

STATISTICAL INEQUALITY AND INTENTIONAL (NOT IMPLICIT) DISCRIMINATION

MICHAEL SELMI*

I

INTRODUCTION

This equality business has proven difficult. Since the passage of the Civil Rights Acts in the 1960s, our nation has made undeniable progress toward racial equality, but it is equally undeniable that this progress has been more limited than what civil rights advocates had envisioned. Schools remain deeply segregated by race, with large achievement gaps persisting.¹ Segregation also remains the predominant motif in housing—so much so that the push for integrated housing has largely been lost.² In the workplace, African-American males continue to have an unemployment rate twice that of white males, and this has been true for decades and at every educational level.³ Relatedly, there is a substantial wage gap again regardless of the educational level.⁴ It has also

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* Samuel Tyler Research Professor, George Washington University Law School. An earlier version of this article was presented at *The Present and Future of Civil Rights Movements: Race and Reform in 21st Century America* conference held at Duke University School of Law in November 2015. I am grateful for the comments I received at that time, as well as for the helpful comments from Mario Barnes and Pat Shin. Finally, thank you to Paulina Starotska for her excellent research assistance.

1. For a recent analysis of school segregation, see RICHARD ROTHSTEIN, *FOR PUBLIC SCHOOLS, SEGREGATION THEN, SEGREGATION SINCE: EDUCATION AND THE UNFINISHED MARCH* (2013), www.epi.org/files/2013/Unfinished-March-School-Segregation.pdf.

2. Although progress has been made on residential segregation in many jurisdictions, the progress has generally been relatively limited by most conventional measures. *See, e.g.*, JOHN R. LOGAN, *SEPARATE & UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS & ASIANS IN METROPOLITAN AMERICA* (2011), www.s4.brown.edu/us2010/Data/Report/report0727.pdf (noting that, on average, black and Hispanic households live in neighborhoods with one-and-a-half the poverty rate of predominately white neighborhoods); PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 9 (2013) (“Despite the high hopes of the civil rights era, the finding that emerges very clearly is that the stark racial inequality in America’s neighborhoods that existed in the 1970s has been passed on, with little change, to the current generation.”).

3. *See* Drew Desilver, *Black Unemployment Rate is Consistently Twice that of Whites*, PEW RES. CTR. (Aug. 21, 2013), <http://pewrsr.ch/13FF0U0> (documenting historical unemployment gap dating to 1954). Unemployment rates vary by educational levels with individuals at the lowest educational levels having the highest unemployment. But no matter the level, African Americans are unemployed at twice the rate whites. In 2011, blacks with less than a high school degree had a 31.7% unemployment rate and whites had 18.1%. For those with advanced degrees, the rates were 5.8% for blacks and 3.0% for whites. *See* LAWRENCE MISHÉL ET AL., *THE STATE OF WORKING AMERICA* 341 (12th ed. 2012).

4. Even those African Americans with advanced degrees make less than whites who have obtained the same level of education. *See* MEDIAN WEEKLY EARNINGS BY EDUCATION ATTAINMENT

been well documented that African Americans are overrepresented in prison⁵ and in school discipline⁶ and have significantly less wealth accumulation than whites.⁷

These statistics are likely to produce one of three responses, which I will refer to as (1) “Yes but . . . ,” (2) “Racism is everywhere,” and (3) “Tell me more.” Those in the “yes but” category are discrimination skeptics who resist concluding that discrimination underlies the observed inequities and seek alternative explanations. Those in the second group see discrimination everywhere there are disparities and may go so far as to cast racial aspersions on those in the first group. The third group wants to know more about the inequities, wants to know more about why wage gaps persist even at the highest levels, or why even affluent African Americans tend to live in neighborhoods that are less affluent than their white cohorts.⁸ To be sure, some of those who initially may want more information will turn out to be skeptics as there will be no additional information that could convince them that the inequities are the product of discrimination.

This article examines how we can reach agreement and come to a mutual understanding about when discrimination is responsible for the many inequalities that persist in society. This is a critical question because in the United States, as a matter of policy, we are committed to remedying discrimination, not inequality. In other words, we will only address inequality

IN 2014 BUREAU OF LABOR STATISTICS, (Jan. 23, 2015), <http://www.bls.gov/opub/ted/2015/median-weekly-earnings-by-education-gender-race-and-ethnicity-in-2014.htm>.

5. Based on the latest statistics on inmates in state and federal—but not local—prisons, African Americans are imprisoned at a rate that is six times higher than that for whites, with black males incarcerated at a rate that is nine times higher than the rate for white males. *See* E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2013 3 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>. 36% of the 1.5 million prisoners were African Americans. Although this has been a long-standing issue, Professor Michelle Alexander has brought heightened attention to the issue. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2012) (asserting that our criminal justice system has disenfranchised a disproportionate percentage of the black population).

6. Inequities in school discipline will be discussed in the next section, but a recent government study found that, whereas African Americans comprise 16% of the public-school population, they account for 33% of out-of-school suspensions and 34% of expulsions. *See* OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., DATA SNAPSHOT: SCHOOL DISCIPLINE 2 (2014), www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf.

7. Based on 2013 data, whites have average net worth that is thirteen times larger than African Americans, which is the highest measured disparity since 1989. *See* Rakesh Kochar & Richard Fry, *Wealth Inequality Has Widened Along Racial Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession.

8. This has long been true and was reaffirmed by 2010 Census data. *See* LOGAN, *supra* note 2, at 1 (“With one exception (the most Affluent Asians) minorities at every income level live in poorer neighborhoods than do whites with comparable incomes.”).

that is the product of discrimination.⁹ As a result, it is important to have a broad and consensual definition of discrimination.

This article is concerned with racial equality and will focus on two areas in which the data are strikingly clear but the causal links between inequality and discrimination are often contested. The first area is school discipline, especially suspension and expulsion, which has had a long-standing, well-documented, and disproportionate effect on African Americans, particularly on African-American boys.¹⁰ The data are clear that African Americans are far more likely to be suspended or expelled for similar infractions than white students, with similar results for expulsions.¹¹ The second area is racial profiling—particularly automobile stops, or what is colloquially known as “driving while black.” Much as is true with school discipline, the data on automobile stops are indisputable: African Americans—and to a lesser extent Latinos—are far more likely to be stopped than are whites, even though white drivers are more likely to be found in possession of contraband.¹² Yet in both of these areas, there is strong resistance by responsible policymakers to attributing these inequities to discrimination, particularly in the context of police stops where the “yes but” perspective prevails as every possible alternative explanation is explored and asserted.¹³ I have decided to focus on these two areas because the relevant data are compelling, and the public’s desire to avoid a finding of discrimination often appears to be equally strong.

The third part of this article discusses the high standards imputed to statistical inequities as proof of discrimination and the many ways in which discrimination skeptics and others seek to avoid concluding that statistical

9. Affirmative action might appear to provide a contrary example, but that is not necessarily so. From its inception, affirmative action has been a deeply contested policy and it has always been used as a modest tool of remediation. Affirmative action has taken hold only in higher education, an important but limited institution, at least in terms of addressing inequality. The courts, in fact, have squelched affirmative action in the housing context. *See, e.g., United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (2d Cir. 1988) (invalidating quota program for public housing that was designed to integrate the housing). As to school desegregation, busing and racial redistricting might be seen as adjuncts of affirmative action, but both of those initiatives were designed to remedy discrimination, rather than the underlying inequalities, and both receded once it appeared that discrimination had run its course. In the context of busing, three short years after approving busing as a remedy to desegregate schools, the Supreme Court prohibited busing that sought to cross school district boundaries, severely limiting busing’s remedial force. *Compare Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (approving busing as a remedial option to desegregate schools), *with Milliken v. Bradley*, 418 U.S. 717 (1974) (invalidating busing plan that sought to include the Detroit suburbs). In the voting rights context, the Supreme Court was hostile to racial redistricting from the outset. *See Shaw v. Reno*, 509 U.S. 630 (1993) (applying strict scrutiny to and rejecting North Carolina’s redistricting plan).

10. *See* Section II.A, *infra*.

11. *See* Section II.A, *infra*.

12. The issue is discussed in Section II.B, *infra*.

13. For a thorough critique of studies that document disparities in police stops see Greg Ridgeway & John McDonald, *Methods for Assessing Racially Biased Policing*, in *RACE, ETHNICITY, AND POLICING: NEW & ESSENTIAL READINGS* 180–204 (Stephen Price & Michael White eds., 2010). These critiques, which often focus on possible differences in driving behavior between studied groups, will be discussed further in Section II.B, *infra*.

disparities are a product of discrimination. This article also suggests, contrary to current trends in scholarship, that the move to define the disparities as “implicit bias” has hurt more than it has helped and the observed disparities should not be confused with implicit bias as repeated patterns of behavior will almost certainly have a conscious component to them.¹⁴ Finally, the last part of the article suggests the importance of ensuring accountability as the best way of reducing statistical disparities, regardless of whether we can obtain consensus on the underlying rationale for the disparities.

II

RACIAL INEQUITIES IN SCHOOL DISCIPLINE AND POLICE STOPS

Racial inequities remain a persistent fact of social and economic life in the United States. Some of those inequities—many people place housing in this category—might be the product of class or even personal choices, and to the extent the observed inequities are the product of personal choices, it is often thought that there is little reason to intervene to address them.¹⁵ As has been well documented, ambiguity is often the death knell for efforts to address observed inequities.¹⁶ This part therefore avoids ambiguity by focusing on two areas in which the data are incontrovertible: school discipline and police stops. In these two areas, it is impossible to deny the existence of significant racial inequities, but attributing those inequities to discrimination turns out to be another matter entirely.

A. School Discipline

There is a tragic quality to the data on school discipline, and it is that African Americans have been subject to far more frequent and harsher discipline than have white students. It is difficult to know just how long this has been going on but the disparities have been documented going back to the 1970s when a Children’s Defense Fund report demonstrated that black students were two to three times more likely to be suspended compared to white

14. See Part III, *infra*.

15. This sentiment is most pronounced in the school desegregation cases, including in the most recent Supreme Court case where the Court viewed the segregation of the schools as a product of housing choices. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 713 (2007) (emphasizing that the segregated nature of the Seattle schools was a function of where students lived). This view that private housing choices are beyond constitutional reach has a long pedigree in the school cases. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (prohibiting multi-district remedy designed to address discrimination within Detroit School District). For an analysis of the connection between the school cases and housing choices see Erika Frankenberg & Genevieve Siegel-Hawley, *Public Decisions and Private Choices: Reassessing the School-Housing Segregation Link in the Post Parents Involved Era*, 48 WAKE FOREST L. REV. 397 (2013).

16. For a discussion of how discrimination often operates in ambiguous situations—where there is no clear decision, for example—see Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY COMPASS 1, 5 (2009) (discussing ways aversive racism operates in ambiguous social norms).

students in various localities throughout the nation.¹⁷ Since that time, matters have actually gotten worse because suspensions and expulsions have sharply increased, and the harms of such school exclusions have become clearer.¹⁸

The racial inequities in the administration of school discipline are so well established that a court could likely take judicial notice of them. In fact, it is difficult to find a jurisdiction in which African-American students are not subject to greater discipline than white students. Recent data collected by the United States Department of Education indicate that black students are suspended and expelled at a rate that was three times higher than the rate for white students, and that, although blacks constitute 16% of the student population, they account for 32% of out-of-school suspensions and 31% of student arrests.¹⁹ What is perhaps most alarming, is that the disparities begin as early as preschool, where African Americans account for 48% of out-of-school suspensions despite being only 18% of the student population.²⁰

The University of California, Los Angeles Civil Rights Project has also recently issued an extensive report on school discipline with similar findings.²¹ In particular, the study found that suspensions of African Americans more than doubled between the 1972–1973 school year, when 11.8% of black students received a suspension, and 2009–2010 when 24.3% of black students were suspended.²² White students, on the other hand, experienced only a modest increase from 6% to 7.1% of students.²³ Female black students had a suspension rate that was higher than the rate for males of all other races.²⁴

A recent study conducted by the Center for the Study of Race and Equity at the University of Pennsylvania analyzed data from school districts located in the South.²⁵ In an astounding eighty-four of the 132 school districts, African

17. See CHILDREN'S DEF. FUND, *SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN?* 9 (1975) ("While the largest numbers of suspended children are white, proportionally suspensions hurt more children who are black, poor, older and male.").

18. See, e.g., James Wallace et al., *Racial, Ethnic and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 NEGRO EDUC. REV. 47, 48. (2008) (documenting increase in suspensions). It has been well-documented that suspensions are connected with future involvement with the criminal justice system. See Anne Gregory, Russell J. Skiba & Pedro A. Noguera, *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 60 (2010) ("Research shows that frequent suspensions appear to significantly increase the risk of academic nonperformance.").

19. See OFFICE OF CIVIL RIGHTS, *supra* note 6, at 2.

20. *Id.* Although African-American boys are subject to the most discipline, African-American girls are subject to far higher rates of discipline than are white girls. *Id.*

21. Daniel J. Losen & Tia Elena Martinez, *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools*, C.R. PROJECT (2013), <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools>.

22. *Id.*

23. *Id.*

24. *Id.* One of the study's interesting findings was that school districts varied widely in their use of suspensions, with some large school districts such as Philadelphia being labeled as having a low frequency while many school districts had extremely high rates of suspension. See *id.*

25. EDWARD J. SMITH & SHAUN R. HARPER, *DISPROPORTIONATE IMPACT OF K-12 SCHOOL*

Americans were 100% of the suspended students, and in all 132 school districts black students were suspended at a rate five times higher than the rate for the overall student population.²⁶ The study also found that although suspensions decreased overall in Texas, the disproportionate impact of suspensions on African Americans increased.²⁷ These studies—and there are many more—paint a consistent and coherent portrait of the school discipline process that severely disadvantages African-American students and has done so since at least the 1970s.²⁸

The data are irrefutable, but that does not end the debate or determine what the appropriate remedial response should be. Suspensions tend to be viewed in a binary fashion: either they are justified by the behavior of the students, or they are discriminatory. This binary approach is particularly prominent among lawyers given that within a legal framework there are no ties, only a winner and loser—a justified suspension or a discriminatory suspension. But it might not be so simple, as we will see as we explore the various justifications that are typically asserted to defend or justify the disparities.

Skeptics of the continuing prevalence of discrimination are almost certain to respond to the statistics by asserting that the disproportionate discipline is the result of disproportionately poor behavior among African Americans. In other words, African-American youth are suspended more because they engage more often in behavior that warrants suspension. There are at least three responses to this claim. First, it should not be assumed that the excessive level of suspensions is the result of excessively poor behavior. To assume as much is to dismiss the force of the data at least its implications. And this would lead to the second response: How do we, or could we, know that it is the behavior of the students that triggers the suspensions rather than the disparate application of the rules, which are almost invariably discretionary in nature? For example, a study of the Texas school system found that only 3% of disciplinary actions were issued for behavior for which state law mandated suspension or expulsion.²⁹ Most suspensions arise from behavior that is subjective in nature, such as disruptive classroom activity, that is not easy to document. It is also difficult to know how

SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES 1 (2015), http://www.gse.upenn.edu/equity/sites/gse.upenn.edu/equity/files/publications/Smith_Harper_Report.pdf.

26. *Id.*

27. *Id.*

28. For additional studies see Russell K. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, IND. EDUC. POL'Y CTR. 3 (2000), www.Indiana.edu/~equity/docs/ColorOfDiscipline.pdf (summarizing findings of prior studies); Lyndsey Layton, *Study Finds Racial Disparities in Texas Elementary Schools' Disciplinary Steps*, WASH. POST, Nov. 4, 2015, at A3 (“An analysis of discipline in elementary schools across Texas shows that black students, especially boys, are suspended and expelled at disproportionately high rates and are labeled as troublemakers as early as pre-kindergarten.”).

29. See TONY FABELO ET AL., *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 38 (2011) (“Less than 3 percent of violations were related to behavior for which state law mandates expulsion or removal.”).

many children got away with similar behavior or how many children received lesser punishment (detention or warnings) for identical or similar behavior.

Third, a number of studies have disputed the differential-behavior theory. For example, researchers have found that many office referrals that ultimately lead to suspension are the result of students questioning established practices or teacher authority and that these students are disproportionately students of color.³⁰ Consistent with this finding, African-American students are more likely to be disciplined for “defiance” and “noncompliance.”³¹ A recent study demonstrated that disruptive white children are often handled very differently than are disruptive black children—white children are more commonly provided with medical treatment, such as drug therapy, whereas black children tend to be treated in a more punitive or criminal way.³² In other words, disruptive white children are likely to be seen as suffering from Attention Deficit Hyperactivity Disorder, while similarly disruptive black students might be seen as bad kids or potentially criminal kids. Divergent judgments such as these are not innocent; rather, they represent differential treatment steeped in racial stereotypes.

All of this is to suggest that, even if the behavior—or some of it—might warrant suspension, that is not to say that black children are not being treated differently or that lesser forms of punishment might be more appropriate. Seizing on suspension as an appropriate punishment is likely tied to perceptions that black children are troublemakers deserving of severe punishment rather than young children who need to be redirected in one form or another. Indeed, a recent study found that teachers and school administrators frequently treat African-American boys as if they are older and more responsible for their actions than is developmentally appropriate.³³

One of the key issues here is that the data that might convince a skeptic that the disciplinary system is being applied in a discriminatory way likely do not exist. There will be no data on overall behavior that would allow for comparison of the treatment of black and white students, and it would be infeasible to conduct a random experiment of children essentially “performing”

30. Frances Varus & K.M. Cole, “*I Didn’t Do Nothin’*”: *The Discursive Construction of School Suspension*, 34 URB. REV. 87, 91 (2002) (arguing that suspensions often occur as a result of a normalized discursive code that Anglo-Americans have better access to).

31. See Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455, 459 (2008) (noting high number of disciplinary infractions relating to defiance or challenging authority among African-American males).

32. See David M. Ramey, *The Social Structure of Criminalized and Medicalized School Discipline*, 88 SOC. EDUC. 181, 194 (2015) (finding that school districts with large minority and poor student populations are more likely to implement “criminalized” disciplinary policies and that white children are more likely to get medical treatment).

33. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 540 (2014) (“Black boys can be misperceived as older than they actually are and prematurely perceived as responsible for their actions during a developmental period where their peers receive the beneficial assumption of childlike innocence.”).

in a disruptive manner to determine whether they are treated similarly. The statistics will either be meaningful or not, but it will be difficult to convince anyone by accumulating additional information. Researchers have sought to clear away some of the arguments by determining whether the disparities in discipline might be attributable to class rather than race, but after taking into account socioeconomic status, it is clear that race remains a significant predictor of discipline.³⁴

Even if it is the case that there is evidence that African-American boys misbehave at a higher rate than other students, the inquiry should not end there, because the question remains: What might account for the higher rate of misbehavior among African-American boys? One might attribute the higher rate to the nature of the students, but there is no neutral reason why one would choose that explanation over others. It may be that the misbehavior of black youth is in response to inequitable treatment in the classroom. A teacher may treat transgressions of black males more harshly than that of other students, and may also respond more harshly than to the transgressions of other students, ultimately leading to negative, reactive behavior by the reprimanded student. A student, for example, who is repeatedly told to “sit down and shut up,” or told that he will amount to nothing as occurs in some classrooms, may respond by what will be perceived as misbehaving.³⁵ Other students who are told that they must work twice as hard—a common message to African-American youth—may rebel at what they properly perceive to be an unfair edict.

When assessing data, such as the disproportionate application of disciplinary standards, there is a tendency to see that application as something other than discriminatory, even by those who seek change in the system. Teachers, it is often asserted, are likely acting not from discriminatory animus but rather it is their subconscious biases—stereotypes—that produce the disparate results.³⁶ This might be so but at the same time this is a circumstance that could just as easily be treated as a form of intentional discrimination. Certainly, for the ultimate decisionmaker, typically the school principal, there is nothing subconscious about the pattern of discipline. The principal will see all of the students who are being suspended and will know whether there is a pattern of disparate results. She, like others, might assume that the behavior warrants suspension rather than taking the time to inquire about how others in the class might be behaving, or whether the disruptive behavior might be the result of

34. See Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin*, 39 EDUC. RESEARCHER, 59, 61 (2010) (“[T]he highly consistent finding that race/ethnicity remains a significant predictor of discipline even after statistically controlling for measures of family income suggests that student SES is not sufficient to explain the racial discipline gap.”).

35. Extensive observational research has demonstrated that African-American boys are often treated differently and hostilely within classrooms and that their behavior is shaped by that differential treatment. See, e.g., ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* 88 (2000) (“This apprehension of black boys as inherently different both in terms of character and of their place in the social order is a crucial factor in teacher disciplinary practices.”).

36. The concept of implicit bias is discussed more fully in Section III.B, *infra*.

unfair treatment at the hands of a teacher or school official. But it is hard to see why the principal's decision to suspend African-American boys without delving further into the pattern of suspensions she observes should be labeled as unconscious bias rather than as a form of intentional bias. Her decision to move forward with suspensions without further inquiry is an intentional decision made against a background of clearly racial results. Alternatively, it may be that the principal wants to appear supportive of her teachers rather than challenging their actions. But it is again important to emphasize that choosing to support her teachers over her students is a conscious choice, one that may be putting loyalty ahead of rooting out discrimination. That is neither a neutral nor an inevitable choice, and again, there is nothing necessarily unconscious or implicit about making such a choice. It might be different if the principal, or a superintendent, reviewed the suspensions and determined they were justified, but to ignore the racial pattern of discipline is to choose some value, whatever it might be, over racial equality, and that is a choice made deliberately.

B. Police Stops

Another area where the data are incontrovertible but the conclusions are contested involves police stops. There are many kinds of police stops, but the two that have been most commonly subject to discrimination analysis involve automobile stops and stops on the street, which are also known as stop-and-frisks or *Terry* stops.³⁷ These latter stops are more controversial, though the findings are often even more compelling than in the automobile context. For example, in a recent lawsuit over the City of New York's stop-and-frisk policy, it was shown that more than 80% of all individuals who were stopped were African-American or Latino, in a city where African Americans and Latinos constituted 52% of the population.³⁸ The City sought to justify its policy by noting that a similarly high percentage of criminal suspects were African-American or Latino,³⁹ an argument the district court thought was too broad because it lumped all African Americans and Latinos together with the very small group that actually engages in criminal activity.⁴⁰ One of the more interesting findings from the case was a statistic put forth by the plaintiffs: only about 6% of the searches were inadequate based on the law; the remaining searches were consistent with the governing legal standards.⁴¹ Yet the sheer

37. *Terry v. Ohio*, 392 U.S. 1 (1968).

38. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013). For a thorough analysis of the case and the various evidence, see generally Arthur Garrison, *NYPD Stop & Frisk, Perceptions of Criminals, Race and the Meaning of Terry v. Ohio: A Content Analysis of Floyd, et al. v. City of New York*, 15 RUTGERS RACE & L. REV. 66 (2014).

39. *Floyd*, 959 F. Supp. 2d at 561.

40. *Id.*

41. See John Cassidy, *The Statistical Debate Behind the Stop-and-Frisk Verdict*, NEW YORKER (Aug. 13, 2013), <http://www.newyorker.com/news/john-cassidy/the-statistical-debate-behind-the-stop-and-frisk-verdict> (“On this basis alone, he concluded that six per cent of the stops—about two hundred thousand of them—were ‘apparently unjustified.’”).

number of stops—in the millions, based on the evidence presented at trial—meant that even a 6% error rate led to thousands of unlawful stops.

In any event, the justifications for street stops are different in nature from automobile stops, and the rest of this section focuses on automobile stops, where the evidence of discriminatory police action is difficult to refute. This is not a new issue as vehicle stops by law enforcement drew national attention in the late 1990s based on a series of studies and lawsuits challenging highway patrol stops in New Jersey and subsequently in other areas, including Illinois and Maryland.⁴² These studies all demonstrated that the police pulled over African-American drivers in far greater numbers than their representation among drivers on the highways studied. At the time, many of the stops were part of a broader “war on drugs” and involved efforts to interdict drug traffickers who were using some of the main highways on the East Coast and elsewhere to move their products.⁴³ But these stops had a quality similar to New York’s stop-and-frisk practices. Many officers seemed to be treating all African Americans, or only African Americans, as drug smugglers rather than the small cohort who were actually engaging in trafficking. The attention brought to these cases spawned legislation in a number of states that required police officers to record their stops and the reason for those stops. In other jurisdictions, such as Los Angeles, similar data were compiled in the context of lawsuit settlements, and it is to the more recent data that I now turn.

The recent studies all show similar results: African Americans, and often Latinos, are stopped more frequently than whites and much higher than their representation in the population, although contraband is found at a higher rate among whites who are stopped. A 2014 report of Missouri vehicle stops statewide indicated that African Americans were stopped at higher rates than were whites and were 1.7 times more likely to be searched than were whites, even though whites had a higher hit rate—26.9% of searches produced contraband—than did African Americans, with a hit rate of 21.4%. In reviewing the report, the state Attorney General noted—in what seemed like a state of exasperation—that the racial disparities had increased since 2000 when the data collection began.⁴⁴ In analyzing similar data from Rhode Island, the American

42. The ACLU has been a leader in challenging racial profiling in automobile stops. For an early report, see DAVID A. HARRIS, *DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS* (1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>.

43. The drug-related enforcement efforts of the 1990s produced a number of lawsuits, most of which were unsuccessful, though many of the cases eventually settled. *See, e.g.*, *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001) (rejecting discrimination claims); *United States v. Duque-Nava*, 315 F. Supp. 2d 1144 (D. Kan. 2004) (finding that statistics proved racial effect but not intent). For a discussion of the various issues in the early cases, see R. Richard Banks, *Beyond Profiling: Race, Policing & the Drug War*, 56 *STAN. L. REV.* 571, 587 (2003).

44. *See* MO. ATT’Y GEN., 2014 VEHICLE STOPS EXECUTIVE SUMMARY (2014), <https://ago.mo.gov/home/vehicle-stops-report/2014-executive-summary>.

Civil Liberties Union (ACLU) noted that in many jurisdictions racial disparities increased between 2003, when the first study in that state was conducted.⁴⁵

The New York Times recently conducted an extensive analysis of police stops in Greensboro, North Carolina, where pursuant to North Carolina law, detailed data are kept regarding police automobile stops. African Americans make up 39% of the population of Greensboro but accounted for 54% of those who were pulled over.⁴⁶ Once pulled over, African Americans were searched at rates that were twice as high as the rate for whites, yet, just as was true in the Missouri study, contraband was found more frequently on whites.⁴⁷ Among the various agencies the newspaper studied, the North Carolina State Highway Patrol performed the best in terms of racial disparities, although the numbers were not encouraging; African-American drivers were still 1.5 times more likely to be pulled over than white drivers.⁴⁸ And in Durham, North Carolina, the authors of an extensive study found that “[t]he average Durham officer stops three whites for every four Blacks but searches one white for every four Blacks.”⁴⁹

The *Times* reporters also reviewed data from seven other states with reporting requirements and all showed similar racial disparities.⁵⁰ In none of the studied jurisdictions did whites and blacks have an equal likelihood of being stopped, and in all but one, whites were more likely to be found with contraband.⁵¹ Despite that higher hit rate, African-American drivers were more likely to be cited or arrested.⁵² A statewide West Virginia study produced the same results: black drivers were 1.64 times more likely to be stopped by law enforcement officers and twice as likely to be searched, though there was a higher hit rate for white drivers.⁵³ Despite that higher hit rate, African-American drivers were more likely to be cited or arrested.⁵⁴

Two recent studies found slightly different results but reached similar conclusions. A highly detailed analysis of stops by Kansas City Police officers

45. See *Data Shows Racial Profiling Increasing in Searches During Motor Vehicle Stops*, ACLU (Dec. 15, 2014), <http://riaclu.org/news/post/data-shows-racial-profiling-increasing-in-searches-during-motor-vehicle-sto>.

46. See Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES, Oct. 24, 2015, at A1.

47. *Id.*

48. *Id.*

49. Frank R. Baumgartner, Derek A. Epp & Bayard Lovell, *Police Searches of Black and White Motorists* (Aug. 5, 2014) (unpublished manuscript), <https://www.unc.edu/~fbaum/TrafficStops/DrivingWhileBlack-BaumgartnerLoveEpp-August2014.pdf>.

50. *Id.* Seven states were studied, all of which had extensive reporting requirements, and particular jurisdictions and departments within those states were studied. The jurisdictions were Connecticut, Illinois, Maryland, Missouri, Nebraska, North Carolina, and Rhode Island.

51. *Id.*

52. CRIMINAL JUSTICE STATISTICAL ANALYSIS CTR., W. VA. DIV. OF CRIMINAL JUSTICE SERVS., WEST VIRGINIA TRAFFIC STOP STUDY (2009), www.djcs.wv.gov/ORSP/SAC/Documents/WVSAC_Traffic_NewOverviewofStatewideFindings2009.pdf.

53. *Id.*

54. *Id.*

found that there were no racial disparities when the focus was on clear violations of the law such as speeding, but when it came to investigative stops, African-American drivers had twice as high a probability of being stopped.⁵⁵ A study of the Washington State Patrol found that, unlike in other jurisdictions, there were no racial disparities in the initial stops but that African Americans, Latinos, and Native Americans were all subject to higher rates of searches and citations even though the hit rate was higher for whites.⁵⁶

Despite the consistency of the findings, police departments are slow to acknowledge the role race may play in their stops. They typically offer one of several responses and often all of them at the same time.⁵⁷ Often, in contesting the racial disparities that are found in the data, police departments suggest that it is inappropriate to measure stops by resident population given that actual drivers might vary from the resident population.⁵⁸ There are at least two problems with this argument. First, many of the studies look at driver population, rather than resident population, and the disparities still stand.⁵⁹ Second, this is a classic argument that the Supreme Court rejected in the context of a regression study approximately thirty years ago.⁶⁰ It is not acceptable, the Court unanimously held, that defendants simply assert some alternative explanation.⁶¹ Rather, they must provide some plausible reason to believe that the alternative might be true.⁶² In this case, that means

55. See CHARLES EPPS & STEVEN MAYNARD MOODY, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 110–14 (2014) (“We have shown that investigatory stops are the site of pervasive racially biased policing, whereas traffic-safety stops generally involve unbiased policing.”).

56. The results of the analysis, which analyzes the results of other studies, can be found in Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System*, app. at A-11 (Mar. 1, 2011) (unpublished manuscript), http://law.seattleu.edu/Documents/korematsu/race%20and%20criminal%20justice/preliminary%20report_report_march_1_2011_public_cover.pdf. Based on the studies, Native-American drivers had the highest disparity, as they were subject to search twice as often as whites. Black drivers had a 20% disparity and Latinos 10%. *Id.*

57. For a discussion of the various critiques see Clayton Mosler & J. Mitchell Pickerell, *Methodological Issues in Biased Policing Research With Applications to the Washington State Patrol*, 35 SEATTLE U. L. REV. 770 (2012); Ridgeway & McDonald, *supra* note 13.

58. See Ridgeway & McDonald, *supra* note 13, at 186–87 (discussing how commuter driving patterns may differ from the commonly used population statistics).

59. For example, a study involving the New Jersey Turnpike and stops made by the State Police had actual observational data. See John Lamberth, *Revised Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers/Travelers on the New Jersey Turnpike Between Exits or Interchanges 1 and 3 from 1988 Through 1991* (Nov. 11, 1994) (unpublished manuscript), <http://www.mass.gov/eopss/docs/eops/faip/new-jersey-study-report.pdf>; see also Geoffrey P. Alpert, Michael Smith & Roger G. Durham, *Toward A Better Benchmark: Assessing the Utility of Not-At-Fault Traffic Crash Data in Racial Profiling Research*, JUST. RES. & POL’Y, June, 2004, at 43 (using observational data in Miami-Dade county to determine driving patterns).

60. See *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

61. *Id.* at 407.

62. In *Bazemore*, the Supreme Court criticized the defendants for failing to demonstrate that the variables they claimed should have been included in the regressions would have changed the analysis, noting that the defendants failed “to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites.” *Id.* at 403 n.14.

demonstrating some reason why the driving population would differ from the resident population, and this is never done. This also applies to another common explanation offered by defenders of the stops—driving patterns might differ based on race, but again, the defenders never provide any data to support the assertion. Instead, while acknowledging the disparities, the departments resist the conclusion that discrimination plays a role in the police stops.⁶³

Second, borrowing from the stop-and-frisk context, police departments frequently argue that they are stopping drivers in high-crime areas or areas where suspicious activity occurs.⁶⁴ This argument is relatively easy to rebut. If it were true, one would observe a higher hit rate of contraband among black drivers.⁶⁵ That the hit rates are invariably higher among white drivers refutes the notion that the stops are related to criminal activity. And it makes sense that the hit rate is higher among white drivers because police stop so many fewer white drivers, likely only when they have a reasonable suspicion. The arbitrariness of police stops for African-American drivers is thus confirmed by the lower hit rates.

Several studies have sought to explore some of the alternative explanations police departments raise. Probably the most sophisticated study was conducted by Professor Ian Ayres of Yale Law School regarding the Los Angeles Police Department.⁶⁶ The Los Angeles study focused on both automobile and in-person stops and again found that African Americans were more likely than whites to be stopped, ordered out of their cars, frisked and subjected to

63. For example, in responding to a study demonstrating disparities in police stops in Durham, North Carolina, the police department responded, “We acknowledge that the numerical data that is being put forth as statistical evidence illustrates a numerical disparity, but it does not offer any evidence or answers as to why the disparity exists.” EXEC. COMMAND STAFF OF THE DURHAM POLICE DEP^T, DURHAM POLICE DEPARTMENT RESPONSE TO THE FADE COALITION POLICY RECOMMENDATIONS (2013), <https://durhamnc.gov/DocumentCenter/Home/View/2153>.

64. Evan Allen & Travis Anderson, *Evans Defends Boston Police After ACLU Report on Racial Bias*, BOS. GLOBE (Oct. 8, 2014), <https://www.bostonglobe.com/metro/2014/10/08/aclu-charges-boston-police-engaged-racially-biased-tactics-police-call-report-inaccurate/Zev3p7jvRVQ2loKSWncu2H/story.html> (noting that the Police “Commissioner William Evans defended the department, and said that officers focused on high-crime areas and individuals with gang affiliations and criminal records”).

65. Hit rates, or the percentage of successful searches, were once thought to be the key measure of racial bias. So long as the searches of African Americans were more frequently successful than searches of whites, the disparities in searches could be justified. See Nicola Persico & David A. Castleman, *Punishment & Crime: Detecting Bias Using Statistical Evidence to Establish Intentional Discrimination in Racial Profiling Cases*, 2005 U. CHI. LEGAL F. 217, 222–25 (discussing the importance of hit rates to assessing bias). However, once the studies demonstrated higher hit rates among whites, the emphasis on hit rates, at least among police departments, has disappeared.

66. Professor Ayres is the author of a number of important studies documenting discrimination in a variety of fields. See, e.g., Ian Ayres, *Fair Driving: Gender & Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 822 (1991) (documenting discriminatory pricing within car negotiations); Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in the Bail Setting*, 46 STAN. L. REV. 987, 1008 (1994) (documenting discrimination in setting bail). His work was transformed into an important and influential book on discrimination. See generally IAN AYRES, PERVERSIVE PREJUDICE? NON-TRADITIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001).

searches even though African Americans were 42.3% less likely to be found with a weapon than whites.⁶⁷ African Americans were also 29% more likely to be arrested than whites, and Latinos were 32% more likely to be arrested.⁶⁸ The study went on to determine that the stops were not an artifact of local crime rates, as the authors were able to control for various geographic and demographic factors.⁶⁹ Despite the evidence, the Los Angeles Police Department immediately dismissed the Ayres study by claiming the data, which was from 2003 to 2004, was old, ignoring the fact that at the time the report was written, it was the most recent data that had been released by the Department.⁷⁰ Another study of the Los Angeles Police Department data reached the same conclusion and noted further that African Americans were subjected to the most consensual searches among drivers of different races, even though the police found the least contraband through such searches.⁷¹

III

STATISTICS AND DISCRIMINATION

Not all statistical disparities are the product of discrimination but some are, and a question that will be central to achieving greater racial equality is how we tell the difference: How do we know when an observed statistical disparity should be equated with discrimination? Or to frame the issue in the context of this article: How do we know when racial disparities in school discipline or police stops should be treated as discrimination? It is important to highlight the phrase “treated as discrimination” because ultimately the question of what constitutes discrimination is a legal and social question, a judgment in the case of statistical disparities that those disparities are likely the product of discrimination, rather than any definitive definition of discrimination.

A. The Meaning of Statistical Disparities

There is no easy metric to define discrimination, but, ultimately, we have to determine how certain, or how confident, we must be, to conclude that the disparities are the result of discriminatory acts. In litigation, common statistical methods are used to determine the likelihood that the observed results were the product of chance or some other factor, such as discrimination. Depending on the data, it is also possible to employ regression analysis to ferret out, or limit,

67. See Ian Ayres & Jonathan Borowski, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department*, ACLU (2008), islandia.law.yale.edu/ayres/Ayres%20LAPD%20Report.pdf. The study is summarized in Andrew Blankstein, *Study Cites Disparities in LAPD Stops*, L.A. TIMES, Oct. 21, 2008, at A1.

68. Blankstein, *supra* note 67, at A12.

69. *Id.*

70. *Id.*

71. See Megan Armentrout et al., *Cops & Stops: Racial Profiling and A Preliminary Statistical Analysis of Los Angeles Police Dept. Traffic Stops and Searches* (June, 2007) (unpublished manuscript), <http://www.public.asu.edu/~etcamach/AMSSI/reports/copsnstops.pdf>.

alternative explanations for observed disparities.⁷² But the standards of proof are very high—typically, within the social-science framework that governs statistical analysis, one would seek a 95% confidence level—equivalent to two standard deviations—before eliminating chance as a possible explanation for the disparities.⁷³ This is a significantly higher standard than the common civil standard that requires proof by a preponderance of the evidence, which requires only that a plaintiff prove her case as more likely than not true, or a greater than 50% probability. Nevertheless, the confidence level is rarely the problem with establishing discrimination based on statistics. Rather, it is exceptionally difficult to rule out all other possible explanations, which is what discrimination skeptics generally require. In an infamous case, the Supreme Court failed to accept the findings of a study demonstrating racial disparities in the application of the death penalty even though the study controlled for more than three hundred factors because not every nondiscriminatory reason could be excluded.⁷⁴

To return to the earlier examples, the underlying question is how to determine whether African-American students are suspended as a result of discrimination. The observed disparities are only a starting point, but statistically significant disparities would support the assumption that the disparities are not the product of chance. But that would not necessarily lead to the conclusion that racial discrimination is the proper explanation. Rather, the disparities could be the result of differential behavior; they might also arise from school districts that suspend high levels of students or from some other nondiscriminatory explanation. Even though studies have shown that African-American students are typically treated differently for their behavior than they would if they were white, it is easy to discount those studies when it comes to an actual school district, and it will often be difficult to have appropriate data on the school or district level. The data on police stops is more complete but still

72. The statistical methods are now well accepted. For a discussion of the use of statistical methods in employment discrimination cases, where they are likely most prominent in legal cases, see DIANNE AVERY ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 204–10 (8th ed. 2010). See generally Theodore Eisenberg, *Empirical Methods and the Law*, 95 J. AM. STAT. ASS'N 665, 667 (2000).

73. Courts, in particular the Supreme Court, have borrowed the statistical methods beginning with an important footnote in a jury selection case. See *Castaneda v. Partida*, 430 U.S. 482, 494 n.3 (1977) (discussing the importance of tests of statistical significance in analyzing statistical data). Courts continue to require a minimum of two standard deviations, or the equivalent of a 95% confidence level, as a measure of statistical significance adequate to require further inquiry. See *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 424 (7th Cir. 2000) (“Two standard deviations is normally enough to show that it is extremely unlikely . . . that the disparity is due to chance.”).

74. The case is *McKleskey v. Kemp*, 481 U.S. 279 (1987), perhaps the most vivid illustration of how difficult it can be to persuade a discrimination skeptic. Nearly thirty years later, studies continue to demonstrate that African Americans who kill whites have a disproportionately high probability of receiving a death sentence. See John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637, 647–48 (2014) (“Specifically minority defendants who commit capital-eligible murders of white victims are over five times as likely to receive a death sentence as minority defendants who commit capital-eligible murder of minority victims.”).

lacking as to those who are not stopped, and police departments can still offer up hypothetical explanations for the disparities that are difficult to refute solely based on data.⁷⁵

Supreme Court case law provides important but oft-ignored guidance for assessing statistical proof of discrimination. In particular, *Bazemore v. Friday* requires parties challenging statistical analysis to refute that analysis based on the data rather than offering up alternative explanations.⁷⁶ That case involved salary disparities between black and white agricultural extension agents. The defendants suggested that some factors other than race might explain the disparities. For example, agents worked on different crops, and it was possible that agents working on certain more desirable crops (tobacco, as this was North Carolina in the 1970s) might have been paid more, or those working in certain counties might have likewise been paid more.⁷⁷ The Supreme Court held, however, that a defendant cannot simply offer hypothetical alternatives but instead must demonstrate the validity of an alternative explanation by using empirical data.⁷⁸ In other words offering alternatives unsupported by data is an impermissible legal strategy.

If followed, this principle would eliminate at least one of the rationales that discrimination skeptics use to reject statistical findings. However, the principle is rarely followed, including by the Supreme Court itself. In a variety of contexts, such as in the recent massive class-action claim against Wal-Mart, the Supreme Court has expressed skepticism over statistical methods of proof.⁷⁹ This suggests that it will be difficult to convince discrimination skeptics of the presence of discrimination purely through statistical analysis and that something more will be needed. What “more” might help is difficult to know; surely by this point in our history, we should not be looking for a smoking gun or a

75. Data on racial profiling have been subject to extensive analysis. For helpful discussions of the issues that arise and the difficulty of dispelling doubt, see generally Chet K.W. Pagar, *Lies, Damned Lies, Statistics and Racial Profiling*, 13 KAN. J. L. & PUB. POL'Y 515 (2004); Nicola Persico, *Racial Profiling? Detecting Bias Using Statistical Evidence*, 1 ANN. REV. ECON. 229 (2009).

76. 478 U.S. 385 (1986).

77. *Id.* at 394. It seems relevant to note that as a young attorney (in other words, many years ago) at the Justice Department, I worked on the *Bazemore* case when it was on remand from the Supreme Court.

78. *Id.*

79. In the Wal-Mart case, the Supreme Court dismissed the plaintiffs' statistical evidence by noting, “A regional pay disparity . . . may be attributable to only a small set of Wal-Mart stores and cannot by itself establish the uniform store-by-store disparity upon which the plaintiffs' theory of commonality depends.” *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 357 (2011). Earlier in the opinion, the Court also expressed doubt about the likelihood of widespread discrimination despite the plaintiffs' extensive statistical evidence, stating, “[L]eft to their own devices most managers in any corporation – and surely most managers in a corporation that forbids sex discrimination – would select sex-neutral preference-based criteria for hiring and promotion that produce no actionable disparity at all.” *Id.* at 355. I have previously written on the Court's skeptical treatment of statistical proof of discrimination in the context of the *Wal-Mart* litigation. See Michael Selmi, *Theorizing Systemic Disparate Treatment Law After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477 (2011). For an additional case dismissing statistical proof of discrimination, see *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (rejecting statistical analysis in selective prosecution case).

confession. But it also seems increasingly clear that further progress challenging statistical disparities through litigation is unlikely. Instead, as discussed below, convincing public and private actors of the need to address the statistical disparities will likely prove a more effective remedy.

This is not to say that litigation will prove fruitless. Class-action discrimination claims based primarily on statistical analyses remain a small but vital part of judicial dockets, particularly in federal courts, and the claims are often successful.⁸⁰ With class actions, success often turns on having the class certified because settlements typically follow, but a number of successful cases have gone to judgment in the last few years.⁸¹ It seems likely that many of these cases proceeded before discrimination sympathizers, those who want to know more as discussed earlier, but it is also the case that litigation remains a viable, if limited, means of bringing redress.

B. Discrimination is Intentional Not Implicit

In the area of contemporary discrimination research, there has been a parallel development that has further complicated proving systemic discrimination. Within the legal and popular literature, there is a growing fascination with what is typically defined as “implicit bias,” bias that is often described as unconscious in nature in that the perpetrator is unaware of her own bias.⁸² The typical measuring stick for the presence of implicit bias is the Implicit Association Test (IAT), an online test developed more than a decade

80. The law firm of Seyfarth & Shaw produces an annual report on workplace class actions, and recently noted that settlements for all such class actions “reached an all-time high of \$2.48 billion” with \$295 million attributable to employment discrimination settlements. The employment discrimination settlements demonstrated a significant increase over recent prior years. See J. STEPHEN POOR, WORKPLACE CLASS ACTION LITIGATION REPORT 1–7 (2016), http://www.workplaceclassaction.com/files/2016/01/2016-WCAR-final-thru-Ch-1-non-printable1.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link. A recent study of class action certifications also noted that even after the *Wal-Mart* decision, many class action cases continued to be certified. See Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After Wal-Mart v. Dukes*, 48 AKRON L. REV. 803 (2015) (analyzing class action decisions after *Wal-Mart* and concluding that there was not a significant decrease in certifications).

81. In a contentious and long-running litigation involving the New York Fire Department and its use of written examinations, the Second Circuit upheld a lower court’s determination of liability based on disparate impact theory but not disparate treatment. See *United States v. City of New York*, 717 F.3d 72 (2d Cir. 2013). A gender discrimination lawsuit against Novartis Pharmaceuticals resulted in a trial verdict of more than \$250 million, and the case was later settled for \$175 million. See *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194, 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010). The Supreme Court also recently held that the disparate impact theory was available for claims filed under the Fair Housing Act, a decision that is likely to spawn substantial housing-related litigation. See *Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

82. The list is long, but, for a sampling of recent scholarship that emphasizes the role of implicit bias in contemporary discrimination, see generally Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Cynthia Lee, *Making Race Salient: Trayvon Martin & Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012).

ago that requires individuals to make rapid judgments based on screen images.⁸³ Since its inception, the IAT has documented implicit bias in individuals based on associating African Americans with more negative words, and these findings have been relied on to indicate that many people might engage in discriminatory acts without even being aware of their own discriminatory impulses.⁸⁴ It is often asserted that this kind of implicit bias, in which an individual actor may not intend to act in discriminatory ways, underlies much of contemporary discrimination.⁸⁵ It is now common for racial profiling and school discipline—and many other statistical inequalities—to be described as products of implicit bias.⁸⁶

The problem with this obsession with implicit bias is that implicit bias is a concept defined mainly by what it is not: it is not explicit. That definition, however, is not particularly helpful when one is trying to understand the underlying basis for repeated statistical disparities. If we think of explicit bias as equivalent to what is sometimes referred to as overt bias—the kind of bias that is present in signs such as “No Blacks Allowed”—nearly all of contemporary discrimination will be seen as implicit, which might then be seen as unconscious or unintentional, and in many ways less blameworthy because implicit bias is often defined as automatic in nature.⁸⁷ Within the literature, particularly the legal literature, this analysis involves a two-step mistake, and both of the mistakes make it more difficult to address contemporary discrimination.

The first mistake is to treat implicit bias as beyond one’s control. This is a distinctive feature of the IAT, which is designed as a rapid-response test so that, almost by definition, it is difficult to control one’s responses.⁸⁸ But very few

83. For an early discussion of the IAT see Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465 (1998). The test is available at Project Implicit, <https://implicit.harvard.edu/implicit/>.

84. Within law, UCLA Professor Jerry Kang has been the most prolific supporter of the IAT. See, e.g., Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1186 (2012); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 519 (2010); see also Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18 (2009); Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265, 266 (J.A. Bargh ed. 2007).

85. This is a central premise of the implicit bias literature. See Daren Leonard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, and Race*, 46 WASH. U. J. L. & POL’Y 23, 28 (2014) (“Research on implicit bias finds that racism persists in the United States because people discriminate due to non-conscious stereotypes.”); Kang et al., *supra* note 84, at 1126 (“[R]esearchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects.”).

86. See, e.g., R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination & Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1170 (2006); Jennifer Eberhardt, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 878 (2004); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2036 (2011); *Implicit Bias in School Discipline*, KIRWIN INST. FOR STUDY RACE & ETHNICITY (May 8, 2014), <http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/school-discipline/>.

87. The title of the book by the originators of the IAT is illustrative: MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

88. *Id.* at 39 (explaining that the IAT measures how quickly individuals “associate a group of

meaningful actions are the product of snap judgments, and this would include school suspensions and police stops, and we could add to the list, employment actions, sentencing decisions, and the like. Advocates of the IAT as a measure of discrimination often point to experimental studies that demonstrate limited, but meaningful, correlations between IAT scores and actual behavior.⁸⁹ But what the advocates overlook is the extensive literature on the ability to control implicit bias.

Studies have repeatedly demonstrated that various interventions can limit the activation of implicit or unconscious bias. For example, individuals primed with counter stereotypical examples demonstrate less bias in their IAT scores, and the decrease in bias lasts for an extended period of time.⁹⁰ Broader research on bias across a wide area, not restricted to the IAT, consistently demonstrates the efficacy of a review process.⁹¹ When individuals know their actions will be reviewed, they are far less likely to allow their discriminatory impulses to influence their actions.⁹² To offer one recent example, a study of baseball umpires found that umpires were more likely to provide a favorable strike zone to pitchers of the same race as the umpire, but the favoritism receded when the game was nationally televised, presumably because the strike zone would be more closely monitored by the national audience.⁹³ In another sports study, the authors found that basketball referees reduced their bias in foul calls after an

people, shown in photographs, with either positive or negative words”).

89. See Greenwald et al. *supra* note 84, at 17 (discussing correlations between IAT scores and behavior).

90. See Michael A. Olson & Russell H. Fazio, *Reducing Automatically Activated Prejudice through Implicit Evaluative Conditioning*, 32 J. PERSONALITY & SOC. PSYCHOL. BULL. 421, 422 (2006) (demonstrating that “automatically activated racial attitudes can be changed more readily than commonly claimed”). In this study, the authors used a technique known as “evaluative learning,” in which the subjects are primed, or debiased, with positive pairings based on race. See also Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotypes, Stereotype Accessibility and In-Group Favoritism*, 78 J. PERSONALITY & SOC. PSYCHOL. 708, 722 (2000) (providing different perspectives can reduce stereotype activation).

91. See generally Patricia G. Devine et al., *Long-Term Reducing in Implicit Race Bias: A Prejudice-Habit Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1276 (2012); Calvin K. Lai et al., *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCHOL. COMPASS 315, 318 (2013); Calvin K. Lai et al., *Reducing Implicit Racial Preferences: A Comparative Investigation of 17 Interventions*, 173 J. EXPERIMENTAL PSYCHOL.: GEN. 1765, 1781 (2014).

92. See Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 594 (2006) (“Laboratory experiments show that when subjects know that their decision will be reviewed by experimenters, they show lower levels of bias in assigning jobs.”). The interesting research of Samuel Sommers has also demonstrated that white individuals may demonstrate less biased reasoning when placed in a diverse decisionmaking group such as a jury. See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects on Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597 (2006). This research suggests that individuals who believe their actions will be judged by others, in this case African-American jurors, may work harder to avoid engaging in racial stereotyping.

93. See Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1422 (2011).

earlier study revealing racial bias by basketball referees received widespread public attention.⁹⁴

Studies have also shown that those who are motivated to control implicit bias can often do so. Extensive research has shown that people can work to reduce prejudice in various ways: some may want to reduce only prejudice that is visible, while others will work to reduce prejudice even when discrimination is not apparent.⁹⁵ The excellent work of Frank Dobbin and his colleagues on workplace diversity has demonstrated that when management makes diversity a priority, in part by designating accountable officials, results will follow.⁹⁶ In other words, even if it is true that most discrimination is now implicit in nature—more on that in a moment—it is not the case that it is likewise inevitable. There are many ways to control and reduce bias, implicit or otherwise.

The second misstep in the implicit-bias assessment is related and implicates the indiscriminate use of the term. Once individuals have been made aware of the presence of implicit bias and they fail to make any efforts to control that bias, it is far less clear that the subsequent acts should be treated as involving implicit bias. This returns to the fact that individuals are capable of controlling—or attempting to control—their biases, and failing to do so can be a sign that something other than implicit bias is at work.

Returning to police stops, accepting that the officer does not consciously pull the driver over because of his race—which is the implication of implicit bias—all of the interactions thereafter will be taken with a consciousness of the driver's race. The police officer will also likely know that African-American drivers are disproportionately pulled over and less frequently found to have contraband than white drivers and every step thereafter is informed by that knowledge. The officer will also know his own pattern of pullovers and searches. The decision to search the car will not be made in isolation, as a snap judgment, or without regard to the person's race, but the officer will be conscious of the driver's race and will make a deliberate decision to search the car, and do so against a known context of police stops. In other words, at least

94. The original study demonstrated racial bias by basketball referees who showed favoritism towards players of their own race. See Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q.J. ECON. 1859 (2010). The original study received substantial media attention, which a subsequent study found eliminated all of the bias. See Devin G. Pope et al., *Awareness Reduces Racial Bias*, (Nat'l Bureau of Econ. Research, Working Paper No. 19765, Dec. 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370221.

95. See E.A. Plant & Patricia Devine, *The Active Control of Prejudice: Unpacking Intentions Guiding Control Efforts*, 96 J. PERSONALITY & SOC. PSYCHOL. 640, 641 (2009). For a fuller discussion see Elizabeth Levy Paluck & Donald P. Green, *Prejudice Reduction: What Works? A Review and Assessment of Research and Practice*, 60 ANN. REV. PSYCHOL. 339, 352 (2009).

96. See, e.g., Frank Dobbin, Alexandra Kalev & Erin Kelly, *Diversity Mgt. in Corporate America*, 6 CONTEXTS 21, 26 (2007) ("Our analyses show that making a person or a committee responsible for diversity is very effective."); Frank Dobbin, Daniel Schrage & Alexandra Kalev, *Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity*, 80 AM. SOC. REV. 1014, 1034 (2015) ("Accountability to diversity managers or federal regulators . . . leads managers to be more attentive to the effects of reforms" [designed to increase diversity] . . .).

after the initial stop, there is nothing implicit about the officer's actions—unless by implicit we mean the officer did not claim to be acting because of the driver's race. But that would be a highly unusual definition of implicit, or of discrimination more broadly. Proof of discrimination has never required a confession or even an acknowledgment by the person engaging in discriminatory behavior.

The school principal is in the same position. She would observe that African Americans are overrepresented among the students who are suspended, and she would make the conscious decision to explore the basis for the suspension more thoroughly or to ignore that fact and proceed with the suspensions. Again, there is no reason to label her behavior as implicit and there is little to be gained by doing so. Surely, repeated behavior by governmental agencies and individuals, with layers of oversight, should be treated differently from an isolated incident by a single police officer or teacher, but the rush to the implicit bias explanation largely ignores the difference between aggregate and individual behavior. Contrary to the message of implicit bias, these are not the unconscious actions of good people who cannot help themselves; these are individuals who are, at a minimum, unconcerned about the racial implications of their actions.⁹⁷

To take a rather mundane but illustrative example, suppose Person A bumps into Person B and offers the common apology, "Sorry, I did not mean to do that." Person B would likely accept that explanation on the first and perhaps the second incidents but, after the third, fourth, or hundredth, would likely reject the excuse and assume the person intended to bump into her, or at a minimum, was not paying attention or did not care. Even within the framework of implicit bias, at some point repeated behavior should no longer be defined as implicit in nature. There is no particular reason to assume differently about incidents in which the police, school administrators, employers, judges, or anyone else engages in repeated acts with strong racial implications after they have been made aware of the possible force of implicit bias and the ability to control it.

There is, it would seem, a strategic desire to define behavior as implicit: individuals might be more motivated to change their behavior if it is seen as common and not racist in nature. As a strategic move, this may work with some well-intentioned people, but we have been waiting a long time for those individuals to alter their behavior.⁹⁸ Emphasizing the strategic nature of the implicit-bias discussion is important because there is a tendency to treat the

97. The subtitle of a popular book from the creators of the IAT emphasizes that that good people can engage in implicit bias. See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

98. For an argument that change will rely on those who are well-intentioned see Katherine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1902 (2009) (arguing that changing discriminatory behavior "requires people who are committed to non-discrimination norms and determined to live by them").

various theories of discrimination as if they represent a thing rather than a theory. To say that someone's behavior has been influenced by implicit bias means their actions have been influenced by stereotypical thinking of which the person may be unaware and of which they will almost certainly disclaim responsibility. Fair enough, but their behavior could just as easily be treated as discriminatory in nature without the need for a label. Implicit bias suggests that its opposite might be explicit bias, which could be equated with old-fashioned discrimination or racist attitudes. This would be reflected in the common mantra "that we now have racism without racists."⁹⁹ But the world of discrimination need not be seen as binary in nature—it does not have to be either implicit or explicit, it can run across a spectrum that might involve some conscious attitudes mixed with stereotypical thinking. If we are forced to rely on a binary approach to discrimination, we should think of lawful and unlawful. Within that legal schema, as I argued many years ago, an individual's motive is irrelevant to establishing liability though it can be relevant as a matter of damages.¹⁰⁰

Part of the problem with labeling troublesome behavior as implicit in nature is that soft-pedaling the behavior allows people to escape without responsibility. Moreover, it likely conveys the impression that there is something different about implicit bias than other forms of discrimination. However, the message we want to send, particularly where seeking to remedy the consequences of the underlying actions, is that implicit bias is just another form of discrimination, not a better or worse form of it.

This is not to suggest that implicit bias is not a real or important concept—it is both and has aided our understanding of contemporary discrimination. It has been overstated, however, in recent analyses on racial bias. Implicit bias should not be equated with its counterpart explicit bias if explicit bias is overt, unambiguous, and inevitably leads to a finding of discrimination. That kind of discrimination on a broad scale has not existed for many years, and we should not define all remaining, other discrimination as implicit bias.

IV CONCLUSION

It is certainly difficult to convert discrimination skeptics into individuals who see discrimination as remaining part of the national landscape. In many ways, the election of President Barack Obama has provided additional fuel for skeptics.¹⁰¹ The move to an emphasis on implicit bias has not had the salutary

99. See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* (4th ed. 2013).

100. See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997).

101. The authors of one analysis of views after the election concluded, "Across race, gender, age, and income, Americans seem to have taken the election of an African-American President as a sign that the country has moved significantly away from its racist past." Nicholas A. Valentino & Ted Brader, *The Sword's Other Edge: Perceptions of Discrimination and Racial Policy Opinion After Obama*, 75 PUB. OPINION Q. 201, 216 (2011).

effect many might have expected, although it has certainly played a role in the decisions of some individuals and entities to address lingering racial disparities. Ultimately, whether the disparities are the product of implicit bias or something else should not be the determining factor of whether those disparities are addressed. Rather, what is necessary is ensuring that someone is accountable for those disparities, which need to be seen as problematic regardless of their origin. Any public-school official who looks at the suspension data should be troubled by those findings both because of the extreme disparities between suspension rates of African Americans and whites and the harm that students endure when excluded from public schools. The response to the disparities should not be that the students are getting what they deserve but that the disparate application of suspension must be addressed, a step a number of school districts are now taking.¹⁰²

The same is true with police stops, a context in which it will take initiative by a police chief or mayor to address disparities. Regardless of whether one concludes that disparities are the product of discrimination, the disparities should be seen as highly problematic and as surely contributing to tension between law-enforcement officers and the communities they are intended to serve. Upon taking office, New York City's Mayor de Blasio quickly settled the litigation over the City's "stop and frisk policy" and changed the policy to reduce the number of such searches.¹⁰³ In light of the *New York Times* article, the Police Chief in Greensboro, North Carolina ordered his police officers to refrain from stopping cars for minor infractions, at least until the Department could better understand the underlying reasons for the racial disparities in their stops.¹⁰⁴ Private companies can and should take the same initiative without waiting for a determination that their workforce disparities are discriminatory. The persistent racial disparities that we observe in virtually all walks of social and economic life demand attention. Even if implicit bias is the proper explanation for the disparities, those disparities, that bias, are neither inevitable nor uncontrollable.

102. For example, Montgomery County in Maryland has issued a new policy designed to reduce suspensions as a way of addressing racial disparities. See Donna St. George, *Montgomery Issues New Code of Conduct for Students*, WASH. POST (Aug. 17, 2014), https://www.washingtonpost.com/local/education/montgomery-issues-new-code-of-conduct-for-students/2014/08/17/5bce6f16-23dd-11e4-8593-da634b334390_story.html (noting that Montgomery County's new policy was designed to make suspensions a "last resort" as one way of pursuing student equity).

103. See Matt Flagenheimer, *New Message on Frisks from de Blasio's City Hall Amid Criticism*, N.Y. TIMES (June 12, 2015), <http://www.nytimes.com/2015/06/13/nyregion/de-blasio-city-hall-now-emphasizes-stop-and-frisk-drop-started-under-bloomberg.html> (discussing change in policy initiated by Mayor de Blasio).

104. See Kate Elizabeth Queram, *Greensboro Police Halt Minor Traffic Stops in Response to Racial Diversity Concerns*, NEWS & REC. (Nov. 10, 2015), www.greensboro.com/news/greensboro-police-halt-minor-traffic-stops-in-response-to-racial/article,42d2dfc7-ed33-5a96-9d33-c797ce0d4905.html (quoting Police Chief stating, "We must make the necessary changes to ensure that the issues, created by the statistics and perceptions, are . . . addressed").