

THE MYTH OF COLORBLIND JUSTICE

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Implicit Racial Bias in Public Defender Triage

ABSTRACT. Despite the promise of *Gideon*, providing “the guiding hand of counsel” to indigent defendants remains unmanageable, largely because the nation’s public defender offices are overworked and underfunded. Faced with overwhelming caseloads and inadequate resources, public defenders must engage in triage, deciding which cases deserve attention and which do not. Although scholars have recognized the need to develop standards for making these difficult judgments, they have paid little attention to how implicit, i.e., unconscious, biases may affect those decisions. There is reason to suspect that unconscious biases will influence public defender decisionmaking due to generations of racial stereotypes specific to stigmatized groups and crime. This Essay urges legal scholars and practitioners to consider how implicit biases may influence the rationing of defense entitlements and suggests ways to safeguard against the effects of these unconscious forces.

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ESSAY CONTENTS

INTRODUCTION	102
I. OVERVIEW OF IMPLICIT RACIAL BIASES	103
II. PUBLIC DEFENDER TRIAGE	105
III. IMPLICIT BIASES' EFFECTS ON TRIAGE JUDGMENTS	108
A. Biased Evaluations of Evidence	109
B. Biased Interactions	110
C. Biased Acceptance of Punishments	113
1. Implicit Dehumanization	113
2. Features-Based Implicit Bias	114
IV. RECOMMENDATIONS	115
A. Office Culture	116
B. Objective Triage Standards	118
C. Accountability	119
D. Awareness	120
E. Intentional Goals	120
CONCLUSION	123

INTRODUCTION

As we commemorate the fiftieth anniversary of the Supreme Court's landmark decision in *Gideon v. Wainwright*, there is little doubt that its promise to provide "the guiding hand of counsel" to indigent defendants remains largely unrealized.¹ There are many reasons for this, including the lack of political will to fulfill *Gideon's* promise by guaranteeing adequate funding and imposing caseload limits. Although some jurisdictions created public defender (PD) offices to meet the demand for services, attorneys in the majority of these offices handle cases well over the maximum recommended limit.

Scholars rightly bemoan the current state of indigent defense. However, insufficient attention has been paid to the fact that, until much-needed changes in the provision of indigent defense services occur, PDs will engage in triage, the process of prioritizing cases for attention. This reality raises important questions about how to guide attorney decisionmaking in order to avoid ad hoc judgments. We focus on state PDs rather than on assigned counsel and contract systems because state PD offices handle the majority of indigent cases in state criminal proceedings.²

Almost no attention has been paid to the effects that unconscious, i.e., implicit, biases may have on PD decisionmaking.³ This is surprising because over three decades of well-established social science research demonstrates that these biases are ubiquitous and can influence judgments, especially when information deficits exist. Worse, these biases are likely to be particularly influential in circumstances where time is limited, individuals are cognitively taxed, and decisionmaking is highly discretionary—exactly the context in which PDs find themselves. Thus, the domain of PDs and triage presents a rare confluence of factors ripe for the influence of implicit biases (IBs) and consequently deserves far more scholarly treatment than it has received.

We argue that it is critical to consider the probable effects of IBs on PD decisionmaking because zealous and effective advocacy is a scarce resource in the current environment. Thus, the distribution of this resource should not be based on unconscious judgments tied to a defendant's race. In the Parts that follow, we consider how IBs may affect PD decisionmaking and end with some suggestions for safeguarding against their influence. This Essay focuses on the

1. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

2. NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 53 (2009), <http://www.constitutionproject.org/pdf/139.pdf>.

3. *But see* Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012).

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

effects of IBs on black clients because psychological research disproportionately addresses anti-black prejudice. However, IBs are likely to impact judgments of other clients who are similarly stereotyped as dangerous and criminal.

I. OVERVIEW OF IMPLICIT RACIAL BIASES

Implicit social cognition is a branch of psychology that studies how mental processes that occur outside of awareness and that operate without conscious control can affect judgments about and behaviors toward social groups.⁴ These unconscious processes are simply an extension of the way humans think and process information. Briefly stated, our mental processes facilitate decisionmaking by making automatic associations between concepts.⁵ For example, people might automatically associate “doctor” with “hospital” and other related ideas. These associations are linked in our minds because they often occur together.

Implicit racial biases refer to the unconscious associations we make about racial groups. The existence of these biases is consistent with the conclusion of more general research that we automatically and unconsciously use heuristics⁶ to cope with the enormous amount of information that bombards us.⁷ Implicit racial biases facilitate our ability to “manage information overload and make decisions more efficiently and easily”⁸ by “filtering information, filling in missing data, and automatically categorizing people according to cultural stereotypes.”⁹ Like all unconscious mental processes, implicit racial biases

are *unintentional* because they are not planned responses; *involuntary*, because they occur automatically in the presence of an environmental cue; and *effortless*, in that they do not deplete an individual’s limited information processing resources. Those characteristics can be

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4. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2036 (2011).
 5. See John R. Anderson, *A Spreading Activation Theory of Memory*, 22 J. VERBAL LEARNING & VERBAL BEHAV. 261 (1983).
 6. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124 (1974).
 7. For an in-depth discussion of the relationship between implicit biases and heuristics, see L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012).
 8. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 485 (2004).
 9. *Id.*

contrasted with conscious processes, or mental activities of which the person is aware, that they intend, that they volitionally control, and that require effort.¹⁰

The fact that these biases are unconscious means that they “are not consciously accessible through introspection.”¹¹

We use the term implicit racial biases to refer both to unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups). Implicit stereotypes and attitudes result from the practice we get associating groups (e.g., blacks) with traits (e.g., criminality). This practice stems from repeated exposures to cultural stereotypes that are ubiquitous within a given society. For instance, the cultural stereotype of blacks as violent, hostile, aggressive, and dangerous persists within our society.¹² Merely being aware of these stereotypes, without personally endorsing them as correct, is sufficient to activate unconscious stereotypes in a person’s mind—often resulting in chronic associations that we call implicit attitudes.¹³ The underlying theory is that some groups (again, like blacks) are so commonly associated with negative traits (again, like criminality) that there is a general tendency to categorize the group with anything negative because of the overall negativity of the associations.

IBs can be activated by racial cues present in the environment,¹⁴ including another person’s skin color, age, gender, and accent.¹⁵ Where blacks are concerned, even thinking about crime may be sufficient to activate IBs. This is because the association between blacks and crime is so pervasive that it has become bidirectional—thoughts of criminality unconsciously activate thoughts of blacks, and reciprocally, thoughts of blacks activate thoughts of crime.¹⁶

10. *Id.* (citations omitted).

11. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012).

12. See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004); Graham & Lowery, *supra* note 8, at 485; Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008).

13. See Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1323 (2002).

14. See Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 310 (2010).

15. John A. Bargh, Mark Chen & Lara Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 241-42 (1996).

16. Eberhardt et al., *supra* note 12, at 883.

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

Over three decades' worth of research repeatedly demonstrates that IBs, once activated, influence many of our behaviors and judgments in ways we cannot consciously access and often cannot control.¹⁷ Furthermore, IBs can predict real-world behaviors.¹⁸ For instance, one study found that for every additional standard deviation of added IB, employers were five percent less likely to hire a job applicant with an Arab- or Muslim-sounding name than a white-sounding name.¹⁹

There is ample reason for concern that IBs will affect public defenders' judgments because IBs thrive in situations where individuals make decisions quickly with imperfect information²⁰ and when they are cognitively depleted,²¹ anxious,²² or distracted.²³ As we discuss next, PDs work in precisely this type of environment.

II. PUBLIC DEFENDER TRIAGE

Indigent defense is in a state of crisis. Defender offices are chronically underfunded, resulting in crushing caseloads. Most offices do not have caseload limits, and those that do regularly surpass them.²⁴ Thus, despite the existence of dedicated and committed PDs, the lack of adequate resources

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17. See Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007).
 18. See generally Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: II. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009) (describing studies demonstrating the real-world effects of implicit bias).
 19. See Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence* 1, 4-5 (Inst. for the Study of Labor, Discussion Paper No. 2764, 2007), <http://d-nb.info/98812002X/34> (discussing the difference in receiving callback job interviews between applicants with Arab or Muslim names and applicants with Swedish names); see also 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, 998 (2004) (demonstrating that job applicants with white sounding names such as Emily or Greg were 50% more likely to receive callback job interviews in Boston and 49% more likely in Chicago than applicants with black-sounding names like Jamal).
 20. Graham & Lowery, *supra* note 8, at 486.
 21. See Olesya Govorun & B. Keith Payne, *Ego-Depletion and Prejudice: Separating Automatic and Controlled Components*, 24 SOC. COGNITION 111 (2006).
 22. See Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316, 318 (2007).
 23. See Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 509 (1991).
 24. NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 67.

coupled with unmanageable caseloads make it virtually impossible to provide zealous and effective representation to every client.

The financial impediments to realizing the promise of *Gideon* must be remedied. In the interim, however, PDs are forced to make difficult resource-allocation decisions among their clients. These resources include an attorney's time and mental energy, as well as purely monetary resources, such as funds to hire experts.

In an ideal world, defenders would have unlimited opportunities to interview and investigate all of the state's witnesses, canvass the neighborhood where the crime occurred, and otherwise thoroughly investigate the case. Furthermore, defenders could conduct legal research, file motions, request funds for expert assistance, and engage in extensive plea negotiations. They also would have the time to develop relationships with clients, which is critical because clients have important information that can aid attorneys in their trial preparation and their arguments for pretrial release, better plea offers, and reduced sentences.

However, most PDs do not work in an ideal environment. They cannot realistically provide each client with zealous and effective advocacy. PDs are forced by circumstances to engage in triage, i.e., determining which clients merit attention and which do not. As one defender put it, "The present M.A.S.H. style operating procedure requires public defenders to divvy effective legal assistance to a narrowing group of clients, [forcing them] to choose among clients as to who will receive effective legal assistance."²⁵

It is no wonder that the provision of indigent defense is often likened to medical triage.²⁶ Similar to hospital emergency rooms, PD offices face demands that far outpace their resources. In order to save time to defend the cases that they find deserving, attorneys may plead out other cases quickly²⁷ or go to trial unprepared.²⁸ This reality means that for most PDs, the question is not "how do I engage in zealous and effective advocacy," but rather, "given that all my clients deserve aggressive advocacy, how do I choose among them?"²⁹

25. *Id.* at 69.

26. See, e.g., Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1180-81 (2003).

27. *Id.*

28. Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 93-94 (2007).

29. We have paraphrased David Luban here. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1765 (1993).

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

We are unaware of any PD office that has formal triage standards to help attorneys make these difficult judgments. Even if standards do exist, they cannot completely eliminate attorney discretion. For instance, even with standards, attorneys must still make judgment calls about whether to advise clients to take a case to trial or to accept a plea offer, and IBs can affect these evaluations. As a result, two similarly situated clients may be treated differently.

On this point, a comparison to medical triage is illuminating. Hospitals have developed objective triage standards to guide medical decisionmaking.³⁰ Despite this, implicit racial biases still affect decisions. In one study, researchers determined that emergency room doctors' implicit racial biases predicted their treatment decisions.³¹ More specifically, "[a]s physicians' prowhite implicit bias increased, so did their likelihood of treating white patients and not treating black patients" with procedures to abort a heart attack.³² Hence, while objective triage standards are important, they are not a panacea for implicit bias.

Given the similarities between PD offices and emergency rooms, it would be surprising if IBs did not affect defender judgments. One study of the implicit attitudes of death penalty defense lawyers found evidence of IBs.³³ Furthermore, abundant research demonstrates that IBs affect individuals who, like defenders, work in cognitively taxing environments and must make complex decisions under time pressure and in the face of ambiguous facts.³⁴ No group appears immune to the possibility of influence. Moreover, IBs can affect judgments even if PDs are committed to zealous advocacy, and consciously and genuinely reject negative stereotypes and attitudes about marginalized

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30. Chet D. Schrader & Lawrence M. Lewis, *Racial Disparity in Emergency Department Triage*, 49 J. EMERGENCY MED. 511, 511 (2013).
 31. See Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1231 (2007).
 32. *Id.* The procedure in question, thrombolysis, attempts to break up blood clots and is often used to treat heart attacks. See *Thrombolytic Therapy*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/007089.htm> (last updated June 1, 2010).
 33. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545-51 (2004). We are unaware of any study that examines the relative number of hours lawyers spend on black versus white clients nor any that links differences in attorneys' delivery of services to implicit biases.
 34. See, e.g., Eberhardt et al., *supra* note 12; Phillip Atiba Goff et al., "I'm Not a Racist, but I Will [Mess] You Up": Stereotype Threat as a Status-Threat that Provokes Aggressive Responses (2013) (unpublished manuscript) (on file with authors); Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children* (2013) (unpublished manuscript) (on file with authors).

populations.³⁵ In other words, individuals' conscious attitudes are weakly related to their implicit attitudes. As such, even the most egalitarian individual can fall victim to IBs absent other precautions.³⁶ In fact, confidence in one's own egalitarianism can be an obstacle to identifying IBs,³⁷ meaning that individuals who became PDs in order to fight racial injustice may be just as susceptible to the effects of IBs as those with less noble motives. Additionally, research suggests that even if PDs are nonwhite themselves, they are in danger of being influenced by IBs.³⁸

Next, we examine how IBs may affect defender judgments. While factors other than IBs can influence triage decisionmaking, this Essay focuses solely on the possible effects of IBs. We will provide some discussion of the research; however, given the constraints of this Essay, we refer the reader to our prior work and other useful sources for an extended discussion of the underlying studies, including their validity, reliability, and effect sizes.³⁹

III. IMPLICIT BIASES' EFFECTS ON TRIAGE JUDGMENTS

Defender triage involves choices about how to allocate precious resources. These triage decisions begin from the moment the PD receives the case. Attorneys likely use a number of different criteria to make these decisions. For instance, they may prioritize cases based upon their assessment of whether the state can prove its case beyond a reasonable doubt. Or they may expend more effort on cases in which they believe their client is factually innocent.⁴⁰ While

35. *But see infra* Section IV.A (discussing the effects of egalitarian attitudes on implicit bias).

36. John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 65-67 (2002).

37. See Cynthia M. Frantz et al., *A Threat in the Computer: The Race Implicit Association Test as a Stereotype Threat Experience*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1611, 1611-22 (2004).

38. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063, 1072 (2006) (noting that "[s]eventy-five percent of Whites (and fifty percent of Blacks) show anti-Black bias").

39. E.g., Richardson, *supra* note 4; L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2011); Richardson & Goff, *supra* note 7; see also, e.g., John T. Jost et al., *The Existence of Implicit Prejudice Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ON ORGANIZATIONAL BEHAV. 39, 41 (2009); Kang et al., *supra* note 11; Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010).

40. We, like others, take the view that public defenders should not focus on cases of factual innocence. See, e.g., Robert P. Mosteller, *Why Defense Attorneys Cannot, but Do, Care About*

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

the science on IBs does not permit us to identify when IB is operating in any particular case, the concern of this Essay is the aggregate probability that, given the prevalence of IBs, PDs' decisions may be frequently affected without correction for the negative consequences. What follows is a discussion of how IBs may influence a host of triage decisions.

A. Biased Evaluations of Evidence

Of necessity, defenders must begin evaluating cases from the moment they are assigned. Their initial evaluations will affect a variety of subsequent decisions important to the ultimate resolution of the case. For instance, after reviewing the discovery, they may decide that expending resources to conduct a fact investigation would be a waste of time because the state's evidence is strong. On the other hand, if attorneys determine that the state's case has weaknesses they can exploit, they may expend more resources to defend the client, including investigating the case and engaging in vigorous plea bargaining. Thus, early appraisals of cases can become self-fulfilling prophecies. While attorneys must evaluate a case's merits, the problem is that IBs may influence these judgments.

Studies consistently demonstrate that IBs can affect evaluations of ambiguous evidence. In one, a researcher activated IBs by subliminally priming subjects with words associated with blacks, such as slavery.⁴¹ Afterwards, the researcher asked subjects to read a vignette about a racially unidentified male and to rate his ambiguous behaviors on a number of traits. The results established that IBs made subjects more likely to rate his behaviors as hostile. Another study utilizing the identical method found that, when IBs were activated, police and probation officers judged a male juvenile as being more culpable and more deserving of severe punishment than when these biases were not activated.⁴² IBs can even influence how mock jurors evaluate evidence that is ambiguous as to guilt. These biases not only caused jurors to be more

Innocence, 50 SANTA CLARA L. REV. 1, 3-4 (2010); Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 509 n.100 (2000).

41. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). "Priming refers to the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context." Bargh, Chen & Burrows, *supra* note 15, at 230. "Subliminal" means that the priming occurs below the level of conscious awareness. Subliminal priming is achieved by a variety of methods and typically involves flashing images on a computer screen so quickly that individuals are unaware they saw anything.

42. Graham & Lowery, *supra* note 8, at 483.

likely “to judge the evidence as tending to indicate criminal guilt,” but “also more likely to believe that the defendant was guilty.”⁴³

When translated to the context of PD triage, these studies suggest that when clients are black or otherwise criminally stereotyped, IBs can influence evidence evaluation, potentially causing PDs to unintentionally interpret information as more probative of guilt. Consequently, PDs may determine that the state will have little difficulty meeting its burden of proof and thus, that the case does not warrant much effort.

The effects of IBs on triage judgments can occur even before defenders meet their clients. At this point, attorneys likely have information about the client’s race. This knowledge, coupled with reading the discovery, is sufficient to activate IBs and their attendant effects.⁴⁴ The consequences for the defendant can worsen once his attorney meets him, particularly if the client has stereotypically African features such as very dark skin.⁴⁵

Furthermore, the influence of IBs will be facilitated if the charge itself is associated with the client’s race. For instance, young black men serve as our mental prototype of the violent street criminal and drug dealer.⁴⁶ If the client is black and the charge involves a drug offense, a judgment of guilt may be cognitively easier to make because of the strong implicit association between blacks and crime.⁴⁷ This gut feeling can then affect the attorney’s views about the merits of the case. Of course, additional investigation might change her initial hunch. However, part of what defenders regulate is how much effort to expend in acquiring additional information. Hence, unless defenders have reason to second-guess their initial impressions, IBs can negatively affect judgments about cases involving clients stereotyped as criminal and crimes stereotyped as black.

B. Biased Interactions

The defender’s initial client meeting is another domain likely to influence triage decisions. For instance, during the meeting, attorneys will inevitably

43. Levinson & Young, *supra* note 14, at 310-11.

44. See *supra* notes 14-19 and accompanying text.

45. See *infra* Subsection III.C.2.

46. See Trawalter et al., *supra* note 12, at 1322.

47. See, e.g., Eberhardt et al., *supra* note 12, at 883 (demonstrating the relationship between blacks and crime); Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815 (2001) (demonstrating the importance of context to the activation of IBs).

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

make judgments about client credibility. If lawyers do not credit their clients' version of events, they may not follow up on leads or may forgo possible motions to suppress government evidence. Additionally, clients are important sources of witnesses and exculpatory and mitigating information. If the initial meeting goes badly, however, clients may not be willing to share information that might be crucial to the case, and attorneys may determine that the client will not be cooperative, forthcoming with information, or otherwise helpful to an investigation. Thus, an unpleasant interaction can influence how much time an attorney is willing to devote to a case.

Unfortunately, IBs can adversely affect interactions with negatively stereotyped individuals. First, IBs can influence how attorneys interpret a client's ambiguous behaviors and facial expressions. In one study, identical expressions were deemed more hostile on black faces than on white faces by subjects with high IB.⁴⁸ In another, subjects with more IB assessed hostile expressions as lingering longer on black than white faces.⁴⁹ Research also demonstrates that study participants interpret black actors engaging in ambiguous behaviors as more aggressive than white actors engaging in identical behaviors.⁵⁰ In fact, when the actor is black, white subjects are more likely to attribute the negative behavior to the individual's character rather than to the situation.⁵¹

Second, IBs can negatively influence attorneys' behaviors. In one study, when interacting with negatively stereotyped individuals, people tended to maintain a greater physical distance, make more speech errors, and end the contact earlier than with positively stereotyped individuals.⁵² Furthermore, unconscious stereotypes can cause people to act in accordance with them.⁵³ For instance, research subjects who were subliminally primed with a black male face reacted with more hostility to bad news than those primed with white faces. This occurred, the researchers concluded, because subliminally priming participants with black male faces unconsciously activated the stereotype of

48. Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 *PSYCHOL. SCI.* 342 (2004).

49. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 *PSYCHOL. SCI.* 640 (2003).

50. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 *J. PERSONALITY & SOC. PSYCHOL.* 590 (1976).

51. *Id.*

52. Carl O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 *J. EXPERIMENTAL SOC. PSYCHOL.* 109 (1974); see also Dovidio et al., *supra* note 36 (finding that nonverbal behaviors can be affected by implicit bias).

53. Bargh, Chen & Burrows, *supra* note 15, at 241-42.

black hostility, which then influenced the participants' behaviors.⁵⁴ These behavioral effects of IB are problematic because individuals on the receiving end of negative behaviors may respond in kind. However, because the originators of the behavior are unaware of their own role in triggering the unpleasant response, they may attribute the negative behavior solely to the other. This "behavioral confirmation" effect⁵⁵ explains how IBs can adversely influence interactions.

Third, IBs can cause attorneys to treat stereotyped individuals in stereotype-consistent ways. Research demonstrates that stereotypes of blacks as untruthful lead police to push black suspects harder for confessions and to adopt more accusatory interrogation techniques.⁵⁶ This approach may yield more anxious behaviors in suspects that, in turn, may produce perceptions of guilt.⁵⁷

With these studies in mind, imagine the interactions between negatively stereotyped clients and defenders. As a result of IB, the attorney may unconsciously exhibit hostility. The attorney may also be more likely to interpret the client's body language and facial expressions as antagonistic. Furthermore, the attorney's unconscious negative expectations may produce perceptions and attributions consistent with them.

If the client mirrors the attorney's behaviors, this will confirm the attorney's initial negative expectations, and the attorney may attribute this behavior to the client's disposition rather than to the attorney's own behaviors or the situation. The resulting negative interaction can create a vicious cycle of mutual distrust and dislike, adversely affecting the attorney's triage decisions. Spending time with a client can, of course, change these initial impressions. However, an unpleasant initial interaction may reduce the defender's desire to do so.⁵⁸

54. *Id.* at 239.

55. See Mark Chen & John A. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 542 (1997).

56. Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, 17 PSYCHOL. PUB. POL'Y & L. 562 (2011).

57. Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187 (2003).

58. See, e.g., Jason P. Mitchell et al., *Contextual Variations in Implicit Evaluation*, 132 J. EXPERIMENTAL PSYCHOL. 455, 460 (2003) (finding that implicit attitudes are changeable).

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

C. Biased Acceptance of Punishments

We have been discussing the effects that implicit stereotypes and attitudes may have on defender judgments. Here we will consider two additional types of implicit racial bias that can also influence decisionmaking: implicit dehumanization and features-based IB.

1. Implicit Dehumanization

Implicit dehumanization stems from a tendency to unconsciously associate highly stigmatized groups with nonhuman animals. Here, we focus on the unconscious association between blacks and apes because of its long history in our culture.⁵⁹ Remarkably, this unconscious association can be activated even when people are not consciously aware of the association.⁶⁰ However, once triggered, it predicts real-world behaviors.

For instance, Goff and colleagues had subjects watch a video of police viciously beating a suspect. If subjects were subliminally primed with images of apes before watching the video, they were more likely to find the beating justified when the victim was black.⁶¹ However, when the victim was white or when the subjects were not subliminally primed, they did not endorse the beating.

To determine whether implicit dehumanization could predict real-world behaviors, these researchers examined Philadelphia newspaper articles reporting on death-eligible cases, looking for ape-related metaphors. After controlling for factors other than race, they found that “Black defendants who were put to death were more likely to have apelike representations in the press . . . than were those whose lives were spared.”⁶² Importantly, in previous experiments, the researchers found that implicit associations between blacks and apes (but not explicit associations) predicted similar behaviors in the lab, leading to the hypothesis that implicit dehumanization likely contributed to both the media representations of death-eligible defendants and the sentencing judgments.

59. For a discussion of this history, see Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 292-94 (2008).

60. *See id.*

61. *Id.* at 302.

62. *Id.* at 304.

Recently, Goff and colleagues built on these findings in a juvenile justice context.⁶³ They found that the more individuals unconsciously associated blacks with apes, the less innocent they thought black children suspected of a crime were. Worse yet, implicit dehumanization predicted racial disparities in the violent treatment of children by police officers. When the researchers compared police officers' actual use-of-force history against juveniles with their implicit dehumanization score—the implicit association between blacks and apes—they found that police officers who held the association more strongly were also more likely to use force against black as opposed to white children.

Taken together, these studies raise concerns that defenders may be more accepting of higher sentencing recommendations for black versus white clients and, thus, less likely to negotiate aggressively for lower sentences or to conduct mitigation investigations. While the effects of implicit dehumanization on PDs have yet to be demonstrated, the fact that implicit dehumanization shapes other actors' behaviors in criminal-justice-related settings suggests that defenders are probably not immune.

2. Features-Based Implicit Bias

Research demonstrates that individuals with more stereotypically black features (i.e., darker skin, broader nose, and fuller lips) are unconsciously judged to be more dangerous and culpable than others.⁶⁴ One study demonstrated the effect of features-based IB on outcomes in death penalty cases. After controlling for a wide range of factors, researchers found that fifty-seven percent of black defendants in the half of the sample determined to have more stereotypically black features received death sentences, compared to twenty-four percent in the other half of the sample. The effect only appeared when the victim was white.⁶⁵

In another study, researchers examined whether “the degree to which . . . inmates manifested Afrocentric features” would predict sentence length after controlling for race, criminal history, and the seriousness of the crime.⁶⁶ Their results were troubling. When comparing white defendants to each other, they

63. Goff et al., *supra* note 34.

64. See, e.g., Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 676-77 (2004) (discussing how Afrocentric features significantly correlate with harsher sentences).

65. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006).

66. Blair et al., *supra* note 64, at 676.

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

discovered that those with more stereotypically black features received longer sentences.⁶⁷ They found the same results when comparing black defendants to each other.⁶⁸ This finding confirmed prior research that people unconsciously “use Afrocentric features to infer traits that are stereotypic of African Americans.”⁶⁹ As a result, even within races, people with more stereotypically black features are perceived as being more criminal.⁷⁰ In fact, one recent study found that subjects were more likely to shoot black individuals with more stereotypically “black” features than those with fewer stereotypically “black” features.⁷¹

In sum, features-based IB may result in defenders unconsciously being more accepting of harsher sentences for some clients than others. Because of their belief that a tougher sentence is appropriate or likely to be imposed, PDs may be less likely to fight for their client’s release on bail and spend time, effort, and scarce resources negotiating a better plea deal. Hence, features-based IB can affect a host of triage decisions that can disadvantage clients of all races who have stereotypically black features.

IV. RECOMMENDATIONS

As the previous discussion demonstrates, IBs may have pernicious effects on PD decisionmaking. However, while IBs are ubiquitous, they are also malleable.⁷² Consequently, defender offices may be able to implement strategies to help debias their attorneys. What follows are five recommendations that have the potential to mitigate or safeguard against the probable effects of IBs on defender judgments. However, given the constraints of this Essay, we only trace the broad outlines of each recommendation and do not address possible limitations.

67. *Id.* at 677.

68. *Id.*

69. *Id.*

70. *Id.* at 677-78; *see also* Eberhardt, *supra* note 12, at 877, 888 (demonstrating that more racially stereotypical black men are seen as more criminal).

71. Kimberly Barsamian Kahn & Paul G. Davies, *Differentially Dangerous? Phenotypic Racial Stereotypicality Increases Implicit Bias Among Ingroup and Outgroup Members*, 14 *GROUP PROCESSES & INTERGROUP RELATIONS* 569, 573 (2011).

72. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 *J. PERSONALITY & SOC. PSYCHOL.* 800 (2001).

A. Office Culture

A person's motivations⁷³ and ideological commitments may be important to reducing IBs.⁷⁴ People highly motivated to be nonprejudiced can reduce or eliminate IBs' effects on their behavior,⁷⁵ especially if they are internally motivated.⁷⁶ Additionally, high epistemic motivation—that is, requiring more information to feel comfortable making a decision—is associated with reduced reliance on stereotypes because it “increase[s] the tendency to engage in systematic information processing.”⁷⁷ Furthermore, people committed to egalitarian goals may be better able to control the activation of IBs.⁷⁸ This is good news for defender offices because many attorneys become defenders as a result of their commitments to equal justice.

Since motivations appear to affect implicit bias, public defender offices should reward these motivations and also consider them when making hiring decisions.⁷⁹ Some defender organizations are already attempting to transform the culture of their offices through “values-based” recruiting.⁸⁰ For instance, Gideon's Promise (formerly the Southern Public Defender Training Center)

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73. See, e.g., Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations To Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835, 845 (2002).
74. Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RESEARCH & PRACTICE 101, 106 (2002).
75. Margo J. Monteith et al., *Suppression as a Stereotype Control Strategy*, 2 PERSONALITY & SOC. PSYCHOL. REV. 63, 73-75 (1998) (citing studies).
76. E. Ashby Plant & Patricia G. Devine, *The Active Control of Prejudice: Unpacking the Intentions Guiding Control Efforts*, 96 J. PERSONALITY & SOC. PSYCHOL. 640 (2009); see also Leslie R.M. Hausmann & Carey S. Ryan, *Effects of External and Internal Motivation To Control Prejudice on Implicit Prejudice: The Mediating Role of Efforts To Control Prejudiced Responses*, 26 BASIC & APPLIED SOC. PSYCHOL. 215, 222 (2004) (finding that those with internal motivations to be nonprejudiced show decreased implicit biases compared to those who are only externally motivated).
77. Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 174-76 (2007).
78. See, e.g., Gordon B. Moskowitz et al., *Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals*, 77 J. PERSONALITY & SOC. PSYCHOL. 167 (1999).
79. See Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 130-31 (2004).
80. See, e.g., Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 175 (2009).

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

screens new lawyers “for their receptiveness to client-centered values.”⁸¹ Paying attention to a new recruit’s client-centered values is important because the desire to develop relationships with and form positive impressions of members of stereotyped groups may help to reduce the activation of negative racial stereotypes.⁸²

Another important consideration during recruitment is the potential hire’s experiences navigating diverse environments. Research demonstrates that significant positive contact with individuals who do not fit our stereotypes about their group can reduce IB.⁸³ For instance, one study found that people reporting more positive personal contacts with blacks were less likely to have negative beliefs about their criminality and violence.⁸⁴ These considerations are job-related because any defender will almost certainly have negatively stereotyped people as clients. Furthermore, racial diversity among defenders themselves can be important to reducing IBs because it increases opportunities for positive interactions between racial group members of equal status, helps to create positive associations, and motivates people to make more accurate, nonstereotyped judgments.⁸⁵ All of these factors reduce implicit bias.

Finally, promoting people who demonstrate the desire to be fair and egalitarian will help to demonstrate the importance of these values within the office, thereby encouraging a culture that motivates attorneys to live up to such values. Group norms are among the most influential factors in changing attitudes of any kind.⁸⁶ Individuals operating within an organizational culture of tolerance tend to become more tolerant – particularly when influential others

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81. Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J. L. & SOC. CHANGE 331, 351 (2010).
 82. See Brian S. Lowery, Curtis D. Hardin & Stacey Sinclair, *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842 (2001).
 83. See, e.g., Shaki Asgari, Nilanjana Dasgupta & Nicole Gilbert Cote, *When Does Contact with Successful Ingroup Members Change Self-Stereotypes? A Longitudinal Study Comparing the Effect of Quantity vs. Quality of Contact with Successful Individuals*, 41 SOC. PSYCHOL. 203 (2010).
 84. B. Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers’ Automatic and Controlled Race-Based Responses to Criminal Suspects*, 28 BASIC & APPLIED SOC. PSYCHOL. 193, 196 (2006).
 85. See Linda R. Tropp & Thomas F. Pettigrew, *Differential Relationships Between Intergroup Contact and Affective and Cognitive Dimensions of Prejudice*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1145 (2005).
 86. See Deborah J. Terry & Michael A. Hogg, *Group Norms and the Attitude-Behavior Relationship: A Role for Group Identification*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 776 (1996).

such as supervisors perform that norm.⁸⁷ Conversely, individuals operating within an organizational culture that does not value egalitarianism will tend to become less tolerant.⁸⁸ Consequently, adopting office norms that demonstrate a commitment to equality will likely increase behavior in keeping with that norm. In sum, being deliberate about instilling a culture that strives for the provision of equitable public defense will not only better serve indigent clients but will also create an environment conducive to reducing the effects of IBs.

B. Objective Triage Standards

Offices should develop triage standards because the wholly discretionary decisionmaking that currently exists does nothing to curb IBs. While we do not advance specific standards in this short Essay, we suggest some criteria offices should utilize when developing them.

First, offices should not rank cases based upon the perceived possibility of factual innocence, as some have suggested.⁸⁹ Given the limited time defenders have to prioritize cases, innocence determinations can only be speculative hunches based upon inadequate information. Implicit biases thrive under these circumstances.

Second, triage standards ought to be based upon criteria that are objectively measurable, i.e., criteria that are not subject to interpretation. An example is to prioritize cases based upon custody status, with in-custody clients being given priority. Another is to prioritize cases randomly, or to reserve a subset (e.g., twenty-five percent) to be prioritized at random. Alternatively, defenders could prioritize cases based upon the speedy trial date. What these suggestions have in common is that they do not rely upon attorneys' subjective or idiosyncratic judgments. While imperfect, these proposals exemplify the types of objective

87. See, e.g., Elizabeth Levy Paluck & Hana Shepherd, *The Saliency of Social Referents: A Field Experiment on Collective Norms and Harassment Behavior in a School Social Network*, 103 J. PERSONALITY & SOC. PSYCHOL. 899 (2012) (demonstrating the importance of collective norms to changing behavior); see also Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 123 (2004) (discussing the motivation to conform to group norms); Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 J. PERSONALITY & SOC. PSYCHOL. 645, 649-51 (2001) (finding that peers can influence racial attitudes and that participants' implicit beliefs about African Americans became less stereotypic if they discovered that their peer group was more egalitarian than themselves)

88. Fiske, *supra* note 87, at 123.

89. See, e.g., Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004); John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1276-78 (1994).

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

criteria offices can utilize to focus attorney decision-making away from client stereotypes.

Although objective standards are important, attorneys cannot avoid subjective decisionmaking altogether. For instance, even if offices decided that attorneys should focus their energies on cases where clients are in custody, or on cases with clients facing the stiffest potential punishment, attorneys would still have to make subjective judgments about how to prioritize cases within a given category. Unfortunately, IBs may affect these judgments. Thus, while triage standards are important, they are not the panacea for IBs. Rather, offices should also employ the additional strategies mentioned in this Part to reduce IBs' effects.

C. Accountability

Offices should also institute accountability mechanisms. Creating checklists that attorneys can use when evaluating their cases is one such mechanism.⁹⁰ Checklists can help reduce biased judgments because having predetermined criteria to guide decisionmaking can hinder people's unintentional tendency to change the criteria upon which their decisions are based in order to fit their preferred course of action.⁹¹

Additionally, offices should collect data about attorneys' decisions. This data will not only inform attorneys and offices about trends, but will also give offices the ability to monitor their attorneys' judgments. This data should include information about guilty pleas, sentencing outcomes, time spent on cases, and the number of meetings with clients broken down by race and initial charges. Once this data is collected, we recommend that PD offices use a simple accountability rule: defenders must be able to explain any racial disparities in how they allocated their resources. This rule can reduce IB because people exercise more care when they know their decisions are monitored and will have to be explained,⁹² and because thinking more carefully and deliberately helps to debias.⁹³

90. Hal R. Arkes & Victoria A. Shaffer, *Should We Use Decision Aids or Gut Feelings?*, in *HEURISTICS AND THE LAW* 411, 411-13 (Gerd Gigerenzer & Christoph Engel eds., 2004).

91. Carol Isaac, Barbara Lee & Molly Carnes, *Interventions that Affect Gender Bias in Hiring: A Systematic Review*, 84 *ACAD. MED.* 1440, 1444 (2009); Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit To Justify Discrimination*, 16 *PSYCHOL. SCI.* 474 (2005).

92. See, e.g., Fiske, *supra* note 87, at 123 (discussing the motivations that reduce implicit bias); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125

D. Awareness

Reducing IBs is more likely when individuals are aware of the potential for biased decisionmaking and are aware of the possibility of safeguarding against the influence of implicit bias.⁹⁴ Accordingly, we recommend that attorneys be taught about implicit biases and their probable effects on behaviors and judgments. This type of education is already occurring with judges, so it should be fairly simple to implement this suggestion.⁹⁵

Additionally, offices should consider requiring or encouraging defenders to take the Implicit Association Test (IAT), the most widely used mechanism for revealing the existence of implicit bias.⁹⁶ A recent study suggests that receiving feedback about IAT results can debias.⁹⁷ Because the sole purpose of any such requirement would be to inform defenders of their own probable biases, they must not be required to disclose the results. This suggestion will be easy to implement because the IAT is available online and provides immediate feedback. If individuals are made aware of the fact that IBs may affect their behaviors and judgments in ways they would not consciously endorse, they likely will be motivated to exercise more care in their decisionmaking and to engage in efforts to reduce the potential for bias.

E. Intentional Goals

Defender offices can also utilize a variety of techniques that, in research contexts, have allowed people to reduce the effects of IB on their behaviors and

PSYCHOL. BULL. 255, 267–70 (1999) (discussing how accountability can reduce cognitive biases).

93. Devine, *supra* note 41, at 15–16; Fiske, *supra* note 87, at 123–24.

94. Nilanjana Dasgupta & Jane G. Stout, *Contemporary Discrimination in the Lab and Field: Benefits and Obstacles of Full-Cycle Social Psychology*, 68 J. SOC. ISSUES 399, 407 (2012); Jack Glaser & Eric D. Knowles, *Implicit Motivation To Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 171 (2008).

95. Kang et al., *supra* note 11, at 1175.

96. For descriptions of how the Implicit Association Test works, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952–67 (2006).

97. Gaëlle C. Pierre, *Confronting Implicit Bias Through Awareness: The Role of IAT Performance Feedback* 43–44 (2010) (unpublished Ph.D. dissertation, New York University), <http://search.proquest.com/docview/305217552?accountid=8285>.

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

judgments. These include repeated practice denouncing stereotypes,⁹⁸ affirming counterstereotypes,⁹⁹ and using mental imagery.¹⁰⁰ Even thinking about ourselves as being less objective than we imagine ourselves to be can reduce the effects of IBs.¹⁰¹

One successful technique involves people developing intentional and specific plans for what they will think or do in situations likely to activate IBs. These are “consciously formed *if-then* plans that indicate the specific cognitive or behavioral response that is to be made at a specific time and place.”¹⁰² The “if *x*, then *y*” formulation is critical because simpler goals such as “I will not use stereotypes in my judgments” are generally ineffective.¹⁰³

In a recent study demonstrating the efficacy of this technique, researchers had subjects watch a video that contained photographs of either black men or white men posed in front of different backgrounds and holding either guns or crime-irrelevant objects such as cell phones.¹⁰⁴ Participants were asked to determine as quickly as possible whether or not the men were armed by pressing buttons labeled “shoot” or “don’t shoot.” Similar “shooter-bias” studies typically demonstrate that subjects mistakenly shoot unarmed blacks more often than unarmed whites because of IB. They also shoot armed targets more quickly when they are black as opposed to white.¹⁰⁵ In this particular study, however, researchers found that when subjects formed a specific,

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98. Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCHOL. 871 (2000). The effect only lasted for twenty-four hours.
99. Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity and Cognitive Control*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 267, 279 (Todd D. Nelson ed. 2009).
100. Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001).
101. Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*”: *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210-11 (2007).
102. Saaid A. Mendoza, Peter M. Gollwitzer & David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 513 (2010).
103. *See id.*
104. *Id.* at 515.
105. *See, e.g.,* Joshua Correll et al., *The Influence of Stereotypes on Decisions To Shoot*, 37 EUR. J. SOC. PSYCHOL. 1102 (2007).

goal-directed plan to ignore race before beginning the task, they were able to reduce shooter bias.¹⁰⁶

Of course, in PD offices, it may not be advisable to tell attorneys to ignore the client's race, especially because in criminal justice contexts, IBs are less likely to be expressed when race is made explicit.¹⁰⁷ Fortunately, research demonstrates that these "if-then" plans are effective even when social categories are salient. For instance, in a recent study published in 2012, researchers found that when subjects formed a specific plan to associate Muslims with peace as opposed to terrorism, they showed reduced IB.¹⁰⁸ These researchers also found that "if-then" goal-directed thinking can reduce IBs in real-world decisionmakers, and that this reduction can be sustained over time.¹⁰⁹

These studies suggest an intriguing strategy for reducing IBs' effects on defender decisionmaking. For instance, when reviewing the discovery in a new case, attorneys could form a specific plan to focus on the weaknesses of the state's case or to think of the client as innocent. In other words, defenders might be asked to form the following specific intention: "If my client is black, then I will think 'innocent' when reviewing the discovery." While it may be difficult to believe that such a simple intervention would reduce the effects of implicit bias, its simplicity is similar to the specific intention that reduced the effects of shooter bias.¹¹⁰ The utility of this strategy has not been tested in the public defense context, but, in light of its success across numerous studies in other contexts, there is reason for optimism.

106. Mendoza, Gollwitzer & Amodio, *supra* note 102, at 516.

107. See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001).

108. Thomas L. Webb, Paschal Sheeran & John Pepper, *Gaining Control over Responses to Implicit Attitude Tests: Implementation Intentions Engender Fast Responses on Attitude-Incongruent Trials*, 51 BRIT. J. SOC. PSYCHOL. 13, 22-24 (2012).

109. *Id.*

110. See Mendoza, Gollwitzer & Amodio, *supra* note 102, at 515. The researchers provided subjects with an instruction that read, "You should be careful not to let other features of the targets affect the way you respond. In order to help you achieve this, research has shown it to be helpful for you to adopt the following strategy: *If I see a person, then I will ignore his race!*" *Id.* Subjects who formed this specific intention made fewer errors than subjects in the control group who were not given the additional instruction.

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

CONCLUSION

Despite the fact that many public defenders are committed to zealous and effective advocacy, there is abundant reason for concern that implicit racial biases may affect their decisions. By highlighting the effects of implicit bias, we do not suggest that other structural inequities in the provision of indigent defense are unimportant. Rather, we seek to supplement existing critiques with our observations. Furthermore, some PDs might believe that their experiences making difficult resource allocation decisions immunize their intuitive, gut-driven triage judgments from the effects of IBs. However, IBs are likely to have their most damaging effects precisely when individuals fail to question their gut instincts. Moreover, without data collection, it is simply impossible to know whether similarly situated clients are being treated alike.

As public defenders seek to provide the best legal representation possible for indigent clients in order to fulfill *Gideon's* promise, it is crucial not only that they remain open to the possibility that they are being influenced by IBs, but also that they be given the full array of tools necessary to protect the values of equality and fairness on which the legitimacy of our criminal justice system rests. Thus, we hope that public defenders will engage in data collection and create partnerships with social psychologists to determine when IBs are likely to influence defenders' judgments and to develop specific defender-oriented approaches for reducing IBs' effects.¹¹¹ Indigent clients deserve no less.

m. Dasgupta & Stout, *supra* note 94 (suggesting the importance of field research to help translate lab findings into real-world contexts).

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Systemic Triage: Implicit Racial Bias in the Criminal Courtroom

*Crook County: Racism and Injustice in
America's Largest Criminal Court*

BY NICOLE VAN CLEVE

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BOOK REVIEW CONTENTS

INTRODUCTION	864
I. RACISM IN PRACTICE	867
A. Policing Racial Boundaries	868
B. Culture and the Race-Blind Code	869
C. Limitations	873
II. SYSTEMIC TRIAGE AND ITS RACIALIZED CONSEQUENCES	875
A. Implicit Racial Bias	875
B. Systemic Triage	877
C. Implicit Bias Under Conditions of Systemic Triage	881
III. RECOMMENDED REMEDIES	885
A. Problems with Court Watching	886
B. Individual, Institutional, and Systemic Solutions	887
CONCLUSION	892

INTRODUCTION

The criminal justice system is broken. Its policies and policing practices flood courtrooms in urban environments with too many cases to handle given available resources. Many are cases involving indigent individuals of color accused of nonviolent offenses. Scholars like Sasha Natapoff, Jenny Roberts, and Issa Kohler-Hausmann are bringing much needed attention to this serious issue, focusing primarily on misdemeanor adjudications.¹

In a groundbreaking new book, *Crook County: Racism and Injustice in America's Largest Criminal Court*, Professor Nicole Gonzalez Van Cleve² adds an important, novel dimension to this problem. She exposes the deeply flawed operation of the criminal justice system by focusing on how felonies are processed in Cook County, Illinois. Her disturbing ethnography of the Cook County-Chicago criminal courts, the largest unified criminal court system in the United States,³ is based upon 104 in-depth interviews with judges, prosecutors, public defenders, and private attorneys; her own experiences clerking for both the Cook County District Attorney's Office and the Cook County Public Defender's Office; and one thousand hours of felony courtroom observations conducted by 130 court watchers.⁴ This mix of perspectives, all of which focus on the court professionals "whose actions define the experience and appearance of justice,"⁵ provides a chilling account of how racialized justice is practiced in the Cook County criminal justice system, despite the existence of due process protections and a court record. By "turn[ing] the lens on those in power as they do the marginalizing,"⁶ Van Cleve reveals how judges, defense lawyers, and prosecutors transform race-neutral due process protections into the tools of racial punishment.

1. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 639-53 (2014); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

2. Nicole Gonzalez Van Cleve is an Assistant Professor at Temple University in the Department of Criminal Justice with courtesy appointments in the Department of Sociology and the Beasley School of Law. She is a recipient of the 2014-2015 Ford Foundation Fellowship Post-doctoral Award and was a Visiting Scholar at the American Bar Foundation.

3. NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* xii (2016).

4. *Id.* at xiii, 6-7, 9-10, 54.

5. *Id.* at xiii.

6. *Id.*

An important theme of Van Cleve's book is that the racism practiced in the Cook County courts is not "more enigmatic than the overt racism of the past."⁷ Rather, it is equally "pervasive, direct, and violent."⁸ To substantiate this point, she exposes deeply problematic and explicitly racist practices that courtroom actors engage in, despite holding seemingly contradictory perspectives. This is one of the more compelling aspects of her book, since it is unusual to encounter such blatant racism on display in this ostensibly colorblind and post-racial era. She explains how these actors "claim their behavior as 'colorblind' through coded language, mimic fairness through due process procedures, and rationalize abuse based on morality—all while achieving the experience of segregation and de facto racism."⁹

In this Review, I complicate the theory of racism underlying Van Cleve's ethnography. Although she never states this explicitly, her theory rests on the assumption that racial bias is visible and conscious, even if expressed in ways that mask its presence. This is demonstrated not only by the examples she uses, but also by the book's conclusion, which encourages readers to go to court to observe the racist practices she describes and thus shame courtroom actors into changing them.

However, I argue that the problem of racial bias is not so limited. Rather, research from the past several decades reveals that implicit racial biases can influence the behaviors and judgments of even the most consciously egalitarian individuals in ways of which they are unaware and thus unable to control. Additionally, the effects of implicit biases may not be open and obvious. Importantly, then, the absence of discernible racism does not signal the absence of racial bias. Furthermore, since it is not possible to detect the influence of implicit biases on decision making simply through observations and interviews, it is difficult to ferret out and even more difficult to address. Yet, the absence of overtly racist practices does not make the problem of racial bias any less concerning.

Despite the fact that implicit biases operate in the shadows, I argue that there is strong reason to suspect that they will influence the judgments of courtroom actors in Cook County, even after blatantly racist practices disappear. This is because criminal courthouses in jurisdictions across the country, including those in Cook County, are bearing the brunt of "tough on crime" policies and policing practices that disproportionately target enforcement of non-violent and quality of life offenses in indigent, urban, and minority communi-

7. *Id.* at 11.

8. *Id.* at 9.

9. *Id.* at 186.

ties. These policies and practices burden the system with more cases than it has the capacity to handle, resulting in what I refer to as systemic triage.

Triage denotes the process of determining how to allocate scarce resources. In the criminal justice context, scholars typically use the term triage to describe how public defenders attempt to distribute zealous advocacy amongst their clients because crushing caseloads limit their ability to zealously represent them all.¹⁰ In this Review, I build upon my prior work examining public defender triage¹¹ and use the phrase *systemic* triage to highlight that *all* criminal justice system players are impacted by such expansive criminal justice policies and policing practices—not only public defenders, but also the entire cadre of courtroom players, including prosecutors and judges.

I argue that under conditions of systemic triage, implicit racial biases are likely to thrive. First, these criminal justice policies and policing practices will strengthen the already ubiquitous association between subordinated groups and crime by filling courtrooms with overwhelming numbers of people of color. Second, implicit biases flourish in situations where individuals make decisions quickly and on the basis of limited information, exactly the circumstances that exist under systemic triage. In sum, the problem of racial bias will likely persist under conditions of systemic triage, even when it is not accompanied by patently racist behaviors. This problem is even more pernicious because its subtle nature makes it more challenging to expose and correct.

This Review proceeds in three parts. Part I summarizes and analyzes Van Cleve's ethnographic evidence and conclusions. Importantly, because her account is primarily qualitative, I cannot quantify the frequency with which the problematic practices she identifies occur nor determine how representative her examples are. Part II argues that racism in the criminal justice system is more problematic and pernicious than even Van Cleve's account suggests. Relying on social science evidence demonstrating the existence of implicit racial biases, I argue that these biases can influence the discretionary decisions, perceptions,

10. Other discussions of triage in the criminal justice system tend to focus on public defender triage. See, e.g., Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004) (arguing that trial judges face the task of rationing public defense services); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 475 (2007) (describing “the rise in total number of cases requiring appointment of counsel and the inadequacy of indigent defense budgets” (footnote omitted)); John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1225 (1994) (“[T]his Article suggests the [public] defender’s work is better described by the medical/disaster theory of allocation in chaos—triage.”); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013) (arguing that public defender triage presents a way for implicit racial bias to affect legal outcomes).

11. Richardson & Goff, *supra* note 10.

and practices of even the most well-meaning individuals in ways that are not readily observable. We should be especially concerned about implicit bias in courtrooms experiencing systemic triage. Finally, Part III offers some solutions to reduce the racialized effects of systemic triage.

I. RACISM IN PRACTICE

Van Cleve's haunting ethnography argues that the existence of "myriad due process protections, legal safeguards, and a courtroom record supposedly holding judges and lawyers accountable"¹² does little to prevent racism from manifesting in the criminal courtrooms of Cook County. Rather, her work reveals how these courts are "transformed from central sites of due process into central sites of racialized punishment."¹³ This punishment takes multiple forms, including treating people of color as criminals even when they are members of the public appearing in court as jurors, witnesses, or researchers;¹⁴ ridiculing defendants with stereotypically black-sounding names;¹⁵ mocking the speech patterns of black defendants by employing a bastardized version of Ebonics;¹⁶ using lynching language during plea negotiations;¹⁷ and subjecting people of color to degrading and humiliating treatment.¹⁸ Van Cleve argues that courtroom actors also routinely punish defendants of color for attempting to exercise their due process rights.

Evidence from her ethnography reveals that judges, prosecutors, defense lawyers, and sheriff's deputies engaged in these racialized practices. Even more disturbingly, bad racial actors were not the only ones to treat people of color more harshly.¹⁹ Van Cleve's ethnography would be slightly less chilling if this were the case because then one could take some comfort knowing that the problems would disappear once all the bad apples were removed from the system. However, Van Cleve's observations foreclose this simplistic account. Rather, she includes examples of even well-meaning judges, prosecutors, and defense lawyers participating in and sustaining this system of racial punishment.

12. VAN CLEVE, *supra* note 3, at xi.

13. *Id.* at 11.

14. *See generally id.* ch. 1 (describing the various forms of racialized punishment in Cook County).

15. *Id.* at 60-61.

16. *Id.* at 43.

17. *Id.* at 108.

18. *See, e.g., id.* at 59-65.

19. *Id.* at 6.

The obvious question is how can actors who “subscribe to the principles of due process, . . . learn ethical standards in law school[,] . . . speak in sympathetic ways about justice, fairness, colorblindness, and even identify bias in the system,” engage in and rationalize their racialized practices?²⁰ As I discuss in Section I.A, Van Cleve argues that racism in the courts is accomplished through a process of acculturation that begins at the courthouse doors with sheriff’s deputies enforcing racial boundaries. In Section I.B, I present Van Cleve’s assessment of how this racialized culture is maintained through the aggressive policing and harsh treatment of anyone, including courtroom actors, who fails to observe its practices.²¹ I also describe Van Cleve’s explanation for how judges, prosecutors, and defense attorneys rationalize their racist behaviors by divorcing their perspectives from their practices or “duties” within the system. It is in this way, she argues, that they deflect blame, assuage their guilt, and abdicate responsibility for their role in maintaining the system of racialized punishment. Finally, Section I.C explores some limitations of her powerful and disturbing account.

A. Policing Racial Boundaries

Van Cleve suggests that the “double system of justice”²² that exists in Cook County begins as defendants, family members, jurors, and witnesses arrive at the courthouse during the morning “rush hour.” She argues that armed sheriff’s deputies, who are the first institutional players the public encounters, begin the process of teaching people of color that they are second-class citizens within this space.²³ To support this point, she shares accounts of court watchers who observed deputies single out people of color for racial mockery and disrespect, making white court watchers acutely aware of their white privilege.²⁴ She explains that some white court watchers, no matter how they were dressed, reported being asked why they were there and whether they were lawyers or students, while some black court watchers “were mistaken for defendants and treated like criminals.”²⁵

She also provides anecdotes of sheriff’s deputies continuing to police racial boundaries in the courtrooms by subjecting people of color to hostile and dis-

20. *Id.* at 133.

21. *Id.*

22. *Id.* at 16.

23. *Id.* at 22-28.

24. *Id.* at 25-26.

25. *Id.* at 25, 41-42.

respectful treatment for actions as simple—and reasonable—as daring to ask questions. When Van Cleve was a clerk in the prosecutor’s office, she observed an incident that occurred when an elderly black woman attempted to ascertain where her son’s case would be heard. The deputy “tore the woman up with insults” and finally stated to a prosecutor walking into the courtroom, “Tell her: ‘Your son is executed.’”²⁶ In contrast, Van Cleve also observed the different treatment of an older, gray-haired white woman—wearing a diamond wedding ring and sporting “perfectly coiffed” hair and “manicured and pristine” nails—who crossed the barrier separating the gallery from the courtroom to talk to the court clerk. This woman “was able to finish her question, was answered respectfully, and then the sheriff kindly told her to sit down—acting more like an usher than the abuser who had been barking at the public all afternoon.”²⁷ These are just a few of the disturbing examples of sheriff’s deputies demeaning people of color while treating the few privileged whites who appeared in the courthouse differently.

Van Cleve’s book does not share a single story in which courtroom actors chastised deputies for the hostility and aggressiveness they heaped on people of color. Instead, she argues that courtroom actors were socialized within the courthouse culture to avoid commenting on racial abuse and racial divides.²⁸ This is discussed next.

B. Culture and the Race-Blind Code

Sheriff’s deputies were not the only courtroom actors to engage in racist behaviors. Van Cleve shares anecdotes of judges, prosecutors, and defense lawyers helping to create and sustain a system of racial punishment. Based on her ethnographic evidence, she explains that courtroom professionals learn to code race out of the picture by conflating criminality, morality, and race. This is done primarily by labeling certain defendants as “mopes,” a construct that implies immorality.²⁹ The term is used by courtroom actors to refer to “someone who is uneducated, incompetent, degenerate, and lazy.”³⁰ According to her, mope is a synonym for “nigger.”³¹

26. *Id.* at 35-36.

27. *Id.* at 66.

28. *Id.* at 32-35.

29. *Id.* at 57-61.

30. *Id.* at 61.

31. *Id.*

Defendants who were labeled mopes were typically charged with nonviolent offenses, such as possession of drugs and shoplifting, that “imply social dysfunction rather than criminal risk.”³² Because these defendants were overwhelmingly black and brown, “the moral rubric applied to defendants by courtroom professionals” was racially inscribed.³³ As such, the “‘immorality’ of defendants . . . is both a criminal distinction and a racial one”³⁴ Van Cleve argues that by using this colorblind logic, courtroom professionals convinced themselves that the “disdain” they showed to people of color was “not based upon the color of their skin but upon the moral violations they embody.”³⁵ She concludes that this “race-blind” code “allow[ed] racism to exist in the courthouse space without professionals being ‘racists.’”³⁶

Defendants labeled as mopes received “due process for the undeserving.”³⁷ This entailed “(1) the streamlining of scripted due process requirements, (2) the curtailing of due process through informal sanctions that are often not part of the court record, and (3) the absolute exclusion of mopes from participation in the legal process—even in cursory ways mandated by law.”³⁸ Van Cleve shares stories of courtroom actors punishing those labeled as mopes for attempting to exercise their due process rights. In one disturbing example, Van Cleve overheard a sheriff’s deputy bragging to prosecutors about wrapping an electrical cord around a defendant’s seat, plugging it into the wall to feign an electric chair, and saying, “OK, you’re all plugged in and ready to go.”³⁹ This was done simply because the defendant had asked for a jury trial.⁴⁰ Prosecutors “laughed, and never questioned the legal ethics of such a practical joke.”⁴¹ White defendants, she argues, were generally not subjected to the same treatment,⁴² unless they “perform[ed] underclass whiteness” through their speech patterns or demeanor.⁴³

32. *Id.* at 115.

33. *Id.* at 58.

34. *Id.* at 53.

35. *Id.* at 60.

36. *Id.* at 68-69.

37. *Id.* at 73.

38. *Id.*

39. *Id.* at 63.

40. *Id.*

41. *Id.*

42. *Id.* at 65-69.

43. *Id.* at 68.

One of the most important aspects of Van Cleve's ethnography is her explanation for how racism becomes entrenched in institutional culture such that it persists regardless of "the racial identity and political leaning of any one person at the helm."⁴⁴ For instance, some prosecutors expressed serious misgivings about the way the system treated criminal defendants, and some of them also viewed drug laws as draconian.⁴⁵ Ironically, one prosecutor even critiqued the "factory mill" practices of the system, which was only concerned with disposing of cases as quickly as possible.⁴⁶ Yet, based on their statements during interviews, Van Cleve concludes that prosecutors learned to rationalize their racialized behaviors by separating their perspectives from their practices.⁴⁷ They viewed their practice of law as a "duty" that did not necessarily reflect their actual beliefs.⁴⁸ Additionally, she found that prosecutors justified the curtailment of due process rights by convincing themselves that spending time on cases involving mopes "literally obstructs 'real justice'"⁴⁹ by taking resources away from the important cases involving serious crimes with actual victims.⁵⁰ Their incentive was to resolve their cases as quickly as possible because due process for mopes, in the words of one prosecutor, was "a waste."⁵¹

Similarly, defense lawyers were sympathetic to "the plight of defendants," "provide[d] critiques about substantive justice and the abuse of defendants by prosecutors and judges,"⁵² and commented on the "obvious racial disparities and divisions in the ways prosecutors and judges treated their indigent clients."⁵³ Yet, they too engaged in racialized practices. This occurred because defense lawyers learned that "[t]here were dire consequences for fighting too hard, pursuing 'too many' motions and trials, or pushing due process necessities beyond the absolute minimum."⁵⁴ Defense attorneys who engaged in vigorous and zealous advocacy often "were labeled 'clueless,' 'difficult,' 'incompe-

44. *Id.* at 133.

45. *Id.* at 13-16, 138.

46. *Id.* at 138.

47. *Id.* at 133.

48. *Id.* at 135, 137.

49. *Id.* at 73.

50. *Id.* at 71-73.

51. *Id.* at 73.

52. *Id.* at 180.

53. *Id.* at 97. Private attorney responses were more mixed, with about half expressing that bias existed and the other half expressing that it did not. *Id.* at 97-98.

54. *Id.* at 83.

tent,' or worse: 'mopes,'"⁵⁵ and were humiliated and punished in ways that were not reflected in the court record.⁵⁶ For example, one attorney was locked up with her client.⁵⁷ Additionally, the clients of defense attorneys who engaged in zealous advocacy were sometimes punished with harsher treatment.⁵⁸

As a result of this socialization, one defense lawyer explained that he had to carefully weigh how much capital he expended on a client because capital was "finite and scarce."⁵⁹ He had to "determine whether a defendant [wa]s worth the fight"⁶⁰ by separating those who were "native" to the system from the "tiny subset of outliers" who deserved zealous advocacy.⁶¹ He deflected personal responsibility for the problematic choices he made, saying that "these are the sorts of decisions you find yourself having to make as a practical matter because that's the system that exists and [it's] bigger than you."⁶²

In sum, Van Cleve's book explains how criminal justice system professionals dispense, legitimize, and defend racialized justice. She argues, "Colorblind racism is more than just a 'doing' of rhetoric; it is a type of complicated habitus that informs institutional practices and cultural memberships, and even aids in the organizational efficiency of the criminal courts [This is] how professionals . . . 'do racism' while 'doing justice.'"⁶³ Her own efforts to fit into the system and maintain her privileged access within it powerfully underscores the importance of entrenched institutional culture to sustaining racial disadvantage.⁶⁴ She describes her time embedded in the Cook County criminal justice system as "an indoctrination: the prosecutors, judges, and defense attorneys took me under their wings. It was through this process that I learned the rules of the racialized court system—rules that included both how to process cases efficiently and the proper moral and professional justifications for such practices."⁶⁵

55. *Id.*

56. *Id.* at 83, 103.

57. *Id.* at 85.

58. *Id.* at 84.

59. *Id.* at 159.

60. *Id.* at 160.

61. *Id.* at 160-61.

62. *Id.* at 161.

63. *Id.* at 53.

64. See, e.g., *id.* at 8, 9, 61.

65. *Id.* at 8.

C. Limitations

Van Cleve's account of how racism is practiced in the era of colorblindness is important and compelling. However, it is limited by a number of features typical of ethnographies. First, her observations are not necessarily generalizable to jurisdictions beyond Cook County.⁶⁶ Second, the absence of quantitative evidence makes it difficult to determine how frequent, representative, and pervasive the overtly racialized practices she exposes are.⁶⁷ Including some explanation of how she coded her data and how she determined which stories to include and exclude, as well as sharing the complexity of her evidence by discussing cases that did not fit neatly into her theory, could have helped address some of these problems and allowed readers to more readily evaluate her claims.

However, despite these limitations, there are reasons to believe that her qualitative accounts are representative of the culture of the Cook County criminal courts. Her ethnographic evidence is the result of nine months of observations collected over the course of seven years (1997-2004);⁶⁸ interviews she conducted during the same period; 104 interviews conducted by others in 2006;⁶⁹ and data collected by 130 court watchers from 2008-09.⁷⁰ Thus, her data "incorporate[] multiple vantage points on the same site"⁷¹ and span over twelve years. Furthermore, the observations remain consistent over this period of time. All of this provides support for the pervasiveness of the practices she recounts and lends some external reliability to her findings.⁷² Additionally, the

66. John D. Brewer, *The Ethnographic Critique of Ethnography: Sectarianism in the FUC*, 28 SOC. 231, 233 (1994) ("Ethnography falls short because findings cannot be generalised; and when ethnographers make claims about empirical generalisation they often fail to establish that the setting is typical of the larger population to which the data are thought to be relevant.").

67. In one instance, she does provide some quantitative data to support her powerful qualitative account. For instance, when discussing whether defense lawyers believed that defendants were treated fairly regardless of race or class, she included two tables providing the percentage of attorneys who answered the question in the affirmative, in the negative, or failed to answer the question at all. VAN CLEVE, *supra* note 3, at 97. However, no similar empirical evidence was provided for any of her other claims.

68. *Id.*

69. *Id.* at 197.

70. *Id.* She explains that she used this multifaceted approach because in an era where people avoid expressing negative racial attitudes, it is difficult to measure the influence of race using a single method. *Id.* at 195-96.

71. *Id.* at 196.

72. See Margaret D. LeCompte & Judith Preissle Goetz, *Problems of Reliability and Validity in Ethnographic Research*, 52 REV. EDUC. RES. 31, 32 (1982) ("External reliability addresses the

lack of quantitative evidence is not a reason to dismiss her compelling conclusions. As one of the great ethnographers, Howard Becker, once observed in a classic article, qualitative methods “do not lend themselves to . . . ready summary”⁷³ and “frequently consist of many different kinds of observations which cannot be simply categorized and counted without losing some of their value as evidence.”⁷⁴

Overall, the importance of Van Cleve’s ethnography is its exposure of how some courtroom professionals in Cook County practice and rationalize racism in the era of colorblindness. She explains how racism thrives despite constitutional safeguards and courtroom actors who are well versed in ethics and who often hold perspectives that are consistent with notions of fairness, equality, and justice.⁷⁵ Van Cleve’s account of racism in the Cook County criminal courts is concerning and important to expose even if it is difficult to determine how pervasive these overtly racialized practices are.

In Part II, my goal is to supplement Van Cleve’s account of how racial bias operates. Van Cleve concludes that the practice of racism in Cook County is virtually indistinguishable from the racist practices of the Jim Crow era.⁷⁶ In support of this theory, she only shares examples of courtroom actors engaging in overtly problematic racialized practices in cases involving individuals labeled as mopes.⁷⁷ By restricting her examples, her account leaves the impression that the problem of racism in Cook County is limited to that which is overt, explicit, and conscious. However, in Part II, I argue that racism in the criminal justice system is even more problematic. Relying on social science evidence demonstrating the existence of implicit racial biases, I contend that explicitly racist practices are not the only form of racism about which we should be concerned.

issue of whether independent researchers would discover the same phenomena or generate the same constructs in the same or similar settings.”).

73. Howard S. Becker, *Problems of Inference and Proof in Participant Observation*, 23 AM. SOC. REV. 652, 659-60 (1958).

74. *Id.*; see also ERVING GOFFMAN, *ASYLUMS* 7-9 (1968) (explaining that the author did not gather statistical evidence because a good way to learn about any social world is to obtain ethnographic detail instead).

75. See VAN CLEVE, *supra* note 3, at 11-13.

76. See *id.* at 186.

77. The only instance she offers of normative professionalism involved a defense lawyer who was not part of any particular courtroom workgroup. According to Van Cleve, this lawyer’s outsider status protected her from the culture of the Cook County courts. *Id.* at 77-78. Van Cleve does not explain why she provides no accounts of courtroom actors engaging in positive interactions with those labeled mopes. The reader is thus left wondering whether these examples existed but she chose not to include them, or whether she and others simply did not observe professional conduct in cases involving mopes.

Rather, implicit racial bias can also influence the discretionary decisions, perceptions, and practices of even the most well-meaning individuals in ways that are not readily observable. Thus, my theory of racism is broader than one that focuses solely on the overt racism Van Cleve exposes. While her account of explicitly racist conduct is deeply troubling, I argue that the problem of implicit racism is even more pernicious.

II. SYSTEMIC TRIAGE AND ITS RACIALIZED CONSEQUENCES

Judges, prosecutors, and defense lawyers in many criminal courtrooms across the country are laboring under the weight of far too many cases to give each one individualized treatment. This has systemic consequences as these professionals struggle to quickly sort defendants into those who are deserving of time and attention and those who are not, a process I describe as systemic triage. As I will explain, racialized justice is a foreseeable consequence of systemic triage because of the influence of implicit, i.e. unconscious, racial biases on behaviors, perceptions, and judgments. Section II.A summarizes the well-established social science research on implicit racial biases. Section II.B sets forth my theory of systemic triage. Finally, Section II.C argues that under conditions of systemic triage, even well-meaning, consciously egalitarian actors will likely engage in practices that sustain significant and problematic racial disparities.

A. *Implicit Racial Bias*

Research demonstrates that many of our decisions result from mental processes that occur without our conscious awareness, intent, and control.⁷⁸ These processes help us to cope with all the information that confronts us by making quick, automatic, and unconscious associations in response to a stimulus.⁷⁹ For instance, we might automatically and unconsciously associate “nurse” with

78. See John A. Bargh, *The Four Horsemen of Automaticity: Awareness, Intention, Efficiency, and Control in Social Cognition*, in 1 HANDBOOK OF SOCIAL COGNITION 1 (Robert S. Wyer, Jr. & Thomas K. Srull eds., Psychology Press 2014) (1994).

79. *Id.* at 31 (stating that automatic processes “enable[] a reduction of the massive amount of stimulation and information bombarding one at any given moment into a more manageable subset of important objects, events, and appraisals”); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 485 (2004) (“[T]he view of stereotypes as largely unconscious is consistent with social cognition research on the cognitive heuristics or shortcuts that perceivers must employ to manage the vast amount of social information with which they must deal.” (citation omitted)).

“compassion” and “hospital.” These unconscious associations can influence our perceptions, judgments, and behaviors without our conscious intent.

Implicit racial biases refer to the unconscious stereotypes and attitudes that we associate with racial groups.⁸⁰ These biases are pervasive and can influence real world behaviors. For instance, a meta-analysis of 122 implicit bias studies found evidence that implicit racial biases predict racial disparities in employment and healthcare.⁸¹

There is copious evidence that individuals of all races have implicit racial biases linking blacks with criminality⁸² and whites with innocence. In a recent article, Professors Robert Smith, Justin Levinson, and Zoë Robinson coined the phrase “implicit white favoritism” to distinguish it from unconsciously negative racial attitudes and beliefs toward people of color.⁸³ They define implicit white favoritism as “the automatic association of positive stereotypes and attitudes with members of a favored group, leading to preferential treatment for persons of that group.”⁸⁴ Their analysis of existing studies reveals that white men are unconsciously “*disassociated* with violence” and associated with positive, law-abiding behavior.⁸⁵ Implicit racial biases are activated by cues present in the environment such as skin color.⁸⁶ Once activated, they can influence the

80. The scholarship on implicit racial bias is vast. For a summary of the literature on implicit racial bias, particularly as it relates to the criminal justice system, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); and L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

81. Anthony G. Greenwald et al., *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 558 (2015).

82. See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (“The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.” (citations omitted)); Graham & Lowery, *supra* note 79, at 485 (describing the “pernicious belief” that African American youth are “violent, aggressive, dangerous, and possess adult-like criminal intent”); Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008) (“There is overwhelming evidence that young Black men are stereotyped as violent, criminal, and dangerous.”).

83. See Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 873 (2015).

84. *Id.* at 874-75 (footnote omitted).

85. *Id.* at 898 (emphasis added).

86. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 241-42 (1996). Bargh writes, “To the extent that an individual repeatedly has the same reaction to a social stimulus event, the representation of that response should come eventually to be activated automatically on the mere occurrence of that event.” *Id.* at 231.

behaviors and judgments of even the most egalitarian individuals in ways that sustain problematic and unwarranted racial disparities.⁸⁷

The influence of implicit biases on behaviors and judgments is not inevitable, however. Rather, certain environments are more conducive to their operation than others. Implicit biases flourish in situations where information and time are limited, decision makers are mentally drained and distracted, and decision making is highly discretionary.⁸⁸ As I will discuss next, these conditions exist under systemic triage.

B. Systemic Triage

Under an ideal model of criminal justice, courtroom professionals would have sufficient resources to give time and attention to every case. However, today's criminal justice system operates very differently. In large urban environments like Cook County, public defenders, prosecutors, and judges are inundated with far more cases involving nonviolent offenses than they are equipped to handle. This makes it difficult to give each individual accused of misconduct the care and consideration he or she deserves and is constitutionally entitled to receive.⁸⁹ For instance, public defenders in Rhode Island each handle more than 1,700 cases per year, on average. The equivalent figures for individual public defenders in Dallas and Arizona are 1,200 and 1,000 respectively.⁹⁰ A re-

87. See generally Greenwald et al., *supra* note 81, at 553 (describing how small, implicit biases can have a societally significant impact either by influencing many people in small ways or by repeatedly affecting individuals); Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009) (describing implicit racial bias studies). For a summary of critiques of the implicit association test and responses to those critiques, see Darren Lenard Hutchinson, "Continually Reminded of Their Inferior Position": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 41-45 (2014).

88. See *infra* Section II.C.

89. See, e.g., Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1043 (2013) (noting the pressure to treat people as groups rather than as individuals, which "is in deep tension with core precepts of criminal law, most fundamentally the idea that criminal guilt is an individuated concept reflecting the defendant's personal culpability"); Natapoff, *supra* note 1, at 1317-18; Lisa C. Wood et al., *Meet-and-Plead: The Inevitable Consequence of Crushing Defender Workloads*, 42 LITIG. 20, 26 (2016) (noting that "the problem of excessive workloads is systemic" and that "[f]or years, tough-on-crime policies, mandatory minimum sentences, collateral consequences, and broken-windows policing pushed workloads ever higher"); see also Kohler-Hausmann, *supra* note 1, at 639 (describing the large increase in the number of misdemeanor arrests in New York City from 1980 to 2011).

90. Wood et al., *supra* note 89, at 20, 22.

cent article reports that “in upstate New York, one attorney represented over 2,200 clients; and in Illinois, a public defender handled 4,000 cases during the course of a year.”⁹¹ These excessive caseloads impact defense lawyers, prosecutors, and judges alike,⁹² creating pressure on each of these courtroom actors to engage in triage – the process of allocating scarce resources.

Typically, analysis of triage within the criminal justice system is focused on public defender offices. Scholars have discussed how public defenders attempt to distribute zealous advocacy amongst their clients since crushing caseloads prevent them from providing it fully to all clients.⁹³ As Phillip Atiba Goff and I previously observed,

[T]he provision of indigent defense is often likened to medical triage. Similar to hospital emergency rooms, [public defender] offices face demands that far outpace their resources. In order to save time to defend the cases that they find deserving, attorneys may plead out other cases quickly or go to trial unprepared. This reality means that for most [public defenders], the question is not “how do I engage in zealous and effective advocacy,” but rather, “given that all my clients deserve aggressive advocacy, how do I choose among them?”⁹⁴

Despite this robust discussion of public defender triage, however, little attention has been paid to the fact that judges and prosecutors also face intense pressure to quickly determine which cases can be resolved with little time and effort and which cases require or deserve the individualized attention associated with due process. I refer to this situation of pressurized decision making by all courtroom actors as *systemic triage*.

Systemic triage primarily results from criminal justice system policies and policing practices such as the War on Drugs and broken windows policing⁹⁵

91. *Id.* at 20.

92. *Id.* at 21 (citing Honorable Sean C. Gallagher, *A Judge's Comments*, 42 LITIG. 21 (2016)).

93. See, e.g., Brown, *supra* note 10; Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1180-81 (2003); Mitchell, *supra* note 10, at 1224-25; Richardson & Goff, *supra* note 10; see also Hashimoto, *supra* note 10, at 475 (“Lawyers carrying caseloads that far exceed national standards cannot adequately consult with their clients or provide sufficient investigation.”).

94. Richardson & Goff, *supra* note 10, at 2632.

95. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* 184 (2010) (arguing that “the War on Drugs is the engine of mass incarceration”); Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288, 309 (2015) (finding that “the policies pursued under the War on Drugs disproportionately held African-Americans accountable for their transgressions”); see also

that overwhelm courtroom professionals with more cases involving nonviolent offenders than they have the capacity to handle. This creates pressure on these actors to develop shortcuts for determining who deserves due process and who does not. For instance, under conditions of systemic triage, prosecutors will not have time, in every case, to interview victims and witnesses, and to make careful and considered judgments about how to exercise their enormous discretion according to their ethical mandate as ministers of justice.⁹⁶ Similarly, rather than providing effective and zealous advocacy to each of their clients by conducting investigations,⁹⁷ communicating and developing relationships with clients,⁹⁸ filing motions,⁹⁹ researching the law, preparing for trials, negotiating pleas, and otherwise engaging in vigorous advocacy,¹⁰⁰ defense lawyers instead will find ways to quickly determine when these time-consuming activities are necessary. Finally, judges will be constrained in their ability to carefully consid-

Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419 (2005) (noting the huge impact of the War on Drugs on blacks); M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding “Zero-Tolerance” Policing As a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 393-95 (2011) (recounting the War on Drugs’ effect on blacks living in New York); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 276-80 (2009) (critiquing broken windows policing); Natapoff, *supra* note 89, 1063-66 (noting that police focus arrests on young men of color); Al Baker, *New York Minorities More Likely To Be Frisked*, N.Y. TIMES (May 13, 2010), <http://www.nytimes.com/2010/05/13/nyregion/13frisk.html> [<http://perma.cc/79DV-GPVM>]; Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), <http://www.nytimes.com/2010/07/12/nyregion/12frisk.html> [<http://perma.cc/NKK6-6QZZ>]. Some scholars, such as Jeffrey Fagan and Garth Davies, conclude that broken-windows policing “is not about disorderly places, nor about improving the quality of life, but about policing poor people in poor places.” Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457 (2000). See generally George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<http://perma.cc/YBP7-VJSS>] (discussing broken windows policing).

96. See MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2014).

97. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, ABA § 4-4.1 (4th ed. 2016), http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html [<http://perma.cc/9F26-DG3X>].

98. *Id.* §§ 4-3.1, 4-3.3, 4-3.9, 4-5.1.

99. *Id.* §§ 4-5.2, 4-7.11, 4-8.1.

100. *Id.* § 4-4.6 (discussing counsel’s obligation to research the law); *id.* §§ 4-6.1 to -6.3 (discussing counsel’s obligation to negotiate). These ethical obligations apply regardless of the lawyer’s workload, see *id.* § 4-4.1(a) (“Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.”), and whether or not defendants want to plead guilty, *id.* §§ 4-4.1(b), 4-6.1(b).

er motions, ensure that defendants understand their rights, and make individualized sentencing decisions after careful review of the evidence.¹⁰¹

However, the concept of systemic triage does not simply consider the triage decisions of individual public defenders, prosecutors, and judges in isolation. Rather, it highlights the symbiotic nature of triage decision making, attending to how the resource allocation decisions of an actor in one institution, such as the prosecutor, influences the workload of actors in the other institutions, i.e. public defenders and judges. For instance, a defense lawyer's decision to take a case to trial does not simply increase her workload; it also has consequences for prosecutors and judges. As a result of the defense lawyer's decision, the prosecutor will have to devote time and resources to tasks such as becoming familiar with the evidence and responding to motions. Similarly, judges will have to dedicate time to reviewing pleadings, issuing rulings, and overseeing jury selection, to name a few of the tasks associated with trials.

Systemic triage pays attention to this interdependent relationship amongst institutional actors. It highlights the fact that while the pressure created by systemic triage comes chiefly from the overwhelming number of cases that flood the system, it also stems from the resource allocation decisions of all actors within the system. Thus, each individual actor, i.e. each prosecutor, defense lawyer, and judge, has a vested interest in overseeing how the others exercise their discretion.

For this reason, attending solely to the triage decisions of one individual institutional actor, such as the prosecutor, is insufficient to understand the systemic effects of triage. Rather, each institutional actor will police the resource allocation decisions of the others. The policing of decisions across institutions can create a racialized culture if resource allocation decisions typically favor individuals of one race over another. For instance, courtroom actors will punish the decision to grant due process rights to an individual who they conclude is undeserving. As I discuss next, the decision that an individual is undeserving is more likely to occur when that individual is a person of color, due to implicit racial bias. Hence, under conditions of systemic triage, a culture of decision making within a courthouse that sustains racially biased decision making is predictable.

101. See *infra* note 144 and accompanying text for an example of a judge in Cook County engaging in triage behaviors.

C. *Implicit Bias Under Conditions of Systemic Triage*

I theorize that racialized justice is the foreseeable consequence of systemic triage, regardless of the conscious racial motives of judges, prosecutors, and criminal defense lawyers, and even in the absence of overtly racist practices. That is because implicit racial biases are likely to impact decision making under conditions of systemic triage for a number of reasons. First, the proactive policing practices that create the conditions leading to systemic triage also result in the disproportionate representation of people of color in criminal courtrooms. Filling criminal courtrooms with overwhelming numbers of people of color will likely strengthen the already ubiquitous conscious and unconscious association linking people of color with crime and whites with innocence because simply rehearsing associations strengthens them.¹⁰² Strengthening these associations can occur even if many of the cases are dismissed¹⁰³ and even if judges, prosecutors, and defense lawyers understand on an intellectual level that this disproportionate representation is the predictable result of focusing law enforcement efforts on communities of color.

Second, under conditions of systemic triage, prosecutors and defense lawyers are likely anxious and distracted by all of the tasks simultaneously pulling at their attention, such as listening to the judge, negotiating with opposing counsel, quickly reviewing case files, thinking about what they will say when their cases are called, and answering questions from clients or witnesses. This multitasking can cause cognitive depletion, which is one of the classic situations in which implicit biases are likely to influence decisions and judgments.¹⁰⁴

102. These negative associations are not just practiced in the courthouse, but within offices too. For instance, in Cook County, Van Cleve shares how the Gang Unit of the State's Attorney's Office wallpapers its office with mug shots of black and Latino defendants. VAN CLEVE, *supra* note 3, at 1.

103. Kohler-Hausmann, *supra* note 1, at 642-43 (noting that many misdemeanor offenses in New York City are dismissed).

104. See Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 509 (1991) (finding that once stereotype activation occurred, cognitive "busyness" increased the application of stereotypes); Olesya Govorun & B. Keith Payne, *Ego-Depletion and Prejudice: Separating Automatic and Controlled Components*, 24 SOC. COGNITION 111, 111-12 (2006) (discussing cognitive depletion); Graham & Lowery, *supra* note 79, at 486 (discussing the impact of information deficits); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 18 (reviewing researchers' finding that "time pressure on a judgment task (thereby reducing attentional resources available for the task) increased the level of ethnic stereotyping in subjects' judgments"); Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibili-*

Additionally, because courtroom actors handle large numbers of cases, they will feel compelled to make quick decisions in the face of enormous information deficits about which cases can be disposed of quickly and which cases are worthy of time and effort. For instance, prosecutors may offer plea bargains and pressure defense lawyers into convincing their clients to accept them despite the fact that neither actor had the time to thoroughly investigate the case and interview all the potential witnesses.¹⁰⁵ Implicit biases are more likely to influence judgments when individuals make discretionary decisions quickly, based upon incomplete information.¹⁰⁶

Implicit racial biases can affect decision making in ways that create and sustain problematic racial disparities. For instance, these biases can cause people to interpret ambiguous information in racially disparate ways. In one study demonstrating this, mock jurors were asked to evaluate evidence that was ambiguous as to guilt or innocence.¹⁰⁷ The results showed that as a result of implicit racial biases, jurors were significantly more likely to conclude that the evidence was probative of guilt when the case involved a dark-skinned perpetrator versus a light-skinned perpetrator.¹⁰⁸ In another study involving an assault, mock jurors were more likely to conclude that the defendant was less aggressive and “more honest and moral” when he was white as opposed to black.¹⁰⁹ These differences in judgment were correlated with implicit bias.

Under conditions of systemic triage, it is probable that implicit racial biases will cause judges, prosecutors, and defense lawyers to draw adverse inferences from ambiguous facts more readily when defendants are black, especially when nonviolent offenses involving drugs are at issue, since young black men are

ties, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316, 318 (2007) (discussing dominant group anxiety during interracial interactions).

105. Van Cleve’s book provides evidence of this type of behavior. See, e.g., VAN CLEVE, *supra* note 3, at 122 (discussing her observation that prosecutors rarely read the case files of “mopes”); *id.* at 83-87 (discussing how public defenders are punished for engaging in zealous advocacy).

106. See Graham & Lowery, *supra* note 79, at 486 (discussing the impact of information deficits); Greenwald & Banaji, *supra* note 104, at 18 (reviewing researchers’ finding that “time pressure on a judgment task (thereby reducing attentional resources available for the task) increased the level of ethnic stereotyping in subjects’ judgments”).

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

108. *Id.* at 337-39.

109. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 212 (2001). These differences disappeared when race was made salient. *Id.* at 212-13.

closely associated with drugs in our conscious and unconscious minds.¹¹⁰ Thus, the confluence of a black defendant and a drug charge will likely make it cognitively easier to form a judgment that the defendant is guilty and will not benefit from more process. Conversely, when the defendant is white, implicit white favoritism will likely make judgments of guilt more difficult, resulting in the decision that due process will make a difference to the case.

Furthermore, implicit biases can also influence feelings of empathy. Empathy sensitizes people to injustice¹¹¹ and plays an important role in discretionary decision making. In one study, for instance, researchers found that people who felt more empathy for white defendants than black defendants would give white defendants more lenient sentences, even when everything else about the case was identical.¹¹² Moreover, social scientists have found that there is a racial empathy gap, meaning that empathy for the pain experienced by another does not occur or occurs with less intensity when white subjects witness or imagine pain inflicted on black individuals.¹¹³ This empathy gap is related to levels of

110. See, e.g., Eberhardt et al., *supra* note 82, at 883 (discussing the implicit association of blacks with crime); Trawalter et al., *supra* note 82, at 1322 (“There is overwhelming evidence that young Black men are stereotyped as violent, criminal, and dangerous.”); Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815 (2001) (discussing how context influences the activation of implicit bias). In prior work, Phillip Atiba Goff and I have referred to this quick judgment of criminality as the “suspicion heuristic.” L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 295 (2012).

111. See John F. Dovidio et al., *Empathy and Intergroup Relations*, in PROSOCIAL MOTIVES, EMOTIONS, AND BEHAVIOR: THE BETTER ANGELS OF OUR NATURE 393, 399 (Mario Mikulincer & Phillip R. Shaver eds., 2010); Matteo Forgiarini et al., *Racism and Empathy for Pain on Our Skin*, 2 FRONTIERS PSYCHOLOGY 1, 1 (2011).

112. James D. Johnson et al., *Rodney King and O.J. Revisited: The Impact of Race and Defendant Empathy Induction on Judicial Decisions*, 32 J. APPLIED SOC. PSYCHOL. 1208, 1215 (2002). Additionally, the jurors were more likely to attribute the actions of white defendants to the situation. *Id.* at 1216.

113. Studies have found that witnessing or imagining another individual experiencing pain causes our own brains to react as if we were experiencing pain ourselves. Forgiarini et al., *supra* note 111, at 1 (“[E]xperimental data indicate that when people witness or imagine the pain of another person, they map the other[’s] pain onto their brain using the same network activated during firsthand experience of pain, as if they were vicariously experiencing the observed pain.” (citations omitted)). However, in one study, the brains of white individuals exhibited less activation when observing pain inflicted on black individuals than on white individuals. *Id.* at 2, 4-6. The study did not involve black subjects. To the extent that this racial empathy gap works both ways, that is, that black decision makers would show the same lack of empathy toward whites experiencing pain, racial disparities would still exist since blacks are underrepresented in the legal field.

implicit racial bias.¹¹⁴ The more implicit anti-black bias subjects had, the greater was the difference in their empathic responses towards black and white individuals.¹¹⁵

Empathy can cause courtroom actors to take time to ensure that an individual's due process rights are protected, to respond with more sympathy and listen with more care and attention to a defendant's concerns, and to pay more attention to the circumstances of the case. Prosecutors and judges may respond more favorably to defense counsel's arguments concerning mitigating circumstances and the hardships their clients might suffer as a result of incarceration. Empathy may also result in prosecutors being more willing to offer treatment or other rehabilitative options instead of incarceration, and judges being more willing to accept these recommendations. Empathy can also influence defense lawyers' decisions about which clients are worthy of zealous advocacy and expending precious capital. However, because the conditions of systemic triage are likely to trigger implicit biases, courtroom actors might feel less empathy toward defendants of color. Thus, the benefits of empathy will accrue more to whites than blacks, resulting in significant racial disparities even in the absence of conscious bias and overtly racist behaviors. In fact, decision makers will be completely unaware that unconscious biases influenced their judgments.

The operation of implicit bias under conditions of systemic triage also explains how a courtroom culture can develop that routinely denies due process to black individuals and others stereotyped as criminal even in the absence of the type of overt and consciously biased decision making Van Cleve highlights in her book. Cook County is a paradigmatic case of systemic triage. As Van Cleve observes, "Cases bombard the system; the average felony prosecutor in Cook County has three hundred or more open cases at any one time,"¹¹⁶ and in 2005, each public defender resolved approximately 229 felonies, meaning that they likely worked on many more.¹¹⁷ In one disturbing demonstration of how this pressure played out in perverse ways, Van Cleve describes an instance when sheriff's deputies "act[ed] as go-betweens to update judges and courtroom workgroups on which court [was] 'winning.' One court watcher noted a judge screaming, "Let's go! Do something!" at his colleagues when there was a brief pause in a stream of plea bargains."¹¹⁸

114. *Id.* at 4.

115. *Id.*

116. VAN CLEVE, *supra* note 3, at 72.

117. *Id.* at 159; *see also id.* at 28-29, 58 (discussing the extreme time pressure under which defense attorneys and prosecutors work).

118. *Id.* at 58.

Additionally, the association between blacks and crime is well rehearsed in Cook County given the disproportionate number of people of color charged with nonviolent offenses.¹¹⁹ Of the almost ten thousand individuals housed in the Cook County jail, approximately 86.3% are black and Latino men charged with nonviolent offenses.¹²⁰ Van Cleve provides evidence of the strong conceptual association between blacks and crime that exists in Cook County.¹²¹ For instance, she describes courtroom actors becoming so accustomed to seeing black individuals within the courthouse that they become desensitized to the racial disparities that shocked them when they first encountered the system.¹²² The disproportionate representation of blacks in the criminal courthouse becomes natural and expected. Thus, even if the system in Cook County evolves to such an extent that judges, prosecutors, and defense lawyers no longer engage in race-conscious decision making that apportions due process rights based on whether or not someone is characterized as a mope,¹²³ and even if overtly racist practices disappear, it is probable that implicit racial biases will continue to influence behaviors in racially problematic ways.

III. RECOMMENDED REMEDIES

Consistent with her theme that racism in the Cook County courts is akin to Jim Crow racism, Van Cleve ends her book by encouraging readers to go to court to observe the racist practices she describes. Doing so, she argues, is “a type of activism [that can] lend a conscience to an otherwise unaccountable system.”¹²⁴ In Section III.A, I raise questions about the efficacy of her solution, and in III.B, I offer alternatives.

119. See *id.* at 20-21.

120. *Id.* at 19 (noting that 67.3% are young black men between the ages of twenty-one and thirty years, and Latinos and other people of color constitute nineteen percent); *id.* at 7 (noting that most of the black and Latino defendants appearing in felony court were charged with “possession of drugs, theft, intent to sell drugs, or other non-violent offenses”).

121. See *supra* note 25 and accompanying text (discussing instances in which sheriff’s deputies treated black researchers like criminals).

122. See VAN CLEVE, *supra* note 3, at 27, 32, 101-02.

123. See *supra* notes 59-62 and accompanying text (discussing pricing decisions made by defense lawyers).

124. VAN CLEVE, *supra* note 3, at 189.

A. Problems with Court Watching

Van Cleve urges readers to help “rectify the . . . racial violence inflicted by the courts”¹²⁵ by engaging in court watching. The practice of court watching can be a powerful tool to expose the workings of a court system that operates in the shadows,¹²⁶ especially if courtroom actors do not realize that court watchers are there. Van Cleve’s ethnography is a testament to that. Additionally, if court watchers are open and obvious, their mere presence might lead judges, prosecutors, and defense lawyers to practice the professionalism that should accompany their role.

However, as a long-term solution to the problem of racial bias, court watching will be ineffective. One reason is that once court watchers leave, courtroom actors might revert back to their problematic behaviors. Van Cleve shares an instance of exactly this. When she was clerking at the prosecutor’s office, a prosecutor cautioned her to be on her “best behavior” after noticing a court watcher sitting in the gallery.¹²⁷ Then the judge and prosecutor “began to ‘perform’ the normative professionalism that one would associate with their roles” until the court watcher left.¹²⁸ Afterwards, they all burst out laughing.¹²⁹

Additionally, court watching might even stymie efforts at addressing bias at the structural level if people expect to witness overtly racist practices similar to the ones Van Cleve recounts.¹³⁰ This is likely since she asks readers to “[r]eplicate my data until you change the findings in Cook County-Chicago and perhaps in other jurisdictions.”¹³¹ The problem is that court watchers may not encounter any of these racialized practices since judges, prosecutors, and defense lawyers may behave differently in their presence, preventing the watchers from getting an accurate view of the system. Furthermore, many of Van Cleve’s examples did not occur in open court, but rather during plea negotiations, in conversations with clients, or during interviews of courtroom actors. Such sources of information may not be available to the average court

125. *Id.*

126. See, e.g., Kathleen Daly, *Black Women, White Justice*, in *CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH* 209 (Austin Sarat & Marianne Constable eds., 1998) (sharing stories of courtroom encounters that reveal how black women experience the justice system).

127. VAN CLEVE, *supra* note 3, at 44.

128. *Id.*

129. *Id.*

130. She writes that court watching will allow people “to see racial degradation ceremonies performed in the name of criminal justice.” *Id.* at 189.

131. *Id.*

watcher. If people do not witness these practices, they may conclude that the system is no longer racially biased and that nothing more needs to be done to address racism in the criminal courts. However, as I argued in Part II, racial bias exists even when it is not discernible.

The problem of racial bias in the criminal justice system defies easy solutions. The influence of race on decision making will be difficult to flush out either because people may be unaware of the effect of implicit biases on their judgments or because they will hide their consciously racist beliefs. Furthermore, the enormous discretion wielded by prosecutors, defense lawyers, and judges facilitates racial bias, both conscious and implicit. The most effective solution would be to rethink the criminal justice policies and policing practices that not only create the conditions for systemic triage but also sustain the negative association between people of color and crime. Nevertheless, until that day arrives, there are some interim solutions that can help to safeguard against the influence of implicit racial biases. These are discussed next.

B. Individual, Institutional, and Systemic Solutions

The conditions of systemic triage allow implicit racial biases to thrive. Importantly, however, their effects are not inevitable. In this Section, I discuss some individual, institutional, and systemic mechanisms that together may help to reduce the influence of implicit biases on behaviors and judgments.

At the individual level, two interventions have proven promising: awareness of implicit bias¹³² and doubting one's objectivity.¹³³ Both of these interventions work by encouraging people to exercise care when making judgments and by helping people understand that their judgments might be biased even if they are not consciously aware of it.¹³⁴ These tools are especially likely to be successful when individuals are internally motivated to reduce biased judg-

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132. Patricia G. Devine & Margo J. Monteith, *Automaticity and Control in Stereotyping*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 346 (Shelly Chaiken & Yaacov Trope eds., 1999); Jack Glaser & Eric D. Knowles, *Implicit Motivation To Control Prejudice*, 44 *J. EXPERIMENTAL SOC. PSYCHOL.* 164, 171 (2008); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 *RES. ORGANIZATIONAL BEHAV.* 39, 56-57 (2009); Devin G. Pope et al., *Awareness Reduces Racial Bias* (Nat'l Bureau of Econ. Research, Working Paper 19765, 2014) (on file with author).
133. Eric Luis Uhlmann & Geoffrey L. Cohen, "I Think It, Therefore It's True": *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 207, 210-11 (2007).
134. Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 *TRENDS COGNITIVE SCI.* 37, 39 (2007).

ments rather than externally motivated by concerns that others will judge them.¹³⁵

These interventions also highlight why the ideology of colorblindness is problematic. As Eduardo Bonilla-Silva argued in *Racism Without Racists*, at the heart of colorblind racism is the “myth” that “race has all but disappeared as a factor shaping the life chances of all Americans.”¹³⁶ Furthermore, this ideology allows “whites [to] enunciate positions that safeguard their racial interests without sounding ‘racist.’”¹³⁷ To the extent that courtroom actors engage in colorblindness, it will stymie efforts to reduce the effects of implicit racial bias on behaviors and judgments.¹³⁸ In fact, in social science studies, colorblindness “has been shown to generate greater individual expressions of racial bias on both explicit and implicit measures.”¹³⁹

One practical method for increasing awareness and encouraging people to doubt their objectivity is through training. Across the country, state and federal public defenders, prosecutors, and judges are being trained on what implicit biases are and how they can influence the decision making of even the most egalitarian individuals.¹⁴⁰ In fact, people who hold perspectives that are genuinely egalitarian can be the perpetrators of biased conduct based on implicit biases, especially if holding these perspectives makes them less likely to question their objectivity. The Department of Justice recently made these trainings mandatory for prosecutors and law enforcement officers.¹⁴¹

In addition to awareness and questioning objectivity, other individual interventions such as slowing down decision making; engaging in mindful, de-

135. E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation To Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 824-28 (1998).

136. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* 302 (2014).

137. *Id.* at 4.

138. Van Cleve highlights numerous instances of colorblindness amongst courtroom actors. See *supra* notes 27-33.

139. Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 COURT REV. 190, 193 (2013) (citing Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417 (2004)).

140. I have conducted these trainings for police departments, federal and state prosecutors, and public defenders.

141. Office of Pub. Affairs, *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, U.S. DEP'T JUST. (June 27, 2016), <http://www.justice.gov/opa/pr/departement-justice-announces-new-department-wide-implicit-bias-training-personnel> [<http://perma.cc/P3K2-JFF4>].

liberate information processing;¹⁴² and gathering more information can prevent reliance on implicit stereotypes and attitudes.¹⁴³ The problem is that the pressure of systemic triage can make these interventions difficult to accomplish.¹⁴⁴ However, engaging in triage is a choice, not a requirement. In fact, triage in the criminal justice context arguably violates constitutional and professional mandates. Thus, prosecutors and defense lawyers should refuse to bow to the pressure to resolve cases hastily simply to deal with the realities of an overburdened system.

Professor Jenny Roberts explains that defense lawyers could “refus[e] to process individuals quickly through the lower criminal courts” by “litigat[ing] some of the many factual and legal issues” raised by these cases.¹⁴⁵ As for prosecutors, they should live up to their special responsibilities as “ministers of justice,”¹⁴⁶ which require them, among other things, “to see that the defendant is accorded procedural justice.”¹⁴⁷ Judges, too, should similarly avoid pressuring defense counsel and prosecutors to rush through jury selection and trials. Some may object to these proposals because giving defendants the individualized justice and zealous advocacy to which they are entitled will lead to longer delays and may also raise speedy trial concerns. However, the answer cannot be to simply continue to short circuit justice in the name of expediency. If giving defendants the process they are due leads the system to grind to a halt, then perhaps this will put pressure on criminal justice system decision makers to re-

142. Bargh, *supra* note 78, at 28.

143. *Id.* (“[I]t is possible to gain control [over automatic processes] by ‘making the hard choice’ and spending the additional cognitive effort to avoid pigeonholing or stereotyping an individual. Instead, the person can effortfully seek out additional individuating information and integrate it into a coherent impression.” (citation omitted)); Marilyn B. Brewer, *A Dual Process Model of Impression Formation*, in 1 *ADVANCES IN SOCIAL COGNITION* 1 (Thomas K. Scrull & Robert S. Wyer, Jr. eds., 1988); Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, in 23 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1 (Mark P. Zanna ed., 1990).

144. Sometimes there is good reason to attempt to resolve cases quickly. For instance, sometimes a defendant can get released from custody immediately or have his case dismissed instead of languishing in jail.

145. Jenny Roberts, *Crashing the Misdemeanor System*, 70 *WASH. & LEE L. REV.* 1089, 1131 (2013); Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, *N.Y. TIMES* (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> [<http://perma.cc/A87K-7SWR>].

146. See *MODEL RULES OF PROF’L CONDUCT* r. 3.8 cmt. 1 (AM. BAR ASS’N 2014).

147. *Id.*

think the policing practices and criminal justice policies that create the conditions of systemic triage in the first place.

None of these interventions will be easy to accomplish. However, once people are aware that there are steps they can take to address implicit biases, the failure to do so is as culpable as acting on the basis of conscious racial bigotry.¹⁴⁸ Judges, prosecutors, and defense lawyers should accept responsibility for taking steps to reduce the influence of implicit biases; otherwise they are complicit in continuing to sustain a racialized system. There is reason for optimism that some courtroom actors will engage in these efforts. For instance, Federal District Court Judge Mark M. Bennett attempts to reduce the effects of implicit racial biases on his sentencing judgments by stripping photos and all racial indicators from his presentence reports.¹⁴⁹

While individual interventions are important, they must be accompanied by interventions at the institutional level in order to increase the chances of success. If this does not occur, it might be difficult for one individual to withstand the pressure to conform by speeding up case adjudications. For instance, Van Cleve relates how prosecutors and judges punished defense lawyers who attempted to engage in zealous advocacy.¹⁵⁰ This is unsurprising given the symbiotic nature of systemic triage, where the resource allocation decisions of one actor influence the workload of the others. Thus, even if an individual public defender decides to slow down in order to safeguard against the influence of implicit biases on decision making, the pressure and formal and informal punishments that the individual will suffer from judges and prosecutors because of his or her efforts may result in that individual succumbing to the pressure.

The leaders of prosecutor and public defender offices can assist by making it clear that they will support the efforts of their line personnel to do what is necessary to ensure that they are living up to their ethical and constitutional obligations. This will help reduce the influence of implicit bias not only because it will give individuals the courage to resist the pressure to dispose of cases quickly, but also because people are motivated to conform their beliefs to those of the people around them.¹⁵¹ Thus, institutions should clearly com-

148. One important caveat needs to be made here. My argument is not that moving swiftly through a case is always problematic. For instance, there are circumstances when defense counsel may want to quickly resolve a case because doing so will result in a better outcome for her client. Rather, I am simply making the point that rushing through cases solely to deal with the pressures of triage is problematic.

149. This knowledge is based on conversations with Judge Bennett.

150. See *supra* notes 54-58.

151. Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 J. PERSONALITY & SOC. PSYCHOL. 645, 651 (2001).

municate that making efforts to reduce the influence of implicit biases is important and provide institutional backing for those efforts. This will make individuals more likely to accept the punishment they might face from other institutional actors for refusing to engage in triage decision making and help them fight the pressure to practice racialized justice. Institutional support can also facilitate the creation of a cohort of like-minded individuals, making it easier to maintain one's commitment to do what is necessary to address implicit biases.

Some institutions are already engaged in these efforts. For instance, San Francisco Public Defender Jeff Adachi has established safeguards in his office to reduce implicit biases' pernicious effects. These safeguards include asking his attorneys to use checklists that require them to answer questions such as, "how would I handle this case different[ly] if my client was another race or had a different social background."¹⁵² Additionally, one district attorney's office in North Carolina has asked an implicit bias expert to embed herself in the office to help line prosecutors determine how to reduce the influence of implicit biases on their discretionary decisions.¹⁵³ Both of these examples send the message throughout the office that the institution believes these efforts are important, thereby helping to motivate individuals to conform their behaviors to meet this expectation.

Finally, even if individuals and institutions make efforts to reduce the influence of implicit racial biases, the gold standard would be coordinated change among different arms of the criminal justice system—that is, the prosecutor's office, the public defender's office, and judges working together to address these biases. As I discussed in Part II, systemic triage attends to the interaction between criminal justice system institutions and the ways in which the resource allocation decisions of one influence the other. Thus, even if one institution encourages its personnel to engage in efforts to reduce implicit bias, the others might resist the increase in their workload that this might cause.

All three institutions should instead work together to ensure that the goal of efficiency does not override the important values of fairness, equality, and protection of constitutional rights. They should encourage each other to practice normative professionalism and pressure each other to align their practices with their beliefs in due process, legal ethics, and other values that likely motivated them to practice criminal law in the first place. If this occurred, it would

152. Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-White Clients*, WASH. POST (June 7, 2016), <http://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients> [<http://perma.cc/S98M-9CRG>].

153. This information is based on my conversations with this implicit bias expert.

slow down the system to such an extent that policymakers would be forced to confront the problem of overburdened courts and insufficient resources. This might provoke changes to current criminal justice policies and policing practices that not only create the conditions for systemic triage, but, by filling criminal courtrooms with individuals of color charged with nonviolent offenses, also help to strengthen the association linking black and brown individuals with crime and whites with innocence.

While it might sound unrealistic to think that institutions could work together to reduce implicit racial bias, aspects of this are already occurring in Seattle, Washington. A group consisting of two federal district court judges, the U.S. Attorney and an Assistant U.S. Attorney, the Federal Public Defender, an ACLU director and an ACLU staff attorney, two civil lawyers, and a law professor are working together to develop jury instructions and a jury orientation video to help address the probable effects of implicit biases on jury decision making.¹⁵⁴ The commitment of this diverse group to address the effects of implicit racial bias provides reason for optimism that other courthouses across the country might engage in similar efforts. While the Seattle project is currently limited to jury decision making, it is possible that the awareness of implicit bias underlying this undertaking and the trust and relationships that have developed during the process will translate into a joint effort to reduce triage decision making in the courthouse.

CONCLUSION

As this Review argues, racialized practices need not be overt, punitive, and extreme, and courtroom actors need not be consciously biased in order for race to have pernicious and disturbing consequences on behaviors and judgments. However, to the extent that people today are more likely to be consciously egalitarian than not, there is reason to hope that educating criminal justice actors about implicit racial biases and how systemic triage makes it more challenging to safeguard against the influence of these biases might help encourage actors to fight for institutional and structural changes. Changing the institutional and structural conditions that allow implicit biases to flourish is important because this “new” racism is, as Van Cleve concludes about colorblind racism, “just as punitive and abusive”¹⁵⁵ as old-fashioned bigotry. In fact, this new racism is in some ways more dangerous and pernicious than racial bigotry because it is ephemeral and difficult to eradicate.

154. This is a project with which I am involved.

155. VAN CLEVE, *supra* note 3, at 186.

SYSTEMIC TRIAGE

Van Cleve's important ethnography brings to light the hidden and pernicious workings of the criminal justice system that often operates in the shadows. Based on the model of systemic triage introduced in this Review, it is likely that the racialized practices she exposes also exist in many other jurisdictions with overburdened courts, although these practices may not operate in a similarly overt and explicit fashion. Even more troubling is the probability that these practices will thrive under conditions of systemic triage despite the existence of constitutional protections, a court record, and prosecutors, defense lawyers, and judges who are ostensibly committed to lofty principles of justice and fairness. The problematic practices of racism without racists make a mockery of justice that should trouble us all.