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Aspirations of Objectivity: Systemic Illusions of Justice in the Biased Courtroom

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Aspirations of Objectivity: Systemic Illusions of Justice in the Biased Courtroom

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*Systemic Illusions of Justice in the Biased Courtroom***Abstract**

Given the ever-growing body of evidence surrounding implicit bias in and beyond the institution of the law, there is an equally growing need for the law to respond to the accurate science of prejudice in its aspiration to objective practice and just decision-making. Examined herein are the existing legal conceptualizations of implicit bias as utilized in the courtroom; implicit bias as peripheral to law and implicit bias as effectual in law, but not without active resolution. These views and the interventional methods, materials, and procedures they inspire are widely employed to appreciably “un-bias” legal actors and civic participants; however, without an accurate conceptualization of the science of prejudice in law, these interventions are likely doing more harm than good. On the basis that these interventional techniques are unscientific in their methodology, reliant upon a misleading theory of transparency of mind, deny the inherently emotional and biased origin of the court, and are disseminated largely technocratically, they fail to serve their intended purpose. In actuality, they reinforce systemic intergroup biases and are seen to produce a lesser objective justice. This project reiterates, as with so many aspects of justice, that there must be the same care taken in the address of those structural and institutional contributions to implicit bias that the enterprise of law perpetuates in and of itself as have been taken in the address of our individual cognitive predispositions toward discrimination.

Introduction: The Injustices of Implicit Bias

It is increasingly difficult to deny the pervasive sort of prejudice that lurks in our legal system and wider sociopolitical interactions. Indeed, the field of implicit bias research has received a great deal of attention by and beyond the academy in recent years, accumulating an impressive body of research¹: Statistically, African American women are less likely to receive adequate pain management medication in out-patient hospitals², individuals with Muslim-sounding names are less likely to be invited to interview for a job when compared to those with traditionally Anglican names irrespective of the content of their resumes³, Asian American are regularly regarded as less interpersonally proficient than their non-Asian peers⁴, women are universally assumed to be less capable than men in positions of active leadership in the workplace⁵, white children are less likely to receive disciplinary action by pre-school and elementary educators than African American children⁶, African American and Hispanic drivers are less likely to be found with contraband than white drivers but are more likely to be stopped, searched, and arrested for contraband-related offenses⁷, and on and on.

These evidences likewise and inevitably spill into the realm of the court: Individuals with

¹ See J. Kang, et al. "Implicit Bias in the Courtroom," *UCLA Law Review* 59, 1124-86 (2012); B. Nosek, et al. "Pervasiveness and Correlates of Implicit Attitudes and Stereotypes," *European Review of Social Psychology* 18, 36-54 (2007); D. Faigman, et al. "Implicit Bias in the Courtroom," *UCLA Law Review* 59, 1124-86 (2012).

² See K. M. Hoffman, et al. "Racial Bias in Pain Assessment and Treatment Recommendations and False Beliefs about Biologic Differences between Blacks and Whites," *PNAS* 113, 4296-301 (2016).

³ See D. Widner and S. Chicoine, "It's All in the Name: Employment Discrimination against Arab Americans," *Sociological Forum* 26, 806-23 (2011).

⁴ See F. Leong and T. Hayes, "Occupational Stereotyping of Asian Americans," *The Career Development Quarterly* 39, 143-54 (1990).

⁵ See A. Eagly and S. Karau, "Role Congruity Theory in Prejudice toward Female Leaders," *Psychological Review* 109, 573-98 (2002).

⁶ See United States Government Accountability Office, ed. "Discipline Disparities for Black Students, Boys, and Students with Disabilities," Government Accountability Highlights, K-12 Education Report, 18-258 (2018).

⁷ See E. Pierson, et al. "A Large-Scale Analysis of Racial Disparities in Police Stops across the United States," Stanford Open Policing Project Database, 1-23 (2017).

prominently Afrocentric features receive longer criminal sentences than those without⁸; women are more likely to be jailed for drug-related offenses than men⁹; American Indian and Alaskan Native juveniles are more likely to be sentenced in adult court than any other demographic¹⁰; non-white jurors stand twice as likely to be removed from their jury pool¹¹. Especially when silhouetted against such stark evidence, it becomes equally difficult to deny the need for something, anything, to curtail the felt effects of implicit bias.

In light of this, the law, now more than ever, has an urgent obligation to understand the nature of the assumptions of prejudice it makes in the pursuit of a normatively and objectively ‘unbiased’ system¹². That obligation seemingly centers on the thoughtful address of discrimination in the courtroom as both a cognitive and institutional phenomenon. The existing narrative of bias goes as so: when it is agreed to be problematic, it is agreed to be problematic at the level of the individual, and to resolve it is eliminate it from the decision-making processes of that individual. The narrative assumes what Linda Krieger calls “transparency of mind”¹³, what Jerry Kang calls “behavioral realism”¹⁴, or what Albert Dzur calls “civic dignity”¹⁵ – that we have the ability to be less biased by simply being less biased, more aware, and more attuned to the ways we exercise our prejudices. It seemingly dismisses the systemic and structural

⁸ See I. Blair, et al. “The Influence of Afrocentric Facial Features in Criminal Sentencing,” *Psychological Science* 15, 674-9 (2004).

⁹ See S. Covington and B. Bloom, “Gendered Justice: Women in the Criminal Justice System” in *Gendered Justice: Addressing Female Offenders*, 3-25 (2003).

¹⁰ See M. Leiber, “A Comparison of Juvenile Court Outcomes for Native Americans, African Americans, and Whites,” *Justice Quarterly* 11, 257-79 (1994).

¹¹ See B. O’Brien and C. Grosso, “Report of Jury Selection Study,” *University of Michigan College of Law Digital Commons*, 1-17 (2011).

¹² J. West, “12 Racist Men: Post-Verdict Evidence of Juror Bias,” *Harvard Journal on Racial and Ethnic Justice* 72, 165-204 (2011) at 166.

¹³ L. Krieger, “The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,” *Stanford Law Review* 47, 1161-1248 (1994) at 1167.

¹⁴ J. Kang and M. Banaji, “Fair Measures: A Behavioral Realist Revision of Affirmative Action,” *California Law Review* 94, 1063-118 (2006) at 1064-5.

¹⁵ A. Dzur, *Punishment, Participatory Democracy, and the Jury*, Oxford University Press, 2012 at 115.

contributions to bias¹⁶ and ignores the impoverished cognitive access each of us has to our biases, irrelevant of our intentions. As will be discussed, this flatfooted conception of prejudice in practice and in law has gone on to produce a lesser objective justice.

It is at this moment that the newest wave of the Implicit Revolution¹⁷ is, I believe, entering the foreground of the court. The entirety of modern law's arsenal against (explicit) prejudice – an arsenal inherited from Civil Rights-era discrimination law – predates the science, even the vocabulary, of today's kinds of implicit biases by decades. It is generally by these ill conceptions of the evidentiary standards of intent and the folk psychology or popular science understanding of the brain and behavior that the law continues to attempt to mediate prejudices¹⁸. From here the problem is further compounded as this distilled folk understanding is rarely seen to translate in full from its origin in science to its application in the courtroom¹⁹. The jurisprudential construction of prejudice in law and order is an overtly emotional, motivated, “consciously” cognitive phenomenon, a circumstantial choice that intends and impels; this provisional approximation and the living breathing version of it in the world – the version the law purports to represent²⁰ – exist now on entirely different, ever-divergent planes.

The first section of this paper seeks to address just this: I aim to devote sufficient space within which to lay side by side the science and the law in hopes of fashioning a wider view of contemporary bias and prejudice and those functions, conceptualized in law versus in reality.

¹⁶ C. Lawrence, “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,” *Stanford Law Review* 39, 317-88 (1987) at 321-3.

¹⁷ The Implicit Revolution is the emergence of the science of unconsciousness, including implicit bias, and ushered in the study of prejudice and science in law as we know it now. For a comprehensive history of the Implicit Revolution of psychological, cognitive, and neurosciences, see A. Greenwald and M. Banaji, “The Implicit Revolution: Reconceiving the Relation between Conscious and Unconscious,” *American Psychologist* 72, 861-71 (2017) and J. Kang, “Trojan Horses of Race,” *Harvard Law Review* 118, 1489-1593 (2005) at 1514.

¹⁸ Krieger, “Content,” at 1166-77.

¹⁹ J. Kane, “Integrity, Conscience, and Science,” in *Nomos vol. XL: Integrity and Conscience*, University of New York Press (1998), at 115-134.

²⁰ Krieger, “Content,” at 1217-8.

This section puts forth a more nuanced discussion of the working legal view – what I have called the “holdover” view – of bias, that attends to the foremost objections of implicit bias reform, including those surrounding the normative structure of anti-discrimination law. I then take up what is perhaps the more cooperative middle-ground or “interventional” view to clarify the problematic use of implicit bias science in law. The subsequent section offers a look at bias in action, namely through the role of juries and the bias “grooming” techniques currently in place in the *voir dire* and judgement processes. These bias-grooming techniques and the cases in which they are used call into question whether efforts put forth by law to reconcile the (disheartening) scientific realities of bias with objectivity and subjectivity are worthwhile at all. I argue that, though they respond to the common sense initiatives for a more impartial, “conscious”, and objective court, they are doomed to be self-defeating, theoretically and practically, and produce a lesser objective justice that reinforces prejudice in law. These first tentative, optimistic steps forward may in fact be doing more harm than good.

What We Mean When We Say Bias

When we talk about bias in law now, we largely do not talk about contemporary science. We talk about the stance taken by litigants and judges reflective instead of that outdated social psychology of 1980s academy science²¹. It is a science that deals in the sociological (not necessarily cognitive) science of ‘stereotyping’, talks about intergroup biases as normatively motivated, and discounts memory research, among other things. When we do talk about bias in law through contemporary science, it becomes far more telling.

For a moment, divorce the notion of bias as prejudice or emotion: As far as the cognitive

²¹ Krieger, “Content,” at 1174-6.

sciences are concerned, bias references the mechanical processes by which the brain makes sense of the huge overabundance of stimuli that it receives at a given time. These are processes of categorization and schema-development that are necessary to combat this massively disparate gap between the amount of stimuli we process and receive, which occurs, by conservative measure, at a rate of 50 chunks (pieces of information) to ten million per second²². The brain is biased to operate in the most efficient means, so bias, most simply (1) regulates and filters what of that overload of stimuli is attended to²³; (2) discerns and constructs meaning from sparse or unreliable stimuli, as in the case of novel or unfamiliar experience²⁴; (3) acts upon information and stimulates predictive action most quickly and efficiently; and (4) aids in governing the processes of memory activation and retention.

If viewed along the lines of these four basic functions, a corresponding twin picture of prejudice emerges more clearly: (1) regulation and filtering can be somewhat arbitrary and stimuli that goes un-attended may in fact be useful; (2) contextual constructions can be an illusory process in which the assumptions made by the brain as based on experience may be false or nonexistent; (3) the efficiency by which the brain acts upon information may be to the detriment of the most beneficial or productive choice, especially when the neurosensory processes are at the mercy of ‘instinctual’ or psychologic responses²⁵; and (4) memory processes are, among the brain’s mechanics, wildly unreliable, errorful, and porous to corruption by other cognitive functions, leading to potential compounding of biases at the point of later retrieval²⁶.

²² Reference Cognitive Information Processing Theory.

²³ As with mood-congruency effects, base rate fallacies, frequency illusions, confirmation biases, etc. For more on this, reference The Cognitive Biases Codex.

²⁴ As with pareidolia, placebo effects, cross-race effects, denomination effects, projection biases, etc.

²⁵ As with conjunction fallacies, decoy effects, unity biases, trait ascription biases, the Dunning-Kruger effect, etc.

²⁶ As with misattribution errors, primacy and recency effects, Google effects, misinformation effects, cryptomnesia, etc.

Such potential deficiencies in the mechanism of bias can devolve into what is widely conceptualized as “prejudice” (that is, negative and discriminatory judgement), and that prejudice, being so closely tied to the brain’s regulatory process of bias, can devolve into something extremely difficult to suppress or avoid, if not impossible. Bias is foundational to prejudice in the same way that marketing is foundational to capitalism, but it is important to note the two are not synonymous. Further, bias is not a ‘learned’ contextualization of identity in the same way racism or sexism is, both schemas we inescapably absorb from the world around us. Given the ways our social identities are increasingly complicated, inter-associative, and intersecting, the transformation of bias has been from labored to automatic and from blatant to ubiquitous. These processes of bias are examined in the science as being at the level of implicit (colloquially, “unconsciously”) or explicit (“consciously”). Explicit biases – what Civil Rights-era legislation deals with – are those we recognize as such and choose to make expressed or unexpressed. Implicit biases – what I am concerned with – are those veiled from ourselves because we are unable to access them from the same level of consciousness that created them.

This simplification is all to say, when bias and prejudice are illustrated in science as distinct phenomena – prejudice being the discriminatory one of the two – their distinction becomes noticeably lacking in the corresponding legal literature²⁷; bias, prejudice, discrimination, discriminatory intent, assumptions, emotions, fears, stereotypes, perceptions, etc. are falsely used interchangeably. It may seem an inappreciable one, but it aims at the heart of the problem, where it is exactly these kinds of distinctions – between bias and prejudice, between implicit and explicit, between motivation and intentionality, between the burden of proof and the burden of production – that muddies the waters of legal decision-making and public perception.

²⁷ See Faigman, et al., “Courtroom,” (2012).

Bias textures our experiential understanding of the world: It itself is not discriminatory, it cannot be “consciously” identified by the individual, and it is not a mediated choice²⁸. Implicit bias is even less so identifiable by the individual, to the point of being so covertly persistent as to potentially modify the individual’s neurochemistry over time²⁹. Prejudice, in the sense of litigious prejudice, is confined to performative discrimination, the likes of which are clearly seen in Title VII disparate treatment language; however, implicit biases do not necessarily align with our explicit ones, or those that we chose to endorse. This is also to say that bias is not contained exclusively within the walls of our brains: Implicit bias is nearly as much a cognitive phenomenon as it is a systemic one reflective of the proliferation of prejudice throughout our institutional and social lives³⁰. What the law lacks, among other things, is an understanding that our biases and prejudices, those very conceptions and ideals, are not entirely, not “consciously” our own.

So, when we talk about bias and the law, we are talking about the Titanic’s iceberg: It’s foolhardy to think that the tools of the court can even begin to spot what rests below the surface, and what may seem as belaboring this distinction is only a necessary illumination of accurate science. When unpacked from the legal amalgam of emotionality, it is these kinds of implicit prejudices – and the bias-grooming techniques derived from their science – that are legitimately threatening to justice-making. Without an accurately informed conception of implicit bias and prejudice, bias-grooming in the court becomes a self-defeating exercise in shadowboxing an invisible adversary.

²⁸ Krieger, “Content,” at 1167.

²⁹ See B. Cheon, et al. “Contribution of Serotonin Transporter Polymorphism (5-HTTLPR) to Automatic Racial Bias,” *Personality and Individual Differences* 79, 35-38 (2015).

³⁰ See Lawrence, “The Id,” (1987).

To Be Bias-Free

Anyone on this side of *Brown v. Board of Education*³¹ is likely to concede that behavioral sciences do inform the citizen public and therefore do for better or worse inform the law.

Dismissing what seems to be, at least to me, the obviously unfounded notion of non-bias – that we are all absolutely objective and omnisciently impartial – there are generally left two ideas as to how this occurs in specific regard to prejudice; the “holdover” formalist view and the common sense “interventional” view.

The Holdover View of Bias

The holdover view of bias – a holdover from Civil Rights-era jurisprudence – puts forth the view that the law is right to reject prejudice and bias on the basis that the law should not or cannot change³². The former objection, that the law should not accommodate a scientific view of prejudice, presses uneasily against evidence to the contrary. On and on, there is so much evidence of racial discrimination in jury selection³³; that *voir dire* instruction produces and reproduces ethnic and classist prejudice³⁴; of inflamed partisanship in the court, on the bench, in the chambers³⁵. It exists in every facet of the process³⁶; CSI and forensic analyses, testimony and

³¹ 347 U.S. 483 (1954). *Brown*'s footnote 11 was a crucial reframing of the applicability of science in law, and make room for the use of social science in the colloquial understanding beyond law and the formal understanding within law. Despite questions of the quality of the then-science it was based upon, the impact of footnote 11 continues to be profoundly felt in legal theory and practice. See also Lawrence, “The Id,” at 350-1, 362-3.

³² See West, “12 Racist Men,” (2011).

³³ B. O'Brien and C. Grosso, “Report on Jury Selection Study,” University of Michigan College of Law Digital Commons, 1-17 (2011) at 11-17.

³⁴ West, “12 Racist Men” at 188-93.

³⁵ Krieger, “Content,” at 1226.

³⁶ See Faigman, et al., “Courtroom,” (2012).

in the language of proof, jury selection³⁷, jury deliberation³⁸, judicial education³⁹, sentencing procedure⁴⁰, precedent, legislation, language, reason, and right⁴¹. Likewise, we can look to the language of mens rea, culpability, scrutiny, admission, intent, so on, to recognize that the law lacks remedy for the probabilistic nature of prejudice⁴². If for no other reason than to insulate the law from avoidable mismemory biases or the unnecessary corruption of juvenile witnesses, as but two examples, it is in the interest of the legal practice to absorb the impact of evidence in brain sciences (At the time of writing, Black's Law admits four types of bias; the Association of Psychological Science admits almost 200). The holdover view defends law as a bastion of excusable raced and gendered and classed inequalities⁴³. More pointedly, it shelters those who benefit from the law as an enterprise of discrimination, and from the systemic prejudice it reinforces in its judgements⁴⁴.

Thinking that the law need not accommodate science in this way is a stance quickly dimming as the law becomes a more intensely politicized, economical machine. If there is merit to be extracted from the holdover view, it is from the latter objection – that the law is unable to accommodate such science. The rub is this: science begins with fact, law ends with fact. Science, even with evidences as well established as those listed, cannot grant the kind of certainty law requires to take as fact⁴⁵. (Also for this reason, the law cannot be treated as purely as a scientific

³⁷ D. Devine, *Jury Decision Making: The State of Science*, New York University Press (2012) at 41-60.

³⁸ *Ibid* at 152-80.

³⁹ See S. Strong, "Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?" *Journal of Dispute Resolution* 2015, 1-22 (2015).

⁴⁰ Devine, *Jury*, at 68-90.

⁴¹ See J. Armour, "Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit," *California Law Review* 83, 733-72 (1995).

⁴² W. Dimock, "Rules of Law, Laws of Science," *Yale Journal of Law & Humanities* 13, 203-25 (2001) at 204.

⁴³ Armour, "Stereotypes," at 734-50.

⁴⁴ Lawrence, "The Id," at 336-44.

⁴⁵ Dimock, "Rules" at 215-20.

methodology or civic technocracy⁴⁶.) However, when bias is at least acknowledged dually as a cognitive and institutional phenomenon, not a normative motivation, the law that surrounds it becomes more mutable and forgiving⁴⁷. There have been demonstrated ways in which the law may be read and exercised that do not require it to fundamentally change or fundamentally readdress its certainty principles but nonetheless accommodates a more accurate science⁴⁸. Materializing this kind of gatekeeping decision⁴⁹, in Title VII legal language and beyond, is a realistic next step in the modernizing the holdover view.

The Interventional View of Bias

If the holdover view states that the law should not acknowledge the science of prejudice, the interventional view swings the pendulum the other direction to say that the law might resolve the whole of the problem of prejudice. What has been offered by legal theorists⁵⁰ and actors is a surface-level and only partially-informed idiomatic view of implicit bias. Despite the evidence already accumulated, there persists in the wider social narrative (in the popular science understanding) a notion of transparent or privileged access to one's cognitive mechanisms of

⁴⁶ *Ibid* at 205-6.

⁴⁷ Krieger, "Content," at 1171-2.

⁴⁸ Instances of this kind of re-reading of the law are seen in Title VII cases *Kimble v. Wisconsin Dept. of Workforce Development* and *McReynolds v. Merrill Lynch Co.*; both judgements saw concepts of in-group bias, uncertainty principles, mis-memory reliability, stereotyping, and so on, in the vein of the interventional view (below), freely cited. The language of Title VII on disparate treatment – language which upon closer inspection trades conscious intent for actionable causation, a more realistic application of implicit bias science – serves to illuminate the ways in which the law may be read as more consistent with an ever-evolving science, without compromising precedent. *Kimble* ruled in concurrence with Title VII discrimination; *McReynolds* did not: Both cases, however, mark a huge departure from what is usually seen of the holdover view, and establish that intentionality does not any longer need to be tied to "conscious" intent (i.e., bias as a choice), and the burden of proof shifts away from the burden of production of motivation. This mindful re-reading does not jeopardize the rule of law nor require the judgement to admit extralegal heuristics, and moves a step closer to an accurate reflection of the science of prejudice by law in practice. See *Kimble v. Wisconsin Department of Workforce Development* 690 F. Supp.2d 765 (E.D. Wis. 2010) and *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith Inc.* 11 7th Cir. 3639 (2012).

⁴⁹ See R. Harris, *Black Robes, White Coats: The Puzzle of Judicial Policymaking and Scientific Evidence*, Rutgers University Press: New Brunswick (1972), at 7-12.

⁵⁰ Those referenced herein including Kang, Krieger, Greenwald, Freeman, Lawrence, and others.

bias as allowing for intervention in the exercise of the resulting implicit bias. Within this narrative, the answers already seem to exist: through mindfulness and an increased awareness, the individual is capable of making himself appreciably less biased, effectively mediating his cognitive processes and subduing the felt effects of institutionally-born discrimination. Markets and media are reflective of this, being saturated with “4 Signs Racism may be an Issue in Your Workplace”⁵¹, “Bias-Proof Your Classroom Today”⁵², “A Fix for Gender Bias in Healthcare? Check!”⁵³, and (most ambitiously) “10 Steps to Overcome Unconscious Bias”⁵⁴. I am, as are many, skeptical that awareness – or thoughtfulness, or thoroughness, or intention – is ever enough a situation as this. That there is such a movement toward engaging in our individual subjectivity is not so much the problem as are the ways in which an interventional approach curtails hope for policy implementation, precedential change, or accountability from those institutions most readily perpetuating our systemic prejudices. To reiterate, implicit bias is not a cognitive choice, but a product of joint cognitive mechanics and institutional exposure:

Because we so readily assume that people have privilege access to the content of their own thought processes, we may easily overlook the significance of this assumption of decisionmaker self-awareness. But if one thinks about it, one must immediately recognize the normative utility of a rule prohibiting discrimination depends entirely on the decisionmaker self-awareness. One can refrain from “discriminating” only to the extent that one can accurately identify the factors impelling one’s actions or desires. Absent decisionmaker self-awareness, the nondiscrimination principle – if framed as a prohibitory injunction “not to discriminate” – loses its normative mooring.⁵⁵

Implicit Association Tests (IAT) and other implicit bias measure are more accurate at predicting

⁵¹ J. Haughton, “4 Signs Racism may be an Issue in Your Workplace,” Chartered Management Institute (12 May 2016).

⁵² E. Hopkins and G. Thompson, Scholastic Teaching Content, “Bias-Proof Your Classroom,” *Instructor* 117, no. 4, 32 (2008).

⁵³ J. Nordell, “A Fix for Gender Bias in Healthcare? Check!” *The New York Times* (11 January 2017).

⁵⁴ N. Goodman, “10 Steps to Overcome Unconscious Bias,” *Association for Talent Development* (2014).

⁵⁵ Krieger, “Content,” at 1186.

certain types of behavioral schemas, including racism, sexism, ableism, and on, than explicit bias or self-report measures⁵⁶. That this is the case cannot be understated: It points to, as accessibly as can be, that even the most introspective or informed among us cannot predict our biases or extinguish our prejudices⁵⁷. Recall here that biases, especially implicit biases, cannot be thought away exactly because they are foundational to our decision-making processes. They are integral to our cognitive functionality and are essentially inaccessible by the kind of mindfulness these fixes champion; at best, mindfulness is a post hoc runaround circling the issue, never meeting it directly.

My stance here – that implicit bias is the un-slayable dragon to our knights of law and order – moves a step further than the theory offered in compliment to the interventional view. Where Krieger, Freeman, and Kang put forth that the implicit biases we harbor regardless of any contrary intention must be muzzled through further and greater intervention⁵⁸, I venture that an interventional approach is somewhat futile. Implicit, or indeed explicit, bias is largely resultant of the political structuring and social performance of identity. The interventional view discounts not only the necessary nuances of implicit bias as cognitively foundational, but the confluence of cognitive mechanisms acting in reaction to systemic racism, sexism, and other prejudices. This overwhelming focus at the level of the individual – like calls for greater detection and screening of bias or selective modulation of decision-making conditions to deter biased tendencies – fails almost entirely to confront the social and historical impulses of discrimination. This misguided relationship between the brain and behavior is alternatively illustrated in the theory as a

⁵⁶ L. Rudman, et al. “‘Unlearning’ Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes,” *Journal of Personality and Social Psychology* 81, 856-68 (2001) at 856-8; Kang, “Trojan Horses” at 1512-5.

⁵⁷ Including and especially those involved in the science: We do not pass IAT’s with any greater degree of impartiality than first-time testers, we only become privy to its predictive patterning and correlations.

⁵⁸ See Kang, “Trojan Horses,” (2005).

perpetrator-victim relationship, wherein

the perpetrator perspective sees [discrimination] not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class. The victim, or “condition”, conception of [discrimination] suggests that the problem will not be solved until the conditions associated with it have been eliminated. *To remedy the condition of [discrimination] would demand affirmative efforts to change the condition.* The remedial dimension of the perpetrator perspective, however, is negative. The task is merely to neutralize the inappropriate conduct of the perpetrator.⁵⁹

In the pursuit of a normatively ‘unbiased’ legal actor, be they judge or juror, the law on the whole continues to wrongly buttress the perpetrator perspective, and with it the systemic prejudices and implicit attitudes that find continued traction in the Petrazyckian lifeworld.

False Aspirations of Objectivity

Both the holdover and interventional view of prejudice and science in law illuminate the chief expectation in law of some normative equality, or achievable objective outcome. In either dismissing (holdover view) or resolving (interventional view) matters of bias there remains an underlying basis of prejudice in the court – that is, a biased and emotional court is inevitable (otherwise, these views would struggle to arise at all). I find it difficult to accept, when we acknowledge this implicitly biased nature of the court and its civic participants, the illusion that there might be objectively right or equitable answers beyond the subjective discretion of legal actors⁶⁰ and decision-makers. An objective jury is in direct conflict with engaged civic participation. The injustice born from the maintenance of an illusory and counterproductive

⁵⁹ A. Freeman, “Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Cases,” *Minnesota Law Review* 62, 1049-1119 (1978) at 1053, emphasis added.

⁶⁰ For an example of this kind of objectivity rhetoric in practice, reference the treatment of ethnicity and race by the International Criminal Tribunal for Rwanda. See R. Wilson, “When Humanity Sits in Judgement” in *In the Name of Humanity: The Government of Threat and Care*, Duke University Press (2010) at 56-7.

aspiration to objectivity is the unifying thread between both views, especially as

we take into account the negative implications about human capacity [and] civic dignity. The recognition of a person as a responsible member of a collective...[contradicts] the more than two centuries of egalitarian and emancipatory political action that shaped the institutions of Western democracies, most recently through the efforts of civil rights social movements.⁶¹

It seems a paradox then that an egalitarian, emancipatory democracy should also call for civic participation that defers to a ‘right’ answer, or at least to one predetermined by the subjectivity of its ever-biased decision-makers⁶². I situate this at the crux of the difficulty in theoretically and practically reconciling social order – represented by jurors – with legal rules – judges – in the performative discourse of the courtroom⁶³. Not only that, but too the reconciliation of the adversarial model of justice when juries are increasingly placed at the center of a triangulation between proof, precedent, and economy. (Juries, tradition tells us, are a moral arbiter, not determinant of guilt in adversarial justice.) The use of juries, and all of the unique particulars surrounding their use in the courtroom, present a concise model of bias-interactions that exemplify most clearly, I believe, the ways in which the legal tradition has failed to adequately address the science of prejudice. In the same breath, so too has it failed to fully realize the capacity of the jury body and their being autonomously subjective and critical; a symbolic, prescribed, or otherwise unengaged jury undercuts the role of civic participation in the court. The mere maintenance of an impossibly objective ideal of implicit bias in the courtroom and in the jury, as from either the holdover or the interventional view, appreciably makes justice less objective.

⁶¹ Dzur, *Punishment*, at 155-6.

⁶² Leiter, “Objectivity,” at 200-2.

⁶³ B. Tamanaha, “A Concise Guide to the Rule of Law,” Legal Studies Research Paper Series 7, 2-20 (2007) at 10.

The Case for Juries, Just Not Expert Ones

It has been my experience that dialogues surrounding implicit bias decision-making in the courtroom also include discussion as to the very need for the (human) jury: Why not eliminate entirely Aristophanes' mortal quality of law⁶⁴? Aside from the imaginable logistical limitations, any alternative process invites equally as many biases into the court (statistical, mechanical, computational, interpretational, representational, etc.⁶⁵). The institution of the jury, as it exists now, aligns with both of the touchstone functions of the rule of law; to "hold governing officials to the law" (the vertical function) and to "resolve disputes between citizens according to the law" (the horizontal function)⁶⁶. The jury represents a unique kind of transmorphing of citizen responsibility:

Voters never have the individual offenders before their eyes; they are never in a position to feel the Montequieian impulse toward mercy. Ordinary voters are never capable of the routinized, sober, and merciful approach to punishment that is the stuff of the daily work of punishment professionals.⁶⁷

When civic dignity is confronting and participatory in this way, it moves from a plebiscitary or advocacy model of participation⁶⁸ to a more direct and pointed engagement with legal decision-making – what is called 'load-bearing participation'⁶⁹. Load-bearing participation is more directly engaged because it allows for and requires a greater exercise of subjectivity and responsibility on the part of the juror. Jury-less justice, or even systems lite on load-bearing

⁶⁴ Dzur, *Punishment*, at 154.

⁶⁵ Though not conscious, I would call these implicit in their nature as well.

⁶⁶ Tamanaha, "Guide," at 14.

⁶⁷ Dzur, *Punishment*, at 152.

⁶⁸ A fine example of this plebiscitary/advocatory versus load-bearing engagement is exemplified in California's Three Strikes policy and voter initiatives since the early 1990s. For more on this, see Dzur, *Punishment*, at 158-63.

⁶⁹ This is defined as follows: "Plebiscitary participation is uninformed, immune to other's perspectives, and undermining – requiring merely a signature or a ballot. Advocacy may well be informed and may demand significant time, but is unconcerned with anything but a specific cause or person. Load-bearing participation is exposed to a range of information, other's opinions, and holds the agent responsible for a collective outcome." See Dzur, *Punishment*, at 163.

forms of participation, runs the steep risk of undermining the perceived legitimacy of the objective legal system⁷⁰.

A more operative iteration of this jury-less stance is the argument for expert juries, either in the case of experts as jurors or jurors as needing an acquired expertise⁷¹. Expert systems of judicial decision-making may be argued in a strong and weak form⁷². In the strong form, the expert benefits over and above the layperson in his knowledge, which affords him the ability to “nullify” his passions; he is simply better outfitted to do objective justice than the common juror. In the weak form, the system of justice is so equipped, not the individual. Of these, however, the strong form is

less defensible than it might appear and leads to an unappealing loss of [civic dignity], among other hazards. [The weak form] is less reliant on the dominant role for professionals and experts than is often thought and indeed demands more rather than less citizen involvement.⁷³

Expert systems of justice therein demonstrate a counterproductive and rightly cautions view of scientific idolatry and cloistered technocracy – those tendencies that also draw out law-as-a-science arguments⁷⁴. Without accountability from non-expert legal actors, the institution is free to become recursively insular (as has been seen in the sciences), where any decision-making is based purely on the subjective discretion of its decision-makers. In either of these jury-less pictures, the call for jurors to be separated from their subjectivity as civilians is problematic: Jurors cannot be only confined to a prescriptive objectivity of law, nor should they be any more

⁷⁰ Restorative justice programs in Australia and New Zealand and the jury models exercised in Japan, South Korea, and Canada indicate as much: “Contemporary justice programs require deeper roots in civic culture attending to the problems of both crime and punishment” and rehabilitation and remedy to be effective and lasting. See Dzur, *Punishment*, at 159.

⁷¹ The same goes for using judges in an expert system.

⁷² Dzur, *Punishment*, at 151-2.

⁷³ *Ibid* at 152.

⁷⁴ Kane, “Integrity,” at 115-39.

removed from the process of decision-making than any other actor. Empirically and theoretically, the jury becomes most unreliable and unproductive when it is only a symbolic exercise of engagement with the law⁷⁵. The jury as it exists now may not be the most efficient means of load-bearing participation, but it is nonetheless an effective and legitimizing intervention between the vertical and horizontal functions of the law⁷⁶.

Bias-Grooming

Bias-grooming techniques appear throughout our social and legal institutions. Relevant to the court, the American Bar Association has its “Achieving an Impartial Jury Toolbox”, a sixty page review published in 2014 as a part of its Implicit Bias Initiative that includes resources like “Ten Quick Tips for De-Biasing” and a “Mindful Courtroom Checklist”. The National Center for State Courts and the State Justice Institute have each instituted their educational pilot programs that zero in on an optimistic and highly sanitized neuroscience. Even Starbucks mandated nationwide racial-bias training at an eight-figure cost that borrows much of the same science in much of the same way⁷⁷. Techniques range in scale and scope from surveys to orientation materials to workshops and trainings to research access to intervention and advising resources, aimed at every level of the court but concentrated at the level of civic participants. It is important to note that these initiatives, though created for institutional-level reform, are a means of individual reformation at explicit levels of prejudice; they almost exclusively approach (in design and/or in practice) implicit bias through the mistakenly virtuous lens of the interventional view⁷⁸.

⁷⁵ Devine, *Jury*, at 230-1.

⁷⁶ See Strong, “Judicial Education,” (2015).

⁷⁷ Bias-grooming and diversity initiatives like Starbucks’ are used by nearly half of all midsize U.S. corporations and by nearly every *Fortune* 500. For more on this, see Dobbin and Kaley, “Why Diversity Programs Fail,” (2016).

⁷⁸ Armour, “Prejudice,” at 760-66.

which is to say, through an ineffectual consciousness-raising of the individual without regard to institutional influence. To them I have four main objections.

First, the normative objectivity sought through bias-grooming is not entirely possible without bias or even prejudice. Even without inviting complications of philosophy or legal theory, we see that rational or objective decision-making is impaired or inhibited at the neurostructural level absent functional emotive centers of the brain⁷⁹. More macro but neurologic all the same, for example, is the use of photography in the court, a fairly well-represented facet of legal psychology. Photographic evidence as presented to a jury is the single most persuasive piece of indirect evidence that can be admitted⁸⁰. Everything from the OJ Simpson blood evidence to the minute-by-minute coverage of the Sayfullo Saipov terror attack in 2017, gruesome or graphic crime scene photos reliably invoke a heightened emotive, cognitive, and prejudicial response from legal actors regardless of experience or familiarity. This is above and beyond the effects of even the most personally effecting testimony and may be on its own responsible for increased punitiveness in juror and judge decision-making. Emotionally antagonized judgements as these are seen to result in lesser (actively) effortful, and thus less reliable, cognition⁸¹. Here, increased emotional salience reflexively motivates juror positive-rehabilitation and (increased) negative-retribution schemas, predisposing jurors to follow the lead of their implicit biases. Objections to include photography in the court echo objections to emotionality, but the law is hard-pressed to go without either: There is no rational or reasonable means by which the court can referee the exercise (or exclusion) of emotionality or provide an emotionally-predetermined environment within which to conduct justice. Though we see from

⁷⁹ See R. Gupta, et al. "The Amygdala and Decision Making," *Neuropsychologica* 49, 760-6 (2011).

⁸⁰ Reference J. Mnookin, "The Image of Truth: Photographic Evidence and the Power of Analogy," *Journal of Law and the Humanities* 10, 1-74 (1998).

⁸¹ Gupta, et al. "The Amygdala," (2011); Kang, "Trojan Horses," at 1510-1.

the science that some ideal emotionality may reduce biased judgement, bias-grooming has little – if any – capacity to enforce that.

My second objection lies within the very conceptualization of these types of techniques and the stereotype-congruence they emphasize⁸². Bias-grooming is ineffectual because it so deeply rooted in interventional notion of transparency of mind on the part of the individual. This a perfunctory pathologizing of the individual (the actor) without healing the system (the law), and the system must be attended to with equally as much fervor. Racism discrimination, as just one specific bias, is a systemic, socially- and historically-integrated pandemic that moves far beyond the singular individual⁸³ – recall here the perpetrator perspective. IAT-related evidence quantifies that bias against African Americans is held nearly equally by Caucasians as by African Americans. Asian Americans are biased against Asian Americans to a lesser but similar degree, and the same goes for Hispanic populations. Similar cases can be made for gender and sexuality prejudices, age, religion, class, and more⁸⁴. Prejudice itself has splintered away from the individual, so as long as the focus of these techniques remains on the individual, they miss the mark. They take up only part of a problem that forever continues to find ammunition elsewhere, in greater and equal measure⁸⁵.

Third is that, though they claim a scientific understanding of bias and prejudice, these techniques are by and large unscientific. These materials do not abide by conventions of follow-up study for subsequent intervention to adapt and modify them; without this kind of longitudinal attention and accountability, they are relatively worthless to the wider picture of bias-‘reduction’.

⁸² Armour, “Prejudice,” at 755-7.

⁸³ Lawrence, “The Id,” at 356-62.

⁸⁴ See Nosek, “Pervasiveness,” (2007).

⁸⁵ See I. Haney López, *Dog Whistle Politics: How Coded Racial Appeals have Reinvented Racism and Wrecked the Middle Class*, Oxford University Press (2015) at 35.

They often politicize topical issues of identity like race and sex, given their proximity to the politicization of the judiciary; this generally diminishes their autonomy and ability to be responsible to burgeoning science. The implementation of these techniques and materials is in no way regulated, so when left as a discretionary matter, there is little incentive for them to be included at all; the practical scope of bias-grooming (through duration, participation, or regularity) is extremely limited, so much so that it is too subtle a cognitive manipulation to establish any lasting effects⁸⁶. The language of these materials typically falls on the side furthest away from clinical legalese (so far away it is beyond merely making them more accessible); as above, this is a disservice to the necessary complexities of both science and law, and underestimates and undermines the capacity of the juror to engage with either. These techniques ostensibly draw from the very inequalities they seek to dispel; to reduce prejudice, jurors are faced with an unexpected crucible of admitting their own implicit attitudes (something, as least in our current political and social climate, I would certainly argue that most people are unwilling to advertise to a room of their colleagues or fellow jurors during one of these workshops⁸⁷. There is ample latitude within these techniques where individuals may hide, and in keeping the dialogue of prejudice sterilized in this way, they continue to perpetuate the notion of objectively ‘fixable’ prejudices⁸⁸, thus reinforcing the opacity of existing intergroup and implicit biases⁸⁹). Each of these is another hitch in a worthy quest for a lesser prejudiced law and only distances law further still from the accurate science necessary to do so. Even from the interventional view,

⁸⁶ See F. Dobbin, et al. “Diversity Management in Corporate America,” *Contexts* 6, 21-7 (2007).

⁸⁷ This is reiterated by creators Banaji and Greenwald in the conceptualization of the IAT: “IAT scores are best considered as medical data or votes. A person may share them, but should not be expected or asked to share with others at this point.” The IBT and AIJ falsely assumes the court is a “non-intimidating atmosphere where potential jurors are sufficiently comfortable to answer openly or to ask to discuss separately” matters of IAT scores and implicit bias measures, and, though bias-grooming materials, generally expects this kind of engagement.

⁸⁸ West, “12 Racist Men,” at 170.

⁸⁹ See Dobbin, et al. “Diversity,” (2007).

these interventions are not robust enough.

Finally, I take issue with the technocratic means by which these kinds of bias-grooming methods have arisen⁹⁰. I have established the harms of an exclusively expert system and have reiterated the common-sensical and theoretical issue that juries cannot be (expected to be) experts. As with those, there are considerable limitations and cautions that come with bias-grooming and diversity training. The science these initiatives are based on is itself problematic as it is, of course, a culturally bound way of knowing, and represents a matrix of intersectional injustices in representation, interpretation, coercive and selective involvement, and so on. Scientific empiricism as a human enterprise, particularly when applied to the law, exacerbates all too easily testimonial and hermeneutical oppressions⁹¹. Moreover, the industry that is diversity and inclusion initiatives is, while facially neutral, an industry nonetheless: Diversity workshops and implicit bias seminars are a privatized and (extremely) profitable capitalization upon a never-ending need, a need that that industry can and does predictively modulate to produce further need and further gain. These techniques groom away the official, endorsed, agreed types of racism or sexism as a sort of ideological scapegoat instead of legitimately challenging the discrimination occurring among us⁹².

The law displaces its due responsibility and accountability for prejudice to institutional and systemic prejudices outside of the court, but it is not alone in the pervasion of bias – technocratic civics and democratized science are both culpable. For this weight to rest entirely on the knowledge-producers of the academy, or on the citizen public, is unreasonable⁹³. Though the

⁹⁰ Dzur, *Punishment*, at 130-1.

⁹¹ Kane, "Integrity," at 115-134.

⁹² See J. Melamed, *Represent and Destroy: Rationalizing Violence in the New Racial Capitalism*, University of Minnesota Press (2011).

⁹³ Kane, "Integrity," at 117-33.

statistics are still infantile, these four objections offer some direction as to why bias-reduction techniques have not been seen to produce the expected longitudinal change in the court.

In Action

Some of the most noteworthy of these bias-grooming techniques in the court are the ABA Implicit Bias Initiative and implicit bias training videos by the District Court of Washington, for jurors, and by the Association's Diversity and Inclusion 360 Commission, for judges, public defenders, and prosecutors. In examining these with a finer tooth, the above objections are seen in action.

The ABA's Implicit Bias Toolbox (IBT)⁹⁴ and "Achieving an Impartial Jury" Toolbox (AIJ)⁹⁵, released initially in 2013, can be linked to more emblematic diversity training-type resources. They are often paired together, the IBT being the more peripheral and the AIJ being more essential to the work of jury selection and judgement, and both are focused on the ABA's claim of 'de-biasing' and making objective jurors at work. Both are designed to be implemented at the discretion of legal leaders, actors, and teachers, and neither require or are designed to include a scientific or academic presence during the training or administration of the training (the AIJ in fact does not necessarily require any administrator and can be utilized by the individual alone) (objection four). Both rely upon the interventional view of transparency of mind and much of the heavy lifting to expose bias and this transparency of mind to the participant is done through IAT testing⁹⁶ (objection two). Even with an ideally transparent mind, they attempt to

⁹⁴ Diversity and Inclusion 360 Commission, American Bar Association, "Implicit Bias Toolbox," posted by the American Bar Association, Implicit Bias Initiative (2013).

⁹⁵ Diversity and Inclusion 360 Commission, American Bar Association, "Achieving an Impartial Jury Toolbox," posted by the American Bar Association, Implicit Bias Initiative (2013).

⁹⁶ IAT testing, even by the admission of its creators, is not equipped to select bias-free juries or determine on its own the significance of implicit bias in an individual. Though the IAT is the most widely utilized and practiced form of

leverage and compartmentalize implicit bias: The AIJ specifically exploits many of the administrator's and participant's existing intergroup biases, over-contextualizes social information processing, and excuses, utilizes, and furthers informal stereotyping of participants and courts when that stereotyping mitigates more formal discriminatory action (objection one)⁹⁷.

Not for naught, the ABA's Toolboxes do include some valid points. As compared to the interventional view of bias, the IBT and AIJ are certainly more informed by relevant and topical science⁹⁸. Nevertheless, both tools significantly overestimate their own efficacy over time, again attributable in part to their lack of (legitimately) scientific bases (objection three). When the court does utilize bias-grooming techniques, they are designed to be mandatory, prescriptive, and one-sided. Here I take a page from Starbucks' book and examine this in terms of the diversity training most widely seen in business: Diversity training is highly effective in theory⁹⁹ and highly ineffective in practice¹⁰⁰. Any long-term improvement in hiring or recruitment – mirrored in jury selection and decision-making – is typically negligible over time and, when training is made mandatory, workplace effects are null, if not (more likely) negative¹⁰¹. This may well be due to those same issues of conceptualization seen in the above objections. To summarize, diversity training is ineffective because it assumes transparency of mind, occurs exclusively at

implicit bias testing, it is not without its significant faults, namely the potential for confounding statistical noise. This reiterates the point that the kind of catch-all safeguard the law seeks does not exist (or at least not yet). For more on this, see A. Greenwald, et al. "Understanding and Using the Implicit Association Test: III Meta-Analysis of Predictive Validity," *Journal of Personality and Social Psychology* 97, 17-41 (2009).

⁹⁷ See C. Kaiser, et al. "Presumed Fair: Ironic Effects of Organizational Diversity Structures," *Journal of Personality and Social Psychology* 104, 504-19 (2013).

⁹⁸ Jerry Kang's version of the Toolbox, the Implicit Bias Primer for Courts produced in conjunction with the NCSC's court and jury education program, is more successful at avoiding an unnecessary distilling of the science and relevant distinctions; his is less widely utilized, I would argue, for precisely this reason.

⁹⁹ Much of the positive effects of diversity initiatives at this scale are attributable to their impact on market reception. Starbucks' prioritization to dialogues surrounding diversity and equality, even at the high cost of their programs, demonstrates a shared progressive commitment to the wider social call for anti-discrimination, irrespective of how their trainings manifest in later customer interactions.

¹⁰⁰ See Kaiser "Presumed Fair," (2013); E. Paluck and D. Green, "Prejudice Reduction: What Works?" *Annual Review of Psychology* 60, 339-67 (2009).

¹⁰¹ Kaiser, "Presumed Fair" at 13-14; see also Dobbins and Kaley, "Why Diversity," (2016).

the level of the individual consciousness, and requires that individual to reframe and focus his prejudices on intergroup relations¹⁰², usually at the detriment of singling out a particular group within that schema like women or African Americans¹⁰³. His subjectivity becomes clinical and legalistic in its prescriptive terms, and any longitudinal accountability that is successfully embedded is repercussive or socially threatening. (Compare this with the typical diversity taskforce: the former is commonly conducted by some authority outside of the institution, uses contractually for-profit science, is contextually independent of the institution, and implemented consequences are made public, while the latter is in-house, entirely contextually dependent, is integrated into the economy of the institution, and its consequences are normally focused inward within that institution. It should not come as a surprise that task forces are usually the more longitudinally successful of the two¹⁰⁴, nor that the ABA's existing narratives are far more likened to trainings than taskforces.) When 'de-biasing' techniques

eliminate people's freedom to value diversity on their own terms, they may actually be creating hostility toward the targets of prejudice...Controlling prejudice reduction practices are tempting because they are quick and easy to implement. They tell people how they should think and behave and stress the negative consequences of failing to think and behave in desirable ways...But people need to feel that they are freely choosing to be nonprejudiced, rather than having it forced upon them.¹⁰⁵

If we look at this from a wider lens, diversity training and bias-grooming are less about the institution – the business or the court – defining the individual as they are about the individual defining the law of that institution. (Note that, unlike in business, there is no comparable system of grievance for jurors and actors in the court.) It tests the tensile strength of the institution to

¹⁰² Kaiser, "Presumed Fair," at 7.

¹⁰³ Not to mention the frustrating issue of, in the practical implementation of these techniques, the framing of "the diversity issue" as problematic *because* of these groups, and that onus of righting these problems is placed upon those demographics of interpersonal interactions.

¹⁰⁴ See F. Dobbin and A. Kaley, "Why Diversity Programs Fail," *Harvard Business Review* 94, 52-60 (2016).

¹⁰⁵ L. Legault, quoted in "Ironic Effects of Anti-Prejudice Messages," *Association of Psychological Sciences*, 6 July 2011.

serve the individual, to respond, and to be passionately attentive. Its calls for procedural and systemic change are a result of equal engagement by the individual as by the institution¹⁰⁶. As counterintuitive as it seems, it is by making jury training and bias-training voluntary, and by getting a foot in the door to invite subjectivity and bias, that the jury stands a fighting chance at efficacious civic representation and engagement. Voluntary bias interference instead reinforces behavioral salience trends including subjective identification (contact hypothesis), self-efficacy and -accountability measures, and domain identification in the simulated environment of the court, versus prejudicial stereotyping¹⁰⁷. Indeed by preventing jury compositional manipulations of any kind – *even those that aim to replace a more biased juror with a lesser biased one* – our bias-grooming begins to resemble more of a taskforce¹⁰⁸; there is no guarantee of fully representational engagement, but we wedge the door open the smallest bit further.

In the years immediately following the AIJ, Washington State introduced its “Understanding the Effects of Unconscious Bias” training video¹⁰⁹, the country’s first implicit-bias based instructional video addressed directly to jurors and mandated in both District houses in Seattle and Tacoma. It is based on much of the same content of the AIJ, some of it lifted directly, and draws particularly from those sections on jury selection and instructional dialogues. The video begins: “It is the court’s goal in every jury trial to find jurors who will decide the case before them without prejudice or bias...so that you can be sure you are making objective decisions”¹¹⁰ (a parrot of AIJ’s proposed juror instruction¹¹¹). It continues:

¹⁰⁶ Devine, *Jury*, at 211-20.

¹⁰⁷ Paluck and Green, “Prejudice Reduction,” at 345-57.

¹⁰⁸ West, “12 Racist Men,” at 197-99.

¹⁰⁹ See J.A. J. Coughenour, et al. “Understanding the Effects of Unconscious Bias,” *U. S. District Court, Western District of Washington* video, 11:00, posted by The Marshall Project (2017).

¹¹⁰ *Ibid* at 0:17.

¹¹¹ Diversity and Inclusion 360 Commission, American Bar Association, “Achieving,” at 22.

If and when we stop to consciously think about it, we might decide our initial [implicit biases] don't actually fit with the information we are being presented with and with what we really know to be fair.¹¹²

Alone this line flags problems with bias-grooming techniques. One, it mistakes implicit bias again as an unintentional and accessibly cognitive phenomenon and assumes a noble Dworkonian view of some objectively right answer or truth in regards to decision-making and sentencing¹¹³. It grapples with prejudice here and throughout similarly to the interventional view but offers no concrete means of intervention, instead encouraging (unaccountable) reflexive meditation on one's prejudices and behaviors. Two, it assumes that the individual is not only aware, or can be made aware, of his implicit and explicit biases, but that he has the capacity to place them in direct and thoughtful contrast to his conception of 'right' and just¹¹⁴, *and* to apply that to naturalistic contexts (i.e., he is self-regulating his own racism, sexism, etc. because he recognizes from the law a fundamentally more "right" prescribed subjectivity than his own¹¹⁵.) The individual juror is therefore expected to supply the court with an extralegal rationality of logic; the juror is no longer the arbiter of guilt, he is the subjective and democratic standard by which guilt is decided¹¹⁶. It requires the individual to respond and be attentive to the law, rather than vice versa (as above).

Well intentioned as it may be, the video's sentiments erode further in its three tenants of being an 'unbiased' juror: (1) "*Know that unconscious bias exists and occurs for all of us*" (valid), (2) "*Carefully examine our decisions and judgements as jurors*" (this is valid so long as it is limited to explicit decision-making and biases), and (3) "*Question our decisions by asking*

¹¹² *Ibid* at 2:50.

¹¹³ B. Lieter, "Objectivity and the Problems of Jurisprudence," *Texas las Review* 72, 187-209 (1993) at 201-2.

¹¹⁴ B. Massumi, *Politics of Affect*, Polity Press (2015) at 86-93.

¹¹⁵ O. Fiss, *The Law as it Could Be*, New York University Press (2003) at 152-5.

¹¹⁶ West, "12 Racist Men," at 200-3.

whether they would be different if the witness, lawyer, or person on trial were of a different race, age, or gender” (this is borrowed from the AIJ and exploits those same stereotyping mechanisms that reinforce bias¹¹⁷)¹¹⁸. “Understanding the Effects of Unconscious Bias” harkens back to those issues of the interventional view and further reiterates the failings of examining one’s own biases in an effort to eliminate them. The final tenant assumes perhaps too much of the juror in his capacity to segregate his objectivity from his subjective and biased (though not necessarily prejudiced) decision-making.

The ABA also supplies judges, public defenders, and prosecutors with similar training videos; the “Hidden Injustice” series¹¹⁹. While it is encouraging that these are considerably more accurately informed than the IBT, they are worryingly more provocative, essentially taking two steps back for each step forward (even more worryingly, the science provided is done so exclusively by legal actors and scholars). The series has its own three tenants of being an ‘unbiased’ judge, arguably hedged too greatly on unreliable IAT evidence¹²⁰: humility (“it is paradoxically only by being humble and recognizing that you are deeply fallible that you can actually become more objective”¹²¹), prudence (“[you] should be most on guard when [you] are under pressure to decide quickly...be mindfully intentional about your equality”¹²²), and intentionality (“if you are highly motivated to avoid discriminatory behavior and that motivation doesn’t come from external requirements...that internal motivation does matter a lot”¹²³). “Bias

¹¹⁷ Diversity and Inclusion 360 Commission, American Bar Association, “Achieving,” at 23.

¹¹⁸ Coughenour, “Unconscious,” at 9:20.

¹¹⁹ For judges; see J. Kang, et al. “Hidden Injustice: Bias on the Bench,” *ABA Legal News Network* video, 10:43, posted by American Bar Association (2016). For public offenders; see “Hidden Injustice, Toward a Better Defense,” *ABA Legal News Network* video, 12:45, posted by the American Bias Association (2016). For prosecutors, see J. Kang, et al. “Hidden Injustice: The Prosecutor’s Paradox,” *ABA Legal News Network* video, 14:06, posted by the American Bias Association (2016).

¹²⁰ See Greenwald, et al. “Meta-Analysis,” (2009).

¹²¹ Kang, et al., “Hidden Injustice: Bias on the Bench,” at 4:17.

¹²² *Ibid* at 5:05.

¹²³ *Ibid* at 5:50.

on the Bench” befalls the same hazards as “Understanding the Effects of Unconscious Bias”:
 “Implicit bias is a bit like an emotional reaction and *you can detect that if you see it happening...* We all have implicit biases and unless we work hard to counter them they have the *potential* of surfacing and effecting judgements that all of us make”¹²⁴. At the risk of again reiterating the interventional view, the series sanitizes the cognitive and institutional realities of implicit bias and assures a negligently and optimistically corrigible outlook.

In this blinkered approach to implicit bias, neither the ABA nor District Court require of legal actors and the institution of law a comparable kind of accountability for any address of the rampant and well-documented manipulations of jury compositions, systemic juror suppression, voter oppression and access, cross-race-like effects that distort conviction rates, trends in cross-sectional negative-retribution and positive-rehabilitation judgement rates, problematic policing practices, and more. Their interventions reflect an increasingly better-informed view of implicit bias, but even so are lack to long-term rigor to constitute any lasting cognitive, behavioral, or structural change. Though “Understanding the Effects of Unconscious Bias” enjoyed a positive reception District-wide, its mandate was brief: It was barred from *voir dire* in *Thomas v. Cannon*¹²⁵, another fatal instance of racially-motivated police brutality, on the basis of the video being “simply too prejudicial” in the context of the case. *Thomas* affirms that that bias-grooming techniques, however effective or ineffective they may or may not be to the juror in either a situational or naturalistic context, are up against the bigger foe of courtroom economy and

¹²⁴ *Ibid* at 7:00.

¹²⁵ 289 F. Supp.3d 1182 (2018). Leonard Thomas, a Black man then-unarmed, was killed in 2013 by Washington SWAT during a civil dispute at his home. The \$15 million jury verdict for Thomas was upheld during retrial and is among the largest in the state’s history. Judge Barbara Rothstein cited the video being too inflammatory for viewing because of the racially-charged arguments on both sides: “The plaintiffs intended to argue that the officers were affected by racial bias” and the defense intended to argue the use of force was justified and that “jurors [would be unfairly] influenced by [social] racial factors, and could not return to their communities and say they found in favor of ‘white cops that shot an unarmed black man’”. For more on this, reference M. Carter, “Jury Awards More than \$15 to Family of Unarmed Black Man Killed by SWAT Sniper in Fife,” *Seattle Times*, 14 July 2017.

politics – they cannot be expected to stand firmly against, much less overcome, things so systemic as prejudicially-motivated intrapersonal and interpersonal behaviors¹²⁶. Aspirations to objectivity are not immune to them, despite whatever their intention. Objectivity, together with subjectivity, must be considered from a holistic perspective. The videos, the IBT and AIJ, and resources like it, are the product of the law’s jumping on an oversold and under-scrutinized, intensely particular filament of research on prejudice, and they reflect a glossy, palatable, temptingly idealized (and irresponsible) account of implicit bias¹²⁷.

More Harm Than Good

My greatest concern with bias-grooming is a fundamental and fundamentally personal one that has been divided since the beginning in the science and evidence. I am of the persuasion, defeating as it may be, that one cannot better his implicit biases; the individual cannot control his biases or make them any less pervasive in his subjective experience. The best the individual can do is reflexively modulate his thoughts and behaviors based on a sociocultural contextualization (not his subjective experience of socioculture)¹²⁸. This is an argument for malleability¹²⁹, not resolution, and such behavioral change can occur absent *ever* a change in prejudice itself¹³⁰:

Altering [structural] associations would presumably have general, long-term consequences, while contextual changes and behavioral strategies for altering expression would have specific, short-term consequences...[We cannot currently know whether] the effects [of bias-intervention] reflect situational short-term malleability or general, long-term change...The degree to which prejudice reduction persists after completion of the

¹²⁶ Devine, *Jury*, at 181-210.

¹²⁷ See Faigman, et al., “Courtroom,” (2012).

¹²⁸ C. Lai, et al. “Reducing Implicit Prejudice,” *Social and Personality Psychology Compass* 7, 315-30 (2013) at 318-9.

¹²⁹ See I. Blair, “The Malleability of Automatic Stereotypes and Prejudice,” *Personality and Social Psychology Review* 6: 242-61 (2002).

¹³⁰ Lai, “Implicit Prejudice,” at 321-4.

intervention is unknown... The existing literature provides solid evidence for implicit prejudice malleability, but little and mixed evidence for “long-term” implicit prejudice change.¹³¹

The frontiers of brain and social sciences – and I do realize it is at the emergent frontiers that this occurs – reveals that in this present moment we are a people quantifiably more discriminatory, more competent in our discrimination, quicker to judge on the basis of prejudices, and more readily neurocognitively affected by matters of identity¹³². Our subjective experience of the world is encroached upon by identities not our own (and, like our politics, it is of greater value to conform to external identities to be objectively ‘right’ than to be engaged in our performative subjectivity). I, we, stand little chance to legitimately effect our subjectivity and implicit prejudices when we are combatting an overwhelming tide of cultural hyper-contextualization and inescapable automatic stereotype activation¹³³.

Not to be mistaken, there is value in understanding the ways in which we are influenced by bias, even at the most subterranean levels of consciousness; this is not to say that we cannot or should not attend to our biases. There is also value in consciously examining how this influence manifests in our explicit judgements, interactions, and decision-making¹³⁴. I do not deny that there could eventually be realized ways to become sincerely less discriminatory as the science grows further¹³⁵, but there is little evidence now to suggest that this is accomplishable by way of bias-grooming or diversity training (or indeed within the confines of the current scientific knowledge of implicit bias)¹³⁶. The adversarial system that is our objective model of justice

¹³¹ *Ibid* at 322.

¹³² Nosek, et al. “Pervasiveness,” at 40-2; *see also* G. Willard, et al. “Some Evidence for the Nonverbal Contagion of Racial Bias,” *Organizational Behavior and Human Decision Processes* 128, 96-107 (2015).

¹³³ Lai, “Implicit Prejudice,” at 324.

¹³⁴ *See* P. Devine, et al. “Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention,” *Journal of Experimental Psychology* 48, 1267-78 (2012).

¹³⁵ Rudman, “Unlearning,” at 866.

¹³⁶ These sentiments are reiterated by emerging empirical work, but it is necessary to note that “while there are many demonstrations of implicit prejudice change based on distinct mechanisms, little is known about the constraints and

seeks, by its own admission, objective truth in the pursuit of some gains that carry no requisite of justness or fairness. It will be accomplishable by a considerable and consistent effort on the part of the entirety of our legal system, our politics, our science, our media, our civic accountability and dignity, everything that does and will motivate our biopsychosocial subjective experience. It will be accomplishable when the transformation of the integrity of our subjective experience is not degraded by our performance of it.

Conclusion

The best I can offer is entre into critical conversation: As law and science continue to converge, I think there is much to be said of the ways in which we choose to move forward now, most notably for the ways in which we give up the search for a normative objectivity in law and instead take up the search for those mechanisms of bias – not prejudice – which could serve justice more constructively. It is assured that implicit bias will not vacate the court so long as the court remains a human endeavor, so it becomes necessary that there exists space within which the law may thoughtfully and subjectively engage with bias; it must be reexamined the wider implications of prejudice as they surface structurally and systemically. Beyond brain or legal sciences, this is a challenge issued collectively, urgently, to legislation, cultural studies, politics, industry, intersectional and minority projects, to everyone standing at the door of the law¹³⁷.

Armour, J. “Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit,” *California Law Review* 83, no. 3 (1995): 733-72.

boundary conditions of their effectiveness. A partial explanation of this is a general phenomenon of scientific publishing norms. Achieving a positive result – i.e., demonstrating that a manipulation changes implicit evaluation – is a de facto requirement for publication. The consequence is that the published literature contains much less evidence of the conditions that do not elicit change in implicit prejudice, even though they are sure to exist [in greater measure].” See Lai, “Implicit Prejudice,” at 321.

¹³⁷ Reference F. Kafka, *Der Prozess*, Schocken Books: New York (1946).

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