"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making

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INTRODUCTION

Over the past decades, the United States Supreme Court's Equal Protection jurisprudence has deepened the disjunction between the fundamental values embedded in the Constitution and the realities of three centuries of collective racial experience. The purposeful discrimination rule, first announced in Washington v. Davis,\(^1\) has created an impenetrable brick wall for today's plaintiffs because it assumes that the most egregious institutional and social forms of discrimination have been overcome.

\(^1\) 426 U.S. 229 (1976).
Despite the growing acceptance by the courts of the existence of "unconscious racism," some proof of legislators' racial animus or their discriminatory intent must be demonstrated for liability under the Equal Protection Clause of the Fourteenth Amendment. The evidentiary requirements to establish the subjective state of mind of legislators are so stringent that they allow governing bodies to adopt numerous measures that harm minorities. While the existing doctrine undercuts the Constitution's prohibition on racial discrimination, it also allows legislators to practice purposeful discrimination quite easily because the doctrine scrutinizes mostly voluntary self-incrimination.

This Article argues that the Court will not fulfill the promise of the Equal Protection Clause unless the Court adapts its vision of anti-discrimination to account for the complex nature of discrimination. Imagine that we could measure unconscious discrimination. If so, then we could broaden the concept of purposeful discrimination to include the measurement of a legislator's reliance on unconscious racial stereotypes. Such a measuring device may already exist: The Implicit Association Test (IAT), a computer-based test developed by Yale and University of Washington psychologists. Researchers do not yet know how well the IAT can uncover racial stereotypes; however, if the IAT could discern the state of mind of decision-makers, it could enable all acts of race-dependent decision-making to be subject to pre-scrutiny analysis under the Equal Protection Clause. Currently, facially race-neutral statutes are practically impervious to constitutional challenges by aggrieved plaintiffs, because discriminatory intent often cannot be "located" by the Court. This barrier has continued to shield legislators from judicial scrutiny. The IAT could "smoke out" illegitimate purposes by demonstrating that the classification does not in fact serve its stated purpose.

Part I of this Article surveys the doctrinal history of the intent standard in anti-discrimination law. It offers critiques by two scholars who argue that the Court in Davis created a dichotomous vision of equal protection jurisprudence—either the racial discrimination was a product of invidious, malicious intent or the perpetrator was entirely blameless. However, several lower federal courts, and even members of the Supreme Court, have acknowledged the existence of unconscious racism in their analyses of equal protection challenges. Additionally, this Part briefly

highlighted how psychological testing, at least in theory, could address the Court's concern for institutional competence and could demystify its skepticism that unconscious racism can actually be measured.

Part II introduces the Implicit Association Test, highlighting the benefits the test offers, such as its ability to unmask prejudice and even reduce the prejudice of test-takers. In addition, this part juxtaposes the IAT with other tests, arguing that the IAT is just as credible as other tests upon which social actors, including courts, routinely rely. Further, this Part acknowledges that courts may not allow litigants to rely on the IAT unless the test can meet the reliability standards that courts require of other evidentiary tools.

Part III examines how the IAT fits neatly within the existing equal protection framework to infer intent. This Part offers a minimal refinement of the Davis intent standard: use of the IAT within the evidentiary factors identified in Village of Arlington Heights v. Metropolitan Housing Development Authority. Plaintiffs could use the IAT to discern motive when the record seems to indicate no animus on the part of the decision-maker but the policy choice has a racially disparate impact. This limited use of the IAT will preserve the autonomy of legislative action and minimize judicial interference. Further, this Part suggests how the IAT could be useful in other areas of law and policy such as jury selection, education, and employment.

Finally, Part IV discusses potential criticisms. The measurement of unconscious racism may be futile if doctrinally conscious awareness is an element of “purposeful discrimination.”

I. The Intent Framework

A. Washington v. Davis and Its Progeny

The Supreme Court's 1976 decision in Washington v. Davis divided anti-discrimination law into two terrains, intentional discrimination and unintentional discrimination, deeming only the former to be subject to strict scrutiny review. The Davis Court held that a facially race-neutral policy or state action that carries a racially disproportionate impact violates the Equal Protection Clause only if the plaintiff can demonstrate that he or she was the victim of intentional discrimination. The Davis plaintiffs were a group of Blacks who had been rejected for employment by the District of Columbia Metropolitan Police Department because they had not passed the Department's written entrance examination (Test 21). The unsuccessful Black applicants filed a class action challenging the

4. 426 U.S. 229.
5. Id. at 239.
exam, because the test excluded four times as many Black applicants as White applicants. The plaintiffs did not claim intentional discrimination on the part of the police department, but argued that Test 21's disproportionate impact on Black applicants violated both their statutory rights under Title VII and their constitutional rights to equal protection under the Fifth and Fourteenth Amendments.

While the plaintiffs were unsuccessful in the district court, the court of appeals applied Title VII's disparate impact analysis to their equal protection claim and found Test 21's racially disproportionate impact unconstitutional. The Supreme Court reversed. The Court held that the standard for adjudicating equal protection claims is not identical to the standard used for Title VII claims. A plaintiff alleging a violation of the equal protection clause could not succeed by showing disparate impact alone. Although the Davis Court acknowledged that Test 21 was not a valid measure of job performance of potential governmental employees, the Court found that the test served a legitimate governmental interest because it measured verbal ability, vocabulary, reading, and comprehension. Therefore, its disproportionate effect on Blacks did not amount to invidious racial discrimination because the plaintiffs could not prove that the Department had adopted the test with the specific intent of excluding Blacks from the police force.

The Davis Court ruled that the "differentiating factor between de jure segregation and so-called de facto segregation is purpose or intent to segregate." The Court was careful to point out that its rule did not require that "the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination;" yet, the Davis Court's shift to a motive-based review signaled the end of any meaningful impact analysis under the Fourteenth Amendment. Disparate impact on its own would no longer trigger strict scrutiny. Justice White's majority opinion principally relied on the economic repercussions of judicial intervention in cases like Davis. He argued that a

6. Id. at 236.
7. Id. at 237. From 1968 to 1971, 57% of Blacks failed the test compared to 13% of Whites.
8. Id. at 233.
10. Davis, 426 U.S. at 238.
11. Id. at 246.
rule mandating strict scrutiny in all disparate impact cases “would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average Black than to the more affluent White.”

One year after Davis, the Court provided further doctrinal clarification of the purposeful discrimination standard in *Village of Arlington Heights v. Metropolitan Housing,* holding that discriminatory motive was required in all cases challenging facially neutral laws. In *Arlington Heights,* a real estate corporation obtained an option to purchase a tract of land on which it planned to develop a racially integrated low- and moderate-income housing project. The village refused to change the zoning of the land from a single-family to a multi-family classification, and the corporation filed suit under the Fourteenth Amendment claiming that the village's refusal was racially motivated. The Court found that policy choices of legislators or administrative bodies might be motivated by several lawful concerns. However, it stated that the constitutional and social importance of racial discrimination demands that judicial deference should cease, not when discriminatory purpose rested “solely on racially discriminatory purpose,” but when it had been shown to be “a motivating factor.” The Court went on to argue that discriminatory purpose “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” The *Arlington Heights* Court offered several evidentiary factors that could be used to infer intent: (1) the historical background of the legislator's or administrator's decision; (2) the specific sequence of events leading to the challenged decision; (3) legislative or administrative history; and (4) the inevitability or foreseeability of the law's consequences. The Court made clear that this list of evidentiary factors was not exhaustive.

In *Arlington Heights,* the Court reviewed several types of circumstantial evidence: (1) the statements of the Planning Commission and Village Board; (2) the minutes of the public meetings; and (3) the disparate impact of the village's decision to maintain single-family zoning. That decision disparately affected minorities who made up eighteen percent of Chicago's population but forty percent of the income groups that would have been eligible for the housing. The Court held that, while some of the opponents "might have been motivated by opposition

14. *Id.* at 248.
16. *Id.* at 252.
17. *Id.*
18. *Id.* at 265–66.
19. *Id.* at 266.
to minority groups ... [this] evidence ‘[did] not warrant the conclusion that this [racial opposition] motivated the defendants.’”

While the Supreme Court in Arlington Heights strengthened its commitment to motive review for facially neutral challenges, the Court also continued to make clear that disparate impact could provide evidence that racial animus existed. This “back road” to intent was closed in the Court’s 1979 decision in Personnel Administrator v. Feeney. In Feeney all applicants for official service jobs had to take a competitive entrance exam. The entrance examination as well as the candidate’s previous training and experience determined an applicant’s final grade. However, a state statute gave veterans an absolute preference for civil service jobs regardless of how they scored on the entrance examination. Because over ninety-eight percent of the veterans in the state were men, the preference overwhelmingly disadvantaged women. The Court upheld the veteran preference, finding that even though it was foreseeable to the legislature that the preference would operate disproportionately to exclude women, there had been no purposeful discrimination because “‘discriminatory purpose’... implies more than ... intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” The Feeney Court’s shift was important because the holding focused on the proffered reasons for the governmental action, not on whether the decision-maker was aware of the foreseeable consequences of his or her decision. The Arlington Heights Court found that it was sufficient for race to simply be a motivating factor, but the Feeney Court’s focus on the actual reason implies that discrimination must be the but-for cause of the decision.

The intent standard articulated in Davis and its progeny has seriously diminished the capacity of plaintiffs to prove a violation under the Equal Protection Clause because the subjective motivation of decision-makers to disadvantage minorities or women is difficult to demonstrate. The Arlington Heights factors enabled plaintiffs to use direct and circumstantial proof.

24. Id. at 263.
25. Id. at 270. When the legislation was enacted, only 1.8% of the veteran population was women, while over one-fourth of the state’s population had veteran status.
26. Id. at 279.
27. Justice Marshall in his dissent criticizes the Feeney majority for refining the Davis intent standard into a primary motive or a but-for causation review. Id. at 284.
evidence to infer intent. One would have thought that this judicial expansion of evidentiary mechanisms open to plaintiffs would have unmasked laws that were the product of racism discrimination, but which neither discriminated clearly on their face nor resulted from overt racism. Unfortunately, the augmentation of evidentiary guidelines in *Arlington Heights* did not help plaintiffs prove their equal protection claims because even if their claims successfully demonstrated the existence of procedural irregularities or statistical disparities, some plaintiffs continued to run into the formidable barrier of proving unconscious racism or prejudice.

A recent case highlights the difficulty of proving intent under the *Feeney* standard. In *United States v. Clary*, a Missouri district court found that unconscious racism had motivated the enactment of the crack cocaine statutes. The court stated that “[r]acial influences which unconsciously seeped into the legislative decision making process are no less injurious, reprehensible, or unconstitutional.” The court relied on the factors announced in *Arlington Heights* to sustain the plaintiffs’ equal protection challenge. The Eighth Circuit reversed the trial court’s decision, holding instead that the objective evidence offered by the plaintiffs demonstrated only the disparate racial impact of the crack statutes and not invidious intent on the part of Congress. The Eighth Circuit argued that the lower court’s reliance on unconscious racism “does not address the question whether Congress acted with a discriminatory purpose.” The lower court had inferred that the legislators’ exposure to media stereotypes of crack dealers had influenced their policy choice. Because at that time it was nearly impossible for the plaintiffs to show that the media stereotypes actually influenced the legislators’ decision-making process, the Eighth Circuit found that application of the *Arlington Heights* factors could not establish proof of racial discrimination.

Thus, the Supreme Court in *Davis* and its progeny announced what has amounted to a most limited equal protection principle. When plaintiffs challenge a facially neutral law or policy, even if they can demonstrate that the law or policy has a disproportionate impact on a protected group, their claim must also be supported by proof of purposeful discrimination. If discriminatory purpose or motive can only be shown by a “conscious behavioral intention to create social distance by
denying out-group members certain benefits and opportunities,” under the current equal protection framework, a decision-maker would either have to admit to holding racial animus or leave a paper trial from which a rational person could infer a discriminatory intent.

B. Unconscious Intent

Numerous constitutional scholars have criticized Davis and Feeney. Many of these authors have critiqued the heavy burden a motive-centered equal protection framework places on plaintiffs. Specifically, two groundbreaking articles focus more directly on unconscious racism and status discrimination and offer alternatives to the Davis intent framework. Professor Charles Lawrence, in his seminal piece The Id, the Ego, and Equal Protection, has argued that the Davis requirement of subjective intent makes little sense because unconscious racial motivation influences most behaviors that produce racially disparate results in law and policy. A requirement of intent is ineffective because it does not take into account “both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.” Professor Lawrence offers two schools of thought that explain the origins and facilities of unconscious racism: cognitive psychology and Freudian theory. Cognitive psychologists argue that individuals internalize prejudicial beliefs and preferences from their cultural surroundings, including family, colleagues, and the media. Freudian theorists further clarify the internalization of this prejudice: “the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right.” Thus the mind, while actively attempting to block out racist ideas, invariably lets them seep into the unconscious.

Lawrence proposes that courts consider the “cultural meaning” of an alleged discriminatory act to determine whether racism operated in the decision-making process. This new equal protection analysis would allow plaintiffs to offer evidence that the governmental action “conveys a symbolic message to which the culture attaches racial significance,” namely a
message that denigrates Blacks to inferior status. For example, in the case of Arlington Heights, this evidence would include "the history of statutorily mandated housing segregation as well as the use of restrictive covenants among private parties that aim to prevent [B]lacks from purchasing property in [W]hite neighborhoods." Professor Reva Siegel in her article, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, similarly criticizes the Court's equal protection jurisprudence. She argues that, while the Court's current doctrine is primed to handle obvious discriminatory action, it is ineffective in combating status-based discrimination. The Court's reluctance to strike down the state's use of "'facially neutral' criteria that have injurious effects on minorities or women" has led to the impossible constitutional standard of discriminatory purpose, which is defined as "tantamount to malice." The Davis standard clearly turned the tide in favor of motivational review and judicial deference.

Siegel argues that, while the Davis doctrine evinced a judicial preference for a showing of discriminatory intent, it was not until the Court's decision in Feeney that the Court made clear that plaintiffs would have to show that legislators acted with express racial animus before strict scrutiny would apply. This stringent standard protects most governmental actions from successful equal protection challenges, thereby inviting "legislators to act without regard to the foreseeable racial or gendered impact of their actions;" and thus, "today doctrines of heightened scrutiny function primarily to constrain legislatures from adopting policies designed to reduce race and gender stratification, while doctrines of discriminatory purpose offer only weak constraints on the forms of facially neutral state action that continue to perpetuate the racial and gender stratification of

41. Id. at 356.
42. Id. at 366.
43. Siegel, supra note 22.
44. Id. at 1113.
45. Most interestingly, Siegel finds that the emergence of the discriminatory purpose doctrine was not a natural evolution but likely the result of an institutional competence debate between judges and legal process scholars who contended that allowing successful challenges to racially neutral practices based on impact alone was an unlawful encroachment on legislative power. Id. at 1132-33. The Davis Court, in adopting the intent doctrine, abandoned important precedents like Palmer v. Thompson, 403 U.S. 217, 225 (1971) (finding that the city's closing of certain municipal swimming pools did not constitute a violation of equal protection despite allegations that the decision to close them was motivated by a desire to avoid integration because the inquiry should focus "on the actual effect of the enactments, not upon the motive which led the states to behave as they did"); and therefore, disagreed with the decisions of six courts of appeals and several district courts that had held that disproportionate impact alone, without regard to intent, violates the Equal Protection Clause.
46. Siegel, supra note 22, at 1134.
47. Id. at 1141.
American society." While Professor Siegel does not fully advocate for the outright abandonment of the Davis doctrine, she believes that courts should not only focus on the mental state of decision-makers but should also look to the racial and gender impact of their policies. To achieve this goal, in circumstances in which policies further gender and racial subordination, a Title VII disparate impact analysis should reign, and government officials should actively justify their policies. Siegel states that this framework would change the way we evaluate such policies and encourage state actors to be more honest about the role they play in perpetuating this stratification.

C. Institutional Competence and Measuring Unconscious Intent

As discussed above, the current intent standard is problematic. However, courts continue to adhere to the intent rule to avoid the slippery slope consequences of applying an alternative standard. The IAT drives a stake in that slope by providing a viable stopping point. The appeal of the Davis framework for a conservative court lies in its promotion of legislative autonomy and curtailment of judicial power in areas that would ostensibly lead to "too much justice." Normatively, institutional factors counsel against judicial interference in the province of legislative authority unless there is compelling justification, such as when the legislature is engaging in a clear pattern of racial discrimination. The Davis rule shields the bureaucratic process from claims by systematically disadvantaged minorities seeking review by the courts. The color-blind principle is embedded in the argument for strict motivational review, which presumes the neutrality of the decision-making criteria absent the clearest showing of racial discrimination. A strict motivational review, without more, insulates race-conscious decision-making, as institutional competence concerns prevail even when unconscious racism is clearly operating. As the district court opined in Hopkins v Price Waterhouse, "it is impossible to accept the view that Congress intended to have courts police every instance where

48. Id. at 1143.
49. Id. at 1144-45.
subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex.”

This Article argues that courts have remained steadfast to the intent doctrine because courts believe that it is impossible to measure unconscious racism. The failure to endorse legal remediation of unconscious racism arises at least in part from the Court’s skepticism about whether unconscious racism can actually be proved in a court of law. The Justices on the Supreme Court seem to be aware of the elusive nature of discrimination, because they continually acknowledge that discrimination is not always subjectively purposeful and can be unconscious. Justice O’Connor, in her dissent in *Georgia v. McCollum*, argued in favor of peremptory challenges to secure minority representation on a jury because “[i]t is by now clear that conscious and unconscious racism can affect the way White jurors perceive minority defendants and the facts presented at trials.” Justice Ginsburg, in a dissent joined by Justice Souter in *Adarand v. Pena*, stated that “[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.” Even Justice Scalia, after oral arguments in *McClesky* said, “[I]t is my view . . . that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable . . . .”

Thus, members of the current Court acknowledge that unconscious racism may motivate decision-makers. However, any refinement of the *Davis* rule must also continue to be sensitive to the Court’s legitimate concerns for institutional competence and separation of powers. The proposed rule must also be workable from an evidentiary perspective, in that it must be able to quantitatively and qualitatively measure unconscious racism. The Implicit Association Test may be such a measure. In theory the

53. *Id.* at 1118. (finding liability because “while the stereotyping by individual partners may have been unconscious on their part, the maintenance of a system which gave weight to such biased criticism was a conscious act on the partnership as a whole”).

54. Barbara Flagg argues that courts may support the intent doctrine because they believe that unconscious decision-making is rare or that racially conscious decisions should be sanctioned more readily than unconscious discrimination. Flagg, *supra* note 51.

55. As the Court stated, “if [the law] applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justices is still within the prohibition of the Constitution.” *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).


IAT has the capacity to ferret out race-specific decision-making without overstepping the Court's stringent evidentiary guidelines and Article III concerns.

II. THE IMPLICIT ASSOCIATION TEST

A. Description of the IAT

In 1997, Professor Mahzarin Banaji, Anthony G. Greenwald and their colleagues at Yale and the University of Washington created an attitude measurement test called the Implicit Association Test, which can measure unconscious or implicit attitudes. Since its creation, the IAT has been used to measure various implicit attitudes, including those pertaining to sexuality, gender, and race. The goal of the Race IAT is to measure automatic expressions of racial stereotypes and attitudes that test-takers expressly and consciously disavow. The IAT posits that scores will reveal whether test-takers generally associate “good characteristics” more with Whites than with Blacks.

One variation of the Race IAT works as follows: The test begins by asking the test-taker two specific questions about her particular racial attitudes and then basic demographic questions about her age, sex, and residency. After completing this survey, the computer-administered IAT begins by introducing the test-taker to the two “target concepts” (White versus Black) and two “attributes” (good versus bad). The test tells the subject that they will be presented with pictures of unfamiliar Black and White faces as well as words that describe “good” and “bad” characteristics. For this particular test, the test-taker is told that the words used to describe “good” are joy, love, peace, wonderful, pleasure, glorious, happy,

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61. Studies have been done which show that the Race IAT predicts recommendations for budget cuts for minority organizations, the gender stereotyping IAT predicted evaluations of female job applicants, and the IAT measuring implicit attitudes towards gay men predicted friendliness and non-verbal behaviors towards a gay male during a face-to-face interaction.
62. Dasgupta et al., supra note 60.
63. The questionnaire asks the respondent the following two questions: (1) “Which statement best describes you?” Answers include: “I strongly prefer Whites to Blacks, I moderately prefer Whites to Blacks, I like Whites and Blacks equally, I moderately prefer blacks to whites, I strongly prefer Blacks to Whites.” (2) Rate “how warm or cold you feel toward Blacks and Whites (0=coldest feelings, 5=neutral, 10= warm).” Implicit Association Test: Black-White IAT, at http://buster.cs.yale.edu/implicit/research/ProcessStudy.jsp.
and laughter; and the words used to describe “bad” are agony, terrible, horrible, nasty, evil, awful, failure, and war. The test-taker is asked to keep her index finger on the ‘e’ and ‘i’ key to enable the test-taker to respond quickly. When the image or word that corresponds with the category on the left-hand side of the screen appears she should press the ‘e’ key; alternatively if it corresponds to the right-hand side, the test-taker should press the ‘i’ key.

Before each trial, the relevant categories appear at the top of the right- and left-hand side of the screen. The Race IAT has six trials and lasts ten minutes. For the first trial, the category “African American” appears on the left and “European American” appears on the right-hand side of the screen. When the first trial begins, a picture of a White or Black face appears in the middle of the screen, and the test-taker is asked to classify the face with the correct category by pressing either the ‘e’ or ‘i’ key. In the second trial, the category “Bad” appears on the left-hand side of the screen and the category “Good” appears on the right. Words that describe either good or bad (Joy, nasty, war) appear in the middle of the screen and the subject has to place them in the correct category by pressing the corresponding key. These first two trials do not mix words and faces.

In the third trial, the categories “African American” and “Bad” are placed together on the left-hand side of the screen and “European American” and “Good” are placed together on the right. In the middle of the screen, the subject now sees a stream of faces and words, which she must sort into the categories. The test-taker goes through this trial twice. The fifth trial places the word “European American” on the right-hand side of the screen and “African American” on the left and presents the test-taker with pictures of Black and White faces. The sixth and seventh trials reverse the pairings and place the categories of “European American” and “bad” on the right-hand side of the screen and “African American” and “good” on the right. Again, the test-taker is presented with pictures and words that describe good and bad.

When the test-taker makes an error, a red X appears on the screen. A test-taker’s implicit attitude is measured by both her response time and her error-rate. Thus, an attitude preference for Whites over Blacks is displayed by a faster response time for White + good combinations compared to the Black + good pairings.

The experiment contemplates that test-takers will have difficulty during the sixth and seventh segment of the trials because most test-takers will have more difficulty pairing good characteristics with the category “Black.” The IAT Corporation found that forty-eight percent of those who take the Race IAT show a strong automatic preference for Whites.
twelve percent show little or no preference, and six percent show a strong preference for Blacks.\footnote{65}{See IAT Black-White Debriefing Research, at http://buster.cs.yale.edu/implicit/research/education/race/debriefing.jsp.}

The IAT demonstrates that single words can activate attitudes and spontaneous trait inferences. Implicit attitudes are formed slowly and develop by experience and social conditioning.\footnote{66}{See generally Anthony G. Greenwald & Mahzarin R. Banaji, \textit{Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes}, 102 PSYCHOL. REV. 4-27 (1995).} Most decision-makers do not intend to make policy choices to harm a stereotyped minority group. Many times a decision-maker’s biased attitude is beyond her own awareness and arises and continues after her initial moment of decision. The IAT makes test-takers aware of their implicit attitudes. This allows for a “mental correction” because conscious self-awareness of automatic biases creates the possibility for test-takers to control these biases in the future.

\section{B. Benefits of Using the IAT}

\subsection{1. Unmasking Prejudice}

The IAT can be used to unmask discriminatory intent by providing evidence that a decision-maker holds a particular negative stereotype. Studies using the IAT show that a test-taker can automatically activate associations with ingrained stereotypes, which can affect subsequent social and legal judgments.\footnote{67}{See id. at 5.} This finding contradicts current equal protection jurisprudence, which assumes that decision-makers can accurately point to why they are about to make or have made a particular policy choice. As Richard Delgado argues, “the search for a culpable actor—one who is malevolently motivated—reinforces a perpetrator perspective that sees racism as a series of isolated actions and not an integrated system that elevates one group at the expense of another.”\footnote{68}{Richard Delgado, \textit{Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection}, 89 GEO. L.J. 2279, 2295 (2001).} If unconscious prejudice operates, it is not subjected to self-correction in the marketplace of ideas because stakeholders are not made aware of the legislators’ beliefs.\footnote{69}{Krieger, supra note 34, at 1216 n.248.} Cognitive psychology confirms that well-intentioned decision-makers will make mistakes and gives insight into how those errors may manifest themselves.\footnote{70}{William N. Eskridge & John Ferejohn, \textit{Structuring Lawmaking to Reduce Cognitive Bias: A Critical View}, 87 CORNELL L. REV. 616, 646 (2002).}
Implicit social cognition uncovers "inaccessible effects of current stimulus or prior experience variations on judgments and decisions." Legislators and other policymakers may make decisions that they themselves would label non-optimal if they were made aware of the unconscious source of their behavior. The effects of unconscious prejudice will likely be important in decisions that distribute scarce goods such as jobs and school admissions. A large number of decisions made by the state that have a racially disparate impact do not result from discriminatory motivation but from a variety of unintentional judgments, and thus, the Court's current understanding of bias is not complete because it is limited to a motivational analysis that relies on a misunderstanding about discriminators' state of mind. A legislator can only refrain from discriminating if she is self-aware, that is if she can identify accurately the factors leading to her policy choice.

Another problem with the intent requirement is that for decisions of multi-member bodies it is hard to discern whose attitudes and feelings must be proved. The intent doctrine allows a decision-maker to mask his or her prejudiced beliefs behind fabricated motivations that are proper. For example, even though the Arlington Heights Court acknowledged that the opponents of re-zoning might have been motivated by racial prejudice, the court stated that "this circumstantial evidence [did] not warrant the conclusion that [racial prejudice] motivated the defendants ... [because] the weight of the evidence proves that the defendants were motivated ... by a legitimate desire to protect property values..." This "atomistic approach" allows defendants to avoid liability using pretexts and false motivations to conceal their true and improper purpose.

Evidence garnered from survey research suggests that the vast majority of individuals who have low prejudice ratings realize that their actual reactions to members of stereotyped groups conflict with their personal sentiments of how they think they would respond. The IAT unmasks this prejudice by bringing the actual race specificity of a decision to the surface, thereby allowing for future race-neutral decision making.

2. Prejudice Reduction

The IAT seeks to serve a remedial function. Studies show that the IAT test-taker's prejudices can actually be reduced once an individual is

71. Krieger, supra note 34, at 1190.
74. 373 F.Supp. 208, 211 (N.D. Ill. 1974).
75. Armour, supra note 72, at 740–742.
confronted with his unconscious prejudices.\textsuperscript{76} Social science evidence shows that increased consciousness of race will decrease discrimination. Once individuals take the IAT and get their results, they can then stop and ask whether thoughtless adherence to racial stereotypes is affecting their decisions. If so, decision-makers can take remedial measures to prevent or diminish unconscious use of race-specific criteria.\textsuperscript{77}

Cognitive psychology teaches us that when individuals are presented with a claim—such as “all crack users are black”—they give some initial import to the hypothesis and will then search for evidence to support the claim.\textsuperscript{78} Once they have begun to start treating it as a tentative theory, they will view evidence that supports their theory as more probative than evidence that disconfirms it.\textsuperscript{79} Theorists argue that this bias can be reduced through correction during the decision-making process.

Bias reduction among decision-makers is feasible. Studies have shown that an individual’s IAT scores can be manipulated by experimental design. For example, studies have shown that when test-takers were exposed to “admirable” African Americans, they were less likely to express their racist attitudes.\textsuperscript{80} Studies have also shown that subjects asked to imagine a powerful woman before taking the IAT were less likely to associate men with strength.\textsuperscript{81}

In the legal arena, the results of a particular decision-maker’s IAT can be used to encourage her to stimulate her non-prejudicial beliefs in her next decision, thereby reducing future discriminatory judgments about members of stereotyped groups.\textsuperscript{82} Assuming that most decision-makers espouse racial equality, they will not consciously recognize their hidden prejudices even if their decisions have adverse consequences for Blacks or other minorities. However, if their responses are monitored by the IAT, they are more likely to scrutinize their attitudes and policy choices because any semblance of discriminatory intent would undermine their egalitarian self-identification. “[U]nless a low-prejudiced person con-

\textsuperscript{76} Greenwald et al., \textit{A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, & Self-Concept}, 109 PSYCHOL. REV. 1, 9–18 (2002).
\textsuperscript{77} Krieger, \textit{supra} note 34, at 1217.
\textsuperscript{80} Greenwald et al., \textit{supra} note 76, at 3–25 (2002).
\textsuperscript{81} Id.
\textsuperscript{82} Armour may label the IAT as means of furthering her dissociation model. The dissociation model “points to the possibility of inhibiting and replacing stereotype-congruent responses with nonprejudiced responses derived from nonprejudiced personal beliefs. If nonprejudiced personal beliefs can counteract stereotypes in this way, perhaps there is hope for combating the influence of ubiquitous derogatory stereotypes.” Armour, \textit{supra} note 72, at 744.
sciously monitors and inhibits the activation of a stereotype in the presence of a member (or symbolic equivalent) of a stereotyped group, she may unintentionally fall into the discrimination habit."

Thus the IAT can serve as both a reminder of decision-makers' unconscious discrimination habits and of their articulated personal racial beliefs. By knowing that their discrimination habit is subject to challenge by a plaintiff's attorney, decision-makers are likely to monitor their decisions more assiduously than if they knew that their decisions would almost always pass muster under the *Davis* intent standard. Further, if the IAT were used early in the decision-making process, it could encourage decision-makers to seek disconfirming evidence and to subject their current pool of information to the highest level of scrutiny. The IAT also encourages community groups to monitor the legislative process and prevent prohibited factors, assumptions, and stereotypes from affecting the judgments of decision-makers.

3. Reconsideration of Testing

At its core, the IAT is a scientific test that has been shown to measure objectively a test-taker's unconscious attitudes and prejudices. The IAT could evaluate a particular legislator's action and see whether this decision was the result of latent prejudice. In this sense the IAT is just as appealing as other "objective tests," such as the LSAT or Test 21—the test administered in *Davis*—because it is easy to administer and has the capacity to be objective and facially devoid of color and gender bias.

Even judges who may be skeptical of tests hold a dual consciousness regarding the efficacy of testing even when the tests have negative racial and gender effects. On one hand, judges may believe that tests are good because they distribute benefits based on the abilities and achievements of the particular candidate rather than on race, socio-economic position, or gender. Additionally, decision-makers may think that tests have the possibility of being objective, in that some quality can be quantified without regard to those characteristics. The belief that tests can be neutral and accurate prevents us from acknowledging that we continue to privilege devices that can spit out numbers quickly because we somehow believe that the readiness of the test makes them color-blind. By failing to conduct a formal inquiry into the efficacy of the test at hand, the triumph of "the measurable" reigns even when the existing selection method does not actually result in hiring or admitting more capable workers or students. For example, the Court in *Davis* acknowledged that Test 21 actually had a tenuous relationship with the ability to perform skills required by police officers on the beat.84 By upholding tests like Test 21 and allowing

83.  *Id.* at 757.
employers to make entrance decisions based on test performance that is unrelated to job performance, the Supreme Court has validated a testing regime that prefers tests that are easy to administer rather than ones that substantively measure the criteria the decision-maker is trying to determine.

If we are going to continue to privilege "one-size-fits all" tests because they are easy to administer and race-neutral, we should also similarly privilege the IAT. The IAT is available to millions of Americans and can be taken on the Internet. It is minimally intrusive and only takes ten minutes to complete. Various socio-economic and racial groups have used it in classrooms and as employment criteria, and it is likely to be cost-effective. If the IAT makes it possible to reduce an individual's degree of prejudice to a unitary measure, then we should promote it as we do any other test, because it objectively uncovers socially useful information, namely the race-specificity of a decision-maker's decision.

Courts may be skeptical about the evidentiary value of the IAT as a means to measure intent. Some critics have argued that the definition of intent is unclear because the Court, instead of defining what acts constitute discrimination, has instead offered guidelines regarding what types of proof will evince purposeful discrimination. In order for strict scrutiny review to apply, a plaintiff has to show that a reasonable inference of discrimination can be made. As Linda Krieger and others have argued, the key question of whether race affected the decision-making process is a question about causation rather than the subjective state of mind. A causation driven inquiry would not focus on whether the decision-maker is aware that he was basing his decision on race, but on whether the plaintiff's race in fact caused the decision to be made. Thus, a potential criticism of the IAT is a performance-based one: Is the IAT a good evidentiary tool to infer racial discrimination? Courts might fear that reliance on an unconventional theory to discern unconscious intent would diminish the probative value of the evidence.

Of the IAT, courts may ask: Can you manipulate its results? Is the test statistically significant? Can a ten-minute test really capture the deliberative process a decision-maker goes through when formulating a policy? Is cognitive theory a sound methodology? What do other experts in the field think about the scientific desirability of the IAT? What is the prospective stability of the IAT? An extensive discussion of the answers to these questions is beyond the scope of this article. Unequivocal empirical evidence is not necessary to make the case that measurement of uncon-

86. White & Krieger, supra note 79, at 498.
87. Id. at 510.
scious intent is essential and that a means of measuring intent may be psychological testing.

In addition, this article posits that the IAT should be used in conjunction with the evidentiary tools listed in Arlington Heights. When a particular policy has racially disparate effects even though the statute is neutral on its face, the test results of a particular decision-maker that shows that he is racially prejudiced allows a court to make the reasonable inference that he acted "because of" race. Part III of this Article will discuss in greater detail how courts could use the results of a legislator's IAT with the other Arlington Heights factors such as historical background, a specific sequence of events, and departures from normal procedures to evince a showing of purposeful discrimination.

III. THE IAT IN THE DAVIS FRAMEWORK AND OTHER POSSIBLE APPLICATIONS

The problem with the existing equal protection doctrine is that it is incapable of rooting out racial discrimination where it is the most pernicious. The IAT can refine the Davis intent standard to help courts accurately identify what facially neutral challenges are deserving of strict scrutiny review. This Part, besides using the IAT as an additional evidentiary factor in the Davis framework, also proposes several other ways the IAT can be implemented in both the legal and educational context. The IAT can be used to help screen jurors out of the venire who may have unarticulated racial biases. The injustice of the intent rule is not confined to non-criminal cases, but has shielded the entire judicial system from its responsibility to identify jurors whose racial animus continues to create systematic disadvantage for certain defendants. The IAT could also be used to supplement ability measurement tests in areas of work in which race-neutrality highly correlates with successful job performance. Finally, the IAT could simply be used as an educational tool in classrooms around the nation. Many teachers have already used the IAT to challenge students' existing assumptions about their own racial attitudes.

A. The IAT and the Davis Standard.

This Article does not argue that courts should abandon the Davis framework. It does not advocate for a constitutional rule that employs strict scrutiny to all cases that have disparate effects. Instead it offers an alternative rule that is a workable refinement of the Davis intent standard: The IAT (or psychological testing more generally) should be added to the non-exclusive list enumerated in Arlington Heights for determining racial intent. This limited use of the IAT would still allow the "central purpose of the [Equal Protection Clause to be] the prevention of official conduct discriminating
Yet this proposal would make the intent standard more meaningful and create the possibility for an equal protection regime that, not only in theory but also in practice, prevents race-dependent governmental decision-making from eluding equal protection scrutiny.

Current equal protection jurisprudence gives courts the power to rectify only those laws that clearly discriminate on their face or acts that are the result of overt racism. Most legislation does not contain overtly racist language. A strict application of the Davis rule, essentially an opaque articulation of how decision-makers deliberate, creates an impossible standard of proof for plaintiffs, because in most cases the challengers cannot detect or quantify the invidious intent of legislators who vote on a particular proposal, especially when the law is neutral on its face. Additionally, because most decisions involve multi-member decision-making bodies, discerning a "group's mental state of mind" can be even more difficult.

However, the evidentiary factors articulated by the Court in Arlington Heights may enable a plaintiff's attorney who is challenging a particular state action to use the IAT to prove negative racial stereotyping or attitudes in the legislative decision making process. Because courts have decided to scrutinize the mental state of government decision-makers rather than the impact of their policies on minorities, the IAT should be used to discern their actual motive.

The Arlington Heights factors create several places that the IAT could be used. First, under the Arlington Heights factors, a legislator could be asked to testify on the stand. Therefore, a plaintiff who is challenging a facially neutral statute that has a disparate effect could possibly subject the legislator to the IAT to show that racial animus could have affected her decision. The IAT results for a particular legislator would not assume that the legislator made a policy choice because of racial animus, but that race may have unconsciously affected what policy she chose, how she interpreted the benefits or costs of that policy, or what value she attributed to the community concerns. Under Arlington Heights, courts could also com-

88. Davis, 426 U.S. at 239.
90. As Professor Fiss has argued, Davis' "state of mind" requirement adds "psychological gloss" and creates a threshold of proof that is difficult to meet. See Owen Fiss, A Theory of Fair Employment Laws, 38 U. CHI. L. REV. 235, 297 (1971).
93. Id. at 268 ("In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.").
pare a legislator's IAT results with contemporaneous statements made by the legislator during the decision-making process. The potential disparity between legislators' statements and their IAT results could buttress a plaintiff's claim of discriminatory intent.

This Article sets out a matrix of four discrete categories of pre-scrutiny analysis useful for understanding the Court's demanding standard for identifying acts of intentional discrimination in facially neutral statutes that violate the Equal Protection Clause. The strength of the direct or circumstantial evidence offered by the plaintiff will determine in which category her claim is placed. After Feeney, a decision-maker must have selected a particular policy at least in part "because of" not merely "in spite" of its adverse effects upon a protected group.

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<th>Conscious Intent</th>
<th>Subconscious Intent</th>
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<td><strong>Because of Race</strong></td>
<td>Category I</td>
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<td><strong>In Spite of Race</strong></td>
<td>Category II</td>
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In Category I, the decision maker consciously chooses to enact a policy because of the group's race, sex, gender, and so forth. Here, the defendants must have left a clear paper trail demonstrating that even though the statute is facially neutral, the express purpose of the statute was to injure the protected group. Some limited cases, such as *Yick Wo v. Hopkins*, in which the pattern of denying Chinese applicants laundry licenses was tantamount to explicit exclusion, so that no rational explanation other than race could be deduced, are also placed in this box. Existing equal protection doctrine will apply strict scrutiny to these decisions. Category II cases occur when the decision-maker is consciously aware of the adverse consequences on a protected group. However, courts will not overturn these laws even though the effects of the policy on minorities or women were foreseeable at the time the legislature chose to act. The *Davis* framework provides no remedy unless the record shows that the decision-maker devised this policy with the goal of discriminating against women or people of color. A court would classify these decisions as non-race dependent because they were not enacted with the clear design to disadvantage a protected group.

94. *See id.* at 268.
96. 118 U.S. 356, 373 (1886)
97. An example of a case in this category is *Feeney.*
98. *Feeney*, 442 U.S. at 279.
Current equal protection doctrine does not remedy the cases that fall into Category III. Here, while the actor's decision to enact a race-dependent policy was "because of race," this intent is unconscious. Under the existing evidentiary tools available to plaintiffs under Arlington Heights, unconscious prejudice will legally be "undetected" by the Court. Category IV cases are more difficult to imagine and might simply be a null set under this framework.

The IAT can be used to remedy the impediments created by the intent requirement for Category III cases. This will minimally expand the number of cases that receive strict scrutiny, compared to the alternative rejected by the Davis Court that would have also remedied cases that fell into Category II and perhaps even Category IV. Currently, only Category I claims are remedied; this has had the practical effect of protecting most race-dependent decision-making embodied in facially neutral statutes. Because purposeful discrimination is socially shamed and politically reprehensible, more often than not, there will be no testimony or direct statements that will provide the basis of evidentiary support presently required for Category I cases. Employing the IAT only in Category III cases does not lead to a wholesale judicial intrusion into the legislative and political processes, as would a general moratorium on discriminatory intent, which would create the "too much justice" problem. By identifying only those cases in which race unconsciously influences the decisions of legislators, the IAT leaves intact non-race dependent laws that disproportionately burden minority groups. This allows the courts to strike an appropriate balance between legislative autonomy and judicial oversight, giving each interest due deference without doing violence to the other.

Category III cases deserve protection because the primary focus of the equal protection doctrine is to prohibit official racial discrimination, including the acts of sophisticated governmental officials who can readily conceal their discriminatory prejudice. It is one thing to immunize broad facially-neutral policies that happen to have some negative effect on a particular racial group, such as Category II and Category IV cases, from judicial oversight; however, it is quite another scenario when courts legally ratify policies that were enacted because of racial bias, simply because the decision-maker did not consciously intend for his decision to be based on race. Additionally, allowing plaintiffs to offer the subconscious intent of legislators as circumstantial evidence of purposeful discrimination simply opens the door to further scrutiny. These claims will only pass muster if the government cannot show it had a compelling interest in enacting such a law.

Using the IAT in Category III cases would invalidate the dual equality regime that exists in equal protection law. When a race-conscious statute is passed that is enacted to remedy past discrimination, courts generally strike it down, turning a blind eye toward institutional competence concerns. But when there is a facially neutral statute that harms minorities, the courts defer to the legislature and apply moral skepticism toward any claim that the decision-makers intended to discriminate.\textsuperscript{49}

Thus, if the IAT can objectively discern that racial animus or race considerations played a motivating role, these cases should similarly be entitled to the same amount of judicial activism and moral repudiation that race-specific programs and policies receive. IAT results serve as an appropriate barometer for racial discrimination, highlighting the presence and degree of unconscious intent, which ostensibly should signal to a court that the state action is akin to an explicit racial classification. Again, this still limits the range of cases that receive judicial review because once purposeful discrimination is determined, a court still engages in a strict-scrutiny analysis to determine whether the policy is narrowly tailored to achieve a compelling governmental interest.

Use of the IAT to determine intent also allows plaintiffs to discern the weight of racial animus in decisions made by multi-member legislative bodies. Most decisions in the state and federal legislative process are a product of committee deliberations in which some persons within the group may consciously act out of racial animus, some may unconsciously do so, and others may neither consciously or subconsciously factor race into their decision. Therefore, the intent standard as it exists leaves intact many race-dependent decisions made by deliberative bodies because as critics have argued, "[g]roups do not have mental states, and while individual members of groups might be shown to possess particular mental states, there is no reason to attribute the motive of any particular individual to the group as a whole."\textsuperscript{51}

Prior to \textit{Davis}, the Court looked at legislative motive with a wary eye because of the problems implicit in any judicial examination of intent of multi-member bodies.\textsuperscript{52} In a 1960s case, \textit{United States v. O'Brien}, the Court argued that legislative motivation should play a limited role in the constitutional inquiry because not only is it hard to discern what a large number of legislators acted on, but relying on a few comments concerning the statute does not indicate motive.\textsuperscript{53} As the Court stated, "[w]hat

\begin{itemize}
\item \textsuperscript{100} Flagg, supra note 51.
\item \textsuperscript{102} See Palmer v.Thompson, 403 U.S. 217 (1971).
\item \textsuperscript{103} O'Brien, 391 U.S. 367, 383 (1968).
\end{itemize}
motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."\textsuperscript{104}

While by the time of the \textit{Davis} decision, the Court was less antagonistic about the efficacy of motive-based review, the \textit{O'Brien} critique has had the effect of leaving race-conscious policies intact because proving the mental state of groups has been onerous. The IAT could deal with the \textit{O'Brien} concerns by determining the conscious intent of each decision-maker and then aggregating the results.\textsuperscript{105} Depending on the decision rule of the particular committee, a claim would exist only if a majority or two-thirds of the voting members unconsciously took the protected characteristic into account.

Further, there is powerful social science evidence that people’s own perceptions about a policy can be influenced by the behavior of others in the group.\textsuperscript{106} Use of the IAT as circumstantial evidence regarding the group decision-making process will inform the court of the degree race played in the decision and how various factors may have influenced the decision-making body to make a race-dependent decision. Additionally, it prevents the court from also making the unsubstantiated assumption that the presence of minorities or women on the committee automatically offsets any chance that racial or gender animus could have driven the decision.

The IAT makes it possible to discern the “collective” intent of decision-making bodies when a decision is a result of a group process. This will allow plaintiffs to determine whether the decision was the collective product of discrimination and whether a prejudiced agent could have played a role in the decision-making process. In this way, the IAT could be used both as an evidentiary tool to show intent and also as a corrective device. Legislators who make decisions in multi-member bodies would be encouraged to check their prejudice rating before and after deliberations to determine whether prejudice played a role in the outcome of their vote.

B. \textit{Other Applications}

1. The IAT and the Jury Venire

The Court in \textit{Turner v. Murray} acknowledged that racial attitudes might play a dangerous role in a capital case when the defendant is Black

\textsuperscript{104} Id. at 384.
\textsuperscript{105} Id. at 384–85.
\textsuperscript{106} White & Krieger, supra note 79, at 535.
and the victim is White. Thus, in Turner, the Court ruled that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.” There is a vast body of psychological and opinion poll evidence that supports the claim that White jurors are more likely to bring racial stereotypes and other cultural baggage into the courtroom.

Jury selection comprises of three distinct stages. First, there is a random gathering and then narrowing of those in the community who are generally eligible for jury service. This pool is called the jury venire. The jury members in the venire then may be excused by a showing of undue hardship or extreme inconvenience. After this group is narrowed, the remaining potential jurors are subject to voir dire. After Turner, attorneys may in this last stage ask eligible jurors in the venire about their racial attitudes and beliefs. This usually involves the judge or the defense attorney asking the prospective juror if she or he has any racial bias. Social cognition theorists would argue that the search for the “ideal impartial juror” is futile because jurors may not be aware of the biases that affect their judgments. Thus, the unconscious nature of juror bias prevents the voir dire from impaneling fair and impartial jurors, and methods, such as direct questioning, may be fruitless unless questions are designed to tap into one’s source of bias.

The IAT may be one means to highlight a juror’s pre-existing biases. Use of the IAT can help eradicate discrimination and ensure the integrity of a fair trial by preventing the Fifth or Fourteenth Amendments from

107. Turner v. Murray, 476 U.S. 28 (1986); see also Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981) (citing Ham v. S.C., 409 U.S. 524 (1973) (holding that questions of racial bias are necessary during voir dire only when “racial issues are inextricably bound up with the conduct of the trial”)); Hernandez v. State, 742 A.2d 952 (Md. 1999) (holding that the defendant has a right to ask prospective jurors specifically about their racial bias even if the crime had no racial overtones). But cf. Spencer v. Murray, 18 E3d 229, 234 n.6 (4th Cir. 1994) (holding that the failure of defendant's counsel to inquire about the racial attitudes of prospective jurors did not satisfy an ineffective assistance of counsel claim).


112. See Krieger, supra note 34, at 1188 (arguing that “stereotypes, when they function as implicit prototypes or schemas, operate beyond the reach of the decisionmaker self-awareness”).

113. Justice Marshall in his concurring decision in Batson v Kentucky explained the potency of unconscious racism by jurors: “A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.” 476 U.S. 79, 106 (1986).
remaining impervious to challenges alleging systematic discrimination in criminal law. Even experienced attorneys who have had years of courtroom experience may not possess tools that can readily determine the racial attitudes and beliefs of eligible jurors. The IAT could be a useful tool to ferret out intentional discrimination that is hidden under a cloak of neutral rationalizations.

2. The IAT as a Test of Job Performance

The IAT may be better at producing observable data related to critical job behaviors. Most citizens would agree that we would like our police officers or teachers to employ non-discriminatory behaviors. Let us accept for a moment that a low-prejudiced decision-maker is able to form better relationships with community members and is less likely to violate a suspect's Fourth Amendment rights. Assuming that the IAT can accurately measure the racial attitudes of a police officer, an officer's IAT results will demonstrate future success in making policing decisions that benefit all of the citizens he or she is supposed to protect. Unlike the District of Columbia's Test 21, the results of the IAT and the inferences that are formed from the IAT—the degree of racial prejudice held by the candidate—have a symmetrical relationship with the relevant job characteristic.

3. The IAT as an Educational Tool

Even if the IAT is not implemented in a court of law it could still be used as a remedial tool in educational settings. Society should not want to encourage people to remain ignorant of their own prejudicial beliefs. Unthinking racial prejudice sharpens social awareness of all kinds of discrimination. Several universities such as Harvard, Yale, and University of North Carolina, use the IAT as an educational tool to instruct students about racism. While the law is imperfect at rooting out racial discrimination, citizen education should continue to take place in America's classrooms so that the racial divide has a possibility of being broken down.

IV. POTENTIAL CRITICISMS

A. Unconscious Attitudes Are Not an Element of Intent

Legal acceptance of the IAT will depend on the definition of intentional discrimination. The Feeney Court stated that "discriminatory purpose . . . implies more than intent as volition or intent as awareness of
consequences.” The Court’s definition reaffirms prior decisions holding that purpose is more than simply making a policy choice knowing the racial or gender consequences of that decision. The Feeney definition gives no clear guidance about whether a plaintiff must show malice or animus; nor does it clearly imply that the actor must consciously be aware that he or she is engaging in discrimination when selecting a particular course of action. Later decisions by the Court have not clearly defined the definition and elements of “discriminatory purpose” and have used “discriminatory intent,” “purposeful discrimination,” and “invidious discrimination” interchangeably. Attempting to clarify this ambiguity, Don Welch argues that:

“intent is prospective while motive is retrospective. Motive addresses the factors that lead into a decision: the reasons upon which a decision is based, the realities that motivate the decisionmaker. Intent is synonymous with purpose. It speaks to the goals toward which the actor moves, the ends the actor aims to achieve. One’s motive can be conscious or unconscious; an actor may or may not be aware of the causes of a particular action. Intent is conscious—a decisionmaker knows what he or she intends.”

If intent and not motive as defined above is the constitutional standard, then proof of unconscious racism is irrelevant to the due process inquiry. Why might conscious intent be the standard? Barbara Flagg argues that implicit in the intent rule is the presumption that “conscious use of race-specific criteria is more blameworthy than the unconscious use of race.” This line of argument is consistent with other areas of common law and criminal law that punish acts that are intentionally or knowingly performed more severely than ones that are inadvertent. Supporters of the current framework argue that the nature of the constitutional injury is different when citizens are aware of the legislator’s improper motive than when there is simply an unconstitutional effect.

However, remediying unconscious racism is consistent with existing equal protection law and encourages public confidence in decisionmakers. Until the Court’s decision in Adarand, it was clear that “invidious purpose must be adduced to support a claim of unconstitutionality.” But

115. Pillai, supra note 32, at 531.
117. Flagg, supra note 54, at 985.
in *Shaw v. Reno* the Court made clear that a "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification."\(^{120}\) In *Adarand*, Justice O'Connor stated that the Court would apply strict scrutiny to governmental actions that explicitly use racial classifications.\(^{121}\) Doctrinally, it is not clear why this skepticism should not extend to non-explicit measures that disadvantage minorities. As the *Adarand* Court states, "the point of strict scrutiny is to "differentiate between permissible and impermissible governmental use of race."\(^{122}\) If the Court no longer differentiates between "invidious" and "benign" racial discrimination, it similarly should not distinguish between "conscious" and "unconscious" intent, especially if unconscious intent can be measured. Justice Thomas should take the same uncompromising position as he did in *Adarand*, that "good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race."\(^{123}\) If the government's good intentions cannot protect its benign racial classifications, then their embedded bad intentions should not protect racial decisions that may be invidious. If we are going to apply skeptical scrutiny to benign classifications, why should the Court then distinguish between active and passive forms of race-based classifications if the transparency of decision-makers actions can be uncovered?\(^{124}\) Further, as a normative matter, to leave unconscious discrimination untouched is to legitimate patterns of behavior that should not be sanctioned by the courts.

**CONCLUSION**

The Court's acknowledgement of unconscious racism demonstrates that the Court may not have a varying vision of what acts constitute discrimination; rather, the Court's jurisprudence is guided by the Justices' normative conclusion that unconscious racism simply cannot be measured. Therefore, this Article proposes a minimal revision of the current *Davis* intent framework. Plaintiffs should be able to use the Implicit Association Test as circumstantial evidence within the *Arlington Heights* factors to demonstrate that the challenged practice was not constitutionally justified and relief is warranted because of unconscious prejudice on the part of the decision-maker. This rule would not trigger the Court's "too much

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122. *Id.* at 228.
123. *Id.* at 240 (Thomas, J., concurring).
justice" concern, because it would leave in tact race-neutral decision-making that had a disparate impact on a cognizable minority.

The Court's restricted notion of intentional discrimination is futile because most decision-makers are not cognizant that they even took race into account. However, if the use of race is the criterion for establishing a constitutional harm, then unconscious race-specific decisions should similarly receive heightened review. Allowing plaintiffs or lawyers to use the IAT would not interfere with majoritarian decisions but would illuminate when discrimination unconstitutionally infected the decision-making process. While it is doubtful that courts could be persuaded to use the IAT as circumstantial evidence to infer intent, engaging in this thought experiment demonstrates that if unconscious discrimination could be measured, the Davis intent rule is an ineffective means of implementing the Constitution's prohibition against racial discrimination.