15 (reporting that Native Hawaiians tied with Samoans for the second-highest unemployment rate in Hawai'i between 2006 and 2010 compared to seven other ethnic groups).

[29] These are not the only groups to continue to struggle. Filipinos in Hawai'i, for example, have had mixed successes and struggles, and objective measures corroborate some continuing challenges.

continue to struggle, at least with reference to objective measures of wealth,[30] education,[31] and health outcomes.[32] Various groups of people have moved to Hawai'i for a range of reasons over the decades, many as part of a plantation system from the mid-late 1800s to early-mid 1900s, and most in search of economic opportunity and prosperity.[33] Others, such as Micronesians, have moved to Hawai'i in large part due to living conditions made harsh in the aftermath of U.S. nuclear testing.[34] For some groups, the transition to Hawai'i life has been marked by language and cultural barriers, as well as occasional outright discrimination.[35] Compounding these barriers may be negative attitudes and stereotypes, both implicit and explicit, of often even well-intentioned Hawai'i residents, which contribute to disparate treatment of already disadvantaged group members. In light of the complex, dynamic, and fascinating history of intergroup relations in Hawai'i, supplemented by the modern revolution of implicit bias research, it is surprising that empirical implicit bias research in Hawai'i is still just beginning.[36]

This Article takes up the empirical exploration of implicit bias in Hawai'i, and presents results of a study that demonstrates, among other things, that people in Hawai'i harbor negative implicit biases towards Micronesians, positive implicit biases towards Japanese Americans, and more complex multidirectional biases towards Native Hawaiians and

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[30] *See* MACARTNEY ET AL., *supra* note 25, app. at 5, 8, 14-15 (stating that between 2007 and 2011 in urban Honolulu, 7.8% of Filipinos, 27.6% of Native Hawaiian and other Pacific Islanders, and 26.7% of Tongans were impoverished compared to only 6.0% of the Japanese only population). Between 2006 and 2010, Samoans had the lowest per capita income at $13,319, had the highest poverty rate, and tied with Native Hawaiians for the second-highest unemployment rate in a study of nine ethnic groups. *See* Tian, *supra* note 15.

[31] *See* OKAMURA, *supra* note 14, at 65-69, 73.

[32] *See* DEP'T OF NATIVE HAWAIIAN HEALTH, CTR. FOR NATIVE & PAC. HEALTH DISPARITIES RESEARCH, JOHN A. BURNS SCH. OF MED., UNIV. OF HAW. AT MĀNOA, ASSESSMENT AND PRIORITIES FOR HEALTH & WELL-BEING IN NATIVE HAWAIIANS & OTHER PACIFIC PEOPLES 7-14 (2013), *available at* http://blog.hawaii.edu/uhmednow/files/2013/09/AP-Hlth-REPORT-2013.pdf.

[33] *See* William P. McGowan, *Industrializing the Land of Lono: Sugar Plantation Managers and Workers in Hawaii, 1900-1920*, 69 AGRIC. HIST. 177, 179-82 (1995).

[34] *See* John Letman, *Micronesians in Hawaii Face Uncertain Future*, AL JAZEERA (Oct. 3, 2013, 6:40 AM), http://www.aljazeera.com/humanrights/2013/10/micronesians-hawaii-face-uncertain-future-201310191535637288.html (reporting that the U.S. conducted at least 67 nuclear tests in the Marshall Islands between 1946 and 1958, with most tests vastly exceeding the nuclear power used in the Hiroshima bombing).

[35] *See, e.g.*, Okamoto et al., *supra* note 17. *See generally* HAAS, *supra* note 21.

[36] For a look at a fascinating empirical study of implicit bias and education in Hawai'i, see Tawnee Sakima & Scott Schmidtke, *Implicit Biases and Hawai'i's Educational Landscape: An Empirical Investigation*, 37 U. HAW. L. REV. 501 (2015).

Caucasians. Section II contextualizes the state of implicit bias research in Hawai'i and reviews past studies relevant to the topic (which have been especially focused on African American stereotypes). Section III presents the research methods we employed. As we describe, the study we conducted tested implicit and explicit biases in Hawai'i (and in other US states as a comparison group) related to four groups: Micronesians, Native Hawaiians, Japanese Americans, and Caucasians. Section IV reviews the results of the study. Finally, Section V considers the results of the study, particularly the negative (implicit and explicit) biases towards Micronesians, in the context of societal inequality in Hawai'i.

## II. IMPLICIT BIAS IN HAWAI'I: PREVIOUS EMPIRICAL STUDIES

Despite the dearth of empirical research on implicit stereotypes relating to groups in Hawai'i, several research projects beginning in 2007 have directly measured residents' levels of implicit bias as it relates to various social and ethnic groups. This research, however, has been fairly limited in breadth, focusing mostly on stereotypes related to a few social groups. The majority of this research demonstrates consistent and troubling stereotypes of African Americans in Hawai'i, particularly in the context of the criminal justice system. This section reviews previous empirical studies on implicit bias in Hawai'i, highlights the lack of empirical studies relating particularly to the majority of groups living in Hawai'i, and sets the stage for the study we conducted.

Although scholars have yet to empirically examine implicit attitudes and stereotypes related to most of Hawai'i's residents, much is known about how people in Hawai'i implicitly stereotype African Americans as aggressive criminals. Justin Levinson and colleagues have conducted several empirical studies that have tested how African American stereotypes manifest in Hawai'i with regard to jury memory errors, skin-tone biases,[37] automatic associations of criminal guilt, as well as unanticipated effects of jury instructions. This research is particularly interesting because the population of African Americans in Hawai'i is small, yet, as this section reviews, the stereotypes are strong and pervasive.

### *A. Local Memory Biases: African Americans and Native Hawaiians*

The first empirical study conducted on implicit bias in Hawai'i examined implicit memory errors in the context of jurors and judges remembering and

[37] These biases are not limited to African Americans in Hawai'i.

forgetting relevant case facts.[38] In this 2007 study, Justin Levinson studied a sample of 153 University of Hawai'i undergraduate students.[39] In one of the study's primary tasks, mock-juror participants read a story of a fistfight (a story Levinson called *The Confrontation*) in which a twenty-three-year-old man and a thirty-year-old man became involved in a violent altercation after an incident at a bar.[40] One-third of the participants read about an African American man named Tyronne who was involved in the fight.[41] Another one-third of participants read about a Native Hawaiian man named Kawika, and the final third of the participants read about a Caucasian man named William.[42] By randomly assigning participants into the three conditions, each participant read the same story, except that the name and ethnicity of the target actor was different.[43] After reading the details of the story, participants were temporarily distracted,[44] and then were later asked to recall what had happened.[45] Levinson hypothesized that "[t]he accuracy of participants' memories in recalling legal stories would be affected by the race of the actors in the stories[,]" that "[p]articipants would make memory errors in a manner harmful to African Americans and Hawaiians but helpful to Caucasians[,]" and that "[p]articipants who exhibited more implicit bias in making memory errors would not necessarily be those who exhibited more explicit bias."[46]

The results of the study indicated that participants remembered certain legally relevant facts in a "racially biased manner."[47] That is, participants who read about an African American actor were able to recall that actor's aggressive actions more accurately than those who read about a Native Hawaiian actor or a Caucasian actor.[48] Specifically, participants correctly recalled 80.2% of aggressive actions when the actor was African American,

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[38] *See* Levinson, *Forgotten Racial Equality*, *supra* note 10.

[39] *See id.* at 390.

[40] *See id.* at 391-92.

[41] *See id.* at 394.

[42] *See id.*

[43] *See id.* at 394-95.

[44] Participants were asked to complete a short measure similar to a standardized test. The purpose of this task was to make sure that memory was tested rather than lingering cognitive remnants from the story.

[45] *Id.* at 391-93.

[46] *Id.* at 397. Explicit, or self-reported, bias was measured using a scale called the "Social Dominance Orientation" scale. *Id.* at 361 (citing Felicia Pratto et al., *Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes*, 67 J. PERSONALITY & SOC. PSYCHOL. 741, 742 (1994)).

[47] Levinson, *Forgotten Racial Equality*, *supra* note 10, at 398.

[48] *See id.* at 398-99.

versus 71.8% of aggressive actions when the actor was Native Hawaiian, and just 67.8% of aggressive actions when the actor was Caucasian.[49]

With regard to the Native Hawaiian actor, one particularly interesting effect emerged. That is, when false memories of "mitigating facts" (facts that would tend to lessen the moral responsibility of a perpetrator) were measured, the results of the study showed that participants were more likely to falsely remember that the Native Hawaiian actor (compared to the African American or Caucasian actor) had been provoked.[50] Specifically, participants who read about Kawika incorrectly "remembered" 49% of questions relating to mitigating facts whereas those who read about William or Tyronne incorrectly remembered 38% and 37% of those facts, respectively.[51] Put simply, participants were more likely to think that Kawika had been provoked. Levinson interpreted these results by suggesting that there is:

> A complex and unique relationship between localism in the community (among Native Hawaiian and non-Hawaiian people alike) and positive and negative stereotypes. Such a unique dynamic could simultaneously implicate negative stereotypes of [Native Hawaiian] aggression and more positive stereotypes regarding mitigation (understanding the historical and societal role and prevalence of the provocation of Hawaiians, for example). As a result, the false memory result could be explained if the provocation of Hawaiians was a societal stereotype—given that stereotypes are linked to false memory generation.[52]

Finally, Levinson's study of memory and implicit bias found that "participants who manifested more memory bias were not more likely to be explicitly biased."[53] That is, memory errors were not explained by the attitudes about group membership that the participants reported in the questionnaire. Instead, Levinson suggested that these memory errors were likely driven by automatic, implicit attitudes and stereotypes.[54]

### *B. Local Skin-Tone Bias and Crime Evidence Evaluations*

Building on the 2007 study, Levinson and Danielle Young later tested whether exposing mock-juror participants to perpetrator photographs with

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[49] *See id.* at 399.

[50] *See id.* at 401-02.

[51] *See id.* at 401.

[52] *Id.* at 402 (citing Eric Yamamoto, *The Significance of Local*, SOC. PROCESS HAW. 138, 138-49 (1974)).

[53] *Id.* at 404.

[54] *See id.* at 400-01.

different skin tones would affect their later decision-making.[55] In that study, Levinson and Young tested jury-eligible student participants at the University of Hawai'i.[56] Each participant was informed that they were to be jurors in a case involving the armed robbery of a mini-mart.[57] They were then told that they would view slides of the crime scene.[58] All participants saw the same five slides for the same amount of time (four seconds each), except that half of the participants saw a security camera photograph of a dark-skinned perpetrator and half of the participants saw an otherwise identical security camera photograph of a lighter-skinned perpetrator.[59] Participants were then informed that a suspect had been arrested and charged with a crime.[60] The mock-juror participants were presented with individual pieces of evidence from the trial and were asked to rate how much they believed each piece of evidence tended to indicate guilty or not-guilty.[61] Finally, they were asked to decide whether, on the basis of all testified information, the defendant was guilty.[62]

The researchers found that the Hawai'i participants who saw the darker-skinned perpetrator judged the case evidence to be more indicative of guilty than the Hawai'i participants who saw the lighter-skinned perpetrator.[63] Furthermore, they found that participants who saw the darker-skinned perpetrator were more likely to believe the defendant was guilty (on a 0-100 scale) than those who saw a lighter-skinned perpetrator.[64] Overall, the study indicates that participants from Hawai'i were sensitive to even a brief exposure related to skin tone, and that even briefly seeing a photo of a darker-skinned perpetrator (which should have been irrelevant to their

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[55] *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 331-39 (2010).

[56] *See id.* at 335.

[57] *See id.* at 332.

[58] *See id.*

[59] *See id.* The perpetrator wore a mask and gloves, such that the only visible skin was on his forearm. *See id.*

[60] *See id.*

[61] *See id.* at 332-33. For example:

> The defendant used to be addicted to drugs[;] [t]he defendant has been served with a notice of eviction from his apartment[;] [t]he defendant is left-handed[;] [t]he defendant was a youth Golden Gloves boxing champ in 2006[;] [t]he defendant is a member of an anti-violence organization[;] [t]he defendant does not have a driver's license or car.

*Id.* at 333.

[62] *See id.* at 334.

[63] *See id.* at 337.

[64] *See id.*

responses) affected ratings of both evidence value and also beliefs of criminal guilt.[65] Such a finding, of course, is in direct contravention of fairness principles underlying the Hawai'i criminal justice system.[66] It is important to note here that at no time was the race or ethnicity of the perpetrator or defender detailed.[67] Skin tone alone, without group identification, led to these effects.[68] In Hawai'i's diverse environment, there is little reason to believe that these effects are limited to some darker-skinned groups but not others.

### C. *Implicit Association of Black with Guilty and White with Not-Guilty*

Research in Hawai'i has also indicated that people implicitly associate the racial category of Black with guilty and the racial category of White with not-guilty. Working with the same University of Hawai'i participants, Levinson, Huajian Cai, and Young created and employed a "Guilty/Not-Guilty Implicit Association Test" that asked participants to pair Black and White (exemplified by photos of Black and White faces) with words representing the legal concepts of guilty and not-guilty.[69] Consistent with the experimenters' predictions, participants implicitly associated Black with guilty and White with not-guilty.[70] That is, based on statistically significant differences in reaction times, participants found it much easier to group together Black faces with guilty words and White faces with not-guilty words.[71] Such a result raises the question of whether the presumption of innocence functions in a racially fair way.

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[65] *See id.* at 338.

[66] *See id.* at 339.

[67] *See id.* at 332.

[68] *See id.* at 338.

[69] *See* Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 10, at 192-93. As we describe *infra* notes 75-93 and accompanying text, the IAT is an implicit measure that employs reaction-time sensitive software. "The IAT pairs an attitude object (such as a racial group) with an evaluative dimension (good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes." Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 9, 16 (Justin D. Levinson & Robert J. Smith eds., 2012).

[70] *See* Levinson et al., *Guilty by Implict Racial Bias*, *supra* note 10, at 204. Participants also displayed more traditional race-based stereotyped implicit biases, such as Black-Unpleasant compared to White-Pleasant. *See id.* at 204. These biases predicted the way jurors made verdict decisions based upon the perpetrator's skin tone. *See id.* at 206 n.95.

[71] *See id.* at 191, 204.

### *D. Race and Bias in the Presumption of Innocence*

A study by Young, Levinson, and Scott Sinnett,[72] also run on Hawai'i residents, provides preliminary evidence that presumption of innocence jury instructions themselves may "prime"[73] jurors in ways consistent with racial stereotypes of Black men.[74] In that study, mock juror participants sitting in a courtroom viewed a video containing jury instructions from a federal judge in which the judge either gave instructions regarding the presumption of innocence and burden of proof or similar-length instructions.[75] Jurors were then immediately given a "dot-probe" task, a computerized visual measure used by attention-perception researchers to determine where a person is attending/focusing.[76] The study showed that participants who received the presumption of innocence instructions were quicker to visually focus on a Black face compared to participants who received the other instructions.[77] Drawing on the literature from perception studies, which have shown that the activation of the concept of "crime" causes people to attend to Black faces[78] and that the priming of Black stereotypes leads to faster identification of weapons,[79] the researchers suggested that this finding may indicate something counterintuitive—that people actually implicitly associate the presumption of innocence with Black aggression

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[72] Young et al., *supra* note 10.

[73] Priming is the "incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context." John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996). As Levinson and colleagues have described, "[s]imply put, priming studies show how causing someone to think about a particular domain can trigger associative networks related to that domain." Levinson et al., *supra* note 69, at 10.

[74] This description of the Young et al. study, including footnotes, is based heavily upon the summary that appears in Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 551 (2014).

[75] The instructions were based upon COMM. ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT (2010), *available at* http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Jury_Instructions_2014_02.pdf. The similar-length instructions were chosen to be innocuous such that they would not likely have an independent effect.

[76] Young et al., *supra* note 10, at 2.

[77] *Id.* at 3.

[78] *See* Eberhardt et al., *supra* note 3, at 888 ("Indeed, thinking about the concept of crime not only brought Black faces to mind but brought stereotypically Black faces to mind.").

[79] *See id.* at 881 (explaining that participants who saw a Black face were quicker to identify "crime-relevant objects").

and guilt.[80] If instructing jurors on the presumption of innocence indeed primes implicit associations of Black guilt, this would be a powerful indication that the jury decision-making process could serve as an automatic bias delivery mechanism.

### *E. Implicit Gender Bias in Hawai'i's Legal Profession*

Outside of the context of race, Levinson and Young have also examined how implicit gender bias functions in Hawai'i—particularly, within the Hawai'i legal profession.[81] In this 2010 study, Levinson and Young were interested in the question of why gender equality had not been reached in terms of success in the highest levels of the legal profession—in judicial appointments and law firm partnership selection. They hypothesized that implicit gender bias affects the success of women in the upper levels of the legal profession, and designed and conducted an empirical study using the IAT. The study tested whether Hawai'i law students held implicit gender biases related to women in the legal profession, and further tested whether these implicit biases predict discriminatory decision-making. The results of the study were both concerning and hopeful. As predicted, the researchers found that implicit biases were pervasive; a diverse group of both male and female law students implicitly associated judges with men, not women, and also associated women with the home and family. Yet the results of the remaining portions of the study offered hope. Participants were frequently able to resist their implicit biases and make decisions in gender neutral ways. Levinson and Young discussed these Hawai'i based results in a broader context, concluding first, that the power of implicit gender biases persists, even in the next generation of lawyers; and second, that the emergence of a new generation of egalitarian law students may offer some hope for the future.

Although this section has reported that quite a bit of research has been conducted that calls into question racial fairness for Black defendants in Hawai'i, little research (other than the studies on skin tone and gender, discussed above) has examined empirically the role of implicit bias with regard to other social groups in Hawai'i. This dearth of research set the stage for the empirical study we conducted.

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[80] *See* Young et al., *supra* note 10, at 3-4.

[81] This paragraph description has been adapted and reproduced, with minimal changes, from a summary in original article. *See* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 1-3 (2010).

## III. THE EMPIRICAL STUDY

Building upon the research outlined in Section II, and in recognition of the still early stage of research on implicit bias in Hawai'i, we designed a study to measure implicit stereotypes and attitudes among a diverse group of Hawai'i residents related to members of four groups: Japanese Americans, Caucasians, Native Hawaiians, and Micronesians.[82] We employed the study both in Hawai'i as well as across the rest of the United States, so that we could not only measure implicit biases and stereotypes in Hawai'i, but also compare them to biases and stereotypes outside of Hawai'i. Although, as outlined in Section II, there has been substantial study of implicit biases of African Americans in Hawai'i, most research related to stereotypes of other groups in Hawai'i has not included the use of methods that measure implicit bias.[83]

### *A. Methods and Materials*

Because of the various societal inequalities in Hawai'i,[84] we were interested in whether there might be a link between intergroup biases and inequality in Hawai'i. To investigate this potential link, this study employed both implicit methods and explicit (self-report) methods, and compared responses in Hawai'i to responses from U.S. states other than Hawai'i. The primary implicit method employed was the IAT. Explicit (self-report) questions were employed using scaled survey-style questions.

The IAT measures implicit cognitions in a simple and compelling way.[85] It asks participants to categorize information as quickly as possible, and then calculates a participant's reaction time (in milliseconds) and accuracy in completing the categorization task.[86] The wisdom behind the IAT holds

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[82] Due to limited resources, we limited this particular study to four groups. We are presently studying attitudes and stereotypes related to other Hawai'i groups.

[83] Research beginning in the late 1940s, however, produced some important findings in terms of understanding the role of explicit (self-reported) stereotypes in Hawai'i. *See* Vinacke, *supra* note 25, at 265; *see also* Graham C. Kinloch & Jeffrey A. Borders, *Racial Stereotypes and Social Distance Among Elementary School Children in Hawaii*, 56 SOC. & SOC. RES. 368 (1972).

[84] *See supra* notes 13-17 and accompanying text.

[85] The following few paragraphs briefly describe the scientific principles underlying the IAT. An almost identical version of this subsection (including footnotes) appeared in Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 10, at 191-93.

[86] As psychologists Nilanjana Dasgupta and Anthony Greenwald summarize, "[w]hen highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater

that statistically-significant speed and accuracy-based differences in a person's ability to categorize different types of information reflect something meaningful in that person's automatic cognitive processes.

The following is a detailed description of the way the IAT is typically conducted: Study participants, working on computers, press two pre-designated keyboard keys as quickly as possible after seeing certain words or images on the computer monitors. The words and images that participants see are grouped into meaningful categories. These categories require participants to "pair an attitude object (for example, Black or White) with either an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts)."[87] Participants complete multiple trials of the pairing tasks, such that researchers can measure how participants perform in matching each of the concepts with each other. For example, in one trial of the most well known IATs, participants pair the concepts Good-White together by pressing a designated response key and the concepts Bad-Black together with a different response key. After completion of the trial, participants then pair the opposite concepts with each other, here Good-Black and Bad-White.[88] The computer software that gathers the data[89] measures the number of milliseconds it takes for participants to respond to each task. Scientists can then analyze (by comparing reaction times and error rates using a statistic called "D-prime")[90] whether participants hold implicit associations between the attitude object and dimension tested. Results of IATs conducted on race consistently show that "white Americans express a strong 'white preference' on the IAT."[91]

As a measure, the IAT is quite flexible. Researchers have created dozens of different kinds of IATs. Some examples include: Gender-Science IAT,

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difficulty." Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001).

[87] Levinson, *Forgotten Racial Equality*, *supra* note 10, at 355 (citing Banaji, *supra* note 1, at 117, 123).

[88] Because participants may naturally be quicker at responding with one of their hands, participants complete these tasks twice, once for each response key, to eliminate differences based on hand preference. The order of the IAT tasks is also usually randomized to reduce order effects.

[89] In our empirical study, we used the software Inquisit, produced by Millisecond Software.

[90] *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197, 201 (2003) [hereinafter Greenwald et al., *Improved Scoring Algorithm*].

[91] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195, 1199 (2009). *See also* Levinson, *The Complicitous Mind*, *supra* note 10, at 612 (citing Nosek et al., *supra* note 3.)

Gay-Straight IAT, and the Fat-Thin IAT, among many others.[92] The Gender-Science IAT, for example, requires participants to group together Male and Female photos with Science and Liberal Arts words.[93] It is worth noting the flexibility of the IAT to test either evaluative dimension words (such as grouping Male-Female with Good-Bad), or attribute dimension words (such as grouping Male-Female with Career-Family, as Levinson and Young did). The four IATs we created for the present study, the Japanese American-Micronesian attitude and stereotype IATs, and the Caucasian-Native Hawaiian attitude and stereotype IATs, require participants to group together words associated with the group category (attitude-object words for each of the four groups) and either good and bad words (attitude-dimension words, such as anger, terrible, happy, smile) or stereotype words (attribute-dimension words, such as lazy, violent, ambitious, ethical).[94]

In addition to measuring implicit cognition with the IATs, we also asked participants to self-report their explicit attitudes and stereotypes towards members of the four groups.[95] To do this, we used "feeling thermometer" measures. These measures ask participants, for example, "How warmly do you feel towards Japanese Americans?" and "How warmly do you feel towards Native Hawaiians?" The purpose of the measure is to quantify explicit attitudes towards each group. We also asked participants to indicate their levels of self-reported stereotyped beliefs about the different groups. Participants were asked, for each group, to rate their beliefs about the four groups with regard to the topics of violence, laziness, closed-mindedness, and dependence upon others. These questions were each completed on 1-7 scales that asked participants how much they agreed or disagreed with statements relating to each group.

There were fifty-nine participants in the study, most of whom were recruited by a prominent internet recruitment service and provided compensation for their participation. Twenty-six of these participants had

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[92] *See Take a Test*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/selectatest.html (last visited Mar. 1, 2015).

[93] *See id.*

[94] The words we used for Caucasian were: White, European, Pilgrims, Blond, Mainland, and Cowboy. The words we used for Japanese American were Mochi, Bento, Omiyage, Bon-dance, Taiko, and Shoyu. The words we used for Micronesian were Palau, Guam, Chuuk, Marshallese, Nauru, and Yap. And the words we used for Native Hawaiian were Pele, Ali'i, Imu, Kamehameha, Lū'au, and Poi.

[95] It should be noted that, by no means do we believe that study of these four groups are the only important tests to be conducted on implicit bias in Hawai'i. However, due to limited time and resources, we selected these particular groups. Each group that we tested has a unique and important history in Hawai'i. This Article is not intended to provide a rich or meaningful history of these groups in Hawai'i.

lived in Hawai'i for more than five years.[96] The remaining participants (n= 33) were from our USA (non-Hawai'i) comparison group.[97] After giving informed consent, participants began the online study by completing four IATs: an attitude IAT and stereotype IAT for Caucasian-Native Hawaiian and an attitude IAT and stereotype IAT for Japanese American-Micronesian. To counterbalance order, some participants completed the relevant attitude IAT first, and others completed the relevant stereotype IAT first.[98]

After completing the implicit measures, participants next completed the feeling thermometer questions and the four explicit measure stereotype questions. These questions were presented in counterbalanced order, such that different participants answered these four questions in different orders (in order to eliminate order effects). Participants were then asked for demographic information and thanked for their participation.

### *B. Hypotheses*

Based upon previous scholarship related to the history of social inequality in Hawai'i, as well as knowledge gained through previous empirical research on implicit bias in Hawai'i and elsewhere, we made the following hypotheses:

> (1) Hawai'i participants would implicitly associate Japanese American with positive attitudes and stereotypes, and Micronesian with negative attitudes and stereotypes
>
> (2) Hawai'i participants would implicitly associate European American with positive stereotypes and Native Hawaiian with negative stereotypes, but implicit attitudes toward the groups would be mixed
>
> (3) On explicit (self-report) measures, Hawai'i participants would favor Japanese Americans, favor Native Hawaiians to a lesser extent, and disfavor Caucasians and Micronesians

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[96] Because we believe implicit attitudes and stereotypes to be context and culture dependent, we excluded new Hawai'i residents (those we defined as having lived in Hawai'i for less than five years) from the study. The mean age of Hawai'i participants was 37.3 years old. Eight Hawai'i participants identified as Japanese American and seven identified as Caucasian. The remainder of the participant pool was quite diverse. No other group was represented by more than two participants.

[97] This comparison group allows us to determine whether the stereotypes and attitudes we measure are unique to Hawai'i. The mean age of this group was 49.1 years. Twenty-one non-Hawai'i USA participants identified as Caucasian and eight as African American. No other group was represented by more than two participants.

[98] All participants completed the Native Hawaiian-Caucasian IATs first.

(4) Non-Hawai'i USA participants would slightly favor Japanese Americans over Micronesians, and would favor Caucasians over Native Hawaiians, on both attitude and stereotype IATs

(5) Non-Hawai'i USA participants would favor Caucasians and Native Hawaiians and disfavor Japanese Americans and Micronesians[99] on explicit self report measures

Because the IAT is such a complicated measure, social scientists have considered several scoring algorithms regarding the IAT.[100] In calculating the results of our study, we relied on the updated scoring algorithms suggested by Greenwald and his colleagues.[101] These improved algorithms addressed several challenges that were raised regarding the original IAT scoring algorithm.[102]

### *C. Results—Hawai'i Participants*

This section presents the study results for the Hawai'i resident participants. Section D separately presents the results for the non-Hawai'i participants.[103]

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[99] We note here that we expect that much of the non-Hawai'i USA participant data regarding Micronesians is likely understood best with reference to the assumption that many non-Hawai'i participants likely do not know much about Micronesian history or culture, and perhaps have little community interaction with residents of Micronesian origin. As a result, we expected similar responses as if we had asked about an unidentified immigrant out-group.

[100] This short paragraph, describing the scoring of the IAT, first appeared in Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 10, at 203.

[101] *See* Greenwald et al., *Improved Scoring Algorithm*, *supra* note 90, at 213–15.

[102] Greenwald, Nosek and Banaji's suggested improved scoring measure for the IAT, called a *D* score, has improved test-response detection (for instance, it throws out indiscriminate responses or responses that indicate a lack of attention) and incorporates an inclusive standard deviation for all congruent trials (for instance, both the practice and test block of white-guilty and black-not-guilty). *Id.* at 213. Mean latencies are computed for each block, and complimentary blocks are subtracted from each other (e.g., practice white-not-guilty and black-guilty would be subtracted from practice white-guilty and black-not-guilty). *Id.* at 214. These two difference scores are divided by their inclusive standard deviation score, and the average of these two scores is called *D*. *Id.* For a detailed summary of Greenwald and his colleagues' scoring algorithm, see Rachlinski et al., *supra* note 91, at 1245–46.

[103] The Tables in that section compare the Hawai'i vs. non-Hawai'i participant results.

### *1. Japanese American-Micronesian IATs: preference for Japanese Americans*

The results of the Japanese American-Micronesian IATs among Hawai'i participants confirmed our hypothesis that Hawai'i residents implicitly favor Japanese Americans over Micronesians. Participants displayed a significant association between Japanese American and good, and Micronesian and bad, and displayed significant associations between Japanese American and positive stereotypes, and Micronesian and negative stereotypes.[104] These results show that Hawai'i residents hold negative implicit attitudes and stereotypes toward Micronesians, and similarly hold strong positive implicit attitudes and stereotypes toward Japanese Americans.

### *2. Native Hawaiian-Caucasian IATs: split results*

The results of the Native Hawaiian-Caucasian IATs did not reach statistical significance. However, they displayed a trend whereby Caucasians were more associated with positive stereotypes (and Native Hawaiians with negative stereotypes).[105] Interestingly, the results for the attitude IAT trended in the reverse direction; Native Hawaiians were more associated with positive attitudes (and Caucasians with negative attitudes).[106] Overall, these results show that there may be a divergence between implicit feelings towards these two groups in Hawai'i (people implicitly prefer Native Hawaiians to Caucasians in terms of feelings and attitudes) and stereotypes about the two groups (people implicitly associate Caucasians with more positive attributes and Native Hawaiians with more negative attributes).

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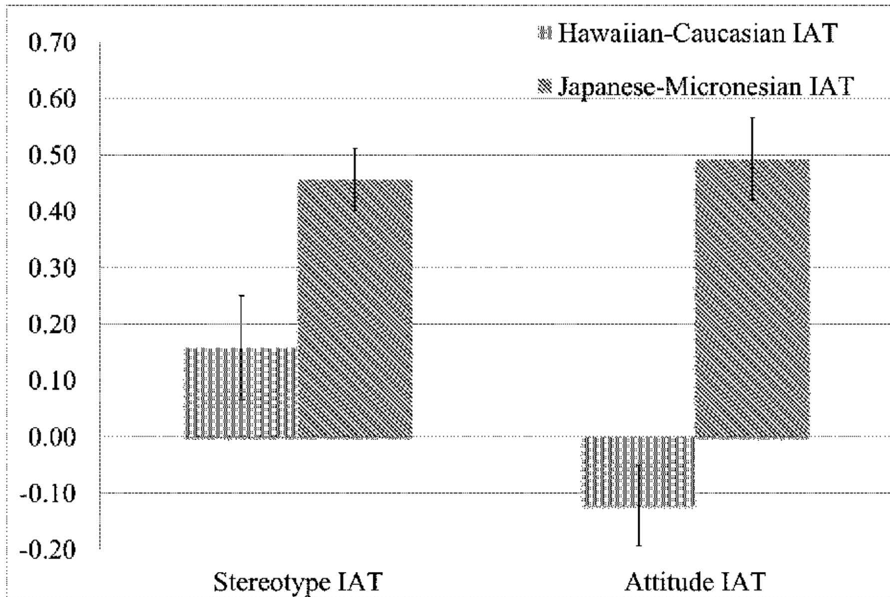
[104] Attitude IATd (Japanese vs. Micronesian) mean = 0.46, standard deviation ("SD") = 0.28, $t(25) = 8.23$, $p < .01$; comparing with 0; Stereotype IATd (Japanese vs. Micronesian) mean = 0.49, SD = 0.38, $t(25) = 6.66$, $p < .01$; comparing with 0.

[105] Stereotype IATd (Caucasian vs. Native Hawaiian) mean = 0.16, SD = 0.47, $t(25) = 1.69$, $p < .10$; comparing with 0.

[106] Attitude IATd (Caucasian vs. Native Hawaiian) mean = -0.12, SD = 0.37, $t(25) = 1.69$, $p = .103$; comparing with 0.

*Figure 1: Hawai'i Participants' Implicit Biases (IAT d scores)*




Positive scores on Hawaiian-Caucasian IAT represent positive associations toward Caucasian. Positive scores Japanese-Micronesian IAT represent positive associations toward Japanese.
Error bars represent standard error.

### 3. *Explicit warmness toward groups: disfavoring Micronesians*

Within Hawai'i, participants displayed significantly cooler feelings towards Micronesians and warmer feelings towards the other three groups.[107] This difference can be illustrated by the gap between the raw scores in judgments toward Native Hawaiians (mean = 70.58)[108] and Micronesians (mean = 42.08).[109] Interestingly, people in Hawai'i self-reported the most warmth toward Native Hawaiians. By contrast, participants appeared to explicitly disfavor Japanese Americans, a somewhat surprising finding, considering the IAT results. This finding raises the possibility that people are either unaware of, or unwilling to, self-report positive feelings towards Japanese Americans, but strongly favor the group using implicit measures.

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[107] $F(1, 25) = 19.61$, $p < .001$.
[108] SD = 4.90.
[109] SD = 3.74.

### 4. *Self-reports of stereotypes toward groups*

With regard to self-reported belief in specific stereotypes, Hawai'i participants consistently endorsed negative stereotypes of Micronesians, occasionally endorsed negative stereotypes towards Native Hawaiians and Caucasians, and endorsed more positive stereotypes towards Japanese Americans.[110] Specifically, Hawai'i participants believed that Micronesians were more aggressive, closed-minded, lazy, and dependent on others than members of the other groups.[111] For the other groups, there were some negative explicit stereotypes reported. For example, Hawai'i participants reported Native Hawaiians to be lazier and more dependent upon others than the other groups (except Micronesian) and reported Caucasians to be more aggressive than the other groups (almost on par with Micronesians).[112] Overall, Japanese Americans were scored quite favorably with regard to stereotypes on the various explicit measures.

*Figure 2: Hawai'i Participants' Explicit Scores*

| | Feeling Thermo (1-100) | Violence (1=very peaceful, 7=very violent) | Dependent on others (1= very self reliant, 7= very dependent on) | Closed mindedness (1=very closed-minded, 7=very open-minded) | Hard working (1=very lazy, 7=very hard working) |
|---|---|---|---|---|---|
| **Caucasian** | 62.35 (24.77) | 4.54 (1.21) | 3.00 (1.47) | 4.15 (1.54) | 4.92 (1.13) |
| **Native Hawaiian** | 70.58 (25.00) | 4.00 (1.47) | 4.08 (1.62) | 4.04 (1.54) | 4.65 (1.87) |
| **Japanese** | 59.00 (25.11) | 2.46 (0.99) | 2.77 (1.66) | 3.88 (1.53) | 6.19 (0.69) |
| **Micronesian** | 42.08 (19.07) | 4.46 (1.63) | 5.27 (1.64) | 2.92 (1.32) | 3.19 (1.44) |
| **F(3, 75)** | 6.89*** | 14.63*** | 13.69*** | 5.59** | 21.64*** |

*Numbers in parentheses are SD; **p <.01, ***p <.001.

## D. *Results—USA (Non-Hawai'i) Participants*

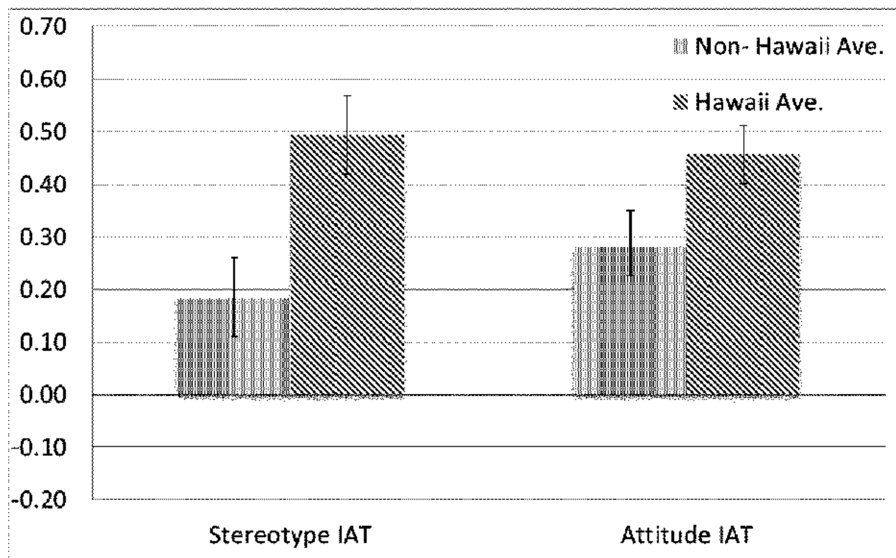
### 1. *Non-Hawai'i Japanese American-Micronesian IATs: slight preference for Japanese American*

The results of the Japanese American-Micronesian IATs among non-Hawai'i participants confirmed our hypothesis that non-Hawai'i residents favor Japanese Americans over Micronesians, but that this Japanese American preference would be significantly weaker than the analogous IAT on Hawai'i participants. Participants displayed a slight association between Japanese American and good, and Micronesian and bad, as well as associated Japanese American with Positive stereotypes and Micronesian

[110] See *infra* Figure 2 for statistics.
[111] See *infra* Figure 2 for statistics.
[112] See *infra* Figure 2 for statistics.

with Negative stereotypes.[113] These results show that non-Hawai'i residents hold much weaker implicit negative attitudes and stereotypes toward Micronesians, and similarly hold weaker positive implicit attitudes and stereotypes toward Japanese Americans, as compared to Hawai'i participants.[114]

*Figure 3: Hawai'i vs. Non-Hawai'i Participants' IAT* d *Scores on Japanese American-Micronesian IATs*




Positive scores represent negative associations toward Micronesian and positive associations toward Japanese.
Error bars represent standard error.

### 2. *Non-Hawai'i Native Hawaiian-Caucasian IATs: strong Caucasian preference outside Hawai'i*

The results of the Native Hawaiian-Caucasian IATs outside of Hawai'i were quite different than results from Hawai'i participants. Hawai'i participants displayed moderate to strong associations favoring Caucasians

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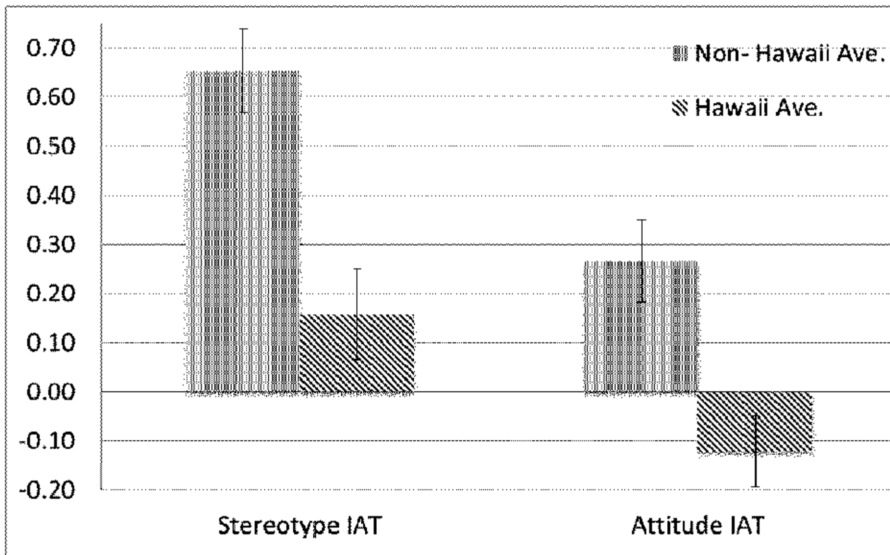
[113] Attitude IATd (Japanese vs. Micronesian) mean = 0.18, SD = 0.19, $t(32) = 2.40$, $p < .05$; comparing with 0. Stereotype IATd (Japanese vs. Micronesian) mean = 0.28, SD = 0.15, $t(32) = 4.09$, $p < .01$; comparing with 0.

[114] This result may be driven by unfamiliarity with Micronesians in the United States outside of Hawai'i. If such unfamiliarly were the case, then the results for this test might be best understood as a comparison of Japanese American attitudes and stereotypes with that of a somewhat unknown minority group.

over Native Hawaiians, both on the attitude (Good-Bad) IAT and the stereotype IAT. Overall, these results show a major difference between Hawai'i and non-Hawai'i residents. Whereas non-Hawai'i participants strongly favored Caucasian over Native Hawaiian on both IATs, Hawai'i residents trended toward favoring Native Hawaiians on the attitude IAT and favoring Caucasians on the stereotype IAT.[115]

*Figure 4: Hawai'i and Non-Hawai'i Participants' IAT* d *Scores on Hawaiian-Caucasian IATs*




Positive scores represent positive attitude toward Caucasians.
Error bars represent standard error.

### 3. *Non-Hawai'i explicit warmness toward groups: warmth toward Native Hawaiian and cool towards Japanese American*

Outside of Hawai'i, participants displayed quite different explicit attitudes towards members of the four groups. Participants outside of Hawai'i reported feeling most warmly toward Native Hawaiians and least warmly towards Japanese Americans. The warmth towards Native Hawaiians expressed by non-Hawai'i participants, even in excess of warmth reported towards Caucasians, diverged from the IAT results. That

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[115] Attitude IATd (Caucasian vs. Native Hawaiian) mean = 0.26, SD = 0.24, $t(32) = 3.13$, $p < .01$; comparing with 0. Stereotype IATd (Caucasian vs. Native Hawaiian) mean = 0.65, SD = 0.24, $t(32) = 7.71$, $p < .01$; comparing with 0.

is, non-Hawai'i residents expressed explicit warmth towards Native Hawaiians on the explicit task, but strongly disfavored Native Hawaiians to Caucasians on the implicit task.[116]

#### *4. Non-Hawai'i self-reports of group stereotypes: Caucasians as violent and Native Hawaiians as peaceful*

With regard to self-reported belief in specific stereotypes, non-Hawai'i participants endorsed somewhat different explicit stereotypes than Hawai'i participants did. With regard to judgments of violence in particular, non-Hawai'i participants believed Caucasians to be the most violent group and Native Hawaiians to be the least violent group. Similar to Hawai'i participants, however, non-Hawai'i participants reported Japanese Americans to be the most hard-working and least dependent on others, as compared to the other groups. Micronesians did not appear to be uniquely stereotyped.

*Figure 5: Non- Hawai'i Participants' Explicit Scores*

| | Feeling Thermo (1-100) | violence (1=very peaceful , 7=very violent) | Dependent on others ( 1= very self reliant, 7= very dependent on) | Closed mindedness (1=very closed-minded, 7=very open-minded) | Hard working (1=very lazy, 7=very hard working) |
|---|---|---|---|---|---|
| **Caucasian** | 64.18 (25.88) | 3.67 (1.47) | 3.15 (1.6) | 4.73 (1.68) | 5.09 (1.31) |
| **Native Hawaiian** | 76.45 (19.73) | 2.00 (0.97) | 2.97 (1.42) | 5.33 (1.14) | 5.36 (1.37) |
| **Japanese** | 59.27 (21.95) | 2.70 (1.21) | 2.15 (1.03) | 4.03 (1.53) | 6.27 (0.94) |
| **Micronesian** | 64.52 (21.06) | 2.64 (0.99) | 3.06 (1.22) | 4.58 (0.83) | 5.15 (1.23) |
| **F(3, 96)** | 5.30** | 15.14*** | 4.80** | 6.21** | 8.47*** |

*Numbers in parentheses are SD.

### *E. Limitations of Study*

Before turning to the discussion of the study results and its implications, this section briefly details some limitations of the current study. First, it is important to note that the study only tested implicit attitudes and stereotypes with regard to four particular groups in Hawai'i. Due to limited resources, we were unable to test implicit attitudes and stereotypes toward other groups in Hawai'i. Such work needs to be done.[117] In addition, the IAT methodology we employed means that our results on the implicit bias tests were relative. That is, Japanese American was always measured against Micronesian, and Caucasian was always measured against Native Hawaiian. Due to this methodological limitation of the IAT, we are unable

[116] See *infra* Figure 5 for explicit warmth (feeling thermometer) scores.

[117] We have begun some of this work and hope that others will, as well.

to determine, for example, whether the strong preference for Japanese American over Micronesian was driven more by positive attitudes and stereotypes toward Japanese Americans or more by negative attitudes and stereotypes toward Micronesians. Although our original study design allowed us to measure these individual group-based scores, our lower-than-expected Hawai'i sample size led us to focus solely on the traditional two-category IAT as an implicit measure. Finally, our limited sample size, particularly in Hawai'i, did not meet our original goals. Although there are many other published studies employing IATs with similar participant numbers, our limited number of participants means that we are unable to report differences within participant groups. That is, we do not report results that compare, for example, whether Japanese American and Micronesian participants score differently on the measures we employed. We intend to continue this line of research in order to provide such additional robust result reporting.

## IV. DISCUSSION OF RESULTS: *IMPLICIT* AND EXPLICIT BIAS IN HAWAI'I

This study provides the first Hawai'i-focused empirical evidence of implicit biases related to four groups: Micronesians, Japanese Americans, Caucasians,[118] and Native Hawaiians. The results of the study build upon what commentators began to document generations ago: racial and ethnic biases are pervasive, group-specific, and nuanced in Hawai'i.[119] Building on scholarship demonstrating the connection between implicit bias and biased human behavior, the results of the study raise the question of whether and how implicit bias in Hawai'i leads to potentially systematic harms for members of stereotyped groups. In this context, for Micronesians in Hawai'i in particular, the study results were most troubling. Micronesians were negatively stereotyped by Hawai'i participants (both implicitly and explicitly), and similarly were the targets of negative attitudes (both implicit and explicit). In light of these results, it is perhaps unsurprising that Micronesians seem disadvantaged by almost every socio-economic measure.

Considering these results in particular, as well as the results on the Native Hawaiian-Caucasian IATs, one must not overlook the ways in which implicit bias likely manifests in broad and compounding ways across

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[118] As discussed in Section II, *supra*, Levinson and colleagues have conducted some studies that have compared African American and Caucasian stereotypes.

[119] The study provides a clear indication that simply asking people about their group-based preferences or stereotypes is not a foolproof method of detecting or understanding intergroup bias in Hawai'i. Instead, the role of automatic biases must be pursued and considered deeply.

Hawai'i's law and society.[120] As prior research has shown, implicit bias can help predict a vast range of decisions and outcomes in areas such as medical care, educational expectations, job candidate selection, property value and land use decisions, and policing behavior. In this light, then, future research should consider how implicit bias plays out in everyday life in Hawai'i. Such a human-focused inquiry can perhaps illuminate the many ways these biases play out and to allow commentators to consider how society can take responsibility for them.

This research could, for example, begin in the realm of early childhood education. Could implicit bias, for example, affect the way children are perceived in school, beginning as early as pre-school or kindergarten? Consider the ways in which teachers and administrators possess remarkable discretion in terms of both disciplinary as well as intellectual decision-making: *How smart is this child and how much will I challenge her? Will her family support her doing homework? Why did he push the other child?* The responses to these questions may well be shaped by implicit stereotypes about a group.

In the realm of education alone, the effects of implicit bias could easily explain how a community's children drop out of high school at a disproportionate rate, end up in the so-called "school to prison pipeline"[121], or choose not to attend college. The social and economic effects of even just a pervasive education-only bias would be monumental. And yet, education is still only one domain in which these implicit biases are relevant and harmful. For the same families affected by implicit bias in schools, their lives can be affected forever by the assumptions made about them in a wide range of domains. One such critical domain is that of health care, where the assumptions made by healthcare workers can prove pivotal during crucial health-related moments in people's lives. *Do "these people" follow my instructions?*, a doctor may wonder. *Do they make lifestyle choices that will limit the effectiveness of the ideal treatment? Should I suggest the newer, more expensive, cutting-edge treatment for this patient?* In this domain, too, implicit bias can, in the aggregate, be devastating for a community.

The list goes on. Implicit bias can influence the behavior of a landlord when receiving a soliciting call or email. *What is that accent?*, the landlord may wonder. *She must have so many kids and not work. My property value will go down.* It may well interfere with seemingly objective judgments of potential employees. *Is this candidate qualified? A hard worker? Likely to be a "team player"?* And it likely plays out in the

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[120] *See supra* notes 7-11 and accompanying text.

[121] *See* UMEMOTO ET AL., *supra* note 16.

criminal justice system, too, where stereotypes of aggression may wreak havoc with a range of judgments, beginning with police interactions, and continuing through prosecutorial discretion all the way to parole board recommendations.[122]

No matter where one turns in Hawai'i, implicit bias, and the society's response to it, stand to shape an entire community's chances for equality. Although this study's methods and findings are still just an early step in understanding the full dynamics of implicit bias in Hawai'i, it is not too early to begin a deep and engaged dialogue about how to achieve the justice Hawai'i should seek to possess.

[122] *See* Robert J. Smith & Justin D. Levinson, *The Impact of Racial Bias in the Exercise of Prosecutorial Discretion*, 35 SEATTLE L. REV. 795 (2012); Charles Ogletree et al., *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 45-60 (Justin D. Levinson & Robert J. Smith, eds., 2012).

# Local Kine Implicit Bias: Unconscious Racism Revisited (Yet Again)

Charles R. Lawrence III*
Featuring a poem by Kathy Jetnil-Kijiner

## I. INTRODUCTION

In 1987, I introduced the idea that anti-discrimination law should take cognizance of unconscious bias in an article titled *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism.*[1] I argued that the purposeful intent requirement found in Supreme Court equal protection doctrine and in the Court's interpretation of anti-discrimination laws disserved the value of equal citizenship and suggested that rather than looking for discriminatory motive, the Court should examine the cultural meaning of laws to determine the presence of collective unconscious bias.

The Supreme Court paid little heed to my call for the law to recognize the continuing effects of unconscious bias.[2] Nonetheless, in the almost thirty years since my article's publication, behavioral scientists have made significant advances in the study of unconscious bias providing us with important evidence and understanding of the ubiquity of biases that reside outside of our awareness.[3]

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* Professor of Law, William S. Richardson School of Law, University of Hawai'i. B.A. 1965, Haverford College; J.D. 1969, Yale Law School. Special thanks to Kathy Jetnil-Kijiner for allowing me to feature her poem in this article and to Mari Matsuda and Stephen Arons for reading and commenting on earlier drafts. Excellent research assistance was provided by Kelsey Inouye.

[1] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter *The Id, the Ego, and Equal Protection*].

[2] I have written elsewhere of how the Supreme Court's conservative majority has marched relentlessly and radically, not to mention intentionally, in the opposite direction of my call to give attention to unconscious bias and the racial meaning of legal and social texts. Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 951-55 (2008) [hereinafter *Unconscious Racism Revisited*].

[3] *See, e.g.*, Justin D. Levinson, *Race, Death, and the Complicitous Mind,* 58 DEPAUL L. REV. 599 (2009); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering,* 57 DUKE L.J. 345 (2007); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence,* 112 W. VA. L. REV. 307 (2010).

Legal scholars have done the vital work of applying the science of implicit bias to legal problems.[4] They have focused primarily on the usefulness of implicit bias evidence in proving that bias may influence an individual decision-maker's actions, thereby rendering those actions discriminatory and potentially unlawful. Although this valuable work has built on my early work, it differs from that work in an important way. Anti-discrimination law prohibits actions by an employer, police officer, or prosecutor that have been tainted by impermissible considerations of race or gender. Lawyers have employed the work of cognitive psychologists to demonstrate that these impermissible biases are at work even when the decision-maker is unaware of their presence. The law understands the statutory, constitutional, or normative harm of race discrimination as the biased, and therefore wrongful, actions of one individual against another.

When I called attention to unconscious bias my project was greater than getting the Court to recognize that each of our decisions was motivated or influenced by unconscious as well as conscious bias. I argued that racism's harm encompassed more than the biased actions of individuals and I sought to challenge the idea that racism's harm derives only from the actions of identified racist individuals against individual victims of racism. I pointed to the ubiquity of conscious and unconscious racism as evidence of the continued vitality of racist ideology and argued that so long as this ideology lived and flourished the Constitution, and normative justice, required that we act affirmatively to remedy its effects and disestablish its institutional embodiments.[5] Racism was a societal illness, and we needed to respond to racism as epidemiologists rather than as moralists or crime fighters.

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[4] Linda Krieger and Justin Levinson, both contributors to this symposium, have made significant groundbreaking contributions to this scholarship. *See, e.g.*, Robert J. Smith, Justin D. Levinson, & Zoe Robinson, *Bias in the Shadows of Criminal Law: The Problem of Implicit White Favoritism*, 66 ALA. L. REV. (forthcoming 2015); Justin D. Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV.945 (2006).

[5] The "cultural meaning" test does not ask whether bias infects the decisions of the individual actors. Rather, it demonstrates the continuing presence of racist belief in the larger society by discerning the racial (or racist) meaning or interpretation that the relevant community would give an act or decision that is not articulated or justified in explicitly racial terms. These are two very different projects. One accepts the central premise of the *Davis* intent requirement—that the harm of race discrimination lies in individual acts infected by bias. *See* Washington v. Davis, 426 U.S. 229, 240-42 (1976). The other rejects that premise and finds the harm of racism in the pervasive effects of shared racist ideology. *See The Id, the Ego, and Equal Protection, supra* note 1, at 362-76.

This article returns to this project once again.[6] I consider and interrogate three texts[7] to model an approach that employs implicit bias to ask how we might understand racism as a disease that infects us as a community, rather than as a collection of acts by individuals who can choose to be racists or not. All three of the texts or stories take place in Hawai'i and within our immediate community. By using local texts I choose this community as my primary audience, trusting that we will recognize the cultural meanings evident in a text that includes us as characters. I also trust that the meanings of these local texts will not be lost on readers who do not live close by, as all of these texts can also be read as stories inhabited by the American family if not the human family.

In telling each story I reprise my original challenge to the law's story that the primary harm of racism, sexism and homophobia is the harm that one individual does to another, rather than the harm that is done when a nation constituted in racism, sexism and homophobia has failed to heal those societal sicknesses. My critique does more than claim descriptive error in the law's understanding of harm. I argue that the "bad guy hurts victim" story of fault and causation keeps us from seeing and recognizing our collective, shared biases, from talking with one another about them, from seeing how they harm us all and from working together to heal ourselves.

## II. LOCAL KINE BLACK FOLKS: WHY WE UNDERSTAND WHAT THE PROSECUTOR MEANT

My first text comes from a *Honolulu Star Advertiser* article titled *Remark About Ethnicity Wins Convict Resentencing Hearing*.[8]

> A state appeals court has overturned the manslaughter sentence of a Waipahu man found guilty of fatally stabbing his cousin because the prosecutor urged

[6] Although almost all of my work considers and is influenced by some aspect of this project, I have made unconscious bias the central theme of my work on three previous occasions. *See The Id, the Ego, and Equal Protection, supra* note 1; *Unconscious Racism Revisited, supra* note 2; Charles R. Lawrence III, *Unconscious Racism and the Conversation About the Racial Achievement Gap, in* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter *Unconscious Racism*].

[7] All three texts are social or cultural rather than legal texts, although one is a newspaper article that reports a legal text. Although I only occasionally refer to a legal text in the body of my argument, I cite and discuss legal texts throughout the footnotes. I trust that I have made clear my belief that legal texts play a central, if not dominant, role in determining the way we understand and misunderstand the texts that are the subjects of this article.

[8] Nelson Daranciang, *Remark About Ethnicity Wins Convict Resentencing Hearing*, HONOLULU STAR ADVERTISER, Dec. 17, 2014, at B2, *available at* http://www.staradvertiser.com/s?action=login&f=y&id=286061841 (login required).

the judge to impose a harsh penalty "to send a message to the Micronesian community."

A state jury found Peter David guilty of manslaughter in the January 2010 stabbing death of his 27-year-old cousin Santhony Albert.

Both men came to Hawaii from Chuuk, the most populous of the four Federated States of Micronesia.

David was facing a murder charge, which carries a mandatory life prison term with the possibility of release on parole.

Manslaughter carries a sentence of either 20 years in prison or 10 years of probation.

*At sentencing in 2012, Deputy City Prosecutor Darrell Wong urged Circuit Judge Randal K.O. Lee to impose the 20-year prison term to send a message to the Micronesian community, "mainly the males, who take it upon themselves the idea that they can just drink all they want and not be responsible for what happens after that."*

According to trial testimony, both men had been drinking alcohol to celebrate the new year prior to the stabbing.

Albert's blood-alcohol content was 0.25, more than three times the legal threshold for drunken driving.

Authorities were not able to measure David's blood-alcohol content because he left the scene before police arrived. He turned himself in the next day.

The Hawaii Intermediate Court of Appeals said Monday that a defendant's race, ethnicity or national origin cannot be used as justification for the imposition of a harsher penalty.

The court said that it does not believe that Lee based his sentence on Wong's improper argument. However, the court said that to satisfy the appearance of justice, Lee should have made clear on the record that he rejected Wong's argument. The court therefore vacated the sentence and sent the case back for resentencing.[9]

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[9] *Id.* (emphases added).

*Peter David*[10]

Initially, I should note that deputy Prosecutor Wong's words hardly seem correctly classified as implicit or unconscious.[11] He urges the judge to send a message to the Micronesian community—and is quite explicit in his characterization of what he thinks of that community—"mainly the males."[12] *They* are the *kind of people* who drink and kill. Furthermore they are the kind of people who feel no responsibility for that behavior and who will be deterred from that behavior not by virtue of their own sense of right and wrong and self-control, but only in response to the threat of severe punishment. We hear in this brief recommendation by one officer of the court to another all of the tropes of racist narrative. The entire Micronesian community is lumped together and labeled. This is not the crime of one individual deserving of punishment, but an entire community that is prone to criminal behavior. The prosecutor calls Micronesians "they" and "them." He employs these pronouns to designate Micronesians as "other,"[13] a people who are different from and less than the rest of us. His

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[10] *Id.*, image available at http://khnl.images.worldnow.com/images/13777379_BG1.jpg.

[11] *See* Linda Hamilton Krieger, Keynote Address at the University of Hawai'i Law Review Symposium: Exploring Implicit Bias in Hawai'i (Jan. 16, 2015).

[12] Daranciang, *supra* note 8.

[13] This is a term often used by scholars in critical theory to describe the social, psychological and ideological process of creating, reinforcing and reproducing positions of domination and subordination. Scholars have employed this word as a verb "to other." The term "othering" was originally coined by Gayatri Chakravorty Spivak in 1985. *See* Gayatri

words invoke all of the images of violence, brutality, savagery, immorality, irrationality, lack of intelligence, sexuality employed to justify slavery and segregation. They echo the words used today to justify the killing of Trayvon Martin, Michael Brown, and Eric Garner,[14] and, dare I mention Kollin Elderts.[15]

If this text represents old-fashioned explicit bias rather than implicit bias, if no Implicit Association Test ("IAT") is needed to reveal the racism here, why do I choose to interrogate it? First, I think that Mr. Wong would say, "I am not a racist. I have not asked the court to lengthen Mr. David's sentence because he is Micronesian." He might even say he has Micronesian friends and argue that he was not using a race-based stereotype. Rather, he was doing nothing more than pointing out a cultural pathology in a particular ethnic community.[16] A court might well agree

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Chakravorty Spivak, *The Rani of Sirmur: An Essay in Reading the Archives*, 24 HISTORY & THEORY 247 (1985); *see also* BILL ASHCROFT, GARETH GRIFFITHS, & HELEN GRIFFIN, POSTCOLONIAL STUDIES: THE KEY CONCEPTS 190 (3d ed. 2013) (The authors explain "othering" as "a process by which the Empire can define itself against those it colonizes, excludes and marginalizes. It locates 'others' by this process in the pursuit of that power within which its own subjectivity is established.").

[14] Trayvon Martin, Michael Brown, and Eric Garner are black men who were killed during police encounters within the past three years. In each of these cases, juries failed to indict the offending police officers, and the victims had been accused of thug behavior by the media, thereby justifying police action as self-defense. *See, e.g.*, Patricia J. Williams, *The Monsterization of Trayvon Martin*, THE NATION (July 31, 2013), http://www.thenation.com/article/175547/monsterization-trayvon-martin ("And so, by the end of the trial, the 200-pound Zimmerman, despite martial arts training and a history of assaulting others, was transformed into a 'soft,' retiring marshmallow of a weakling. The 158-pound Martin had been reimagined as an immense, athletically endowed, drug-addled 'thug.'"); *see also* Alexandra Jaffe, *Huckabee: Michael Brown Acted Like a "Thug,"* CNN, (Dec. 3, 2014), http://www.cnn.com/2014/12/03/politics/ferguson-mike-huckabee-michael-brown-shooting-thug/.

[15] *See* Hawaii v. Deedy, 532 F. App'x 751 (9th Cir. 2013). Christopher Deedy, a U.S. State Department officer, shot and killed Kollin Elderts in a Waikiki McDonald's in 2011. During the trial, the Deedy defense argued that Deedy's actions were in self-defense as Elderts was intoxicated, aggressive, and used racial slurs. Jim Dooley, *Shooting Victim Was Grabbing Federal Agent's Gun, Defense Argues,* HAWAII REPORTER, (July 27, 2012), http://www.hawaiireporter.com/shooting-victim-was-grabbing-federal-agents-gun-defense-argues.

[16] The argument that an attribution to and characterization of behaviors of persons from a particular racial or ethnic community is not racist because it refers to culture rather than race has its origins in a report on the black family authored in 1965 by Daniel Patrick Moynihan, Secretary of Labor under President Lyndon Johnson. The report argued that the problems of crime, drugs, out-of-wedlock babies and increasing welfare rolls in poor black communities could be traced to a community culture of poverty that legitimized immoral behavior and encouraged economic dependence. OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION

with him.[17] After all, the trial court heard his argument without objection and imposed the maximum sentence he recommended . Even the appellate court that overturned the sentence did so not because the harsher penalty was based on the defendant's race or upon a racial stereotype of the defendant's ethnic group, but because the remarks did not satisfy the *appearance* of justice. The appellate court's concern with the appearance of fairness asks a question about the individual adjudicator's bias. Was the trial judge's sentence influenced by the prosecutor's or judge's bias against the individual defendant? Or will it appear that he was influenced by such racial bias?

Often when we ask how research on implicit bias can help make our judicial system more just we ask the same kind of question—how do we reveal, recognize and correct the individual bias of various legal decision-makers. We conduct implicit bias training seminars for police officers, judges, prosecutors, probation officers, teachers and social workers.[18] We give them the IAT and demonstrate to them that they are more likely to find the brown face guilty, untrustworthy, unfit for parental responsibility, more likely to pull the trigger when that brown face is holding a cell phone and not a gun. Such training is designed to make decision-makers aware of their own unintentional bias.[19]

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(1965), *available at* http://www.dol.gov/oasam/programs/history/webid-meynihan.htm; *see also The Moynihan Report Revisited: Lessons and Reflections after Four Decades*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (2009); JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH: THE MOYNIHAN REPORT AND AMERICA'S STRUGGLE OVER BLACK FAMILY LIFE—FROM LBJ TO OBAMA (2010); *cf.* WILLIAM RYAN, BLAMING THE VICTIM (1976). There is also recent resurgence of research and scholarship on culture and poverty. Patricia Cohen, *'Culture of Poverty' Makes a Comeback*, N.Y. TIMES (Oct. 17, 2010), *available at* http://www.nytimes.com/2010/10/18/us/18poverty.html?pagewanted=all&_r=0.

[17] *See* Hernandez v. New York, 500 U.S. 352 (1991) (upholding the use of peremptory challenge to exclude Latino jurors who would understand defendants' testimony rather than relying on interpreter).

[18] *See, e.g.*, Cheryl Staats, *State of the Science: Implicit Bias Review 2014*, THE KIRWAN INSTITUTE (2014), http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf; Implicit Bias Training, National Consortium on Racial and Ethnic Fairness in the Courts, http://www.national-consortium.org/Implicit-Bias/Implicit-Bias-training.aspx (last visited Feb. 27, 2015); NATIONAL CENTER FOR STATE COURTS, STRATEGIES TO REDUCE IMPLICIT BIAS, http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx (last visited Feb. 27, 2015).

[19] The Implicit Association Test ("IAT") was developed by Dr. Mahzarin Banaji, now at Harvard University, and Dr. Anthony Greenwald of the University of Washington and their colleagues. *See* Shankar Vedantam, *See No Bias*, WASH. POST (Jan. 23, 2005), http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21.html. *See generally* Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgputa, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Levinson, Cai & Young,

We should look at the text of prosecutor Wong's recommendation to ask a different question. Why is it that all of us understand the meaning of the text? What makes his words intelligible not just to the judge but to all of us? What makes him assume, with considerable confidence, that we will hear truth in his assertion that Micronesian people, especially males, will think and behave as he describes and that it is a good idea to send them a message to get their act together? I think the answer to this question reveals our collective bias. It reveals the racism we have all internalized and share.

In overturning the sentence the appellate court focuses on the intrusion of bias in the individual judge's sentencing decision, and one might argue that this is only appropriate, as the possibility or appearance of improper judicial bias was the only question before the court. The law tells us this is the only question we can ask. The law determines that the only question properly before the court is whether the individual prosecutor's or judge's bias has interfered with the individual defendant's right to due process.[20]

What might we learn if we asked about bias writ large? How did racial bias play a role in this young man's life story? What trauma, what injury brought him to a place where he would stab his cousin to death? What if we asked where he went to school? What if we looked at how his teachers spoke to him, or whether they listened to him, or really believed that he was smart, or good, or might amount to something other than a kid who would one day kill a relative in a drunken fight? What if we asked why we understand the prosecutor's words and how the way we understand those words effects the way we read the story of this young man's life?

These kinds of questions look not only at the way the content of our biases influences each of our discretionary decisions.[21] Instead these questions ask how the stories we have been told all of our lives inhibit our ability to see the structural inequalities that rig the game in favor of individuals and groups privileged by racism, patriarchy, heterosexism, or classism. These are the questions that precede even the first moment of discretion in the criminal justice system that Professor Levinson speaks of when he describes how the police officer must decide how to characterize an ambiguous behavior or potential suspect as worthy of further observation or the discretion by the system in choosing where to deploy police officers.[22] These questions ask how the biases that all of us share (explicit

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*supra* note 4; Greenwald & Krieger, *supra* note 4.

[20] *See* McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting an equal protection challenge to the administration of Georgia's death penalty statute).

[21] Krieger, *supra* note 11.

[22] Justin D. Levinson, Koichi Hioki & Syugo Hotta, *Implicit Bias in Hawaii: An Empirical Study*, 37 U. HAW. L. REV. 429 (2015).

and implicit) keep us from recognizing our own responsibility for changing those structural conditions.[23]

When I look at the text of the *Advertiser* article I am immediately drawn to the photographic image of Peter David. In Washington DC, New York, Cleveland, Oakland or Ferguson, Missouri, he could well be taken for a black man. He would be treated by the police,[24] by his teachers,[25] by realtors,[26] by banks,[27] by doctors in the emergency room[28] and by white folks he passed on the street just as we black folk have become accustomed to being treated.

Here in Hawai'i we claim it is different. We recognize and celebrate our ethnic diversity and multiracial genealogies.[29] We sing songs and tell jokes

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[23] *See infra* notes 65–67 and accompanying text. In *Unconscious Racism Revisited,* I noted that my goal in *The Id, The Ego and Equal Protection* was to challenge doctrine established in *Washington v. Davis* that if there were no evidence of intentional racists no constitutional violation had occurred. My goal was to do more than call attention to the inevitable implicit bias harbored by every individual. Rather, my purpose was to expose the way that the court had declared the reconstructive work of the Thirteenth, Fourteenth, and Fifteenth amendments accomplished by conflating the issue of bad motive with that of the constitutional and moral injury occasioned by the historical and structural inequalities produced by slavery and segregation. "I asked my readers to think of America's racism as a public health problem, as a disease that required anti-racists to adopt the mindset and methodology of epidemiologists rather than that of policemen." *Id.* at 948.

[24] *See, e.g.*, E. Ashby Plant & Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects,* 16 PSYCHOL. SCI. 180 (2005); Patricia Warren, Donald Tomaskovic-Devey, William Smith, Matthew Zingraff & Marcinda Mason, *Driving While Black: Bias Processes and Racial Disparity in Police Stops,* 44 CRIMINOLOGY 709 (2006).

[25] *See* Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap, in* THE BLACK-WHITE TEST SCORE GAP 273–317 (Christopher Jenks & Meredith Phillips eds. 1998); THERESA PERRY ET AL., YOUNG GIFTED AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN AMERICAN STUDENTS 85 (2005); Tom Rudd, *Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated,* THE KIRWAN INSTITUTE (Feb. 2014), *available at* http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf.

[26] *See generally* Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets,* 34 ANNU. REV. SOC. 181 (2008).

[27] *See id.*

[28] *See, e.g.*, Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I. Iezzoni & Mahzarin R. Banaji, *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients,* 22 J. GEN. INTERNAL MED. 1231 (2007) (finding that white doctors with implicit biases favoring white patients are more likely to treat white patients than black patients suffering from thrombolysis).

[29] *See* John P. Rosa, *Race/Ethnicity, in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE 53 (Craig Howes & John Osorio eds., 2010). Hawai'i is often referred to by residents and in the media as a "melting pot." *See, e.g.*, Carla Herreria & Chloe Fox,

about our cultural practices, food preferences and accents.[30] Even when we tell stories about the segregation and hierarchy of the plantation it is a nostalgic story of a distant past.[31]

Nonetheless, we understand the meaning of Prosecutor Wong's words. Although we might seek to distance ourselves from the racist meaning of those words by designating him the perpetrator,[32] the culpable[33] and causal actor,[34] our understanding of his text implicates all of us. We understand

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*Why You Can't Understand Obama Until You Understand Hawaii,* THE HUFFINGTON POST, http://www.huffingtonpost.com/2014/12/31/what-hawaii-teaches-us-about-obama_n_6358330.html (last updated Dec. 31, 2014) (quoting Barack Obama) ("The opportunity that Hawaii offered—to experience a variety of cultures in a climate of mutual respect—became an integral part of my world view, and a basis for the values that I hold most dear."); *cf.* Gene Park, *The Debate Over Race, History and Racism in Hawaii,* CIVIL BEAT (Feb. 21, 2014), http://www.civilbeat.com/2014/02/21257-gene-park-the-debate-over-race-history-and-racism-in-hawaii/ (discussing conflicts between native Hawaiians and haoles).

[30] *See Local Kine Jokes From Hawai'i*, E-HAWAII.COM, http://www.e-hawaii.com/jokes (last visited Feb. 4, 2015); *see also* FRANK DE LIMA, http://www.frankdelima.com/ (last visited Mar. 12, 2015). Frank De Lima is perhaps Hawai'i's most popular local comedian. His routines, that poke fun at Hawai'i's diverse ethnicities and cultures, rely on local stereotypes about each of Hawai'i's racial and ethnic groups as well the local community's view that these stereotypes are harmless because they no longer manifest or represent the ideologies and structures of racism and colonialism that once gave them meaning. The De Lima web site includes the following introduction: "His ethnic background, which is self-described as 'veritable Portuguese Soup' and 'Chop Suey Nation,' consists of Portuguese, Hawaiian, Irish, Chinese, English, Spanish, and Scottish. He celebrates, not disregards, ethnic differences and integrates them into his comedic routines".

[31] *See, e.g.*, HAWAII'S PLANTATION VILLAGE, http://www.hawaiiplantationvillage.org/ (last visited Feb. 9, 2015). Hawai'i Plantation Village is a museum focusing on the sugar plantations that proliferated during the late nineteenth and early twentieth centuries. The Village features the multiple cultures represented by plantation workers.

[32] Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine.* 62 MINN. L. REV. 1049 (1978).

> The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.

*Id.* at 1053.

[33] *See The Id, The Ego, and Equal Protection, supra* note 1 (critiquing the discriminatory intent requirement established in *Washington v. Davis*, and positing that intent in itself is a false notion).

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.

*Id.* at 322.

[34] *See* Mari J. Matsuda, *On Causation*, 100 COLUM. L. REV. 2195 (2000) (arguing for a

his words because they gesture toward and signify a shared understanding about Micronesians,[35] about their blackness, their foreignness, their dirtiness, their scariness, their bestiality, their less-human-than-the-rest-of-us-ness. I use these hard-to-hear words to describe our shared beliefs quite intentionally. They come from a lexicon that Americans have used to imagine and construct my own people.[36] They are words that inhabit and shape the narrative of white supremacy, words and images that at different moments in history meant and signified Chinese or Japanese,[37] that still often mean Filipino, or Samoan or Native Hawaiian,[38] but in this moment in

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collective sense of obligation based in social responsibility).

[35] *See Unconscious Racism Revisited*, *supra* note 2, at 358 (quoting PAUL RICOEUR & JOHN B. THOMPSON, HERMENEUTICS AND THE HUMAN SCIENCES: ESSAYS ON LANGUAGE, ACTION AND INTERPRETATION, 200-02 (1981)) ("In spoken discourse, the subjective intention of the speaker and the objective meaning of the discourse overlap, while with written discourse the meaning of the text is disassociated from the mental intention of the author and the two no longer coincide. Likewise, spoken discourse ultimately refers to the contextual situation common to the speaker and the listener. Texts, on the other hand, speak about the world. The text frees itself from the reference of the particular situation in which its author speaks and creates its own universe of references.").

[36] *See* FRANZ FANON, BLACK SKIN, WHITE MASKS (Grove Press rev. ed. 2008); DVD: 1987 Ethnic Notions (Marlon Riggs 1987) (on file with California Newsreel); TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION (1993); ROBERT GOODING WILLIAMS, LOOK, A NEGRO!: PHILOSOPHICAL ESSAYS ON RACE, CULTURE, AND POLITICS (2005); *see also* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 860 (2004); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 56 (1994).

[37] *See, e.g.*, Keith Aoki, *Is Chan Still Missing? An Essay About the Film Snow Falling on Cedars and Representations of Asian Americans in U.S. Films*, 7 ASIAN PAC. AM. L.J. 30, 36 (2001) (describing racial stereotypes of Japanese and Chinese women as either "exotic" or "dragon lad[ies]"); *see also* Keith Aoki, *The Yellow Pacific: Transnational Identities, Diasporic Racialization, and Myth(s) of the "Asian Century,"* 44 U.C. DAVIS L. REV. 897 (2011); Gary Y. Okihiro & Julie Sly, *The Press, Japanese Americans, and the Concentration Camps*, 44 PHYLON 66 (1983) (discussing "Yellow Peril").

[38] Shelley Sang-Hee Lee & Rick Baldoz, *"A Fascinating Interracial Experiment Station": Remapping the Orient-Occident Divide in Hawaii*, 49 AM. STUD. 87, 92 (2008). Contemporary racist images and stereotypes of Filipinos and Hawaiians go back to the plantation era. These groups were described as "improvident and shiftless" and "stuck at an adolescent stage of development." *Id.* (quoting STANLEY PORTEUS, TEMPERAMENT AND RACE (1926)) (internal quotation marks omitted); *see also* Darlene Rodrigues, *Imagining Ourselves: Reflections on the Controversy Over Lois-Ann Yamanaka's Blu's Hanging*, 26 AMERASIA J. 195 (2000) (discussing the ways that Yamanaka's writing of Filipino characters confirm and reinscribe racist stereotypes and erase the diversity of Filipino communities in Hawai'i). Samoans, a relatively new group to the islands, are characterized in similar terms, known as lazy, poor, and violent in the community. *See* Lee Cataluna, *Changing Stereotypes of Samoans*, HONOLULU ADVERTISER (Apr. 20, 2004), *available at* http://the.honoluluadvertiser.com/article/2004/Apr/20/ln/ln48alee.html; Levinson, Hioki, &

Hawai'i's history we have designated our brothers and sisters from the Micronesian islands to assume the role of blackness. I will not use the "N" word, but you get my meaning.

Listen to this young Chuukese poet speak truth to the lie we tell ourselves when we say we are different in Hawai'i. When we say, "We have no bias. We are not racists."

Lessons from Hawai'i
by
Kathy Jetnil-Kijiner[39]

"Fucking Micronesians!"
That's my seventh grade friend
cussin at those boys across the street
rockin swap meet blue t-shirts
baggy jeans
spittin a steady beetlenut stream
yea that one's related to me

"You know. You're actually kinda smart
for a Micronesian."

And that's my classmate
who I tutored through the civil war
through the first immigrants
through history that always
seems to repeat itself

Micronesians
MICRO(nesians)
as in small
tiny crumbs of islands scattered
across the pacific ocean;
too many countries / cultures no one has heard about / cares about
too small to notice.

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Hotta, *supra* note 22.

[39] The text of this poem was transcribed from a recorded performance by Kathy Jetnil-Kijiner later uploaded to YouTube. Kathy Jetnil-Kijiner, *Lessons from Hawai'i by Kathy Jetnil-Kijiner*, YOUTUBE (Jan. 19, 2013), https://www.youtube.com/watch?v=3sbtpazYra0.

small like how
i feel
when woman at the salon
delicately tracing white across my nail
stops and says
*you know you don't look*
*Micronesian.*
*You're much prettier!*
Prettier as in not
ugly like those
other Micronesian girls
who are always walking by the street
smiling rows of gold teeth like they got
no shame

with hair greased and braided
cascading down dirt roads of brown skin,
down shimmering dresses called guams
and neon colored Chuukese skirts
and i can hear
the disgust
in my cousin's voice

Look at those girls! They wear their guams
to school and to the store like they're
at home don't they
know?
This isn't their country this is America see that's
why everyone here hates
us Micronesians

I'll tell you why everyone here hates us Micronesians
It's cuz we're neon colored skirts screaming DIFFERENT!
Different like that ESL kid
whose name you can't pronounce
whose accent you can't miss

Different like 7-Eleven/WalMart/Mickey D's
parking lot kick its and fights

those long hours
those blue collar nights

Different like parties
with hundreds of swarming aunties, uncles, cousins
sticky breadfruit drenched in creamy coconut
coolers of our favorite fish
wheeled from the airport
barbequed on a spit
my uncle waving me over
*Dede a itok! Kejro mona!*
*Dede come! Let's eat!*

Headline: No aloha for Micronesians in Hawai'i.
Headline: Micronesians fill homeless shelters.
Headline: Micronesians run hefty healthcare tab.
Quote: "You know they're better off living homeless in Hawai'i than
they are living in their own islands.

Quote: "We should've just nuked their islands when we got the chance."
Joke: "Eh, eh. Why did the Micronesian man marry a monkey?"
"Because all Micronesian women are monkeys!"
What? Can't you take a joke?

It's actually
NOT Micronesians
It's Marshallese/Yapese/Chuukese/Palauan
Kosraean/Pohnpeian/Chomorro/Kiribati/
but when Hawai'i insists
on lumping us all together

when they belittle us and tell us we're small,
when they tell us our people are small
when they give us a blank face
when they give us a closed door
when so many in Hawai'i hates
Micronesians, when so many in Hawai'i hates us

That's how I learned
That's how I learned
That's how I learned

to hate ME

I suspect that the first injury done to Peter David by our collective racism was the injury the poet speaks of in her last line. White supremacy teaches black and brown folk to hate ourselves. This was the lesson of Dr. Kenneth Clark's doll test cited by the U. S. Supreme Court in footnote eleven of *Brown v. Board of Education*.[40] The Court reasoned that segregation denoted "the inferiority of the Negro group," and that message of inferiority "affects the motivation of a child to learn."[41] There is ample evidence that Black children, and brown children, whom we designate as black, continue to experience the devastating effects of segregation's defamatory message.[42] Our schools and our neighborhoods are no longer segregated by law, but they are segregated nonetheless.[43] However, the Supreme Court has held that if the segregation of our schools and our neighborhoods is not mandated by law, if it is *de facto* rather than *de jure*, there is no

[40] 347 U.S. 483, 494 (1954).

[41] *Id.* ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.").

[42] *See, e.g.*, Kiri Davis, *A Girl Like Me*, YOUTUBE (May 4, 2007), https://www.youtube.com/watch?v=YWyI77Yh1Gg. In the video, Davis replicated Doctors Kenneth and Mamie Clark's doll test, which involved providing each black child with two dolls of different skin colors, asking them to respond to a set of questions including: Which doll would you like to play with? Which doll looks like you? Which is the pretty doll? The study was cited by the Court in *Brown v. Board of Education* to support its holding that segregation induces a sense of inferiority that affects the motivation of a child to learn. *Brown*, 347 U.S. at 494 n.11. Davis's film illustrates how young Black children's self-images continue to be affected by racism over fifty years after *Brown*, as the children she interviews identify the dark-skinned doll as less pretty than the white doll, while also reluctantly recognizing that they themselves look like the dark-skinned doll.

[43] *See* Gary Orfield, Erica Frankenberg, Johnyeon Ee & John Kuscera, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, UCLA CIVIL RIGHTS PROJECT, http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf ("[E]nrollment trends in the nation's schools (between 1968 and 2011) show a 28% decline in white enrollment, a 19% increase in the black enrollment, and an almost unbelievable 495% percent increase in the number of Latino students. . . . White enrollment was almost four times the combined black and Latino enrollment in 1968, but only about a fifth bigger in 2011. The Asian enrollments, insignificant in 1968, reached 2.5 million by 2011, more than the number of Latinos in 1968. The country underwent an incredible transformation. In 2011 it was, in important ways, a different society than that which existed when *Brown* was decided. *Brown* and the Civil Rights Act were fundamentally aimed at a transformation of a black-white South, and the impact was most dramatic there."). Although segregation looks different in our multiracial state of Hawai'i than it does in Mississippi or Washington D.C., when we ask, "Where you live?" or "Where you grow up?" or "Where you go school?" we know the question and the answer are racially coded.

constitutional violation.[44] If we who are privileged by race and class continue to segregate ourselves by the neighborhoods we live in and the schools we choose to send our children to, the law tells us we are not responsible. It does not matter if that segregation still sends a defamatory message, still designates some children as inferior, still teaches black and brown children to hate themselves and still denies privileged children lessons of democracy, critical thinking, and humanity that are only possible in truly integrated communities. The law says we played no part in those injuries and need not concern ourselves with righting the wrong.[45]

## III. LOCAL KINE WHITE FLIGHT: IMPLICIT BIAS AND SCHOOL SEGREGATION

This brings me to my second text. Three of the contributors to this symposium have written on the effects and implications of implicit bias on issues of educational equity in Hawaiʻi.[46] Tawnee Sakima and Scott Schmidtke's article reports on the results of a study on how implicit bias effects our beliefs about the relative quality of education provided by public and private schools and our views about the intelligence, skills, trustworthiness and overall professional competence of graduates of those schools.

On its face this study does not make racial bias its subject. Nor were the evaluative instruments the authors used designed to inquire into or reveal implicit racial bias.[47] Instead, the authors' research sought to determine

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[44] This doctrine holds that equal protection is violated only when a law requires racial segregation on the face of the statute or where evidence shows that school officials acted intentionally to segregate children by race. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1 (1970); Keyes v. School Dist. No. 1, 413. U.S. 189 (1973). These cases are early examples of how the law's focus on the motivation of an individual or government perpetrator. The court in *Davis* cites the desegregation cases as precedent to show that the *Davis* intent requirement is not a departure from but is consistent with prior doctrine. *See* Washington v. Davis, 426 U.S. 229, 240-41 (1976) ("The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.").

[45] Milliken v. Bradley, 418 U.S. 717 (1974) (refusing to include suburban school districts in the desegregation remedy using the equitable principle that the remedy may not exceed the scope of the injury).

[46] Breann Nuʻuhiwa, *"Language is Never About Language": Eliminating Language Bias in Federal Education Law in Futherance of Indigenous Rights*, 37 U. HAW. L. REV. 381 (2015); Tawnee Sakima & Scott Schmidtke, *Implicit Biases and Hawai'i's Educational Landscape: An Empirical Investigation*, 37 U. HAW. L. REV. 501 (2015).

[47] In the study, participants took an online survey assessing implicit biases towards

whether their subjects harbored an implicit bias that favored private schools over public schools. They tested their hypothesis, that residents of Hawai'i held an implicit bias that favored private schools, by measuring responses to questions about the perceived professional competence of individuals when respondents were told lawyers or doctors were graduates of public schools compared to when respondents were told the same professionals had graduated from private schools.[48]

Despite the apparent racial neutrality of this study, I want to suggest that in the context of Hawai'i we should read the study as a racial text. We should ask ourselves whether one can think about public and private schools in Hawai'i without thinking about the race of the children who attend those schools.[49] In Hawai'i we have experienced significant flight from the public to the private schools.[50] Studies of school segregation in the continental United States have named this phenomenon "white flight."[51] In Hawai'i the racial demographics of the fleeing parents is more diverse than on the continent. Here we think of the flight from public schools as primarily socioeconomic,[52] but the resulting segregation also has evident racial markings and meaning.[53]

In this context, it is impossible to ask about public schools, private schools and competence, without implicating (triggering, seeing through the

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Hawaii public and private schools.

[48] Sakima & Schmidtke, *supra* note 46.

[49] I use the words "coming to mind" to include not only those images and associations of which we are aware but also those about which we are not fully aware. *See* Krieger, *supra* note 11, at 6-7.

[50] During the 2012-2013 school year, 183,251 (84.5%) students attended public schools while 33,702 (15.5%) students attended private schools. STATE OF HAW. DEPT. OF EDUC., SUPERINTENDENT'S 24TH ANNUAL REPORT 5 (June 2014), *available at* http://arch.k12.hi.us/PDFs/state/superintendent_report/2013/2013SuptRptFinal20140806.pdf.

[51] *See* Mingliang Li, *Is There "White Flight" Into Private Schools? New Evidence from High School and Beyond,* 28 ECON. EDUC. REV. 382 (2009); Robert W. Fairlie & Alexandra M. Resch, *Is there "White Flight" into Private Schools? Evidence from the National Educational Longitudinal Survey,* 84 REV. ECON. & STAT. 21 (2002); Milliken v. Bradley, 418 U.S. 717, 806 (1974); *see also* Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy*), 114 YALE L.J. 1353 (2005) [hereinafter *Forbidden Conversations*].

[52] In Hawai'i, 14% of public school students are white, while white students make up 25% of the population. In contrast, Hawaiian students compose 26% of public school students, while only 6.6% of the general population identifies as Hawaiian. JONATHAN Y. OKAMURA, ETHNICITY AND INEQUALITY IN HAWAII 65 (2008).

[53] Middle class Chinese and Japanese parents, who attended Hawai'i's once well regarded public schools now send their children to private schools along with white children. Hawai'i's brown children, Native Hawaiian, Filipino, Samoan, Tongan, Micronesian are left behind to populate a public school system that has deteriorated, as those with the social and political capital to demand its excellence have departed. This is what segregation looks like.

distorting lenses of) race. The racial segregation in Hawai'i's schools was never mandated by law.[54] No school board or legislature has acted intentionally to segregate our schools. Instead, when parents decide to send their children to a private school or move to a neighborhood where the public school is mostly white or Asian, they are looking for the schools that will make their children most competent, where the teachers will recognize their children's gifts, where their children will have access to the skills and social networks that will give them an edge in this all too competitive world.[55] The explicit biases influencing school choice decisions favor excellence and competence over poor performance and incompetence. However, those decisions also reflect our racial bias.

We flee schools that become too black or brown because of our racism. We flee because we have internalized a set of beliefs about black and brown people that has its origins in racist ideology. We flee because we know that structural racism has made these schools less good and that often it has made them terrible. In the latter case, we are not so much fearful of black and brown children as of having our own children treated as if they were black. We flee because we are fearful of giving up our race and class privilege.[56]

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[54] Hawai'i did achieve what amounted to *de jure* racial segregation with the establishment of the English Standard School. Children could gain admission to public schools designated as English Schools only by passing a test requiring them to speak Standard English rather than pidgin or Hawaiian Creole English. As almost all children of immigrant contract laborers from China, Japan, Portugal and the Philippines as well as native Hawaiian children spoke pidgin, the English Standard schools were almost exclusively white. *See* Eileen H. Tamura, *Power, Status, and Hawai'i Creole English: An Example of Linguistic Intolerance and History*. 65 PAC. HIST. REV. 431, 436-37 (1996) ("Arthur L. Dean, former president of the University of Hawai'i and then vice-president of the sugar company Alexander and Baldwin and chairman of the Territorial Board of Education, admitted in 1936 that the establishment of Standard schools was a way to separate children of different cultural and economic groups[ and] . . . the Department of Public Instruction created these schools in response to pressure from Caucasians. . . .").

[55] *Forbidden Conversations*, *supra* note 51, at 1374 ("In a world where knowledge, teaching, and learning are increasingly commodified and stratified, where only those children whose parents can pay will touch a cello, read James Joyce, or a see a cell divide beneath a microscope . . . we fear our child will be left out, that the promise of her gifts will go unrealized and that it will be our fault. We may disagree in principle with an education system that preserves class hierarchy, but if it's the only game in town and our children are at stake, it's just too scary to opt out.").

[56] Elsewhere I have written more extensively about the kinds of fear that engender white flight. I argue that while most of these fears do not have their origin in explicit racist beliefs they all result from embedded ideological and structural racism. *See Forbidden Conversations*, *supra* note 51, at 1370-75 (arguing that it is a fear of blackness—conscious or unconscious—that makes us send our children to certain schools, a fear that our children will be treated as black children in run-down buildings with less-than top-notch teachers).

I do not believe that these fears operate at an entirely unconscious level. I think that if we are honest with ourselves most of us who are privileged will admit we are afraid to send our children to the worst of the schools that are populated by poor brown people. Some of us would confess to fearing that these brown children will beat-up our children, or take their lunch-money, or sell them drugs. Certainly a skillfully constructed IAT would quickly reveal that our fears that our children will not be safe in these schools are caused in part by implicit racial biases.

I am not arguing here that we all should take a public/private school IAT. I am not asking for a *mea culpa* from each and every parent who sends his children to private schools. To the contrary, I am asking that we reconsider the law's paradigm of individual fault, culpability and causation, or that we consider how that paradigm has created a different kind of distortion in our cognitive processes and more importantly in our ethical and moral perceptions and responses.

In the context of separate and unequal *de facto* segregation perhaps the implicit bias resides in our assumptions about the morality or justice of our privilege rather than in our individual unconscious beliefs about racial others.[57] When the law tells us that only intentional state sponsored *de jure* segregation violates the Fourteenth Amendment's Equal Protection Clause, it announces that we have done no injury to the poor black and brown children we leave behind in racially isolated failing schools. The *de facto/de jure* distinction does more than declare that our flight from these schools was not motivated by racism. It also asserts no racism exists, and that we should therefore feel no sense of moral responsibility for the conditions of racially isolated and failing schools. The subtext, the hidden assumption in the law's story of no injury and no racism tells us if no wrong has caused the conditions that result in our relative privilege, that privilege must be natural and just.[58] The law tells us we have privilege

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[57] Cheryl I. Harris, *Whiteness as Property,* 106 HARV. L. REV. 1709, 1753 (1993). Cheryl Harris has noted that *Brown v. Board of Education* created these expectations of continuing white privilege. She argues that although *Brown* overturns *Plessy*'s validation of officially-sanctioned segregation and status inequality, it represents a "transition from old to new forms of whiteness as property." *Id.* at 1714. *Brown* declined to dismantle white privilege or "even to direct that the continued existence of institutionalized white privilege violated the equal protection rights of Blacks." *Id.* at 1751. White status privilege accorded as a legal right by law was rejected, but substantive inequality produced by white domination and race segregation remained unaddressed. Thus *Brown* protected white Americans continued expectations of race-based privilege.

[58] As Alan Freeman notes, the perpetrator perspective imagines a world where, but for the conduct of a few identified misguided racist perpetrators, "the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities and where deprivations that did correlate with race would be 'deserved' by those

because we are indeed better, that our children deserve to be in the best schools, that our achievements, our success, our advantages in life manifest our talent and hard work, and have nothing to do with the racist structures, practices, and accepted beliefs that distort our politics, our policies and our collective decisions. We hear the law's story and we internalize it. It fits neatly into the schematics and content of our cognitive categories. When we see poor black and brown children performing less well than our children, when we are told no injury or wrong has caused the achievement gap, it fits the content of white supremacy's story: these children are less intelligent, less motivated, and less disciplined. Their parents care less and their people's culture is somehow different and deficient.[59] The *de facto/de jure* distinction does more than declare us innocents. It joins with other racial narratives to distort the lens through which we see school segregation.[60]

Ten years ago in a *Yale Law Journal* article titled *Forbidden Conversations*, I wrote:

> Schools must be integrated because segregated schools build a wall between poor black and brown children and those of us with privilege, influence, and power. The wall denies them access to the resources we command: social, political, and economic. Although the wall is not a physical structure or a prohibition mandated by law, it is nonetheless a division that permits and encourages us to hoard our wealth on one side of the wall while children on the other side are left with little.[61] The genius of segregation as tool of

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deprived on grounds of insufficient 'merit.'" *Freeman, supra* note 32, at 1054.

[59] *See Unconscious Racism, supra* note 6 (discussing how implicit bias shapes the way that racial disparities in education are understood and explained, resulting to powerful harms to black and brown children).

[60] *See* Freeman, *supra* note 32, at 1055 (1978) ("The fault concept gives rise to a complacency about one's own moral status; it creates a class of 'innocents,' who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations. This resentment accounts for much of the ferocity surrounding the debate about so-called 'reverse' discrimination, for being called on to bear burdens ordinarily imposed only upon the guilty involves an apparently unjustified stigmatization of those led by the fault notion to believe in their own innocence.").

[61] *See* ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 35 (2003), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream/frankenberg-multiracial-society-losing-the-dream.pdf (noting that "[a]lmost half of the students in schools attended by the average black or Latino student are poor or near poor" and that "[h]igh poverty schools have been shown to increase educational inequality for students in these schools because of problems such as a lack of resources, a dearth of experienced and credentialed teachers, lower parental involvement, and high teacher

> oppression is in the signal it sends to the oppressor—that their monopoly of resources is legitimate, that there is no need for sharing, no moral requirement of empathy and care. The children on the other side of the wall are not our own. They are not kin to us. They may not even belong to the same species. They are different from us in essential, unchangeable ways. They do not belong to our community. This is the meaning of Brown's observation that segregation is inherently unequal.[62]

The distortion of racism lets us accept a *de facto* segregated system that leaves most black and brown children in the United States in underfunded and underperforming schools. Our racism leads us to believe this allocation of resources is ethical, moral and just. In other words, our unconscious racism manifests itself not just by turning black and brown children into scary bullies from whom we must flee. Our racial bias also distorts our ability to care, to know these children are no different than our own. Our racial bias, our unconscious belief that these children are less intelligent, less hard working, less deserving of the best education, alters our perceptions and deforms our empathy. We believe the arguments that black and brown children are in the worst schools because that is where they belong, that the achievement gap is evidence of their intellectual inferiority or a culture of poverty and "oppositional behavior."[63] Our collective infection with unconscious racism leads us to accept the Supreme Court's holding that there is no constitutional injury in *de facto* segregation. It keeps us from recognizing our ethical responsibility for engaging in collective political action to demand that our politicians desegregate our schools. Our implicit bias distorts our vision, so we do not see that separate and unequal schools injure all of us.

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turnover"); JONATHAN KOZOL, SAVAGE INEQUALITIES (1991) (graphically describing who gets what and who does not get much in American public education); Linda Darling Hammond & Laura Post, *Inequality in Teaching and Schooling: Supporting High-Quality Teaching and Leadership, in Low-Income Schools, in* A NATION AT RISK 129 (Richard D. Kahlenberg ed. 2000) ("African-American students are nearly twice as likely to be assigned to the most ineffective teachers and about half as likely to be assigned to the most effective teachers.").

[62] *Brown*, 347 U.S. at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

[63] *See Unconscious Racism, supra* note 6, at 118-25.

> I first heard the culture story when Daniel Patrick Moynihan . . . argued that the problems of crime, drugs, out-of-wedlock babies, and increasing welfare rolls in poor black communities could be traced to a community culture of poverty that legitimized immoral behavior and encouraged economic dependence. . . . The culture story, filled with the familiar tropes of indolence, ignorance, and immorality, sounded suspiciously like the nature story with a new title.

*Id.* at 120.

## IV. LOCAL KINE TRADITION: THE ETE BOWL HALF-TIME SHOW

My final text comes from the autobiography of our own law school. I begin with the story of a halftime performance at our annual Ete bowl.[64] Throughout my discussion I consider the texts that surround that performance and give it meaning.[65] Again, as in the first two sections of this article, I suggest that our shared understanding of cultural texts and the meaning we give those texts reveals our collective biases—our conscious and unconscious racism, sexism, and homophobia. These shared biases make up the content of our categories. They are the epidemic diseases that we are called to cure, and because we are all infected, our remedy, our cure, our justice seeking must be collective.

I include this text with some trepidation. Richardson Law School is a small and tight-knit community. It is impossible to read a story about this community and not know, or think we know, the characters, without seeing our friends and ourselves. My reluctance to speak of this text arises from the fear that the reader will hear the story and imagine she sees individuals she knows playing particular roles. I fear that merely by writing about this text, speaking it out loud as it were, I will perpetuate the very way of thinking this article hopes to criticize. I worry the story will cause the reader to look for perpetrators and victims, for someone to blame, as a way to make the rest of us blameless.

I have decided to tell the story despite my fears. For this article also calls on us to break the silence imposed by what I have called "forbidden conversations."[66] We do not wish to call our friends racist. We know that

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[64] *See Ete Bowls: Genesis of the Ete Bowl*, WILLIAM S. RICHARDSON SCHOOL OF LAW, https://www.law.hawaii.edu/ete-bowls (last visited Feb. 25, 2015). The Ete bowl, brainchild of Diane Ho, originated in 1978 as a female flag football challenge between University of Hawai'i law students. From there, it grew into an annual event where one team composed of female law students (the Etes) played a team of female law practitioners (the Bruzers). The game has become an expression of strong women lawyers as well as feminism, poking fun at the patriarchal idea that only men play football and only women do half-time cheerleading shows; male members of the 1L class are responsible for putting together the Ete Bowl half-time show. *See also* Mari Matsuda, *A Richardson Lawyer*, 33 U. HAW. L. REV. 61, 64 n.10 (2010) ("The Ete bowl began as a way to generate and perpetuate bonds of friendship. It has evolved into something more. It is a catalyst for connecting people far, far beyond the three years they spend in law school.").

[65] Note that there are texts that surround this temporally—that come before and after the performance—as well as texts that surround it cartographically—texts in the world outside of the law school.

[66] I have considered this theme at some length elsewhere. *See, e.g.*, *Forbidden Conversations*, *supra* note 51; Charles R. Lawrence III, *The Epidemiology of Color Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1 (1995).

if we call something racist, if we name racism when we see it, we are heard as casting aspersions, as finger-pointing, as blaming bad guys, so we do not speak of racism at all. We have made the subject taboo.[67] This taboo, our reluctance to speak out loud about our shared racism, reinforces the "post-racial" narrative of formal equality that claims we have conquered racism and our work is done.[68] I include this story because I do not wish to participate in that conspiracy.

All of us here at Richardson are characters in this story. We are good people. We celebrate our multiple heritages. We teach and learn from one another across our differences. We care about and for one another. We are committed to tolerance of difference, but more than that, we value our differences. We know that our diversity makes our community special, creative and strong. We know that the work of seeking justice is joyous work,[69] and that it is hard, giving work as well.[70] I use this text, this story, because it is a story about good people doing the hard work of seeking justice.

*The Story*

On Sunday November 16, 2014, during half-time of the Law School's annual Ete Bowl game, a group of male students donned shiny green wigs and stuffed balloons inside the backside of their basketball shorts to replicate the appearance of extremely large buttocks. They danced to the soundtrack of *Anaconda,*[71] a song performed by Nicki Minaj, a popular African American hip-hop artist renown for performances that accentuate her voluptuous body and sexuality. I first learned of the performance when a small group of students who were present came to speak with me. As I listened to them I quickly realized that, although they had come to ask for

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[67] The U.S. Supreme Court cases *Bakke*, *Grutter*, *Gratz*, *Parents Involved in Community Schools*, and *Fisher* have altered the perception of race in higher education by moving towards a "colorblind" approach to racial categories, supporting the belief that by recognizing race we only support racism. However, by turning a colorblind eye to issues of race, we also fail to engage in those conversations.

[68] *See, e.g.*, Freeman, *supra* note 32.

[69] Mari Matsuda, Commencement Speech at the University of Hawai'i Law School (2008) (on file with author) ("[T]here is nothing, nothing, nothing, that feels better than working with your fellow citizens to make ours a better community."); *see also* Mari Matsuda, *A Richardson Lawyer,* 33 U. HAW. L. REV. 61 (2010).

[70] Charles R. Lawrence III, Incoming Student Speech at The University of Hawai'i Law School (2009) (on file with author) ("Dean Soifer knows his descriptive truth of a community norm of kindness is always a work in progress.").

[71] Nicki Minaj, *Anaconda,* YOUTUBE (Aug. 19, 2014), https://www.youtube.com/watch?v=LDZX4ooRsWs.

my advice about how they should respond to the incident, the first thing they needed was for someone to listen and hear what had happened to them. They had been hurt and needed someone to validate what they had experienced, to tell them that the hurt they felt was real.[72]

The students described the performance and told me how their classmates and friends had responded with laughter and applause. When I asked if they had said or done anything when this happened, they said, "No." They had not responded. They seemed ashamed of their failure to speak up. They explained that they were caught unawares, had not anticipated the shock, the strength of their feelings and sense of isolation. One of them said she wondered if she were the only one who thought something was wrong. They did not know what to do and had done nothing. As I listened I wondered if I would have had the presence of mind and courage to speak up, to interfere and disrupt the fun and festive spirit among friends and colleagues when I knew that all of them meant well and no one had intended any harm. I knew that I had too often failed myself by remaining silent in similar circumstances.

Some of the students did speak with their friends after the game and voiced their objections to the performance. Some of the people they spoke with said that they too felt uncomfortable, but many others did not understand why anyone would be offended. "It was all intended in fun," they said. "It was a spoof, a joke, a bunch of guys acting stupid." "Getting the guys to put on these crazy halftime shows is part of the Ete Bowl tradition." "You know these guys. They aren't sexist or racist." "Why do you have to be so sensitive? Why can't you lighten up?"

That evening and the next day students on both sides of the debate placed posts on Facebook. As might be expected, the Facebook postings only further divided the students and drove them apart. Unmediated by gestures of relationship, care, respect, humor and goodwill they might have conveyed had they spoken to one another in person, the students experienced each other's posting as accusatory and defensive. This no doubt heightened feelings of injury, misunderstanding and mistrust, on both

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[72] Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 39 DUKE L.J. 431, 462 (1990) [hereinafter *If He Hollers*] ("There is a great difference between the offensiveness of words that you would rather not hear—because they are labeled dirty, impolite, or personally demeaning—and the *injury* inflicted by words that remind the world that you are fair game for physical attack, evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.") (emphasis added); *see Unconscious Racism Revisited*, *supra* note 54, at 942 ("I write so I know I am not crazy. . . . I hope that my writing will help other people know that they are not crazy.") (internal quotation marks omitted).

sides. I saw none of the postings, and no one shared their content with me. However, the students who spoke with me told me that they were injured as much by the on-line comments as by the performance itself. It was apparent that the on-line exchange was fueled in part by mutual feelings of betrayal among friends who were now situated as accuser and accused.

On the Monday following the Ete Bowl some of the students who objected to the half-time performance met with Dean Soifer.[73] He listened to their account of the performance and the on-line exchange that followed.[74] He acknowledged the complaining students' experience of injury and made clear his own belief that the performance was not in keeping with the law school's commitment to creating an inclusive, respectful culture and community. He noted that this was not the first time that the half-time show had used material that demeaned some members of our community[75] and said that he had even suggested that we eliminate the

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[73] I accompanied the students and participated in the conversation. I had already talked with the students about the central thesis of this article and I knew that Dean Soifer had heard me make this argument before and supported it entirely.

[74] Although Dean Soifer had attended the Ete Bowl game he said that he had not watched the half-time performance and had not been made aware of its troublesome content. The first complaint about the half-time show occurred after the 2012 Ete Bowl, when 1L male students dressed in drag and performed to songs that included Beyonce's "Single Ladies." Several students in the law student community raised concerns that the show was hurtful to transgender and transsexual communities, and set up meetings with the Dean in protest.

[75] In the fall of 2013, Dean Soifer received an email from a student in the 2L class.

> As the only openly gay individual in the Class of 2015, I feel that I have a special duty to speak up when I encounter homophobia at our school. I sincerely believe that the Ete Bowl's half time drag show is homophobic. Heterosexual male students dressed in drag, imitating women prancing about the football field, is a mockery to women and gay individuals. It might have been acceptable in the past to do so but in today's fight for equality I believe it is in very poor taste.
>
> The legitimacy of the Ete drag half time show should seriously be questioned for the following reasons:
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> 1) The Ete Bowl is about female empowerment. However, having intoxicated heterosexual men distastefully dressed with gobs of make-up on their face, sashaying and shaking their rears in heels and nylons, is female degradation. Ete women are strong as they enter the traditional male sphere of football. The drag show is shallow and is blatantly sexist. It is antagonistic toward women, taking away power and subverting it for showman purposes. Nothing in the half time performance embodies the femininity or womanhood a female would desire. Instead, these men are promoting stereotypes and objectifying women.
>
> 2) The drag show is offensive and insensitive to the transgendered and drag queen

half-time show altogether. He asked the students how they thought the law school could best respond and what they wanted him to do.

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communities. These communities take pride in their identity. Dressing in drag is an opportunity for them to express their gender identity, unafraid. A true drag performer may temporarily escape social pressures and display to some degree her/his true self. The Ete Bowl's men performing are not serving this purpose. They trivialize true drag performers for a few laughs. Our male student performers have no understanding of the marginalization and brutal realities a transgendered individual may face. Instead they mock and ridicule.

3) The drag show is offensive to the gay and lesbian communities. This year's game will take place around the same time as the special legislative session's vote on the Marriage Equality Bill. As you may know, last year, a photo spread of our scantily clad male students appeared in the Star Advertiser. It would be shameful if photos from this year's show appeared in the same issue of our local paper reporting on the legislative vote. This is a very important month—year—for LGBT rights in Hawaii and the United States. Perhaps 35 years ago when the Ete Bowl was first established this kind of drag show was deemed acceptable. But a lot has happened in this country since then. I never imagined that I may soon have the opportunity to marry my boyfriend in Hawai'i, who I've been engaged to for the past 6 years.

Last Monday, October 7, Lambda met with Ete members. The outcome was disappointing. In spite of Lambda's heartfelt objections, Ete members were insistent that the show would go on.

The Ete Bowl's drag show is a tradition, but not all traditions are worth preserving. The Ete Bowl's drag show is homophobic as white people black-facing is racist, and the name "Redskin" is derogatory toward American Indians.

There are countless other kinds of shows my fellow students could present, a Glee-like song and dance number, a Super Bowl type musical performance, a rousing cheerleading routine, but they seem to be insisting that the tradition of the Ete Bowl calls for a silly drag show.
I am writing this letter to you as a class of one gay man fighting for my self worth. My fellow colleagues will not marginalize me and degrade me as I have been in the past.

I welcome the opportunity to meet with you to discuss this matter. I thank you for listening.

The Dean's office negotiated a compromise that called for a moratorium on half-time drag shows, and there was no performance at the 2013 Ete Bowl. Different explanations have been offered for the reappearance of the half-time show in 2014. Did the Ete Bowl organizers interpret the moratorium to be in effect for only one year? Did the performers believe that the *Anaconda* performance did not constitute a drag show? In any case it was apparent that the Gay student's letter had not occasioned the kind of community discussion that might have helped the larger community hear and understand the injury he had so carefully articulated in his letter.

After some conversation the students agreed that the Dean should write a letter to the law school community communicating the law school's position that this performance and others like it violated the law school's commitment to and responsibility for ensuring all students a non-discriminatory education. They also asked the Dean to convene an educational forum early in the following semester that would give the entire law school community an opportunity to talk about these events and the larger question of how best to work towards living up to our commitment to nondiscrimination and honoring our diversity.[76]

Early on Tuesday an anonymous pamphleteer left a flyer on all of the desks in Classroom Two where a first year class was scheduled to meet. The title, *Why The ETE Half Time Show Was Racist, Sexist & Transphobic*, appeared in bold print at the top of the first page. Below the title photographs taken at the 2014 half-time "Anaconda" performance were displayed along with photographs of a 2013 half-time performance, where male performers had dressed in drag and done a burlesque performance. Seven additional pages contained several additional photographs of the two performances juxtaposed with pictures and drawings of an African woman,

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[76] Dean Soifer sent the following email to the law school community.

Dear Members of the WSRSL Community:

We take pride in the fact that Richardson is a unique Law School in part because we celebrate difference and care for one another much more than is the norm in legal education. To many, the half-time performance during the Ete bowl reinforced stereotypes and thus caused harm to our community. Further, I am told that it has been followed with hurtful communications among our students.

The half-time show has a long tradition and has often been appreciated by many spectators. In recent years, however, some members of our community have found the show to be demeaning or even worse. Even if such harm is unintentional, it is not something that befits our Law School and it undercuts our celebration of diversity, tolerance, and civility. In fact, we should consider no longer having any half-time Ete Bowl performance.

In addition, some students and leaders of our Lambda, FLSA, and Aha Hui O Hawai'i organizations, as well as several faculty members suggested that we hold an educational event early in the next semester to examine issues of stereotyping, oppression, and collegial communication, and we will do so. I trust that both before and after that event takes place, we will all work toward mutual understanding and respect for all members of our community.

Please let me know if you have any questions.

I hope you all will join me in being particularly thankful to be part of the William S. Richardson School of Law.

Mahalo and aloha,
Avi

Saartjie (Sara) Baartman, who was enslaved and exhibited in Europe as a freak and sexual curiosity because of her pronounced hips and backside.[77]

While the flyer's language referred to the show as racist rather than charging those who performed with racism, the men in the photographs were easily identifiable. They experienced the flyer as a personal attack by its author and the other students who objected to the performance. They felt their friends and classmates were calling them racist, sexist and homophobic and they were none of these. They knew that even if the language of the flyer did not single them out, it would be read and understood to accuse them. The flyer cast them as bad guys, as outsiders who did not share the Richardson community's ethic and culture of tolerance and commitment to equal justice for all. The flyer injured them, much as their half-time performance had injured black, women, gay and transgendered students, by placing them outside of the circle of belonging. A student whose photograph appeared in the flyer told me, "This was clearly intended as a shaming device."

How is this story related to our understanding of unconscious or implicit bias? What does it teach us about how the law re-inscribes and reinforces bias even as it claims to seek its eradication? How does it inform the work of lawyers, social scientists and citizens who seek to use our understanding of implicit bias to seek justice?

I begin my response to these questions as I have in the two previous sections of this article by interrogating the text. I ask about the meaning we give to the text of the performance, about the way we read or interpret it. Do we read the text to have the same or similar meaning, and does that meaning derive from historical and contemporary narratives and tropes about race, gender or sexuality?

Secondly, I ask about injury. How does the text of the performance injure us? I ask this question about the individuals and groups who are the subjects, objects or targets of the text, the people whom the performance

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[77] The leaflet also included a brief text explaining why its author believed the Ete Bowl performances and contemporary hip-hop videos like *Anaconda* were replicating and re-inscribing this racist and sexist narrative. The author closed her/his essay with these words:

> I have seen countless videos that go viral on social media of women "twerking." Their butts are the only thing in the shot. And turns out the women are usually black, and if they are not black one is sure to find numerous comments on the video saying something along the lines of "wow she can move like a black girl." That is a clear example of racism and how black women are sexualized in our everyday life. In Baartman's day, there were no cameras to take videos but people would travel to see the same thing people see every day on popular media. As far as I'm concerned we as a whole have not gotten any better. Black women or any women should not be sexualized for their looks.

represents or constructs,[78] but I also ask how the text's meaning injures all of us, how it impedes the transformational project of achieving a just society.[79] The latter question is particularly important for my analysis, as I am arguing for an approach that treats racism, sexism and heterosexism as diseases with collective consequences.

The third part of my response explores how the law's approach to questions of equality hinders, rather than helps, our efforts to recognize, redress and heal the injury the diseases of racism, sexism and heterosexism inflict upon us all. I use the story of the Ete Bowl half-time performance to show that the law's requirement of intentionality, blame and causation, what Alan Freeman has named the "perpetrator perspective,"[80] impedes our ability to recognize and acknowledge the injuries of racism, sexism and heterosexism, to know that we are all injured and to understand our responsibility for fighting them together.

### *The Text*

We cannot understand the Ete Bowl half-time performance, cannot discern its textual meaning,[81] outside of the context of Nicki Minaj's *Anaconda* video. At the time of the Ete Bowl performance the Minaj video had "gone viral" and become a cultural phenomenon. Only those of us whose advanced age or cultural isolation separates us completely from

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[78] *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (1984); John A. Powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. J. 99 (1997); Charles R. Lawrence III, *"Acting Our Color": Racial Re-Construction and Identity as Acts of Resistance*, 18 ASIAN PAC. AM. L.J. 21 (2013).

[79] Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995); Albie Sachs, *Towards a Bill of Rights for a Democratic South Africa*, 35 J. AFRICAN L. 21 (1991); Charles R. Lawrence III, *Forbidden Conversations*, *supra* note 51, at 1382 (describing the substantive value of the Equal Protection Clause as requiring an affirmative duty to move from slavery to freedom).

[80] Freeman, *supra* note 32, at 1053.

[81] In *The Id, The Ego and Equal Protection*, I argued that in determining whether facially neutral laws should be treated as suspect (infected by racism or white supremacy) we should ask whether the law or government action had a racist cultural meaning. What does the text of the performance mean? How do we read it? *See supra* note 1, at 324 ("This test would thus evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance. A finding that the culture thinks of an allegedly discriminatory governmental action in racial terms would also constitute a finding regarding the beliefs and motivations of the governmental actors: The actors are themselves part of the culture and presumably could not have acted without being influenced by racial considerations, even if they are unaware of their racist beliefs. Therefore, the court would apply strict scrutiny.").

popular culture could watch the young men dancing to the video's music without also seeing the video.[82] Perhaps more importantly, we cannot understand Minaj's performance in the video, cannot know its meaning, without understanding a larger cultural narrative whose meaning lies at the intersection gender, race, and sexuality.[83]

The *Anaconda* video is a remake or re-mix of an original song by Sir Mix-a-Lot, titled "Baby Got Back."[84] In the video Minaj and a back-up troupe of young Black women perform a sexually suggestive dance called the "twerk."[85] The women are clad in a variety of costumes all featuring skimpy halter-tops and G-string bottoms designed to reveal and call attention to their buttocks. I will not attempt to describe the video here.[86] Nor will I engage the considerable cultural commentary and critique surrounding the video and hip-hop music in general.[87] I think it sufficient

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[82] Of course this is the point of a spoof. A satire only works if we know what is being satirized.

[83] Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,* 43 STAN. L. REV. 1241, 1282-95 (1991) (on representational intersectionality).

[84] SIR MIX-A-LOT, *Baby Got Back, on* MACK DADDY (Def American Recordings 1992).

[85] *See Teddy Wayne,* Op-Ed., *Explaining Twerking to Your Parents,* N.Y. TIMES, Aug. 31, 2013, (Sunday Review), http://www.nytimes.com/2013/09/01/opinion/sunday/explaining-twerking-to-your-parents.html?_r=0.

[86] A recurring refrain in the lyrics is representative.

My anaconda don't, my anaconda don't
My anaconda don't want none unless you got buns, hun
Oh my gosh, look at her butt
Oh my gosh, look at her butt
Oh my gosh, look at her butt
(Look at her butt)
Look at, look at, look at
Look, at her butt

NICKI MINAJ, *Anaconda, on* THE PINKPRINT (Republic Records 2014).

[87] A considerable body of academic scholarship and popular literature has considered the subject of how racial, gendered, gay and lesbian and transgendered bodies, subjects and subjectivities are viewed, constructed, constituted, performed and appropriated. *See, e.g.*, BLACK PERFORMANCE THEORY (Thomas F. DeFrantz & Anita Gonzales, eds. 2014); E. PATRICK JOHNSON, APPROPRIATING BLACKNESS: PERFORMANCE AND THE POLITICS OF AUTHENTICITY (2003); JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993); LET'S GET IT ON: THE POLITICS OF BLACK PERFORMANCE (Catharine Ugwu ed. 1995); REPRESENTATIONS OF BLACKNESS AND THE PERFORMANCE OF IDENTITIES (Jean Muteba Rahier ed. 1999). This literature has been particularly vital in its interrogation and theorization of black influenced hip-hop music and culture. Among other things the literature considers hip-hop performance as a site where the narratives, constructions, tropes and disciplinary histories of white supremacy, patriarchy and heterosexism enforce and reiterate oppression. The literature also asks how hip-hop performance can be read as transgressive, and oppositional, contesting oppressive narratives and constructions,

to note that the words and the imagery employed in the video are replete with references to sexual acts and bodies as well as racial sexual stereotypes. The song "went platinum," selling over a million digital copies within the two weeks of its release. During the twenty-four hour period after its release, the video was viewed 19.6 million times.[88] The Internet quickly made *Anaconda* a cultural phenomenon.[89]

In the first part of this article I suggested that we consider our shared understanding of the prosecutor's words describing Micronesian men as evidence of a derogatory racial meaning we all understand that text to convey.[90] Likewise, we need no translation to understand that the balloon stuffed basketball shorts and gyrating pelvises that constitute the text of this performance gesture toward and signify a derogatory, demeaning, dehumanizing narrative about race, gender and sexuality.[91] We understand the Ete Bowl performance because the intersecting narratives of white supremacy, patriarchy and heterosexism persist.[92] Despite our noble

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sometimes by re-appropriation. *See, e.g.*, Luciana Villalba, *TYF Column: Nicki Minaj, Feminism, and the Message Behind 'Anaconda,'* THE YOUNG FOLKS (Aug. 30, 2014), http://theyoungfolks.com/review/nicki-minaj-feminism-and-the-message-behind-anaconda/38651. Minaj herself situates her video as part of this transgressive discourse of reappropriation. Zayda Rivera, *Nicki Minaj talks 'Anaconda' Music Video Controversy: 'It's Just Cheeky, Like A Funny Story,'* N.Y. DAILY NEWS (Oct. 20, 2014), http://www.nydailynews.com/entertainment/gossip/nicki-minaj-talks-anaconda-video-cheeky-article-1.1980608. For purposes of my argument here I need not consider whether one might read Manaj's *Anaconda* as a performance that disrupts or contests dominant narratives of oppression. I believe it is evident that the Ete Bowl performance reinforces rather than contests those narratives.

[88] Marisa Meltzer, *For Posterior's Sake*, N.Y. TIMES, Sept. 17, 2014, http://www.nytimes.com/2014/09/18/fashion/more-women-seeking-curvaceous-posteriors.html.

[89] *See, e.g.*, Booty Rap, *Saturday Night Live*, NBC.COM, http://www.nbc.com/saturday-night-live/video/booty-rap/2815279 (last visited Feb. 25, 2015); *How Kids React to Nicki Minaj New Anaconda Video*, YOUTUBE (Aug. 22, 2014), https://www.youtube.com/watch?v=CU_tq_CTPA4; Adriana Williams, *8yr. Old Singing Anaconda by Nicki Minaj*, YOUTUBE (Sept. 28, 2014), https://www.youtube.com/watch?v=y2y2YrNu14o.

[90] *The Id, the Ego, and Equal Protection*, *supra* note 1.

[91] DVD: 1987 Ethnic Notions (Marlon Riggs, 1987) (on file with California Newsreel); DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACK AMERICAN FILMS, 4th ed. (2001); JAN NEDERVEEN PIETERSE, WHITE ON BLACK: IMAGES OF AFRICA AND BLACKS IN WESTERN POPULAR CULTURE (1992); K.SUE JEWELL, FROM MAMMY TO MISS AMERICA AND BEYOND: CULTURAL IMAGES AND THE SHAPING OF U.S. SOCIAL POLICY (1993); Stuart Hall, *Racist Ideologies and the Media*, in MEDIA STUDIES: A READER (Paul Marris, Caroline Bassett, & Sue Thornham eds., 2d ed. 2000); TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION (1993).

[92] *See* Kimberle Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE

aspirations to put them to rest, despite the Supreme Court's claims that we have already done so, we hear them and we know what they mean. These stories constitute the content of our categories.

*The Injury*

We can identify several different injuries in the story of the half-time performance and the events that followed. All of these injuries are interdependent and no one of them occurs without the others. First is the injury that the students who first came to speak to me experienced, which I will call "assault."[93] I use the word assault because it best describes the feeling I get when I hear words or see images that makes me feel as if I am under attack. This includes feelings of fear and shame that momentarily constrict my breathing as if I have been hit in the gut.[94] Mari Matsuda has written of the psychological and physical symptoms experienced by victims of hate speech,[95] and although I do not believe we should think of this performance as hate speech, the injuries these students experienced were similar.[96]

The second injury I will call the injury of exclusion.[97] The students told me that the performance's portrayal of women, of black women in

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FIRST AMENDMENT (Mari Matsuda & Charles R. Lawrence III et al. eds., 1993).

[93] *See* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari Matsuda & Charles R. Lawrence III et al. eds., 1993). The students who came to speak with me used the word "offended" to name their experience at watching the performance but offence does not capture the nature of the injury.

> There is a great difference between the offensiveness of words that you would rather not hear—because they are labeled dirty, impolite, or personally demeaning—and the *injury* inflicted by words that remind the world that you are fair game for physical attack, evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.

*If He Hollers*, *supra* note 72, at 461.

[94] I describe my own experience with this feeling as I first read reports of the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*. *See Unconscious Racism Revisited*, *supra* note 2, at 934-35. One student said, "I found it deeply troubling and disrespectful for straight men from the law school to put on a drag show making a caricature of LGBTQ people and perpetuating the stereotypes of women, particularly black women. I feel that, as a black man and person of color I have been attacked. The half-time show perpetuated negative and harmful stereotypes about black women, black people, people of color, women and LGBTQ members."

[95] Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 24 (Mari Matsuda & Charles R. Lawrence III et al. eds., 1993).

[96] *See infra* notes 98-102 and accompanying text.

[97] I have argued elsewhere that signs and symbols that signify exclusion and non-

particular, and of gay men and transsexuals made them feel as if they were being made fun of. The performers and the audience who laughed at and applauded them were not laughing at themselves. The big-butted women portrayed in the skit were outsiders. They were ugly, exotic, oversexed, unintelligent, not like and somehow inferior to people in our community, to us. However, the students who came to speak to me also knew, and just as importantly felt, that the big-butted women were related to them, that these big-butted people were their kin, were them, and this made them outsiders too.[98] They knew that if they laughed along with the rest of the audience they would be making fun of themselves, demeaning and defaming their own people.[99]

The third injury is the injury of silence. Although several students and faculty who were in the audience told me they were offended, upset or at least troubled by the performance no one spoke up at the time.[100] How does this happen? Several elements of this story may have contributed to the silence of those who in one way or another were troubled by the performance and the audience's response.[101] The students who first came to speak to me reported that they were surprised and stunned by the content of

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membership in the constitutive community are central to the injury that violates the Equal Protection Clause of the Fourteenth Amendment. The symbolism of segregation, not just the act of exclusion, makes segregation inherently unequal. *See If He Hollers*, *supra* note 72, at 439 ("The key to this understanding of *Brown* is that the practice of segregation, the practice the Court held inherently unconstitutional, was speech. *Brown* held that segregation is unconstitutional not simply because the physical separation of black and white children is bad or because resources were distributed unequally among black and white schools. *Brown* held that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children.") (internal citations omitted).

[98] *The Id, the Ego, and Equal Protection*, *supra* note 1, at 317 ("I wish I could laugh along with my friends. I wish I could disappear."); *see also* Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech*, 31 HARV. J. RACIAL & ETHNIC JUST. (forthcoming 2015).

[99] *The Id, the Ego, and Equal Protection*, *supra* note 1, at 317 ("It is circle time in the five-year old group, and the teacher is reading us a book. . . . The book's title is *Little Black Sambo*. Looking back, I remember only one part of the story, one illustration: Little Black Sambo is running around a stack of pancakes with a tiger chasing him. . . . I have heard the teacher read the 'comical' text describing Sambo's plight and have heard the laughter of my classmates. There is a knot in the pit of my stomach. I feel panic and shame. . . . I am slowly realizing that, as the only black child in the circle, I have some kinship with the tragic and ugly hero of this story—that my classmates are laughing at me as well as at him.").

[100] I understand that sometime soon after the performance one or two students posted to Facebook responses and critical analysis of the halftime show. This elicited further postings from other members of the law school community, and it was primarily through social media that word of the controversy spread.

[101] *If He Hollers*, *supra* note 72, at 452-56.

the performance—surprised at what they saw, that their friends would participate in this performance, and stunned by the force of their own emotional reaction. In the context of discussions surrounding hate speech and the First Amendment, critical race theorists have noted that face-to-face racial insults have an immediate injurious impact that often disables speech.[102] Although the half-time performers were not intentionally hurling racial invective, the impact of unintentional insult can be just as immediate and the surprise that it comes from an unexpected source may increase the shock that disables responsive speech.

The students who objected to the performance may have worried that by speaking out against the performance, by calling attention to its racism and interrupting the fun, they would only fuel the feeling among other students that they were outsiders. If most of us think this is just harmless fun, what's wrong with you guys? Why can't you share in the joke? Why do you always have to play the race card? Here anti-racist speech is silenced by a colorblind post racial ideology and rhetoric that makes the person who calls attention to racism the racist.[103] I believe that what most often silences us from speaking up when we see racism is our fear that to name racism will be heard as calling our friends racist. When we can only think of racism within the paradigm of individual fault and causation then any naming of racism must refer to a racist. If the student sees her friend dancing in a green wig with balloons stuffed down his gym shorts, and she says, "What I see injures me because it is racist and sexist," her friend will hear her calling him a sexist and racist. The perpetrator perspective leaves only two choices. Either he is a racist or there is no racism here.

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[102] *Id.* at 452 ("The experience of being called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech."). Furthermore, speech is usually an inadequate response when one is assaulted with words that denote one's subhuman status and untouchability. There is little (if anything) that one can say that responds to one's experience of emotional or reputational injury. This is particularly true when the message and meaning of the assaultive message resonates with beliefs widely held in society. Segregation and other forms of racist speech injure victims because of their dehumanizing and excluding message. But each individual message gains its power because of the cumulative and reinforcing effect of countless similar messages that are conveyed in a society where racism is ubiquitous.

[103] Ian Haney-Lopez, *Freedom, Mass Incarceration, and Racism in the Age of Obama*, 62 ALA. L. REV. 1005, 1010 (2010) ("[C]olorblindness at the level of public discourse tells us that the first person to mention race is the racist, an indictment frequently made through the claim that someone is 'playing the race card.'").

### *The Perpetrator Perspective and the Ete Bowl Story: Critical Race Cliff Notes*

I close my discussion of the story of the Ete Bowl performance by examining how the perpetrator perspective[104] and post racial discourse shape the way we read the text of the performance and the events that followed. I have already touched upon several parts of this analysis as I have told the story and described the injuries inflicted by its constituent texts. In this section I summarize those arguments and ask the reader to recall the earlier moments in my narrative of the story that provide context, feeling and nuance. I present this brief reprise of my argument to demonstrate how at each moment the story, the law's paradigm of individual blame, causation, and culpability captures our perception and understanding of the events and of our relationship to one another. The perpetrator perspective keeps us from seeing that we have all internalized racism's story. It keeps us from naming our shared racism when we see it, from speaking to each other about it and joining forces to fight it together.

The story begins when students who were present at the half-time performance feel assaulted and demeaned. The perpetrator perspective identifies the performers and the audience members who respond with laughter and applause as the source of their injury. The performers and

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[104] Freeman, *supra* note 32, at 1053-55. Alan Freeman has described the perpetrator perspective as follows:

> The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator.
>
> . . . .
>
> Its central tenet, the "antidiscrimination principle," is the prohibition of race-dependent decisions that disadvantage members of minority groups, and its principal task has been to select from the maze of human behaviors those particular practices that violate the principle [and] outlaw[] the identified practices.
>
> The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors. . . .
>
> Central to the perpetrator perspective are the twin notions of "fault" and "causation." Under the fault idea, the task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm. . . .
>
> The fault concept gives rise to a complacency about one's own moral status; it creates a class of "innocents," who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations.

audience have engaged in racist, sexist, homophobic and transphobic speech and these intentional speech acts have caused injury.[105]

The students who performed in the half-time show and those who participated as an appreciative audience hear the charge that the performance is racist, sexist and homophobic as a charge that they are bad people. They hear what the injured students say as a personal accusation. The law's story requires a perpetrator, and thus they hear the injured students calling them the bad guys. Naturally, they deny. They say "We are not racist, sexist, or transphobic. We have done nothing to injure you." If they were to admit their racism they would be cast as pariahs in a community where the law has declared that the rest of us are color-blind.[106]

The injured students hear their classmates' disavowal as a refusal to see or recognize that they have been injured at all. They hear in their friends' response, "I am not a racist. I did nothing to hurt you," a denial of their experience of injury. The Court's intent requirement tells us that there is no injury unless some intentionally racist person has caused the injury. If the performers and their audience are not racist then the students who experienced injury have not been injured at all.[107]

Thus the injured students' initial experience of assault by the performance is compounded by the denial of that injury.[108] Moreover, they

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[105] Implicit bias research might demonstrate that the performers were not aware of their bias.

[106] Within the perpetrator perspective, the performing students and those who support them are not only identified as the racists, but the rest of us are excused—told that we are not racist. Some of us get to point the finger of blame and remain innocent and not responsible while those at whom we point our fingers become racist—culpable of wrongdoing. *See also* Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality,* 52 WM. & MARY L. REV. 197 (2010).

[107] This aspect of the perpetrator perspective is reflected in the *Washington v. Davis* intent requirement itself. If no discriminatory intent can be established in the case and controversy before the court then no racism exists. The perpetrator perspective's assertion that no racism exists in this case in turn becomes an argument that there is no racism in the community/society/nation except in those individual cases that racism has been proven. The affirmative action cases that hold remedial racial classifications suspect unless they are narrowly drafted to remedy identified intentional racism incorporate this doctrinal sleight of hand that transforms the injuries of past and contemporary discrimination into no injury at all. *See* Regents v. Bakke, 438 U.S. 265 (1978) (Justice Powell holding that societal discrimination is "too amorphous" to remedy); *see also* Adarand Constructors v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning,* 31 U.S.F. L. REV. 757, 766-70; Lawrence & Matsuda, WE WON'T GO BACK 67-87; *cf.* Plessey v. Ferguson, 163 U.S. 537 (1896).

[108] This injury is further compounded by the court's colorblind doctrine and the post racial claim that society has overcome its racism—so that this denial of the experience of injury happens to these students many times every day.

hear this denial not just from their classmates in this instance. Rather, they hear the larger post racial discourse denying society's racism.[109] The post-racial discourse tells them, "Nothing happened to you." In other words, they are hurt not just by the performance itself but by the performers and the rest of the community's participation in the discourse that says they were not hurt. This community denial of the injury they experienced from the performance becomes a denial of the racism they experience many times every day and therefore feels like a denial of entirety of their lived experiences with racism as well.[110]

The injured students respond by distributing a flyer that affirms and explicates their experience of injury. Although they articulate this injury by referring to the injury done by the original text of the performance, the pamphlet also expresses the injury they feel as the result of their classmates', friends' and the larger community's denial of their racism. The flyer's words say "Why the Ete Half Time Show Was Racist, Sexist, & Transphobic," and could be read as meaning, "Why the show evidences the continued existence of racism, sexism and transphobia in our society." However, the photographs in the pamphlet from the most recent and past shows place this text squarely within the perpetrator perspective. The individuals in the photographs are easily identifiable. We read and interpret the flyer as a personal accusation leveled against the individuals pictured in the photographs. The individuals who appear in the photographs read the flyer as intended to shame them, and single them out as individual racist, sexist and transphobic perpetrators.

The historical examples of racism and sexism that appear in the pamphlet, examples that might in another context be read as arguments about the continuing presence of societal racism, (Sarah Baartman and other historical pictures stereotyping big-butted black and native women), only serve to reinforce the performing students' post-racial defense. Within the perpetrator perspective, the examples of racism in the pamphlet point to

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[109] *See* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2-3 (1991); Ian F. Haney-Lopez, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889 (1995).

[110] *See* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1568 (1989); Daniel Solórzano et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60, 62 (2000); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Claudia Rankine, *"You are in the dark, in the car . . ."*, *in* CITIZEN: AN AMERICAN LYRIC (2014).

a racist past—a past that we have moved beyond, for which we should not be held responsible.[111] Within the post-racial narrative even the contemporary images of black women in the flyer (Nicki Minaj in her *Anaconda* costume and pose) are read as no longer having demeaning racial and sexual meaning.[112] If we live in a post-racial colorblind society, even those things that we may have recognized as racist at an earlier time cannot be racist now. The same costumes or performances that were used to portray blacks in minstrel shows or circus exhibits before we declared ourselves colorblind no longer convey the same meaning that they did before we overcame our racism. The leaflet is read within this colorblind post racial discourse. The students pictured in the pamphlet experience it as a shaming device, an unfair accusation intended to defame them. The Court's perpetrator perspective has done its work and we will find it even more difficult to have the forbidden conversation about our shared racism, sexism and heterosexism.

*Unconscious Racism Revisited, Again (We haven't finished our work yet)*

In *The Id, the Ego, and Equal Protection*, I suggested that the court should consider the "cultural meaning" of an allegedly racially discriminatory act as the "best available analogue for and evidence of the collective unconscious that we cannot observe directly."[113] My reference to the "collective unconscious" rather than the individual actor's unconscious was meant to convey my belief that the harm of racism resided in the continued existence of a widely shared belief in white supremacy and not in the motivation of the individual actor or actors charged with discrimination. I argued that so long as this shared ideology remained we must assume that

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[111] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 (2006) (quoting Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)) ("We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.' Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.") (internal citations omitted).

[112] Minaj and other hip hop artists have embraced an argument made by some postmodern black feminist that their performances should be read as a feminist reclaiming of women's power to control their own bodies, to represent them in their own chosen way, to contest the narrative by disrupting it and to be independent actors in the market. *See, e.g.*, Villalba, supra *note* 87; Zayda Rivera, *Nicki Minaj talks 'Anaconda' Music Video Controversy: 'It's Just Cheeky, Like A Funny Story,'* N.Y. DAILY NEWS (Oct. 20, 2014), http://www.nydailynews.com/entertainment/gossip/nicki-minaj-talks-anaconda-video-cheeky-article-1.1980608.

[113] *The Id, the Ego, and Equal Protection*, *supra* note 1, at 324.

the affirmative command of the Constitution's Equal Protection Clause to abolish white supremacy has not been accomplished.

In applying a cultural meaning test I sought to reveal the continued vitality of the ideology of white supremacy in determining the content of conscious and unconscious bias. I also meant to show how our collective biases serve to rationalize and justify chronic conditions of structural and institutional racism. My final purpose was to expose the Supreme Court's doctrine of discriminatory intent as a mechanism designed to deny the continuing legacy of slavery and segregation in our nation and show how the perpetrator perspective has kept us from acknowledging our disease and working together towards a cure.

Several weeks ago, as I wrote the final drafts of this article, I was asked to comment on a documentary about Albie Sachs, a freedom fighter during the anti-apartheid movement in South Africa, one of the principal drafters of that country's Constitution and one of the first justices to serve on its Constitutional Court. The film takes its titled "Soft Vengeance"[114] from Sach's own words. In the film's opening scene we watch news footage taken immediately after an assassination attempt on Albie Sachs. Sachs, in exile in Mozambique, has been targeted by the apartheid regime's secret police because of his leadership role in the resistance struggle and the African National Congress (ANC). Miraculously, he survives the bomb they have planted in his car but he loses his right arm in the explosion. In the film he recalls lying in his hospital bed and receiving a note from his comrades in the ANC. "Don't worry comrade," they said, "We will avenge you." "Avenge me? We going to chop off their arms? We going to blind people? Where's that going to get us? But if we get democracy in South Africa and freedom, that will be my soft vengeance."

Albie Sachs's soft vengeance was realized in 1994 when the Republic of South Africa elected its first democratically elected government and in 1996 when it adopted its Constitution. At the end of the film we watch Justice Sachs as he takes the oath of his judicial office along with eight other members of South Africa's first Constitutional Court. He raises the stump of his right arm as he promises to faithfully uphold a Constitution whose preamble opens by recognizing "the injustices of *our* past."[115]

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[114] SOFT VENGEANCE: ALBIE SACHS & THE NEW SOUTH AFRICA (The Rord Foundation & Ginzburg Productions 2013).

[115] S. AFR. CONST., 1996, pmbl., *available at* http://www.constitutionalcourt.org.za/site/constitution/english-web/preamble.html.

> We, the people of South Africa,
>
> Recognise the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land;
>
> Respect those who have worked to build and develop our country; and

Justice Sachs, a white man who fought side by side with his brothers and sisters in a multiracial struggle, who twice endured prison and solitary confinement, who experienced exile and survived an attack on his life, was instrumental in the drafting of this new Constitution.[116] He knew that they could not create a new and just South Africa without confronting apartheid's injuries, without understanding that those past injuries, the psychic injuries of racist ideologies and the material injuries of racist structures, lived with them still. He knew that their Constitution must commit them to the affirmative disestablishment of these twin injustices.

As his country contemplated and debated its Constitution, Sachs wrote that the new bill of rights must not enact a "constitutional freezing of the present unjust and racially enforced distribution of land."[117]

> [T]he starting point of constitutional affirmation in a post-apartheid democratic South Africa is that the country belongs to all who live in it, not just to a small racial minority. If the development of human rights is criterion, there must be a constitutional requirement that the land be redistributed in a fair and just way, not a requirement that says there can be no redistribution.
>
> . . . .

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Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

[116] Albie Sachs was born in Johannesburg, South Africa in 1935. From a young age he engaged in activism and civil disobedience, and after receiving his law degree at twenty-one, he represented a number of black clients. Sachs endured two stints in prison as a political prisoner. Following his release, Sachs lived in England and then Mozambique before returning to South Africa where he was appointed to the Constitutional Committee and played a major role in creating South Africa's Bill of Rights. *See Albie Sachs*, ACADEMY OF ACHIEVEMENT, http://www.achievement.org/autodoc/page/sac0bio-1 (last visited Mar. 7, 2015).

[117] Albie Sachs, *Towards a Bill of Rights in a Democratic South Africa*, 35 S. AFR. J. ON HUM. RTS. 21, 28 (1991).

> Without a constitutionally structured programme of deep and extensive affirmative action, a Bill of Rights in South Africa is meaningless. Affirmative action by its nature involves the disturbance of inherited rights. It is redistributory rather than conservative in character.[118]

Sachs understands equal protection as a transformative project that requires a constitutional and collective community commitment to the eradication of racism and the disestablishment of ideologies and systems of racial subordination. This transformative project defines the injury of racism very differently than our own Supreme Court's doctrine and theory of individual fault and causation. The latter theory is designed to help us turn away from, repress and deny the past and continuing injuries of racism so that we can tell ourselves there is no longer need for redistribution. Our laws define the injury of racism as acts perpetrated by individuals against other individuals. The theory that seeks societal transformation sees the injury as done to the collective, as participated in and suffered by us all.[119]

In this Article I have considered three local texts. I have asked the reader to consider the cultural meaning of those texts and to think about how our knowledge of unconscious bias might help us understand them. Like Justice Sachs and the South African Constitution, I call on all of us to recognize the injuries and injustice of racism, sexism, and heterosexism as injustices of our past that live with us still. The way we read and understand the texts of the prosecutor's words about Micronesians, of our flight from Hawai'i's public schools, and of our own Ete Bowl show, are evidence of biases, conscious and unconscious, that none of us has escaped. Perhaps more importantly it is evidence that our transformative project is not complete.

In his book *War Crimes, Atrocity and Justice*,[120] Mike Shapiro explores the notion of juridicial cartographies or the mapping of spaces of justice. The state is constructed and built through various practices and justice is activated through such practices. States are made and remade as they are both legitimated and attenuated, as justice is created and implemented.[121] The state is constituted by crime, violence and atrocity—the genocide of

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[118] *Id.* at 28-29.

[119] I have argued elsewhere that our own Constitution should be read to command a transformative approach to equal protection. *See, e.g.*, Lawrence, *supra* note 6; Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001); *Forbidden Conversations, supra* note 51.

[120] MICHAEL J. SHAPIRO, WAR CRIMES, ATROCITY, AND JUSTICE 41(2015) (quoting SHOSHANA FELMAN, THE JUDICIAL UNCONSCIOUS: TRIALS AND TRAUMAS OF THE TWENTIETH CENTURY 8 (2002)).

[121] *Id.*

indigenous Americans,[122] and our Constitution's creation of property in human beings.[123] The state is constituted by grand juries in Ferguson and Staten Island, declaring black lives "unworthy of life."[124] The state is constituted by the savage inequality of segregated and unequal schools,[125] by prisons filled with black and brown faces,[126] by homeless families and hungry children, by corporations deemed persons,[127] their global theft protected while human beings are named "illegals."[128]

Our country, our laws, our communities are constituted by these practices, histories and mappings of justice, by the meaning we give them and by our internalization of the content of that meaning. In a democracy our Constitution and laws gain their authority by the consent of the people. We constitute ourselves.[129] We choose our values. We are responsible for asking ourselves who we are and who we should be, for engaging in a conversation about public morality and the values we hold as a

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[122] *See generally* DAVID STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD (1992); ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); Johnson v. McIntosh, 21 U.S. 543 (1823). Indian possession of desirable lands, according to Justice Story, "was not treated as a right of dominion, but as a mere right of occupancy. As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations." Joseph Story, *Commentaries § 152*, *reprinted in* MARK LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKGROUND TERRITORY IN INTERNATIONAL LAW 29 (1926).

[123] U.S. CONST. art. I, § 2 ("three-fifths" clause); art. I, § 9 (prohibition on ending the slave trade); art. IV, § 2 (fugitive slave provision).

[124] *See* Amy Davidson, *What the Eric Garner Grand Jury Didn't See*, THE NEW YORKER (Dec. 4, 2014), http://www.newyorker.com/news/amy-davidson/eric-garner-grand-jury-didnt-see; Lawrence, *supra* note 98; SHAPIRO, *supra* note 120, at 65-66. Shapiro notes that the Nazis, in their death sentences for Jews, Gypsies and the physically impaired, "eradicate[ed] their victim's citizenship to cancel their juridical subjectivity, and then implemented a biopower (in Foucault's sense), not the traditional sovereign's right over life and death, but a state-implemented racism . . . so that 'inferior species' and 'abnormal individuals' are identified and eliminated. . . . The National socialist eugenic program . . . drew form anthropological (turned into biopolitical) discourses on human life, the most notorious and sinister of which was Alfred Hoche's treatise, 'Life Unworthy of Life.'"

[125] JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (2012); JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005).

[126] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010).

[127] Citizens United v. FEC, 558 U.S. 310 (2010).

[128] *See, e.g.*, DAVID BACON, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS (2008).

[129] *See* Charles R. Lawrence III, *Promises to Keep: We Are the Constitution's Framers*, 30 HOW. L.J. 937, 939 (1987).

community.[130] We cannot do this if we look away from who we are, if we deny and repress our collective racism, sexism and homophobia. We will never accomplish the transformation from a nation constituted in slavery and patriarchy if we use the law's perpetrator perspective to pretend that we are healed from racism's ravages.

Critical race theorists and their sisters and brothers in outsider communities have told stories from the bottom, the margins and the borders to challenge the universality of stories told by the law.[131] Again, I borrow from Mike Shapiro who designates as "literary cartography" the efforts from story-tellers in exile who seek to constitute a "literary justice" that contests the violence of legal constitutions. Shapiro notes:

> In contrast to the "legal justice" dispensed at trials ("physical theaters of justice"), literature is a dimension of concrete embodiment and language of infinitude that in contrast to the language of the law, encapsulates not closure but precisely what in a given legal case refuses to be closed and cannot be closed. It is to this refusal of the trauma to be closed that literature does justice.[132]

The Hawai'i Court of Appeals does "legal justice" declaring the trial court in error—pointing the finger at prosecutor and judge as if only their words did injustice, as if only their racism and this sentencing were at stake. Kathy Jetnil-Kijiner's poetic "Lessons" from our own neighborhood do "literary justice" exposing our wounds for examination and conversation. The Court's holding that our segregation is "*de facto*" not "*de jure*" attempts to hide the wounds caused by our fear of black and brown children, as we flee from their schools leaving them behind to live with a savage inequality that blames them for their failure. When we engage in the forbidden conversation about our flight we begin the work of literary justice. The law's claim that we are "color blind," its post racial tale of "no intent, no fault, no injury," covers up and hides the wounds that racist, sexist, homophobic images still inflict. It says the content of what we once knew was a minstrel show does no injury, that it no longer bears its old racist meaning. The conversation about the Ete Bowl show will be difficult for all of us. It may seem unbearable to see and feel the open wounds of

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[130] *See Forbidden Conversations, supra* note 51, at 1398.

[131] *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); *Unconscious Racism*, *supra* note 6; Margaret E. Montoya, *Máscaras Y Trenzas: Reflexiones Un Proyecto De Identidad Y Análisis A Tráves De Veinte Años*, 36 HARV. J. L. & GENDER 469 (2013); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983). Charles R. Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory,* 46 LAW & SOC. REV. 247 (2012).

[132] SHAPIRO, *supra* note 120.

our racism, sexism, and homophobia, but if we can listen to each other's stories we can begin to heal.

At the end of the film *Soft Vengeance* we watch the officer who planned and orchestrated the bomb attack on Justice Sachs as he appeared before South Africa's Truth and Reconciliation Commission.[133] We watch him as he tells the commission the horrible details of the apartheid regime's assassinations of ANC leaders. The new nation, determined to remember and move forward from its bloody past, established the Commission because it knew that true transformation requires confronting the past. They knew they must hear the survivors' stories of torture and imprisonment, of murdered children, parents, husbands and wives. The murderers and torturers must also stand before the people and tell the truth of atrocities they carried out in the nation's name. They must name and confess their crimes. The nation would not declare them guilty perpetrators singled out from those in whose name they acted. Nor would they be forgiven or absolved of guilt. They confessed collective crimes, the crimes of a nation. The Truth Commission began the work of literary justice, confronting the communal trauma that refuses to heal, knowing that this collective confrontation with past and still living evils was necessary to the nation's healing.

We cannot heal our wounds by covering them and pretending they do not exist, by refusing to listen to the hard-to-hear meaning of the content of our categories. We must not be afraid to speak with one another about our wounds. We must name racism, sexism, and heterosexism when we see and feel them without accusation or claim of innocence. We must know "every wound upon a human heart or body as both caused by us and happening to us."[134] Only then will we know justice.

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[133] The South African Truth and Reconciliation Commission ("TRC") was set up by the Government of National Unity to help deal with what happened under apartheid. The conflict during this period resulted in violence and human rights abuses from all sides. No section of society escaped these abuses. The TRC was based on the Promotion of National Unity and Reconciliation Act, No. 34 of 1995. "*[A] commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.*" TRUTH & RECONCILATION COMMISSION, http://www.justice.gov.za/trc/ (last visited Mar. 18, 2015); *see* Martha Minnow, *Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission*, 14 NEGOTIATION J. 319 (1998).

[134] Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2220 (2000).

# Implicit Biases and Hawai'i's Educational Landscape: An Empirical Investigation

Tawnee Sakima and Scott Schmidtke*

*Abstract*

*Students at the William S. Richardson School of Law conducted a multi-part study seeking empirical evidence of implicit biases related to education in Hawai'i. The objective was to discover whether implicit biases based on education exist in Hawai'i and, if so, collect meaningful data that could help to understand how implicit biases might distort everyday decision making in the community. Previous research in the field of implicit biases has shown that awareness and education are effective tools in combating the ill effects of—and potentially overcoming—implicit biases. Study One sought evidence of the ways implicit biases and associations affect the assessment of others; Study Two sought evidence of the way implicit biases and stereotypes affect self-identification and performance on a standardized test.*

*The results of Study One suggest the existence of an implicit bias favoring individuals who graduated from a private high school over those who graduated from a public high school in Hawai'i, and that given identical performance, private high school graduates are judged better than public high school graduates. The results of Study Two suggest the existence of a Stereotype Threat within Hawai'i's population that depresses standardized test scores of public high school graduates and conversely lifts the test scores of private high school graduates.*

## I. INTRODUCTION

In Hawai'i, it is not six degrees of separation between any two people—it is one—and everyone wants to know: "So, where'd you go to school?" *High school.*

Why is this bit of information so important in Hawai'i? In a 2014 *Civil Beat* article, John Rosa, Assistant Professor of History at the University of Hawai'i (who also taught at Kamehameha Schools) notes, "[p]laying the which-school game can be about getting to know each other, but it can also

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be a way to double check who people are in a small community."[1] Asking this simple question is certainly a quick way for locals to improve familiarity, communication, and comfort with a new acquaintance, and it also invites valuable encoded information that can be used to place the other person within the context of Hawai'i's complex social tapestry. Every answer comes with a bundle of information accessible to those privy to the histories, stereotypes, and assumptions that attach to each individual high school. In Hawai'i, a person's high school can carry stereotypes related to neighborhood, ethnicity, or race; additionally, whether a person went to a Hawai'i public school or private school can trigger stereotypes of class, wealth, and intelligence.

The research outlined in this Article sought a deeper understanding of the effects these high school stereotypes have in Hawai'i and whether they manifest into biases that affect behavior. The primary hypothesis for this research was that in Hawai'i, there exists an implicit bias favoring private school graduates over public school graduates. The research conducted sought to find empirical evidence of such an implicit bias and to test for any behavioral effects of such bias.

Research suggests that stereotypes can be formed and perpetuated without cognizant realization.[2] How do such stereotypes affect the day-to-day lives of the people of Hawai'i? Empirical evidence of any biases associated with high schools in Hawai'i could be an important factor in the ongoing discourse about the success of Hawai'i's educational system and Hawai'i's future.

In Hawai'i, private schools educate about sixteen percent of the state's children; that is twice the average of private school enrollment across the nation.[3] According to Hawai'i Association of Independent Schools data, "more than one out of every three students in school in Honolulu—nearly [thirty-eight] percent—attend a private school."[4] These statistics reveal that more families are choosing to pay thousands of dollars a year to enroll their children in private schools instead of sending them to public schools. In April 2014, the *Honolulu Star-Advertiser* reported, "tuition at three of

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[1] Eric Pape, *Hawaii High School Confidential: Where All Politics is Truly Local*, HONOLULU CIVIL BEAT (Oct. 29, 2014), http://www.civilbeat.com/2014/10/hawaii-high-school-confidential-where-all-politics-is-truly-local.

[2] *See generally* Justin D. Levinson, *Introduction: Racial Disparities, Social Science, and the Legal System*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 3 (Justin D. Levinson & Robert J. Smith eds., 2012).

[3] Alia Wong, *Living Hawaii: Many Families Sacrifice to Put Kids in Private Schools*, HONOLULU CIVIL BEAT (Mar. 17, 2014), http://www.civilbeat.com/articles/2014/03/21502-living-hawaii-many-families-sacrifice-to-put-kids-in-private-schools/.

[4] *Id.*

Hawaii's largest private schools—'Iolani School, Mid-Pacific Institute and Punahou School—will hit the $20,000 mark for the first time next school year as most schools plan hikes of between [three] percent and [seven] percent."[5] Some may ask why any parent would pay $20,000 a year for private school tuition rather than rely on Hawai'i's public school system to educate their child at a significantly lower cost.

An April 2014 *Honolulu Civil Beat* article about Hawai'i families sacrificing to put their kids into private schools cites the laments of Ann Bayer, University of Hawai'i College of Education Professor, that the "conventional wisdom" in Hawai'i is that "private schools are superior to public schools."[6] Bayer, author of the book *Going Against the Grain: When Professionals in Hawaii Choose Public Schools Instead of Private Schools*,[7] wrote that this idea "is perpetuated by word of mouth and the media, and history. Private schools gained higher status during the missionary and plantation days when it was common practice to segregate the students of elite, often white, families from the 'commoners.'"[8]

The Hawai'i State Department of Education (the "DOE") oversees all of the public schools in the state. "Hawaii's Department of Education is the ninth-largest U.S. school district and the only statewide educational system in the country."[9] Over the past few years, there has been a strong emphasis on increasing the quality of Hawai'i's public education system.[10] By participating in federal-based programs such as Race to the Top,[11] Hawai'i's DOE has worked to boost national standardized test scores by increasing financial support to schools.[12] With continuous hard work and dedication from the DOE and Hawai'i's communities, results from the 2013 National Assessment for Educational Progress showed that Hawai'i

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[5] Nanea Kalani, *Private Schools Cite Higher Costs for Higher Prices*, HONOLULU STAR-ADVERTISER (Apr. 7, 2014), http://www.staradvertiser.com/s?action=login&f=y&id=254158201 (login required).

[6] Wong, *supra* note 3.

[7] ANN SHEA BAYER, GOING AGAINST THE GRAIN: WHEN PROFESSIONALS IN HAWAII CHOOSE PUBLIC SCHOOLS INSTEAD OF PRIVATE SCHOOLS (2009).

[8] Wong, *supra* note 3.

[9] Arne Duncan & Neil Abercrombie, *Hawaii Emerges as a Rising Star in Education Reform*, HONOLULU STAR-ADVERTISER (Apr. 16, 2014), http://www.staradvertiser.com/s?action=login&f=y&id=255451021&id=255451021 (login required).

[10] *Id.*

[11] *See* THE WHITE HOUSE, SETTING THE PACE: EXPANDING OPPORTUNITY FOR AMERICAN STUDENTS UNDER RACE TO THE TOP (Mar. 2014), *available at* http://www.whitehouse.gov/sites/default/files/docs/settingthepacerttreport_3-2414_b.pdf ("Race to the Top has focused on providing better support and resources for America's most important leaders: teachers and principals. Under these grants, schools and districts are making sure we have excellent principals leading our schools and skilled teachers who inspire students.").

[12] Duncan & Abercrombie, *supra* note 9.

improved in its public school education.[13] Specifically, "Hawaii was one of the top five fastest improving states in the country, with an eight-point increase in math for fourth-and eighth-grade, a four-point increase in reading in fourth-grade, and a five-point increase in reading in eighth-grade."[14] These results show that the DOE is fulfilling its goals by providing better education for students in the public school system. However, even with all of the DOE's progress, there remains, in Bayer's words, "the perception that, a lot of the really bright kids have left [public schools] . . . [T]here's this notion that there's a brain drain, and who is left would be like the lowest levels of kids. That isn't true, but it certainly has had a negative impact, I think."[15]

The private and public school distinction matters enough that the topic even makes its way into Hawai'i's political arena. Prior to the 2014 General Election, Hawai'i's top political candidates were interviewed by *Civil Beat* to discuss the significance and persistence of knowing about one's high school Alma Mater.[16] While candidates' stances differed on virtually every topic during political debates, one thing seemed to ring true for everyone: where someone went to high school was a telling fact about that individual.[17] When asked why, years later, candidates still market their high school identities "with such persistence on the campaign trail," former Honolulu Mayor Mufi Hannemann responded that "[i]t is a matter of being able to identify where you are from. And, most importantly, that you'll never forget your roots."[18] Current Governor, David Ige, distinguished the emphasis of one's high school with where one went to college by explaining, "the high school you graduated from is kind of a marker of where you're from and probably what kind of background or experience you had."[19] Based on this simple question and answer, people in Hawai'i begin to make assumptions about whether someone grew up in the middle class or in an elite environment and can serve up clues about the ethnicity and race of an individual.[20] These are the kinds of assumptions, stereotypes and biases the research outlined below sought to reveal in empirical evidence.

The assumptions people in Hawai'i tend to make based on the bundle of information attached to another's high school reflect a part Hawai'i's socio-

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[13] *Id.*

[14] *Id.*

[15] BAYER, *supra* note 7, at 126.

[16] Pape, *supra* note 1.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

cultural history and current social landscape. Whether or not people are explicitly aware of the connections and assumptions they make, current research in the field of implicit biases reveals that the human mind can automatically and unintentionally react to different groups in divergent ways.[21] The presence of these assumptions begs the following questions: First, in what other ways does the knowledge of where someone in Hawai'i went to high school change the way he or she is perceived? Secondly, in what way does one's self-identification with one's own high school change the way he or she perceives himself or herself? Lastly, in what ways do these perceptions affect our interactions, treatment, assessment, and preference for others here in Hawai'i?

The fact that Hawai'i's marketplace accepts that private school education is worth $20,000 a year is worth investigating. Comparisons between a private school and public school student are generally done through an examination of relative test scores and college placement;[22] this research takes a different approach. The focus of this investigation is to examine whether there is a perception—a stereotype—held in Hawai'i that favors individuals who attend private school over public school. This research is comprised of two studies: Study One is an implicit bias inquiry. It gauges a participant's projected feelings toward a private school versus a public school graduate.[23] Study Two is a Stereotype Threat inquiry. It gauges the effects of a participant's internal identification with his or her private or public school background.[24]

## II. STUDY 1: IMPLICIT BIAS INQUIRY

### *A. Introduction*

Study One primarily tested if participants held an implicit bias associating private schools more positively than public schools. The secondary objective of Study One measured how any implicit bias might affect the explicit decision-making in the holder of the bias. Study One was conducted through a survey comprised of three distinct evaluative components alongside a demographic questionnaire.

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[21] Justin D. Levinson, Danielle M. Young, & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 10 (Justin D. Levinson & Robert J. Smith eds., 2012).

[22] *See, e.g.*, Paul E. Peterson & Elena Llaudet, *The NCES Private-Public School Study*, 7(1) EDUCATION NEXT 75-79 (2007).

[23] *See infra* Part II.

[24] *See infra* Part III.

At the outset, respondents completed an Explicit Evaluative Task ("EET") by evaluating a written prompt. Second, respondents completed an Implicit Association Test ("IAT"). Third, respondents filled out a Feeling Thermometer survey. Lastly, a demographic questionnaire was administered.

### *B. Method*

The survey used to conduct this research was built online and hosted using a web service called *SocialSci*, which provides an interface for the public to create and host studies and surveys of different varieties.[25] *SocialSci* also provides users with an interface to compile and measure results of data collected.[26] Once the survey was fully constructed, tested, and debugged, researchers generated a unique URL address (web link) and took the survey live.

To distribute the survey, the web link was published within a news item on the *Honolulu Civil Beat* ("*Civil Beat*") website.[27] The news item encouraged readers to respond and share.[28] From there, the survey was freely transferred across the internet via the *Civil Beat* web share functions as well as by linking to the survey's *SocialSci* URL address.[29]

*Civil Beat* is a "news outlet dedicated to public affairs reporting about Hawaii" seeking "to foster community discussion by providing a place where citizens can debate important issues."[30] The civic-minded readership[31] of *Civil Beat* was a demographic that researchers anticipated would be interested in completing the surveys and perhaps assist in distribution by sharing the survey link with others who might participate. Additionally, *Civil Beat*'s ability to host and share the survey link helped bring added heft and legitimacy to the research, which was desirable since it helped maximize survey distribution and exposure. These potential benefits were weighed against the possible ill effects that using *Civil Beat* would have on survey sample diversity and external validity. Ultimately,

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[25] *See* SOCIALSCI, https://www.socialsci.com/.

[26] *See id.*

[27] *See Take This Interesting Survey and Help UH Researchers*, HONOLULU CIVIL BEAT (May 7, 2014), http://www.civilbeat.com/2014/05/take-this-interesting-survey-and-help-uh-researchers/.

[28] *Id.*

[29] *Id.*

[30] Honolulu Civil Beat, *About Us*, http://www.civilbeat.com/civil-beat/ (last visited Feb. 17, 2015).

[31] *See, e.g.*, Adrienne Lafrance, *Surviving the Storm: Checking in on Hawaii's World of Journalism*, HONOLULU CIVIL BEAT (Aug. 7, 2013), http://www.civilbeat.com/2013/08/19652-surviving-the-storm-checking-in-on-hawaiis-world-of-journalism/.

*Civil Beat* was used with the knowledge that the sample size could be expanded if need be.

When participants followed the singular link to the survey, they were variably directed to one of five possible page sequences. For each unique visitor, there was a twenty percent chance that the participant would be directed to Study Two (Stereotype Threat Inquiry) in which case they would completely bypass the Implicit Bias Inquiry. The remaining four variable page sequences accounted for the controls of Study One. Using four different possible page sequences was crucial in order to test the different variables in the Explicit Evaluative Task as well as account for the threat of order-effects skewing the IAT data.

### *C. Explicit Evaluative Task*

In the Explicit Evaluative Task (the "EET"), participants were asked to evaluate a written prompt describing patient-care at a doctor's visit. The written prompt was administered with an alternating variable so that two different groups responded. The alternating variable was the high school alma mater of the doctor—that is, whether the doctor graduated from a private school or public school.

Participants were asked to respond, on a scale of one to ten, to the following: (1) how *careful* they deemed the doctor to have been; (2) how *comfortable* they would be in choosing the doctor for their own child's care; (3) how *professional* they deemed the doctor to have been; and (4) how *competent* they found the doctor to have been.

After consenting to take the survey, the first page presented to participants asked them to read and respond to the fact pattern reprinted below. The only variable change was between the words "public" and "private," which established the doctor as either a graduate of a private or public school.

*Figure 1.0: Implicit Inquiry Page 1—Explicit Evaluative Task*

**Please read this short fact pattern and answer the following questions.**
Before the birth of their first child, a couple meets with Dr. A, a pediatrician, to interview as a candidate for their new child's care.

Dr. A explains that he was born and raised in Hawaii, graduated from a [private/public] high school in Honolulu and then got his undergraduate and medical degrees from the University of San Diego. He notes that he's been in pediatric practice for three years.

The couple is impressed with Dr. A and his approach to care. After meeting with some other potential candidates, the couple decides to choose Dr. A.

A few months after the baby is born, the couple visits Dr. A in need of immediate attention due to the child's fever.

Dr. A has his staff admit the family to an examination room but is not able to join them for 20 minutes. When he arrives, Dr. A asks the parents to explain what has been going on and asks a few follow up questions while taking notes.

Dr. A then examines the baby, checks vital signs and takes a temperature reading. Dr. A tells the parents that while he can't be positive the fever appears to be a symptom of a harmless cold. Dr. A directs the parents to use over-the-counter treatments and be on the lookout for any developing symptoms that would indicate a return visit is necessary. Dr. A says a quick goodbye and leaves for his next patient.

**On a scale of 1-10 (with 10 being the highest), how careful was Dr. A in his diagnosis? (0 means not at all careful, 10 means as careful as possible)**

**On a scale of 1-10 (with 10 being the highest), how comfortable would you be with choosing this doctor for your own child's care?**

**On a scale of 1-10 (with 10 being the highest), how professional was the doctor in his care for the child?**

**On a scale of 1-10 (with 10 being the highest), how competent do you find Dr. A?**

The description of the doctor's visit was drafted to be banal and ambiguous to allow for implicit biases to "fill in the gaps" and drive

measureable differences in the evaluations. The four different evaluative categories were chosen to address the nuanced ways that individuals evaluate one another. Researchers operated under the assumption that these types of evaluations form the basis for people's larger decisions.

Researchers anticipated that measureable differences in the explicit numerical rating assigned to the variable doctors might express connections along demographic lines and correlate with both aggregate and individual IAT scores. Scores for the EET were anticipated to be measured individually against a respondent's own IAT score and Feeling Thermometer rating by combining the four categories into an indexed score[32] out of the possible forty total points and coming up with a percentage.

### *D. Feeling Thermometer*

In 1964, the National Election Study introduced the "Feeling Thermometer" measure as a way to gauge a respondent's affect towards prominent political groups and figures.[33] Today, the Feeling Thermometer is "a common survey tool used by researchers to determine and compare respondents' feelings about a given person, group, or issue."[34] Thermometers have been used to measure a wide variety of concepts, including group affect, racism, sexism, as well as various aspects of gender and racial identification and consciousness.[35] In this study, participants were asked to report their feelings of "warmness" in response to private, public, and non-Hawai'i high school ("non-Hawai'i school") stimuli. The *explicit* data collected by taking Feeling Thermometer temperatures can often help shed light on the *implicit* information collected in studies like the IAT.

Respondents were given the Feeling Thermometer survey, reprinted below, after completion of both the EET and the IAT.

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[32] An index is "[a] type of composite measure that summarizes and rank-orders several specific observations and represents some more-general dimension." EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 159 (13th ed. 2012).

[33] Shannon C. Nelson, *Feeling Thermometer*, *in* 2 ENCYCLOPEDIA OF SURVEY RESEARCH METHODS 276 (Paul J. Lavrakas ed., 2008.).

[34] *Id.*

[35] *Id.*

*Fig. 1.1: Implicit Inquiry Page 3—Feeling Thermometer*

**Feeling Thermometer**

Use the 'feeling thermometer' to indicate whether you have positive or negative feelings toward the following groups.

You may mark any degree between 0 and 100.

Fifty (50) degrees represents neutral feelings. Markings above fifty (50) degrees indicate positive or warm feelings, and markings below fifty (50) degrees indicate cold or negative feelings.

**1. On a scale of 0-100, how warmly do you feel towards graduates of a public Hawaii high school?**

**2. On a scale of 0-100, how warmly do you feel towards graduates of a private Hawaii high school?**

**3. On a scale of 0-100, how warmly do you feel towards graduates from non-Hawaii high schools?**

Feeling Thermometer readings can be measured on an individual basis against an EET score as well as against an IAT score. The readings may also be measured in aggregate according to demographic reporting, and in aggregate against other combined measures.

*E. Demographic Questionnaire*

The goal of this study was to target the implicit biases present in Hawai'i so it was of great importance that respondents be verified as Hawai'i residents. To do so, participants were asked the demographic questions reprinted below. Respondents could select answers from dropdown menus for questions one through three and were given blank entry response boxes for questions four and five.

*Figure 1.2: Implicit Inquiry Page 4—Demographics*

**Demographic Information:**

**1. What is your age?**

**2. How many years (in total) have you lived in Hawaii?**

**3. Did you graduate from a Public or Private Hawaii High School?**

**4. (Optional) What Hawaii High School did you graduate from?**

**5. (Optional) Is there any other information you think would be important for researchers to know about your results (i.e. computer problems or accidental responses) or would otherwise like to share with researchers?**

Question one provided multiple age options at five to ten year intervals. Researchers anticipated that age data might help to uncover any generational differences in bias as well as provide information as to the diversity of the sample size.

Question two provided increasingly long time periods of residency including a zero (0) option indicating the respondent has never resided in Hawai‘i. Researchers planned to use years of residency as a way not only to qualify individuals as Hawai‘i residents, but also to determine if length of residency in Hawai‘i had any noticeable effects on recorded biases.

Question three offered three possible answer options: (1) "Public Hawaii High School;" (2) "Private Hawaii High School;" and, (3) "Neither, Graduated from Non-Hawaii High School." This question, asking for respondents' alma mater, was of critical importance. It served to establish a representative sample size and allowed researchers to examine the extent that biases existed, not only across the whole sample, but also within the groups being stereotyped.

### *F. Implicit Association Test*

The Implicit Association Test ("IAT") is the most frequently discussed measure of implicit social cognition.[36] The IAT pairs an attitude object (e.g., "Black" or "White") with an evaluative dimension (e.g., positive or negative attribute), and asks participants to group them together. It tests the

[36] Levinson et al., *supra* note 21, at 16.

accuracy and speed of a respondent's grouping in order to determine if any implicit biases, automatic attitudes or stereotypes may be indicated.[37] In this study, participants were asked to evaluate the names of certain Honolulu private schools and public schools against synonymous words implying competence or incompetence.

### *1. Pre-testing and researching attributes*

The list of target attributes used in the IAT were chosen by combining the results of prior narrow pre-testing with additional targets, which were drawn from an expanse of IAT scholarship, and were designed to augment and broaden the scope of the pre-tested targets. During the specific pre-testing phase, researchers polled fifteen individuals from the Fall 2013 William S. Richardson School of Law ("WSRSL") *Implicit Bias and the Law* class. Respondents received a list of 52 potential attributes chosen by researchers and rated 25 of the words for their positive association and 27 of the words for their negative association.[38] Respondents were asked to rate the words on a scale of zero (0) to five (5); with a score of zero (0) indicating that respondent did not think the word described a positive/negative attorney attribute at all; three (3) meaning the respondent felt the word was neutral; and five (5) signifying that the respondent felt the word was extremely representative of its positive or negative category. Respondents were allowed the choices of two and four to indicate a word seemed somewhere in between poles.

After compiling the results of the pre-test, sixteen words were chosen from the initial list of fifty-two as those that would be most effective in the IAT. After compiling all the data from the pre-test phase, Researchers identified the words with the highest mean score in its category. For the sake of clarity, words that were merely a negative association by function of a prefix like "un-" or "in-" were retained in the negative category, but their positive counterpart was dropped if it was also in the top eight. For example, "incompetent" was retained, but "competent" was removed from the final attribute list. The functional loss of eliminating a higher scoring positive attribute was offset by the fact that many more of the positive attribute words scored with a mean of greater than 4.0 and would ultimately create less recognition confusion in the IAT context.

Beyond the pre-tested list, additional attributes were collected from other social science research[39] and blended with the pre-tested attributes to

[37] *Id.*

[38] *See* Appendix A: List of Attribute Words Submitted for Pre-testing.

[39] *See, e.g.*, Hiroshi Miyawaki Sasaki, *An Intervention for Stereotype Automaticity in Therapist-trainees: A Pilot Study in Implicit Multicultural Social Cognition* (May 2008),

broaden the scope of the stereotype suggested and also to maintain continuity. Researchers made the decision to broaden the range of competence-based language to those that implicated stereotypically "good" and "bad" personal attributes. Some competence language was retained for the purposes of its association with education.

The eight positive attributes included in the administered IAT were the words: Ambitious, Determined, Intelligent, Successful, Focused, Trustworthy, Logical, and Precise. The eight negative attributes were the words: Unprofessional, Incompetent, Lazy, Unethical, Ineffective, Unemployed, Unreliable, and Sloppy.

*2. Constructing the target*

The IAT was set up using twelve Oahu high school names as the target prompts to be categorized against the positive/negative attribute words. The decision to use high school names as opposed to other targets, such as high school mascots, came as a result of discussions concerning how to effectively activate a public school-private school schema in a local respondent's mind. It was agreed that using other targets, such as logos, photos of campuses, sports scenes, famous graduates or other types of indicators, while valuable in their 'implicit' activation, most likely netted a decrease in the validity of the measures.

The target school names selected for the six public schools were: Pearl City High School, Kaiser High School, Moanalua High School, Kalani High School, Kalaheo High School, and Mililani High School. The six private school names selected were: Punahou School, 'Iolani School, Maryknoll School, Kamehameha School, Saint Louis School, and Mid-Pacific Institute.

The high school names selected for the IAT were chosen at the discretion of the researchers after careful planning. In the case of the private schools, selections were made favoring better-known private schools and after a determination to use only Oahu schools.

In selecting public schools, the selection was guided by an attempt to create a representative sample of larger and more populated public schools. Beyond additional pre-testing, the researchers agreed that the target demographic would likely be familiar with the selected school names.

Upon completion of the EET, respondents were transported to Page 2: The IAT.

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*available at* http://digitallibrary.usc.edu/cdm/ref/collection/p15799coll127/id/69489; *see also* PROJECT IMPLICIT, www.projectimplicit.net (last visited Feb. 19, 2015) (Project Implicit is an "international collaborative network of researchers investigating implicit social cognition—thoughts and feelings outside of conscious awareness and control").

*3. The IAT stages*

The IAT consisted of seven stages, each stage designated as a page viewed separately. The first stage familiarized the respondent with the program as well as with the public and private schools sorting. In order to familiarize the respondent with the names, one name would be shown at a time in the middle of the screen and the respondents were instructed to press either the "E" key (left side) for one group and the "I" key (right side) for the other group. Respondents were shown twenty different names in a randomized order.

The IAT was designed so that half of respondents began by grouping private school names with positive attributes while the other half began by grouping public school names with positive attributes. This was done in order to account for the impact of order effects resulting from respondents growing accustomed to the initial sorting direction.

The second stage of the IAT familiarized respondents with the positive and negative attributes used. There were a total of sixteen attributes (eight positive and eight negative).[40] Similar to the first page, respondents pressed "E" if a word in the middle of the screen was the positive attribute, or respondents pressed "I" for negative attributes. Respondents were shown twenty different attribute words in a randomized order.

The third stage of the IAT was the first compatible test. Both private/public school names and positive/negative attributes were flashed and respondents had to sort both to the assigned direction. Respondents were shown either a school name or attribute twenty times in a randomized order.

The fourth stage was the second compatible test. The only difference from the prior page (stage three) was that respondents were shown either a school name or attribute word *forty* times in a randomized order instead of twenty times.

The fifth stage was the target incompatible practice page. Similar to the first two pages, this page helped familiarize respondents with sorting the private school and public school names again. However, on this page, the private school and public school sorting directions (sort left (E) or sort right (I)) were reversed. Respondents practiced with twenty school names.

The sixth stage was the target compatible practice page. Similar to page three, respondents sorted both private/public schools and positive/negative attributes again. The difference on this page was that the school sorting directions remained in the reversed order from stage five. Positive

[40] For a list of all the attributes used, see Appendix.

attributes remained on the left side and negative attributes on the right side. Twenty items were sorted in this stage.

The seventh stage was the incompatible test two. Everything remained the same on this page from the previous page. Respondents were shown either a high school name or an attribute *forty* times. The school sort direction and attribute side remained the same from the previous stage.

### *4. Measures & ratings*

Results of the IAT were calculated after measuring the delays (known as latency) between the introduction of the stimuli (target or attribute) and respondent's sorting of the stimuli into the instructed category. Once recorded, these latencies were processed through an algorithm to reach a final adjusted score known as *d*.[41] The general idea was that "[w]hen highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty."[42]

Latency times are measured in milliseconds ("ms"). One component of the algorithm accounts for trials where respondents might be simply pressing the keyboard without reference to the targets by flagging for removal responses when more than ten percent of trials have a latency of less than 300ms. Additionally, any trial latency of greater than 10,000ms is replaced by a number arrived at by calculating the unique respondents' own mean latency and standard deviation; this creates a usable number for purposes of the later calculations in the algorithm. Doing this also accounts for the possibility of discrete distractions and other interferences that may otherwise have ruined a legitimate data sample.

Following this "cleanup," the latencies are then put through the rest of the Greenwald et al. recommended procedure:[43]

1. Compute the "inclusive" standard deviation for all trials in Stages Three

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[41] *See* Anthony G. Greenwald, Brian A. Nosek & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85(2) J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

[42] Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81(5) J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001).

[43] Greenwald et al., *supra* note 41, at 214 tbl. 4.

and Six likewise for all trials in Stages Four and Seven: sd1a, sd1b, sd2a, sd2b

2. Compute the mean latency for responses for each of Stages Three, Four, Six, and Seven: m1a, m2a, m1b, m2b

3. Compute the two mean differences:
$(\text{Mean}_{\text{Stage } 6} - \text{Mean}_{\text{Stage } 3})$ and
$(\text{Mean}_{\text{Stage } 7} - \text{Mean}_{\text{Stage } 4})$

4. Divide each difference score by its associated "inclusive" standard deviation
da = (m2a - m1a) / sda
db = (m2b - m1b) / sdb

5. D = the equal-weight average of the two resulting ratios:
D = (da + db) / 2

The *d* score that results from the process above is grounded in a possible range from -2 to +2; this score is known as the IAT effect. Break points for 'slight' (.15), 'moderate' (.35) and 'strong' (.65) are generally accepted and were selected conservatively according to psychological conventions for effect size.[44] The *d* score is the most important measure and the final indicator of the strength of any implicit association differences distinguishing public and private Hawai'i high schools.

Also of note regarding the measurement of latency are some of the additional procedures that *SocialSci* has in place to maintain accuracy. *SocialSci* helps to minimize error by preloading all tasks so that response times are not affected by respondents' internet connection. *SocialSci* states:

> Before each task, we preload all IAT stimuli (including images, if appropriate). Once the stimuli are loaded and the task begins, we start timing participants. After participants respond to the last stimulus in the current task, we stop the timer. Then, the IAT page preloads the stimuli needed for the next task. Again, the timer only starts once the stimuli are prefetched and ready to display. This process is repeated for all tasks.[45]

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[44] *Id.*

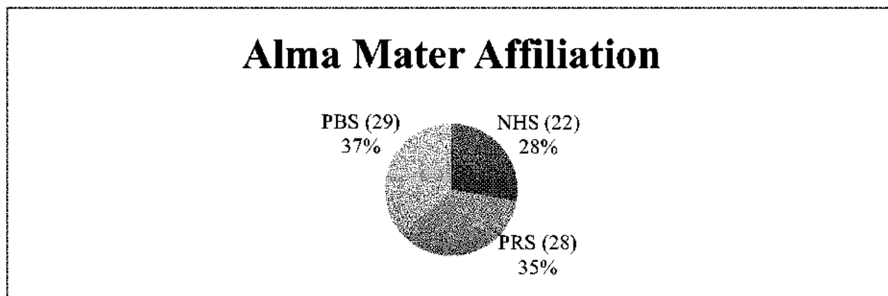
[45] SocialSci, *Measuring Response Times*, https://research.socialsci.com/docs/contents/188-response_times (last visited Feb. 11, 2015).

### *G. Results*

#### *1. Demographics*

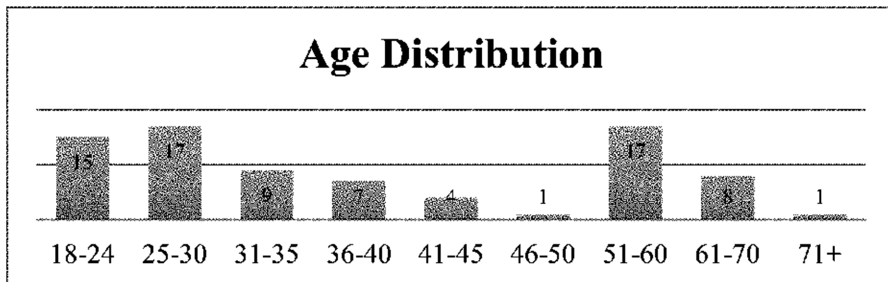
##### *a. Alma Mater*

Seventy-nine respondents completed the survey. Of those, twenty-two (27.8%) reported as non-Hawai'i school, twenty-eight (35.4%) as private school, and twenty-nine (36.7%) as public school.




##### *b. Age*

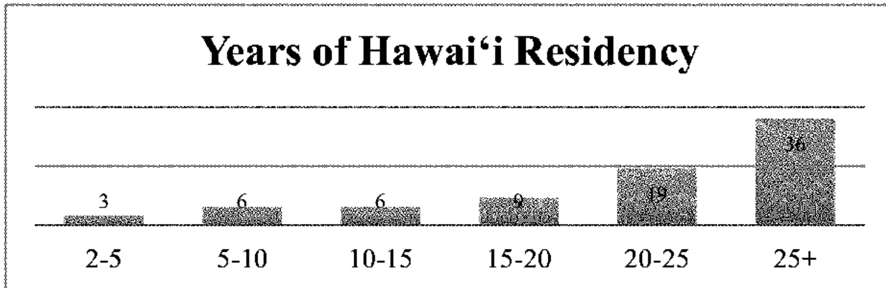
The three most commonly reported age groups were 18-22 years old (22%), 51-60 years old (22%) and 18-24 (19%). With the exception of minimal results from those between 40-50 years old, the age distribution was not glaringly imbalanced. At least five respondents were heard from in six out of the nine categories.




##### *c. Hawai'i residency*

The vast majority of respondents (45%) reported living in Hawai'i for greater than twenty-five years in total. This would account for people who are older than twenty-five years and have lived in Hawai'i all their life, or possibly lived for a time elsewhere and returned. Respondents who lived in Hawai'i for ten years or more accounted for 88% of the total sample. These

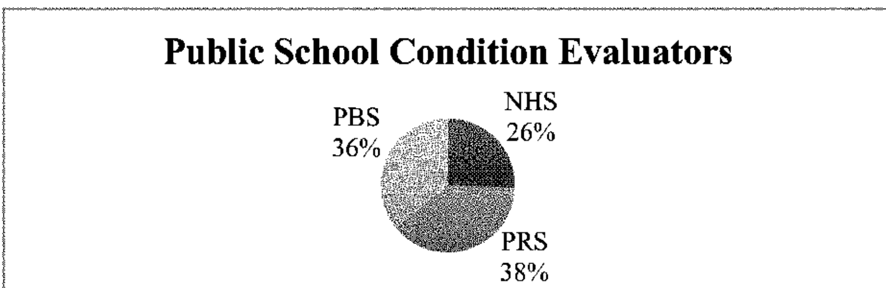
measurements indicate that respondents are for the most part coming from the target demographic and do not suggest much of a threat to validity on their face.




*2. Explicit Evaluation Task*

Out of the seventy-nine total respondents completing the survey, thirty-nine (49.4%) respondents completed the EET with a public school doctor as the subject variable; forty (51.6%) respondents completed the evaluation in response to the private school variable.

Out of the thirty-nine participants who responded to the public school variable, ten (25.6%) were non-Hawai'i school graduates; fifteen (38.5%) were private school graduates and fourteen (35.9%) were public school graduates. Out of the forty who responded to the private school variable, twelve (30%) were non-Hawai'i school graduates, thirteen (32.5%) were private school graduates, and fifteen (37.5%) were public school graduates.



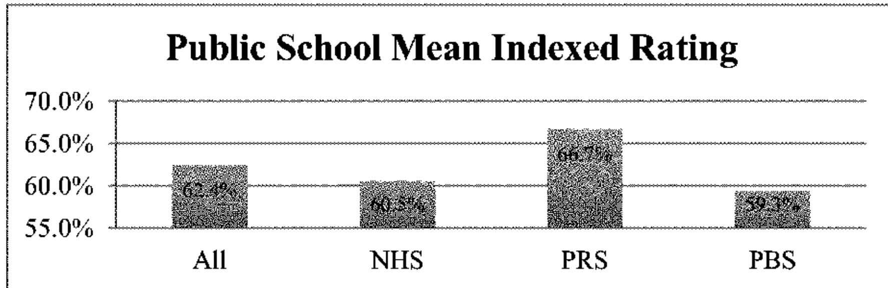

*a. Public school doctor condition*

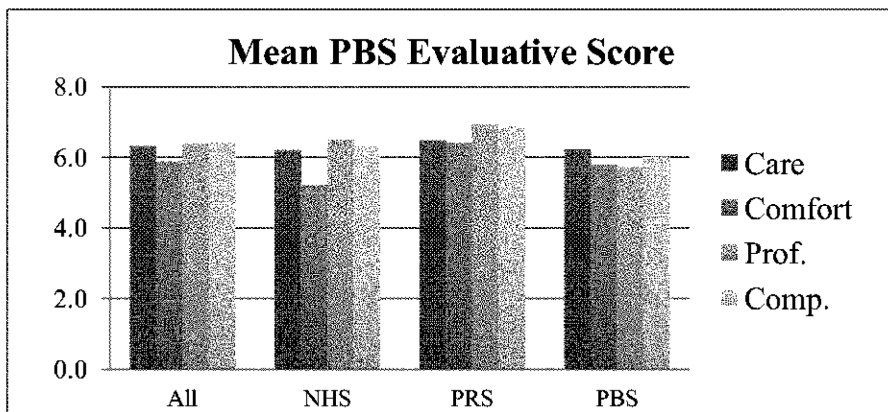
Respondents to the public school doctor returned mean[46] scores for Carefulness ("Care") at 6.31, Comfort with choosing the doctor for your own care ("Comfort") at 5.87, Professionalism at 6.38, and Competence at

[46] Mean average of category scores.

6.41. These totals equate to an indexed score of 24.97 out of a possible 40 total points generating a mean indexed rating of 62%.[47]

Non-Hawai'i school respondents turned in a mean index rating of 60.5%; private school respondents graded the doctor at 66.7%; and public school respondents graded the doctor at 59.3%.[48] Private school respondents scored the public school doctor the highest while public school respondents scored the public school doctor lowest.



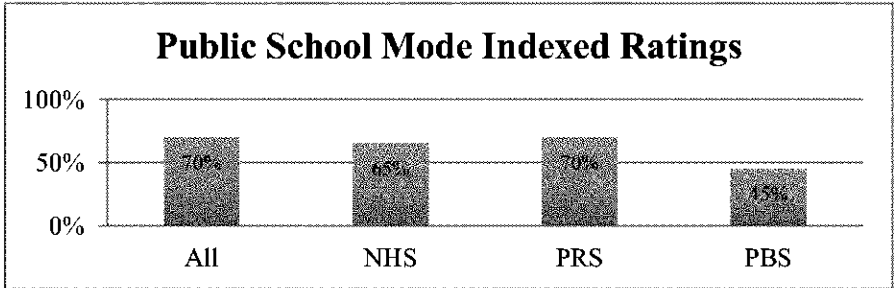

In the public school doctor scenario the mode for each category across all alma maters was seven, also equating to a mode indexed score of twenty-eight out of the possible forty total points; a mode indexed rating of 70% (8% higher than the overall mean index rating).

Non-Hawai'i school respondents returned mode scores as follows: Care, 7; Comfort, 5; Professionalism, 7; and Competence, 7. This indexed to 26 total points out of the possible 40, an index rating of 65%. Private school respondents turned in mode scores of 7 for each category; this indexed to 28 total points and a score of 70%. Public school respondents turned in an

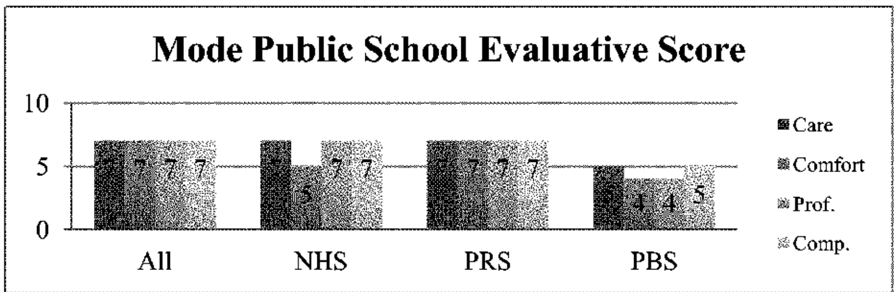
[47] Running a trimmed mean analysis boosted this score by two percentage points to 64%.

[48] On the IAT these exact sub-groups scored respectively: *d* (-0.37); *d* (-0.40); *d* (-0.29).

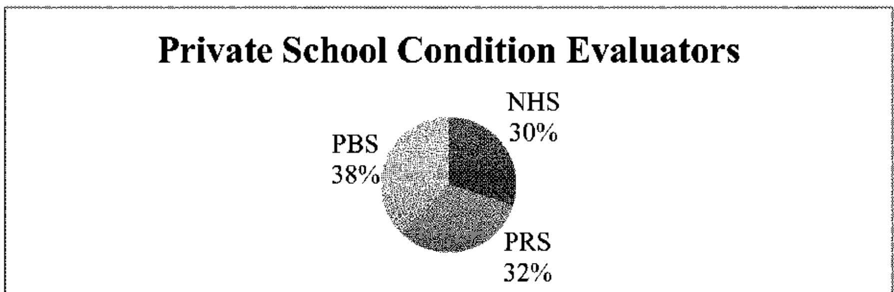
indexed mode score as follows: Care, 5; Comfort, 4; Professionalism, 4; and Competence, 5. This indexed to only 18 total points out of the possible 40; an index rating of 45%.[49]




The mode index rating returned by public school respondents was the lowest public school evaluative score (45%) and was also the lowest rating of any doctor by any group.




*b. Private school doctor condition*




In the private school doctor scenario, the mean score for Care was 5.78; Comfort, 5.78; Professionalism, 5.80; and Competence, 5.90. These figures equated to an indexed score of 23.25 out of the possible 40 total points, or

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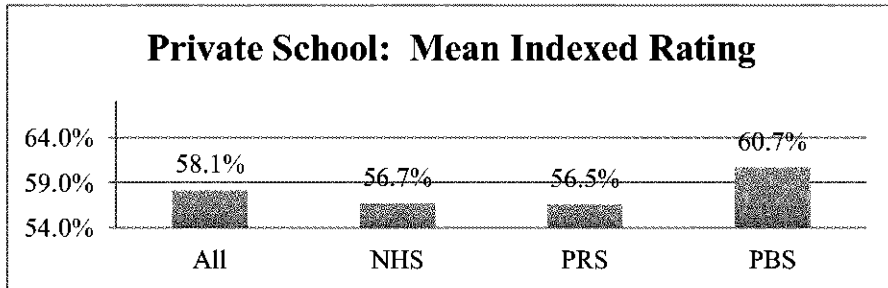
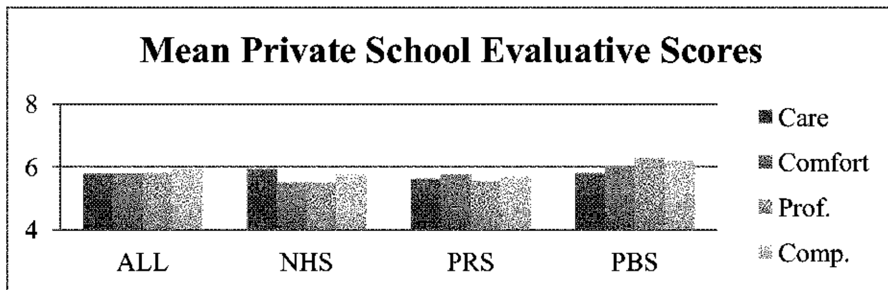
[49] On the IAT these groups scored respectively: *d* (-0.230); *d* (-0.584); *d* (-0.001).).

mean indexed rating of 58.1%.[50] Non-Hawai'i school respondents turned in a mean indexed rating of 56.7%; private school respondents graded the doctor at 56.5%; and public school respondents graded the doctor at 60.7%.




In the private school doctor scenario the mode score was as follows: Care, 7; Comfort, 5; Professionalism, 8; and Competence, 8. This equated to a mode indexed score of 28 out of the possible 40 total points, or indexed rating of 70%.

Non-Hawai'i school respondents returned the following mode scores: Care, 4; Comfort, 5; Professionalism, 8; and Competence, 8. This indexed to 25 total points out of the possible 40; a rating of 62.5%. Private school respondents returned mode scores of the following: Care,7; Comfort, 8; Professionalism, 7; and Competence, 7. This indexed to 29 total points out of the possible 40; a rating of 72.5%. Public school respondents returned the following mode scores: Carefulness, 7; Comfort, 5; Professionalism, 8; and Competence, 8. This indexed to 29 total points out of the possible 40; a rating of 70.0%.[51]

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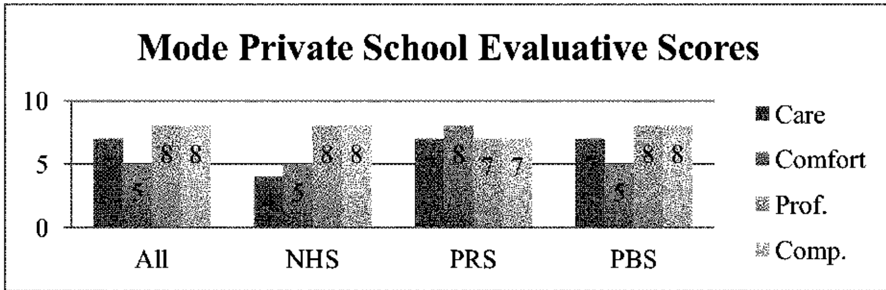
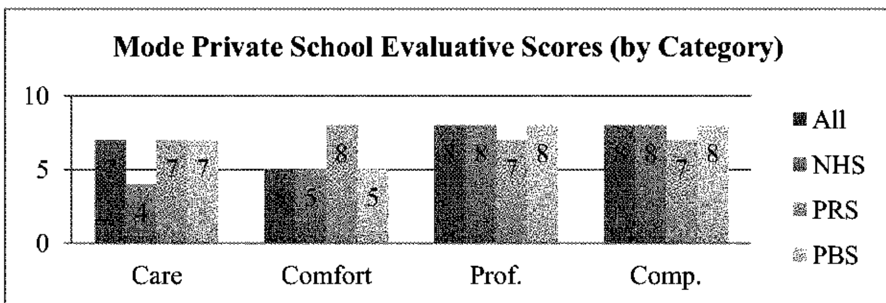
[50] Running a trimmed mean analysis also boosted this score by two percentage points to 60.2%. A trimmed mean analysis is "[a] method of averaging that removes a small percentage of the largest and smallest values before calculating the mean. After removing the specified observations, the trimmed mean is found using an arithmetic averaging formula." INVESTOPEDIA, http://www.investopedia.com/terms/+/trimmed_mean.asp (last visited Jan. 30, 2015).

[51] On the IAT these groups scored respectively: *d* (-0.230); *d* (-0.584); *d* (-0.001).).

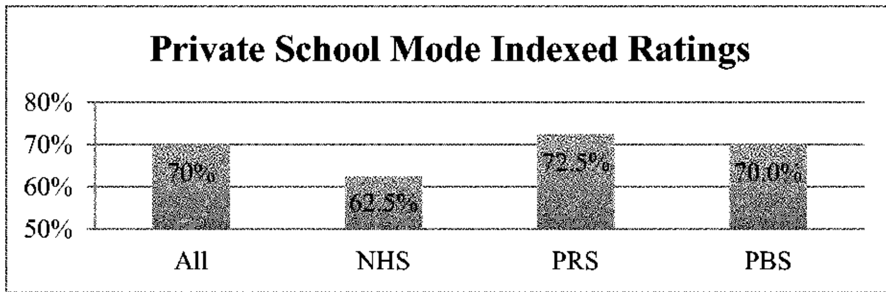



There was a 3-point increase in the Comfort mode from private school respondents compared to the other groups; this appears to be a significant distinction from the other results and suggests future research into the importance of Comfort when it comes to relations between the groups. Private school respondents Comfort mode was 8 while the three other measures were 5. While the public school mode Comfort score was very low in contrast to the rest of the public school scores. It appears that Comfort of the private school with private school is significantly more than the Comfort of public school with private school when other category scores are similar.

Also of note was that non-Hawai'i school respondents gave the private school doctor lower Careful scores by a full 3-point difference from the other three measures.




From the results measured by mode (i.e., what *most* people do), it appears that private school respondents evaluate other private schools more highly than outside groups like public school and non-Hawai'i school respondents rank private schools. However, when taking an *average* sample (i.e., the *cumulative* effect) the public school respondents ranked private school highest. This is striking when considering that public school respondents by average *and* mode rated the public school doctor to be the lowest of all scorers.




The private school respondents had the biggest differential in mean indexed rating across the conditions. Surprisingly, the private school evaluation was higher in *favor* of the public school doctor ranking. Meanwhile, on average, the other three groups did not change a great deal between the conditions, though the mode score for public school respondents showed a dramatic increase in favor of a private school doctor, having evaluated the public school doctor lower than all other respondent groups.

### *3. IAT Mean* d *Scores*

A *d* score is the result of the final computation of respondents' latencies indicating a preferential value of the IAT effect; in other words it is a measure of a particular respondents' preferential associations. The *d* score is set on a range of -2 to 2, with conservative preferential index points set at: (.15) indicating 'slight' preference; (.35) indicating 'moderate' preference; and (.65) indicating a 'strong' preference for the target object.[52] Due to the mechanics of this experiment and the order in which the stimuli were administered, for the purposes of this study positive (+) *d* scores were indicative of a preference for public school and negative (-) *d* scores were indicative of a preference for private schools.

| | |
|---|---|
| **(+.65) - (+2.0)** | Strong Preference for Public High School |
| **(+.35) - (+.65)** | Moderate Preference for Public High School |
| **(+.15) - (+.35)** | Slight Preference for Public High School |
| **(-.15) - (0.0) - (+.15)** | Little or No Preference |
| **(-0.15) - (-.35)** | Slight Preference for Private High School |
| **(-.35) - (-.65)** | Moderate Preference for Private High School |
| **(-.65) - (-2.0)** | Strong Preference for Private High School |

[52] *See Race Attitude*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo/background/raceinfo.html (last visited Feb. 22, 2015).

*a. Overall mean d score*

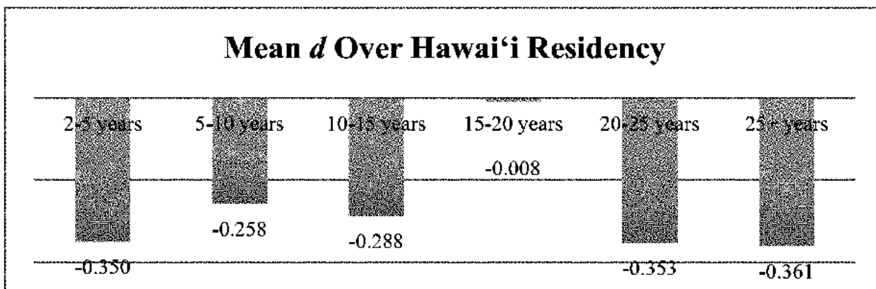
The overall mean *d* score was taken through an analysis of each individual respondents' *d* score as produced by the *Greenwald* algorithm. Upon averaging the total individual *d* scores together the overall *d* came out to (-0.305). This score falls in at the high end of the slight-to-moderate private school preferential range of *d*.

*b. Residency mean d scores*

To test the effects that exposure to Hawai'i's people, culture, and discourse might have on the prevalence of what appears to be an implicit positive association with Hawai'i private schools; figures were run to determine the mean *d* of respondents based upon their years of residency in Hawai'i.

The respondents in the range of two to five year residency displayed a mean *d* average of (-0.350). Respondents who had been in the islands for five to ten years held slightly less of a private school positive bias and combined for a mean *d* of (-0.258). That downward trend maintained for respondents in Hawai'i for ten to fifteen years who averaged a mean *d* of (-0.288). Respondents who reported living in Hawai'i for fifteen to twenty years stood out as having no preference, recording a mean *d* of (-0.008). Respondent Hawai'i residents of twenty to twenty-five years held a strong private school favoritism with a *d* of (-0.353) and residents of twenty-five years or more scored *d* (-0.361).

The general trend line indicates that new residents may buy into the bias initially but tend to lose it over time, but there clearly is an increase in preference towards private school over time the longer someone lives in Hawai'i.




*c. Alma Mater mean d scores*

Of significant interest was the effect a respondent's alma mater has on their preference towards Hawai'i public or private schools. One would

assume a certain level of in-group bias[53] and most likely guess this bias to be roughly equivalent between the two groups. How powerful are effects of the social discourse and landscape?

To investigate how these effects and attitudes might manifest themselves, mean *d* scores were taken group by group after dividing the data into the three high school categories. Of the total seventy-nine respondents: 22 (27.8%) identified as Non-Hawai'i School; 28 (35.4%) reported as private school; and 29 (36.7%) identified as public school.

*1. Non-Hawai'i school respondents*

Of the twenty-two non-Hawai'i school respondents, ten took the IAT with public/positive association first; this group averaged *d* (-0.223). Twelve took the IAT with a private/positive condition first; this group averaged *d* (-0.340). Across both samples the average score for Non-Hawai'i school respondents was *d* (-0.290). This score indicated a slight to moderate preference to associate private schools with the positive targets and/or otherwise to associate public schools with negative targets. The order effects appeared to account for a (0.118) difference in score.

*2. Private school respondents*

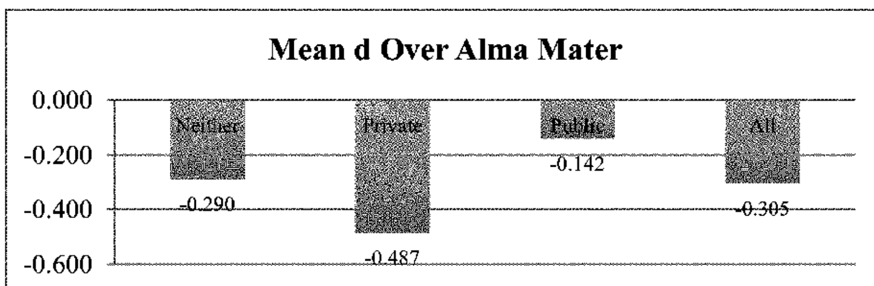
Of the twenty-eight private school respondents, fifteen took the IAT with public/positive association first; this group averaged *d* (-0.443). Thirteen took the IAT with a private/positive association to begin; this sample averaged *d* (-0.537). Across both samples the average score for private school was *d* (-0.487). This score indicated a strong preference to associate private schools with the positive targets and/or otherwise to associate public schools with negative targets. Order effects appeared to account for a (0.093) difference.

*3. Public school respondents*

Of the twenty-nine public school respondents, fifteen took the IAT with public/positive association first; this group averaged *d* (-0.205). Fourteen took the IAT with a private/positive association to begin; this sample averaged *d* (-0.074). Over both samples the average score for public school was *d* (-0.142). This score indicated little to no preference to associate

[53] The phenomenon defined as "our tendency to favor the groups we belong to." Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476 (2010).

private schools with the positive targets and/or otherwise to associate public schools with negative targets. Order effects appeared to account for a (0.131) difference.




## III. STUDY TWO: STEREOTYPE THREAT INQUIRY

### *A. Introduction*

*Stereotype Threat* is an experienced, self-evaluative threat, which means that "anything one does or any of one's features that conform to [a stereotype] make the stereotype more plausible as a self-characterization in the eyes of others, and perhaps even in one's own eyes."[54] In this phase of the study, respondents were asked to answer Scholastic Aptitude Test ("SAT") reading comprehension questions. Half of the participants were placed in the control group, while the other half were primed prior to taking what was presented as a "Hawai'i Verbal Ability Study." In order to prime[55] participants, prior to completing the questions respondents were asked to provide information such as name, age, gender, and whether they attended a private school or public school. The hypothesis for this study was that once a participant was forced to consciously associate with either private school or public school, he or she would be primed to think about their school's stereotype while completing the diagnostic, resulting in scores that would reflect the impact.

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[54] Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69(5) J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995).

[55] Priming refers to the "incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context." John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996).

### B. Method

#### 1. Participants

Twenty participants completed Study Two. Participants were randomly assigned either the primed condition or the control (unprimed) version of the study. The only difference between the primed condition and control version of the study was the placement of the request-for-demographic-information page. In the primed condition, each participant's demographics were requested prior to the SAT questions; in the control version, each participant's demographics were requested afterwards. In total, there were nine participants who completed the primed study and eleven who completed the unprimed study. Each participant was informed that this study would take approximately twelve minutes to complete.

#### 2. Materials

Eighteen questions from the reading comprehension section of a sample SAT were chosen for the Hawaii Verbal Ability study. Two different question styles were used—one to test a participant's correctness and effectiveness of expression, and another to test the participant's grammar usage. In total, there were nine multiple-choice questions for each style. Each question was individually uploaded as a JPG file and compiled into a survey using *SocialSci*.[56]

#### 3. Procedure

For the primed condition of the Hawai'i Verbal Ability study, participants were specifically informed that this study was being administered with the intent to test each individual's verbal ability. Additionally, participants were told this study was not meant to be overly difficult and both Hawai'i public and private school graduates would be participating in the test. Prior to the study being administered, participants were asked general demographic questions similar to questions asked in other standardized tests. For purposes of priming the participants, researchers specifically asked what type of school participants attended (private school, public school, non-Hawai'i school). The goals of this direct question were to trigger the participant's conscious recollection of his or her own background and corresponding group and trigger unconscious associations.

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[56] *See* SOCIALSCI *supra*, note 25.

Participants who completed the unprimed study were not asked to provide their demographic information until the conclusion of the Hawai'i Verbal Ability study. The same demographic questions were left until the end of the study so that these unprimed participants were not consciously comparing themselves to other participants from other groups (private school, public school, non-Hawai'i school).

#### *4. Design*

In total, there were ten pages to this study. There were three questions per page for the diagnostic portion of the study, and a two-minute time limit was implemented for each of these pages. Prior to beginning the two different sections of the study, a page with directions and an example were given to participants. The directions informed the participant what the following types of questions were going to test (grammar usage or correctness and effectiveness of expression). The first set of questions tested participant's grammar usage. After completing three pages, each containing three questions on grammar usage, participants were then taken to the instruction page for the correctness and effectiveness of expression questions. Following the instruction page, three pages with three questions each were shown to the participants.

The only pages that had a strict two-minute time limit were the six pages that had three questions each on them. On the timed pages, if a participant did not choose an answer for any of the questions within the two-minute time limit, the study took that incomplete answer as an incorrect answer.

### *C. Results and Discussion*

#### *1. Data preparation*

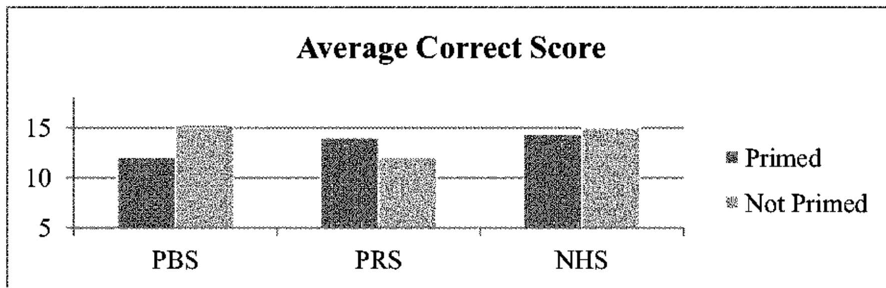
Each question consisted of four multiple-choice options. At the end of the study, each participant was given one point for each question answered correctly out of eighteen possible questions. A wrong answer or a question that had no answer chosen was given zero points. Out of the twenty total participants, the average score was 13.95 correct answers. A further breakdown of the participant results showed that the nine primed participants averaged a score of 13.22 correct answers, compared to the eleven unprimed participants' average score of 14.55 correct answers.

Seven participants identified themselves as a public school graduate. Of those seven participants, four (4) were primed. Primed public school participants averaged a score of 12.0 correct answers. The other three

public school participants completed the unprimed study; unprimed public school participants averaged a score of 15.33 correct answers.

Four participants identified themselves as a private school graduate. Of those four participants, two graduates were primed and averaged a score of 14.0 correct answers. The other two unprimed private school graduates averaged a score of 12.0 correct answers.

Nine participants associated themselves as Non-Hawai'i School graduates. Of the nine participants, three were primed and averaged a score of 14.33. The six unprimed Non-Hawai'i School graduates averaged a score of 15.0 correct answers.




### 2. *Summary*

Overall, participants who were not primed averaged higher scores than those who were primed. Analysis of the public school and private school participant scores individually shows that public school graduates scored better when they were unprimed, while private school graduates scored better when they were primed. While the low number of participants within this study is a legitimate threat to the study's validity, the results are still indicative of the presence of stereotype threat in Hawai'i. These results are similar to Steele and Aronson's stereotype threat studies conducted with black and white students at Stanford University,[57] and imply the existence of a stereotype in Hawai'i that public school graduates are not as educationally capable as their private school counterparts. Unlike Steele and Aronson's studies, however, researchers in this study were not able to gather prior standardized test results from private and public schools to definitively reveal whether private school graduates by and large score higher than public school graduates in the official administration of the SAT.

It appears from the limited results that the simple act of requiring a participant to identify themselves as a member of a group (private school,

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[57] Steele & Aronson, *supra* note 54.

public school, or non-Hawai'i school) was enough for a stereotype threat to be activated. Participants need not believe in the stereotype; they "need only know that it stands as a hypothesis about him[/her] in situations where the stereotype is relevant."[58] For the primed public school participants, a decrease in score could be a result of anxiety, self-doubt, or extra efforts to overcome a stereotype that they may not even believe.

When participants are not in a negatively impacted group, stereotypes can sometimes influence in positive ways.[59] Stereotype lift occurs when a group does better when it is primed with a positive stereotype about itself.[60] The higher accuracy in private school participants who were primed versus private school participants who were unprimed illustrates a possible stereotype lift. While public school participants may possibly experience anxiety or doubts about their performance, private school participants who are specifically told that they are being compared to public school participants may be more likely to score better with that added lift of confidence.

Using the non-Hawai'i school averages as a control group, the results show that the non-Hawai'i school primed group and the non-Hawai'i school unprimed group have the smallest difference in average correct answers (14.33 non-Hawai'i school primed vs. 15.00 non-Hawai'i school unprimed). Researchers used non-Hawai'i school results as a control group under the assumption that participants in this group, who did not attend either a private school or a public school, were unlikely to be affected by the stereotype that private school graduates are more able than public school graduates.

## IV. General Discussion

### *A. Threats to Validity*

The biggest threat to the validity of the research conducted is the sample size used in the two studies. Collectively, ninety-nine participants completed one of the two studies. The studies were sent out through one URL link, and participants were randomly transferred to one of the two

[58] *Id.* at 798.

[59] *See* Gregory M. Walton & Geoffrey L. Cohen, *Stereotype Lift*, 39 J. Experimental Soc. Psychol. 456, 465 (2003).

[60] *Id.* ("Stereotype lift is the performance boost caused by the awareness that an outgroup is negatively stereotyped. People may benefit from stereotype lift when the ability or worth of an outgroup is explicitly called into question. But they may also benefit even when there is no specific reference to a stereotyped outgroup, if the performance task is linked to a widely known negative stereotype.").

studies. Seventy-nine participants completed Study One, and twenty participants completed Study Two. The ninety-nine responses were spread thinly across all the studies due to the amount of variable sets. Consequently, the results may not be an accurate and true representation of the views of private school and public school individuals.

Minor typographical errors in the surveys are another threat to validity. A few participants noticed these errors. One error in particular was in Study Two, the Stereotype Threat study. The error was found in a question meant to test the participant's correct grammar usage by requiring the participant to indicate the correct grammatical scheme to the underlined words. However, in one particular question, one of the necessary words was not underlined, which caused two participants to leave a comment noting the error. An analysis of the results for this particular question illustrated no significant change in error rate, so the question's data was retained in the final results.

### *B. The Studies' Impact on Hawai'i*

The data from both studies suggests an individual's perception and comparison of people from private and public schools are skewed due to biases in favor of private school students over public school students. This bias affects both the way individuals think and feel about themselves and the way they think and feel about others.

On an individual level, stereotype threat impacts both private school and public school individuals, but in different ways. From the results, public school participants primed by being told that both public school and private school individuals would be taking the same verbal ability test scored lower test scores than public school participants who were not primed with the stereotype. The implications of this effect likely goes beyond an educational setting. Feelings of inferiority to another individual, merely based upon one's high school, is concerning because one's alma mater alone does not define an individual. While these researchers are not stating that the results of the studies represent the ideas and opinions of the State of Hawai'i as a whole, the results can and should be the starting point to encourage further research into the implicit biases of community members.

Lastly, a stereotype lift that theoretically helps private school students feel a boost over public school students was revealed in our results. The fact that unprimed public school participants had an average score of 15.33, versus primed private school participants' average score of 14.0, shows that there are not large disparities in the verbal ability of private school and public school individuals if, in the end, any at all. In fact, the results reveal

that public school participants are just as capable, if not more, than their private school counterparts when completing academically related tasks.

As noted earlier, the limited sample size for Study Two is a factor that affects the results of this study, but the results nonetheless provide a great place to start a conversation about these private school and public school stereotypes. Stereotype lift can be rectified, along with the self-doubt of the negatively impacted group, if awareness of the stereotype is stressed and debiasing[61] concepts are implemented at an early age.

## V. CONCLUSION

This study sought to uncover empirical evidence of implicit biases favoring private school graduates over public school graduates in Hawai'i. Based on the results of both studies, our hypothesis was proven correct—there is an overall preference for private school graduates over public school graduates.

In Study One, researchers found that there is a slight-to-moderate preference to associate positive traits with private school graduates. The IAT results show that private school graduates themselves were most affected by this bias, showing a strong preference for other private school graduates. In Study One, researchers also learned that—all things being equal—Hawai'i residents may value or rate a private school graduate as more competent, careful, or professional than a non-Hawai'i school or public school graduate. Interestingly, this preference was reversed in private school graduates but was pronounced enough in non-Hawai'i school and public school graduates that the average on the whole was found to be significant.

In Study Two, researchers found that all it takes is a brief thought about the stereotypes associated with public school versus private school for actual effects to take place on one's performance when completing a standardized test.

With greater awareness of these implicit biases and stereotypes, Hawai'i's communities can better combat the negative ramifications of treating one another unequally at an unconscious level. Hawai'i residents take great pride in representing where they were born and raised. Hawai'i's history and culture ensure that one does not easily forget where he or she came from, and where one went to high school can be a telling factor about that person. As simple as it may seem, telling someone where you went to

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[61] Debiasing refers to the process of using interventions to reduce or eliminate implicit biases. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345-46 (2007).

high school can affect and influence the way he or she interacts with you. In light of this, we should all reconsider what is really going on when someone asks, "*Eh! What school you went?*"

Appendix: *List of Attribute Words Submitted for Pre-testing.*

Please rank these positive/negative attributes on a scale of 1-5.
1 = not representative at all of a "good"/"bad" attorney
3 = neutral
5 = completely representative of a "good"/"bad" attorney

Positive Attorney Attributes:
Trustworthy
Determined
Creative
Ethical
Effective
Reliable
Competent
Connected
Intelligent
Insightful
Confident
Competitive
Experienced
Communicative
Clear
Expressive
Analytical
Interpersonal
Logical
Persistent
Civil
Empathetic
Precise
Professional
Focused

Negative Attorney Attributes:
Sloppy
Incompetent
Unorganized
Uninformed
Lazy
Unreliable
Untrustworthy
Unfocused
Inexpressive
Confusing
Hostile
Inexperienced
Inexpressive
Confusing
Hostile
Narrow-minded
Myopic
Arrogant
Unsympathetic
Indifferent
Apathetic
Overwhelmed
Imprecise
Unethical
Dishonorable
Unprofessional
Distracted
Ineffective
Lost
Out-of-their-league

# Exclusive Democracy: Contemporary Voter Discrimination and the Constitutionality of Prophylactic Congressional Legislation

Ronson P. Honeychurch*

*While the nation has made substantial progress in rooting out many overt attempts to exclude minority voters from the ballot box, the subtler problem of systemic, de facto exclusion of new minority voters remains prevalent and often goes unnoticed against the backdrop of history. Undoubtedly, the plight of minority voters has improved substantially from absolute denials of the right to vote and Jim Crow—the days of literacy tests, grandfather clauses, and poll taxes—but the implementation and proliferation of voter ID laws, complex and varied voter registration procedures, and the English-only ballot have had the practical effect of excluding new minority groups from American democracy. The Supreme Court's* Shelby County v. Holder *decision to strike down the coverage formula of the Voting Rights Act of 1965, which required certain states and political subdivisions to obtain Department of Justice approval for new voting laws that could harm minority voters, exacerbated the problem faced by minority voters—particularly language-minority groups.*

*This Article argues that despite disagreement about the propriety or the practical impact of the* Shelby *decision, both the coverage formula and the preclearance requirement of the Voting Rights Act remain essential elements in ensuring that all Americans, including language-minority groups, realize the promise of the Fourteenth and Fifteenth Amendments. To that end, this Article argues that Congress should enact the Voting Rights Amendment Act of 2014 because it is a powerful, fitting means to root out constantly evolving voting discrimination in general and de facto discrimination against language-minority groups in particular.*

*Although some might argue that a new coverage formula would be no more constitutional than the one struck down in* Shelby, *it is clear that Voting Rights Amendment Act of 2014 is substantially different from its predecessor and far more likely to survive the rational review standard applied in that decision. Many believe that* Shelby *rested on principles of federalism. While it may be true that* Shelby *implicated some federalism concerns, federalism*

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*actually only speaks to the issue of preclearance, an issue not addressed by that opinion. Accordingly, while the Voting Rights Amendment Act of 2014 may force the Supreme Court to address the constitutionality of preclearance, neither federalism nor equal sovereignty nor rational review are likely to compel an opinion that holds any significant provision of the Act unconstitutional.*

## I. INTRODUCTION

On May 2, 1935, Winston Churchill addressed the House of Commons by warning against complacency in Parliament. He observed:

> When the situation was manageable it was neglected, and now that it is [thoroughly] out of hand we apply too late the remedies which then might have effected a cure. There is nothing new in the story. It is as old as the Sibylline books. It falls into that [long,] dismal [catalogue] of the fruitlessness of experience and the confirmed unteachability of mankind. Want of foresight, unwillingness to act when action would be simple and effective, lack of clear thinking, confusion of counsel until the emergency comes, until self-preservation strikes its jarring gong—these are the features which constitute the endless repetition of history.[1]

I begin by observing that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[2] "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society"[3] and "most absolute denials of the franchise must survive strict scrutiny."[4] Yet, at the time of this writing, House of Representatives bill "H.R. 3899: Voting Rights Amendment Act of 2014"[5] ("VRAA") sits in committee[6] while states across the country "pursue measures that suppress voting rights."[7] Not only has Congress been unwilling to act generally,[8] but it has

[1] 301 PARL. DEB., H.C. (5th ser.) (1935) 602 (U.K.).

[2] Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

[3] Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

[4] Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1648 (1979).

[5] H.R. 3899, 113th Cong. (2014).

[6] *See* 160 CONG. REC. H1240 (daily ed. Jan. 16, 2014); H.R. 3899: Voting Rights Amendment Act of 2014, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/hr3899# (last visited Oct. 29, 2014).

[7] *Justice Dept. to Sue NC for Alleged Racial Discrimination at the Voting Booth*, PBS NEWS HOUR (Sept. 30, 2013, 11:49 AM), http://www.pbs.org/newshour/rundown/justice-department-to-sue-north-carolina-for-alleged-racial-discrimination-at-the-voting-booth [hereinafter *Justice Dep't.*].

[8] *See, e.g.*, *Do-nothing Congress II: It's Not a Compliment*, LOS ANGELES TIMES (Dec. 26, 2013), http://articles.latimes.com/print/2013/dec/26/opinion/la-ed-congress-worst-ever-

been unwilling to act even when the specific issue of voting rights arose in legislative enactments that became law. For example, the 2006 renewal of the Voting Rights Act of 1965 retained the status quo coverage formula even though Congress recognized its inadequacies, because failures in the legislative process made revision politically difficult.[9] If what Churchill observed nearly a century ago remains true today, then the unteachability of mankind and the persistence of Congressional unwillingness to act will ensure that certain segments of the population, regardless of race, color, creed, or financial happenstance, will remain underrepresented segments of the polity.

On June 25, 2013, the Supreme Court of the United States ("Supreme Court") decided *Shelby County v. Holder*.[10] In *Shelby*, the Supreme Court "declare[d] § 4(b) [of the Voting Rights Act of 1965] unconstitutional."[11] Section 4(b), commonly referred to as the coverage formula, determined which states were subject to the preclearance requirements in Section 5 of the Voting Rights Act of 1965.[12] The coverage formula included states based on two factors;[13] both had to be present in a single presidential election between 1964 and 1972 to result in coverage.[14] First, the coverage formula only applied to states that used a "test or device."[15] Second, the state must also have had either an eligible voter registration rate or a registered voter participation rate "less than 50 per centum."[16]

Although the Supreme Court limited the *Shelby* holding "only [to] the coverage formula,"[17] it effectively rendered Section 5's preclearance requirement a dead letter, absent further Congressional action.[18] *Shelby* appeared to rest on principles of federalism.[19] In *Shelby*, however, the Supreme Court expressed three interrelated restraints that Congress must overcome before any replacement coverage formula will satisfy rational

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20131226 (discussing the likelihood that "the 113th Congress will be the least productive in modern memory").

[9] *See* S. REP. NO. 109-295, at 27-30 (2006).

[10] 133 S. Ct. 2612 (2013).

[11] *Id.* at 2631.

[12] *See* 42 U.S.C. § 1973b (2006), *invalidated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (current version at 52 U.S.C.A. § 10303 (West 2014)).

[13] *See id.*

[14] *See id.*

[15] *Id.*

[16] *Id.*

[17] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

[18] *See id.* ("Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.").

[19] Justice Antonin Scalia, Presentation to Law Students at the University of Hawai'i William S. Richardson School of Law (Feb. 3, 2014).

review.[20] These restraints include limitations on federal power over the States,[21] the equal sovereignty of the States,[22] and the requirement that Congress act on a rational basis.[23]

Despite the substantial progress in voting access made since 1965,[24] discrete groups continue to have disproportionately lower rates of voter registration and voter turnout.[25] For example, nationally, the Latino voter turnout rate in the 2004 elections was just 28.0% compared to 56.1% for blacks and 60.3% for whites.[26] In addition, there remain numerous discrete cases of voting discrimination such as a sheriff taking "it upon himself to get a sample list of Latino voters and . . . [going] door to door knocking on people's houses and [asking to] see proof of citizenship."[27] The fact that such discrimination persists across the nation speaks to the necessity of reinstating a coverage formula to give effect to the preclearance remedy under Section 5.

Preclearance is an essential component of the Voting Rights Act of 1965 because it requires any jurisdiction seeking to make a change that will affect voting to "prove the change would not make black or Latino voters worse off than they were before."[28] In effect, preclearance shifted the burden of proof in covered jurisdictions. Without a coverage formula, disenfranchised voters must show, on a case-by-case basis, that the changes were "intended to, or had the effect of, discriminating against [their] voting rights."[29] Although the federal government can temper the effects of discriminatory changes in voting laws through enforcement of Section 2,[30] the national prohibition on voter discrimination,[31] federal oversight on a case-by-case basis cannot address highly localized changes that lead to

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[20] *See Shelby*, 133 S. Ct. at 2612.

[21] *Id.* at 2623.

[22] *Id.*

[23] *Id.* at 2628.

[24] *See, e.g.*, Richard Wolf, *Equality Still Elusive 50 Years After Civil Rights Act*, USA TODAY (Apr. 12, 2014, 12:22 PM), http://www.usatoday.com/story/news/nation/2014/01/19/civil-rights-act-progress/4641967/ (discussing substantial gains made since passing the VRA, but the remaining lack of equality).

[25] *See* S. REP. NO. 109-295, at 11 (2006).

[26] *Id.*

[27] *Id.* at 14.

[28] Steven Seidenberg, *Sinking the Vote: With the Supreme Court's OK, States Begin Imposing New Laws to Limit the Ballot*, A.B.A. J. 60, 64 (Jan. 2014).

[29] *Id.*

[30] Ari Berman, *North Carolina Shows Why the Voting Rights Act Is Still Needed*, THE NATION (Dec. 12, 2013, 4:41 PM), http://www.thenation.com/blog/177577/north-carolina-shows-why-voting-rights-act-still-needed.

[31] *See* 42 U.S.C. § 1973(a) (2006) (current version at 52 U.S.C.A. § 10302(c) (West 2014)).

localized voter disenfranchisement.[32] This will have a profound impact on aggregate minority voter representation in state and federal elections.[33]

In Section II, I argue that the coverage formula was and remains an indispensable component of the Voting Rights Act of 1965 because it gives effect to the essential preclearance remedy that remains necessary to prevent and deter ongoing voting discrimination. In Section III, I break down the VRAA and explain its provisions as distinguished from the coverage formula struck down in *Shelby* and as they relate to the remaining provisions of the Voting Rights Act of 1965. In Section IV, I analyze the VRAA's proposed formula under the rational review standard the Supreme Court applied in *Shelby*. Finally, I conclude that the VRAA is an essential piece of legislation, flexible enough to combat the shape-shifting threat presented by modern discriminatory practices regardless of the form they take, and tough enough to uproot the evil no matter where the ill-effects become apparent.

## II. THE COVERAGE FORMULA: AN INDISPENSABLE COMPONENT

"[T]he Voting Rights Act [was] designed to ferret out and stop unconstitutional discrimination on the basis of race or ethnicity. It [was] not designed to protect political parties, or to prevent statewide political realignments from being reflected in the redistricting process."[34] Since first enacting the Voting Rights Act of 1965, Congress has repeatedly made findings concerning the pervasive, flagrant, widespread, and rampant problem of racial discrimination in voting.[35] Although both the face and the epicenter of voting discrimination in America may have shifted, the same basic problems that faced the country in 1965 continue to plague American voters.[36] In this section, I first examine critical facts that Congress relied on in deciding to renew the Voting Rights Act of 1965 in 2006, emphasizing that voter discrimination is alive and well, albeit transformed in its nature and geographically more ubiquitous than legislators care to recognize. Next, I explore the fallout from *Shelby* and the local battles that, if left unchecked, will permit a retrogressive process that, as Churchill warned, can become thoroughly out of hand. Finally, as a backdrop to the VRAA proposals, I examine several unique attributes of the American voting experience.

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[32] *See infra* pp. 540-42.

[33] *See infra* pp. 540-42.

[34] S. REP. NO. 109-295, at 18 (2006).

[35] *See, e.g.*, H. REP. NO. 89-439, at 11 (1965); S. REP. NO. 109-295, at 11 (2006).

[36] *See* Berman, *supra* note 30; *see also* Wolf, *supra* note 24 (discussing substantial gains made since passing the VRA, but the remaining lack of equality).

*A. Congressional Findings from the 2006 Renewal of the Voting Rights Act*

In 2006, while deciding to renew the Voting Rights Act of 1965, Congress engaged in extensive fact-finding that revealed widespread disenfranchisement for minority voters.[37] For example, nationally the eligible voter registration rate for Latinos was only 34.3%, while black and white eligible voters had registration rates of 64.3% and 67.9% respectively.[38] National voter turnout reflects a similar problem, as registered Latino, black, and white voters have turnout rates of 28.0%, 56.1%, and 60.3% respectively.[39] These statistics tell two stories—first, that barriers to voting, both *de facto* and *de jure*, continue to disproportionately affect some races more than others, and second, that the laws protecting voters' rights may not be keeping up with the changing face of voter discrimination in America. While some might suggest that voter apathy may explain the aforementioned statistics, apathy neither comprehends divisions on racial lines, nor explains recent trends in voter participation rates within different racial groups.[40] In fact, national trends show increasingly polarized voting along racial lines, where margins of victory for either party are increasing within racial groups such that racial demographics are more likely to control future election results than is voter participation.[41]

*1. American voter discrimination is alive and well*

Between 1982 and 2004—the intervening period between reauthorizations—the Department of Justice made 626 objections to changes in voting laws compared to 1,116 total objections between 1968

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[37] *See generally* S. REP. NO. 109-295 (2006) (discussing the extensive factual record compiled by and relied on by law makers in the legislative process leading up to the 2006 renewal of the Voting Rights Act of 1965).

[38] *Id.* at 11.

[39] *Id.*

[40] William H. Frey, *Minority Turnout Determined the 2012 Election*, THE BROOKINGS INSTITUTE (May 10, 2013), http://www.brookings.edu/research/papers/2013/05/10-election-2012-minority-voter-turnout-frey.

[41] *See id.* (noting that white voters favored the republican candidate by margins of 17%, 12%, and 20% in 2004, 2008, and 2012 respectively, while black voters favored the democratic candidate by margins of 77%, 91%, and 87% respectively. Similarly, Hispanic voters favored democratic candidates by margins of 18%, 36%, and 44% respectively while Asians favored democratic candidates by margins of 12%, 27%, and 47% respectively. The study projects that if racially polarized voting persists, racial demographics will determine future elections despite declines in minority voter participation rates).

and 2004.[42] While the Department of Justice objected to an average of thirty-nine proposed changes per year by states subject to preclearance between 2000 and 2004,[43] that number increases to ninety-one when submission withdrawals and declaratory judgments adverse to the jurisdiction are included.[44] Each of these "changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process."[45] Covered jurisdictions are certainly not the only offenders, to be sure, but the record "shows that attempts to discriminate persist and evolve"[46] throughout the country.

Representative government has been slow in coming to statewide offices. In North Carolina, "[e]very statewide election since 1988 where voters were presented with a biracial field of candidates has been marked by racially polarized voting."[47] For Latino candidates, the outlook is worse. Latinos hold only "0.9 percent of the total number of elected offices in the country, despite being the largest minority group in the country."[48] In 2004, the United States was home to more than twelve million Asian Americans, but only 346 of them held elected office at any level.[49] Similar statistics reflect the disparity in representation of other language-minority groups including Native Americans and Native Alaskans.[50]

In recent years, language barriers to voting have increasingly served as a basis to disenfranchise eligible voters.[51] More than one third of surveyed jurisdictions failed to provide both written and oral language assistance as required by the Voting Rights Act of 1965.[52] In addition, one in five of the jurisdictions surveyed provided neither written nor oral language assistance for eligible voters.[53] Beyond these direct language barriers, another indication of the continued prevalence of racially biased voting practices is

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[42] S. REP. NO. 109-295, at 86 (2006) (noting that some of the additional objections by the Attorney General, during the relevant period, can be explained by expansion of the coverage formula to include additional states in 1975 and the significantly longer interval between 1982 and 2004).

[43] *Id.* at 88.

[44] *Id.*

[45] H.R. REP. NO. 109-478, at 21 (2006).

[46] *Id.*

[47] *Id.* at 33 (citation omitted).

[48] *Id.* at 34.

[49] *Id.*

[50] *See id.*

[51] *See* S. REP. NO. 109-295, at 88 (2006).

[52] *Id.*

[53] *Id.*

the population's persistent tendency toward polarized, racial bloc voting—particularly evident following the 2008 Presidential election cycle.[54]

In South Carolina, "black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting."[55] In Louisiana, "racial bloc voting substantially impairs the ability of black voters in this parish to become fully involved in the democratic process."[56] Even in states that mainstream America has not recognized as having racially discriminatory voting practices or targeted through the Voting Rights Act of 1965, racially polarized voting remains a persistent threat.[57] For example, "voting in South Dakota is racially polarized among whites and Indians."[58] The continued prevalence of racially discriminatory voting practices goes on and on, seemingly without end.

As recently as 2000, even Hawai'i maintained a system of voter qualifications for certain statewide offices that required otherwise qualified voters to demonstrate Hawaiian or Native Hawaiian ancestry.[59] While ancestry may be different from race or ethnicity, it readily serves as a proxy for race or ethnicity.[60] Undoubtedly, an ancestry provision is indistinguishable from the "grandfather clauses"[61] repeatedly struck down by the Supreme Court. Because there is a dangerously high "potential for discrimination [and reversion] in environments characterized by racially

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[54] *See* Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL'Y REV. 59, 71-73 (2009) (citing exit poll data indicating that in all twenty-seven states with available statistics, black voters casted ballots for Barrack Obama, the nation's first African American presidential candidate from a major political party, at rates of 90-100% while white voters in the nine states covered by Section 5 of the Voting Rights Act of 1965 voted for Barrack Obama at rates of 10-40%. Significantly, white voters in nine additional states, not covered by Section 5, also voted for Barrack Obama at rates less than 40%. Notably, white voters in only two states, Vermont and Hawai'i (Barrack Obama was born in Hawai'i and attended high school there), voted for Barrack Obama at rates of 60% or more); *see also* Frey, *supra* note 40 (noting unprecedented and increasingly large margins of victory in election results within racial groups).

[55] H.R. REP. NO. 109-478, at 35 (2006).

[56] *Id.*

[57] *See* Frey, *supra* note 40 (noting unprecedented and increasingly large margins of victory in election results within racial groups).

[58] H.R. REP. NO. 109-478, at 35 (2006).

[59] *See* Rice v. Cayetano, 528 U.S. 495 (2000) (holding that limiting voters to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," as defined by statute, violated the Fifteenth Amendment by using ancestry as a proxy for race, and thereby enacting a race-based voting qualification).

[60] *Id.*

[61] *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (discussing the unconstitutionality of grandfather clauses in past Supreme Court decisions).

polarized voting,"[62] the imposition of a preclearance requirement becomes increasingly important despite any recent statistical gains in voter participation rates.[63] Without preclearance, the conditions are such that reversion is not only possible, but likely.

*2. The preclearance requirement was extremely effective in jurisdictions covered by the formula*

The Attorney General's annual objection rate under preclearance has fallen to 0.2% of proposed changes.[64] The nation has achieved parity between black and white voter registration and turnout rates.[65] Department of Justice objections to changes in voting laws peaked in the mid-1990s and have been declining ever since.[66] By 2000, American voters had elected more than 9,000 African Americans to office compared to only 1,469 in 1970.[67] In 2004, 346 Asian Americans held elected offices compared to only 120 in 1978.[68] While the nation has made significant progress since 1965, much remains to be done. Despite attaining rough parity between black and white voters, particularly in covered jurisdictions, only 45% of voting-age Latino citizens and 43% of voting-age Asian American citizens voted in the 2000 election cycle.[69] At least in the case of Asian Americans, this disparity is partly attributable to the fact that nearly "70% of the Asian American population aged 15 and over were foreign-born and a large number of Asian Americans had limited English proficiency," according to the 1980 census.[70]

Nationally, voter registration rates for blacks and whites in 2004 were 64.3% and 67.9% respectively.[71] Comparatively, in five of the seven states originally subject to preclearance, black voter registration rates exceeded 70% in 2004 with the remaining two states achieving rough parity with the national averages.[72] These statistics suggest that there is evidence that "Congress really ought to be expanding coverage"[73] under Section 4. In

[62] H.R. REP. NO. 109-478, at 35 (2006).
[63] *See id.*
[64] S. REP. NO. 109-295, at 84 (2006).
[65] *Id.* at 84-85.
[66] *Id.* at 85.
[67] H.R. REP. NO. 109-478, at 18 (2006).
[68] *Id.* at 19.
[69] S. REP. NO. 109-295, at 95 (2006).
[70] GARRINE P. LANEY, CONG. RESEARCH SERV., 95-896, THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES 29 (2008).
[71] S. REP. NO. 109-295, at 11 (2006).
[72] *Id.* at 94.
[73] *Id.* at 85.

fact, Congress found that "increased [voter] participation levels are directly attributable to the effectiveness of the VRA's temporary provisions."[74] An alternative method to ensure the protection of voting rights would be for Congress to broadly apply a preclearance requirement to all states for any change in voting laws that would infringe basic voting requirements established by Congress. Although such a provision is beyond the scope of this paper, it would certainly have significant federalism implications due to its infringement on states' rights.[75] However, the Supreme Court might uphold such an application of federal power if the intrusion, into an area predominantly controlled by the states, were limited to securing the federally protected right to vote—whatever the scope of that right may be.[76]

Ironically, the demise of the coverage formula was a product of its own success. The Voting Rights Act of 1965, "[a]s originally passed in 1965 . . . was designed primarily to protect the voting rights of African Americans in the southern states with a long history of disfranchisement."[77] It follows, then, that the most significant strides made in voting rights occurred one, in the south, and two, with respect to African American voters. Recall that five of the original seven states subject to preclearance now have African American voter registration rates that exceed the national averages for both black and white voters.[78]

Conversely, Asian Americans have a voter turnout rate of just 43%[79] compared to 56.1% and 60.3% for blacks and whites respectively.[80] Even more significant is the fact that 49% of the nation's twelve million Asian

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[74] H.R. REP. NO. 109-478, at 21 (2006).

[75] *See, e.g.*, Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2618 (2013) (discussing the requirement that states obtain federal permission before enacting any law related to voting as a drastic departure from basic principles of federalism).

[76] *See* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (explaining that "[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right"). In practice this would be incredibly difficult to implement because it would require a complete definition of the full scope of the right to vote as a basis for determining whether proposed changes should be granted preclearance. Arguably, Congress would have the ability to create the preclearance requirement to provide relief for violations of that right, but would be without power to define the full scope of the right to vote as protected by the Fifteenth Amendment—a role reserved to the Supreme Court. *See, e.g.*, Civil Rights Cases, 109 U.S. 3, 11 (1883).

[77] THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 26 (2006), http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf.

[78] *See* S. REP. NO. 109-295, at 94 (2006).

[79] *Id.* at 95.

[80] *Id.* at 11.

Americans live in just three states, California, Hawai'i, and New York.[81] Prior to the Supreme Court striking down the coverage formula in *Shelby*, none of these three states were subject to preclearance.[82] Furthermore, if the same coverage formula were instead applied to the 1996, 2000, and 2004 elections, the only state that would be subject to preclearance would be Hawai'i.[83] In fact, application of the same formula to election data from 2000 through 2004 demonstrates "significant coverage that would be retained in currently covered jurisdictions as well as the fact coverage would be expanded."[84]

This is an argument that illustrates the shape-shifting, amorphous nature of racial discrimination and its uncanny ability to surreptitiously infect and overwhelm distinct parts of the county. These same concerns about the nature of racial discrimination in voting are woven into the fabric of the *Shelby* decision,[85] leading some critics of the Supreme Court to characterize that decision as "either disingenuous or cunning."[86] Ultimately, whether that decision was disingenuous or cunning will turn on Congress' ability to pass the VRAA and the Supreme Court's application of rational review should a constitutional challenge arise.

### 3. *A tale of two cities: The modern face and breeding grounds of racial discrimination in voting has transformed*

The face of voter discrimination in America is changing. For example, consider participation rate by race within the November 2004 electorate (the citizen, voting age population). The participation rate for "Non-Hispanic White citizens had the highest level of voter turnout in the November 2004 election—67 percent, followed by Black citizens at 60 percent, Hispanic citizens at 57 percent, and Asian citizens at 44 percent."[87] When combined, Asian Americans and Pacific Islanders made up 4.2% of the population.[88] Much of their growth in population share is attributable to

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[81] *Id.* at 95.

[82] U.S. DEP'T OF JUSTICE, *Jurisdictions Previously Covered by Section 5*, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Oct. 22, 2014).

[83] Brief for the Am. Unity Legal Def. Fund as Amici Curiae Supporting Petitioner at 5-6, Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2618 (2013).

[84] S. REP. NO. 109-295, at 36 (2006).

[85] *See, e.g.*, *Shelby*, 133 S. Ct. at 2627-30 (explaining that coverage today is based on decades-old data and eradicated practices and not on the record Congress assembled detailing the discrimination that presently exists).

[86] Seidenberg, *supra* note 28.

[87] KELLY HOLDER, UNITED STATES CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, 7 (2006).

[88] S. REP. NO. 109-295, at 98 (2006).

"a sharp increase in Asian American immigration."[89] To exacerbate the problem, "[d]isparities in access to education, employment, housing, health care, social services, and political participation disenfranchise language-minority voters at a disproportionate rate."[90] Similar trends also explain low Hispanic voter participation rates.

Other factors tell the same story. Of the people who actually voted in the 2000 election cycle, 80.7% were non-Hispanic,[91] while whites comprised 75.1% of the population.[92] In that same year, African Americans accounted for 11.7% of participating voters,[93] nearly matching their population share of 12.3%.[94] In comparison, Latinos, the single largest minority group constituting 12.5% of the total population,[95] only accounted for 5.4% of voters.[96] Even before *Shelby*, the Voting Rights Act of 1965 failed to prevent discrimination against Asian Americans and Pacific Islanders.[97]

The geography of discrimination has also shifted, largely as a result of preclearance. Compare the 2004 elections in California and Texas: both are large states with significant Hispanic populations.[98] In 2004, Texas was subject to the preclearance requirement but California was not.[99] In 2004, both states had white voter registration rates more than five percentage points below the national average and white voter turnout rates nearly ten percentage points below the national average.[100] Additionally, both states had black voter registration and turnout rates that were on par with or exceeded national averages.[101] However, the experiences of California and Texas clearly diverge in the context of Latino voting. Admittedly, it is

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[89] *Id.*

[90] *Id.* at 100.

[91] *Id.* at 96.

[92] ELIZABETH M. GRIECO & RACHEL C. CASSIDY, UNITED STATES CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN 3, 11 (2001).

[93] S. REP. NO. 109-295, at 96 (2006).

[94] *Id.* at 94.

[95] *Id.*

[96] *Id.* at 95.

[97] Asian Americans and Pacific Islanders, who make up 4.2% of eligible voters, only accounted for 2.2% of participating voters. *Id.* at 96-98 (calculated by author). The net result is that voter participation continues to reflect systemic inputs that over-represent white voters at the expense of Hispanics and Asian Americans. While African Americans have achieved rough parity in terms of voter participation roughly proportional to their population share, parity remains elusive for Hispanics and Asian Americans.

[98] U. S. CENSUS BUREAU, *Population Estimates*, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2013_PEPASR6H&prodType=table (last visited Oct. 22, 2014).

[99] U.S. DEP'T OF JUSTICE, *supra* note 82.

[100] S. REP. NO. 109-295, at 11 (2006).

[101] *Id.*

difficult to compare the experiences of Asian Americans in these states because Texas lacks a comparably sized Asian American population.[102]

In the 2004 elections, the Latino voter registration rate in California was 30.2%.[103] By comparison, the national average for Latinos was 34.3% and in Texas it was 41.5%.[104] Voter participation rates reflect a similar trend. In California, the 2004 Latino voter participation rate was just 25.6%, while the national average was 28.0%.[105] In Texas, the 2004 Latino voter participation rate was 29.3%.[106] These numbers are hardly surprising. As the face of discrimination evolves, those states best situated to combat the threat will experience more favorable results. If anything, this comparison shows that forcing states to engage in a searching inquiry before changing voting laws will prevent at least some race-based voter discrimination.

### *B. The Fallout from the Shelby Decision*

Almost immediately after the Supreme Court struck down Section 4, states began hurriedly passing voting laws that were almost surely objectionable under preclearance. Less than two months after *Shelby*, the Department of Justice ("DOJ") sued Texas because of a recently enacted voter ID law.[107] After remand by the Supreme Court, the DOJ also filed an intervenor's motion to stay implementation of an interim congressional redistricting plan in a Texas case regarding redistricting laws that allegedly affected the relative weight of minority votes.[108] In North Carolina, the DOJ intervened in a suit regarding a sweeping package of voting reforms that impose strict voter ID requirements, reduce early voting opportunities, and eliminate same-day registration options.[109] State and local legislators have doubled down on stomping out the almost non-existent crime of voter fraud.[110] While this trend may be the result of political gerrymandering, laws that "suppress poor and minority voters will likely have an equal

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[102] U. S. CENSUS BUREAU, *supra* note 98.

[103] S. REP. NO. 109-295, at 11 (2006).

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Justice Dept.*, *supra* note 7.

[108] *Id.*; *see* Perez v. Texas, 891 F. Supp. 2d 808 (W.D. Tex. 2012).

[109] *Id.*; *see* N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C.) *aff'd in part, rev'd in part sub nom.* League of Women Voters of N.C. v. N.C., 769 F.3d 224 (4th Cir. 2014).

[110] Marcus Anthony Hunter, *Voter Suppression Is a Threat to All*, WASH. POST (Jan. 20, 2014), http://www.washingtonpost.com/opinions/voter-suppression-is-a-threat-to-all/2014/01/19/abc56154-7fa6-11e3-9556-4a4bf7bcbd84_story.html.

impact on the same populations,"[111] regardless of which party controls future legislatures. This is because today's electorate will necessarily be responsible for the election of tomorrow's legislators.

Beyond the clear and present danger posed to the current electorate, there are hidden and existential threats to the institutional knowledge of minority candidates, cultivated over the course of two generations. These candidates represent more than their constituents; they represent their communities and a knowledge base gained only through the experience of their predecessors. If society allows that knowledge base to atrophy, the situation will become thoroughly out of hand. This hidden threat to progress would permit a return to invidious discrimination that reaches far beyond the ballot box. The thing that makes this sort of discrimination particularly vile is the cross-section of the "key" to power in a democratic society—the vote—and the cloak of apparent propriety. Indeed, even the Supreme Court has recognized the immense difficulty of determining benign intent.[112] This sleight of hand is an evil without equal because it is a trend that is particularly difficult to identify, articulate, and combat while its benefactors, in effect, hold the key to the city. For these reasons, the citizenry and the courts must be vigilant in protecting the developmental processes of a diverse cadre of minority candidates for statewide and national offices.

Local races matter. Important issues often go "under the radar."[113] In Macon, Georgia, for example, recent changes have created an odd-month voting scheme that triggers reduced publicity surrounding the election cycle.[114] The result is usually much lower voter turnout, and disproportionately so among poor and minority voters.[115] At its very core, preclearance protected such local elections, which are most susceptible to discriminatory interference and not suitable for protection on a case-by-case basis. To make matters worse, these elections play a vital role in preparing a cadre of minority leaders to compete in the electoral process for state and national offices.[116] Therefore, it is important to view preclearance as a

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[111] *Id.*

[112] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (noting that "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics").

[113] Adam Ragusea, *Loss of Key Voting Rights Act Section Most Keenly Felt in Local Elections*, GPB NEWS (Feb. 6, 2014, 2:10 AM), http://www.gpb.org/news/2014/02/06/loss-of-key-voting-rights-act-section-most-keenly-felt-in-local-elections.

[114] *Id.*

[115] *Id.*

[116] *Id.*

preventative measure designed to compel thorough consideration of practical effects before changing the status quo.

### *C. Voluntary Reforms and Best Practices: An Ineffective Alternative in the Absence of a Federally Imposed Preclearance Requirement*

One alternative to a federal legislative mandate is to work with states to adopt voluntary reforms and "best practices." A recent report by the Presidential Commission on Election Administration ("Commission") identified many of the same systematic problems that I maintain contribute to discriminatory voting in perpetuity. Although there are four main problem areas where the Commission's recommendations, if voluntarily adopted, would obviate the need for preclearance, the absence of a federal compliance mechanism presents a fatal flaw. Notably, even the Commission recognized that voluntarily adopted national reforms are of limited effect because "local institutions, rules, and cultures differ considerably."[117] Nonetheless, I briefly discuss the proposals as potential bridging mechanisms in the absence of Congressional action.

Under Sections 203 and 208 of the Voting Rights Act of 1965, communities with "large non-English speaking populations"[118] must provide language assistance; voters who cannot read a ballot are allowed to obtain "assistance in voting from a person of their choosing."[119] However, many poll workers are not even aware of these requirements.[120] There are regular shortages in bilingual poll workers and in ballots in alternative languages.[121] To make matters worse, many language-minority voters have difficulty even making it to the polling booth because of inadequate signage.[122] The Commission recommends election officials ensure the skill and effectiveness of bilingual poll workers hired to assist language-minority voters and recruiting bilingual teachers and students to work at the polls.[123] Additionally, the Commission recommended engaging with the local language-minority communities to improve access to the polls.[124] While

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[117] THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 9 (2014), *available at* https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf [hereinafter PRESIDENTIAL COMMISSION].

[118] *Id.* at 16.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 53-54.

[124] *Id.* at 53.

these are not foolproof measures, they represent the aspirational goals of Sections 203 and 208 of the Voting Rights Act of 1965—and perhaps a realistically attainable outcome if Congress enacts the VRAA.

The Commission also highlighted the problem of inadequate professionalism in election administration.[125] Critics of the current system charge that election officials are "subjected to competing pressures from partisans and political constituencies, on the one hand, and their obligation to the voting public as a whole, on the other."[126] This is certainly a fair criticism, but it goes to the very principles "embedded in the legal structure and long-standing practice of American election[s]."[127] Nonetheless, the Commission recommended selection of "individuals who are chosen and serve solely on the basis of their experience and expertise."[128] Similar principles should also apply to committees tasked with redistricting and reapportionment plans.

As a mechanism to facilitate voter registration, the Commission recommended a move to an online voter registration process.[129] The Commission found four primary benefits of such a system without any significant drawbacks.[130] Online voter registration would reduce error rates over paper methods, reduce cost outlays for the state, enhance accuracy and currency of voter rolls, and improve voter satisfaction with the process.[131] This is a common sense reform that has significant potential to allow election officials to reach voters in their native tongue, at relatively low cost. Of course, it requires individual voters to have internet access, which may disproportionately affect the poor and elderly.

Finally, the Commission recommends coordinating state voter rolls to facilitate accuracy and timeliness in voter registration lists.[132] The Commission notes that programs such as the Voter Registration Crosscheck Program, with twenty-nine member states, allow states to effectively identify incidents of voter fraud and to prosecute them when appropriate.[133] While voter fraud may not be a substantial issue, having such a program addresses many of the concerns advanced by states seeking to implement tough voter ID laws and thus should be viewed as a means to enable open polls while providing assurances as to the integrity of the voting process.

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[125] *Id.* at 18.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* at 24.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 28.
[133] *Id.*

Again, these reforms are neither a "one size fits all" remedy, nor do they fully resolve the problems faced by minority voters. Although timely and nicely tailored to the present nature of discriminatory practices (language barriers and voter ID), these recommendations are inadequate because the jurisdictions that need them most are also least likely to voluntarily implement such reforms. Thus, the Commission's report should inform the development of next generation voting right legislation rather than replace federal protection of voting rights. In the following section, I examine the proposed VRAA, its coverage formula, and the additional provisions that make it effective in combating voting discrimination in the aftermath of the *Shelby* decision.

## III. H.R. 3899: THE VOTING RIGHTS AMENDMENT ACT OF 2014

### *A. The Replacement Coverage Formula and How It Works*

If enacted, the VRAA would provide for application of the preclearance requirement:

> [W]ith respect to a State and all political subdivisions within the State during a calendar year if 5 or more voting rights violations occurred in the State during the previous 15 calendar years, at least one of which was committed by the State itself (as opposed to a political subdivision within the State).[134]

Thus the relevant period is the floating fifteen-year timeframe immediately before the current calendar year.[135] It protects states to some degree by requiring state responsibility for at least one of the five violations before coverage attaches.[136] In other words, if ten different municipalities within a single state, each accrue one violation every ten years, but there is no violation attributable to the state as an independent entity, no coverage attaches to the state. This results because, although there are conceivably twenty violations within the state's relevant fifteen-year window, the state, as distinguished from its political subdivisions, did not discriminate. Although this formula may appear much less potent, there is a supplemental formula that applies to the political subdivisions within each state that preserves the effectiveness of preclearance while facilitating a much tighter fit.[137]

Under what is proposed as Section 3(b)(1)(B) of the VRAA, coverage would attach to individual political subdivisions of a state:

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[134] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).

[135] *See id.*

[136] *See id.*

[137] *See id.*

> during a calendar year if—(i) 3 or more voting rights violations occurred in the subdivision during the previous 15 calendar years; or (ii) 1 or more voting rights violations occurred in the subdivision during the previous 15 calendar years and the subdivision had persistent, extremely low minority turnout during the previous 15 calendar years.[138]

Like the formula applicable to states, the relevant period is again a floating fifteen-year window.[139] Political subdivisions are limited to three violations in that window before coverage necessarily attaches, however.[140] While this does not mean any of our hypothetical jurisdictions is necessarily covered, coverage would attach in any of those jurisdictions where there is persistent, extremely low minority turnout in the previous fifteen calendar years. Before exploring some of the nuanced terminology in this legislation, it is important to recognize that the three-violation threshold (absent persistent, extremely low minority turnout) for political subdivisions and the five-violation threshold for states are important as they create breathing space and allow for a streamlined process in determining when individual violations occur.

Proposed Section 3(b)(3) of the VRAA defines voting rights violations. Violations fall into either of two categories, those that apply to all states and those that only apply after preclearance attaches (i.e., those that extend the term of coverage only after it has attached in a particular jurisdiction).[141] If enacted, Section 3(b)(3) would provide that:

> [A] voting rights violation occurred in a State or political subdivision if any of the following applies:
>
> (A) In a final judgment (which has not been reversed on appeal), any court of the United States has determined that a denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group, in violation of the 14th or 15th Amendment, occurred anywhere within the State or subdivision.
>
> (B) In a final judgment (which has not been reversed on appeal), any court of the United States has determined that a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting was imposed or applied or would have been imposed or applied anywhere within the State

[138] *Id.* (internal quotation marks omitted).

[139] *Id.*

[140] *See id.*

[141] *Compare* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014) (proposed as 42 U.S.C. 1973b(b)(3)(A)-(B) and requiring a final judgment before a violation is recognized), *with* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014) (proposed as 42 U.S.C. 1973b(b)(3)(C)-(D) and merely requiring an objection by the Attorney General or a final judgment declining to overturn an objection by the Attorney General).

> or subdivision in a manner that resulted or would have resulted in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2), in violation of Section 2.[142]

The sections proposed as 3(b)(3)(A)-(B) should be thought of as the general provisions—both serve as a basis for establishing a violation regardless of whether coverage under the new formula has attached.[143] Under proposed Section 3(b)(3)(A), a violation occurs if a court determines there was a "violation of the 14th or 15th Amendment."[144] Proposed Section 3(b)(3)(B) similarly requires a court determination, but the court need only determine that a "violation of section 2" of the Voting Rights Act of 1965 occurred.[145] Undoubtedly, proving violations under the proposed Sections 3(b)(3)(A)-(B) would require litigation as a prerequisite for coverage to attach in an otherwise "innocent" jurisdiction. Proposed Section 3(b)(3) would further provide that:

> (C) In a final judgment (which has not been reversed on appeal), any court of the United States has denied the request of the State or subdivision for a declaratory judgment under Section 3(c) or Section 5, and thereby prevented a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting from being enforced anywhere within the State or subdivision.
>
> (D) The Attorney General has interposed an objection under Section 3(c) or Section 5 (and the objection has not been overturned by a final judgment of a court or withdrawn by the Attorney General), and thereby prevented a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting from being enforced anywhere within the State or subdivision, other than an objection which is based on a voting qualification or procedure which consists of the imposition of a requirement that an individual provide a photo identification as a condition of receiving a ballot for voting in an election for Federal, State, or local office.[146]

Thus, the proposed Sections 3(b)(3)(C)-(D) can be thought of as a second category of violations, available as an additional basis for establishing voting rights violations. These sections only apply to jurisdictions already covered, but they serve the important purpose of extending applicability of the preclearance remedy beyond the initial coverage period without the need for additional litigation. Under proposed Section 3(b)(3)(D), a

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[142] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).
[143] *See id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*

violation occurs when the "Attorney General has interposed an objection . . . thereby prevent[ing] a voting qualification or prerequisite . . . from being enforced."[147] Proposed Section 3(b)(3)(C) complements Section 3(b)(3)(D) by allowing for an additional basis on which to establish a violation in the case of a court judgment denying a state request for declaratory judgment. While somewhat ambiguous, this language appears to allow a state to appeal an objection by the Attorney General, but if it chooses to proceed with its appeal and loses, then it in effect tallies two violations—one based on the initial objection by the Attorney General and a second based on the failed appeal, however, if the state prevails, no violation would be counted.

The VRAA coverage formula uses the descriptor "persistent, extremely low minority turnout"[148] within its formula to attach coverage to political subdivisions. The term actually has different meanings in different elections.[149] With respect to presidential elections,

> a political subdivision has persistent, extremely low minority turnout with respect to a calendar year if . . . in the political subdivision during the previous 15 calendar years—
>
> (i) in the majority of such elections, the minority turnout rate in the political subdivision was below—
>
> (I) the minority turnout rate for the entire Nation,
>
> (II) the nonminority turnout rate for the entire Nation,
>
> (III) the minority turnout rate for the State in which the political subdivision is located,
>
> (IV) the nonminority turnout rate for the State in which the political subdivision is located, and
>
> (V) the nonminority turnout rate for the political subdivision; and
>
> (ii) the average minority turnout rate across all such elections in the political subdivision was more than 10 percentage points below the average nonminority turnout rate for the entire Nation.[150]

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[147] *Id.*

[148] *Id.*

[149] *Compare* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014) (proposed as 42 U.S.C. 1973b(b)(4)(A) and applying to "general elections for the office of President"), *with* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014) (proposed as 42 U.S.C. § 1973(b)(4)(B) U.S.C. § 3(b)(4)(B) (2006) and applying to "general elections for Federal office").

[150] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).

It is important to begin by recognizing that there are three presidential elections in any given fifteen-year period.[151] To invoke the proposed Section 3(b)(4), in at least two of the three relevant presidential elections, i.e., "the majority"[152] of the three relevant elections, there must be a minority turnout rate below each of the five comparison rates listed: (I) through (V).[153] This requirement accounts for changing trends in voter participation rates and prevents preclearance from attaching when the minority voter turnout in a political subdivision exceeds the turnout rates for minorities and nonminorities at the local, State, and national levels. In effect, this provision accounts for degrees of voter apathy both now and in the future. Additionally, for preclearance to attach, the average minority turnout rate in a political subdivision for all three relevant election cycles must be more than ten percentage points below the national average nonminority rate for the same three elections.[154] This formula is slightly modified under the proposed Section 3(b)(4)(B) for non-presidential, federal election cycles.

During the relevant fifteen-year window, with respect to non-presidential, federal election cycles, a violation occurs if:

> (i) in the majority of such elections, the minority turnout rate in the political subdivision was below—
>
> (I) the minority turnout rate for the State in which the political subdivision is located,
>
> (II) the nonminority turnout rate for the State in which the political subdivision is located, and
>
> (III) the nonminority turnout rate for the political subdivision; and
>
> (ii) the average minority turnout rate across all such elections in the political subdivision was more than 10 percentage points below the average nonminority turnout rate for the State in which the political subdivision is located.[155]

Again, it is important to recognize that there are only three federal, non-presidential elections in any given fifteen-year period.[156] The formula for

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[151] Presidential elections only occur once every four years. *See* U.S. CONST. art. II, § 1, cl. 1.

[152] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).

[153] *Id.*

[154] *Id.*

[155] *See id.*

[156] *See* U.S. CONST. art. II, § 1, cl. 1. Federal, non-presidential elections occur between presidential election years, at two-year intervals, thus also occurring once every four years. *See id.*

coverage of political subdivisions is very similar to the state formula under proposed Section 3(b)(4)(A), except in two areas.[157] First, under the Section 3(b)(4)(B)(i) proposal, the comparison between the minority turnout rate in the political subdivision and the minority and non-minority national averages is removed.[158] This change actually removes a barrier that could otherwise prevent preclearance from attaching.[159] Second, under the political subdivision formula, the relevant comparison is to "the average nonminority turnout rate for the state in which the political subdivision is located."[160] This is an important distinction, likely based in part on considerations of the distorting impact that U.S. Senate elections could have on individual and national voter turnout rates in a given election cycle.[161]

It is important to note that once coverage attaches, it remains in effect for no less than ten years.[162] The VRAA provides that coverage "begins on January 1 of the year in which"[163] the coverage formula is satisfied. Once coverage attaches, it continues through "the date which is 10 years after January 1 of the year in which the most recent voting rights violation occurred."[164] This allows for a minimum coverage period of at least ten years, but automatic renewals of the ten-year coverage minimum begin on January 1 of any year in which a subsequent violation occurs. Thus, one qualifying violation every ten years would sustain perpetual coverage in a particular jurisdiction.[165]

This revised coverage formula is arguably the single most important part of the VRAA. Indeed, the effectiveness of the preclearance requirement under Section 5 of the Voting Rights Act of 1965 now depends entirely on the new coverage formula.[166] Although nine states were wholly covered

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[157] H.R. 3899 § 3(a)(1).

[158] *See id.*

[159] Both formulas, under the Voting Rights Amendment Act of 2014, require the minority turnout rate in the majority of the political subdivision's relevant election cycles to be below all comparison rates. By removing the national minority and non-minority turnout rates in non-presidential elections, the formula, proposed as section 3(b)(4)(B)(i), removes two criteria that would otherwise have to be satisfied before preclearance could attach. *See id.*

[160] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).

[161] Under the formula proposed as section 3(b)(4)(B)(ii), using a comparison to national turnout rates may diminish the relevance of the requirement where some states have reduced turnout rates for all voters because no U.S. Senate seat from that state is up for contest in a particular election cycle. Likewise, because roughly only one third of U.S. Senate seats are up for contest in a given election cycle, even states with one seat up for contest may have a higher base turnout rate than the national average.

[162] *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).

[163] *Id.*

[164] *Id.*

[165] *See id.*

[166] *See generally* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

under the previous coverage formula,[167] the revised formula under the VRAA would retain preclearance coverage for the entirety of four states, namely Georgia, Louisiana, Mississippi, and Texas.[168] In addition, Congressional fact-finding suggested that updating the previous coverage formula to reflect data from recent elections would extend coverage to nearly one third of the nation's political subdivisions.[169] The Congressional record reflects that these political subdivisions would be located in thirty-nine different states,[170] far more than the fifteen states covered in whole or in part by the coverage formula as it existed before the *Shelby* decision.[171] Admittedly, the VRAA provides a substantially different coverage formula that does far more than simply update the data set. Nonetheless, there is good reason to believe that the VRAA will include far more political subdivisions, in many more states, than its predecessor. In addition to a revised coverage formula, the VRAA has other complementary provisions that bolster its effects.

### *B. Four Additional Changes Strengthen the Voting Rights Act of 1965*

In this section, I first discuss the VRAA changes that strengthen the so-called "bail in"[172] provisions under Section 3 for the Voting Rights Act of 1965. Second, I discuss new notice requirements that in effect impose a limited form of preclearance, applicable to all states. Third, I highlight the enhanced power of the Attorney General in using federal observers to enforce federal voting rights protections. Finally, I discuss the reduced burden faced by individual voters who seek a preliminary injunction to prevent voting rights violations.

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[167] U.S. DEP'T OF JUSTICE, *supra* note 82.

[168] Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, THE NATION (Jan. 16, 2014), http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act [hereinafter Berman II].

[169] *See, e.g.*, S. REP. NO. 109-295, at 53 (2006) (finding that 1,010 of the nation's counties would be subject to preclearance under a revised coverage using elections data from the 2000 and 2004 election cycles); *see also* U. S. GEOLOGICAL SURVEY, *How Many Counties are there in the United States?*, http://gallery.usgs.gov/audios/124 (last visited Oct. 18, 2014) (stating that there are 3,141 total counties in the United States).

[170] *See* S. REP. NO. 109-295, at 53 (2006).

[171] *See* Shelby Cnty., 133 S. Ct. at 2612.

[172] *See id.* at 2644 (referring to provisions of the Voting Rights Act of 1965 Section 3 as the "bail-in" provisions).

### *1. The VRAA removes the intentional purpose requirement for the "bail-in" provision under Section 3 of the Voting Rights Act of 1965*

Section 3 for the Voting Rights Act of 1965 provides, "[i]f in any proceeding instituted by the Attorney General or an aggrieved person . . . the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred . . . the court . . . shall retain jurisdiction."[173] This provision is known as the bail-in provision because it further provides that "no voting qualification or prerequisite . . . different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that . . . [it] does not . . . deny[] or abridg[e] the right to vote."[174] Under the VRAA this bail-in provision would be amended by:

> striking 'violations of the fourteenth or fifteenth amendment' and inserting 'violations of the 14th or 15th Amendment; violations of this Act (other than a violation of Section 2(a) which is based on the imposition of a requirement that an individual provide a photo identification as a condition of receiving a ballot for voting in an election for Federal, State, or local office); or violations of any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group.'[175]

By amending the "bail-in" provision, the VRAA substantially strengthens protections for voting rights by empowering lower courts to invoke the preclearance remedy based on mere violations of federal voting rights laws, whether or not the Fourteenth or Fifteenth Amendments are violated.[176] Without a new coverage formula, only jurisdictions covered by the underutilized bail-in provision in Section 3 of the Voting Rights Act of 1965 would be subject to preclearance.[177] Furthermore, without such an amendment to the bail-in provision, lower courts previously were limited to invoking preclearance only when plaintiffs established a violation of the Fourteenth or Fifteenth Amendment.[178] This change is significant because

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[173] 42 U.S.C. § 1973a(c) (2006) (current version at 52 U.S.C.A. § 10302(c) (West 2014)).

[174] *Id.*

[175] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 2(a) (2014).

[176] *Id.*

[177] *See* 42 U.S.C. § 1973a(c) (2006) (current version at 52 U.S.C.A. § 10302(c) (West 2014)); Shelby Cnty. v. Holder, 679 F.3d 848, 855 (D.C. Cir. 2012), *cert. granted in part*, 133 S. Ct. 594 (2012) and *rev'd*, 133 S. Ct. 2612 (2013) and *vacated and remanded*, 541 F.App'x 1 (D.C. Cir. 2013).

[178] *See* 42 U.S.C. § 1973a(c) (2006) (current version at 52 U.S.C.A. § 10302(c) (West 2014)); *accord* Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2006 (2010) (noting that "section 3 authorizes courts to impose preclearance in response to violations of the Fourteenth and Fifteenth Amendments").

"to establish a violation of the fourteenth . . . [or] fifteenth amendment . . . a plaintiff must show that a challenged voting practice or procedure reflected an intent to discriminate"[179] whereas under Section 2 of the Voting Rights Act of 1965, a plaintiff need only show voting laws are applied "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote."[180]

The changes to the bail-in provision significantly expand the ability of lower courts to apply preclearance on a case-by-case basis.[181] The VRAA changes to the bail-in provision thus will supplement any perceived gaps in the VRAA's new coverage formula.

### *2. The VRAA mandates transparency through notification of recent changes in state voting laws*

Under the VRAA, the proposed addition of Section 6 would require any "State or political subdivision mak[ing] a[] change in any prerequisite to voting . . . [different from what was in effect] 180 days before the date of

[179] David L. Eades, *Section 2 of the Voting Rights Act: An Approach to the Results Test*, 39 VAND. L. REV. 139, 142 (1986). Though somewhat controversial, the purposeful discrimination requirement under the Fourteenth Amendment has been long established. *See, e.g.*, Akins v. Texas, 325 U.S. 398, 403-404 (1945) ("A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination."). Later cases sometimes cause jurists to confuse the long established purposeful discrimination requirement with the interrelated requirement of state action, both necessary to claims arising under the Fourteenth or Fifteenth Amendment. *Compare* Gomillion v. Lightfoot, 364 U.S. 339, 347-48 (1960) (stating "that [redistricting] '[a]cts generally lawful may become unlawful when done to accomplish an unlawful end'" under the Fifteenth Amendment), *and* Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218, 231 (1964) (noting, in the context of state assistance of private schools in place of public schools closed following court orders to desegregate, that "[w]hatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional"), *with* Palmer v. Thompson, 403 U.S. 217, 225 (1971) ("[T]here is no evidence in this record to show that the city is now covertly aiding the maintenance and operation of pools which are private in name only. It shows no state action affecting blacks differently from whites."). Where *Gomillion* and *Griffin* require purposeful discrimination, *Palmer* requires a clear showing of discriminatory *state action* before any inquiry into purpose becomes relevant.

[180] 42 U.S.C. § 1973(a) (2006) (current version at 52 U.S.C.A. § 10301(a) (West 2014)).

[181] *Compare* 42 U.S.C. § 1973a(c) (2006) (current version at 52 U.S.C.A. § 10302(c) (West 2014)), *with* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 2(a) (2014). *See, e.g.*, Jeffers v. Clinton, 740 F. Supp. 585, 595 n. 7 (E.D. Ark. 1990) (discussing that constitutional violations justifying preclearance under Section 3(c) must be left to a case-by-case determination).

the election . . . [to] "provide reasonable public notice."[182] To satisfy the "reasonable public notice" requirement, this notice must be provided in the "State or political subdivision and on the Internet, in a reasonably convenient and accessible format, of a concise description of the change, including the difference between the changed prerequisite, standard, practice, or procedure and the prerequisite, standard, practice, or procedure which was previously in effect."[183] While notice will certainly assist voters in understanding changes, this requirement does not require notice for changes that take effect more than six months before an election date.[184] The six-month cushion should blunt the blow of "no notice" changes in voting laws by providing voters with a reasonable period of time to familiarize themselves with ballot requirements prior to Election Day.

The state or political subdivision must publish the notice "not later than 48 hours after making [a] change."[185] The proposed Section 6 also includes specific types of information that must be included to satisfy the notice requirement.[186] Lastly, Section 6 includes an exception that makes compliance with the notice requirement optional for jurisdictions with fewer than 10,000 persons.[187] Such exceptions are essential to maintaining the feasibility of the VRAA's provisions but may prove troublesome in sparsely populated counties throughout the South.

#### *3. The VRAA enhances the Attorney General's ability to use election observers to enforce compliance with language-minority protections*

Under the Voting Rights Act of 1965, the Attorney General may use federal observers if he certifies that in his judgment "the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment."[188] Again, this has required prediction of an actual violation of the Fourteenth or Fifteenth Amendment, as distinguished from a violation of federal voting rights laws. Under the VRAA, the Attorney General need only determine that "assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th Amendment or any provision of this Act or any other law of the United States protecting the

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[182] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 4(a)(1) (2014).
[183] *Id.*
[184] *See id.*
[185] *Id.*
[186] *See id.*
[187] *See id.*
[188] 42 U.S.C. § 1973f(a)(2)(B) (2006) (current version at 52 U.S.C.A. § 10305(a)(2)(B) (West 2014)).

right of citizens of the United States to vote."[189] The revised provisions of the VRAA thus afford the Attorney General greater discretion in assigning federal observers to state and local elections thereby better enabling the Department of Justice to identify and investigate voting discrimination claims.[190]

*4. The VRAA reduces the burden of proof on a plaintiff seeking to obtain a preliminary injunction to prevent enforcement of new restrictions*

The VRAA reduces the burden for obtaining preliminary injunctive relief in two ways.[191] First, it creates a private cause of action that "the aggrieved person or (in the name of the United States) the Attorney General may institute."[192] Under the Voting Rights Act of 1965, only the Attorney General could bring a civil action for preventive relief.[193] By creating a private cause of action, the VRAA allows private individuals to seek preventive relief before a voting rights violation occurs. This allows interested parties to vindicate rights even if the Attorney General declines to act on a particular matter.

Second, the VRAA reduces the burden faced by private individuals seeking preliminary injunctive relief[194] by modifying the traditional four-factor test for injunctive relief.[195] The VRAA provides that "the court shall grant the [injunctive] relief if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted."[196] Under the proposed VRAA standard, any court considering a request for preventative relief would grant the request on a simple balance of harms analysis.

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[189] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 5(a) (2014).

[190] *Id.* § 5(b).

[191] *Compare* 42 U.S.C. § 1973j(d) (2006) (current version at 52 U.S.C.A. § 10308(d) (West 2014)), *with* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 6(a)(2) (2014).

[192] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 6(a)(2) (2014).

[193] *See* 42 U.S.C. § 1973j(d) (2006) (current version at 52 U.S.C.A. § 10308(d) (West 2014)).

[194] *See id.*

[195] *See, e.g.*, Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (under applicable case law, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest").

[196] H.R. 3899 § 6(b)(4).

Together, these changes complement the VRAA coverage formula by strengthening the bail-in provision and allowing broader case-by-case application of the preclearance requirement by enhancing the prospects of success on such claims.[197] Through enhanced transparency, the VRAA mitigates the adverse effects of changes in voting laws by requiring reasonable notice to voters.[198] Furthermore, the VRAA better positions the Attorney General to enforce federal voting laws through greater use of federal observers.[199] Finally, the VRAA expands standing to prevent voting rights violations before they occur and makes obtaining preliminary injunctive relief more attainable.[200] While the VRAA, like all proposed legislation, remains untested, there can be little doubt that the new coverage formula, working in tandem with the additional provisions, will better protect the rights of American voters than individually litigated Fourteenth and Fifteenth Amendment cases.

### *C. A Better "Fit"—But Problems Remain with the VRAA*

#### *1. The persistent problem of over and under inclusivity*

The VRAA, like its predecessor, suffers from a problem of over and under inclusivity.[201] Admittedly, the issue of inclusivity is one of degree,[202] but the VRAA formula is far closer to the ever elusive perfect "fit" than its predecessor.[203] It is important to note that the over-under inclusive analysis will ultimately depend on the goals of preclearance and the coverage formula. In other words, if the goal is to prevent all voting rights violations, then preclearance should apply to all jurisdictions. Although specific application might be over-inclusive, the final determination would be a "perfect fit" because the Attorney General individually tailors specific objections.[204] On the other hand, if the goal is to prevent only repeated and systematic discrimination, then a better "fit" would require tailoring a formula that allows the occasional or inadvertent offender to escape

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[197] *See id.* § 2(a).
[198] *See id.* § 6(a)(1).
[199] *See id.* § 5(a).
[200] *See id.* § 6(a)(2).
[201] A "law is underinclusive, because some [states or political subdivisions] pose the harm yet are not burdened" by preclearance. Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 465 (1989). A law is "overinclusive, because many who are burdened do not pose the harm." *Id.*
[202] *See, e.g.*, Note, *supra* note 4.
[203] *Compare* 42 U.S.C.A. § 1973a(c) (2006) *with* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 2(a) (2014).
[204] H.R. 3899, 113th Cong. § 3(a)(1) (proposed as 3(b)(5)(c).

preclearance, answering for the violation on a case-by-case basis in the courts—this appears to have been the legislative objective behind both the Voting Rights Act of 1965 and the VRAA.

The VRAA substantially improves the over-inclusivity problem at the State level. For example, the original Section 4 coverage formula included South Carolina in its entirety.[205] South Carolina has forty-six counties.[206] In South Carolina, there are fourteen counties with three or more voting rights violations between 1982 and 2004.[207] Only one county had five violations in the twenty-two-year period Congress studied.[208] There are eighteen counties in South Carolina with one or two violations and fourteen counties with no violations in that twenty-two-year period.[209] There can be no serious contention that the original coverage formula was not over-inclusive, at least in respect to the fourteen counties with no violations and possibly with respect to the eighteen counties with only one or two violations in a twenty-two-year period. Under the VRAA, South Carolina would not be "covered" as a state,[210] but it is likely that coverage would attach to many of its counties based on either three or more violations in the past fifteen years or one violation coupled with "persistent, extremely low minority turnout."[211]

Conceivably, the VRAA coverage formula does far more to remedy the over-inclusivity problem than it does to address the issue of under-inclusivity. The original coverage formula under Section 4 developed a significant under-inclusivity problem as well,[212] particularly with regard to its protection of Asian, Hispanic, and language-minority voters.[213] Ultimately, the degree of VRAA improvements to the under-inclusivity

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[205] U.S. DEP'T OF JUSTICE, *supra* note 82.

[206] South Carolina State Library, *South Carolina Information: SC Counties*, http://statelibrary.sc.libguides.com/sc-information/sc-counties (last updated Oct. 17, 2014).

[207] *See* H.R. REP. NO. 109-478, at 79 (2006) (calculated by author).

[208] *See id.* Notably, under the VRAA's new coverage formula, if the violations of each county were evenly distributed across the twenty-two year period for which data was compiled, only the county with five violations would be covered absent "persistent, extremely low minority turnout" because South Carolina is not credited with a statewide violation. *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014); *see also* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 2(a) (2014) (modifying the bail-in provision allowing a case-by-case application of preclearance following a judicial determination and thus reducing the overall under-inclusivity of the VRAA).

[209] *See* H.R. REP. NO. 109-478, at 79 (2006) (calculated by author).

[210] *See* Berman II, *supra* note 168.

[211] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).

[212] *See* 42 U.S.C. § 1973b (2006), *invalidated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (current version at 52 U.S.C.A. § 10303(b) (West 2014)).

[213] *See* S. REP. NO. 109-295, at 96-98 (2006).

problem will depend on the timing of recent voting rights violations in each political subdivision.[214] But over time, courts can remedy any established under-inclusivity problem through the improved bail-in provision or ordinary case-by-case judgments—more easily proved under the VRAA.[215] Although some degree of over-under inclusivity will always affect far-reaching legislation like the Voting Rights Act of 1965, inclusivity is undoubtedly less problematic under the VRAA because of its many tailoring provisions.

#### 2. *The voter identification (voter ID) quagmire*

A potentially troublesome loophole in the VRAA coverage formula is the specific exception Congress provided for voter ID laws that otherwise might violate voting rights.[216] Under this exception, the Attorney General's determination that a particular voter ID law violates the Fourteenth or Fifteenth Amendments cannot serve as a basis on which to extend the period of coverage once attached.[217] This voter ID exception affects two sections of the VRAA, specifically the bail-in amendment[218] and the interposed objection by the Attorney General.[219] Though the popular press has made much of this exception as a significant loophole in the VRAA,[220] its effect is to prevent the Attorney General and the federal courts adjudicating bail-in cases from using voter ID laws as a backdoor method of extending coverage under the VRAA.

In effect, the voter ID exceptions only limit findings of violations when the decision to extend coverage under the VRAA is susceptible to significant discretionary authority. On the other hand, when a court issues a final judgment and determines that a voter ID law actually violated an individual's voting rights, that violation can serve as a basis for attaching coverage in the affected jurisdiction, provided that the court issuing the judgment is not attempting to use it as a basis to retain its own jurisdiction under the bail-in provision.[221] While the voter ID exception carves out a narrow loophole in the broad bail-in powers of the federal courts and the Attorney General's basis for interposing objections once preclearance attaches, the effect on the protective scheme is likely to be negligible. In

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[214] *See* H.R. 3899 § 3(a)(1).
[215] *See id.* § 2(a).
[216] *See id.* § 2-3.
[217] *See id.*
[218] *See id.* § 2(a).
[219] *See id.* § 3(a)(1).
[220] *See, e.g.*, Berman II, *supra* note 168.
[221] *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).

fact, even if the Attorney General objects to a voter ID law, and subsequently cannot use it as a basis to extend coverage, if the state unsuccessfully appeals the objection, the resulting final judgment would allow the Attorney General to use the violation as a basis for extending coverage.[222] In other words, when the Attorney General objects to a new voter ID law in a jurisdiction in which coverage has already attached, the jurisdiction faces a Catch-22 situation[223]—either it can submit to the objection and never enforce the voter ID requirement,[224] or it can "institute an action in the United States District Court for the District of Columbia."[225] If it loses in that court, however, the final judgment will have the effect of a bonafide violation,[226] thereby extending coverage to ten years from the date of that judgment.[227]

### 3. *The violation threshold obstacle*

The violation threshold—that is, the requirement that a state accrue five violations or that a political subdivision accrue three violations before coverage can attach—could severely undermine the coverage formula. Undoubtedly, some threshold is necessary to preserve flexibility and to avoid universal attachment of coverage, unless the underlying legislative objectives have changed.[228] However, the question that inevitably arises is "how high should that threshold be?" This question is particularly important in light of the fact that states and political subdivisions, as well as "local institutions, rules, and cultures differ considerably."[229] Likewise, an alternative approach is to extend the rolling period over which the Attorney General tracks violations. In any case, the severity of the threshold problem appears to rest on county-by-county statistics and thus will remain vulnerable to the changing characteristics of each political subdivision.

## IV. CONSTITUTIONAL ANALYSIS OF H.R. 3899

In this section I examine the constitutionality of the VRAA through the framework utilized by the Supreme Court in the *Shelby* decision. I briefly

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[222] *See id.* § 3(a)(1).

[223] A "Catch-22" is a paradox of sorts, where conflicting rules prevent a favorable outcome regardless of the choice one makes.

[224] 42 U.S.C. § 1973c (2006) (current version at 52 U.S.C.A. § 10304 (West 2014)).

[225] 42 U.S.C. § 1973c(a) (2006) (current version at 52 U.S.C.A. § 10304 (West 2014)).

[226] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).

[227] *Id.*

[228] *See supra* Part II.C.1 (discussing the problem of over- and under-inclusivity).

[229] PRESIDENTIAL COMMISSION, *supra* note 117, at 9.

discuss the federalism and equal-sovereignty concerns emphasized by the Supreme Court before focusing on the VRAA through the lens of rational review as applied in *Shelby*.

### *A. Federalism Limits Congressional Power in Determining the Scope of Preclearance—Not Congressional Discretion in Deciding When and Where to Exercise the Full Power of the Federal Government*

No one can reasonably dispute that federalism was an important factor the Supreme Court considered in its *Shelby* decision.[230] Federalism is particularly important in the area of federal voting rights legislation because "[s]tates have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised."[231] However, federalism did not compel the *Shelby* decision.[232] If universal application of preclearance to all states was at issue in *Shelby*, then one might reasonably assert that federalism was the basis of that decision.[233] Instead, the Supreme Court upheld the Section 5 preclearance requirement with federalism implications,[234] adhering to the principle, established in *South Carolina v. Katzenbach*,[235] that "exceptional conditions can justify legislative measures not otherwise appropriate."[236] In upholding the preclearance remedy, the Supreme Court appeared to recognize that second-generation voting barriers, like language, present the sort of "[d]ifficult and intractable problems [that] often require powerful remedies."[237]

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[230] *See, e.g.*, Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2618 (2013) (discussing section 5 of the Voting Rights Act of 1965 as "a drastic departure from basic principles of federalism").

[231] Carrington v. Rash, 380 U.S. 89, 91 (1965) (citation omitted).

[232] The Supreme Court emphasized federalism costs only in respect to Section 5 of the Voting Rights Act of 1965. *Shelby*, 133 S. Ct. at 2621. *See also* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) (discussing Section 5 as "authoriz[ing] federal intrusion into sensitive areas of state and local policymaking, impos[ing] substantial 'federalism costs'"). In *Shelby*, the Supreme Court issued no ruling on Section 5 of the Voting Rights Act, instead limiting its decision to ruling "§ 4(b) unconstitutional." *Shelby*, 133 S. Ct. at 2631.

[233] The Supreme Court noted that broadening "§ 5 coverage would 'exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality.'" *Shelby*, 133 S. Ct. at 2627 (quoting Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000)).

[234] *Id.* at 2631.

[235] 383 U.S. 301 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[236] *Shelby*, 133 S. Ct. at 2618 (quoting *Katzenbach*, 383 U.S. at 309).

[237] Tennessee v. Lane, 541 U.S. 509, 524 (2004) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000)).

Although the effect of the *Shelby* decision was to undercut the effectiveness of Section 5 by rendering it inapplicable to any jurisdiction, that decision only ruled "§ 4(b) unconstitutional."[238] The practical effect of rendering preclearance inapplicable only results by operation of law. In other words, the unconstitutionality of the Section 4(b) coverage formula legally foreclosed any possible application of the Section 5 preclearance requirement despite the fact that Section 5 remains fully enforceable federal law under *Shelby*.[239]

The Supreme Court did not decide the unconstitutionality of Section 4(b), the coverage formula, on federalism principles. That decision results from the requirement that the formula be "rational in both practice and theory."[240] Nonetheless, federalism continues to be a weighty concern both in this context and more generally in American jurisprudence because "[it] was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each *protected* from incursion by the other."[241] While federalism provides important context for the *Shelby* decision, it is not the basis of the decision to overrule Section 4(b). Accordingly, while the VRAA's proposed coverage formula may revive federalism concerns as they pertain to Section 5, the VRAA cannot possibly offend federalism principles not already offended at the time *Shelby* was decided. It remains possible under *Shelby*, however, that the VRAA may compel the Supreme Court to confront the issue of the constitutionality of preclearance more directly. This issue was left open by the *Shelby* decision to "issue no holding on § 5 itself."[242] It is entirely conceivable that principles of federalism would give the Supreme Court sufficient grounds to "find § 5 of the Voting Rights Act unconstitutional."[243] However, any such decision would require overruling *City of Rome v. United States*,[244] where the Supreme Court upheld Section 5 "against the reserved powers of the States."[245] While overruling *Rome* would seriously undermine the objectives of the VRAA, it has no direct

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238 *Shelby*, 133 S. Ct. at 2631.

239 42 U.S.C. § 1973c (2006) (current version at 52 U.S.C.A. § 10302(c) (West 2014).

240 *Shelby*, 133 S. Ct. at 2627 (quoting *Katzenbach*, 383 U.S. at 330).

241 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (emphasis added).

242 *Shelby*, 133 S. Ct. at 2631.

243 *Id.* (Thomas, J., concurring).

244 446 U.S. 156 (1980), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

245 *Id.* at 178 (quoting *Katzenbach*, 383 U.S. at 324 (1906), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013)).

effect on the constitutionality of the provisions actually proposed in the VRAA.

### *B. Equal Sovereignty Does Not Bar Congress from Distinguishing Between States Provided There Is a Rational Basis for the Distinction*

The Supreme Court also discussed the principle of equal sovereignty as a substantial concern underlying its *Shelby* decision.[246] Equal sovereignty, as applied by the Supreme Court in *Shelby*, "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[247] One potential remedy to the equal sovereignty problem would be to universally apply preclearance to all states. As previously discussed, however, the Supreme Court would likely hold such an application unconstitutional based on the federalism implications clearly expressed within the *Shelby* decision.

The coverage formula, whether under the original Voting Rights Act of 1965 or the VRAA, does have direct implications for equal sovereignty.[248] It is obvious that the VRAA's proposed coverage formula continues to distinguish between states.[249] Nonetheless, the VRAA coverage formula targets a much more widespread, albeit less obvious, form of voting discrimination.[250] Additionally, the geographic coverage of the VRAA coverage formula is limited to those states and political subdivisions that have an unusually high rate of voting rights violations in *recent* election cycles.[251] By targeting modern forms of voting rights violations[252] and by limiting geographic coverage to those jurisdictions that have heightened rates of recent voting rights violations,[253] the VRAA coverage formula

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[246] *See Shelby*, 133 S. Ct. at 2616.

[247] *Id.* (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

[248] *See, e.g.*, *id.* at 2624 (discussing the equal sovereignty implications that result from applying preclearance against only nine states, under the Section 4 coverage formula, as compared to unburdened legislative process in states that are not covered by Section 4).

[249] *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014).

[250] The VRAA is refined to target the so-called "second generation" barriers to voting. For example, the VRAA takes substantial steps to remedy discrimination against language-minority groups. *See generally* S. REP. NO. 109-295 (2006); H.R. REP. NO. 109-478, at 21 (2006).

[251] *See* H.R. 3899 § 3(a)(1).

[252] *See, e.g.*, H.R. 3899 § 2 (expanding the basis of violations to include violations of the Voting Rights Act of 1965, thus allowing the violations invoking coverage to be based on discrimination against language-minority groups).

[253] *See, e.g.*, H.R. 3899 § 3(a)(1) (requiring five violations in a rolling fifteen-year window before extending coverage to states and three violations in the same rolling fifteen-year window before extending coverage to political subdivisions in certain cases).

should satisfy the equal sovereignty requirement that "geographic coverage" be "sufficiently related to the problem that it targets."[254]

However, Congress is targeting more than violations of the Fourteenth and Fifteenth Amendments.[255] By including violations of the Voting Rights Act of 1965 and "any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language-minority group"[256] as a basis for attaching coverage under the VRAA, Congress clearly intends to target not only "impediments to the casting of ballots,"[257] but also the "'second-generation barriers,' . . . affect[ing] the weight of minority votes."[258] Congress has in effect recognized that, much like the English literacy tests of generations past, English-only ballots, poll worker assistance, and voting directions can be and often are used as proxies for race by providing English speakers a relative advantage in accessing the ballot box.[259] Accordingly, by using the existence of recent voting rights violations as the basis for treating different jurisdictions differently,[260] Congress fully satisfies its constitutional mandate that "'disparate geographic coverage' . . . be 'sufficiently related' to its targeted problems."[261]

### *1. Congress may utilize prophylactic remedial legislation to proscribe state action not otherwise unconstitutional*

In endeavoring to craft a better fit, Congress has undeniably proscribed state action that is not, itself, prohibited by the Fourteenth or Fifteenth Amendments. Thus, the VRAA inevitably raises the issue of whether Congress has exceeded the scope of its enforcement powers. However, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[262] In particular, the inquiry into Congressional enforcement power requires a

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[254] *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2616 (2013) (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

[255] *See* H.R. 3899 § 2.

[256] *Id.* § 2(b).

[257] *Shelby*, 133 S. Ct. at 2629.

[258] *Id.*

[259] *See* H.R. 3899 § 2.

[260] *See id.* § 3(a).

[261] *Shelby*, 133 S. Ct. at 2630.

[262] City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

finding of both state action[263] and sufficient "congruence and proportionality."[264] In the case of discrimination against language-minority groups, the state acts by conducting elections, providing only English polling instructions, and, as a result, providing more *effective* voting assistance to English speaking voters. Such factors readily support a finding of sufficient state action to bring this conduct within the broad sweep of the Fourteenth and Fifteenth Amendments and Congress' enforcement power.[265]

### 2. *Appropriateness, congruence, and proportionality of congressional action in passing the VRAA*

The congruence and proportionality analysis begins with recognizing that "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[266] In *Boerne*, the Supreme Court explained that the scope of Congress' enforcement power includes "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain,"[267] and "if not prohibited, is brought within the domain of congressional power."[268] While *Shelby* discussed appropriateness in the context of the "power to enforce [the Fifteenth Amendment] by appropriate legislation,"[269] the Supreme Court determined the appropriateness of the legislative fit, rather than the appropriateness of congressional power in relation to the Fourteenth or Fifteenth Amendments[270]—the proper focus of appropriateness analysis under the enforcement powers.[271] In other words, the Supreme Court used the term "appropriate" generically as distinguished from its use as a term of art in the context of the enforcement powers.[272]

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[263] *See* Palmer v. Thompson, 403 U.S. 217, 225-26 (1971).

[264] *Boerne*, 521 U.S. at 520.

[265] *See, e.g.*, Griffin v. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218, 231 (1964) (discussing state action in the form of assistance provided to white private schools after closing all public schools following an order to desegregate); *see also Palmer*, 403 U.S. at 225 (distinguishing *Griffin* on the basis of state action).

[266] *Boerne*, 521 U.S. at 519.

[267] *Id.* at 517 (quoting Ex Parte Virginia, 100 U.S. 339, 345-46 (1879)).

[268] *Id.* at 517-18.

[269] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2619 (2013) (citing U.S. CONST. amend. XV).

[270] *See generally id.* at 2629-36.

[271] *See Boerne*, 521 U.S. at 517-19.

[272] In recognizing "that exceptional conditions can justify legislative measures not

This analysis supports the view that the Supreme Court decided *Shelby* on the rationality of the coverage formula, not principles of federalism.[273] The controlling standard in enforcement power cases provides that the power sought is only appropriate if it is "an enactment to enforce"[274] a substantive provision of the Fourteenth or Fifteenth Amendment, the legislation is "readily seen as 'plainly adapted' to furthering"[275] the Amendment's aims, and the means selected "are consistent 'with the letter and spirit of the [C]onstitution.'"[276] It is beyond reproach that the Fifteenth Amendment clearly aims to prevent denial or abridgment of the right to vote.[277] In its most basic form, the VRAA is plainly adapted to further prevention of the denial or abridgment of the right to vote.[278] However, Congress's enforcement power "is limited to adopting measures to enforce the guarantees of the Amendment . . . [and] Congress [has] no power to restrict, abrogate, or dilute these guarantees."[279] Scholars commonly refer to this directional limitation on Congressional discretion under the enforcement power as the "One-Way Ratchet Theory"[280] whereby Congress can act to *expand protection* for substantive rights and, in so doing, incidentally protect matters beyond the scope of the substantive rights on which the enforcement powers are based.[281]

The text of the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or *abridged*"[282] and that "Congress shall have power to enforce this article by *appropriate* legislation."[283] The term abridged means "to reduce or diminish."[284] The textual language of the Fifteenth Amendment supports a meaning consistent with the One-Way Ratchet Theory. In addition, the Supreme Court has

otherwise appropriate," *Shelby*, 133 S. Ct. at 2618, the Supreme Court cited a line of cases generically using the term "appropriate" in rational review analysis. *See, e.g.*, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934) (determining whether a State law "is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end").

[273] *See, e.g.*, *Shelby*, 133 S. Ct. at 2630-31 (stating that "[i]t would have been irrational for Congress to distinguish between States").

[274] Katzenbach v. Morgan, 384 U.S. 641, 652 (1966).

[275] *Id.*

[276] *Id.* at 656.

[277] U.S. CONST. amend. XV, § 1.

[278] *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 2 (2014).

[279] Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

[280] Rachel Toker, *Tying the Hands of Congress City of Boerne v. Flores, 117 S. Ct. 2157 (1997)*, 33 HARV. C.R.-C.L. L. REV. 273, 286 (1998).

[281] *Katzenbach*, 384 U.S. at 651 n.10 (1966).

[282] U.S. CONST. amend. XV, § 1 (emphasis added).

[283] *Id.* at § 2 (emphasis added).

[284] BLACK'S LAW DICTIONARY (9th ed. 2009).

consistently held that the enforcement power "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[285] The VRAA coverage formula is congruent because its effect is limited to preventing a denial or abridgement of the right to vote effectively based on language as a proxy of race.

While any judicial endeavor into defining the full scope of the right to vote would be controversial,[286] resolution of that question is unnecessary in deciding the constitutionality of the VRAA. Assuming, arguendo, that "States have 'broad powers to determine the conditions under which the right of suffrage may be exercised,'"[287] the Supreme Court need look no further than the right to vote as it existed before the law at issue in a particular case and jurisdiction was enacted. Doing so will enable the Court to determine whether the right to vote has been abridged. In other words, even under a narrow construction, the Fifteenth Amendment, at the very least, protects the right to vote as defined by the states against later abridgement by those same states.[288] It protects voters against both the denial of the substantive right, as yet undefined by the Supreme Court, and against the later abridgment of the right to vote as it previously existed—determined by the states.[289]

In addition, the VRAA coverage formula also satisfies the proportionality requirement by limiting attachment to jurisdictions with multiple violations in recent years, subject to judicial review and bailout.[290] Therefore, despite the reasonably prophylactic remedial qualities of the VRAA, principles of equal sovereignty do not render the law unconstitutional.[291] Accordingly, the VRAA would be clearly appropriate legislation under Congress'

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[285] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727 (2003) (quoting Bd. Of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 365 (2001)); *see also* Tennessee v. Lane, 541 U.S. 509, 523 (2004) (explaining that "§ 5 authorizes Congress to enact reasonably prophylactic remedial legislation").

[286] *See supra* note 76 (discussing the difficulty of any Supreme Court attempt to define the full scope of the right to vote).

[287] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2623 (2013) (quoting Carrington v. Rash, 380 U.S. 89, 91 (1965)).

[288] *See* Toker, *supra* note 280.

[289] *Id.*

[290] *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3 (2014).

[291] Because the VRAA extends coverage based on voting rights violations only if they are recently perpetrated and the duration of coverage is limited to ten years unless an additional, more recent, violation occur in the interim, there are substantial and timely justifications for any resulting differences in the treatment of the covered and non-covered jurisdictions. Beyond that, by declining to extend coverage unless the state, as distinguished from its political subdivisions, is responsible for a voting violation, the VRAA's provisions further buttress the argument for dissimilar treatment. *See supra* Part III.A.

Fourteenth and Fifteenth Amendment enforcement powers and only subject to attack if clearly irrational.

### *C. Rational Review: The Way Ahead and Implications for the Future*

Generally, in the absence of a suspect classification or the infringement of a fundamental right, a statute will be upheld as long as the "statute is rationally related to a legitimate state interest."[292] Furthermore, the rational review standard controls even in the case of "a law that deprives a person of the right to vote."[293] The rational review standard provides a distinct two-prong test. First, there must be a "legitimate state interest."[294] A bare "desire to harm a politically unpopular group,"[295] an "irrational prejudice,"[296] or "animosity toward the class of persons affected"[297] fails to satisfy the legitimate state interest standard even under rational review. Rational review's second prong requires a showing that the law is "rationally related"[298] to the identifiable legitimate state interest. Under this standard, "[i]t is enough that . . . it might be thought that the particular legislative measure was a rational way to correct it."[299]

#### *1. Congress has an unquestionably legitimate purpose in effectuating the constitutional prohibition of racial discrimination in voting*

No one can reasonably question the legitimacy of Congress's purpose in enacting the Voting Rights Act of 1965. At the time, the nation faced "'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination"[300] in voting. The Supreme Court quickly recognized the fundamental principle that "[a]s against the reserved powers of the States, Congress may use *any* rational means to effectuate the constitutional prohibition of racial discrimination in voting."[301] The Supreme Court embraced that principle based on the "language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of

[292] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).
[293] *Id.* at 452.
[294] *Id.* at 440.
[295] United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973)).
[296] *Cleburne*, 473 U.S. at 450.
[297] Romer v. Evans, 517 U.S. 620, 634 (1996).
[298] *Cleburne*, 473 U.S. at 440.
[299] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).
[300] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 (2013).
[301] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

constitutional interpretation."[302] In *South Carolina v. Katzenbach*, the Supreme Court accepted the Congressional purpose of effectuating the constitutional prohibition of racial discrimination in voting as a legitimate purpose.[303] Where Congress recognizes the widespread use of language as a proxy for race,[304] prohibiting racial discrimination in voting by enacting protections for language-minority groups remains as legitimate a purpose today as it was in 1965.[305]

Under the VRAA, much like under the Voting Rights Act of 1965, it would be inconceivable for the Supreme Court to find no legitimate Congressional purpose when it so clearly embraces the constitutional prohibition of racial discrimination in voting.[306] Accordingly, it is unlikely that the VRAA would be susceptible to constitutional challenge on the grounds that Congress acted for an illegitimate or impermissible purpose. While the Supreme Court may recognize an alternate purpose for the Voting Rights Act of 1965, as it did in *Shelby*, by reframing the purpose of the Fifteenth Amendment as to "ensure a better future"[307]—and by inference that the purpose of the Voting Rights Act of 1965 was to ensure a better future—the law must be upheld so long as "any legitimate government purpose"[308] currently exists. Accordingly, if the Supreme Court strikes down the VRAA using a rational review standard, the decision will not be for want of a legitimate purpose.

*2. Enforcing the constitutional prohibition of racial discrimination in voting and the VRAA coverage formula are rationally related*

The last remaining hurdle to the constitutionality of a replacement coverage formula is the requirement that Congress act on a rational basis.[309] At the heart of this rational basis requirement is the notion that "Congress

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[302] *Id.*

[303] *See id.* at 328.

[304] *See supra* Part IV.C (discussing Congress' expanded objective under the VRAA by protecting language-minority voters).

[305] The legitimate purpose as recognized in *Katzenbach* is sufficiently broad as to apply to subsequent reenactments of the Voting Rights Act of 1965. The purpose of a constitutional prohibition of racial discrimination in voting does not even approach the desire to harm, irrational prejudice, or animus that would render a legislative purpose illegitimate. *See, e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (discussing irrational prejudice as illegitimate).

[306] *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014).

[307] *Shelby*, 133 S. Ct. at 2629.

[308] Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 455 (1988).

[309] *See supra* notes 22-24 (discussing the three principle restraints offered by the Supreme Court as limitations on Congressional power to enact a coverage formula).

has to have some rational basis"[310] for the laws it passes. In other words, the fundamental proposition of the *Shelby* decision is "the need for Congress to readjust"[311] the coverage formula. Congress, through the VRAA, can readjust the aim of the Voting Rights Act of 1965 by targeting violations of "any Federal voting rights law"[312] in addition to violations of the Fourteenth and Fifteenth Amendments.[313] Moreover, Congress readjusted its coverage formula under the VRAA to extend coverage only to those jurisdictions with a sufficiently high number of voting rights violations within a rolling fifteen-year window.[314] These adjustments will likely provide the rational relationship essential to upholding the constitutionality of the coverage formula.

By expanding the aim of the coverage formula, Congress shores up the grounds for finding a rational basis. Under the original coverage formula declared unconstitutional in *Shelby*, the aim simply was to prevent "violations of the [F]ourteenth or [F]ifteenth amendment."[315] Although one may view the adjusted aim under the VRAA as actually being broader—because in addition to violation of the Fourteenth and Fifteenth Amendments, it also includes violations of federal voting rights laws—the broader aim also buttresses the rational relationship for coverage under the VRAA by reducing the problem of under-inclusivity of jurisdictions based on contemporary forms of voting discrimination.[316] Under-inclusivity is an important indicator because "[a]s the degree of underinclusivity becomes greater, so does the likelihood that the real legislative objective is discriminatory or illegitimate."[317] Thus, by reducing the degree of under-inclusivity, Congress has enhanced the likelihood that the Supreme Court will find that some rational basis exists for the VRAA.

Though one might challenge the expanded aims of the VRAA as exceeding the scope of Congress' enforcement power under the Fourteenth and Fifteenth Amendments, such an argument is without merit.[318] Notably, to limit the "enforcement power granted in one of the Civil War

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[310] Justice Antonin Scalia, Presentation to Law Students at the University of Hawai'i William S. Richardson School of Law (Feb. 3, 2014).

[311] *Id.*

[312] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 2(b) (2014).

[313] *Id.*

[314] *See id.* § 3(a).

[315] 42 U.S.C. § 1973a(c) (2006) (current version at 52 U.S.C.A. § 10302(c) (West 2014)).

[316] *See, e.g.*, H.R. REP. NO. 109-478, at 21 (2006) (discussing the rising prevalence of voting discrimination against language-minority groups).

[317] Note, *supra* note 4, at 1664 n.38.

[318] *See supra* Part IV.B.1-2 (discussing the well-settled principle that Congress may implement prophylactic remedial legislation as appropriate under the congruence and proportionality test).

amendments would be wholly inconsistent with the spirit of the times and the specific purpose to provide for Congressional protection of the rights of . . . citizens. It would be at war with our entire constitutional history."[319] The enforcement power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[320]

Congress narrowed VRAA applicability by providing a minimum threshold number of violations that must occur before coverage attaches.[321] The narrow coverage formula guards against over-inclusion by providing a tighter means-ends fit.[322] Congress also limited coverage by imposing time requirements for violations.[323] By reducing over-inclusion, Congress undoubtedly bolstered the rational relationship between the coverage formula and its legitimate aims.

Although, "[u]nder the rational basis test, probably no amount of overinclusion or underinclusion is too much,"[324] inclusivity analysis does provide a useful metric for evaluating the relationship between a legitimate governmental interest and the legislative means selected to advance that interest.[325] In the case of the VRAA, Congressional adjustments to broaden the aim of the coverage formula[326] and narrow the breadth of coverage[327] tend to demonstrate a strong rational relationship between the proposed VRAA coverage formula and the legitimate governmental purpose of effectuating the constitutional prohibition of racial discrimination in voting.[328] These adjustments to the aim and application of the coverage formula provide for an adequate basis that "makes sense in light of current conditions."[329] Furthermore, no one can seriously contend that the

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[319] Brief for Defendant at 33-34, South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[320] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824); *see also Katzenbach*, 383 U.S. at 324 (1966).

[321] *See, e.g.*, Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3(a)(1) (2014) (discussing the minimum voting rights violation requirements for coverage to attach to a political subdivision).

[322] *See id.*

[323] *See id.*

[324] Simons, *supra* note 201, at 478.

[325] Concerns about over-inclusivity appear to underlie the Supreme Court's finding that it is "irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time." Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

[326] *See* H.R. 3899 § 2(b).

[327] *See, e.g.*, *id.* § 3(a)(1) (discussing the minimum voting rights violation requirements for coverage to attach to a political subdivision).

[328] *See* South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[329] *Shelby*, 133 S. Ct. at 2629.

proposed coverage formula, under the VRAA, has "no logical relation to the present day"[330]—a central claim offered as a basis for holding Section 4 of the Voting Rights Act of 1965 unconstitutional in the *Shelby* decision.[331]

A rational relationship merely requires that a particular legislative measure "might be thought"[332] to be a rational means to obtain a legitimate state interest.[333] Where there is a "legitimate state interest"[334] and the law in question is "rationally related"[335] to that interest, it will be upheld.[336] To that end, it is likely that the proposed VRAA coverage formula would satisfy rational review and the Supreme Court would uphold it despite any contrary inference from the *Shelby* decision.

### 3. *Rational Review, Deference, and Stealth Decision Making*

The Supreme Court sometimes makes decisions that fall at the "margins of the black-letter doctrine"[337] and that one might characterize as a "stealth determination[]."[338] These decisions may involve "constru[ing] a question at a broad or narrow level of generality . . . [or] a challenge as facial or as-applied."[339] Among the categories of stealth decisions is the determination of when to exercise judicial deference—a determination that "pretend[s] to be law-like but in important ways lack the predictability, transparency, and rigor generally associated with law."[340] There are two fundamental deference theories—doctrinal and institutional—that may influence any future Supreme Court decision on the constitutionality of the VRAA.[341]

Doctrinal deference results from the substantive analysis that leads to the application of rational review.[342] Ordinarily, one might assume that if the appropriate tier of scrutiny is rational review, doctrinal deference will compel the Supreme Court to uphold the legislative act—and, alternatively, that the application of strict scrutiny is the equivalent of no judicial deference at all. Yet deference determinations may be either doctrinal or

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[330] *Id.* at 2629.

[331] *See id.*

[332] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

[333] *See id.*

[334] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[335] *Id.*

[336] *See id.*

[337] Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 496 (2013).

[338] *Id.*

[339] *Id.* at 496-97.

[340] *Id.* at 494.

[341] *See generally id.*

[342] *See id.* at 468.

institutional.[343] Institutional deference can be summed up as a determination that the relevant "political actor's characteristics and behavior deserve presumptive respect from the judiciary."[344] These two theories of deference determination are distinct and independent, but they sometimes overlap.[345] I posit that the degree of judicial deference is greatest when both doctrinal and institutional deference support that conclusion. In the alternative, where the two theories of deference overlap with conflicting results, the outcome may appear anomalous to outsiders.

This anomaly may explain the *Shelby* decision and may afford critical insight into any future Supreme Court ruling on the VRAA. In *Shelby*, the Supreme Court purported to apply the rational review tier of scrutiny[346] or, in other words, doctrinal deference. Yet the Supreme Court also expressed substantial skepticism in highlighting what it described as the "more fundamental problem"[347] of Congress's failure to "use the record it compiled to shape a coverage formula grounded in current conditions."[348] This line of reasoning suggests a determination of no institutional deference to Congressional action, based on a genuine distrust of the legislative process in deciding to reenact the Voting Rights Act of 1965. While these "stealth determinations"[349] remain at the "margins of the black-letter doctrine,"[350] awareness of the issue can shed light on the decision making process of the Supreme Court as it arrives at a decision seemingly at odds with the requirement that legislative means be "a rational way"[351] to obtain a legitimate state interest.

## V. CONCLUSION

On July 4, 1776, our Founding Fathers endeavored to undertake what would later become known as the Great Experiment. Their zeal and their use of language would see them through the tumultuous times that lay between the birth of a nation and the realization of its promise. Today, the nation is at a critical juncture and the stakes could not be higher. While the obstacles to progress are far more diverse and substantial than the remaining barriers to voting rights, Congress must seize this opportunity to

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343 *See id.* at 492.
344 *Id.*
345 *Id.*
346 *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2628 (2013).
347 *Id.* at 2629.
348 *Id.*
349 Berger, *supra* note 337, at 496.
350 *Id.*
351 Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

ensure the right of suffrage for all Americans because "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws."[352] Voting discrimination, though more difficult to trace, remains prevalent in many parts of the country despite the tremendous progress made in the arena of civil rights.

When the Supreme Court struck down the coverage formula in *Shelby*, civil rights advocates lost an important tool in the fight to ensure representative government. The VRAA represents the promise that all Americans will have a voice in our elections. Understandably, there are many obstacles between drafting the VRAA and fully implementing its provisions, but the experience of our Founding Fathers demonstrates that progress is possible, "one step at a time."[353] The VRAA provides a powerful tool for ensuring ballot access for all Americans. The coverage formula is consistent with our historic tradition of federalism. Under the VRAA, the coverage formula bases any disparate treatment of states or political subdivisions on contemporary conditions, and those differences remain in effect for limited periods of time. Although some criticize the *Shelby* decision as disingenuous, passage of the VRAA would frame that decision as an example of cunning zeal. Furthermore, despite the Supreme Court's retention of substantial flexibility in deference decisions, if Congress is diligent in the drafting process, as it appears to have been, there should be no basis for withholding institutional deference. Accordingly, I posit that the Supreme Court would uphold the VRAA as constitutional, even under the rational review standard as applied in *Shelby*. Together, *Shelby* and the VRAA will strengthen voting rights for all Americans, whereas the Voting Rights Act of 1965 secured the franchise for those in only the most hostile jurisdictions.

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[352] Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

[353] *Lee Optical*, 348 U.S. at 489.

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