

7-1-2018

Implicit Bias's Failure

Samuel R. Bagenstos

Follow this and additional works at: <https://scholarship.law.berkeley.edu/bjell>



Part of the [Law Commons](#)

Recommended Citation

Samuel R. Bagenstos, *Implicit Bias's Failure*, 39 BERKELEY J. EMP. & LAB. L. 37 (2018).

Link to publisher version (DOI)

<https://doi.org/10.15779/Z38PN8XF7F>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Implicit Bias’s Failure

Samuel R. Bagenstos[†]

INTRODUCTION: THE POLITICAL PROJECT OF IMPLICIT BIAS	
RESEARCH.....	37
I. THE FAILURE OF DEPOLITICIZATION	43
II. THE FAILURE OF DEPERSONALIZATION.....	48
CONCLUSION.....	51

INTRODUCTION: THE POLITICAL PROJECT OF IMPLICIT BIAS RESEARCH

The 2016 presidential election was a coming-out party of sorts for the concept of implicit bias—and not necessarily in a good way. In answering a question about race relations and the police during the vice-presidential debate, Mike Pence introduced the topic. Offering his explanation for why the Fraternal Order of Police had endorsed the Trump-Pence ticket, Pence said:

They see his commitment to law and order. But they also—they also hear the bad mouthing, the bad mouthing that comes from people that seize upon tragedy in the wake of police action shootings as a reason to use a broad brush to accuse law enforcement of implicit bias or institutional racism and that really has got to stop. I mean, when an African-American police officer in Charlotte named Brently Vincent, an all-star football player who went to Liberty University here in the state, came home, followed his dad into law enforcement, joined the force in Charlotte in 2014, was involved in a police action shooting that claimed the life of Keith Lamont Scott, it was a tragedy. I mean, we—we mourn with those who mourn. We grieve with those who grieve and we’re saddened at the loss of life. But Hillary Clinton actually referred to that moment as an example of implicit bias in the police force, where she used—when she was asked in the debate a week ago whether there was implicit bias in law enforcement, her only answer was that there’s implicit bias in everyone in the United States. I just think—[crosstalk]—What we ought to do is stop seizing on these moments of tragedy. We ought to assure the public that we’ll have a full and complete and transparent

DOI: <https://doi.org/10.15779/Z38PN8XF7F>

[†] Frank G. Millard Professor of Law, University of Michigan Law School.

investigation whenever there's a loss of life because of police action. But Senator, please, you know, enough of this seeking every opportunity to demean law enforcement broadly by making the accusation of implicit bias every time tragedy occurs.¹

This statement—along with the remarks by Hillary Clinton to which Pence was responding²—represents the most prominent platform yet on which implicit bias has been discussed. And, I will argue in this essay, Pence's statement highlights the failure of the political—though not necessarily the scientific—project of implicit bias research.

Obviously, the story is a bit more complicated than that. The very fact that implicit bias was an overt topic of discussion in the presidential and vice presidential debates demonstrates that the concept has penetrated American political consciousness. As the *New York Magazine* writer Jesse Singal says, “[p]erhaps no new concept from the world of academic psychology has taken hold of the public imagination more quickly and profoundly in the 21st century than implicit bias.”³ The implicit association test (IAT), which is designed to demonstrate the existence of implicit bias, “is one of the most famous psychological instruments created in recent history,” and “has been the subject of more recent fascination and acclaim than just about anything else to come out of the field of social psychology.”⁴ On college campuses throughout the country, students learn about the pervasiveness of implicit bias. If my classroom experience is any indication, many of these students come to see implicit bias as the principal lens through which to understand the persistence of racial (and other sorts of) inequality.

The courts have taken notice as well. A number of lower-court cases have deployed the concept of implicit bias in applying various doctrines involving discrimination and criminal justice.⁵ Although the Supreme Court has not used the term “implicit bias,” its opinion in the *Inclusive Communities*

1. *Full Transcript: 2016 Vice Presidential Debate*, POLITICO (Oct. 5, 2016, 11:56 AM EDT), <http://www.politico.com/story/2016/10/full-transcript-2016-vice-presidential-debate-229185> (emphasis added).

2. See, e.g., John A. Powell, *Implicit Bias in the Presidential Debate*, BERKELEY BLOG (Sept. 27, 2016), <http://blogs.berkeley.edu/2016/09/27/implicit-bias-in-the-presidential-debate/> (“At one point, moderator Lester Holt asked Secretary Clinton if she ‘believed that police are implicitly biased against black people’ and Clinton responded, ‘Implicit bias is a problem for everyone, not just police.’”).

3. Jesse Singal, *Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job*, N.Y. MAG. (Jan. 11, 2017, 12:18 PM), <http://nymag.com/scienceofus/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html>.

4. *Id.*

5. See, e.g., *United States v. Mateo-Medina*, 845 F.3d 546, 553 (3d Cir. 2017) (refusing to allow consideration of bare arrest reports in sentencing, based, in part, on “research indicating that police are more likely to stop and arrest people of color due to implicit bias”); *Shirley v. Yates*, 807 F.3d 1090, 1110 n.26 (9th Cir. 2015) (“Vague preferences are particularly likely to conceal implicit bias, as the district judge—to his credit—recognized.”); *Kimble v. Wisconsin Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 778 (E.D. Wis. 2010) (finding that “in addition to failing to provide a credible explanation of the conduct complained of, Donoghue behaved in a manner suggesting the presence of implicit bias”).

case explained that the disparate impact prohibition under the Fair Housing Act (FHA) “permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”⁶ What kind of “unconscious prejudices”? Well, eight separate amicus briefs filed in that case specifically discussed “implicit bias” as a principal target of the FHA’s disparate impact prohibition.⁷

In the two decades since the introduction of the IAT, then, the effort by many researchers to get policymakers and society to take implicit bias seriously has had many successes. But, as I will argue below, it has failed in its most important political project.

Note that I referred to the “political project” of implicit bias research. There is also increasing *scientific* controversy over that research. Critics have questioned what, if anything, the IAT actually shows, and whether, even if the IAT shows the existence of implicit bias, that bias is purely internal or instead actually translates into actions that treat people differently on the basis of race or other characteristics.⁸ That scientific controversy is not my principal focus here, though I do discuss it briefly below. For myself, I tend to agree that the utility of the IAT as a measure of implicit bias (and potential discrimination) has been oversold—or at least over-bought by enthusiastic customers. But whether the IAT is a useful measure is a different question from whether implicit or unconscious bias exists. On the latter question, an abundance of evidence, independent of the IAT, supports the conclusion that unconscious bias is real and significant in the world. Unfortunately, some commentators have conflated the two questions. As I discuss below, that is one consequence of the incredible attention given to the IAT—and one indication of the failure of implicit bias as a political project.

6. Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2512 (2015).

7. See Brief for the Nat’l Black Law Students Ass’n as Amicus Curiae Supporting Respondent, Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7336686; Brief for AARP et al. as Amici Curiae Supporting Respondent, Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405729; Brief of Massachusetts et al. as Amici Curiae Supporting Respondent, Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405727; Brief of Current and Former Members of Congress as Amici Curiae Supporting Affirmance, Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405734; Brief of Students from the New York University School of Law Seminar on Critical Narratives in Civil Rights as Amici Curiae Supporting Respondent, Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7272801; Brief of Howard University School of Law Fair Housing Clinic and Civil Rights Clinic as Amicus Curiae Supporting Respondents, Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7336685; Brief of Sociologists, Social Psychologists, and Legal Scholars as Amici Curiae Supporting Respondent, Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405800.

8. See *infra* text accompanying notes 28–32.

The political project of implicit bias research responded to the increasing racial conservatism of the period following the civil rights era. In the 1970s, 1980s, and 1990s, the political process turned against robust remedies for discrimination.⁹ Judges followed by reading antidiscrimination laws narrowly and imposing stringent limitations on affirmative action and other tools to eliminate entrenched discrimination.¹⁰ With Bull Connor long gone, and other flagrant examples of racism increasingly rare, the public and judicial appetite for aggressive antidiscrimination enforcement seemed to be disappearing. The lack of appetite was connected in part to the rise of an innocent-victims narrative, in which antidiscrimination law, and especially remedies such as busing and affirmative action, were understood to impose significant costs on good-hearted people who were not responsible for the injustices of the past.¹¹

Advocates of aggressive antidiscrimination remedies thus seemed to need a new approach. And implicit bias seemed to provide it. In the academy, in the courts, and in public policy advocacy, researchers and activists have deployed the findings of implicit bias research to defend antidiscrimination efforts and to support extending those efforts to new domains. Their political project responded to the increasing conservatism on racial issues by aiming to depoliticize and depersonalize society's understanding of discrimination.

The first goal, depoliticization, would be achieved by substituting a discourse of science for the then-dominant discourse of justice.¹² Studies demonstrating the prevalence of implicit bias, researchers argued, provided scientific proof that racial discrimination persists. To recognize that point, they suggested, did not require acceptance of a political agenda of distributive justice.¹³ Nor did it require a conclusion that current inequalities resulted from slavery or Jim Crow—a conclusion that would require resolution of complex and inherently contestable arguments about historical and

9. See Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 902–04 (2003).

10. See *id.*

11. See, e.g., Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1005–23 (1989); Christopher A. Bracey, *The Cul De Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1242–65 (2006); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 297–316 (1990).

12. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CAL. L. REV. 1063, 1064–65 (2006) ("The methodology of behavioral realism forces the law to confront an increasingly accurate description of human decision making and behavior, as provided by the social, biological, and physical sciences. Behavioral realism identifies naïve theories of human behavior latent in the law and legal institutions. It then juxtaposes these theories against the best scientific knowledge available to expose gaps between assumptions embedded in law and reality described by science. When behavioral realism identifies a substantial gap, the law should be changed to comport with science.")

13. See, e.g., Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 519–20 (2010).

sociological causation. It just required “realism” about how the world actually is.¹⁴

The second goal, depersonalization, aimed to respond to the rise of anti-anti-racism.¹⁵ In the United States after the Civil Rights Era, to be accused of racism is to be accused of a heinous act or disposition. Such an accusation provokes denial and resistance—nobody wants to think of themselves as a racist.¹⁶ The pervasiveness of that denial and resistance undermined public support for antidiscrimination remedies. Implicit bias seemed to provide a response to that denial. Not only is implicit bias widespread, researchers argued, it is something that is nobody’s fault. Implicit bias reflects the operation of automatic functions of our brains—the brains of all of us. Bias is just hard-wired into us, and to respond to it is not to call out bad actors but simply to plan for the ordinary foibles of the human condition. Beyond what Eduardo Bonilla-Silva called “racism without racists,”¹⁷ we have racism without racism—or, at least, bias without racism. Depersonalization says that people should not be upset when others call out implicit bias. To have one’s acts attributed to implicit bias is not to be accused of having done something wrong. It is to be accused of being human.

The political project of implicit bias research has thus rested on at least two predictive premises. First, that scientific proof of the persistence of bias will help persuade moderates and conservatives who believed that antidiscrimination laws had already served their purpose of addressing continuing inequalities. Second, that implicit bias explanations for inequality will be more politically acceptable to the broader public because they do not involve accusing individuals of racism. To some extent, these premises have surely proven true. The incredible public, political, and judicial attention

14. See, e.g., Linda H. Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1001 (2006). See generally Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 444 (2007) (“[T]his review should reveal the robustness of the evidence that much of human cognition can and does occur without introspective access, that such processes nevertheless influence and guide decision making, that the costs incurred by individuals and social groups are less at the hands of the malign and more likely to come from the unaware and uncontrolled mental acts of ordinary people. The law will need to include these discoveries about how the mind (really) works to be true to Erksine’s idea that intelligence about such matters, not just meaning well, is the virtue.”).

15. See, e.g., Jamelle Bouie, *Racial Discontent is Rising, But That’s Not Obama’s Fault*, SLATE (July 15, 2016, 5:00 PM), http://www.slate.com/articles/news_and_politics/politics/2016/07/racism_discontent_is_rising_but_that_s_not_obama_s_fault.html; Ed Kilgore, *David Brooks and Anti-Anti-Racism*, NEW REPUBLIC (Sept. 17, 2009), <https://newrepublic.com/article/69459/david-brooks-and-anti-anti-racism>. Anti-anti-racism obviously is related to what Jed Rubenfeld called “the anti-antidiscrimination agenda.” See Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

16. See generally Sarah Sobieraj, Jeffrey M. Berry & Amy Connors, *Outrageous Political Opinion and Political Anxiety in the U.S.*, 41 POETICS 407, 424 (2013) (collecting evidence that “white anxiety about being perceived as racist is powerful even in nonpolitical contexts”).

17. See generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (4th ed. 2014).

given to the concept of implicit bias, and to the IAT specifically, is certainly suggestive.

But think back to the Mike Pence quote with which I began this essay. To Pence, the claim of implicit bias was very much tantamount to an accusation of racism. Rather than carefully examining—or even being influenced by—the scientific evidence regarding implicit bias, Pence simply resisted it. More to the point, he resisted the efforts to address continuing inequalities that the claim of implicit bias was invoked to justify.

Pence's statement, though perhaps the most prominent example, hardly stands alone. The increasing use of implicit bias language by political progressives has not, in the main, blunted opposition to aggressive antidiscrimination enforcement. Instead, the same battle lines that were once drawn around accusations of individual racism, and later drawn around accusations of systemic racism, are now drawn around attributions of implicit bias.

Indeed, in some ways the turn to using implicit bias language has given the advantage to those who resist aggressive efforts to overcome racial inequality. The focus on implicit bias, as instantiated by the IAT, has given racial conservatives the opportunity to frame their opposition in scientific terms—as questioning the reliability or validity of particular studies or tools—and thus allowed them to draw attention away from the political underpinnings of their arguments. And the repeated invocation of implicit bias by political progressives suggests that old-fashioned intentional discrimination is a thing of the past, when in fact it may simply be better hidden. Indeed, at a moment in history when overt racism—seen in the reaction among some to the election of a black president, and in a significant part of the movement that elected Donald Trump¹⁸—once again seems a major factor in our public life, the suggestion that implicit bias is the central problem may be particularly misleading.

The remainder of this essay proceeds as follows. Part II argues that the depoliticization goal has failed—and that the turn from a discourse of history, sociology, and justice to a discourse of science is likely, on balance, to have undermined efforts to address racial inequality. Part III turns to the depersonalization goal and argues that assertions of implicit bias trigger a defensive response very much like the response triggered by accusations of racial animus. Part IV is a brief conclusion.

18. See, e.g., Jamelle Bouie, *How Trump Happened*, SLATE (Mar. 13, 2016, 9:00 AM), http://www.slate.com/articles/news_and_politics/cover_story/2016/03/how_donald_trump_happened_racism_against_barack_obama.html; Ta-Nehisi Coates, *My President was Black*, ATLANTIC, Jan./Feb. 2017, <https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793/>; Michael Tesler, *Trump is the First Modern Republican to Win the Nomination Based on Racial Prejudice*, WASH. POST (Aug. 1, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/01/trump-is-the-first-republican-in-modern-times-to-win-the-partys-nomination-on-anti-minority-sentiments/?utm_term=.da46457d434c.

I.
THE FAILURE OF DEPOLITICIZATION

The depoliticization goal of implicit bias research posited that a move away from a discourse of justice and distribution to a discourse of science would reduce opposition to efforts to overcome continuing racial inequality. In part, this goal was a response to the arguments of racial conservatives that so much time had passed since the end of Jim Crow—and certainly of slavery—that continuing inequalities could no longer be attributed to discrimination. To that extent, the depoliticization goal involved taking these arguments in good faith, and providing facts to demonstrate that discrimination—in the form of conduct actuated by implicit bias—remains widespread.¹⁹ By focusing on current bias, rather than on the legacy of past discrimination, advocates of racial reform could perhaps avoid the inherently indeterminate efforts to explain how much of today's inequality results from past injustices. And by arguing on the level of fact rather than on the level of justice or distribution, perhaps those advocates could lower the temperature around issues of racial inequality. Arguments based on empirical evidence rather than abstract principle might make it easier for people of diverse political perspectives to come together to address our society's continuing problems.

Two leading implicit bias researchers, Jerry Kang of the University of California, Los Angeles, School of Law and Kristin Lane of Bard College, capture the depoliticization goal perfectly. They write:

Once upon a time, the central civil rights questions were indisputably normative. What did “equal justice under law” require? Did it, for example, permit segregation, or was separate never equal? This is no longer the case. Today, the central civil rights questions of our time turn also on the underlying empirics.²⁰

Kang and Lane explain that many people today “assume that we already live in a colorblind society.”²¹ “Accordingly,” many people believe, “if some groups underperform in various economic, political, and educational competitions, those disparities evince not injustice but incompetence.”²² Although prior scholarship had challenged this “convenient” colorblind-meritocratic story, Kang and Lane argue that this scholarship was too easily

19. Although he does not base his position on implicit bias, there is an analogy here to the way Kim Forde-Mazrui constructs his argument for affirmative action. See Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 693 (2004) (drawing “upon principles that are either accepted by opponents of affirmative action or are widely accepted by American society as relevant to questions of attributing collective responsibility for the harmful effects of wrongful conduct”).

20. Kang & Lane, *supra* note 13, at 519.

21. *Id.* at 465.

22. *Id.* at 519.

dismissed as anecdotal and sociologically contestable.²³ But now, they contend, “the convenient story is also being contested with something more—the modern authority of empirical evidence from the mind sciences.”²⁴ With our “hard data, collected from scientific experiments, with all their mathematical precisions, objective measurements, and statistical dissections,” doubters will now be “force[d]” to “see through the facile assumptions of colorblindness.”²⁵

But, as Pence’s debate statement indicates, the turn to a discourse of science and fact has not displaced the more hotly contested normative arguments about racial issues. Consider the statements of the *National Review* writer David French, who wrote a piece during the presidential campaign entitled *Hillary’s Talk of ‘Implicit Bias’ Should Scare Every American*.²⁶ French argued that “[w]hen it moves from abstract to concrete, all this talk about ‘implicit bias’ gets very sinister, very quickly” and “allows radicals . . . to use virtually any negative event as a pretext for enforcing their ideological agenda.”²⁷ French’s argument, though couched in pejorative terms, makes perfect sense from his political perspective. The reason why the concept of implicit bias has become prominent in public discourse is not (just) because we are interested in how our brains work. The concept has become prominent because it undergirds an argument for policy interventions to overcome racial inequality—policy interventions that have been exceedingly controversial. Advocates may wish to focus the debate on what they understand to be scientific facts, but it is to be expected that those on the other side will attempt to shift the focus to the policy agenda that those facts are marshaled to support.

If anything, the turn to scientific discourse presents an opportunity for racial conservatives. Live by the psychological study, die by the psychological study. The implicit bias political project has, inherently, focused on a single kind of discrimination—discrimination actuated by implicit or unconscious bias. And it has focused on a particular tool for identifying and proving the existence of that kind of discrimination—the IAT. If there are weaknesses in the scientific case for the IAT, opponents will necessarily use them to undermine support for the political project of restoring robust responses to discrimination and inequality.

And, indeed, there are weaknesses. An accumulating body of evidence suggests that the reliability of the race IAT is too low to draw many, if any,

23. *See id.* at 519–520.

24. *Id.* at 520.

25. *Id.*

26. David French, *Hillary’s Talk of ‘Implicit Bias’ Should Scare Every American*, NAT’L REV. (Sept. 28, 2016, 2:43 PM), <http://www.nationalreview.com/article/440503/hillary-clintons-implicit-bias-talk-ominous>.

27. *Id.*

conclusions from a person's score on that test.²⁸ There are reasons to question whether the test is measuring bias against—rather than knowledge of stereotypes involving, or empathetic understanding of injustices experienced by—members of minority groups.²⁹ And there is little evidence that an IAT score correlates with discriminatory behavior on the individual level in any significant way³⁰—though there may be more reason to believe that the aggregate results of the test are telling us something meaningful about discrimination in society.³¹ The creators and popularizers of the test have, in recent years, repeatedly stressed that the IAT should not be used to identify the degree of implicit bias harbored by any particular individual, nor should it be used to predict the degree to which any particular individual will engage in discriminatory behavior.³²

I should emphasize: It does not at all follow from the fact that there are methodological weaknesses in the IAT that implicit or unconscious bias does not exist. The case for the existence—and, indeed, pervasiveness—of unconscious bias long predates the invention of the IAT.³³ There are all sorts of reasons to think that biases are widespread and often unconscious. The minimal group experiments, in which researchers construct groups of people based on completely arbitrary factors, where subjects quickly prefer members of their own groups, strongly suggest that unconscious bias against perceived out-groups is deeply baked into us.³⁴ Linda Krieger describes the findings:

The experiments showed that, as soon as people are divided into groups—even on a trivial or even random basis—strong biases in their perception of differences, evaluation, and reward allocation result. As soon as the concept

28. See, e.g., Yoav Bar-Anan & Brian A. Nosek, *A Comparative Investigation of Seven Indirect Attitude Measures*, 46 BEHAV. RES. METHODS 668, 676 (2014).

29. See, e.g., Michael R. Andreychik & Michael J. Gill, *Do Negative Implicit Associations Indicate Negative Attitudes? Social Explanations Moderate Whether Ostensible "Negative" Associations are Prejudice-Based or Empathy-Based*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1082 (2012).

30. See Frederick L. Oswald, Gregory Mitchell, Hart Blanton, James Jaccard & Philip E. Tetlock, *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCHOL. 171 (2013).

31. See 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 (2015).

32. See, e.g., *id.* at 557 ("IAT measures have two properties that render them problematic to use to classify persons as likely to engage in discrimination. Those two properties are modest test-retest reliability (for the IAT, typically between $r = .5$ and $r = .6$) and small to moderate predictive validity effect sizes. Therefore, attempts to diagnostically use such measures for individuals risk undesirably high rates of erroneous classifications.") (citation omitted).

33. Charles Lawrence's classic piece on unconscious bias, for example, predated the IAT by a decade. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). For an illuminating discussion of the origins of Lawrence's piece, see Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931, 942–51 (2008).

34. See Henri Tajfel, M.G. Billig, R.P. Bundy & Claude Flament, *Social Categorization and Intergroup Behaviour*, 1 EUR. J. SOC. PSYCHOL. 149, 154–55 (1971).

of “groupness” is introduced, subjects perceive members of their group as more similar to them, and members of different as more different from them, than when those same persons are simply viewed as noncategorized individuals. Indeed, when offered a choice minimal group subjects prefer to view information indicating their similarity with ingroup members and their distinctiveness from outgroup members.³⁵

And a lot of evidence suggests that racial bias and race discrimination continue to be pervasive. The evidence is ambiguous, however, regarding whether discrimination results from unconscious bias or instead is motivated by conscious, but perhaps disguised, prejudice or stereotyping. The résumé studies, in which employers are far more likely to call back applicants with stereotypically white rather than those with stereotypically black names, offer a prime example of continuing discrimination.³⁶ A recent study, in which subjects responded to a fictional vignette involving a man who gets into a fight at a bar, suggests that results like those in the résumé studies stem at least in part from unconscious bias. When the vignette used a stereotypically black name to refer to the man who got into the fight, subjects perceived the man as more aggressive, and more physically formidable, than when the vignette used a stereotypically white name to refer to the man.³⁷ Additional evidence comes from a study by Jennifer Eberhardt, Phillip Goff, Valerie Purdie, and Paul Davies, which showed police officers photographs of individuals and asked those officers which faces “look[ed] criminal.”³⁸ The researchers found that “[t]he more stereotypically Black a face appears, the more likely officers are to report that the face looks criminal.”³⁹ Shooter-bias studies—simulations in which both civilians and police officers are more likely to shoot armed black suspects than armed white suspects, and civilians are more likely to shoot *unarmed* black suspects than unarmed white suspects—also suggest that racial bias is pervasive and operates at a relatively automatic level.⁴⁰

35. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1191–92 (1995). See also Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313, 388–391 (2000) (discussing minimal group experiments).

36. See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

37. Colin Holbrook, Daniel M.T. Fessler & Carlos David Navarrete, *Looming Large in Others’ Eyes: Racial Stereotypes Illuminate Dual Adaptations for Representing Threat Versus Prestige as Physical Size*, 37 EVOLUTION & HUM. BEHAVIOR 67, 71 (2016).

38. Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 878 (2004).

39. *Id.*

40. See Cynthia Lee, *Race, Policing, and Lethal Force: Remediating Shooter Bias with Martial Arts Training*, 79 L. & CONTEMP. PROBS. 145, 152–60 (2016) (discussion of shooter-bias studies); L. Song

Although that evidence is suggestive of implicit or unconscious bias, it is also consistent with the existence of conscious, but perhaps disguised, bias—precisely what the focus on implicit bias tends to obscure. To the extent that the depoliticization project directs discussion of discrimination to the scientific validity and reliability of the IAT—a necessarily imperfect tool—we are likely to miss the very powerful evidence of continuing conscious bias.

For example, the in-person audit studies of employment, which show similar widespread bias as that found by the résumé studies,⁴¹ offer evidence suggesting that conscious prejudice or stereotypes are at work. In addition to sending matched testers to employers—the basis for the finding of discrimination—the researchers also conducted open-ended interviews with them. In those interviews, the employers were “adamant that race does not affect their decisions about who to hire”⁴² But, “when asked to step back from their own hiring process to think about racial differences more generally, employers were surprisingly willing to express strong opinions about the characteristics and attributes they perceive among different groups of workers.”⁴³ Those opinions notably included negative stereotypes about African Americans. Pager and Western found that “the plurality of employers we spoke with, when considering Black men independent of their own workplace, characterized this group according to three common tropes: as lazy or having a poor work ethic; threatening or criminal; or possessing an inappropriate style or demeanor.”⁴⁴

As Michael Selmi has emphasized, the effects of implicit bias in practice often shade into stereotyping or aversive racism, so the focus on only one of these modalities to the exclusion of the others can be misleading.⁴⁵ The focus on scientific proof of implicit bias may thus be doubly counterproductive. First, it suggests that the most prevalent form of discrimination is unconscious, when conscious bias, stereotyping, and prejudice may be just as important in practice. Second, it suggests that the case for continuing to respond to discrimination rests on applying a set of scientific standards to one particular tool that provides one category of evidence for the persistence of that one narrow kind of bias. And, as I have previously argued, framing these

Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 306–07 (2012).

41. See Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOCIAL ISSUES 221 (2012).

42. *Id.* at 229.

43. *Id.*

44. *Id.*

45. See Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 975–981 (2014).

issues in scientific terms obscures the deeply-contested normative issues that we are actually fighting about.⁴⁶

The focus on implicit bias, far from shoring up the political case for responding to racial injustice, actually threatens the case for reform by resting it on a narrow and vulnerable foundation. Turning away from arguments about justice, distribution, and the legacy of history does not make racial issues any less political. But it does deny advocates of aggressive responses to racial inequality of some of their most authentic and potentially powerful responses. The rich descriptions of current racial inequalities by authors such as Daria Roithmayr,⁴⁷ Richard Rothstein,⁴⁸ and Ta-Nehisi Coates,⁴⁹ carefully traced to an accumulation of distant *and* recent public and private decisions, make a far more powerful case for aggressively intervening to right racial wrongs than do the fleeting “a-ha” moments generated by the IAT.

II.

THE FAILURE OF DEPERSONALIZATION

The depersonalization goal of implicit bias research rests on the idea that assertions of continuing bias would be more politically palatable if they did not entail accusing individuals of racism. As *Slate* writer William Saletan put the point, “‘Implicit bias’ isn’t an accusation. It doesn’t mean you’re bad. It means you’re normal.”⁵⁰ Or, as Adam Benforado and Jon Hanson wrote, implicit bias researchers “are attempting to demonstrate that the conventional understanding of racism is incorrect—their concern is with something attributionally less blameworthy, though perhaps no less influential over the lives and opportunities of its victims.”⁵¹ White people react defensively to

46. Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007).

47. DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014).

48. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

49. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

50. William Saletan, *Implicit Bias is Real. Don’t Be So Defensive*, SLATE (Oct. 5, 2016, 7:35 PM), http://www.slate.com/articles/news_and_politics/politics/2016/10/implicit_bias_is_real_don_t_be_so_defensive_mike_pence.html.

51. Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087, 1140 (2008).

being accused of racism.⁵² “Moving beyond a focus on conscious racial bias” could be a “way to overcome [that] defensiveness.”⁵³

Does it work that way, though? Song Richardson offered some anecdotal evidence showing that a focus on implicit bias has, at times, enabled law enforcement officers to overcome defensiveness and buy into efforts to reduce discrimination.⁵⁴ But let’s return to the Pence quote with which I began this essay. Pence used the language of accusation: Hillary Clinton had made an “accusation of implicit bias”; she “use[d] a broad brush to accuse law enforcement of implicit bias or institutional racism.”⁵⁵ And that was something that “really has got to stop.”⁵⁶ To Pence, at least, an attribution of implicit bias was essentially the same as an accusation of racism.

Left-of-center commentators responded that Pence was missing the point. *Wired*’s Issie Lapowsky said that Pence “missed the most important part” of implicit bias research, which Lapowsky described as follows: “It’s not demeaning at all to point out implicit bias. That’s the whole idea: The people who study implicit bias say just about everybody has it, to some degree, and pointing it out may be the first, best step to beating it.”⁵⁷ *Slate*’s Saletan said that Pence had violated a cardinal rule: “When somebody brings up implicit bias, don’t freak out. Don’t get defensive and shut down the discussion.”⁵⁸

This response to Pence parallels the response that scholarly supporters of the implicit bias program have offered to scholarly critics of that program. When Amy Wax and Philip Tetlock criticized implicit bias research as suggesting that “we are all racists at heart,”⁵⁹ Adam Benforado and Jon Hanson responded that Wax and Tetlock “seem to have missed the point of those they are claiming to rebut. They have conflated conventional understandings of ‘racism’ with the unconscious biases that situationist theorists seek to bring to light.”⁶⁰ Wax and Tetlock, they argued, were

52. See, e.g., Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54 (2011); Katie Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1310 (2012) (“[S]cholars have found that attributions to discrimination against out-group members lead to a defensive reaction, causing people to more strongly embrace their own in-group.”); Eyer, *supra* at 1309 n.118 (collecting studies).

53. See L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2975 (2015).

54. See *id.*

55. See *supra* note 1 and accompanying text.

56. *Id.*

57. Issie Lapowsky, *In the VP Debate, Mike Pence Got Implicit Bias Pretty Wrong*, WIRED (Oct. 7, 2016, 10:36 AM), <https://www.wired.com/2016/10/vp-debate-mike-pence-got-implicit-bias-pretty-wrong/>.

58. Saletan, *supra* note 50.

59. See, e.g., Amy Wax & Philip E. Tetlock, *We Are All Racists at Heart*, WALL ST. J. (Dec. 1, 2005), at A16.

60. Benforado & Hanson, *supra* note 51, at 1140.

engaging in a “backlash” to implicit bias research, carried out through “naïve cynical reactions.”⁶¹ In my own work on implicit bias, I have similarly argued that critics of implicit bias research like Wax, Tetlock, and Gregory Mitchell often frame in scientific terms what are really normative disputes about what kinds of conduct should count as impermissible discrimination.⁶²

But perhaps those engaged in this sort of analytic parsing—myself very much included—are missing the point. The point of implicit bias as a political project was to provide an account of continuing inequality that was more palatable to racial moderates and conservatives than prevailing accounts that focused on corrective or distributive justice. The depersonalization goal of that program rested on the premise that people will not react as defensively to claims of implicit bias as they do to accusations of intentional discrimination. If that premise does not hold true—as Pence’s reaction indicates—then the political project is failing. And it’s failing no matter how much we *want* people to understand that a claim of implicit bias is not an accusation of racism. As German Lopez recently pointed out, “While terms like ‘racist,’ ‘white privilege,’ and ‘implicit bias’ intend to point out systemic biases in America, for white Americans they’re often seen as coded slurs.”⁶³

In retrospect, it should not have been a surprise that the depersonalization goal would fail. Claims of racial bias are highly charged in our society. For many people who are told that they are racially biased, what they are likely to hear is an accusation of racism.⁶⁴ This is probably especially true for those who are most committed to anti-racism—the individuals who are most sensitive to being accused of bias.

The changing connotation of claims of implicit bias is analogous to what the cognitive linguist Steven Pinker has called the “euphemism treadmill.”⁶⁵ Roughly speaking, the idea is this: when certain words (particularly those describing less powerful groups) come to have stigmatizing or offensive meanings, social movements often push society to use new, less stigmatizing

61. *Id.* at 1143.

62. See Bagenstos, *supra* note 46.

63. German Lopez, *Research Says There Are Ways to Reduce Racial Bias. Calling People Racist Isn't One of Them*, VOX (Aug. 14, 2017, 9:35 AM EDT), <https://www.vox.com/identities/2016/11/15/13595508/racism-trump-research-study>.

64. See, e.g., DiAngelo, *supra* note 52, at 57 (triggers for white racial defensiveness include being told that a white person’s “viewpoint comes from a racialized frame of reference” as well as being told “that one’s behavior had a racist impact”); Eyer, *supra* note 52, at 1310 (discussing evidence “that defensive reactions may play some role in majority group resistance to making attributions to discrimination, a conclusion that is buttressed by research showing that individuals are much less likely to characterize behaviors as discriminatory in circumstances that might be self-implicating (i.e., where they themselves have engaged in similar behaviors)”; Joseph E. Flynn, Jr., *White Fatigue: Naming the Challenge in Moving from an Individual to a Systemic Understanding of Racism*, 17 MULTICULTURAL PERSPECTIVES 115, 121–22 (2015) (many white people feel worried about being “associated with the term racist,” and develop “white fatigue,” when presented with discussions of systemic racism and unconscious privilege).

65. Steven Pinker, *The Game of the Name*, N.Y. TIMES, Apr. 5, 1994, at A21.

words. But soon, those new words come to carry the same social meaning as the now-abandoned ones, and the movements go off to find even newer words, thus starting the cycle yet again.

One ought not to oversell the point. Pinker's account of the euphemism treadmill, at least as presented in this simplified form, is overstated. Efforts at destigmatization—including through abandoning charged language—can succeed. And the euphemism treadmill idea is often deployed in public discourse as an attack on efforts to respond to continuing racial, gender, and disability injustice.⁶⁶ It is ironic for my purposes, but the notion of the euphemism treadmill is often a weapon wielded by anti-anti-racists.

Still, the social dynamics Pinker describes ring true here. When racial justice activists argue that broad swaths of people have implicit bias, and that we need to respond to that bias by adopting broad-ranging remedies of the sort that racial justice advocates have long pushed, audiences are likely to hear those calls in the context of prior arguments by the same racial justice advocates for the same remedies. And what they hear is an accusation of racial bias; the notion that the bias is “implicit” and endemic to the human condition becomes background noise.

In its depersonalization goal, as in its depoliticization goal, the implicit bias political project is unlikely to succeed. The individuals whom advocates aim to persuade are not disarmed by claims of implicit bias; they continue to hear accusations of racism, and they remain defensive about it. Once again, it seems that there is no way around making an argument straightforwardly grounded in history, sociology, and justice.

CONCLUSION

Implicit bias research has pursued not just a scientific but also a political project. Researchers and advocates who urge action to overcome implicit bias sought to overcome our nation's increasing racial conservatism through strategies of depoliticization and depersonalization. But the dust-up over implicit bias in the presidential debates, as well as a close examination of the premises of the depoliticization and depersonalization goals, suggests that the political project is likely to fail. Unconscious bias is an important factor in the world, as is conscious bias, and both are important targets of policy interventions. But we cannot elide the difficult politics of addressing these problems by invoking the discourse of science. To gain traction in pursuing racial equality in the years to come, we must straightforwardly engage the issues on the planes of history, sociology, and justice.

66. See, e.g., Ben O'Neill, *A Critique of Politically Correct Language*, 16 INDEP. REV. 279 (2011).

