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Author

Kang, Jerry

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Jerry Kang
Professor of Law

Jerry Kang's teaching and scholarly pursuits center around civil procedure, communications and race. Professor Kang has published on such important communications topics as cyberspace privacy, pervasive computing, social cognitive analyses of mass media policy and cyber-race. He authored *Communications Law & Policy: Cases and Materials* (2d edition Foundation 2005), a leading casebook in the field. An expert on Asian-American communities, he is co-author of *Race, Rights, and Reparation: The Law and the Japanese American Internment* (Aspen 2001). He joined UCLA School of Law in fall of 1995 and was elected Professor of the Year in 1998, and received the Rutter Award for Excellence in Teaching in 2007.

TROJAN HORSES OF RACE[†]

Excerpt from:

Jerry Kang

Recent social cognition research has provided stunning evidence of implicit bias against various social categories. In particular, it reveals that most of us have implicit biases against racial minorities notwithstanding sincere self-reports to the contrary. These implicit biases have real-world consequence—in how we interpret actions, perform on exams, interact with others and even shoot a gun. The first half of this Article imports this remarkable science into the law reviews and sets out a broad intellectual agenda to explore its implications. The second half examines where implicit bias comes from, and focuses on vicarious experiences with racial others mediated through electronic communications. This, in turn, raises a timely question of broadcast policy sparked by the FCC's controversial 2003 Media Ownership Order. There, the FCC repeatedly justified relaxing ownership rules by explaining how it would increase, of all things, local news. But local news is replete with violent crime stories prominently featuring racial minorities. Consumption of these images, the social cognition research suggests, exacerbates our implicit biases. In other words, as we consume local news, we download a sort of Trojan Horse virus that increases our implicit bias. Unwittingly, the FCC linked the "public interest" to racism. Potential responses, such as recoding the public interest and examining potential firewalls and disinfectants for these viruses, are discussed in light of psychological, political and constitutional constraints.

"There is no immaculate perception."

— Commonly attributed to Nietzsche

"You are what you eat."

— Nutritional maxim

**"In all fighting, the direct method may be used for joining battle,
but indirect methods will be needed in order to secure victory."**

— Sun Tzu

Introduction Consider the following studies, with an open mind.

Computer Crash. Social cognitionist John Bargh asked participants to count whether an even or odd number of circles appeared on a computer screen.¹ After the 130th iteration, the computer was designed to crash, and the participants were told to start over. A hidden video camera recorded their reactions. Third-party observers then evaluated those recordings to measure participants' frustration and hostility. What neither participants nor observers knew was that for half the participants, a young Black male face was flashed subliminally before each counting iteration; for the other half, the face was White. As rated by the observers, those who had been shown the Black faces responded with greater hostility to the computer crash.²

Mug shot. Political scientists Frank Gilliam and Shanto Iyengar created variations of a local newscast: a control version with no crime story, a crime story with no mug shot, a crime story with a Black suspect mug shot and a crime story with a White suspect mug shot.³ The Black and White suspects were represented by the same morphed photograph, with the only difference being skin hue—thus controlling for facial expression and features. The suspect appeared for only five seconds in a ten-minute newscast; nonetheless, the suspect's race produced statistically significant differences in a criminal law survey completed after the viewing. Having seen the Black suspect, White participants showed 6% more support for punitive remedies than did the control group, which saw no crime story. When participants were instead exposed to the White suspect, their support for punitive remedies increased by only 1%, which was not statistically significant.

Math Test. Social psychologist Margaret Shih asked Asian American women at Harvard University to take a hard math test.⁴ Before taking the exam, each participant answered a questionnaire designed to prime subtly different social identities: female (with questions relating, for example, to coed dormitory policy) or Asian (with questions relating, for example, to language spoken at home). A control group answered questions related to neutral topics, such as telecommunications usage. As measured by an exit survey, these questions had no conscious impact on self-reports of test difficulty, self-confidence in math ability, the number of questions attempted or how well participants thought they did. Yet something happened implicitly. The group that had its Asian identity triggered performed best in accuracy (54%); the group that had no identity triggered came in second (49%) and the group that had its female identity triggered ranked last (43%). "Being" Asian boosted, while "being" female depressed, math performance. Of course, these students were both.

Shooter Bias. Social cognitionist Joshua Correll created a video game that placed photographs of a White or Black individual holding either a gun or other object (wallet, soda can, or cell phone) into diverse photographic backgrounds.⁵ Participants were instructed to decide as quickly as possible whether to shoot the target. Severe time pressure designed into the game forced errors. Consistent with earlier findings, participants were more likely to mistake a Black target as armed when he in fact was unarmed (false alarms); conversely, they were more likely to mistake a White target as unarmed when he in fact was armed (misses). Even more striking is that Black participants showed similar amounts of “shooter bias” as Whites.

What is going on here? Quite simply, a revolution. These studies are the tip of the iceberg of recent social cognition research elaborating what I call “racial mechanics”⁶—the ways in which race alters intrapersonal, interpersonal and intergroup interactions. The results are stunning, reproducible and valid by traditional scientific metrics. They seriously challenge current understandings of our “rational” selves and our interrelations.

In Part I, I import crucial findings from the field of social cognition with emphasis on the recent “implicit bias” literature. This research demonstrates that most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities. These implicit biases, however, are not well reflected in explicit self-reported measures. This dissociation arises not solely because we try to sound more politically correct. Even when we are honest, we simply lack introspective insight. Finally, and most importantly, these implicit biases have real-world consequences—not only in the extraordinary case of shooting a gun, but also in the more mundane, everyday realm of social interactions.

A vast intellectual agenda opens when we start probing what this new knowledge might mean for law. I start by asking a fundamental question: “Where does bias come from?” One important source is vicarious experience with the racial other, transmitted through the media. If these experiences are somehow skewed, we should not be surprised by the presence of pervasive implicit bias. What, then, might we do about such media programming given the rigid constraints of the First Amendment? To be sure, private actors of good faith can voluntarily adopt best practices that decrease implicit bias and its manifestations. But can the state, through law, do anything?

If there is any room for intervention, it would be in the communications realm of broadcast, which enjoys doctrinal exceptionalism. In broadcast, notwithstanding the

First Amendment, we tolerate the licensing of speakers. In broadcast, we tolerate suppression of speech we dislike, such as indecency and violence. In broadcast, we tolerate encouragement of speech we like, such as educational television and local-oriented programming. All this is in the name of the “public interest,” the vague standard that Congress has charged the Federal Communications Commission with pursuing.

That “public interest” standard was recently reshaped in the controversial June 2003 Media Ownership Order.⁷ There, the FCC repeatedly justified relaxing ownership rules by explaining how such changes would increase, of all things, local news. Since local news was viewed as advancing “diversity” and “localism,” two of the three core elements of the “public interest,” any structural deregulation that would increase local news was lauded.

Troubling is what’s on the local news. Sensationalistic crime stories are disproportionately shown: “If it bleeds, it leads.” Racial minorities are repeatedly featured as violent criminals. Consumption of these images, the social cognition research suggests, exacerbates our implicit biases against racial minorities. Since implicit bias is fueled in part by what we see, the FCC has recently redefined the public interest so as to encourage the production of programming that makes us more biased. Unwittingly, the FCC linked the public interest to racism. No one spotted the issue for the Commission.

I. Racial Mechanics

A. Racial Schemas

1. *Schemas Generally*—A schema is a “cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes.”⁸ For instance, when we see something that has four legs, a horizontal plane and a back, we immediately classify that object into the category “chair.” We then understand how to use the object, for example, by sitting on it. This schematic thinking operates automatically, nearly instantaneously.

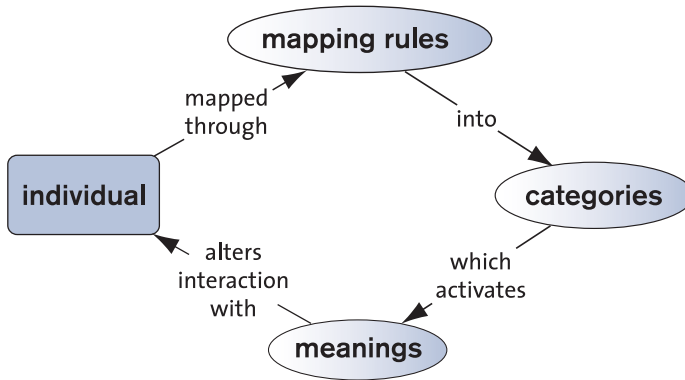
We employ schemas out of necessity.

Different schema types exist for different types of entities, including human beings.⁹ When we encounter a person, we classify that person into numerous social categories, such as gender, (dis)ability, age, race and role.¹⁰ My focus is on race.

2. *Racial Schemas*—Through law and culture, society provides us (the perceivers) with a set of racial *categories* into which we map an individual human being (the target) according to prevailing rules of racial *mapping*. Once a person is assigned to a racial category, implicit and explicit racial meanings associated with that category are

triggered. These activated racial *meanings* then influence our interpersonal interaction. All three elements (presented as ovals in Figure 1)—racial categories, racial mapping rules and racial meanings—constitute components of the racial schema.

Figure 1



Critical race scholars regularly repeat the mantra that “race is a social construction.”¹¹ My social cognitive account provides a particularized understanding of that general claim: all three components—racial categories, mapping rules and racial meanings—are contingent, constructed and contestable. Not one of these elements is biologically inevitable.

In sum, schemas automatically, efficiently and adaptively parse the raw data pushed to our senses. These templates of categorical knowledge are applied to all entities, including human targets. Racial schemas, because they are chronically accessible, regularly influence social interactions.

3. *Automaticity*—The Computer Crash experiment reveals that we do not have to consciously “see” the Black male face for it to influence our behavior. Such findings indicate that schemas operate not only as part of a conscious, rational deliberation that, for example, draws on racial meanings to provide base rates for Bayesian calculations (what social cognitionists might call a “controlled process”). Rather, they also operate automatically—*without conscious intention and outside of our awareness* (an “automatic process”).¹²

To summarize: we think through schemas generally, and through racial schemas specifically, which operate automatically when primed, sometimes even by subliminal stimuli. The existence of such automatic processes disturbs us because it questions our self-understanding as entirely rational, freely choosing, self-legislating actors. We

are obviously not robots that mechanically respond to stimuli in precisely programmed ways. We do respond to individuating information, when we are motivated and able to do so. Nevertheless, we ignore the best scientific evidence if we deny that our behavior is produced by complex superpositions of mental processes that range from the controlled, calculated and rational to the automatic, unintended and unnoticed. Finally, we must recognize that these biases are not random errors; rather, they have a tilt. After all, the participants in the Computer Crash experiment got more hostile, not friendlier, after being flashed Black faces. Why?

B. Implicit Bias

1. *The Problem: Opacity*—Social psychologists have long sought to measure the nature and content of the racial meanings contained within our racial schemas. One way to measure is simply to ask people directly. But are such self-reports trustworthy? An individual may feel awkward showing her ambivalence, anxiety or resentment toward specific racial categories.¹³

More troubling, we may honestly lack introspective access to the racial meanings embedded within our racial schemas. Ignorance, not deception, may be the problem. Relatedly, our explicit normative and political commitments may poorly predict the cognitive processes running beneath the surface. It is as if some “Trojan Horse” virus had hijacked a portion of our brain

2. *The Solution: Measuring Speed*—How have social cognitionists measured the bias in racial meanings if it is so opaque? One method has been to use sequential priming procedures that take advantage of the automaticity of schemas. The Implicit Association Test (IAT) has become the state-of-the-art measurement tool.¹⁴ The IAT examines how tightly any two concepts are associated with each other. In a typical experiment, two racial categories are compared, say “Black” and “White.” Next, two sets of stimuli (words or images) that correspond to the racial meanings (stereotypes or attitudes) associated with those categories are selected. For example, words such as “violent” and “lazy” are chosen for Blacks, and “smart” and “kind” for Whites.

Participants are shown a Black or White face and told to hit as fast as possible a key on the left or right side of the keyboard. They are also shown words stereotypically associated with Blacks or Whites and again told to hit a key on the left or right side of the keyboard. In half the runs, the Black face and Black-associated word are assigned to the same side of the keyboard (schema-consistent arrangement). In the other half, they are assigned opposite sides (schema-inconsistent arrangement). The same goes for the White face/White-associated stimulus combination.

Tasks in the schema-consistent arrangement should be easier, and so it is for most of us. How much easier—as measured by the time differential between the two arrangements—provides a measure of implicit bias. The obvious confounds—such as overall speed of participant's reactions, right- or left-handedness and familiarity with test stimuli—have been examined and shown not to undermine the IAT's validity.

3. *The Results: Pervasive Implicit Bias*—Using the IAT and similar tools, social cognitionists have documented the existence of implicit bias against numerous social categories. According to Nilanjana Dasgupta, the “first wave” of research demonstrated that socially dominant groups have implicit bias against subordinate groups (White over non-White, for example). By her count “almost a hundred studies have documented people's tendency to automatically associate positive characteristics with their ingroups more easily than outgroups (i.e. ingroup favoritism) as well as their tendency to associate negative characteristics with outgroups more easily than ingroups (i.e. outgroup derogation).”¹⁵ These studies address not only automatic attitudes (prejudice), but also automatic beliefs (stereotypes). In the United States, bias has been found against Blacks, Latinos, Jews, Asians, non-Americans, women, gays and the elderly. Implicit bias against outgroups has also been found in other countries.

Fascinating is the overwhelming evidence that implicit bias measures are dissociated from explicit bias measures. Put another way, on a survey I may honestly self-report positive attitudes toward some social category, such as Latinos. After all, some of my best friends are Latino. However, implicit bias tests may show that I hold negative attitudes toward that very group. This is dissociation—a discrepancy between our explicit and implicit meanings.

C. Behavioral Consequences

By now, even patient readers demand a payoff: Do racial schemas alter behavior? More particularly, does implicit bias represent anything besides millisecond latencies in stylized laboratory experiments? What is the evidence, for instance, that the IAT predicts any real-world behavior, much less anything that is legally actionable?

Research addressing behavioral consequences has been called the “second wave” of implicit bias research. There is now persuasive evidence that implicit bias against a social category, as measured by instruments such as the IAT, predicts disparate behavior toward individuals mapped to that category.

1. *Interpreting—Agentic Backlash*. Laurie Rudman and Peter Glick examined the relationship between implicit bias against women and their job interview evaluations.¹⁶

Four tester candidates were created for the position of a computer lab manager: agentic man, androgynous man, agentic woman, and androgynous woman. In the “agentic” profile (for both genders), the videotaped interview and “life philosophy” essay of the job candidates emphasized self-promotion and competence. In the “androgynous” profile (again, for both genders), the written essay added qualities of interdependence and cooperation. Half the study participants were told that they had to evaluate the candidates for a job that required masculine qualities; the other half were told that it also required some feminine qualities. After reviewing the interview tapes and the essays, participants rated the candidates on three measures: competence, social skills and hireability.

The participants evaluated women differently from men in only one setting. In the feminized job condition (in which the job explicitly called for the ability to cooperate with others), the agentic female was rated less hireable than the identical agentic male.¹⁷ The researchers isolated the mediating variable to be differences in evaluation of “social skills,” not “competence.” In other words, if the job required cooperative behavior, women who showed agentic qualities were penalized more than their identical male counterparts.

In addition to rating the job applicants, the participants completed a gender IAT and explicit gender stereotype questionnaires. Not surprisingly, explicit bias measures did not correlate with how participants evaluated the social skills of agentic females. What did correlate were their IAT scores: the higher the implicit bias against women, the lower the social skills rating.¹⁸

Biased interpretation can have substantial real-world consequences. Consider a teacher whose schema inclines her to set lower expectations for some students, creating a self-fulfilling prophecy. Or a grade school teacher who must decide who started the fight during recess. Or a jury who must decide a similar question, including the reasonableness of force and self-defense. Or students who must evaluate an outgroup teacher, especially if she has been critical of their performance. The Agentic Backlash study provides support for a more specific version of our tendency toward schema-consistent interpretation by demonstrating behavioral consequences of implicit bias.

2. *Performing*—Differential assessments may not be caused entirely by subjective interpretations. Rather, racial meanings transmitted through the culture, coupled with implicit cognitive processes, may alter how we actually perform on objectively measured tests. Evidence comes from the remarkable “stereotype threat” literature launched by psychologist Claude Steele.¹⁹ In a seminal experiment, Claude Steele and

Joshua Aronson gave a difficult verbal test to White and Black Stanford undergraduate students. One group was informed that the test was *ability diagnostic*—testing how smart they were. Another comparable group, given the same test, was told that the test was *ability nondiagnostic*—simply a laboratory problem-solving task. In the latter condition, the Black students performed comparably to equally skilled White students.²⁰ But in the former condition, Black students greatly underperformed equally skilled White students.

The apparent explanation for this odd result is that somehow the stereotype that Blacks are intellectually inferior got activated in the former group. According to Steele, this “stereotype threat” may have raised the group’s fear that by doing poorly, they would reinforce a negative stereotype of the group they belong to. Thus, doing poorly had a “double consequence”: not only individual failure but also confirmation of the negative stereotype. This anxiety somehow disrupted their performance.

What is amazing is that not only can test scores be depressed, but they can also be boosted. That was the finding of the Math Test study described in the Introduction. By unconsciously activating a particular identity, performance on difficult tests by the very same category of people could be boosted upward (Asian) or depressed downward (woman).

I want to be up front about the limited state of our knowledge. We have no deep understanding of such bizarre testing phenomena. But even without any clear explanation, we can safely say that racial stereotypes, both negative and positive, can be activated implicitly and explicitly to alter test performance in striking ways. We should remember stereotype threat each time we judge someone, including ourselves, on the basis of a test score.

3. Interacting—Nonverbal Leakage. Recent research demonstrates that implicit bias, as measured by reaction time studies, also predicts behavior in stranger-to-stranger social interactions, such as interviews and face-to-face meetings. Researchers have termed this phenomenon behavioral “leakage.” Allen McConnell and Jill Leibold were the first to demonstrate the linkage between IAT results and intergroup behavior.²¹ In this study, White participants completed an explicit bias survey and took the IAT. They were guided through the first part of the experiment by a White female experimenter but through the last part of the experiment by a Black female experimenter. Both experimenters asked questions of participants according to a prepared script. Participants’ interactions with both experimenters were videotaped.

Trained judges blind to the participants' bias scores coded the videotaped interactions, focusing on nonverbal behaviors such as friendliness, eye contact and number of speech errors. In addition, the experimenters were asked to evaluate their interactions with each participant. A strong correlation was found between the IAT scores and the ratings of both the judges as well as the experimenters.

These nonverbal behaviors that leak out from our implicit bias influence the quality of our social interactions. In classic experiments by Carl Word, Mark Zanna and Joel Cooper, White interviewers were trained to display less friendly nonverbal behavior—the sort that has now been correlated with higher implicit bias against racial minorities.²² When such behavior was performed in front of naive White interviewees, those interviewees gave objectively worse interviews, as measured by third parties blind to the purpose of the experiment. In addition, the perceiver's (interviewer's) unfriendly nonverbal behavior can instigate retaliatory responses from the target (interviewee), causing a positive feedback loop. This creates a vicious circle that reinforces the racial schema. Worse, the perceiver's decision not to hire the target based on that social interaction is understood as legitimately on “the merits.”

4. *Shooting*—But for some of us, things get much, much worse. Recall the Shooter Bias study. Under threat conditions that police officers face, our racial schemas incline us to shoot Black men faster. Keith Payne performed the first gun study in 2001.²³

Joshua Correll and his colleagues performed a second gun study in 2002.²⁴ They created a simple videogame that placed White or Black targets holding either guns or other objects (such as wallets, soft drinks or cell phones) into realistic background settings. The researchers directed participants to decide as soon as possible whether to shoot or not shoot. Consistent with Payne's earlier results, participants were more likely to trigger “false alarms” against a Black target (that is, shooting when no gun was present);²⁵ conversely, they were more likely to “miss” against a White target (that is, not shooting when a gun was present).

The researchers next tested whether “shooter bias” (as measured by the difference in response times to White and Black targets) was correlated with other bias measures. They were also asked about their personal views of the violence, dangerousness and aggressiveness of African Americans (an explicit measure of a *personal stereotype*, reflecting actual endorsement of the stereotype). Finally, they were asked how most White Americans would answer the same question (an explicit measure of a *cultural stereotype*, reflecting mere knowledge of the stereotype). The personal stereotype

measure, reflecting endorsement, showed no correlation with shooter bias—again, demonstrating dissociation. Interestingly, what did correlate was the measure of the cultural stereotype. The race of the player surprisingly had no impact on shooter bias. Recall Amadou Diallo, the young West African immigrant standing in the doorway to his apartment, who was shot at forty-one times by New York police who “saw” a gun that did not exist. It should haunt us to read social science that suggests that if Diallo were White, he may still be alive. For those who doubt race played any such role, the Shooter Bias studies cannot be pooh-poohed as another tiresome play of the “race card.” For those who always knew race mattered, here is cold quantification. And more chilling is the fact that Whites and Blacks both exhibited shooter bias—a contention that would be hard to make politically without the test results.

D. A Research Agenda

My model of racial mechanics is a simple application of schematic thinking. We map individuals to racial categories according to the prevailing racial mapping rules, which in turn activate racial meanings that alter our interaction with those individuals. The mapping and activation are automatic, and the racial meanings that influence our interaction may be stereotypes and prejudice we explicitly disavow. But disavowal does not mean disappearance, and it turns out that reaction time measures, such as the IAT, can measure the latent persistence of these implicit racial meanings. And implicit bias has behavioral consequences, which can be deadly.

As future research confirms, constrains and elaborates these results, a vast research agenda will open for those who explore the nexus of law and racial mechanics. Topics on that agenda include:

- the role of intent in all bodies of law;²⁶
- criminal law (for example, racial profiling, self-defense, community policing, jury selection,²⁷ penalty setting²⁸);
- antidiscrimination law (for example, disparate treatment,²⁹ disparate impact, unconscious discrimination,³⁰ hostile environments, mortgage lending);
- civil rights law and policy (for example, affirmative action's³¹ contact hypothesis,³² role model justifications, merit definitions, advocacy strategies, housing segregation);
- lawyering and evidence (for example, strategies and rules with which to engage jurors' implicit biases);³³ education law and policy (for example, teaching strategies, interpretation of tests, debiasing programs and environments);
- privacy law (for example, comparing measures of implicit bias, such as the IAT, with polygraph results; widespread use of fMRI brain scans; IATs for Article III confirmations or legislators³⁴);

- labor law (for example, comparing IATs to other psychological tests, such as the Myers-Briggs test, given before hiring or promotion; employment discrimination; new compliance intermediaries; evidentiary privileges for voluntary debiasing programs³⁵);
- constitutional law (for example, equal protection intent versus impact, autonomy as a constitutional value, paternalism);
- cultural policy (for example, spectrum regulation, campus speech codes, subsidization of production and distribution of debiasing content, media ownership policy);
- remedies, both voluntary and court-ordered (for example, requiring debiasing screensavers as part of a settlement in a discrimination suit; providing debiasing booths in lobbies where jurors wait to be picked; providing debiasing software installed on computers).

Some might say that I am calling for an overeager extension of a premature science, embraced for political reasons. And one must concede that science has been and will always be exploited for political purposes. Just as the Right might jump on *Bell Curve*³⁶ findings, the Left might jump on stereotype threat findings. There will always be those who out of convenience declare faith in some set of scientific explanations without due diligence. Accordingly, the goal has to be honest, public and transparent engagement on the merits.

This requires, for instance, highlighting scientific findings that cut against one's political orthodoxy. The most vivid example this Article points out is the fact that even African Americans seem to suffer from shooter bias. I also point out that Asian Americans generally have implicit biases against African Americans that are almost as strong as those held by Whites. Neither finding is convenient to progressive politics, but that does not mean they should be swept under the rug. And in this Article, they are not.

Recognizing our self-understandings to be provisional, we must still confront the difficult choices to come. As social cognitionists further demonstrate the possibility of altering levels of implicit bias—and explore the mechanisms to do so most efficiently—we will encounter difficult philosophical and legal questions about our autonomy, our normative commitments to racial equality and the proper role of explicit collective action by private and public actors to decrease implicit bias.³⁷

A. Tuning In to Broadcast

In the second half of this Article, I pursue a concrete application of the racial mechanics model. This Part concerns, of all things, recent FCC decisions about the local news. To understand my choice of topic, we must start with a fundamental question: “Where do racial meanings come from?” Racial meanings that accrete in our schemas can, on the one hand, come from “direct experiences” with individuals mapped into those categories. On the other hand, the racial meanings can arise from what I call “vicarious experiences,” which are stories of or simulated engagements with racial others provided through various forms of the media or narrated by parents and our peers. Given persistent racial segregation, we should not underestimate the significance of vicarious experiences. Even if direct experience with racial minorities more powerfully shapes our schemas, vicarious experiences may well dominate in terms of sheer quantity and frequency.

The next question becomes, “Why are racial meanings biased against racial minorities?” One hypothesis is that people encounter skewed data sets—or as the computer scientists say, “garbage in, garbage out.” If these principally vicarious experiences, transmitted through electronic media, are somehow “skewed,” then the racial meanings associated with certain racial categories should also be skewed.

Suppose that social cognitionists identify which types of vicarious experiences trigger and exacerbate bias and which ameliorate it. Private parties will obviously be free to act on the basis of such discoveries. Voluntary attempts to create a “diversity” of role models on television reflect some such impulse, in addition to financial self-interest since “diversity” is sometimes good for business. But what about collective action, mediated through the state and implemented through law?

Maybe the state can do nothing. But there is one communications medium that has always tolerated substantial state intervention: broadcast. In the United States, broadcast is regulated in a public-private partnership. As the Communications Act of 1934 makes clear, the electromagnetic spectrum that broadcasters employ as the wireless “channel” of communications is not private property. Instead, it is owned by the government, held in public trust for all. The United States licenses that spectrum to private parties who exploit that resource not only for private commercial gain but also for the “public interest.” No one may broadcast without a license from the federal government, which authorizes the use of a particular frequency, at a specified transmission power, within a designated geographical area.

In the 1934 Act, Congress created the FCC and charged it with managing the spectrum to further the “public convenience, interest, or necessity”³⁸—the public interest standard. In addition to regulating entry by assigning frequencies,³⁹ the FCC has power to mold, at least softly, the content of broadcast. Given our robust constitutional and political commitment to free expression, one might wonder how such constraints are tolerated. But under current First Amendment law, the medium matters: the Supreme Court has accepted scarcity⁴⁰ and intrusiveness/unique availability⁴¹ justifications to permit greater regulation of the spectrum, as compared to other media, such as print.⁴²

In its history, the FCC has promulgated (and the courts have enforced) regulations that restrict the broadcast of content deemed “bad,” such as obscenity,⁴³ indecency⁴⁴ and excessive commercialization.⁴⁵ Specific to antiracism, the FCC, at the instruction of the courts, has revoked the broadcast licenses of stations that favored segregation and aired anti-Black racial epithets.⁴⁶ Conversely, the FCC has also promulgated regulations that promote content deemed “good” through informational programming guidelines,⁴⁷ community needs and interests ascertainment requirements,⁴⁸ the fairness doctrine and children’s educational television guidelines.⁴⁹ Specific to questions of race, the FCC has also tried to promote “good” and diverse content by increasing minority ownership of stations through affirmative action. Finally, the FCC has regulated market structure at each stage of production, distribution and consumption. Examples regarding production include the now-defunct Prime Time Access Rules (PTAR)⁵⁰ and financial-syndication (“FinSyn”) rules. Examples regarding distribution include the various rules concerning station ownership that were altered in the recent media ownership deregulation. Examples regarding consumption include the V-chip requirement of the 1996 Telecommunications Act.

The point of this catalog of congressional and FCC interventions is not to defend each regulation on its merits. But they, nonetheless, show that our commitment against shaping broadcast content is far from categorical.

B. Redefining the Public Interest

The touchstone for governmental management of broadcast is the “public interest” standard. That standard has recently been explicated in an unusual way. At least in the context of ownership policy, the public interest has been functionally equated with the local news.

In June 2003, a divided FCC lifted numerous media ownership restrictions in the name of the “public interest.”⁵¹

The FCC began by deconstructing “public interest”⁵² into its three constituent components: diversity, competition and localism. Interesting was how the FCC decided to measure “viewpoint diversity”:

Although all content in visual and aural media have the potential to express viewpoints, we find that viewpoint diversity is *most easily measured* through news and public affairs programming. Not only is news programming *more easily measured* than other types of content containing viewpoints, but it relates most directly to the Commission’s core policy objective of facilitating robust democratic discourse in the media. Accordingly, we have sought in this proceeding to measure how certain ownership structures affect news output.⁵³

Although the FCC was willing to credit news magazine programs, such as 60 Minutes and Dateline,⁵⁴ it refused to consider other programming formats. The Fox Network specifically invited the FCC to credit entertainment programming that addressed or challenged stereotypes, such as “Will & Grace,” “Ellen,” “The Cosby Show” and “All in the Family.”⁵⁵ The FCC declined.

Local news also played a starring role in one other component of the public interest: “localism.” Localism has never been consistently defined in the Commission’s analysis. In its order, the FCC did not clarify the term, but it did establish a methodology for measuring localism. It focused again on “programming responsive to local needs and interests, and local news quantity and quality.”⁵⁶ For two out of the three fundamental components of the “public interest”—diversity and localism—the FCC highlighted the significance of local news production.⁵⁷

In sum, “local news” has become the critical component of the FCC’s “public interest” analysis, at least in the media ownership context. The supervening norm that the FCC must pursue, the “public interest,” has now become practically identical to the number of hours of local news a station broadcasts.⁵⁸ But what in fact is on the local news?

C. Local News

1. *Crime and Punishment*—Violent crime. Crime occupies a heavy share of broadcast news programming. The PEJ’s annual study of local news programming consistently finds that local newscasts spend about a quarter of their time on crime stories.⁵⁹

Violent crime news stories frequently involve racial minorities, especially African Americans. One reason is that racial minorities are arrested for violent crimes more

frequently on a per capita basis than Whites.⁶⁰ Given our social cognition review, we can predict what watching local news might do to us. If subliminal flashes of Black male faces can raise our frustration, as shown by the Computer Crash study, would it be surprising that consciously received messages couched in violent visual context have impact, too? In fact, we have already seen in the Mug shot study, described in the Introduction, that even ephemeral exposure to race can alter our opinions about crime and punishment.

In the Mug shot study, Gilliam and Iyengar also used survey data to corroborate their experimental findings. In a large survey conducted at approximately the same time and location as the experiments, participants answered questions about their political opinions and media consumption habits. Three statistically significant correlations emerged: greater viewing of local news led to greater support for punitive remedies, more old-fashioned racism and more “new racism.”⁶¹ Such results should give us all pause. On the basis of this evidence alone, one could challenge the FCC’s unmindful adoration of local news as furthering the public interest—at least as local news is currently constituted.

2. Trojan Horse Viruses—I now make explicit what I have so far left implicit: local news programs, dense with images of racial minorities committing violent crimes in one’s own community, can be analogized to Trojan Horse viruses. A type of computer virus, a Trojan Horse installs itself on a user’s computer without her awareness. That small program then runs in the background, without the user’s knowledge, and silently waits to take action—whether by corrupting files, e-mailing pornographic spam or launching a “denial of service” attack—which the user, if conscious of it, would disavow.

Typically, a Trojan Horse comes attached secretly to a program or information we actively seek. For instance, we might download a new program for a trial run, and embedded inside may be a Trojan Horse that installs itself without our knowledge. Or, we might browse some website in search of information, and a small JavaScript bug may be embedded in the page we view. Here is the translation to the news context: we turn on the television in search of local news, and with that information comes a Trojan Horse that alters our racial schemas. The images we see are more powerful than mere words. As local news, they speak of threats nearby, not in some abstract, distant land. The stories are not fiction but a brutal reality. They come from the most popular and trusted source.

How do we know violent crime stories can, like Trojan Horses, exacerbate implicit bias? The Mug shot study and other work by political scientists using the newscast paradigm are suggestive. Further evidence comes from studies that demonstrate media primings of racial schemas. For example, we now know that exposure to violent rap music can increase implicit bias against African Americans⁶² and that playing the video game *Doom* can increase one's implicit self-concept of aggressiveness⁶³—all the while having no statistically significant impact on one's explicit, self-reported views. Still further evidence comes indirectly from research Nilanjana Dasgupta calls the “third wave” of implicit bias research, which examines the malleability of implicit bias. This research demonstrates that implicit bias can be exacerbated or mitigated by the information environments we inhabit.

Positive Role Models. Consider, for example, how exposure to positive exemplars of subordinated categories can decrease implicit bias. Nilanjana Dasgupta and Anthony Greenwald found that implicit attitudes could be changed without conscious effort simply by exposing people to particular types of content.⁶⁴ Participants were first given a “general knowledge” questionnaire. For the pro-Black condition group, the researchers used names and images of positive Black exemplars, such as Martin Luther King, Jr., and negative white exemplars, such as Jeffrey Dahmer. For the pro-White condition group, the valences of the images were reversed (Louis Farrakhan and John F. Kennedy, for example). Finally, for a control group, the questionnaire required correct identification of insects and flowers. After finishing the questionnaire, participants took an IAT and then completed a survey of racial bias.

The type of questionnaire had no impact on participants' explicit bias as measured by the self-reports. By contrast, the researchers found that the questionnaires had a surprisingly significant effect on implicit bias as measured by the IAT: those participants who had experienced the pro-Black condition reduced their implicit bias by more than half.⁶⁵ These results persisted for over twenty-four hours, as measured by a follow-up test.

Mental Imagery. A study by Irene Blair, Jennifer Ma and Alison Lenton focusing on counterstereotypic mental imagery is also telling. Motivated by evidence that visualization shares many characteristics with real experiences and thus can influence learning and behavior, they tested whether mental imagery could moderate implicit stereotypes.⁶⁶ Individuals instructed to visualize a counterstereotypic image would, in effect, be priming themselves in a way that would make counterstereotypic actions easier.

In the first experiment,⁶⁷ one group of participants was instructed to spend a few minutes imagining a strong woman, her attributes and abilities, and the hobbies she enjoys; another group was asked to imagine a Caribbean vacation.⁶⁸ Those who imagined the strong woman registered a significantly lower level of implicit stereotype in the IAT.⁶⁹

Coed Education. For those who are rightly skeptical about external validity—translating laboratory findings into real-world results—there is now some evidence that exposure to counterstereotypic exemplars decreases implicit bias in real-world situations. Nilanjana Dasgupta and Shaki Asgari performed a longitudinal study of female students before and after their first year of college.⁷⁰ Half the participants were recruited from a coeducational college, whereas the other half attended a women's college. Both groups took tests measuring explicit and implicit bias and completed campus experience questionnaires. The two groups started with statistically indistinguishable levels of *implicit* bias: both groups viewed women stereotypically, as more “supportive” than “agentic.” What happened after one year of college? On average, the implicit bias of those who had attended women's colleges disappeared. By contrast, the implicit bias of those who had attended coeducational colleges increased.⁷¹ Providing further evidence of dissociation, the groups' *explicit* self-reported endorsements of stereotypes did not change regardless of the college attended or time of measurement.

But what was the mediating variable? The only statistically significant correlation was to “exposure of female faculty” (and not, for example, number of courses taken with gender-related content, say in the women's studies department).⁷²

To summarize: Local news provides data that we use consciously in a rational analysis to produce informed opinions on, say, criminal punishment. But these newscasts also activate and strengthen linkages among certain racial categories, violent crime and the fear and loathing such crime invokes. In this sense, the local news functions precisely like a Trojan Horse virus. We invite it into our homes, our dens, in through the gates of our minds, and accept it at face value, as an accurate representation of newsworthy events. But something lurks within those newscasts that programs our racial schemas in ways we cannot notice but can, through scientific measurements, detect. And the viruses they harbor deliver a payload with consequences, affecting how we vote for “three strikes and you're out” laws, how awkwardly we interact with folks and even how quickly we pull the trigger.

A predictable objection is that the violent content, including crime committed by racial minorities, is a feature, not a bug. In other words, the data presented are not skewed and instead faithfully reflect a reality that the local news did not create. I have three responses to this “accuracy objection”: the data are likely not fairly presented; our memories and abilities to see patterns are selective and we interpret the data in self-serving ways.

D. Virus Protection

The social cognition studies that I have presented are not without their ambiguity, confusion and contradiction. They often raise as many questions as they answer. That said, a prima facie case has been made about the existence of implicit bias, its dissociation from explicit self-reports of bias, its measurability through reaction time designs and its impact on behavior. Although weaker, a prima facie case has also been made that a nontrivial stream of negative meanings is provided through the local news. These images not only strengthen long-term, well-learned associations between certain racial categories and certain racial meanings, but also activate specific responses or states. Social scientists will, I believe, further confirm these claims over the next decade. What then?

1. Recoding the Public Interest —First, we should reject the strong linkage the FCC made between the public interest and the number of hours of local news aired.

Second, the FCC should reconsider its decision to limit viewpoint diversity analysis to news and public affairs programming. Recall that various stakeholders, such as the Fox Network, wanted counterstereotypic entertainment programming to count in the viewpoint diversity calculus. The FCC declined. But if we care about implicit bias, counting only local news in the public interest analysis is perverse. In the malleability studies, for instance, many of the positive minority images that decreased implicit bias were entertainment celebrities. In other words, the best scientific evidence is that repeated exposure to Bill Cosby, no doubt in part because he is also “Dr. Huxtable,” decreases our implicit bias. Of course, there may be substantial costs to opening this diversity can of worms. But at the very least, the FCC should be forced to make a public accounting.

Third, further study through a Notice of Inquiry is warranted. Relevant lines of inquiry include:

- How should the “public interest” be defined?
- What are the costs and benefits of using “local news” to define the “public interest?”

- How might the quality of "local news" be measured?
- Are there broadcast practices or guidelines that might mitigate the implicit bias increased by viewing violent crime on local news?
- How might the quantity and quality of public affairs programming be measured?
- How might viewpoint diversity in entertainment programming be measured?

Fourth, the FCC in conjunction with media elites should publicly explore how the news exacerbates implicit bias, with an eye toward voluntary development and adoption of "best journalistic practices." Examples include scrupulously checking against disparate treatment of minority suspects in crime stories, minimizing unnecessary racial mapping and avoiding the worst inflammatory images. These best practices could extend beyond crime stories, to seek more diverse representation of "experts" and to emphasize the value of positive stories of racial minorities promoting safety and harmony within the local community. The FCC could catalyze this conversation through various informal bully pulpit and jawboning techniques. In addition, the FCC could institute greater self-monitoring and self-reporting requirements about the percentage of news minutes focusing on violent crime during some randomly sampled time periods. Such data could bring social and market pressure to bear on how stations discharge their public interest responsibilities.

In the vast electronic ocean of vicarious experiences swirling around us, who knows what total impact crime stories in local news have in comparison to representations of minorities in music videos, video games, entertainment programming and motion pictures? However, regardless of the relative significance of news, we should not allow a poor articulation of the "public interest" standard to go unchallenged simply because the problems of negative stereotypes and prejudice against racial minorities are so enormous. Finally, although the focus has been on the local news, this public discussion would shine a new light on racial meanings generated and delivered throughout all media. Maybe nothing will be done about it, in the name of profit and freedom of expression. But at the least, we as a society will better understand what we have chosen to do, through act and omission.

2. Thought Experiments—I now take a more radical turn, by engaging in two thought experiments. At the outset, I concede that the scientific case for the efficacy of these proposals may not be strong, depending on where the burden of proof is set. Nonetheless, considering more provocative measures may be illuminating.

So I return to the metaphor of local news as Trojan Horse viruses. In these terms, the prior recommendation to recode the "public interest" standard was a call to stop encouraging the production of programs that turned out to be Trojan Horses. But in the realm of computer security, more aggressive antivirus strategies are available: build a firewall to decrease the exposure, and push out disinfectants to treat the infection.

(a) Firewall: Capping Crime Stories—Questioning governmental encouragement of the Trojan Horses of race is one thing. But might we go a step further and affirmatively build a firewall against them? We ban obscenity outright. It would, however, be inconsistent with any reasonable interpretation of the First Amendment to try to ban local news, crime stories, or even particular ways in which stories are conveyed.⁷³

(b) Disinfection: Public Service Announcements—The other antivirus strategy is disinfection, to push out antidotes to the Trojan Horses that we admit.

In more familiar doctrinal terms, disinfection is counter speech. And if the firewall approach felt uncomfortably like censorship, disinfection avoids such associations. To be clear, disinfection does not necessarily take the form of ponderous documentaries about race. Although such shows may decrease explicit bias, they may not be best suited to tweak implicit bias. As John Bargh said, we must "fight automatic fire with automatic fire."⁷⁴

The malleability studies suggest that positive images of racial minorities alter the cache of racial meanings as well as make positive exemplars more accessible. So, consider numerous variations on a strategy of debiasing public service announcements (d-PSAs).⁷⁵ For purposes of argument, suppose that social cognitionists confirm that d-PSAs decrease implicit bias in substantial amounts. Even if the effect is temporary, viewers would be debiased daily, given the amount of television that Americans watch. How might we utilize d-PSAs? The strategy could differ along the following variables: state action (mandatory/voluntary); notice (subliminal/supraliminal) and consent (opt-out/opt-in).

First, consider state action. On the one hand, the FCC could require broadcast licensees to show some quota of d-PSAs. This would be state action that burdened licensee speech. That is not to say that stations would challenge such a regulation or that they would succeed in court. For example, broadcast stations have never challenged the current children's educational television programming rules, which strongly encourage broadcasters to show three hours of such programming per week.⁷⁶

On the other hand, a licensee may voluntarily broadcast these d-PSAs, as an exercise of its editorial judgment in discharging its “public interest” responsibilities.

Second, consider notice. On the one hand, experiments such as the Computer Crash study suggest that d-PSAs could work even if they are subliminal (compare again with fluoridation or an antivirus software package that automatically updates itself weekly, without user intervention). They would also have the attractive characteristic of not taking up advertising time. Of course, subliminal programming would never be tolerated by the American people.⁷⁷

On the other hand, these announcements could be supraliminal, similar to current PSAs. What might be different is that these announcements could last just a few seconds, more like scenes from a fast-cut music video than a lugubrious documentary.

Finally, consider how the audience could manifest its assent to receiving these d-PSAs. Suppose we include an implicit bias option in the next generation V-chip, which is embedded in our television sets. Then, only those viewers who consented to d-PSAs would be exposed to them. Those who thought this was mind control could avoid them entirely. Choice could be exercised through an “opt-out” or an “opt-in” regime. In an “opt-out” regime, if the viewer does nothing, she will be exposed to these announcements; by contrast, in an “opt-in” regime, the viewer must take some affirmative action to program her V-chip to gain access to these announcements.

Table 1. Disinfecting PSA Options

Option	State Action (mandatory/voluntary)	Notice (subliminal/supraliminal)	Consent (opt-out/opt-in)
1	mandatory	subliminal	opt-out
2	mandatory	subliminal	opt-in
3	mandatory	supraliminal	opt-out
4	mandatory	supraliminal	opt-in
5	voluntary	subliminal	opt-out
6	voluntary	subliminal	opt-in
7	voluntary	supraliminal	opt-out
8	voluntary	supraliminal	opt-in

Table 1 lists the possible disinfection strategies. They range from most to least disconcerting. Option 1, which is mandatory on the licensee, subliminal, and requires opt-out by the viewer, seems Orwellian—although a truly totalitarian state would not tolerate opt-out, not even by turning off the “two-way screen.” Thankfully, one

could not imagine such a strategy ever being adopted politically or being tolerated constitutionally in the United States. In sharp contrast, Option 8, a voluntary decision by licensees to broadcast disinfection, which is supraliminal and thereby provides clear notice, and requires an affirmative opt-in for individual viewers to see d-PSAs in the first place, sounds both politically feasible and constitutional. After all, how different is this from current PSAs against smoking or violence? Compare also the decision to produce and broadcast a Sesame Street that features positively valenced characters of all races (and species) enjoying integrated neighborhoods that do not reflect any real city in America. Is this not one of the reasons why we opt in to these programs on behalf of our children?

My goal here is not to analyze each option along the metrics of political feasibility, scientific soundness and constitutional validity. Rather, I have two more modest goals. The first is simply to point out the feasibility of a disinfection strategy using the same vector that caused infection in the first place. Options 7 and 8 would be the most realistic places to start. The second goal is to suggest how various strategies could be implemented in ways that respect individual choice enough to avoid constitutional problems.

3. The Autonomy Objection—For some, everything I have said is deeply disturbing. It is an invitation to state manipulation of its citizenry. It is a disrespectful caricature of the human mind, which is not a mere computer vulnerable to viruses. It is a direct affront to the individual's autonomy. This is the "autonomy objection." It is strongly felt. It is understandable. It is untenable.

This objection incorrectly supposes that, prior to state intervention (to build a firewall or to broadcast disinfection), we existed in some virginal state without coercion or manipulation. But I have demonstrated that Trojan Horses are being broadcast right now, everywhere, in late-breaking, saturation coverage. The Trojan Horses have been beaming into our brains since we were old enough to be parked in front of a television.⁷⁸ Private actors have always been engaging us, sometimes unknowingly, sometimes shrewdly, on the implicit level. My recommendations are only to counter implicit fire with implicit fire.

The arc of this article has been long, and given its multiple goals, it has been more evocative than comprehensive. A primary goal is to make the case for using social cognition in critical race studies. In the 1980s and 1990s, debates raged about the best or most appropriate methodology with which to engage in "criticism"

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of law and legal institutions on matters of racial equality. Countless articles explored, for example, whether narrative defended through postmodernism would be the best or only way. Countless articles explored whether minority scholars did or should have preferred standing to make these inquiries. We have learned from those debates, and the time has come to move on and add things new. This Article has been an attempt to demonstrate how and why that should be done.

The benefits will not flow only in one direction, from science into law. Instead, legal analysts who are subject to different craft norms can apply and extend the science into the policy realm in ways that social cognitionists cannot. Less instrumentally, as outsiders, we can identify scientific blind spots. The upshot is a call for a new school of thought called “behavioral realism,” in which legal analysts, social cognitionists (with emphases in implicit bias and stereotype threat literatures), evolutionary psychologists, neurobiologists, computer scientists, political scientists and behavioral (law and) economists cooperate to deepen our understanding of human behavior generally and racial mechanics specifically, with an eye toward practical solutions. The next generation of critical race scholars should be at the forefront of this endeavor and not in some rearguard action. Sitting on the back of this bus is not an option.

A more modest goal of this Article is to bridge divides within the law itself. As in *Cyber-race*,⁷⁹ I am trying to cajole legal scholars working in cyberlaw and communications to engage with race as well as other social categories of subordination. At the same time, I am trying to persuade race scholars to select unconventional points of entry by adopting unorthodox subjects, metaphors and analytic tools. The cross-fertilization should help us think things anew. The crucible for this Article has been the FCC’s recent mass media ownership deregulation—specifically the Commission’s fixation on local news. Local news explicitly furthers the public interest, but its fetish for violent crime makes it a Trojan Horse, a “thing that undermines from within.”⁸⁰

I have made a solid case for recoding the FCC’s definition of the public interest to decrease its reliance on local news. I recognize that counting hours of local news is simple, but something can be both simple and wrong.

I close with a caution and a call. The caution is that the remarkable science of implicit bias could draw all of our interest and attention. But implicit bias is not the only source of pervasive and persistent inequalities among social groups. Explicit bias still thrives in many circles. Durable inequality may also be maintained by structural arrangements that are no longer tightly connected to bias, implicit or explicit. Implicit bias should not circumscribe the content of our concerns.

Mahzarin Banaji, a leading scientist in the field of implicit bias, has suggested that “one measure of the evolution of a society may indeed be the degree of separation between conscious and unconscious attitudes—that is, the degree to which primitive implicit evaluations that disfavor certain social groups or outgroups are explicitly corrected at the conscious level at which control is possible.”⁸¹ Although my response to the autonomy objection was framed at the individual level, Banaji’s insight restates that response at the level of entire societies. Maybe this alignment between the explicit and implicit cannot be reached, at least not perfectly. Evolutionary psychology will surely have its say. Still, achieving this convergence is our challenge. It is our call.

Endnotes

[†] Excerpt from the full article “Trojan Horses of Race,” 118 HARV. L. REV. 1489 (2005).

¹ 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, 238-39 (1996) (describing experimental procedure).

² See Bargh et al., *supra* note 1, at 239. Hostility measures were scored on a scale of 0 to 10, with 10 being most hostile. The blind coders evaluated the White-primed participants at a hostility of $M = 2.13$; by contrast, they coded the Black-primed participants at $M = 2.79$. The difference was statistically significant at $p < 0.05$. *Id.* Readers who see this effect as small might consider that each face appeared on the screen for only about one-fortieth of a second. *Id.* at 238.

³ Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 563-67 (2000) (describing experimental procedure). Participants answered a preliminary questionnaire, which solicited basic demographic, political affiliation, and media habits data, prior to watching the newscasts and completed a detailed questionnaire gauging crime-related and racial attitudes after the newscast. *Id.* at 564. The crime-related attitudes that were measured were fear of crime, dispositional explanations for crime, and support for punitive criminal justice. *Id.* at 565. Racial attitudes were measured on both “old fashioned” and “new” racism scales. See *id.* at 566. The 2331 participants were residents of the Los Angeles metropolitan area. *Id.* at 564. Reflecting the demographics of the area, 53% of the participants were White, 22% Black, 10% Asian, and 8% Latino. Fifty-two percent were women, 49% had graduated from college, 45% were Democrats, and 25% were Republicans. *Id.*

⁴ See Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80-81 (1999).

⁵ Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315-17 (2002) (describing experimental setup).

⁶ See Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1138-46 (2000) (introducing the “racial mechanics” model).

⁷ In the Matter of 2002 Biennial Regulatory Review, 18 F.C.C.R. 13,620 (2003) [hereinafter *Media Ownership Order*], *aff'd in part and remanded*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

⁸ SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 98 (2d ed. 1991).

⁹ See Fiske & Taylor, *supra* note 8, at 18-19 (noting differences between interpreting people and objects, which include the facts that people perceive back, can alter their behavior because they are being observed, and are often more complicated than objects).

¹⁰ There is evidence that we usually acquire social categories in this order: gender, age, then race. See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 376 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

¹¹ See, e.g., Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1759-64 (2001); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 10-39 (1994). Much of the legal analysis in this vein draws from the sociological work of Michael Omi and Howard Winant. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994).

¹² To be careful, we should distinguish what we mean by “automatic.” Fiske and Taylor describe five different meanings or criteria associated with the term: that the operation of some schema is unintentional (does not require any explicit goal); involuntary (always occurs in the presence of relevant environmental triggers); effortless (does not consume limited cognitive resources or processing capacity); autonomous (does not need to be controlled once the process has been initiated); and outside awareness (occurs without consciousness

of initiation or of the process itself). FISKE & TAYLOR, *supra* note 8, at 271. I use the term “automatic” principally to emphasize that it is unintentional and outside our awareness. Whether these processes are truly “involuntary” will be discussed below.

¹³ There is clear evidence of such impression management. For example, in the well-known “bogus pipeline” studies, Edward Jones and Harold Sigall convinced participants that they were attached to a machine that would measure their true attitudes regardless of what they in fact said. The participants did not know that the machine was bogus. Their explicit self-reports changed significantly when they were hooked up to this bogus machine. See Edward E. Jones & Harold Sigall, *The Bogus Pipeline: A New Paradigm for Measuring Affect and Attitude*, 76 PSYCHOL. BULL. 349 (1971); see also Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCHOL. 1013, 1014 (1995) (discussing the possibility of a bona fide pipeline).

¹⁴ One of the attractive features of the IAT is that it generally produces much larger effects than did prior priming methodologies. See Jens B. Asendorpf et al., *Double Dissociation Between Implicit and Explicit Personality Self-Concept: The Case of Shy Behavior*, 83 J. PERSONALITY & SOC. PSYCHOL. 380, 382 (2002). For the most current recommendations on how to conduct and read IATs, see Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003). Readers are invited to take the test themselves online at the Project Implicit website. See *Project Implicit, IAT Home*, at <http://implicit.harvard.edu/implicit/demo> (last visited Feb. 13, 2005). For a list of other implicit bias measurement tools, see Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 260-61 (2002).

¹⁵ Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 Soc. JUST. RES. 143, 146 (2004); see also Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (noting the same research trends). These results are consistent with an older set of social psychological theories called Social Identity Theory (SIT).

¹⁶ Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. Soc. ISSUES 743, 747-48 (2001).

¹⁷ On a 5-point scale, with 5 being the most hireable, M (agentic male) = 3.52 versus M (agentic female) = 2.84 ($p < 0.05$). See *id.* at 753. On the hireability index, there was no disparate treatment of agentic men and agentic women in the masculine job condition. Also, across both job conditions, the androgynous men and women fared equally well. To repeat, disparate treatment was seen when the job required the candidate to be “supportive,” and agentic men were not penalized but agentic women were. See *id.*

¹⁸ *Id.* ($r = -0.49, p < 0.001$).

¹⁹ *Id.* at 753-54.

²⁰ *Id.* at 751-52.

²¹ The authors recognized that the behavior link had been demonstrated for other implicit bias measures. See Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 436 (2001); see also Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCHOL. 1013, 1018 (1995) (showing correlation between “facilitation” scores and subjective ratings of Black experimenter regarding friendliness and interest of participant).

²² See Carl O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109 (1974).

²³ See B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 183-86 (2001).

24 See *supra* pp. 42-43.

25 This finding was statistically significant at $p < 0.02$. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1319 (2002). However, when outlier target images were put back into the dataset, the significance disappeared. The researchers removed certain outlier images because they produced so many errors, suggesting that something in the background image or person's clothing produced misleading impressions. *Id.*

26 See, e.g., Reshma M. Saujani, "The *Implicit Association Test*": A Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395, 413-15 (2003) (suggesting IAT scores as an additional evidentiary factor for measuring racial intent under the rule of *Village of Arlington Heights v. Metropolitan History Development Corp.*, 429 U.S. 252, 267-68 (1977)).

27 See, e.g., *id.* at 419-20 (discussing the use of IAT in jury selection process). Consider also what SJT might have to say about the significance of minority representation on juries. The Supreme Court, in *Castaneda v. Partida*, 430 U.S. 482 (1977), cautioned that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Id.* at 499 (addressing discrimination against Mexican Americans in grand jury selection); see also *id.* at 503 (Marshall, J., concurring) (pointing to social scientists' agreement that "members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority").

28 See, e.g., Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 677 (2004) (finding no disparate sentencing on the basis of race in Florida data set, but finding that within each racial category, White or Black, those individuals with more afrocentric facial features received harsher sentences); see also *United States v. Clary*, 34 F.3d 709, 710 (8th Cir. 1994) (rejecting the district court's ruling that the crack cocaine statute and U.S. Sentencing Guidelines violated African-American defendants' equal protection rights). The Eighth Circuit specifically rejected the lower court's reliance on "unconscious racism" and disputed the idea that stereotypical media representations of crack users influenced Congress. *Id.* at 713. Legal interest in the findings of social cognitionists may lead to a reopening of the issue. Cf. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1553 (2004) (finding that capital defense attorneys have implicit bias scores similar to the rest of the population).

29 See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164-65 (1995) (arguing that current Title VII jurisprudence does not adequately address unconscious bias); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 499 (2001) (arguing that disparate treatment inquiries in employment discrimination cases "should focus on causation, not conscious discrimination").

30 Obviously, this issue has been on the research agenda for critical race theory for a long time. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324-26 (1987).

31 See, e.g., Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1257-58 (1998) (discussing the relevance of social cognition and social identity theory to affirmative action policy).

32 See, e.g., Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. SOC. PSYCHOL. 335, 344 (2004) (finding correlations between close friendships with out-group minorities and lower implicit bias scores).

33 See, e.g., Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 766-72 (1995), (arguing against formal colorblindness and in favor of allowing counsel to address issues of race directly in order to counteract potential bias among jurors).

34 See, e.g., M. Saujani, "The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395, 414 (2003) (suggesting that legislators could be forced to take the IAT "on the stand"). Leading social cognitionists, such as Anthony Greenwald and Mahzarin Banaji, would resist such crude applications of the IAT.

35 See, e.g., Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 916 (1999) (persuasively calling for "the recognition of a privilege for unconscious-bias testing to encourage its use in equal employment opportunity efforts").

36 RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994).

37 Those uninterested in mass media policy or FCC regulation may be ready to stop reading. As explained earlier, the two Parts were written to be read in a modular fashion. However, I encourage readers to at least review the "malleability" studies in section II.C.2, *infra* pp. 56-59, so as to avoid an unnecessarily pessimistic view of the scientific research.

38 See 47 U.S.C. § 303 (2000).

39 See *id.* § 303(c).

40 See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390-92 (1969).

41 See *FCC v. Pacifica Found.*, 438 U.S. 729-30, 748-49 (1978) (citing the "uniquely pervasive presence" of broadcast, which is "uniquely accessible to children," as grounds for allowing the FCC to put a negative mark in a broadcast station's license file for broadcasting comedian George Carlin's indecent "Filthy Words" monologue).

42 See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243-44, 258 (1974) (striking down a Florida right-of-reply statute, as applied to a newspaper).

43 See, e.g., 18 U.S.C. § 1464 (2000) (criminalizing radio communication of "obscene, indecent, or profane" content); 47 C.F.R. § 73.3999(a) (2003) (prohibiting the broadcast of obscene material).

44 See, e.g., 18 U.S.C. § 1464; see also *Pacifica*, 438 U.S. at 748-51. In practice, the indecency ban has resulted in time channeling of potentially "indecent" speech to the safe harbor of late night. See 47 C.F.R. § 73.3999(b) ("No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent."); *Action for Children's Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995) (upholding time channeling as constitutional).

45 See *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076, 1101 (1984) [hereinafter *TV Deregulation Order*] (describing a 1973 order setting guidelines of sixteen minutes per hour for commercials). Although most of the commercialization guidelines were lifted in 1983, the Court of Appeals for the D.C. Circuit prevented the lifting of these caps in children's television. See *Action for Children's Television v. FCC*, 821 F.2d 741, 744, 750 (D.C. Cir. 1987).

46 See, e.g., *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 547-50 (D.C. Cir. 1969). See generally JERRY KANG, *COMMUNICATIONS LAW AND POLICY* 334-36 (2001) (providing background on these cases).

47 Until the broadcast deregulation of the early 1980s, broadcast stations were required to show at least 5% local programming, 5% informational programming (news and public affairs), or 10% total non-entertainment programming. See *The Revision of*

Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1078 (1984) (describing programming criteria established in 1976, before broadcast deregulation).

48 See *id.* at 1097 (describing then-existing ascertainment requirements).

49 Congress passed the Children's Television Act (CTA) of 1990. See Pub. L. No. 101-437, 104 Stat. 996 (codified as amended at 47 U.S.C. § § 303(a), 303(b), 394 (2000)). Some commentators suggest that two different public interest standards should be expressly recognized: one for adults, and another for children. See, e.g., Clay Calvert, *TOXIC TELEVISION, EDITORIAL DISCRETION, & THE PUBLIC INTEREST: A ROCKY MOUNTAIN LOW*, 21 HASTINGS COMM. & ENT. L.J. 163, 169 (1998).

50 See *In re Review of the Prime Time Access Rule*, 11 F.C.C.R. 546, 547 (1996) (describing rules that generally limited network affiliates in the top fifty markets from broadcasting more than three hours of network or off-network programming during the four prime-time hours). These rules were repealed in 1995. See generally JERRY KANG, *supra* note 46 at 432-33 (2001).

51 The vote was 3-2, along party lines. Media Ownership Order, *supra* note 7, at 13,620.

52 This term has never been very clear in meaning. See Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 606 (1998) (suggesting that no other area in communications has generated as much controversy).

53 *Id.* Media Ownership Order, *supra* note 7, at 13,631.

54 It is not clear that the FCC actually did count such programs in any systematic way in its structural analyses. It instead focused on the number of hours of local news, with some discussion of news quality as measured by industry awards and/or viewer ratings.

55 Media Ownership Order, *supra* note 7, at 13,631.

56 *Id.* (emphasis added).

57 The FCC recognized one final component of the "public interest": "competition." Nothing especially relevant to local news came up in this analysis. However, the FCC did clarify that it would measure "competition" not solely by looking at competition in advertising markets. The FCC said it would consider other metrics as well, such as measures of audience share. See *id.* at 13,639-40.

58 Beltway insiders and industry players may think me naive in taking the Commission at its word. Local news may have been a convenient cover to justify certain regulatory changes sought for other reasons. Or it might have been a largely dissatisfying political compromise that captures no single Commissioner's understanding of the "public interest." Of course, the same could be said of the written opinions of appellate courts. But official explanations carry weight, not only for judicial opinions but also FCC reports. Departing from or ignoring these explanations and reasons in subsequent actions would be grounds for reversal under the "arbitrary and capricious" review of the Administrative Procedure Act. See, e.g., *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1053-54 (7th Cir. 1992) (finding new FinSyn rules arbitrary partly because the Commission did not explain its deviation from its prior 1983 tentative decision).

59 Tom Rosenstiel et al., *Local TV News: What Works, What Flops, and Why*, COLUM. JOURNALISM REV., Jan.-Feb. 1999, at 65, available at [http:// archives.cjr.org/year/99/1/pej](http://archives.cjr.org/year/99/1/pej). The PEJ is an affiliate of the Columbia University Graduate School of Journalism.

60 See FBI, U.S. DEPT OF JUSTICE, CRIME IN THE UNITED STATES 2002: UNIFORM CRIME REPORTS 17 (2003) (reporting the racial breakdown of violent crime arrestees: 59.7% White, 38.0% Black, 2.3% other), available at <http://www.fbi.gov/ucr/O2cius.htm>. Whites constitute 75.1% of the population, while Blacks constitute 12.3% of the population. U.S. Census Bureau, *Race Alone or in Combination: 2000*, at <http://factfinder.census.gov/servlet/>

OTTable?_bm=y&-qr_name=DEC_2000_SF1_U&uscore:QTP5&-lang=en (last visited Feb. 13, 2005). For murder arrests during 2002, 47.7% were White and 50.0% were Black. FBI, *supra*, at 17. For similar statistics, see ROBERT ENTMAN & ANDREW ROKECKI, *THE BLACK IMAGE IN THE WHITE MIND* 49, 79 (2000); and See, e.g., Jon Hurwitz & Mark Peffley, *PUBLIC PERCEPTIONS OF RACE AND CRIME: THE ROLE OF RACIAL STEREOTYPES*, 41 AM J. POL. SCI. 375, 376 (1997) (summarizing eclectic literature demonstrating that Whites “respond more punitively to blacks than to those of their own race”). This disproportionality in arrest rates is likely exacerbated, however, by unfavorable portrayals of Black criminals by local news media and concentration of news stories featuring blacks in violent crime stories. See *id.* (citing KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY* (1992)); and Robert M. Entman, *Blacks in the News: Television, Modern Racism and Cultural Change*, 69 JOURNALISM Q. 341 (1992) (“These findings strongly suggest that the media contribution is one of both linking blacks to the issue of crime and, moreover, rendering stereotypes of blacks more negative.”).

⁶¹ See Gilliam and Iyengar, *supra* note 3, at 571 tbl.5 (reporting that at the $p < 0.01$ level, there was a 4% increase for punitive remedies, a 4% increase in old-fashioned racism, and a 7% increase in “new racism”). Gilliam and Iyengar characterize “new racism” as “symbolic, subtle, covert, hidden, or underground.” *Id.* at 566 (internal quotation marks omitted); see also JAMES M. AVERY & MARK PEFFLEY, *RACE MATTERS: THE IMPACT OF NEWS COVERAGE OF WELFARE REFORM ON PUBLIC OPINION*, in *RACE AND THE POLITICS OF WELFARE REFORM* 131, 136 (Sanford F. Schram et al. eds., 2003) (internal citations omitted) (“Experimental evidence suggests that even a brief visual image of a black male in a typical nightly news story on crime is powerful and familiar enough to activate viewers’ negative stereotypes of blacks, producing racially biased evaluations of black criminal suspects. In their experimental studies manipulating the skin color of a male perpetrator in a local news broadcast, Gilliam and associates found that when the perpetrator was African American, more subjects endorsed punitive crime policies and negative racial attitudes after watching the news broadcast.”).

⁶² Laurie Rudman and Matthew Lee found that a thirteen-minute audio-only exposure to violent, misogynistic rap music increased the implicit racial bias of participants, as measured by the IAT. See Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 137-38 & tbl.1 (2002). Those participants in the “prime” condition listened to rap music that portrayed African Americans as violent and sexist. *Id.* at 136 (providing lyric samples). Those in the “control” group listened to contemporary pop tunes. *Id.* Then, the participants took a stereotype IAT, categorizing Black versus White names (for example, Jamal versus Hank) and negative versus positive words (for example, hostile versus calm). See *id.* at 136-37. Primed subjects generated higher IAT scores. See *id.* at 137 (reporting scores of $M = +327$ ms for primed subjects versus $M = +107$ ms for control subjects at the $p < 0.001$ level).

Not surprisingly, the rap music prime also displayed increased measures of explicit bias on a self-reported stereotype endorsement scale. *Id.* at 138 tbl.1. However, the only statistically significant increase was in participants identified as “high prejudice” according to the MRS. See *id.* This evidence of priming and dissociation indicates that “low prejudice” people can sincerely claim that rap music does not influence their explicit agreement with racial stereotypes; nevertheless, like a Trojan Horse, the audio input will at least temporarily increase their implicit bias. See *id.* at 145 (“[E]ven low prejudiced people are unlikely to recognize the power of the situation and implicit stereotypes when they make interpretative judgments about others.” (citation omitted)).

⁶³ Eric Uhlmann and Jane Swanson examined how playing violent video games might alter one’s self-concept of aggressiveness. See generally Eric Uhlmann & Jane Swanson, *Exposure to Violent Video Games Increases Automatic Aggressiveness*, 27 J. ADOLESCENCE 41 (2004). One hundred and twenty-one psychology students participated in the experiment, in which one group played the violent first-person shooter video game Doom for ten minutes and another group played Mahjongg; Clicks, an absorbing puzzle game. *Id.* at 43. Participants then took an IAT measuring the implicit connections between Self and Other and Aggressive

and Peaceful. *Id.* at 44. Finally, participants answered explicit self-reports about their own aggressiveness. *Id.* Participants who played Doom implicitly associated themselves more with the concept of aggressiveness than did those who played Mahjongg: Clicks. *See id.* at 46 (reporting that at the $p = 0.036$ level, “participants in the Doom condition were more likely to automatically associate themselves with aggression ($M = -130$ ms, $s.d. = 153$ ms) than participants in the Mahjongg condition ($M = -201$ ms, $s.d. = 204$ ms), a difference that was statistically significant”). Although women had implicit self-concepts that were more peaceful than men ($p = 0.023$), there was no interaction between participant gender and game condition. *See id.* Moreover, Doom had no impact on explicit self-reports. *See id.* at 47. Collectively, this and the music study discussed above, see *supra* note 62, suggest that the electronic media we encounter can activate certain schemas and at least temporarily increase certain implicit associations.

64 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. PSYCH. 800, 807 (2001).

65 The net decrease in latency came from faster reaction times for the “Black + pleasant” and the “White + unpleasant” combinations in the IAT. Interestingly, the latencies for the “White + pleasant” and the “Black + unpleasant” combinations did not change across the various exemplar conditions. *See id.*

66 Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 828-29 (2001).

67 Researchers selected forty-two undergraduates—seventeen male and twenty-five female—as participants. *See id.* at 830.

68 *See id.*

69 *See id.* at 831. For the neutral imagery group, the reaction time difference between the schema-consistent and schema-inconsistent blocks was ninety-five milliseconds. For the counterstereotypic imagery group, the difference was twenty-four milliseconds, which reached statistical significance at $p < 0.05$. *See id.* at 831 tbl.1.

70 *See generally* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 647 (2004).

71 The IAT effect for those attending a women’s college started at 31 ms and went down to -5 ms. By contrast, the IAT effect for those attending a coed college started at 74 ms and went up to 128 ms. *See id.* at 651.

72 *Id.* ($p = 0.004$). Initially, the number of math and science courses taken also seemed to produce a significant effect. However, the researchers determined that this was caused by the fact that math and science courses at coeducational colleges were disproportionately taught by male faculty. Controlling for the effect of number of female faculty, the interaction between math-science courses and implicit bias lost significance. *See id.* at 652-53.

73 Voluntary decisions not to mention race unless relevant to the story are another matter, and may reflect good journalistic judgment. Although one may be able to do this in text, since names may not guarantee racial mapping, one cannot so easily do this with images. *See Kang, supra* note 6, at 1156 (discussing different techniques of racial mapping as a function of text, voice, and video).

74 *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1254 (2002) (quoting John A. Bargh, Presentation at the UCLA Department of Psychology (Jan. 25, 2002)) (internal quotation marks omitted).

75 A PSA is any announcement (including network) for which no charge is made and which promotes programs, activities, or services of federal, state, or local governments (e.g., recruiting, sale of bonds, etc.) or the programs, activities or services of nonprofit organizations (e.g., United Way, Red Cross blood donations, etc.) and other announcements regarded as

erving community interests, excluding time signals, routine weather announcements, and promotional announcements.

GEORGE DESSART, PUBLIC-SERVICE ANNOUNCEMENT, IN 3 ENCYCLOPEDIA OF TELEVISION 1849 (Horace Newcomb ed., 2d ed. 2004). Stations are not required to broadcast PSAs. However, a station's choice to do so provides some evidence of its discharging its "public interest" requirements.

⁷⁶ See *In the Matter of Policies and Rules Concerning Children's Television Programming*, 11 F.C.C.R. 10,660, 10,718-21 (1996) (discussing processing guidelines).

⁷⁷ There are no federal or state statutes directly banning subliminal messages or advertisements. See Scot Silverglate, Comment, *Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?*, 44 U. Miami L. Rev. 1243, 1266 (1990). At the federal level, the FCC has announced publicly that it believes subliminals are against the public interest, but the Commission has never issued regulations or a more formal policy statement. See Harry Schiller, Note, *First Amendment Dialogue and Subliminal Messages*, 11 N.Y.U. REV. L. & SOC. CHANGE 331, 359 (1983). With respect to subliminal advertisements, the Lanham Act's ban on unfair trade practices may apply, although there have been no examples of such litigation. Nicole Grattan Pearson, Note, *Subliminal Speech: Is it Worthy of First Amendment Protection?*, 4 S. CAL. INTERDISC. L.J. 775, 783-84 (1995). Also, it is possible that the FTC could invoke its general enforcement authority against unfair and deceptive practices, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives has issued express regulations against subliminal advertisements for products within its jurisdiction. See Silverglate, *supra* at 1268-69 (1990). Finally, the National Association of Broadcasters and the major television networks are officially on record against subliminals. Pearson, *supra*, at 783; Schiller, *supra*, at 354.

⁷⁸ See GEORGE GERBNER ET AL., GROWING UP WITH TELEVISION: THE CULTIVATION PERSPECTIVE, IN MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 17, 17-37 (Jennings Bryant & Dolf Zillman eds., 1994) (describing how television cultivates and socializes all of us, with focus on the authors' "Cultural Indicators" project); see also *id.* at 29-30 (demonstrating that heavy exposure to television increases the tendency to view the real world as violent, mean, and dangerous). Gerbner's research, though, has been controversial. See Barrie Gunter, *The Question of Media Violence*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH, *supra*, at 163, 184-86.

⁷⁹ See Kang, *supra* note 6, at 1207; see also Jerry Kang, *E-racing Elections*, 34 Loy. L.A. L. REV. 1115 (2001) (exploring the relationship between e-voting and race).

⁸⁰ 18 THE OXFORD ENGLISH DICTIONARY 574 (2d ed. 1989) ("Trojan horse: according to epic tradition, the hollow wooden horse in which Greeks were concealed to enter Troy; fig. a person, device, etc., insinuated to bring about an enemy's downfall; a person or thing that undermines from within. ...").

⁸¹ Mahzarin R. Banaji, *The Opposite of a Great Truth Is Also True: Homage to Koan #7*, in PERSPECTIVISM IN SOCIAL PSYCHOLOGY: THE YIN AND YANG OF SCIENTIFIC PROGRESS 127, 134 (John T. Jost et al. eds., 2003).