IMPLICIT BIAS EVIDENCE: A COMPENDIUM OF CASES AND ADMISSIBILITY MODEL

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ABSTRACT

Implicit bias theory suggests a person's thoughts and actions are influenced by subconscious racist tendencies. While this is hardly a novel concept, its popularity and celebrity have skyrocketed in recent years—attributable in no small part to the so-called Implicit Association Test (IAT) which is available online.

Scholars and scientists have questioned the validity of the IAT, as well as its ability to measure discriminatory thoughts and to predict discriminatory behavior. These concerns are more than mere academic speculation; plaintiffs alleging discrimination have sought to introduce evidence of implicit bias theory and the IAT at this. Courts have not yet reached a consensus as to whether this evidence should be admissible. The real problems attendant to implicit bias are illustrated in this Article along with a review of decisions highlighting the various treatment implicit bias evidence has received in state and federal courts and a discussion of its specific evidentiary applications. Should this evidence continue to be admitted, a domino effect is sure to follow. Absent judicial or legislative intervention, implicit bias evidence threatens to punish a person's mere thoughts.

Although the IAT's accuracy and predictive validity is doubtful, the import of openly discussing implicit bias is undeniable. We must strike a careful balance among these competing concerns. Explicitly excluding implicit bias evidence from the courtroom, while acknowledging its significance in allowing for open discussion and increased awareness in a variety of settings, accomplishes just that.

TABLE OF CONTENTS

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I. INTRODUCTION

Imagine a world where a defendant can be accused of a crime and convicted not with hard evidence of criminal conduct or culpable *mens rea* but with statistics arguing that many people similar to the defendant engaged in criminal conduct: Frightening and barbaric. The mere mention of such a scenario evokes images of the most unjust societies of history. Terms used to describe such a regime are visceral: stereotyping, guilt by association, the Jim Crow era, and the focus of this Article—implicit bias science.

Yes, implicit bias science is being used to circumvent the fundamental substantive and procedural safeguards upon which the U.S. legal system is built. Unless it is checked, the trend to rely upon so-called implicit bias science will badly harm U.S. discrimination law or trigger a potentially harmful backlash.

This Article describes the history of implicit bias science as used in employment-discrimination litigation. The Authors outline the evidentiary issues surrounding implicit bias science in the courtroom. The Article identifies the common evidentiary errors that go hand in glove with implicit bias science and addresses the potential problems that can stem from the

introduction of this evidence. Finally, the Article offers a statutory or judicial solution for dealing with the science of implicit bias in a manner that serves society while avoiding the miscarriage of justice.

II. IMPLICIT BIAS SCIENCE: A SHORT HISTORY

Science is fascinated by the subconscious mind. Scientists, philosophers, and theologians have for countless generations wrestled with the unseen forces that drive the actions of human beings. Pavlov's dogs, lab rats, carnival chickens, and hapless college students have been the subjects of countless theories and peer-reviewed studies on the subject.

In modern times, the science of behavior occasionally bubbles out from the ivory tower into the world of common culture. Journalists, marketing professionals, and activists oftentimes become enthralled with scientific theory. In the hands of nonscientists, novel theories can take on a life independent of their scientific foundations. These "popular" social theories become dangerous weapons for unscrupulous or careless advocates.[1] Modern media, especially social-media platforms, can exacerbate the problem.[2]

The emergence of the social science of so-called subconscious discrimination is a classic example of such a phenomenon. Subconscious discrimination, also known as aversive racism or implicit bias, is a relatively new concept in psychological and sociological circles.[3] The theory expands upon the idea that humans sometimes behave in a manner inconsistent with their conscious beliefs.[4]

A. *Cognitive Dissonance, Pop Psychology*

When a theory happens to reinforce the opinion of advocacy groups, it can easily take on a life of its own. Implicit bias theory exemplifies this point. The theory originates from the study of implicit social cognition.[5] The

1. *See generally* Michela Del Vicario et al., *The Spreading of Misinformation Online*, 113 PROC. NAT'L ACAD. SCI. U.S. AM. 554 (2016), https://www.pnas.org/content/pnas/113/3/554.full.pdf [https://perma.cc/4WEX-L9PK] (detailing how social media acts as a means of spreading misinformation).

2. *See id.*

3. Camille A. Olson et al., *Implicit Bias Theory in Employment Litigation*, PRAC. LAW., Oct. 2017, at 37, 37.

4. *Id.*

5. Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Revolution:*

psychological phenomenon of unconscious attitudes and thoughts has been studied and documented for some time.[6] Some academicians have used the term *microaggressions* to describe brief and commonplace forms of discrimination, often unconscious or unintentional, that communicate hostile or derogatory messages, particularly to and about members of historically marginalized social groups.[7] Hundreds of studies over the past two decades have empirically supported that individuals have at least some implicit bias about different groups.[8]

Dr. Anthony Greenwald, a psychology professor, researched this theory and set out to prove it.[9] He and his colleagues developed a computerized "test" that purported to uncover unconscious biases and racism.[10] Thus, the so-called Implicit Association Test (IAT) was born.[11] The test had the common elements of viral concepts: it was free, Internet-based, easily accessible, always available, and most importantly, it reinforced

Reconceiving the Relation Between Conscious and Unconscious, 72 AM. PSYCHOLOGIST 861, 865 (2017) [hereinafter Greenwald & Banaji, *The Implicit Revolution*].

6. *See, e.g.*, 19 SIGMUND FREUD, THE EGO AND THE ID: THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3 (James Strachey ed., 1960) ("We have found—that is, we have been obliged to assume—that very powerful mental processes or ideas exist . . . which can produce all the effects in mental life that ordinary ideas do (including effects that can in their turn become conscious as ideas), though they themselves do not become conscious.").

7. Derald Wing Sue et al., *Racial Microaggressions in the Life Experience of Black Americans*, 39 PROF. PSYCHOL. 329, 329 (2008).

8. *See, e.g.*, Christina M. Capodilupo et al., *The Manifestation of Gender Microaggressions*, *in* MICROAGGRESSIONS AND MARGINALITY: MANIFESTATION, DYNAMICS, AND IMPACT 193, 193–216 (Derald Wing Sue ed., 2010); M. V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726 (1995); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315 (2000); 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*, 29 RES. ORGANIZATIONAL BEHAV. 39 (2009).

9. Althea Nagai, *The Implicit Association Test: Flawed Science Tricks Americans into Believing They Are Unconscious Racists*, HERITAGE FOUND. (Dec. 12, 2017), https://www.heritage.org/science-policy/report/the-implicit-association-test-flawed-science-tricks-americans-believing-they [https://perma.cc/RTT4-7GEJ].

10. *Id.*

11. Anthony G. Greenwald, Debbie E. McGee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998) [hereinafter Greenwald et al., *The IAT*].

popular beliefs.[12] Greenwald touted the IAT as having the ability to measure and quantify implicit bias.[13] It quickly became popular among pop psychologists.[14] Like a picture of a dress that, depending upon the viewer, may be one color or another, the IAT played upon popular beliefs about perception and cognition.[15]

The IAT swept through the world of the newly enlightened masses.[16] It provided a convenient excuse for discrimination: people simply are not aware of their subconscious racist tendencies.[17] People driven by implicit bias supposedly are not racist or sexist—they simply are not enlightened to the powers that direct their own daily activities.[18]

12. Olson et al., *supra* note 3, at 37 (attributing the visibility of the IAT "to the fact that the IAT is easily accessible via the website Project Implicit"); *see also* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1057 (2009) (stating the IAT is "[a]kin to a computer game for grownups"). To take the IAT yourself, simply visit the website at https://implicit.harvard.edu/implicit/selectatest.html [https://perma.cc/CDC7-8VNJ].

13. *See* Greenwald et al., *The IAT*, *supra* note 11, at 1464.

14. For a discussion of pop psychology, see Margaret McCartney, *The Rise of the Pop Psychologists*, BMJ, May 29, 2012.

15. *See* Bevil Conway, *Why Do We Care About the Colour of the Dress?*, GUARDIAN (Feb. 27, 2015), https://www.theguardian.com/commentisfree/2015/feb/27/colour-dress-optical-illusion-social-media [https://perma.cc/6L4W-SPVV].

16. Beth Azar, *IAT: Fad or Fabulous?*, MONITOR ON PSYCHOL., July/Aug. 2008, at 44, 44; *see* SAUL KASSIN, STEVEN FEIN & HAZEL ROSE MARKUS, SOCIAL PSYCHOLOGY 163 (10th ed. 2017) (reporting 17 million people took the IAT online between October 1998 and October 2015); Olson et al., *supra* note 3, at 37 ("Since 1995, the theory of implicit bias has moved from the halls of academic debate to the parlance of everyday Americans with remarkable speed.").

17. *See* Banks & Ford, *supra* note 12, at 1054 (explaining unconscious bias is more palatable because it "levels neither accusation nor blame"); Olivia Goldhill, *"Implicit Bias" Tests Help People Feel Morally Superior, Even When Their Results Show Bias*, QUARTZ (Mar. 26, 2018), https://qz.com/1236594/implicit-bias-tests-help-people-feel-morally-superior-even-when-their-results-show-bias/ [https://perma.cc/2BG7-U29F] ("'For the record, I took this test a while ago and I have a slight anti-black bias . . . . Although I think of myself as passionately egalitarian, I'm happy to own my implicit biases and glad to be made conscious of them. Someday I hope to be able to take the same test and see how my brain feels about men and women. . . .' [The authors of the study] highlight how the commentator distances herself from her results: she admits bias, but seems to hold her brain responsible, as though it were separate from herself." (quoting Jeffrey Yen et al., *'I'm Happy to Own My Implicit Bias:' Public Encounters with the Implicit Association Test*, 57 BRITISH J. SOC. PSYCHOL. 505 (2018)).

18. *See* Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, L. & CONTEMP. PROBS., 2016, at 199, 216 (illustrating how implicit bias

Implicit bias enthusiasts can, allegedly, use the theory to bring about all kinds of desirable changes.[19] For example, if one sees the existence of a so-called color-blind workplace culture as primitive and unfair, implicit bias theory provides an excellent rationale for imposing a supposedly more enlightened regime. A system premised upon uniformity in achievement goals and measures can be replaced with tools geared toward accounting for race, national origin, gender, and sexual proclivities.[20] As the theory goes, once the decision makers in a workplace are aware of their own implicit biases, they can consciously make efforts to treat everyone equally, and harmful discrimination will magically disappear.[21]

B. *The Implicit Bias Cottage Industry*

The academics most commonly associated with implicit bias theory are well known in the legal community.[22] This is not due to the bar's enthusiasm for science to combat social ill; it is the byproduct of civil-rights plaintiffs seeking to use implicit bias to gain an advantage in discrimination actions.[23]

Dr. Greenwald is well known to lawyers dealing with implicit bias theory in the discrimination context.[24] Though not really the first to espouse

is "less blameworthy" than covert discrimination); Olivia Goldhill, *The World Is Relying on a Flawed Psychological Test to Fight Racism*, QUARTZ (Dec. 3, 2017), https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism/ [https://perma.cc/78JY-TDQC] (explaining implicit bias is convenient in that it "lets us off the hook" because "[w]e can't feel as guilty or be held to account for racism that isn't conscious").

19. Olson et al., *supra* note 3, at 38.

20. *See id.*

21. *See* Amy L. Wax, *Supply Side or Discrimination? Assessing the Role of Unconscious Bias*, 83 TEMP. L. REV. 877, 899 (2011) [hereinafter Wax, *Supply Side*].

22. Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1118 (2006) ("[W]e have seen how rarely IAT researchers temper their enthusiasm for ferreting out unconscious prejudice with offsetting concerns about the dangers of making false accusations of prejudice.").

23. *See, e.g.*, Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 108 (2008) ("Plaintiffs need to determine their theory early, i.e., decide whether to present the case as one of 'old-fashioned' intentional discrimination or one of unconscious discrimination. The parties need to identify and disclose psychologists as expert witnesses; lawyers and judges need to understand the role of such experts and be prepared to address their role and the admissibility of their testimony at a *Daubert* hearing . . . .").

24. Sidney R. Steinberg & Benjamin S. Teris, *Explicitly Excluding Evidence of*

the implicit bias theory, Greenwald has certainly exploited the science to the degree that, like Christopher Columbus, he is credited by lawyers with having "discovered" implicit bias.[25] Greenwald has published numerous studies since first championing the IAT, invariably asserting humans are driven by unconscious categorization of "out" groups.[26]

Predictably, plaintiffs' lawyers quickly seized upon the IAT as a tool for making an esoteric theory seem common and practical.[27] Greenwald successfully commercialized the IAT, blossoming into a popular plaintiffs' expert with an ever-increasing number of cases under his belt.[28] Defense lawyers have called upon other academics, such as Philip Tetlock, to debunk the implicit bias theory.[29] A cottage industry was born.[30]

Implicit Bias in Employment Cases, FOR DEF., Jan. 2019, at 37, 37 ("Since as early as 2012, Dr. Greenwald, the co-originator of the term implicit bias and the Implicit Association Test, has been busy testifying for plaintiffs seeking to support a legal theory for implicit bias.").

25. *See, e.g.*, GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

26. *See, e.g.*, Greenwald & Banaji, *The Implicit Revolution*, *supra* note 5, at 866; Anthony G. Greenwald, Mahzarin R. Banaji & Brian A. Nosek, *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 558 (2015) [hereinafter Greenwald et al., *Societally Large Effects*]; Anthony G. Greenwald, Jacqueline E. Pickrell & Shelly D. Farnham, *Implicit Partisanship: Taking Sides for No Reason*, 83 J. PERSONALITY & SOC. PSYCHOL. 367, 367 (2002).

27. *See* Bodensteiner, *supra* note 23, at 108.

28. *E.g.*, Haynes v. Ind. Univ., 902 F.3d 724, 730 (7th Cir. 2018); Karlo v. Pittsburgh Glass Works, L.L.C., 849 F.3d 61, 67 (3d Cir. 2017); Jones v. Nat'l Council of Young Men's Christian Ass'ns of the U.S., 34 F. Supp. 3d 896, 898 (N.D. Ill. 2014) [hereinafter Jones I]; Samaha v. Wash. State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *1 (E.D. Wash. Jan. 3, 2012); Pippen v. State, 854 N.W.2d 1, 6 (Iowa 2014) [hereinafter Pippen I].

29. Jones v. Nat'l Council of Young Men's Christian Ass'ns of the U.S., No. 09 C 6437, 2013 WL 7046374, at *5 (N.D. Ill. Sept. 5, 2013) [hereinafter Jones II], *report and recommendation adopted by* 34 F. Supp. 3d 896 (N.D. Ill. 2014); Rebuttal Export Report of Philip E. Tetlock, Ph.D., Holloway v. Best Buy Co., No. C-05-05056 PJH (MEJ), 2009 WL 8580738 (N.D. Cal. Mar. 25, 2009).

30. *See* Williams v. Eckstein Marine Servs., Inc., Nos. 91-1841, 91-3026, 1992 WL 373616, at *1 (E.D. La. Dec. 9, 1992) (noting the concern of some courts "that in many cases the 'expert' testimony tendered . . . is nothing more than a reflection of the cottage industry of 'expert' testimony that has been spawned as a parasitic satellite industry of the litigation practice").

Criticisms of the IAT have been plentiful.[31] One of the biggest points of contention is whether the IAT can predict discriminatory *behavior*, as opposed to discriminatory thoughts.[32] The distinction is significant "because if the IAT does not predict actual behavior then its primary value would be little more than observational—the presence of implicit bias might be an interesting social fact, but without a link to behavior, it likely would not be more than that."[33]

Even assuming arguendo that the IAT can properly gauge implicit bias, the notion that implicit bias research can accurately predict real-world discriminatory action "employ[s] far too simplistic a general-causation model."[34] The realities of a workplace, where coworkers and managers

31. *See, e.g.*, Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 710 (2009) (stating psychological tests, such as the IAT, designed to measure implicit bias "tell us nothing about the likelihood of bias occurring at the level of judgments, decisions, or behaviors"); Mitchell & Tetlock, *supra* note 22, at 1030–33 (listing four major shortcomings as "(a) Problems of Construct Validity and Metric Meaning: Researchers jump the inferential gun in labeling measures of implicit associations measures of unconscious propensity to discriminate"; "(b) Problems of Internal Validity: Researchers ignore alternative explanations for alleged discriminatory behavior that conflict with the implicit-prejudice hypothesis"; "(c) Problems of Statistical-Conclusion Validity: The IAT has serious psychometric flaws and an alarmingly high false alarm rate"; and "(d) Problems of External Validity: Researchers suspend disbelief in judging the real-world implications of laboratory results on implicit prejudice").

32. Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 203 (2018) [hereinafter Selmi, *Paradox of Implicit Bias*]; *see also* Mitchell & Tetlock, *supra* note 22, at 1032 ("Thus, even if we grant that the IAT is a valid measure of implicit associations between group categories and evaluative attitudes, IAT scores remain meaningless until empirical studies link specific ranges of scores to specific acts that objectively (or consensually) represent discrimination.").

33. Selmi, *Paradox of Implicit Bias*, *supra* note 32, at 203; *see also* Greenwald et al., *Societally Large Effects*, *supra* note 26, at 557 ("IAT measures have two properties that render them problematic to use to classify persons as likely to engage in discrimination."); Mitchell, *supra* note 31, at 712 ("These suggestions [that the IAT could be used as evidence of discriminatory intent] assume a stability in implicit bias, a reliable relation between implicit bias and behavior, and a reliability in the measurement of implicit bias that do not exist. The IAT has a median test-retest reliability coefficient of approximately 56, which is poor from a psychometric perspective and which means that a person's score on the IAT at Time 1 is likely to be very different from the score at Time 2.").

34. Mitchell & Tetlock, *supra* note 22, at 1108; *see also* Daniel Masakayan, Comment, *The Unconscious Discrimination Paradox: How Expanding Title VII to Incorporate Implicit Bias Cannot Solve the Issues Posed by Unconscious Discrimination*,

interact on a daily basis, are remarkably different than the abstract laboratory setting where testing for implicit bias often takes place.[35]

25 GEO. MASON L. REV. 246, 274 (2017) ("Discerning implicit bias from the text of a deposition, or even from the confines of a laboratory environment, ignores the complexities of the workplace and how implicit biases can affect one's propensities.").

35. Mitchell & Tetlock, *supra* note 22, at 1108–10 ("Consider the following dozen specific ways in which work settings (many modeled on best-practices precepts in organizational behavior) differ from the typical laboratory experiment on stereotyping and prejudice: (1) Subjects in laboratory experiments are typically asked to judge people about whom they have virtually no work-history or past-performance information (indeed, subjects often have little more information than group category membership, like race or gender, on which to base their impressions); however, hiring and staffing managers often have access to a great deal of carefully compiled data on the past behavior and performance of those they are judging; (2) Subjects in laboratory experiments are not typically judging people with whom they expect to interact in the future; yet, hiring and staffing managers often expect future interaction (including potentially awkward social encounters in which they must explain in detail to those whom they have judged why the ratings or outcomes take the form they do); (3) Subjects in laboratory experiments are not typically asked to judge people whom they perceive to be on their 'team' (people with whom they must work collaboratively to achieve shared goals—an independent variable some psychologists have designated as 'outcome interdependence'); hiring and staffing managers have strong interests in choosing the best possible people because the people they choose will indeed be on their team and potentially affect their own future performance evaluations and raises; (4) Subjects in laboratory experiments rarely, if ever, have powerful long-term financial or legal incentives for doing a better job at performance appraisal; hiring and staffing managers typically have strong financial, legal, and long-term incentives for making correct and lawful decisions; (5) Subjects in laboratory experiments are rarely given any training in using rating scales or other evaluation tools; hiring and staffing managers at many organizations receive extensive training in performance evaluation and making compensation decisions, and these persons have been alerted to the dangers of a variety of rating biases as well as the dangers of discrimination; (6) Subjects in laboratory experiments rarely expect that they will have to justify their opinions to people above them in an organizational hierarchy who control important rewards and punishments; hiring and staffing managers are well aware of the need to have adequate and legal justifications for their judgments and decisions; (7) Subjects in laboratory experiments rarely expect that they will be accountable to high-status others who have repeatedly affirmed a non-discrimination policy; hiring and staffing managers at many organizations are often aware of the views of those to whom they are accountable and of the high value that is placed on achieving diversity goals and avoiding charges of discrimination; (8) Subjects in laboratory experiments rarely receive clear or repeated admonishment not to allow job-performance-irrelevant characteristics, such as membership in ethnic-racial groups, to affect their personnel judgments; hiring and staffing managers often receive clear and repeated admonishment on this score; (9) Subjects in laboratory experiments

Researchers have "strongly caution[ed] against any practical applications of the IAT that rest on [the] assumption" that "the IAT can meaningfully predict discrimination."[36]

III. LEGAL TREATMENT OF IMPLICIT BIAS THEORY

The list of published decisions addressing the implicit bias theory in discrimination litigation constantly grows. Unfortunately, because of some of the quirks inherent in discrimination litigation, the number of *thoughtful* evaluations of the theory does not grow nearly as fast. Unlike products

are rarely encouraged or required to attend training workshops on how to make personnel decisions; the opposite is true of hiring and staffing managers at large organizations, as well as many small to mid-size organizations; (10) Subjects in laboratory experiments are rarely given written manuals and guidelines that place constraints on how they should perform their task; the opposite is true of hiring and staffing managers at many large organizations, as well as many small to mid-size organizations; (11) Subjects in laboratory experiments rarely expect that they will have to offer comparative rationales for why they selected certain people and did not select others; hiring and staffing managers are often expected to do so; and (12) Subjects in laboratory experiments are typically college undergraduates who have had virtually no experience supervising and evaluating employees; hiring and staffing managers typically are fully mature adults who have considerable experience in supervisory roles.").

36. Rickard Carlsson & Jens Agerström, *A Closer Look at the Discrimination Outcomes in the IAT Literature*, 57 SCANDINAVIAN J. PYSCHOL. 278, 278 (2016); *see also* Mitchell, *supra* note 31, at 712 ("[S]uggestions that IAT scores be used as evidence of discriminatory propensities for purposes of litigation or personnel selection should be rejected."); Mitchell & Tetlock, *supra* note 22, at 1108; Jesse Singal, *The Creators of the Implicit Association Test Should Get Their Story Straight*, INTELLIGENCER (Dec. 5, 2017), http://nymag.com/intelligencer/2017/12/iat-behavior-problem.html [https://perma.cc/9UFU-6522] (describing "a 'Schrödinger's test' situation in which the test both does and doesn't predict behavior at the same time" and commenting on how the IAT test creators wrote, in a 2013 book, the test "predicts discriminatory behavior even among research participants who earnestly (and, we believe, honestly) espouse egalitarian beliefs," and then published an academic paper (unlikely to be read by the general public) in 2015 in which they argued that due to the test's methodological weaknesses, it is "problematic to use [it] to classify persons as likely to engage in discrimination" as it "attempts to diagnostically use such measures for individuals risk undesirably high rates of erroneous classifications," yet then wrote to a journalist in 2017 that "[t]he IAT can be used to select people who would be less likely than others to engage in discriminatory behavior").

liability,[37] medical malpractice,[38] and commercial cases[39] where expert testimony is subjected to rigorous scientific analysis and professional skepticism, courts in discrimination cases are quick to recite "fundamentals" about evidence in discrimination cases and admit expert testimony.[40]

The propensity of courts to give expert testimony a "free pass" in employment litigation is not the fruit of intellectual laziness or bias; it is the byproduct of the historic development of antidiscrimination laws. When measured on the timeline of legal rights, workplace discrimination was mostly lawful and accepted until very recent times. Title VII, the crown jewel of antidiscrimination law, was not passed until 1964—nearly two centuries after the enshrinement of liberty in the United States, a hundred years after the passage of the Civil Rights Amendments, and nearly a millennia after the concept of commercial and legal equity was emblazoned on Western Civilization.[41]

To make the radical new workplace-rights legislation more palatable, lawmakers drafted in moderating concepts. There was no jury trial.[42] Plaintiffs were required first to exhaust their administrative remedies.[43] Punitive damages were not available.[44] Soft and relatively mild penalties awaited transgressors.[45]

37. *E.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) ("To summarize: 'General acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.").

38. *E.g.*, Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208 (8th Cir. 2000) (finding no abuse of discretion where the trial court excluded expert testimony and the expert's opinion on medical causation "was not based upon a methodology that had been tested, subjected to peer review, and generally accepted in the medical community").

39. *E.g.*, Union Pac. R.R. Co. v. Progress Rail Servs. Corp., 778 F.3d 704, 710 (8th Cir. 2015) (affirming the exclusion of unreliable expert testimony).

40. *See infra* Part III.A.

41. Magna Carta (1215), *reprinted in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 33 (rev. ed. 1998); Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

42. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2018).

43. *Id.* § 2000e-5(e).

44. *Id.* §§ 2000e–2000e-17.

45. *See id.* § 2000e-5.

With this paternalistic backdrop, judges were keen to level the legal playing field by reducing the traditional obstacles to a plaintiff's recovery.[46] Numerous early discrimination opinions talk of supposedly relaxed evidentiary standards in discrimination claims.[47] A predominately white-haired, white-skinned male bench was quick to deflect potential criticism by essentially changing the rules. None of these early decisions discuss the legal foundation authorizing the abandonment of evidentiary concepts refined over centuries; they simply announce the relaxed standard. The U.S. Supreme Court joined in with its *Price Waterhouse v. Hopkins* decision.[48] Serving as both judge and fact-finder, the bench was quick to relax evidentiary rules and "sort things out" in the end.[49]

Relatively harmless judicial fiat became a dangerous, untidy mess with the passage of the Civil Rights Act of 1991. Congress bestowed upon plaintiffs the right to a jury trial and punitive damages in federal discrimination claims.[50] Many states followed suit by similar statutory enactment or judicial fiat.[51] However, there was no concomitant return of

46. *See* Smith v. Bd. of Educ., 365 F.2d 770, 782 (8th Cir. 1966).

47. *E.g.*, Coke v. Gen. Adjustment Bureau, Inc., 640 F.2d 584, 590 n.11 (5th Cir. 1981) ("[T]he requirement of a right-to-sue letter before suit is filed in the district court may be relaxed . . . ."); Contreras v. City of Los Angeles, 656 F.2d 1267, 1290 n.4 (9th Cir. 1981) ("Proof of a negative in Title VII cases would not necessarily be onerous. For instance, it might not be impractical to require the employer to make a preliminary demonstration of the absence of less discriminatory alternatives under a relaxed burden of proof followed by a more thorough presentation of proof by the plaintiff."); EEOC v. Pac. Press Publ'g Ass'n, 535 F.2d 1182, 1187 (9th Cir. 1976); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 465 (5th Cir. 1970) ("It is more important that pleading rules be relaxed in the decidedly informal atmosphere of Title VII."); *see also* Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 862 (2004) ("Early Title VII courts adopted a special proof structure for proving intent. The special proof structure permits plaintiffs to take advantage of relaxed pleading standards and favorable inferences.").

48. Price Waterhouse v. Hopkins, 490 U.S. 228, 237–38 (1989) (plurality opinion).

49. *See id.*

50. Wright v. Gen. Dynamics Corp., 23 F.3d 1478, 1479 (8th Cir. 1994) ("Sections 102(a)(1) and 102(b) of the Civil Rights Act of 1991, codified at 42 U.S.C. §§ 1981a(a)(1) and 1981a(b), make compensatory and punitive damages available for intentional violations of Title VII. Section 102(c) of the Civil Rights Act of 1991, codified at 42 U.S.C. § 1981a(c), provides for a right to trial by jury when such damages are sought.").

51. *E.g.*, KY. REV. STAT. ANN. § 344.020 (West 2019); Haskenhoff v. Homeland Energy Sols., L.L.C., 897 N.W.2d 553, 572 n.2 (Iowa 2017) (stating hostile-work-environment claims in Iowa "developed through our caselaw, beginning in 1990, based

the rules of evidence.[52] When confronted with evidentiary issues, many courts simply cited old precedent and repeated the refrain that evidentiary rules must be relaxed because proving discrimination is hard.[53]

Evidence of implicit bias is most often sought to be introduced through expert testimony.[54] Courts have not yet reached a consensus on whether this testimony should be admissible.[55] A number of authors have analyzed the treatment of implicit bias in federal court.[56] While a comprehensive compendium of state and federal cases analyzing implicit bias is beyond the scope of this Article, below is a sampling of decisions illustrating the range of treatment by the courts.

A. *Decisions Admitting Implicit Bias*

In the following cases, federal courts allowed evidence of implicit bias. Of note, all of these cases involved intentional discrimination through disparate-treatment claims.

1. *Expert Testimony on Implicit Bias Satisfies* Daubert *to Establish "General Principles"*

In *Samaha v. Washington State Department of Transportation*, the plaintiff brought both state and federal discrimination claims, alleging

expressly on Title VII precedent" (citing Lynch v. City of Des Moines, 454 N.W.2d 827, 833 (Iowa 1990)).

52. *See, e.g.*, Abner v. Kan. City S. R.R. Co., 513 F.3d 154, 168 (5th Cir. 2008) (finding the admission of evidence of defendant–supervisor's KKK-related conviction did not amount to prejudicial error); Sawyer v. Sw. Airlines Co., 243 F. Supp. 2d 1257, 1266 (D. Kan. 2003), *aff'd*, 145 F. App'x 238 (10th Cir. 2005) (allowing expert testimony "to educate the jury about the historical genesis of 'eenie, meenie, minie, moe' and to explain why the phrase is inherently offensive and racist").

53. Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) (holding that even "implausible," "silly," "fantastic," or "superstitious" reasons would satisfy the burden for plaintiff's prima facie case); Thomas v. Nat'l Football League Players Ass'n, No. 96-7242, 1998 WL 1988451, at *7 (D.C. Cir. Feb. 25, 1998) ("[T]here is no bar on using circumstantial or inferential evidence to shift the burden of persuasion under *Price Waterhouse*.").

54. *See* State v. Plain, 898 N.W.2d 801, 833 (Iowa 2017) (Appel, J., concurring).

55. *See id.* ("[T]he United States Supreme Court has not expressly embraced the theory of implicit bias, [but] various members of the court have done so.").

56. Anthony Kakoyannis, Case Comment, *Assessing the Viability of Implicit Bias Evidence in Discrimination Cases: An Analysis of the Most Significant Federal Cases*, 69 FLA. L. REV. 1181, 1185–86 (2017); *see also* Selmi, *Paradox of Implicit Bias*, *supra* note 32, at 201–02.

disparate treatment on the basis of his national origin.[57] The plaintiff sought to offer the expert testimony of Dr. Greenwald, and the defendants moved in limine to exclude the testimony under Federal Rule of Evidence 702 on the basis that it was not relevant, was unfairly prejudicial, and failed to apply the principles and methods reliably to the facts of the case.[58] The defendants did not contest Dr. Greenwald's qualifications as an expert nor the validity and reliability of the theory and methodology.[59]

The court opined it was satisfied the expert opinion was "reliable" because "[a]ccording to Dr. Greenwald, and unchallenged by Defendants, researchers have validated this test."[60] As to the helpfulness and fit of the testimony, the court found testimony "that educates a jury on the concepts of implicit bias and stereotypes" would be relevant to the issue of intentional discrimination.[61] Accordingly, the court denied the motion to exclude the expert testimony.[62]

57. Samaha v. Wash. State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *1 (E.D. Wash. Jan. 3, 2012). The plaintiff, who was of Arab descent, asserted his employer treated him differently by holding him to a higher standard than other non-Arab employees. *Id.* He pointed to his job performance evaluations as evidence of the disparate treatment. *Id.*

58. *Id.* at *1–2.

59. *Id.* at *3.

60. *Id.*

61. *Id.* at *4.

62. *Id.* at *5. Likewise, the plaintiff in *Maciel v. Thomas J. Hastings Properties* sought to introduce expert testimony on explicit and implicit bias. Maciel v. Thomas J. Hastings Properties, Inc., No. 10-12167-JCB, 2012 WL 13047595, at *1, *4 (D. Mass. Nov. 30, 2012). The plaintiff alleged the defendants discriminated against her in her attempt to purchase a condominium. *Id.* at *1. The defendants moved to exclude the proffered testimony, arguing it would not meet the requirements of Rule 702 and that it would be unduly prejudicial under Rule 403. *Id.* The defendants did not challenge the expert's qualifications regarding bias. *Id.* at *4. The court found that social-science testimony "regarding bias in general" was relevant to the case. *Id.*

However, the court found the testimony "regarding bias in this case" was not reliable under *Daubert v. Merrill Dow Pharmaceuticals, Inc*. *Id.* at *5. The expert's report referenced the IAT and stated, based on the expert's review of the documents and depositions in the case, that he could "see evidence of conscious bias due to business concerns." *Id.* The court explained:

> [The expert] does not provide any connection between, or scientific support for, his general statements about bias and his opinion that Defendants were biased in this case. He does not describe how the listed events indicate bias, the method by which he determined that these events indicate bias, or how his experience informed this conclusion. Although he states that the Implicit Association Test

2. *Expert Testimony on Implicit Bias Is Proper in a Bench Trial*

In *Martin v. F.E. Moran, Inc.*, the court considered the defendants' motion to strike the plaintiffs' expert, who was offered to testify on the subject of implicit bias.[63] The court found the expert's opinion reliable and sufficiently connected to the facts.[64] It reasoned that because the case would go to a bench trial, it "need not perform the same gatekeeping role of keeping unreliable expert testimony from the jury."[65] The judge, not a jury, would serve as the trier of fact, and therefore, "[T]he Court can hear the testimony at trial and determine the weight of the evidence at trial without a fear of prejudicing the untrained ear of a juror."[66]

That the case would go to a bench trial also factored into the court's determination that the report did not contain impermissible legal conclusions.[67] Explaining the expert would opine "on the *presence* of stereotypes and aversive racism [at the defendant company] and how that *could have influenced* decision makers," the court acknowledged, "If the issue were before a jury, this distinction might be lost."[68] It concluded, however, "[T]he Court can assess [the] testimony carefully and disregard any missteps into the arena of legal conclusion."[69] Likewise, the court noted the report was not unduly prejudicial because issues of prejudice "carry significantly less weight in a bench trial, where there is a presumption that the court is not improperly influenced by the evidence brought before it."[70]

> is the standard bearer for measuring implicit bias, he does not describe its application to, or use in, this case. There is simply "too great an analytical gap between the data and the opinion proffered." In effect, [the expert's] statements about the Defendants in this case are only connected to his statements about bias by [the expert's] ipse dixit. Accordingly, [the] testimony regarding the existence of bias in this case is not reliable and is excluded.

Id. (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)).

63. Martin v. F.E. Moran, Inc., No. 13 C 03526, 2017 WL 1105388, at *2 (N.D. Ill. Mar. 24, 2017). The plaintiffs brought federal discrimination claims against their former employer, alleging disparate treatment of racial minorities resulted in fewer employment opportunities and greater incidence of termination. *Id.* at *1.

64. *Id.* at *3.

65. *Id.* at *4.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

3. *The Court's Sua Sponte Consideration of Implicit Bias*

In *Kimble v. Wisconsin Workforce Development*, the plaintiff brought suit under Title VII for intentional discrimination.[71] Following a bench trial, the court found the defendants had violated Title VII.[72] Interestingly, though implicit bias factored into the court's conclusion, neither side presented expert testimony on the subject, and implicit bias was not referenced in the pleadings.[73]

After it rejected the defendants' proffered explanation for their conduct, the court discussed additional evidence to "provide a fuller explanation of the challenged decision."[74] The court noted that employee evaluations are highly subjective, and accordingly, "[T]here is a risk that supervisors will make judgments based on stereotypes of which they may or may not be entirely aware."[75] Reviewing the record, the court found the supervisor might have treated the plaintiff poorly because of an "uncomplimentary stereotype," and this behavior suggested the presence of implicit bias. [76]

B. *Cases Excluding Implicit Bias Evidence*

Many courts have recognized the inherently speculative nature of inferring an intentionally discriminatory employment action from implicit bias evidence. In the following cases, courts excluded evidence of implicit bias. These courts expressed skepticism of the plaintiffs' contentions that the testimony was being offered for "general principles," finding rather that the evidence was actually being offered to show causation.

1. *Implicit Bias Testimony Is Not Helpful to the Jury and Is Effectively Offered for Causation*

In *Jones v. National Council of Young Men's Christian Associations of the United States*, the plaintiffs sought to introduce Dr. Greenwald's expert testimony, which the defendants moved to strike.[77] The defendants argued

71. Kimble v. Wis. Dep't of Workforce Dev., 690 F. Supp. 2d 765, 767 (E.D. Wis. 2010). Specifically, the plaintiff contended his employer discriminated against him on the basis of race and gender by not giving him a raise. *Id.*

72. *Id.* at 778.

73. *Id.* at 776.

74. *Id.*

75. *Id.* at 775–76.

76. *Id.* at 778.

77. Jones II, No. 09 C 6437, 2013 WL 7046374, at *4 (N.D. Ill. Sept. 5, 2013), *report*

Dr. Greenwald's testimony would not be helpful, as discrimination was within the understanding of an ordinary juror and not the appropriate subject of expert testimony.[78] The magistrate judge declined to rule out the possibility of the need for the fact-finder's education on implicit bias "if it is reliable testimony applicable to the facts of the case."[79]

The defendants also challenged Dr. Greenwald's methodology, arguing it was unreliable.[80] They offered the testimony of their own expert witness, Dr. Tetlock, who explained that the laboratory experiments upon which Dr. Greenwald based his report were dramatically different from actual employment settings.[81] The magistrate judge agreed with the defendants' position and recommended to the district court that the motion to strike be granted.[82]

The district court adopted the magistrate judge's report and recommendation in full and elaborated on the rationale.[83] "Even at the level of general principles," the court was not convinced Dr. Greenwald's testimony would "fit" the case closely enough to aid the jury:[84]

> The substantial disconnect between the abstract testing from which Dr. Greenwald's "general principle" is derived and the fact context of this case is particularly problematic given that Dr. Greenwald's opinions cross the line into the realm of causation and blur, if not erase altogether, the line between hypothetical possibility and concrete fact.[85]

The court also noted that, even if there were "a minimally adequate 'fit' between Dr. Greenwald's general principles and the facts of this case, it would nevertheless be appropriate to exclude his testimony under Federal Rule of Evidence 403" because it would tend to confuse or mislead the jury.[86]

and recommendation adopted by 34 F. Supp. 3d 896 (N.D. Ill. 2014).

78. *Id.* at *7.
79. *Id.*
80. *Id.* at *8.
81. *Id.*
82. *Id.* at *9.
83. *See* Jones I, 34 F. Supp. 3d 896, 898–900 (N.D. Ill. 2014).
84. *Id.* at 900.
85. *Id.* at 901.
86. *Id.*

Finally, the court rejected the plaintiff's assertion that the testimony was being offered to educate the jury, finding instead that the testimony would effectively be conclusory statements on causation.[87]

2. *Expert Testimony on Implicit Bias Fails* Daubert *and Is Not Relevant*

In *Karlo v. Pittsburgh Glass Works*, the defendants moved to exclude the testimony of the plaintiff's expert witness, Dr. Greenwald.[88] The court granted the motion, concluding Dr. Greenwald could not satisfy the requirements of Federal Rule of Evidence 702 or *Daubert*: "Dr. Greenwald's opinion is not based on sufficient facts or data. It is not the product of reliable methods. And it would not assist the factfinder in resolving an issue in this case."[89] Additionally, the court found the expert opinion did not fit the case.[90]

The court questioned whether testimony of implicit bias could be relevant in deciding disparate-impact or disparate-treatment claims:

> Where, as here, a plaintiff asserts a disparate treatment claim, he or she must "prove that intentional discrimination occurred at th[e] particular [employer], not just that gender stereotyping or intentional discrimination is prevalent in the world." Moreover, disparate treatment claims require proof of a discriminatory motive, which seems incompatible with a theory in which bias may play an unconscious role in decision-making. In a disparate impact claim, evidence of implicit bias makes even less sense, particularly because a plaintiff need not show motive.[91]

3. *Implicit Bias Cannot Support the Commonality Requirement for Class Certification*

The U.S. Supreme Court considered evidence of implicit bias in the context of certifying a class action in the case of *Wal-Mart Stores, Inc. v.*

87. *Id.* at 900.

88. Karlo v. Pittsburgh Glass Works, L.L.C., No. 2:10-cv-1283, 2015 WL 4232600, at *1 (W.D. Pa. July 13, 2015), *vacated on other grounds*, 849 F.3d 61 (3d Cir. 2017). The plaintiffs brought suit against their former employer, alleging violations of the Age Discrimination in Employment Act on individual theories of disparate impact and disparate treatment regarding the company's layoff practices. *Id.*

89. *Id.* at *7.

90. *Id.*

91. *Id.* at *9 (internal citation omitted).

Dukes.[92] The plaintiffs' proposed class consisted of current and former female employees of Wal-Mart, alleging disparate-treatment and disparate-impact claims.[93] To meet the commonality requirement for class certification, the plaintiffs offered the expert testimony of Dr. William Bielby, "who conducted a 'social framework analysis' of Wal–Mart's 'culture' and personnel practices, and concluded that the company was 'vulnerable' to gender discrimination."[94] The district court certified the class, and the Ninth Circuit affirmed.[95]

Reversing, the Supreme Court noted the only evidence the plaintiffs offered of a "general policy of discrimination" was the expert's testimony that Wal-Mart's "strong corporate culture" makes it "'vulnerable' to 'gender bias.'"[96] The Court found the report failed to support the plaintiffs' theory of commonality and expressed doubt as to whether the methodology would survive a *Daubert* analysis.[97]

4. *Implicit Bias Testimony Would Confuse and Mislead the Jury*

The plaintiffs in *Johnson v. Seattle Public Utilities* retained Dr. Greenwald as an expert witness, contending his testimony would help the jury "better understand the evidence as it relates to discriminatory intent, to counteract common misconceptions concerning the character of discriminatory intent, and to determine whether Plaintiffs' racial status provided a basis for Defendants' actions."[98] The plaintiffs admitted his testimony would not include an opinion on implicit bias as it related to the facts of the case.[99]

The trial court found that the generalized opinions in the proffered testimony, if admitted, "would be confusing and misleading for the jury" and therefore excluded the testimony.[100] The Washington Court of Appeals

92. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352–53 (2011).
93. *Id.* at 343.
94. *Id.* at 346.
95. *Id.* at 347.
96. *Id.* at 353–54.
97. *Id.* at 354–55.
98. Johnson v. Seattle Pub. Util., No. 76065-3-I, 2018 WL 2203321, at *6 (Wash. Ct. App. May 14, 2018), *cert. denied*, 426 P.3d 751 (2018) (unpublished table decision).
99. *Id.* at *8.
100. *Id.*

affirmed, noting, "The trial court properly recognized the important policy concerns presented by the concept of implicit bias."[101]

5. *Implicit Bias Evidence Introduced in Iowa State Courts*

In *Pippen v. State*, the plaintiffs brought a class action suit under both federal and state discrimination claims, alleging disparate impact in hiring practices and promotion decisions on the basis of race.[102] In addition to statistical data, the plaintiffs offered testimony from Dr. Greenwald and his colleague, Dr. Cheryl Kaiser, on the subjects of implicit bias, prejudice, and stereotyping.[103] After considering the statistical and implicit bias evidence, the court found the plaintiffs had failed to prove the causation element of the disparate-impact claim:

> Dr. Greenwald conceded that he would not use the phrase "implicit bias" in writing a scientific article. How, then, should it import more gravamen in a court of law? Implicit bias does not mean prejudice, but merely reflects attitudes. More pointedly, he offered no empirical data regarding Iowans and implicit racial bias, did not opine that the Killingsworth bottom-line figures were caused by implicit racial bias, and offered a causal link as an "untested hypothesis."
>
> Even more significant is the fact that neither he nor Dr. Kaiser offered a reliable opinion as to how many, or what percentage, of the discretionary subjective employment decisions made by managers or supervisors in the State employment system were the result of "stereotyped thinking" adverse to the protected class. The closest Dr. Greenwald came to such an opinion was extrapolating data from an internet based site relating to the IAT. From the uncontrolled responses to this website he opined that 70 to 80 percent of respondents in the United States had an "automatic preference for whites." This was not a "representative sampling by research design." It did not require the respondent to give demographic information. It was a weighted data set. And in his words "it could be representative of the United States."
>
> Dr. Greenwald has "relatively little data" about how the IAT has been applied in Iowa, and based on the internet data is "assuming" the

101. *Id.*
102. Pippen I, 854 N.W.2d 1, 5–6 (Iowa 2014).
103. *Id.* at 6.

> percentages would be the same for this State. In fact, he has no representative data for the State of Iowa, no representative data for employees of the State of Iowa and no representative data for managers or supervisors working in the executive branch. When initially asked if he could render an opinion with "scientific certainty" on this issue he provided a convoluted answer and then stated he had forgotten the question. When asked again, he responded, "I would be willing to bet if a study were done" the percentage would be about 75 percent.
>
> Both social scientists seem to operate from the assumption that every three out of four subjective discretionary employment decisions made in the State's hiring process were the result of, or tainted by, an unconscious state of mind adverse to African-Americans. The Supreme Court has noted this is a fatal flaw in the proof of a social scientist in a case of this nature and is "worlds away from 'significant proof'" that an employer "operated under a general policy of discrimination." In legal parlance, this is an opinion of conjecture, not proof of causation.
>
> The implicit bias evidence does not prove causation.[104]

The Iowa Supreme Court affirmed.[105]

C. *Summary Observations*

The arguments advanced by the various defendants in these cases, and the effectiveness of those arguments, provide valuable insight. First, as the *Samaha* defendants learned the hard way, it is a mistake to let the validity and reliability of the implicit bias theory go unchallenged.[106] The *Samaha*

104. Pippen v. State, No. LACL107038, 2012 WL 1388902, at *30 (Iowa Dist. Ct. Apr. 17, 2012) (internal citation omitted).

105. *Pippen I*, 854 N.W.2d at 32.

106. *See* Samaha v. Wash. State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *3 (E.D. Wash. Jan. 3, 2012) ("Defendants do not directly challenge the validity of implicit bias theory. Rather, Defendants argue that the Implicit Association Test ('IAT') on which Dr. Greenwald bases his testimony amounts to mere 'statistical generalizations about segments of the population.'"); *see also* Defendant's Reply in Support of its Renewed Motion to Bar Proposed Expert Opinion of Anthony G. Greenwald Related to Purported Implicit Social Bias, Karlo v. Pittsburgh Glass Works, L.L.C., No. 2:10-cv-01283, 2014 WL 11115765 (W.D. Pa. Oct. 23, 2014) [hereinafter Defendant's Reply in *Karlo*] (distinguishing *Samaha*, where the court "specifically acknowledged that the parties both accepted the qualifications and the methodology that was used by the expert," from the case at bar, in which the defendant "vehemently rejects the IAT and its validity for purposes of litigation").

court explicitly noted the defendants' failure to challenge the validity of the theory in making its determination that Dr. Greenwald's opinion was sufficiently reliable.[107]

As discussed above, there are numerous concerns about the reliability and the validity of the IAT.[108] Each of the defendants in the above cases who successfully moved to exclude implicit bias testimony challenged the validity and reliability of the IAT, implicit bias evidence, or both.[109] The *Karlo* defendants, for example, pointed out, "While that test may have been taken 'over a million times,' Dr. Greenwald readily admits that it was not taken by a representative sample of the US population or a single person at [the defendant company]."[110] Further, they argued the IAT was unreliable because "it is [publicly] available and the results database is comprised of data from people who self-selected to be included in an evaluation. Therefore, the data is skewed in favor of those that sought out the test as opposed to a random sample."[111] Finally, they challenged the lack of controls

107. *Samaha*, 2012 WL 11091843, at *4.

108. *See* Gail M. Sullivan, *A Primer on the Validity of Assessment Instruments*, 3 J. GRADUATE MED. EDUC. 119, 119–20 (2011) (emphasizing the serious questions about whether the "gold standard" meets the standard by which psychometric instruments are judged—reliability and validity); discussion *supra* Part II.B.

109. Karlo v. Pittsburgh Glass Works, L.L.C., No. 2:10-cv-1283, 2015 WL 4232600, at *9 (W.D. Pa. July 13, 2015), *vacated on other grounds*, 849 F.3d 61 (3d Cir. 2017); Jones II, No. 09 C 6437, 2013 WL 7046374, at *3 (N.D. Ill. Sept. 5, 2013), *report and recommendation adopted by* 34 F. Supp. 3d 896 (N.D. Ill. 2014); *see* Defendant's Memorandum in Support of Its Motion to Strike the Report and Bar the Testimony of Plaintiffs' Purported Expert, Destiny Peery, Martin v. F.E. Moran, Inc., No. 13-cv-03526, 2016 WL 11257365 (N.D. Ill. May 27, 2016) [hereinafter Defendant's Memorandum in *Martin*].

110. Defendant's Reply in *Karlo*, *supra* note 106, at *2.

111. *Id.* The *Karlo* court referenced each of the following arguments in its opinion:

> Dr. Greenwald cannot establish that his publicly available test was taken by a representative sample of the population—let alone any person or the relevant decision-maker(s) at [the defendant company]. Dr. Greenwald also fails to show that the data is not skewed by those who self-select to participate, without any controls in place to, for example, exclude multiple retakes or account for any external factors on the test-taker. Perhaps to compensate for these shortcomings, Dr. Greenwald explains that his test is widely-used by "[m]any social cognition experts as a method in their own research" and that "[t]here exists near unanimous agreement among social psychologists as to the validity of the IAT as a method for implicit measurement of attitudes and stereotypes."

on the publicly available test.[112]

The defendants who were successful in excluding the testimony also challenged the expert's application of the methodology to the facts of the case, especially where the expert never met with the defendants' employees and simply reviewed materials from the case.[113] More importantly, they argued there is no practical application of the IAT in predicting discriminatory employment decisions.[114] Implicit bias testimony purporting to do so is merely "unscientific speculation that cannot qualify as admissible expert testimony."[115] These defendants specifically contended that, however arguably valid the IAT or implicit bias theory may be, there is no way to extrapolate the results of cognitive experiments in a laboratory setting to the

> Be that as it may, the IAT still says nothing about those who work(ed) at [the defendant company].

Karlo, 2015 WL 4232600, at *8.

112. Defendant's Reply in *Karlo*, *supra* note 106, at *2. Additionally, the *Karlo* defendants noted, "Dr. Greenwald is advancing his own theories which he claims are supported by peer review and empirical testing but for which he provides no support." *Id.* at *3. The court took to that argument, referencing Greenwald's theory and "his self-invented IAT." *Karlo*, 2015 WL 4232600, at *7.

113. Defendant's Reply in *Karlo*, *supra* note 106, at *2; Defendant's Motion to Strike the Report and Testimony of Dr. Anthony G. Greenwald, Jones v. Nat'l Council of Young Men's Christian Ass'ns of the U.S., No. 09-CV-6437, 2012 WL 13043108 (N.D. Ill. Dec. 14, 2012) [hereinafter Defendant's Motion in *Jones*]; Defendant's Memorandum in *Martin*, *supra* note 109 (arguing the expert's failure to interview any individuals related to the case and the review of a "short list of case-related documents" failed to establish the foundation for her opinion).

114. Defendant's Reply in *Karlo*, *supra* note 106; *see supra* Part II.B.

115. Defendant's Motion in *Jones*, *supra* note 113 ("As for [Dr. Bielby's] sociological opinion, even if one puts aside reservations one might have as to its ultimate admissibility under [Daubert], it consists on its face of little more than rank conclusion and gross speculation. For example, the opinion baldly premises that negative stereotypes result in African-Americans being considered 'inappropriate for higher level jobs' by defendant's managers. Similarly, the opinion simply presumes that [defendant's] personnel and disciplinary systems are inherently subjective and allow managers to materially circumvent policies that would reduce subjectivity and bias. No meaningful weight can reasonably be attributed, even at this stage of the proceedings, to a report so facially suspect."); *see Karlo*, 2015 WL 4232600, at *7 (referring to the expert's opinion as "the say-so of an academic who assumes that his general conclusions from the IAT would also apply to [the workplace]").

realities of the workplace.[116] The *Jones* defendants' decision to retain an expert to opine that the IAT is not a reliable predictor of behavior, and thus cannot be applied in actual employment settings, proved to be wise; the court relied heavily on the defense expert's testimony in its determination to exclude the implicit bias evidence.[117]

Plaintiffs who have successfully introduced implicit bias testimony have most frequently done so by asserting the testimony will simply establish "generalized principles."[118] Defendants' counterarguments that the expert testimony was being offered as proof of causation is well-accepted by the courts to consider it.[119] Particularly, the "substantial disconnect" between the "abstract testing" from which the expert purports to derive the general principles and the facts of a particular case proves problematic: "[These] opinions cross the line into the realm of causation and blur, if not erase altogether, the line between hypothetical possibility and concrete fact."[120]

Finally, the defendants who successfully excluded implicit bias testimony did not forget to object under other applicable rules of evidence. Implicit bias testimony is highly prejudicial and should be objected to under

116. Jones II, No. 09 C 6437, 2013 WL 7046374, at *8 (N.D. Ill. Sept. 5, 2013), *report and recommendation adopted by* 34 F. Supp. 3d 896 (N.D. Ill. 2014) ("Even if Dr. Greenwald has a scientific basis for his observations in one area of study [in a laboratory], that implicit bias exists in his testing, he has no scientific argument that these observations can be transposed to an entirely different area [such as employment decision-making], or at least none that he has provided in this case."); Defendant's Motion in *Jones*, *supra* note 113; *see* Defendant's Memorandum in *Martin*, *supra* note 109.

117. *Jones II*, 2013 WL 7046374, at *8; *see Karlo*, 2015 WL 4232600, at *9.

118. Maciel v. Thomas J. Hastings Properties, Inc., No. CV 10-12167-JCB, 2012 WL 13047595, at *4 (D. Mass Nov. 30, 2012); Samaha v. Wash. State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *5 (E.D. Wash. Jan. 3, 2012).

119. Jones I, 34 F. Supp. 3d 896, 899 (N.D. Ill. 2014); Defendant's Renewed Motion to Bar Proposed Expert Opinion of Anthony G. Greenwald Related to Purported Implicit Social Bias, Karlo v. Pittsburgh Glass Works, L.L.C., No. 2:10-cv-01283, 2014 WL 11115763 (W.D. Pa. July 31, 2014) [hereinafter Defendant's Renewed Motion in *Karlo*] ("Plaintiffs here are attempting to use Dr. Greenwald's theories to manufacture causation evidence."); *see Maciel*, 2012 WL 13047595, at *4 (noting the defendants argued the expert's opinion "will not assist the trier of fact because such opinions deal with common occurrences that jurors have knowledge of through their experiences in everyday life").

120. *Jones I*, 34 F. Supp. 3d at 901.

Rule 403.[121] Further, as noted by the U.S. Supreme Court in *Dukes*, it is evidence of "bad corporate character" that should be objected to under Rule 404.[122]

Perhaps most importantly, implicit bias evidence is simply not relevant and should be objected to under Rule 401.[123] Implicit bias testimony concerning the role that unconscious bias may play in employment decisions has no bearing in cases where the plaintiff must establish a discriminatory motive.[124] Plaintiffs cannot use this testimony to support intentional discrimination claims because the "opinions speak only to the question of implicit, or hidden, bias—not intentional acts."[125] As for disparate-treatment claims, the admission of implicit bias evidence "makes even less sense," given that there is no requirement for the plaintiff to "show motive."[126] Moreover, evidence of implicit bias in the general population, as shown

121. *Id.*; Defendant's Renewed Motion in *Karlo*, *supra* note 119. ("Dr. Greenwald's opinion is nothing more than a highly-prejudicial 'untested hypothesis' as to a causal link between implicit bias and discrimination.").

122. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354–55 (2011); Defendant's Renewed Motion in *Karlo*, *supra* note 119; *see* Allan G. King & Syeeda S. Amin, *The Propensity to Stereotype as Inadmissible "Character" Evidence*, 27 ABA J. LAB. & EMP. L. 23, 35 (2011) ("When implicit bias evidence is introduced, it is not the words or actions of the defendant-employer that are offered as proof, but rather the unconscious beliefs and attitudes of third-party test-takers who share the same race, gender, or age as the particular decisionmakers at issue. Thus, the expert projects onto an employer's managerial hierarchy the implicit discriminatory 'character' of the subjects of a social science experiment to prove that these managers acted in conformity with that discriminatory character."); Masakayan, *supra* note 34, at 274 ("To conform with Rule 404, courts should only admit such evidence if the parties provide it with more than a generalized notion that an employer was acting with a certain 'character' of intolerance or discriminatory behavior. Courts must carefully scrutinize whether the IAT data is sufficiently predictive of discriminatory behavior at the time of the alleged unconscious discrimination. Without this sufficient causal link, the general use of IAT data to establish a general 'propensity' to engage in unconscious discrimination collapses into non-admissible character evidence under Rule 404.").

123. *See Jones I*, 34 F. Supp. 3d at 901.

124. Karlo v. Pittsburgh Glass Works, L.L.C., No. 2:10-cv-1283, 2015 WL 4232600, at *29 (W.D. Pa. July 13, 2015), *vacated on other grounds*, 849 F.3d 61 (3d Cir. 2017); *Jones I*, 34 F. Supp. 3d at 901; *see* Masakayan, *supra* note 34, at 273 ("Given the significant difficulties that IAT evidence faces under Rules 401, 402, 403, 404, and 702, courts should look upon such evidence with scrutiny.").

125. *Jones I*, 34 F. Supp. 3d at 901.

126. *Id.*

through a popularized Internet test, does not establish that implicit bias played a role in the challenged employment decision.[127]

IV. SPECIFIC EVIDENTIARY APPLICATION

The concerns about implicit bias outlined above are more than mere academic speculation. The very real problems attendant to implicit bias are chronicled by a series of real cases that unfolded in Iowa courts. The domino effect sure to follow, absent judicial or legislative intervention, is best exemplified by proposals already advanced by proponents of the IAT.

A. *The* Salami *Swinging Door*

A pair of decisions decided by Iowa courts illustrates the perils of scattered thinking in the context of implicit bias; for purposes of this Article, the cases will be referred to as *Salami I*[128] and *Salami II*.[129] These cases demonstrate the problems inherent in poor analysis of the evidentiary issues surrounding so-called implicit bias testimony.

Idorenyin Salami, a Nigerian immigrant, excelled as a sales associate in the men's fashion department of Von Maur, one of the Midwest's oldest and most respected department stores.[130] After being promoted to department manager, Salami's performance suffered.[131] In the span of just 10 months, Salami was the subject of three separate customer complaints.[132] Because Von Maur's "customer-first" culture abhorred customer complaints, Sarah Whitlock, manager at the flagship Von Maur store, fired Salami.[133] Salami's husband, Olu, a county prosecutor, assisted her in filing a race discrimination and harassment suit against Von Maur and Whitlock.[134]

127. *See Dukes*, 564 U.S. at 354 (noting the implicit bias expert could not "determine with any specificity how regularly stereotypes play[ed] a meaningful role in employment decisions at Wal-Mart").

128. Salami v. Von Maur, Inc., No. 12-0639, 2013 WL 3864537 (Iowa Ct. App. July 24, 2013) [hereinafter Salami I].

129. Salami v. Von Maur, Inc., No. 14-1603, 2016 WL 530253 (Iowa Ct. App. Feb. 10, 2016) [hereinafter Salami II].

130. *Salami I*, 2013 WL 3864537, at *1.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.*

Although Salami was represented by competent counsel, she was not consistent with the facts surrounding her termination.[135] In support of her discrimination claim, which otherwise lacked any credible evidence, she retained implicit bias expert Dr. Philip Atiba Goff.[136] Salami also proffered the testimony of three alleged me-too witnesses: Misha Koger and Rose Byrd, two former employees of Von Maur, both of whom were African American and both of whom also had been supervised by and fired by Whitlock, and Mr. Lopez, a Von Maur customer who complained of Whitlock's racial discrimination against him.[137]

The defendants moved in limine to exclude the testimony of Dr. Goff and the me-too witnesses.[138] The trial court engaged in a Solomonic analysis and excluded the me-too witnesses but allowed Salami to offer Dr. Goff's expert testimony.[139] In excluding the me-too testimony, the court focused on the nature of the testimony—namely, that Salami sought to introduce the witnesses' mere allegations—and its prejudicial effect, which would outweigh its probative value.[140] As for allowing Dr. Goff's testimony, the trial court was not as precise in its logic.[141]

The trial court ignored or failed to comprehend the thrust of Von Maur's argument: Dr. Goff's testimony had no place in a disparate-treatment trial.[142] Under Iowa law, a disparate-treatment plaintiff must present evidence of unlawful discriminatory *intent*.[143] By definition, and as explained by Dr. Goff, implicit bias is unintentional.[144] Thus, implicit bias expert testimony is irrelevant in a trial alleging intentional discrimination.[145]

135. *See id.* at *2.

136. *Id.* at *2–3. Dr. Goff is a Harvard-trained psychologist who specializes in research and writing surrounding implicit bias. Philip Atiba Goff, UCLA PSYCH. DEP'T (Mar. 14, 2016), https://web.archive.org/web/20160314100630/https://www.psych.ucla.edu/faculty/page/goff.

137. *Salami I*, 2013 WL 3864537, at *1.

138. *Id.* at *1–2.

139. *Id.* However, allowing irrelevant and prejudicial testimony for the sake of "splitting the baby" is certainly not something the wise King Solomon would have condoned. *See* 1 *Kings* 3:16–28.

140. *Salami I*, 2013 WL 3864537, at *1–2.

141. *See id.* at *2–3.

142. *See id.*

143. *See id.*

144. *See id.* at *3.

145. *See id.*

Salami resisted the defendants' motion to exclude by resorting to the proverbial evidentiary "shell game."[146] She conceded Dr. Goff would not opine that discrimination actually occurred but then argued that did not necessarily mean his testimony would be of no "assistance" to the trier of fact; rather, he would "explain the concept of implicit racial bias and how the presence of certain factors within an organization may lead to discriminatory decision making—even from well-meaning individuals."[147] She emphasized Dr. Goff premised his conclusions on a simple examination of the "factors that have been long known to make it more likely for implicit bias to occur."[148]

The focus of Dr. Goff's proposed testimony was not whether Salami experienced discrimination by the defendants; the obvious reason being "[s]ocial science has no way of knowing that."[149] Salami urged, however, that scientists *do* know "based on decades of peer-reviewed research . . . what factors in an organization and in a decision-making process tend to make it more likely that discrimination would occur," and Dr. Goff would lay out the risk factors that make it more likely for implicit bias to impact a workplace decision.[150] Moreover, she contended, this knowledge would not be within the common experience of most jurors.[151]

The trial court fell for the shell game and denied the motion to exclude Dr. Goff's testimony.[152] It cautioned, however, that Dr. Goff would not be allowed to offer an opinion on "whether or not there was, in fact, discrimination against this particular plaintiff" and limited the testimony to "the concept of implicit racial bias and how the presence of certain factors

146. *Id.* at *2. "In the shell game, a prestidigitator places a pebble under one of several shells, and then shuffles them. The player, who has wagered on his or her ability to find the pebble, then guesses under which shell the pebble resides. The player is almost always wrong." Ellen Wertheimer, *The Products Liability Shell Game: A Response to Victor E. Schwartz and Mark A. Behrens*, 64 TENN. L. REV. 627, 628 (1997). The "pebble" in the implicit bias context is the expert testimony; the "shells" are the opinions to which the expert could offer. The plaintiff, through a sleight of hand, tricks the court into thinking the pebble is under the "general principles" shell, though it is actually hidden under the "causation" shell.

147. *Salami I*, 2013 WL 3864537, at *2.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

may lead to discriminatory decision making."[153] In doing so, the trial court simply ignored the heart of the defendants' argument: testimony asserting that "it looks like racism" is inadmissible under Rules of Evidence 401, 403, 608, and 702.[154]

The *Salami I* trial court was preoccupied with the concept of the supposed helpfulness of expert testimony on the modern and sophisticated nature of social framework science.[155] The court committed common logical errors and neglected to analyze the implicit bias testimony for what it was: inadmissible pseudo-character evidence that should have been excluded under Rules 404 and 608, as well as irrelevant and unduly prejudicial and thus inadmissible under Rules 401 and 403.[156]

At trial, Dr. Goff offered typical implicit bias testimony focused on the "social framework analysis" of race discrimination.[157] That testimony included six elements or factors that provide a context for the jury to analyze whether the individual defendant, Sara Whitlock, engaged in disparate treatment—which, again, requires *intentional* discrimination.[158] Dr. Goff claimed he was not attempting to influence the jury's decision; he testified he "wasn't tasked with figuring out whether or not Sara Whitlock fits a caricature of a bigot."[159] Rather, Dr. Goff claimed to be called to a higher task—to determine "whether or not the kind of situations that we tend to study as social psychologists were present or absent in this particular case."[160]

Dr. Goff's testimony in *Salami I* is a classic example of the implicit bias litigation "bait and switch." While pretending not to offer an opinion as to whether Sara Whitlock discriminated against Salami, Goff testified the

153. *Id.*

154. In state court, these are Iowa Rules of Evidence 5.401 (relevant evidence); 5.403 (probative and prejudicial value); 5.608 (reputation or opinion evidence); and 5.702 (expert witness testimony). *See* Arthur Best & Jennifer Middleton, *Winking at the Jury: "Implicit Vouching" Versus the Limits on Opinions About Credibility*, 55 ARIZ. L. REV. 265, 289 (2013) ("[E]xpert opinion about credibility that is based on an analysis of a particular statement or interview, and not on an analysis of the witness's character trait of truthfulness, would be outside the coverage of Rule 608. It would instead be governed by the general rules for expert testimony.").

155. *See Salami I*, 2013 WL 3864537, at *2.

156. *See* IOWA R. EVID. 5.404, 5.608, 5.401, 5.403.

157. *Salami I*, 2013 WL 3864537, at *2.

158. *Id.* at *3.

159. *Id.*

160. *Id.*

customer-service sector, such as retail sales, is a "stereotype relevant domain."[161] He explained black women, such as Salami, were "likely [to] be stereotyped as . . . abrasive, sassy, angry and rude."[162] Not surprisingly, the three explicit customer complaints that resulted in Salami's termination described her as "rude" and "angry."[163]

Goff told the jury that a color-blind approach to workplace fairness—such as Von Muar's nondiscrimination training, which emphasized treating all employees and customers the same regardless of race or sex—is likely to result in "increased reliance on stereotyping" and "increased racial bias."[164] He also testified about the concept of aversive racism and identified it playing a role in Salami's workplace.[165] Again, without openly calling Whitlock a well-intentioned racist, Goff explained that "the vast majority" of U.S. white people prefer to see themselves as "nonracist."[166] He opined that this results in avoidance and reliance upon stereotypes.[167]

On cross-examination, Goff conceded some of the fundamentals of implicit bias science: (1) not all social scientists adhere to implicit bias theory and (2) even zealous proponents, such as Goff himself, admit that exposure to diverse races can abate the impact of implicit bias.[168] Armed with these admitted truths, the defendants' questioned whether the fundamentals of his theory would be altered if Sara Whitlock interacted with African Americans in her personal life.[169] Goff conceded it would change his theory, allowing Whitlock to respond to Goff's supposed nonattack by explaining that her best friend was black, she had previously been in a long-term relationship with a black man, she had a black brother-in-law, and she had several biracial nieces and goddaughters.[170] Goff was forced to admit that these facts were all relevant to his theory and that he was ignorant of them before reaching his conclusion.[171] Though this testimony would normally be barred by Rule

161. *See id.*
162. *Id.*
163. *Id.* at *3–4.
164. *See id.* at *3.
165. *Id*.
166. *Id*. at *3 n.1.
167. *Id.*
168. *Id.*
169. *See id.*; Trial Testimony Transcript of Philip Atiba Goff at 83, Salami v. Von Maur, Inc., No. LACL118608 (Iowa Dist. Ct. Feb. 2, 2012) [hereinafter Goff Transcript].
170. *Salami I*, 2013 WL 3864537, at *3 n.1; Goff Transcript, *supra* note 169, at 83.
171. *Salami I*, 2013 WL 3864537, at *3 n.1.

608, Salami failed to object to any of this evidence—presumably because it related directly to her expert's testimony.[172] The jury found Salami failed to prove that race was a motivating factor in her discharge and that she had failed to prove her claim of a hostile work environment based on race; the trial court accordingly entered a verdict for the defense.[173]

The lessons from *Salami I* are twofold. Unlike many judges, jurors are more inclined to cast a skeptical eye at expert testimony supposedly offered to simply provide background foundation.[174] Second, once a court discards the rules of evidence, the journey down the rabbit hole is quick to follow.

Coming full circle, Salami argued on appeal that she should have been allowed to offer her me-too evidence in rebuttal to the character evidence offered by Whitlock.[175] Salami ignored the so-called science behind the implicit bias theory and convinced the Iowa Court of Appeals to do likewise.[176]

The Iowa Court of Appeals fared no better than the trial court when it came to the rules of evidence. On appeal, the court analyzed Whitlock's testimony and held Salami should have been allowed to offer the me-too testimony of Koger, Byrd, and Lopez.[177] Disregarding fundamental evidentiary concepts, the appellate court concluded that since Whitlock was allowed to testify about her lack of bias, Salami should have been allowed to controvert Whitlock's testimony with rebuttal evidence in the form of me-too complaints.[178] This proof regime essentially devolves into a he-said-she-said swearing match in which witnesses offer competing testimony as to bias or lack thereof.[179]

172. IOWA R. CIV. P. 5.608.

173. Verdict, Salami v. Von Maur, Inc., No. LACL 118608, 2011 WL 9381644 (Iowa Dist. Ct. Feb. 2, 2011).

174. Indeed, most jurors know when they are being "sold" in voir dire and with expert testimony.

175. *Salami I*, 2013 WL 3864537, at *9.

176. *See id.* at *10.

177. *See id.*

178. *See id.*

179. *See* State v. Redmond, 803 N.W.2d 112, 125 (Iowa 2011) (noting the jury is more likely to improperly infer propensity "in cases with weak evidence or cases that are he-said-she-said swearing matches").

This flawed logic created what in Iowa can be called the "*Salami* swinging door"—a plaintiff is allowed to offer me-too testimony in supposed response to a defendant's denial of illegal intent.[180] *Salami II*, in which the plaintiff was allowed to do just that, completes the circle of legal and evidentiary retrenchment.[181] In three easy steps, it goes like this: (1) implicit bias experts testify they are not opining that a defendant had an unlawful motive; (2) when the defendant tests the expert's assumptions and opinions using implicit bias scientific fundamentals, the defendant is characterized as offering character evidence; and (3) the plaintiff is therefore allowed to offer otherwise inadmissible "other act" evidence to prove the defendant acted in conformity therewith. In other words, the rules of evidence are completely ignored—and usually without comment.

Unfortunately for Salami, this fractured logic never paid dividends. In *Salami I*, Goff was badly tainted by cross-examination related to an article he wrote while attending Harvard where he likened all white Americans to slave owners and all black Americans to slaves.[182] Unsurprisingly, Salami did not call Goff as an expert witness in *Salami II*, though she did offer the testimony of Koger, Byrd, and Lopez.[183] *Salami II* also resulted in a defense verdict.[184]

Despite the defense victories in *Salami I* and *Salami II*, the damage was done. Relying on this haphazard analysis, Iowa courts spend too much time

180. *See Salami I*, 2013 WL 3864537, at *5.

181. *See generally* Salami II, No. 14-1603, 2016 WL 530253 (Iowa Ct. App. Feb. 10, 2016)

182. *See generally Salami I*, 2013 WL 3864537, at *3.

183. *See generally Salami II*, 2016 WL 530253.

184. *Id.* at *1. The me-too character evidence of *Salami II* wilted when exposed to the sunlight of a courtroom. The trial testimony indicated Koger's termination resulted from her impetuously making a pass at a customer's boyfriend. *See* Trial Transcript of May 27, 2014, at 116–17, Salami v. Von Maur, Inc., No. LACL118608 (Iowa Dist. Ct. May 30, 2014). Byrd was, in reality, a content black manager; trial testimony supported the conclusion that Byrd actually liked and respected defendant Whitlock. *See id.* at 10–12. Byrd appeared to have been unscrupulously duped into making statements that seemed to indicate she believed she was the victim of discrimination. Her testimony actually helped the defendants. As for Lopez, who the defendants described as a "wholesaler," he failed to testify at trial after attracting the defendants' attention for purchasing large quantities of merchandise and reselling the goods in his Mexican village. Despite her failure to object to the evidence used to impeach her me-too witnesses, Salami argued on appeal the evidence should not have been admitted. Ironically, the decision was overturned on other grounds anyway.

examining whether certain evidence is in rebuttal to other evidence.[185] The courts often fail to spend valuable time considering whether an implicit bias expert should be allowed to testify at all.

B. *Future Problems with Implicit Bias Evidence*

Allowing implicit bias evidence as evidence of discrimination leads one down a slippery slope to its application elsewhere in the courtroom. Parties, judges, witnesses, and even jurors could be forced to undergo IAT testing, despite the serious concerns about its predictive validity. To most, such a suggestion would be alarming. The proponents of the IAT, however, have already launched their campaign to weaponize the test.[186]

Plaintiffs will undoubtedly seek to compel defendant decisionmakers to submit to the IAT or other implicit bias testing under Federal Rule of Civil Procedure 35 and its state counterparts.[187] Indeed, Dr. Greenwald has already begun advising plaintiffs' attorneys to do just that.[188] These requests will likely be made in response to arguments to exclude testimony on implicit bias because evidence of implicit bias in the general population, as shown through the IAT, does not establish that implicit bias played a role in the challenged employment decision.[189] The requests, therefore, "will be aimed

185. *See Salami I*, 2013 WL 3864537, at *10.

186. Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 501–02 (2005); Allan G. King & Carole F. Wilder, Dukes v. Wal-Mart*: Some Closed Doors and Open Issues*, LITTLER REP., Feb. 2012, at 6, http://www.littler.com/files/The_Littler_Report_Dukes_vs_Wal-Mart_2-12.pdf [https://perma.cc/N4UX-AUML].

187. FED. R. CIV. P. 35 ("The court where the action is pending may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner.").

188. King & Wilder, *supra* note 186, at 6; *see* Lee, *supra* note 186, at 501–02 (arguing in favor of having a defendant submit to IAT testing and using the results as proof of causation).

189. Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 985 (2008) ("Biased thinking and attitudes, and mental processing of stimuli and concepts, are not the same as unlawful discrimination. It is important never to lose sight of this distinction. Racial discrimination is not about mental states. It is about social results and the causal basis for those results. . . . Mental states alone do not harm people. Adverse actions are what harm people."); *see* Masakayan, *supra* note 34, at 274 ("Discerning implicit bias from the text of a deposition, or even from the confines of a laboratory environment, ignores the complexities of the workplace and how implicit biases can affect one's propensities.").

at obtaining case-specific evidence on the percentage of biased managers in a company to respond to the claim that it is inappropriate to infer the level of bias within a company from general social science research conducted with persons outside the company."[190]

The most obvious problem with permitting plaintiffs to compel opposing parties to submit to the IAT is that the results cannot determine whether implicit bias actually played a role in the challenged employment decision.[191] "[E]ven examining the decisionmaker would not permit an expert to say whether any particular prior decision was the result of implicit bias. The nature of implicit bias simply does not permit this level of precision."[192]

Perhaps even more troubling, some scholars and even a federal court judge have suggested that potential jurors should be required to submit to implicit bias testing during voir dire.[193] Clearly, requiring potential jurors to submit to implicit bias testing—with results to be shared with the trial judge and counsel for both parties—raises serious privacy concerns.[194] The concern is exacerbated by the serious doubts as to whether the IAT can accurately predict real-world discriminatory behavior.[195] Furthermore, given that the

190. King & Wilder, *supra* note 186, at 6.

191. Annika L. Jones, Comment, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221, 1238 (2017).

192. *Id.*

193. Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 170 (2010) ("Courts could administer computer or hand-written bias sensitivity tests to potential jurors and share the results with the lawyers before voir dire."); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 166 (2010); *see* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1179 (2012) ("One obvious way to break the link between bias and unfair decisions is to keep biased persons off the jury.").

194. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 856 (2012); *see* Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 1014 (1999) ("Unconscious bias test takers have a privacy interest in their test results.").

195. Kang et al., *supra* note 193, at 1179 (conceding that "the leading scientists in implicit social cognition recommend against using the test as an individually diagnostic measure" and therefore recommending against the use of the IAT in jury selection);

IAT results indicate that the majority of Americans harbor unintentional and unconscious bias,[196] any attempt to delineate the IAT score beyond which potential juror would be considered "too biased" to impartially serve would be arbitrary at best.[197]

V. A CLEAR ANALYSIS

The analogy that most clearly shows the error of allowing implicit bias testimony involves a simple, personal injury claim brought on products-liability theories. In our hypothetical, the plaintiff and her two-year-old son suffered devastating injuries after the car she was driving skidded into a bridge abutment.

In response to the plaintiff's allegations of defectively designed brakes, the defendant argues there is no evidence of negligent design and asserts comparative fault based on the plaintiff's alleged speeding. There is absolutely no engineering evidence—no skid marks, models, or road camera footage—as to the speed of the car. The plaintiff denies she was speeding and is adamant that she always drives within the posted speed limit. To rebut her denial, the defendant proffers the testimony of a "driver conduct" expert. This expert will opine that the presence of certain factors may lead to speeding by well-meaning individuals. He will explain the following: (1) over 70 percent of drivers are known to speed on the roadway in question; (2) modern vehicle design makes speeding difficult to resist; (3) speeding is more common on lightly patrolled roadways; and (4) the stretch of roadway in question is lightly patrolled by law enforcement because of the presence of speed cameras.[198] Should the jury deny the plaintiff recovery based on the expert's testimony that the plaintiff probably was speeding, even if she did not mean to?

Another analogous hypothetical further illustrates the point. Imagine a trial where first-time homebuyers seek damages for the fraudulent

Roberts, *supra* note 194, at 854 (noting a significant disadvantage of the proposal is "the question of the connection between an IAT score and any real-world phenomena that would affect the impartiality of a juror").

196. *See* Amelia M. Wirts, Note, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 58 B.C. L. REV. 809, 811 (2017) ("Several studies suggest that nearly everyone holds implicit biases.").

197. Larson, *supra* note 193, at 167 ("[I]t's unclear where a cutoff point could be to remove a juror for cause based on an IAT result . . . .").

198. While these assumed "facts" may seem extreme or exaggerated, they are strikingly similar in kind and scope to the facts offered by implicit bias experts.

concealment of known material defects and intentional misrepresentations on the disclosure documents required for the sale of the home. The plaintiffs experienced significant water damage through lateral cracks in their foundation one week to the day after closing on the property. The plaintiffs allege the defendant home sellers knew of the cracks in the foundation and attempted to conceal any visible signs of defect with caulk and paint. There is substantial evidence to suggest the plaintiffs' allegations are true, but the defendants proffer the testimony of an expert who will opine on self-deception and willful ignorance. Specifically, the expert's testimony will illustrate how even well-meaning people can unconsciously avoid otherwise obvious facts to eliminate facing an unpleasant reality. Thus, the expert will testify that the defendants' skewed perception of reality—created by the defendants' subconscious, unbeknownst to them, in order to avoid the harsh reality that the house they intended to flip will not realize significant financial gain—negates the elements of knowledge and intent required for the plaintiffs' claims. Given the expert testimony, must the jury find for the defendants?

When outlined in these terms, the irrelevant nature of implicit bias testimony in an employment discrimination case becomes clear. Implicit bias theory testimony is unfortunately offered by one party for one reason—a plaintiff in a baseless discrimination case.[199] Although proponents invariably claim the testimony is not intended to usurp the role of the jury, opine on the ultimate question, or instruct the jury as to what decision it should reach, that is *precisely* the reasons for which this testimony is offered.[200] After all, if it is not offered to prove discrimination, what relevance could it possibly have? It does not relate to damages; it must therefore address liability.

As for liability in a disparate-impact case, the testimony would be irrelevant because intent is entirely irrelevant in these cases.[201] Likewise, because implicit bias is, by definition, not intentional, it has no relevance in

199. *See* Banks & Ford, *supra* note 12, at 1095 (explaining the plaintiffs' emphasis on introducing evidence of implicit bias is "a means of forcing a relaxation of the burden of proof").

200. *See* Wax, *Supply Side*, *supra* note 21, at 889 (criticizing the use of unconscious bias to prove actual discrimination because "[c]ausation is assumed, and alternative explanations disregarded or dismissed").

201. Banks & Ford, *supra* note 12, at 1101.

a disparate-treatment case.[202] And because of these truisms, there is only one conclusion to reach: Implicit bias testimony has absolutely no role in discrimination actions.

A. *Proposed Solution*

What is to be done with implicit bias? Should it be rejected as junk science? Of course not. But should it be injected into discrimination litigation? Emphatically, no.

Though there is serious doubt as to whether implicit bias testing can accurately predict discriminatory behavior,[203] studies suggest education and training may help eliminate the potential effects of implicit bias in the workplace and other settings.[204] Some employers have already implemented

202. Sabreena El-Amin, *Addressing Implicit Bias Employment Discrimination: Is Litigation Enough?*, HARV. J. RACIAL & ETHNIC JUST. ONLINE, 2015, at 1, 3.

203. *See supra* Part II.B; *see also* Maurice Wexler, *The Survival of the Intentionality Doctrine in Employment Law: To Be or Not to Be?*, 47 U. MEM. L. REV. 699, 738–39 (2017).

204. Masakayan, *supra* note 34, at 283–84 ("By providing employees primers on the pervasiveness of implicit biases, and helping employees to understand their own implicit biases, individuals can learn about their own feelings in a context where they are not encouraged to deny their own propensities. In these trainings, employers could even provide IAT testing for their employees. While the IAT may have its own drawbacks, it could be useful for both management and other employees who wish to find their own biases and understand them. By taking such tests, individuals making hiring decisions will be better aware of their own biases during the hiring process. These trainings will allow employers to foster direct dialogue on an otherwise uncomfortable subject and will allow employees to personally reflect on their own biases and how to combat them." (internal citations omitted)); Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis"*, 99 KY. L.J. 259, 321 (2011) (arguing that while administering the IAT to judicial candidates would be an inappropriate screening device, education about implicit bias can be a starting point for judges to take steps to reduce this bias); Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 396 (2008) ("[T]his [article] advocates for the creation of a firm-based diversity norm, where firms implement programs, training, and inter-group cooperation that increase diversity in the workplace and address conscious and unconscious discrimination."); *see* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1215 (1989) ("[I]t would be unwise to rely on litigation as the sole, or even primary, means of reform."). *But see* Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 4 (2001) (cautioning that antidiscrimination training may further polarize employees).

company-wide training programs aimed at doing just that.[205] Many employers, however, may decline implicit bias training and the resulting benefits, based on concerns about the potential exposure to litigation.[206] A plaintiff may later claim the company's provision of this training is proof of the discriminatory practices within the organization, leading to a greater likelihood that the company will be found liable and skyrocketing the amount of damages.[207] As one commentator observes, "No matter how committed an employer is to equal employment opportunity, the benefits of unconscious-bias testing [and training] may be outweighed by the risk of plaintiffs' accessing this potentially inflammatory and incriminating data to support an inference of discrimination."[208]

To encourage education and training on implicit bias, the best approach would be to treat implicit bias as useful information to inform policy, social interactions, and educational decisions, while recognizing its inherent shortcoming in the litigation context.[209] This model would

205. *See, e.g.*, Jonah Engel Bromwich, *Sephora Will Shut Down for an Hour for Diversity Training Tomorrow*, N.Y. TIMES (June 4, 2019), https://www.nytimes.com/2019/06/04/style/sephora-will-shut-down-for-an-hour-of-diversity-training-tomorrow.html; Yuki Noguchi, *Starbucks Training Focuses on the Evolving Study of Unconscious Bias*, NPR (May 17, 2018), https://www.npr.org/2018/05/17/611909506/starbucks-training-focuses-on-the-evolving-study-of-unconscious-bias.

206. Pollard, *supra* note 194, at 965; *see* Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459, 490 (2003) ("If the information in the IAT is also a source of liability, employers will not want to use the IAT.").

207. Pollard, *supra* note 194, at 965.

208. *Id.* Further, there are concerns that allowing discrimination claims premised on implicit bias would further perpetuate stereotypes and discrimination. *See* Masakayan, *supra* note 34, at 281.

209. Deborah Thompson Eisenberg, *The Restorative Workplace: An Organizational Learning Approach to Discrimination*, 50 U. RICH. L. REV. 487, 556 (2016) ("The current coercive, litigation-based strategy incentivizes organizations to deny that discrimination exists at all (lest they be sued), and to adopt a 'whack-a-mole' response to deny or stamp out individual claims as quickly and quietly as possible. In a restorative approach, however, organizations would cultivate a learning infrastructure. A restorative strategy recognizes that maintaining a workplace that values and practices equality and dignity norms is a constant, dynamic learning process for which everyone is responsible."); El-Amin, *supra* note 202, at 26–27 (stating the problem with attempting to address implicit bias in the legal system is that litigation "cannot address the root cause of the discrimination and cannot offer remedies beyond those meant for individual victims").

acknowledge implicit bias as real but dangerous. This would entail treating the theory similar to the manner in which federal law treats statistics on higher education campus safety, along with similar legal implications. Perhaps the best way to effectuate this would be through the enactment of a law akin to the Clery Act.[210]

The Clery Act recognizes public policy benefits derived from gathering data regarding crimes committed on the campuses of U.S. Institutes for Higher Education (IHE).[211] The law requires IHEs to track, report, and publish various violent crimes that occur on campus.[212] This allows IHEs to develop appropriate policies and procedures to address potential problems.[213] It likewise provides ample incentive for IHEs to prioritize campus safety.[214] Another purpose of the Clery Act is to ensure consumers, such as prospective students, are fully informed.[215] As a tradeoff to IHEs recognizing and reporting criminal conduct, the Clery Act explicitly

210. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2018).

211. *Id.*

212. *Id.* § 1092(f)(1).

213. Havlik v. Johnson & Wales Univ., 509 F.3d 25, 30 (1st Cir. 2007) ("The goal of the notification requirement is to protect members of the constituent campus communities by 'aid[ing] in the prevention of similar occurrences.'" (quoting 20 U.S.C. § 1092(f)(3))); *see* Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 71 (2002) (stating one of the purposes of the Clery Act is "to encourage all IHEs to develop security policies and procedures, especially ones to address sexual assault and racial violence on campuses").

214. Nancy Chi Cantalupo, *"Decriminalizing" Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 509 (2012); *see* Caroline Cox, Note, *Saving Title IX Values: The Campus Save Act as a Critical Tool for Survivors and Allies*, 41 HARV. J. L. & GENDER 429, 446 (2018) (reporting a $2.4 million fine against Penn State).

215. Texie Evans, *What the Heck Does a University Lawyer Do?*, ADVOCATE, Mar./Apr. 2017, at 29, 30 ("The Clery Act is billed as a consumer protection law—the idea being that a prospective student (and/or their parents) can make a better informed decision of what school to attend if they know information about their crime statistics and security practices."); Tara N. Richards, *No Evidence of "Weaponized Title IX" Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes*, 43 LAW & HUM. BEHAV. 180, 182 (2019) ("Further, the Clery Act requires IHEs to afford certain rights to sexual assault victims: grant both the accuser and accused the same opportunity to have others present at any proceedings, inform both parties of the outcome of any disciplinary proceeding and any appeals process, and notify the individual reporting victimization of available counseling services and options to change academic and living situations.").

prohibits the information from being used in litigation.[216] Thus, the problem is flagged, policy is advanced, and safety is promoted.

Though campus violence and implicit bias in the workplace are dissimilar problems, both can be addressed in a similar fashion. Using the Clery Act as a framework for implicit bias would provide an approach under which employers, public-accommodation providers, and others would be required to recognize that implicit bias is potentially real and should be addressed.[217] Like the Clery Act, this framework would still allow for regulatory enforcement while avoiding litigation.[218]

Explicitly removing implicit bias from the courtroom would remove any impediment to conceding the legitimacy of the science. It would then remove obstacles to identifying and attempting to rectify implicit bias in workplaces, housing markets, and classrooms. The goal, after all, is the reduction or elimination of discrimination. The best way to do so would be to address implicit bias through training—not litigation.

VI. CONCLUSION

Though the concept of implicit bias is not new, its admission as evidence in discrimination cases threatens to punish mere thoughts and does not promote inclusive workforces. The IAT's accuracy and predictive validity may be in doubt, but no one can question the import of openly

216. 20 U.S.C. § 1092(f)(14)(A) ("Nothing in this subsection may be construed to—(i) create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or (ii) establish any standard of care."); *id.* § 1092(f)(14)(B) ("Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with this subsection shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action to enforce this subsection."); *see Havlik*, 509 F.3d at 33 (noting the Clery Act gives colleges and universities "substantial leeway to decide how notices should be phrased and disseminated so as most effectively to prevent future incidents" and dismissing student's defamation claim); Dziedzic v. State Univ. of N.Y., No. 5:10-CV-1018 (FJS/DEP), 2014 WL 7331926, at *2 (N.D.N.Y. Dec. 19, 2014), *aff'd*, 648 F. App'x 125 (2d Cir. 2016) (dismissing the plaintiff's claim under the Clery Act sua sponte); Andersen v. Midland Lutheran Coll., No. 8:11CV93, 2012 WL 12884565, at *11 (D. Neb. Nov. 5, 2012).

217. *See* El-Amin, *supra* note 202, at 19 ("The possibility of creating a workplace environment primed to address implicit biases is eliminated by litigation. For instance, scholars agree that the first step to addressing implicit biases is awareness and recognition of the problem. Litigation, however, incentivizes an employer to spend months or years denying the existence of implicit biases and their impact on firm decisions.").

218. *See* 20 U.S.C. § 1092(f)(13).

discussing implicit bias. Whether through legislative or judicial review, striking a balance among these competing concerns will entail careful weighing; the inherent dangers of admitting evidence of unintentional bias premised on test results of questionable accuracy must be weighed against the societal value in endeavoring to end a form of discrimination. Explicitly excluding implicit bias testimony from the courtroom, while acknowledging its significance in allowing for open discussion and increased awareness in a variety of settings, accomplishes precisely that.