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Poll Workers, Election Administration, and the Problem of Implicit Bias

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POLL WORKERS, ELECTION ADMINISTRATION, AND THE PROBLEM OF IMPLICIT BIAS

Antony Page*
Michael J. Pitts**

Racial bias in election administration—more specifically, in the interaction between poll workers and voters at a polling place on election day—may be implicit, or unconscious. Indeed, the operation of a polling place may present an “optimal” setting for unconscious racial bias. Poll workers sometimes have legal discretion to decide whether or not a prospective voter gets to cast a ballot, and they operate in an environment where they may have to make quick decisions, based on little information, with few concrete incentives for accuracy, and with little opportunity to learn from their errors. Even where the letter of the law does not explicitly allow for a poll worker to exercise discretion, there is a strong possibility that unconscious bias could play a role in poll worker decision-making. Whether a poll workers’ discretion is de jure or de facto, the result may be race-based discrimination between prospective voters. This Article addresses how unconscious bias may play a role in the interaction between poll workers and prospective voters and discusses some ways in which the potential for unconscious bias to operate in America’s polling places may be mitigated.

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INTRODUCTION

When it comes to the administration of democracy in the United States, there has been a long history of racial discrimination. The Fifteenth Amendment, guaranteeing the right to vote regardless of race, was passed just after the Civil War.¹ But the Fifteenth Amendment's aspirations did not truly start to be realized until almost a century later after passage of the Voting Rights Act of 1965.² In the interim, the "great mass of the white population intend[ed] to keep the blacks from voting"³ through such invidious devices as grandfather clauses, White primaries, poll taxes, gerrymandering, and literacy tests.⁴

Voting-related discrimination, however, is not merely a historical relic of a different time. In the last few decades, examples abound of voting-related discrimination against racial and ethnic minorities.⁵ Of particular interest for our present purposes are instances of poll workers treating prospective voters in a discriminatory manner. Take, for example, Charleston County, South Carolina, where a federal court found that the local election commission routinely used poll workers who "caused confusion, intimidated African American voters, and had a tendency to be condescending to those voters"—even into the 1990s.⁶ Or, take another

1. U.S. CONST. amend. XV, § 1.

2. Act of August 6, 1965, Pub. L. No. 89-110, 79 Stat. 1965 (passed to enforce the Fifteenth Amendment to the Constitution of the United States and for other purposes).

3. *Giles v. Harris*, 189 U.S. 475, 488 (1903).

4. Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 397 (1985). Women have also faced discrimination, including the bald-faced denial of their voting rights for many years. See, e.g., *Minor v. Happersett*, 88 U.S. 162 (1874) (rejecting a Fourteenth Amendment challenge to Missouri's denial of the right to cast a ballot to women). The Nineteenth Amendment was ratified in 1920 to guarantee women the right to vote. U.S. CONST. amend XIX. We hope to examine the impact of unconscious bias on women's exercise of the vote in a subsequent piece.

5. We use the National Research Council's definition of discrimination: "(1) differential treatment on the basis of race that disadvantages a racial group and (2) treatment on the basis of inadequately justified factors other than race that disadvantages a racial group." National Research Council, *MEASURING RACIAL DISCRIMINATION, Panel on Methods for Assessing Discrimination* 4 (Rebecca M. Blank et al., eds., 2004). See generally Thomas Pettigrew & Marylee C Taylor, *Discrimination* in *ENCYCLOPEDIA OF SOCIOLOGY* 688 (Edgar F. Borgatta & Rhonda J.V. Montgomery, eds., 2000).

6. *United States v. Charleston County Council*, 316 F. Supp. 2d 268, 287 (D.S.C. 2003). The federal district court's findings related to discrimination by poll workers in Charleston are included in a footnote that spans more than three pages in the federal reporter. *Id.* at 286–290. See also Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How Can They Be Stopped*, 11 *TEMPLE POL. & CIV. RTS. L. REV.* 401, 408–09 (2002) (describing how a poll worker in Conecuh County, Alabama, used a racially derogatory term when speaking to African American voters and how "poll workers treated African American voters very differently from the respectful, helpful way in which they treated white voters").

recent example from Reading, Pennsylvania, where poll workers made hostile statements about Latino voters such as: “Dumb Spanish-speaking people . . . I don’t know why they’re given the right to vote” and imposed barriers to casting a ballot on Latino voters that were not placed on other racial or ethnic groups.⁷ Or, take a report on a recent election issued by the Asian American Legal Defense and Education Fund that documented how “[p]oll workers made improper or excessive demands for identification—often only from Asian American voters.”⁸

Any discussion of voting-related discrimination must frankly acknowledge that intentional discrimination still exists, but even the most ardent supporter of the modern civil rights movement would have to admit—at least as it relates to the casting of ballots in polling places—that such obvious, intentional discrimination in voting is likely to have less impact than it has had in the past. As one commentator recently noted, “Bull Connor is dead.”⁹ Indeed, during the recent congressional deliberation regarding extension of certain provisions of the Voting Rights Act, the evidence of voting-related discrimination was not focused on poll workers’ intentional discrimination at polling places so much as it was focused on the presence of racially polarized voting by the electorate and on electoral structures (such as redistricting plans) that inhibit the ability of minority voters to aggregate their ballots and elect their candidates of choice.¹⁰ In this respect, voting mirrors other areas, such as employment and jury selection, where it is difficult to find relatively clear, direct evidence of intentional discrimination.¹¹

But racial bias in election administration—more specifically, in the interaction between poll workers and prospective voters at a polling place on election day—can be unintentional as well. Massive amounts of research support the notion that people engage in unconscious or implicit discrimination—that “good people often discriminate and they often

7. *United States v. Berks County, Pennsylvania*, 277 F. Supp. 2d 570, 575 (E.D. Pa. 2003).

8. Asian American Legal Defense and Education Fund, *Asian American Access to Democracy in the 2006 Elections* 1, available at http://www.aaldef.org/docs/Election_2006_Report_AALDEF.pdf (last visited Nov. 30, 2009).

9. Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 179 (2005). Theophilus “Bull” Connor, a member of the Ku Klux Klan, was a national symbol of racism in the civil rights struggles of the 1960s.

10. See generally H. Rep. No. 109-478 (2006).

11. See, e.g., Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 753 (2001) (stating that “antidiscrimination law is inadequate because it targets mainly intentional discrimination, missing the more prevalent contemporary forms of bias that are often nondeliberate or unconscious” (footnote omitted)); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 157–58 (2005) (jury selection); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (arguing that deliberate racism has been replaced by other sources of bias).

discriminate without being aware of it.”¹² Scholars have looked at unconscious bias¹³ and its impact on the law in various arenas.¹⁴ One pair of researchers has even applied unconscious bias to the political choices made by voters when they step into a voting booth and cast a ballot in contests involving candidates from different racial and ethnic groups.¹⁵ Unconscious bias, however, may not just have implications for the specific electoral choices made by voters when they step behind the curtain and into the privacy of the voting booth. Indeed, unconscious bias may prevent a voter from getting into the voting booth and casting a ballot in the first place.

The operation of a polling place on election day may, in fact, present an “optimal” setting for unconscious bias to have an impact. In some instances, election law explicitly empowers poll workers with the discretion to decide whether a prospective voter may cast a ballot. And even when this is not the case, the nature of polling places on election day often provides poll workers with *de facto* discretion over who gets to exercise the

12. See Page, *supra* note 11, at 160–61.

13. “Unconscious,” “implicit” and to a lesser degree “automatic” bias are generally used synonymously in the psychological and legal literature. As the Project Implicit website puts it, the terms “all refer to mental associations that are so well-established as to operate without awareness, or without intention, or without control.” See Project Implicit, available at <https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq2> (last visited Nov. 30, 2009).

14. See, e.g., Jody David Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994); R. Richard Banks et al., *Discrimination and Implicit Racial Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); Debra Lynn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 81 IOWA L. REV. 1244 (2002); Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 317–338 (2002); see also generally Martha Chamallas, *The Architecture of Bias: Deep Structure in Tort Law*, 146 U. PA. L. REV. 463 (1998); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004); Barbara J. Flagg, “Was Blind, but Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CAL. L. REV. 1063 (2006); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007); Sherri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 ILLINOIS L. REV. 237; Page, *supra* note 11; Reshma M. Saujani, “The Implicit Association Test”: *A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395 (2003); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 500–07 (2007). For extensive recent discussion see *Unconscious Discrimination Twenty Years Later*, 40 CONN. L. REV. 927 (2008) and *Behavioral Realism*, 94 CAL. L. REV. 969 (2006).

15. See Gregory S. Park & Jeffrey J. Rachlinski, *A Better Metric: The Role of Unconscious Race and Gender Bias in the 2008 Presidential Race*, Cornell Legal Studies Research Paper No. 08-007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1102704 (last visited Nov. 30, 2009).

franchise. Moreover, poll workers operate in an environment where they may have to make quick decisions, based on little information, with few concrete incentives for accuracy, and with minimum opportunity to learn from their errors. Research shows that all these factors may serve to exacerbate the impact of unconscious bias.

The most obvious manner in which unconscious bias can manifest itself in a polling place occurs when poll workers have discretion to make judgments about whether a particular voter possesses the necessary qualifications to cast a ballot. An excellent example of this type of discretion (and one we describe in more detail later on) can be found in Indiana's high-profile, controversial¹⁶ law requiring prospective voters on election day to present government-issued photo identification.¹⁷ Opponents of photo identification have primarily worried about the disparate impact photo identification will have on certain categories of voters, including African Americans, because those voters are less likely to possess photo identification.¹⁸ As such, opponents of this requirement have asserted that state officials adopted Indiana's law (and similar laws in other states, such as Georgia, Missouri, and Arizona) for an unconstitutional (i.e., intentional) discriminatory purpose.¹⁹ Opponents have, however, failed to focus sharply²⁰ on the fact that Indiana's law grants discretion to poll workers to

16. Indiana's photo identification law was upheld in *Crawford v. Marion Election Bd.*, No. 07-21, slip. op. (U.S. 2008). The controversial, high-profile nature of the litigation becomes clear when one considers the large number of amicus briefs filed in the Supreme Court. A total of 39 amicus briefs were filed; 23 filed on behalf of the petitioners in the case, 15 filed on behalf of the respondents, and one filed in support of neither party. See Michael J. Pitts, *The Amicus Briefs in the Indiana Voter Identification Case: I Read . . . So You Don't Have To*, Election Law @ Moritz, available at <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=227> (last visited Nov. 30, 2009).

17. Ohio State's Dan Tokaji has recognized that photo identification laws grant discretion to poll workers and that such discretion can lead to discriminatory treatment. See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1233 (2005) ("The lack of specific standards leaves discretion in the hands of local election officials and poll workers, and may result in the dissimilar treatment of similarly situated individuals from county to county—or even from precinct to precinct."). However, while Professor Tokaji recognizes the possibility of discriminatory treatment, he does not focus on whether unconscious bias may be the cause of that discriminatory treatment.

18. See generally Matt A. Barreto et al., *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate*, 7, available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf (last visited Nov. 30, 2009).

19. See, e.g., Brief for Amicus Curiae Mexican American Legal Defense and Educational Fund in Support of Petitioners, *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) No. 07-21, at 2 (suggesting that Arizona's voter identification law was "motivated by discriminatory animus").

20. It is true that opponents of photo identification objected to Indiana's law, in part, because of the vague way in which the statute might be interpreted, but they did not describe how this vagueness may create the opportunity for unconscious bias. *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 835–38 (S.D. Ind. 2006).

accept or reject a prospective voter depending on whether the name on the photo identification “conforms”²¹ to the name on the registration list and that this discretion could invite unconscious bias into poll worker determinations of voter eligibility.²²

Even where the law does not explicitly allow poll workers to exercise discretion, a strong possibility still exists for unconscious bias to play a role during the interaction between prospective voters and poll workers.²³ For example, when a prospective voter walks into a polling place, poll workers typically must search a list to find the voter’s name. In most instances, poll workers easily find the name. In some instances, however, poll workers have difficulty finding a name on a registration list and unconscious bias might play a role in how diligently poll workers search (thirty seconds, one minute, five minutes?) to find the name.²⁴ Or take the concept of provisional balloting, which, in theory, is supposed to occur when a poll worker during a federal election cannot locate a voter’s name on the registration list.²⁵ In practice, though, not every voter who should receive a provisional ballot gets one.²⁶ Moreover, for a voter to cast a

21. IND. CODE § 3-5-2-40.5 (2006) (setting forth requirements for photo identification). In a nutshell, the photo identification requirement does not require an exact match—if the name on the photo identification of a prospective voter is J. Smith and the name on the registration list is Jim Smith, then the voter might be able to cast a ballot depending on the poll worker’s judgment regarding whether the name on the photo identification adequately “conforms” to the name on the list. Thus, photo identification gives poll workers the ability to make judgment calls as to who gets to cast a ballot. A fuller description of Indiana’s photo identification law appears *infra* Part I.B.

22. Technically, a voter whose name does not “conform” should still get to cast a ballot—albeit a provisional one. However, there are many potential flaws with provisional balloting and these potential flaws are discussed in the next paragraph and *infra* Part I.B.

23. Although we cannot definitively establish the cause of poll workers’ erroneous interpretations of law, it is clear that misapplication of the law by poll workers occurs and that sometimes such misapplication has a disproportionate impact on particular racial groups. See, e.g., AALDEF, *supra* note 8, at 1 (concluding that poll workers “misapplied HAVA’s ID requirements”).

24. Returning to voter identification for a moment, it is worth noting that unconscious bias could have implications for *any* voter identification law—not just a photo identification law that gives *de jure* discretion to poll workers. In essence, no matter what the actual identification requirements are, in practice, poll workers have *de facto* discretion in the application of voter identification rules such that “they might ignore the rule altogether, or they might ask for identification even when the law does not require it or when they are forbidden from doing so.” See Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 NYU ANN. SURV. OF AM. L. 613, 615 (2008).

25. 42 U.S.C. § 15482 (2009) (allowing for provisional balloting in the event that an individual’s name “does not appear on the official list of eligible voters for the polling place”).

26. One high-profile example of this phenomenon occurred when a group of elderly nuns was turned away from a polling place without being offered provisional ballots. Deborah Hastings, *Nun working Ind. poll turns fellow sisters away for lacking photo ID under state’s new law*, A.P. NEWS, May 6, 2008, available at http://talkingpointsmemo.com/news/2008/05/indiana_nuns_lacking_id_denied.php (last visited Nov. 30, 2009).

provisional ballot, poll workers often must fill out paperwork and, if the paperwork is not correctly filled out, the provisional ballot may ultimately be rejected. So it is a distinct possibility that the ostensibly non-discretionary decision to offer a provisional ballot and the poll worker's attentiveness to the proper administration of provisional ballots could be affected by unconscious bias.²⁷

Given the risk that unconscious bias affects the interaction between prospective voters and poll workers, there are several responses that legislators and election administrators might consider to mitigate the impact of unconscious bias.²⁸ These responses take two forms. The first type of response would aim to affect poll workers on the individual level. Indeed, there may be some relatively simple actions that could be taken, such as having poll workers begin every election day by taking an oath not to discriminate on the basis of race, that might make it less likely that individual poll workers would engage in unconscious discrimination. The second type of response would aim at the institutional or structural level of America's polling places, primarily in an effort to limit the role poll workers play on election day. Here, a broad-based reform like vote-by-mail might help to offset the impact of unconscious bias because vote-by-mail eliminates the need for poll workers.

After describing how polling places generally operate and delving into some additional specifics about Indiana's photo identification law (Part I), we review the research related to unconscious bias. Following a brief explanation of how unconscious bias operates, we set forth why America's polling places provide a setting that may aggravate the possibility of unconscious bias (Part II). Finally, we turn to the implications of unconscious bias for the interaction between poll workers and prospective voters and discuss some possible ways to mitigate unconscious bias in the nation's polling places (Part III).

I. THE NATURE OF POLLING PLACES IN AMERICA: INDIANA (AND ITS PHOTO IDENTIFICATION LAW) AS MODEL

Unconscious bias likely plays a role in the interaction between poll workers and prospective voters in America's polling places on election day. To fully understand unconscious bias's impact, though, it is necessary to

27. It is important to note early on that unconscious bias can serve not only to *exclude* qualified African Americans from casting a ballot—it could also serve to *allow* unqualified White voters to cast a regular ballot. In both cases the concern is similarly situated potential voters being treated differently.

28. A number of the proposals we suggest *infra* Part III as a way to mitigate unconscious bias, such as election-day voter registration, are election reforms that have been suggested for other reasons, such as to increase voter turnout. Thus, unconscious bias may serve as an additional justification for some of these reforms.

describe how polling places typically operate. In the United States, no single standard exists for how polling places function.²⁹ Federal laws governing the operation of polling places are relatively limited. Indeed, until enactment of the Help America Vote Act in 2002,³⁰ there were virtually no federal laws that directly governed the actual operation of polling places at federal elections. While the National Voter Registration Act³¹ and the Voting Rights Act³² have had a modest impact on the operation of polling places through changes in registration rules and the enforcement of anti-discrimination principles, the majority of enforcement related to these acts has not been directly related to the mechanics of how a polling place operates on election day.³³ In short, the operation of polling places varies from state to state, from county to county, and can even vary from precinct to precinct within the same county.³⁴

That said, the fact remains that when a prospective voter walks into a polling place in the United States, is greeted by a poll worker, and casts a ballot, a relatively similar process occurs—even if differences in detail exist. Thus, to provide a more concrete discussion of the issue, we will focus here on one state's set of election laws—the state of Indiana. Indiana provides a useful springboard for discussion both because it is fairly typical and because it is unique. Indiana is typical in the way it runs its polling places in that the process of casting a ballot in a polling place does not vary enor-

29. See generally ALEC EWALD, *THE WAY WE VOTE* (2009) (describing the diversity of practices used in American elections).

30. Help America Vote Act of 2002, Pub.L. No. 107-252 (2002).

31. National Voter Registration Act of 1993, Pub.L. No. 103-31 (1993).

32. 42 U.S.C. § 1973 et. seq (2006).

33. See, e.g., Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 692 (2006) (describing how a body of jurisprudence has not developed regarding the application of Section 2 of the Voting Rights Act to vote denial). Perhaps the biggest exception to this statement is the Voting Rights Act's mandate that certain jurisdictions provide election materials in polling places (such as voting instructions) and assistance (i.e., poll worker assistance) in languages other than English. 42 U.S.C. § 1973b(f)(4); 42 U.S.C. § 1973aa-1a (2009). Another exception is Section 208 of the Voting Rights Act that allows a voter to, within certain limits, receive assistance at the polls from the person of that voter's choosing. 42 U.S.C. § 1973aa-6 (2009). Section 5 of the Voting Rights Act also mandates that certain jurisdictions submit any changes related to how polling places operate so the federal government can ensure these changes have not been adopted with a discriminatory purpose and will not have a retrogressive discriminatory effect on minority voters. 42 U.S.C. § 1973e (2009). Finally, in some situations, the Voting Rights Act also allows federal officials to monitor polling places on election day to ensure that discrimination does not occur against racial and ethnic minorities. 42 U.S.C. § 1973f (2006).

34. Indeed, polling places often differ within states because, for example, different machinery to cast and count ballots may be used in different counties or cities. Moreover, even polling places within a single government unit (i.e., a particular county) may operate differently. For example, one of the authors recently collected provisional ballot forms used by poll workers at polling places and discovered that in some instances within the same county different forms were used in different precincts.

mously from most other polling places throughout the United States. When most prospective voters enter a polling place anywhere in America, they identify themselves to the poll worker, the poll worker checks the voter registration list to ensure eligibility, and the voter then casts a ballot—unless some problem or issue arises.³⁵ And that is, essentially, what occurs in Indiana. On the other hand, Indiana is unique in that it is one of less than a handful of states that absolutely require voters to identify themselves using a government-issued photo identification.

This discussion of Indiana's polling places is meant to emphasize two points central to our thesis. First, the basic structure and operation of Indiana's polling places shows how critical poll workers are to a voter's ability to cast a countable ballot. At virtually every step of the election process, a voter's "fate" is in the hands of poll workers, regardless of what the law says. Second, the design of Indiana's photo identification law demonstrates how some election laws explicitly place discretion in the hands of poll workers.³⁶

A. A Brief Sketch of What (Should) Happen on Election Day in Indiana

Indiana has more than 5,000 voting precincts throughout the state that open at 6 a.m. and close at 6 p.m. on election day³⁷ and are staffed by a cadre of up to nine poll workers.³⁸ Each precinct has a "precinct election board" that consists of three poll workers—two "judges" and one "inspector."³⁹ The inspector is the poll worker in charge of the overall management of the precinct—essentially the precinct "boss."⁴⁰ The duties of the inspector include, among other things, checking photo identifications and challenging voters who do not have valid photo identification. The election judges

35. It is worth noting that in several states prospective voters may register to vote on election day. We discuss election-day registration *infra* Part III.B.

36. The design of Indiana's photo identification law is important beyond Indiana for a couple of reasons. First, photo identification in general is being considered by other states. See, e.g., Terrence Stutz, *Texas Senate at odds over voter ID legislation, two-thirds rule*, DALLAS MORNING NEWS (Jan. 14, 2009); Jake Grovum, *GOP Legislators Want Photo IDs for Voting In Minnesota*, MINNEAPOLIS STAR-TRIBUNE (Jan. 26, 2009). Second, because Indiana's law has now been upheld by the United States Supreme Court, it may well serve as a model that other states will adopt in an effort to minimize the possible success of future legal challenges.

37. IND. CODE § 3-11-8-8 (2006) (setting forth polling place hours). Because Indiana is partly on central time and partly on eastern time not all polling places are open simultaneously.

38. Indiana Election Division, 2008 Election Administrator's Manual 52 (2008).

39. IND. CODE § 3-6-6-1 (2006).

40. The inspector is appointed by the county chairperson of the major political party whose candidate for the office of secretary of state received the highest vote in the county at the last election. IND. CODE § 3-6-6-8 (2006) (nomination of inspector by county chair). The appointment is subject to final approval by the county election board. IND. CODE § 3-6-6-11(a) (2006).

are also, among other things, charged with checking photo identifications and challenging voters who do not have a valid identification; in addition, the judges also are responsible for assisting voters with disabilities.⁴¹ Many precincts also have poll clerks who are in charge of “ballot control,” such as managing the poll books and handing out ballots.⁴² In addition, assistant poll clerks⁴³ and sheriffs may serve at the polls.

Poll workers’ impact on elections can be enormous. As one commentator has generally observed, “Poll workers perform many important tasks that ensure elections are administered smoothly; they set up voting equipment, check voters against registration rolls, assist voters with sometimes complicated voting procedures, and close up shop at day’s end.”⁴⁴ In Indiana, poll workers must make sure each voting booth (and any voting equipment, such as electronic machines) is properly operating.⁴⁵ Poll workers are also the persons with whom prospective voters will most closely interact during their time at the polls. Indeed, in Indiana, voters may not lawfully communicate with anyone except a poll worker while at the polls.⁴⁶ Poll workers make decisions about who may cast a ballot, including who may cast a “regular” ballot and who may cast a provisional ballot, because they, as members of the precinct election board, are charged with resolving all challenges to a prospective voter’s eligibility.⁴⁷

41. Each chair of a major political party gets to appoint one of the judges; in other words, the local Democratic Party chair gets to appoint one judge and the local Republican Party chair gets to appoint the other judge. IND. CODE § 3-6-6-1 (c) (2006) (nomination by county chair). The appointment is subject to the approval of the county election board. IND. CODE § 3-6-6-11(a) (2006).

42. Unless the county election board adopts a resolution to the contrary, each precinct also has two poll clerks and each chair of a major political party nominates one of the clerks. IND. CODE § 3-6-6-38 (2006) (ability of county election board to eliminate the position of poll clerk); IND. CODE § 3-6-6-2 (2006) (nomination of poll clerk by county chair). The nominations are subject to approval by the county election board. IND. CODE § 3-6-6-11(a) (2006).

43. Each county election board has the discretion to appoint two assistant poll clerks and, again, each county chair of a major political party nominates one of the assistant poll clerks subject to the approval of the county election board. IND. CODE § 3-6-6-3 (2006) (nomination of assistant poll clerk by county chair); IND. CODE § 3-6-6-11(a) (2006) (approval of nomination by county election board).

44. Matthew Corritore, *Redefining What It Means to Be a Poll Worker*, AEI/Brookings Election Reform Project (July 2, 2008), available at <http://www.electionreformproject.org/Resources/8c6c074e-2e42-4e2f-9291-a2e9c04ad32a/r1/Detail.aspx> (last visited Nov. 30, 2009).

45. 2008 Indiana Election Day Handbook 25 (rev. 2007) (detailing the steps poll workers should take to ensure the balloting equipment is properly functioning).

46. IND. CODE § 3-11-8-18 (2006) (“A voter or person offering to vote may not converse or communicate with a person other than a member of the precinct election board while at the polls.”).

47. IND. CODE § 3-6-6-30 (2006) (“Each precinct election board shall determine all questions of challenge and all other matters coming before the board.”).

In other words, they are on-the-spot arbiters of state law.⁴⁸ And poll workers are also responsible for assisting and instructing voters when assistance is requested.⁴⁹

There are several steps in the process of casting a ballot that occur when a prospective voter arrives at a polling place. Upon arrival, the prospective voter must provide his or her name to the poll workers and the poll workers must find the name in the poll book, which, in theory, lists each registered voter.⁵⁰ The prospective voter must then present identification. In Indiana, there are actually two separate voter identification requirements. First, with only very limited exceptions, persons presenting themselves at the polling place on election day must present a photo identification.⁵¹ Second, certain first-time voters must present one of the pieces of identification required by the federal Help America Vote Act.⁵² If the poll workers find the prospective voter's name on the registration list, the prospective voter satisfies all identification requirements, and no one otherwise challenges the eligibility of the prospective voter to cast a ballot, the prospective voter then signs the poll book, confirms that the address in the poll book is correct, and proceeds to cast a regular ballot.⁵³ Indeed, this is how the voting process goes for the vast majority of persons who present themselves at polling places on election day.

There are, however, many other possibilities that could lead to a prospective voter being unable to cast a regular ballot. Momentarily putting aside a lack of necessary identification, a number of problems can arise for a prospective voter. For instance, the prospective voter's name might not appear in the poll book for any number of reasons, including an error in the registration process by election officials, a name change by the prospective voter (e.g., because of marriage or divorce)⁵⁴ or because the prospective voter failed to register. If the prospective voter's name does

48. There is, essentially, very little a voter in Indiana can do to challenge the determination of the precinct election board on election day itself. In contrast, the state of New Jersey has codified a procedure that allows a voter to challenge poll workers' denial of a ballot in a streamlined judicial proceeding. N.J.S.A. § 19:15-18.3 (2009). See also Frank Askin, *A View from the Trenches: Telling It To the Judge on Election Day*, N.J. LAW, Aug. 2008 at 44.

49. IND. CODE § 3-6-6-30 (2006).

50. Indiana Election Day Handbook, *supra* note 45, at 15.

51. IND. CODE § 3-11-8.25.1(a) (2006) ("[A] voter who desires to vote an official ballot at an election shall provide proof of identification.").

52. IND. CODE § 3-7-33-4.5 (2006). The requirement of first-time voters to present some form of identification stems from a federal mandate included in the Help America Vote Act. 42 U.S.C. § 15483(b)(1)(A) (2009).

53. Indiana Election Day Handbook, *supra* note 45, at 15, 18-19.

54. In the event that the poll workers determine that a name change has occurred, the prospective voter is supposed to be directed to complete an affidavit stating that he or she has undergone a name change. The prospective voter is then supposed to sign the poll book with the new name and then vote a regular ballot.

not appear in the poll book, poll workers must try to determine if the prospective voter fits into any of the “fail-safe” procedures that would still allow the voter to cast a “regular” ballot.⁵⁵ If the prospective voter does not fit one of the fail-safe options, then poll workers are supposed to offer the prospective voter the opportunity to cast a provisional ballot.⁵⁶

Even if the prospective voter’s name appears in the poll book, a prospective voter can be challenged by a poll worker or a challenger appointed by a political party⁵⁷ for any number of reasons, including the prospective voter’s failure to: provide valid identification,⁵⁸ have a signature matching the one appearing in the poll book,⁵⁹ reside in the precinct (i.e., a change in the prospective voter’s address), be 18 years old at the time of the general election, or be a United States citizen.⁶⁰ An additional basis in a primary election is the failure of the prospective voter to be a member of the political party for which he or she is casting a ballot.⁶¹ When a prospective voter is challenged, the person making the challenge must fill out an affidavit stating the reason for the challenge.⁶² The prospective voter then has an opportunity to submit what might be termed a “counter-affidavit” in which the prospective voter affirms his or her eligibility to vote.⁶³ After these affidavits are completed, the prospective voter casts a provisional ballot.⁶⁴

Poll workers are thus often the key in determining whether a prospective voter gets to cast a regular ballot that automatically gets counted in the final tally. Importantly, if a regular ballot does not get cast, the op-

55. Indiana Election Day Handbook, *supra* note 45, at 15–18.

56. *Id.* at 23.

57. IND. CODE § 3-11-8-20 (2006). Technically, in Indiana, the challenge cannot be made by just any poll worker, but must come from a member of the three-person precinct election board. During a primary election, a challenge may also be lodged by a voter who is a member of the political party whose ballot is being requested by the prospective voter. IND. CODE § 3-10-1-10 (2006).

58. IND. CODE § 3-11-8-25.1(c) (2006).

59. IND. CODE § 3-11-8-25.1(i) (2006).

60. Indiana Election Day Handbook, *supra* note 45, at 21. A prospective voter’s address may not be the same as that on the list because he or she has moved and not updated his or her registration. If that occurs and the prospective voter has moved in the 30 days prior to the election, the prospective voter fills out a form and casts a regular ballot. If the prospective voter moved more than 30 days before the election, the choices for poll workers become a little more complicated. If the prospective voter has moved within the same precinct, the prospective voter writes his or her new address in the poll book and votes a regular ballot. If the prospective voter has moved to a different precinct in the same congressional district in the same county, he or she fills out a form and casts a regular ballot. However, if the prospective voter has moved out of the county or out of the congressional district, he or she may only cast a provisional ballot that will not be counted. *Id.* at 20.

61. IND. CODE § 3-10-1-9 (2006).

62. IND. CODE §§ 3-11-8-20; 3-11-8-21 (2006).

63. IND. CODE § 3-11-8-23 (2006).

64. IND. CODE § 3-11-8-23.5 (2006).

portunity to cast a countable ballot decreases significantly. When a prospective voter cannot cast a regular ballot that individual is supposed to be able to cast a provisional ballot. However, provisional balloting is not fool-proof. Poll workers will sometimes fail to offer a provisional ballot to the prospective voter⁶⁵ or the prospective voter will refuse to go through the lengthy process of filling out a provisional ballot.⁶⁶ Moreover, even if the poll workers offer a provisional ballot and the prospective voter takes the time to fill it out, errors can occur in the process. The paperwork accompanying provisional ballots is often incomplete, resulting in the possibility of the provisional ballot not being counted.⁶⁷ Indeed, in a typical election in Indiana, less than half of the provisional ballots cast ultimately get included in the final tally of votes.⁶⁸

The most critical job of poll workers (at least in relation to their interaction with prospective voters) is undoubtedly determining voter eligibility, including which voters will be offered a provisional ballot. However, the importance of poll workers also extends into the voting booth itself. For example, in Indiana (as in many places), voters are technically only allowed to spend a certain amount of time in the voting booth—three minutes in a primary election and two minutes in a general election.⁶⁹ After this time period, poll workers are supposed to remove the voter from the booth.⁷⁰ While in theory this is an unambiguous rule, it is not clear that poll workers actually enforce this rule in any systematic

65. *Supra* note 26 (news story about nuns in South Bend). For an example of poll workers failing to offer provisional ballots elsewhere, see AALDEF, *Asian American Civil Rights Group Reports Widespread Voter Problems on Election Day* (Nov. 2, 2004), available at http://www.aaldef.org/article.php?article_id=184 (last visited Nov. 30, 2009) (reporting that at the 2004 general election in New York City, Asian American voters whose names were not found on the registration list were not offered provisional ballots).

66. Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through An Examination of Provisional Balloting*, 24 J. L. & POL. 475, 502 (2008) (describing provisional ballot that was not completed because voter did not have time to complete the necessary paperwork).

67. *Id.* at 502. Cf. ADVANCEMENT PROJECT, *PROVISIONAL VOTING: FAIL-SAFE OR TRAP-DOOR TO DISENFRANCHISEMENT?* 5 (2008) (“[W]hen voters were permitted to vote provisionally, most poll workers did not assist voters in ensuring their ballots were complete and properly submitted.”).

68. ELECTION ASSISTANCE COMMISSION, *THE 2006 ELECTION ADMINISTRATION AND VOTING SURVEY 19* (2007) (table showing less than half of Indiana’s provisional ballots cast at the November 2006 election were counted); Pitts, *supra* note 66, at 499 (showing at May 2008 primary election, less than 30 percent of the provisional ballots cast were counted). Nationwide, the rate of counting provisional ballots is a bit higher, but there are significant variations from state to state.

69. IND. CODE § 3-11-11-10.5(a)–(b) (2006).

70. IND. CODE § 3-11-11-10.5(c) (2006).

way.⁷¹ So poll worker decisions about enforcement of this rule can play a role in a voter's ability to cast a full and complete ballot.

Moreover, the importance of poll workers while the voter is casting a ballot goes beyond enforcing time limits. For instance, voters who are elderly or disabled may need assistance in the operation of voting equipment. In such an instance, poll workers may play a couple of key roles.⁷² First, any prospective voter is allowed to choose just about any person to assist them in the polling place.⁷³ However, as is the case with enforcement of time limits in the voting booth, past experience indicates poll workers do not always allow voters to make an unfettered choice in relation to assistance.⁷⁴ Second, a prospective voter may choose to have poll workers provide assistance.⁷⁵ In such an instance, the two election judges (who represent different political parties) are supposed to assist the voter in casting the ballot.⁷⁶

In the final analysis, poll workers are "critical elements of the election system" who "decide whether the voter can even cast a ballot."⁷⁷ From the opening to the closing of the polls, poll workers represent the key to the experience of voters on election day.⁷⁸ As one election official has succinctly stated: "On Election Day, the poll worker is God."⁷⁹

B. Indiana's Controversial Photo Identification Law

Poll workers play a vital role in the election day balloting process, but in Indiana they play an especially critical role in implementing the state's ground-breaking photo identification system. In 2005, on a strict

71. For instance, one of the authors has voted several times in Indiana and has never seen poll workers clocking voters on a stop-watch.

72. Indiana Election Day Handbook, *supra* note 45, at 26 (describing how elderly and disabled voters may have needs that are distinct from other voters).

73. IND. CODE § 3-11-9-2(a) (2006); 42 U.S.C. § 1973aa-6 (2009).

74. To the best of our knowledge, no litigation has been brought in Indiana alleging a violation of Section 208 of the Voting Rights Act. However, poll worker refusals to allow voters to choose the "assistors of their choice" have been the subject of litigation in other jurisdictions. See United States Department of Justice, Civil Rights Division, *Voting Section Litigation*, available at <http://www.usdoj.gov/crt/voting/litigation/caselist.php> (last visited Nov. 30, 2009) (listing cases raising claims under Section 208).

75. IND. CODE § 3-11-9-3 (2006).

76. IND. CODE § 3-11-9-3(c) (2006).

77. Thad Hall et al., *Poll Workers and the Vitality of Democracy: An Early Assessment*, PS: POLITICAL SCIENCE & POLITICS 40.4 647, 647-54 (2007).

78. R. Michael Alvarez, et al., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS FINAL REPORT 17 (2009) ("The volunteer army of poll workers is often viewed as the critical link in making voting work.").

79. Matthew Waring & David Waterman, *Poll Workers: The Forgotten Side of Election Reform?*, AEI/Brookings Election Reform Project (Sept. 3, 2008), available at <http://www.electionreformproject.org/Resources/dc058082-a778-435e-8bd3-81135a5cb44c/r1/Detail.aspx> (last visited Nov. 30, 2009).

party-line vote,⁸⁰ the Indiana legislature adopted a new system for verifying the identity of prospective voters who present themselves at polling places on election day.⁸¹ The 2005 law replaced a system where prospective voters who presented themselves at Indiana's polling places would only have to identify themselves through the process of signature matching.⁸²

In contrast, under the system of voter identification passed by the state legislature in 2005—a system that may be the most stringent in the United States⁸³—when a prospective voter enters a polling place on election day, a poll worker must ask the prospective voter to show photo identification before the prospective voter is allowed to sign his or her name in the poll book.⁸⁴ But not just any photo identification, such as an employer identification, will suffice. The photo identification must have certain qualities. For starters, the photo identification must have been issued by either the state of Indiana or the United States Government.⁸⁵ In addition to being government-issued, the photo identification must have an expiration date.⁸⁶ While the law does not specify exact types of photo identification necessary, the most common forms of photo identification that meet these requirements are either an Indiana driver's license or an

80. Mary Beth Schneider, *House Oks Strict Voter ID Bill*, INDIANAPOLIS STAR (March 22, 2008); Mary Beth Schneider, *Voter ID law looming for Hoosiers*, INDIANAPOLIS STAR (April 13, 2005). The legislation was signed by Governor Mitch Daniels.

81. Senate Enrolled Act No. 438, Pub. L. No. 109(2005).

82. Signature matching is still an aspect of voter identification in Indiana's polling places. If a voter's signature on the poll book does not match the signature on the county's registration records, then the voter can be challenged. IND. CODE § 3-11-8-25.1(i) (2006); Indiana Election Day Handbook, *supra* note 45, at 21. There does not appear to be any empirical evidence regarding the number of persons who were challenged for lack of a signature match either before or after the implementation of photo identification. However, a report from one of the larger counties in Indiana indicated that problems with signature matching are "rare to nonexistent" in elections where photo identification has been used. TIPPECANOE COUNTY BD. OF ELECTIONS AND REGISTRATION, TIPPECANOE COUNTY GENERAL ELECTION 2008 21–22 (2008).

83. *Crawford v. Marion County Election Bd.*, No. 07-21, slip. op. at 5 (U.S. 2008) (Breyer, J., dissenting) (describing Indiana's law as "impos[ing] a significantly harsher, unjustified burden" than voter identification laws in other states).

84. IND. CODE § 3-11-8-25.1(b) (2006). Admittedly, one has to recognize that election administration by poll workers tends to be imperfect and what actually occurs in one of the thousands of Indiana precincts at any given time may not correspond to the exact letter of the law as written in the Code.

85. IND. CODE § 3-5-2-40.5 (2006) (defining proof of identification); IND. CODE § 3-11-8-25.1(a) (2006) ("[A] voter who desires to vote an official ballot at an election shall provide proof of identification.").

86. IND. CODE § 3-5-2-40.5(1) (2006). The photo identification will be accepted if it is not expired or if the identification expired after the date of the most recent general election. In essence, this rule creates a small window of opportunity for a prospective voter to use an expired identification.

Indiana state identification card. In addition, United States passports and military identifications might also commonly be used.⁸⁷

It is not enough, however, just to have a photo identification with an expiration date that has been issued by the state of Indiana or the federal government—the name on the identification must also “conform” to the name on the poll list.⁸⁸ And this aspect of Indiana’s law amounts to one of the key factors related to unconscious bias because the statute does not provide a specific definition of the word “conform.” Indeed, according to a memorandum from the Indiana Election Division, “[a] common question regarding this requirement [that the name conform] is whether this requires that the name on the Photo ID be identical, or merely similar, to the name on the poll book.”⁸⁹

The Indiana Secretary of State and the Indiana Election Division have published some guidance—both in the Election Day Handbook provided for poll workers and in a memo issued just prior to the May 6, 2008, primary election—for poll workers on how to determine whether a name on a photo identification “conforms” to the name in the poll book.⁹⁰ According to state election officials, the term “conform” does *not* require the name on the photo identification to “match identically” the name in the poll book.⁹¹ What this interpretation means is that a person who uses a “common” nickname as a substitute for their given first name should be allowed to cast a regular ballot; a person who substitutes their middle name for their given first name should be allowed to cast a regular ballot; a person who substitutes a “common” nickname for their middle name as a substitute for their given first name should be allowed to cast a regular ballot; a person who substitutes the initial for their given first name should be allowed to cast a regular ballot; and a person who substi-

87. Indiana Election Day Handbook, *supra* note 45, at 10. If it contains a photograph and a valid expiration date, a college student identification (or any other such state-issued identification) can also be employed by the prospective voter. *Memorandum from Co-Counsels*, Indiana Election Division on Photo ID Interpretations at 3–4 (2006) available at http://www.in.gov/sos/elections/pdfs/PhotoIDAdvisory_4_30_06.pdf (last visited Nov. 30, 2009). State schools in Indiana include Indiana University, Purdue University, Indiana State, Ball State, Ivy Tech, University of Southern Indiana, and Vincennes. *Id.* at 4.

88. IND. CODE § 3-5-2-40.5(1) (2006).

89. *Memorandum from Co-Counsels*, Indiana Election Division on Photo ID Interpretations at 1 (May 1, 2006), available at http://www.union1.org/badforindiana/PDF%20Files/voterinfo/PhotoIDAdvisory_4_30_06.pdf (last visited Nov. 7, 2009).

90. Indiana Election Day Handbook, *supra* note 45, at 10.

91. *Id.* Why not? Because the dictionary defines the term “conform” as “to be similar or identical,” the legislature could have easily chosen to use the words “exact” or “identical” in place of the word “conform” and chose not to do so, and interpreting the term “conform” to mean “similar” rather than “identical” is consistent with the general rule in Indiana to interpret election law “liberally in favor of the electors.” *Memorandum from Co-Counsels*, *supra* note 89, at 1–2.

tutes the initial for their given middle name should be allowed to cast a regular ballot.⁹²

Of course, this guidance from state officials remains quite abstract and certainly has the ability to make one's head spin. Thus, to illustrate the types of names on a photo identification that would "conform" to the name on the poll list, state officials have provided examples for poll workers. According to state officials, the following are examples of names that would conform to "Robert John Crew":⁹³

Robert John Crew	Bob John Crew
Robert J. Crew	Bob J. Crew
Robert Crew	Bob Crew
R. John Crew	John Crew
R. J. Crew	J. Crew

These examples, however, fail to give poll workers a clear indication of when a name on a photo identification conforms to that in the poll book.⁹⁴

92. *Id.* at 2; Indiana Election Day Handbook, *supra* note 45, at 10.

93. *Id.*

94. Issues can also arise as to what constitutes an expiration date for purposes of complying with photo identification. For instance, prior to the May 6, 2008, primary election, a question arose as to whether photo identifications issued to students at Purdue University (a state school) contained an expiration date. Dorothy Schneider, *Purdue Student IDs don't pass the early voting test*, LAFAYETTE JOURNAL & COURIER, April 17, 2008. The photo identification cards did not have an expiration date printed on the face of the cards. *Id.* However, there was a possibility that the cards had an expiration date encoded in the magnetic strip. *Id.* Ultimately, a method was created that allowed the Purdue student identification to be used to satisfy the photo identification requirement. Purdue University, *Early, Election Day voting to be offered on Purdue Campus*, Oct. 20, 2008, available at <http://news.uns.purdue.edu/x/2008b/081020MalavendaElection.html> (last visited Nov. 7, 2009).

In addition, prior to the May 2008 primary, a question also arose as to whether photo identifications issued by the military contained an expiration date. *Memorandum from Co-Counsels*, *supra* note 89, at 4. The military identifications contained a box labeled "Expiration Date." *Id.* at 4. However, no specific calendar date was present in the expiration date box. *Id.* Instead, the letters "INDEF", an abbreviation for indefinite, were used. *Id.* In a memo issued a week before the May 6, 2008, primary election, the Indiana Election Division found that this expiration date satisfied the requirements of Indiana's photo identification law. *Id.*

At the May 2006 primary election, a question arose related to the expiration date on photo identification offered by Congresswoman Julia Carson. Amy Goldstein, *Democrats Predict Voter ID Problems*, WASH. POST, Nov. 3, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/11/02/AR2006110201897_pf.html (last visited Nov. 30, 2009). Rep. Carson showed her congressional identification card for the 109th Congress to a poll worker. *Id.* The poll worker initially determined that the congressional identification card did not contain an expiration date because it did not explicitly contain a calendar date that designated its expiration. *Id.* Eventually, though, the poll worker made a phone call to the local election office and a determination was made that the fact that the card was only designated for the 109th Congress served to satisfy the requirement of an expiration date. *Id.*

Other than voters named “Robert John Crew,”⁹⁵ poll workers have little to go on.⁹⁶

In the final analysis, then, there may also be some possibility of unconscious bias when poll workers make decisions as to whether or not a photo identification contains an expiration date.

95. There are likely not very many prospective voters with this name. A google search for “Robert John Crew” turned up 1,880 hits, the vast majority of which were related to Indiana’s photo identification law.

96. Another difficulty with names arises when an individual has changed his or her name so that the photo identification does not match the name in the poll book. The most common examples of such a name change undoubtedly occur when a person takes a new last name as a result of marriage or divorce. In this instance, there is a distinct possibility that the person registered to vote using their previous last name and the name on their photo identification matches their current last name. For example, assume Brad Pitt marries Angelina Jolie. In the poll book, their names are listed as “Brad Pitt” and “Angelina Jolie.” Assume, however, that after the marriage they change their names to “Brad Pitt-Jolie” and “Angelina Pitt-Jolie” and their Indiana driver’s licenses reflect the changes. *Memorandum from Co-Counsels, supra* note 89, at 2 (providing example of this hypothetical situation). This situation creates a thorny question as to whether the name on the photo identification “conforms” to the name in the poll book.

According to the Indiana Election Division, when the prospective voter’s name in the poll book does not match the name on the photo identification because of a name change, the name *does* “conform” for purposes of photo identification. *Id.* at 2-3. The reasoning here is that the Indiana Election Code allows for a prospective voter to indicate a name change by writing the necessary information concerning the name change on the poll book prior to receiving the ballot. IND. CODE § 3-7-41-2 (2006). The prospective voter may then vote “if otherwise qualified.” *Id.* According to the Indiana Election Division:

Under these circumstances, the voter has been permitted to legally vote under the newly changed name and, therefore, must be considered to be registered under the newly changed name as well. There is nothing further the voter needs to do after signing the poll book to change her voter registration . . . and, therefore, once she has signed the poll book, her Photo ID would conform to the name on the poll book.

Memorandum from Co-Counsels, supra note 89, at 3. Of course, this raises a bit of an oddity in the photo identification law as a voter can, essentially, make a photo identification conform to the name in the poll book. The Indiana Election Division recognizes the difficulty this interpretation poses in other respects as well:

We are mindful that this presents a challenge for the precinct election board who may feel uncomfortable with the voter signing the poll book before the determination is made that the Photo ID meets the requirements of the Photo ID law. However, to interpret the Photo ID law any other way would appear to contradict IC 3-7-41-2.

Nevertheless, the Indiana Election Division asserts that this interpretation of the Election Code adheres to the general rule that “election laws be construed liberally in favor of the electors.” *Id.* (quoting *Brown v. State ex rel. Slack*, 84 N.E.2d 883 (Ind. 1949)). For purposes of our thesis here, the level of ambiguity in applying this “rule” creates the possibility for unconscious bias to play a role on election day.

If the prospective voter does not have photo identification, declines to provide photo identification, or if a single member of the precinct election board determines that the photo identification presented by the prospective voter does not meet the law's requirements (e.g., the name does not "conform"), a member of the precinct election board must challenge the prospective voter.⁹⁷ The prospective voter then may execute a challenged voter's affidavit.⁹⁸ If the prospective voter executes this affidavit then he or she may cast a provisional ballot.⁹⁹ In order for that provisional ballot to count, however, the prospective voter must appear personally in the circuit clerk's or county election board office within ten days following the election.¹⁰⁰ At that appearance, the prospective voter must provide valid photo identification and execute an affidavit under the penalty of perjury that he or she is the same person who appeared at the precinct on election day and cast the provisional ballot.¹⁰¹ In the alternative, the prospective voter may execute an affidavit on penalty of perjury that he or she does not have to show a photo identification because of indigency (and the inability to obtain proof of identification without payment of a fee) or a religious objection to being photographed.¹⁰²

97. IND. CODE § 3-11-8-25.1(b) (2006). According to the plain language of the statute, the voter shall be challenged even if only a single member of the precinct election board makes the determination that the proof of identification is not valid. *Id.* (providing that a voter shall be challenged if "a member of the precinct election board determines that the proof of identification provided by the voter does not qualify as proof of identification" (emphasis added)). Put differently, if there is a question as to the validity of a prospective voter's identification, it does not appear that the issue is put to a vote of the three-member precinct election board.

98. IND. CODE § 3-11-8-23(f) (2006). The challenged voter affidavit must be sworn and affirmed by the prospective voter and must contain: (1) a statement the prospective voter is a citizen of the United States; (2) the prospective voter's date of birth to the best of the voter's information or belief; (3) a statement that the prospective voter is a resident of the precinct or otherwise qualified to cast a ballot in that precinct; (4) the prospective voter's name and a statement that the prospective voter is generally known by that name; (5) a statement that the prospective voter has not voted and will not vote in any other precinct in this election; (6) the prospective voter's occupation; (7) the prospective voter's current residential address; (8) the prospective voter's understanding that making a false statement on the affidavit is punishable as perjury; and (9) if the prospective voter's name does not appear on the poll list, a statement that the prospective voter registered to vote and information about where and when the individual registered to vote. IND. CODE § 3-11-8-23 (2006).

99. IND. CODE § 3-11-8-25.1(d) (2006).

100. IND. CODE § 3-11.7-5-1(b) (2006) (providing for ten-day time period); IND. CODE § 3-11.7-5-2.5(a) (2006) (appearance before circuit court clerk or county election board).

101. IND. CODE § 3-11.7-5-2.5(b) (2006).

102. IND. CODE § 3-11.7-5-2.5(c) (2006). At this point, it is important to note a few other aspects of photo identification in Indiana. First, a prospective voter whose precinct polling place is located at a state licensed care facility where he or she resides is not required to provide a government-issued photo identification in order to cast a ballot. IND. CODE § 3-11-8-25.1(e) (2006). Second, some persons who cast an absentee ballot do not need to provide photo identification. IND. CODE § 3-11-10-1.2 (2006).

The provisional balloting process, then, provides a theoretical fail-safe for persons who are denied the ability to cast a regular ballot due to a lack of valid photo identification. However, as previously mentioned,¹⁰³ provisional balloting is not fool-proof. Indeed, a recent study showed that only about 20 percent of persons who voted a provisional ballot because they lacked photo identification ultimately had their vote counted.¹⁰⁴ Moreover, even among those voters who ultimately had their vote counted, some of them may have been wrongfully burdened into having to take the extra step to validate their provisional ballot.

In sum, there are two major points to be gleaned from this discussion of photo identification in particular and the operation of Indiana's polling places more generally that will be important for our discussion of unconscious bias going forward. First, when it comes to photo identification, the law leaves some discretion in the hands of poll workers as to whether a name on an identification "conforms" to the name on a poll book. This becomes important for the discussion of unconscious bias because discretion allows room for poll workers' unconscious bias to operate. Second, even apart from explicit, *de jure* discretion, at several other points during the Indiana voting process—the search for the voter's name, the decision to challenge based on citizenship, the quality of assistance provided to a prospective voter who needs help, etc.—poll workers have *de facto* discretion as to whether the prospective voter casts a countable ballot. And unconscious bias may operate in the areas where poll workers have *de facto* as well as *de jure* discretion.

Before moving on, however, it is necessary to emphasize that whereas Jim Crow laws were explicitly intended to deprive African Americans of the right to vote based on their race, no credible commentator claims that photo identification laws or the vast majority of other laws governing the operation of polling places, are *intended* to be *applied* by poll workers in a discriminatory fashion. Rather, photo identification laws and other election laws are almost always intended to be applied equally, regardless of the potential voter's race.¹⁰⁵ Even, however, if one assumes little intentional discrimination will occur, there may still be a problem with unconscious discrimination: a poll worker makes a decision to allow or disallow a vote (or even simply to inconvenience a prospective

103. See *supra* notes 65–68 and accompanying text.

104. Pitts, *supra* note 66, at 497–98.

105. The point is subtle. Credible commentators have claimed that photo identification laws are intended to disfranchise minorities, but it is not through discriminatory *application* by poll workers. Rather, the intent is inferred based on legislators enacting these laws knowing that fewer minority voters will have access to photo identification. *Supra* note 19 and accompanying text. It is true, though, that some commentators have recognized that notwithstanding legislators' intent, these laws may still be applied in a discriminatory manner. See Ansolabehere, *supra* note 24, at 615 (recognizing that "new [voter identification] rules may amount to a test that is applied capriciously and discriminatorily at polling places, as were literacy tests and other standards").

voter by requiring him or her to jump through the hoops of provisional balloting) that, but for the potential voter's race, would have been decided differently.¹⁰⁶ How that might happen, in Indiana as well as elsewhere, is a subject to which we now turn.

II. UNCONSCIOUS BIAS

There is an enormous amount of evidence demonstrating that the unconscious can affect us in numerous ways.¹⁰⁷ And unconscious bias may be particularly important in the context of exercising the right to vote. The right to vote, although not explicitly granted by the United States Constitution,¹⁰⁸ is nonetheless fundamental because it is "preservative of all rights."¹⁰⁹ Poll workers are democracy's representatives on the front lines, determining who may cast a countable ballot (or who may have to jump through additional hoops to have their provisional ballot counted). In this Part, we explore how unintentional racial discrimination may occur,¹¹⁰ beginning with a short introduction to contemporary racism and

106. We are here describing race as the but-for cause of the decision; i.e., but-for the prospective voter's race, would the decision have been different? In other contexts there has been controversy regarding whether but-for causation is necessary to sustain a challenge against the decision, or whether simply finding that race was a factor in the decision is sufficient. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n. 21 (1977) (but-for causation necessary); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion) (same); *State v. Lucas*, 18 P.3d 160, 163 (Ariz. Ct. App. 2001) (listing cases that have concluded that if race is a factor in the decision the decision is tainted). We are not taking a position here, but the concerns we express in this Article apply *a fortiori* to the degree that the factor approach is accepted.

107. Unconscious bias based on race and ethnicity is particularly important, given the constitutional restrictions on decisions based on these factors. Numerous law review articles and some judges have used insights regarding unconscious bias to draw legal conclusions. See articles cited, *supra* note 14; *Miller-El v. Dretke*, 545 U.S. 231, 268–69 (2005) (Breyer, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272–274, (1995) (Ginsburg, J., dissenting); *Georgia v. McCollum*, 505 U.S. 42, 68 (1990) (O'Connor, J., dissenting). In one Supreme Court case, four members of the court suggested that the majority's decision resulted from the Justices' unconscious preferences. See *Alexander v. Sandoval*, 532 U.S. 275, 317 (2001) (Stevens, J., dissenting).

108. See generally Jamin B. Raskin, *Is There a Constitutional Right to Vote and be Represented?*, 48 AM. U. L. REV. 589 (1999); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

109. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo*, 118 U.S. at 370) (stating that voting is a "fundamental political right . . . preservative of all rights."). See also *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627 (1969).

110. We also recognize that partisanship, whether conscious or unconscious, may also impact decision-making. See, e.g., Drew Westen et al., *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18 J. COGNITIVE NEUROSCIENCE 1947 (2006) (using functional magnetic

its differences from traditional forms. We then describe the unconscious, our dual mental processes, and social psychological experiments that demonstrate the impact our unconscious can have on our behaviors and decisions—experiments that suggest that even those persons who believe that they are race-blind may in fact be wrong. Finally, this Part considers factors that serve either to exacerbate or mitigate unconscious bias and analyzes these factors in the context of the interaction between poll workers and prospective voters.

*A. Poll Workers Are People Too: A Brief Primer on
How Unconscious Bias Operates*

Racism. Racism has drastically changed in the United States—moving from a regime where explicit prejudice was the order of the day to one where publicly expressing racist views can make one a social pariah.¹¹¹ Traditionally, discrimination resulted from explicit prejudice. Many people knew their distaste for members of other racial groups, dismissed any countervailing norm of equality, and made decisions accordingly.¹¹² Archie Bunker was a representative face in popular culture of this traditional view.¹¹³ Sixty years ago, White Americans tended to believe in the intellectual inferiority of African Americans.¹¹⁴ More recently, only a small fraction make this claim.¹¹⁵ In 1945, 55 percent of White respondents asserted that Whites, as opposed to “Negroes,” should be given initial job opportunities; by 1972, only 3 percent agreed.¹¹⁶ In the political sphere, Americans similarly report more enlightened views with respect to supporting individual political candidates. In 1958, a majority of Americans

resonance imaging to demonstrate that Democrats and Republicans respond differently to information depending on whether it supports their preferred party).

111. See generally Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995).

112. Although discrimination and to a greater degree prejudice carry negative connotations, racism carries with it even more of a negative connotation. See Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOC. 299, 301 (2006).

113. See generally *All in the Family* (CBS Television 1971–79). Bunker was named number one in a ranking of greatest television characters. See Preston Turegano, *Bravo is booed for fumbling ‘100 Greatest TV Characters’*, SAN DIEGO TRIB., Dec. 17, 2004, available at http://www.signonsandiego.com/uniontrib/20041227/news_mz1c27bravo.html (last visited Nov. 30, 2009).

114. DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 12–34 (1996).

115. HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1997), web update available at <http://www.igpa.uillinois.edu/programs/racial-attitudes/brief> (last visited Nov. 30, 2009) (stating that since 1997 “fewer and fewer white Americans readily endorse statements that blacks are less intelligent and hardworking than whites”).

116. Quillian, *supra* note 112, at 309–10 (reporting the results of two surveys).

indicated they would not cast a ballot for an African American presidential candidate,¹¹⁷ but by 2007 that number had dropped to 7%¹¹⁸ (and in 2008 Americans for the first time elected an African American president).¹¹⁹ Arguably, our society has accepted that it is wrong to judge people by their race rather than by their character.¹²⁰ Race is not an acceptable criterion: we must be colorblind. Not only is discrimination morally wrong, in many circumstances it has also become illegal.¹²¹

Although the concept of colorblindness has become firmly ingrained in society and overt racism has declined,¹²² some studies demonstrate that discrimination remains a significant problem.¹²³ Minorities still report that

117. See E.M. Schreiber, *Education and Change in American Opinions on a Woman for President*, 42 PUB. OPINION Q. 171, 179 (1978).

118. *Id.* By mid-2008, polls found that 70% of White Americans and 65% of African Americans believed that the United States was "ready to elect an African American president." See, e.g., Adam Nagourney & Meghan Thee, *Poll Finds Obama Isn't Closing Divide on Race*, N.Y. TIMES, Jul. 16, 2008, at A1 (reporting the results of a New York Times/CBS News public opinion poll).

119. The election of an African American president does not mean that racial differences or racism has disappeared. Although President Obama received 53% of the popular vote, his support among African Americans, Latinos and Asians was polled at 95%, 67%, and 62%, respectively, whereas his support among Whites was only 43%. CNN Exit Polls, available at <http://www.cnn.com/ELECTION/2008/results/polls/#USP00p1> (last visited Feb. 15, 2009). Previous polls had also demonstrated significant differences in perception among racial groups. In July 2008, among other significant differences in perception, whereas more than 80 percent of African Americans had a favorable view of then-Senator Obama, about 30 percent of Whites had a favorable view. Nagourney & Thee, *supra* note 118.

120. Schuman et al., *supra* note 115 (finding that nearly all Americans report favoring equal treatment independent of race); Quillian, *supra* note 112, at 299 (finding that most Americans disfavor overt racism while still maintaining unconscious biases). People do still make judgments about character, but it is much less likely to be based on race itself and more likely to be based on race-neutral factors, such as attributing African Americans' failures to culture or moral shortcomings. See, e.g., David O. Sears & P.J. Henry, *Over Thirty Years Later, A Look At Symbolic Racism*, in 37 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 95, 102 (2005) (arguing that "race-neutral conservative rhetoric often disguises underlying racial animosity").

121. See, e.g., Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 to 2000e-17 (2009)); Voting Rights Act, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 42 U.S.C. § 1973b (2009)).

122. See, e.g., Lawrence D. Bobo, *Racial Attitudes and Relations at the Close of the 21st Century*, in AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES, 264, 269-73 (Neil J. Spelser et al. eds., 2001) (summarizing studies showing a change in "fundamental norms" with respect to race); John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences and Challenges of Aversive Racism*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3 (J. Eberhart & Susan T. Fiske eds., 1998).

123. IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION*, 165-314 (2001) (describing unequal access to kidney transplantations and bail bonds); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*,

they face racial discrimination.¹²⁴ American culture and society continue to project pervasive race-based inequality. African Americans remain the subjects of such stereotypes as low intelligence, low socio-economic status, laziness, loudness, and hostility.¹²⁵ Yet even if we consciously reject the use of these stereotypes (and evidence suggests that we do),¹²⁶ these stereotypes may still affect us.

Unconscious Processes. Social psychological research suggests that the failure to consistently act upon our ideals may result from unconscious processes. Specifically, we are aware of society's negative stereotypes, probably learned them at an early age,¹²⁷ and even if we consciously reject them, we still hold them at an unconscious level.¹²⁸ Importantly, correlations between measurements of implicit and explicit attitudes are relatively low, suggesting that people's conscious and unconscious beliefs can greatly differ.¹²⁹ Indeed, the unconscious is no longer your grandpar-

94 AMERICAN ECON. REV. 991 (2004) (employment); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIOL. 937 (2003); Alexander Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GENERAL INTERNAL MED. 1231 (2007) (medical treatment). See generally Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOCIOL. 181 (2008); Quillian, *supra* note 112, at 304–09 (providing summaries of studies). Researchers have characterized this less overt form of prejudice under several different terms such as aversive racism, symbolic racism or modern racism. See John F. Dovidio et al., *Contemporary Racial Bias: When Good People Do Bad Things*, in THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 141, 141 (Arthur G. Miller ed., 2004) (aversive racism); John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in PREJUDICE, DISCRIMINATION, AND RACISM 91, 91 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (modern racism); David O. Sears et al., *Egalitarian Values and Contemporary Racial Politics*, in RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA 75, 77 (David O. Sears et al. eds., 2000) (symbolic racism).

124. See Nagourney & Thee, *supra* note 118, at A1 (reporting that nearly 70 percent of African Americans and more than 50 percent of Latinos believed they had been victims of racial discrimination).

125. Devine & Elliot, *supra* note 111, at 1142–44 (1995).

126. *Id.* at 1145 (arguing that “personal beliefs toward African Americans . . . are, at present, predominately positive”).

127. See, e.g., Yarrow Dunham et al., *From American City to Japanese Village: A Cross-Cultural Investigation of Implicit Race Attitudes*, 77 CHILD DEV. 1268 (2006) (finding implicit race bias in six- and ten-year-old children).

128. See, e.g., John F. Dovidio & Samuel A. Gaertner, *Aversive Racism*, in 36 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1, 4 (2004).

129. Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 64 ANN. REV. PSYCHOL. 297, 303–04 (2003) (finding correlations between unconscious prejudice and stereotypes and explicit attitudes were generally below 0.2). There are other possible explanations for the low correlations between self-report and implicit measures, including social desirability (i.e., people try to look less racist than they are). See generally Wilhelm Hoffman et al., *What Moderates Explicit-Implicit Consistency?*, 16 EUR. REV. SOCIAL PSYCHOL. 335 (2005) (reviewing factors that may explain low correlations between self-report and implicit measures).

ents' Freudian unconscious.¹³⁰ The new unconscious is less obsessed with sex and presumptively adaptive. It is now seen as more like a Darwinian unconscious, something necessary to help us survive.¹³¹ In particular, the unconscious affects our decision-making in ways of which we are frequently unaware.¹³² To understand this, we must recognize how we have two decision-making processes rather than one.

People have both a reflective system and a reflexive system.¹³³ The two systems in many situations use different neural structures.¹³⁴ The reflective system is conscious, purposeful and time-consuming. It can, for the most part, be controlled deliberately.¹³⁵ This is the system we are usually referring to with the term "thinking."¹³⁶ The reflexive system, by

130. See generally John A. Bargh, *Bypassing The Will: Toward Demystifying The Nonconscious Control of Social Behavior*, in *THE NEW UNCONSCIOUS* 37 (Ran R. Hassin et al. eds., 2005).

131. See generally TIMOTHY D. WILSON, *STRANGERS TO OURSELVES* (2002) (discussing the "adaptive" unconscious).

132. Perhaps the paradigmatic example of this is the evidence that suggests we actually make a decision unconsciously up to ten seconds before we are consciously aware that we made a decision. See Chun Siong Soon et al., *Unconscious Determinants Of Free Decisions In The Human Brain*, 11 *NATURE NEUROSCIENCE* 543, 543 (2008) (recording neural signals that indicated a decision had been reached before the participant was aware of the decision). See also Benjamin Libet, *Do We Have Free Will?*, in *THE VOLITIONAL BRAIN: TOWARDS A NEUROSCIENCE OF FREE WILL* 47 (Benjamin Libet, et al. eds., 2000) (finding that choices were initiated up to one third of a second before participants were aware of them). For other unusual examples of the unconscious affecting people see John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 *J. PERSONALITY & SOC. PSYCHOL.* 230 (1996) (finding that 63% of participants interrupted a conversation when unconsciously primed with words related to rudeness, but only 17% interrupted when primed with words related to politeness); Ap J. Dijksterhuis et al., *Seeing One Thing and Doing Another: Contrast Effects in Automatic Behavior*, 75 *J. PERSONALITY & SOC. PSYCHOL.* 862, 866–67 (1998) (finding that participants walking speed was affected after experimenters primed them with "elderly"); Jonah Berger et al., *Contextual Priming: Where People Vote Affects How They Vote*, 105 *PNAS* 8846 (2008) (arguing that whether a polling station is a church or a school affects how people vote). Jonathan Haidt concludes, "[t]he emerging view in social cognition is that *most* of our behaviors and judgments are in fact made automatically." Jonathan Haidt, *The Emotional Dog and its Rational Tai: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 819 (emphasis in original).

133. See generally *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* (Shelly Chaiken & Yaacov Trope eds., 1999).

134. Ajay B. Satpute & Matthew D. Lieberman, *Integrating Automatic and Controlled Processes Into Neurocognitive Models of Social Cognition*, 1079 *BRAIN RESEARCH* 86 (2006).

135. As anyone who has attempted not to think about something can attest, it is not completely controllable. See e.g. Daniel M. Wegner, *Irony Processes of Mental Control*, 101 *PSYCHOL. REV.* 34, 34–35 (1994).

136. Somewhat counterintuitively, the reflective system is not necessarily best at decision-making, and is sometimes worse. See, e.g., Ap J. Dijksterhuis et al., *On Making the Right Choice: The Deliberation-Without-Attention Effect*, 311 *SCIENCE* 1005, 1007 (2006) (finding that participants made better complex decisions when they were unable to focus conscious attention on the choice, and that this effect increased the more complicated the decision);

contrast, is unconscious or implicit.¹³⁷ The reflexive system takes little effort, acts quickly, and is often characterized as automatic. For example, the reflexive system is what puts our bodies into fight or flight mode when we are startled by something. It is also the system that allows us to suddenly hear our names across a crowded room,¹³⁸ or allows us to have the “eureka” moment.¹³⁹ Put simply, part of our brain makes conscious choices, and another part of our brain makes unconscious choices.

Associations Affect Thinking. Of particular importance for unconscious bias, the reflexive system operates using associations, or links, between co-varying concepts. If you think of one attribute, linked attributes become more accessible, meaning they come more readily to mind. For example, if we asked you to think of a tall building, you would be more likely to name the Eiffel Tower if you had been thinking of Paris or France (and more likely to name the Empire State Building if you had been thinking about New York, or the Sears Tower if you had been thinking about Chicago).

Importantly, though, one need not consciously think about an attribute. In the somewhat awkward phrasing of psychology, an attribute can be activated (or primed) without any conscious awareness, and this activation can then influence a person’s perception, judgment, and behavior. For example, if we showed you the word “Paris” on a computer screen for 200 milliseconds—enough time for your brain to register the image but not enough time for you to be aware of what you read—Paris would be activated, and all of the co-varying attributes, like baguettes, French, the month of April, and the Eiffel Tower (or Hilton, for those under the age of 30) would all become more accessible.¹⁴⁰ Attributes less

Timothy D. Wilson & Jonathan W. Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions*, 60 J. PERSONALITY & SOC. PSYCHOL. 181 (1991) (showing that increased conscious deliberation can result in less accurate judgments).

137. Unconscious and implicit are often used synonymously. There is, in fact, significant ambiguity in how psychologists use the terms. See, e.g., Jan De Houwer & Agnes de Moors, *How to Define and Examine the Implicitness of Implicit Measures*, in *IMPLICIT MEASURES OF ATTITUDES*, 179 (Berndt Wittenbrink & Norbert Schwarz, eds., 2007). For our purposes the distinctions are unimportant to our larger claim that poll workers’ unconscious biases are likely to affect the administration of election laws without the poll workers’ conscious awareness. See Bertram Gawronski & Galen V. Bodenhausen, *What Do We Know About Implicit Attitude Measures and What Do We Have to Learn?*, in *IMPLICIT MEASURES OF ATTITUDES*, *supra* note 137, at 272.

138. The experience of suddenly hearing a personally-relevant word has been termed the cocktail party effect. See generally Barry Arons, *A Review of the Cocktail Party Effect*, J. AM. VOICE INPUT/OUTPUT SOC’Y, July 1992, at 35, available at <http://xenia.media.mit.edu/~barons/cocktail.html> (accessed Nov. 27, 2009).

139. See generally DAVID PERKINS, *THE EUREKA EFFECT: THE ART AND LOGIC OF BREAK-THROUGH THINKING* (2001).

140. There are other methods of priming. Pictures or faces rather than words could also be shown long enough to be read or recognized by the unconscious but not long enough to be consciously identifiable. Or subjects can be shown a group of words which

associated with Paris, such as fish and chips, Swahili, and the Great Pyramids, would become relatively less accessible. When an attribute is more accessible, it takes less cognitive effort to think of that attribute; conversely, when an attribute is less accessible, it takes more cognitive effort to think of that attribute.¹⁴¹

Measurement. Measuring these automatic (or implicit) associations is difficult, particularly for those associations that are consciously rejected, such as some associations connected with race.¹⁴² The most common assessment procedure measures response latency, based on the notion that people will perform more slowly if the association between object and attribute is unfamiliar.¹⁴³ The much written about (and frequently criticized) Implicit Association Test (IAT) is one example of this type of assessment procedure.¹⁴⁴ The test, now available in fourteen different areas,¹⁴⁵ requires participants to respond to paired concepts. Sure enough, people respond more quickly to concepts that are closely related

include somewhat more words linked to the attributes the experimenters wish to activate, such as shuffleboard, basketball, Florida, retired, and voting to activate elderly. Even the presence of an experimenter of a particular race may be enough to activate that construct. See, e.g., Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 851 (2001). Similarly, it can merely be a matter of making a particular identity more salient. For example, an Asian woman using chopsticks is more likely to activate Asian stereotypes whereas an Asian woman applying make-up is more likely to activate female stereotypes. C. Neil Macrae et al., *The Dissection of Selection in Person Perception: Inhibitory Processes in Social Stereotyping*, 69 J. PERSONALITY & SOC. PSYCHOL. 397, 402–03 (1995).

141. For a general review of implicit attitudes, see Fazio & Olson, *supra* note 129.

142. Measuring attitudes with implicit measures has the benefit of addressing both those who might conceal unpopular or unacceptable views and those who are not consciously aware of the attitude. For a general discussion, see Fazio & Olson, *supra* note 129, at 318–20.

143. Other assessment procedures include indirect self reports, memory tasks (people may remember closely associated objects and attributes more easily), and physiological responses (such as eye blinks, or the movement of facial muscles (facial electromyography)). For a detailed discussion of different measurement methods, see chapters 2 to 6 in IMPLICIT MEASURE OF ATTITUDES, *supra* note 137. Specific tests include the affect misattribution procedure, Extrinsic Affective Simon Task, Go/No-Go Association Task, and approach avoidance tasks. See generally Bertram Gawronski, *Ten Frequently Asked Questions About Implicit Measures and Their Frequently Supposed, But Not Entirely Correct Answers*, 50 CANADIAN PSYCHOL. 141–57 (2009).

144. Anthony Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998). In some ways the IAT is analogous to the seventy-year-old Stroop test. Stroop observed that it was harder to state the color of ink if the ink spells out the name of a different color. For example, identifying purple ink used to write the word yellow was difficult. Overriding the brain's attempt to read the word, rather than recognize the color, takes longer.

145. Project Implicit, <https://implicit.harvard.edu/implicit/demo/> (last visited Nov. 30, 2009) (providing tests regarding race, skin-tone, Arab-Muslim, Asian American, Native American, gender (career and science), sexuality, weight, disability, religion, weapons, candidates and presidents).

(flower, pleasant; insect, unpleasant) than those that are not closely related (flower, unpleasant; insect, pleasant).¹⁴⁶ Although there is some evidence that IAT responses can be consciously controlled, it takes some effort on the part of a person to control IAT responses.¹⁴⁷ The IAT and other methods of assessing implicit attitudes become more interesting—and more controversial—when applied to attitudes about people.

Stereotypes about people, implicit or otherwise, are arguably just another kind of association.¹⁴⁸ They can be thought of as simply a type of adaptive categorization, in that we must make some assessments based on group membership or we would be overwhelmed by detail. Nearly everyone has knowledge of the content of racial and ethnic stereotypes (e.g., White men can't jump), even if they do not consciously accept them.¹⁴⁹ Stereotypes are activated by a person's salient (or most noticeable) features, typically one or more of the "top three" visible factors: race, sex, and age.¹⁵⁰

Interpretation. Americans are generally able to associate positive words more quickly with Whites than they are able to associate positive words with African Americans.¹⁵¹ Psychologists generally interpret this to mean that people tend to have automatic preferences for (or implicit

146. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP RELATIONS 359, 359-60 (2007) (using dog/loyal and cat/alooof as examples).

147. See, e.g., Karl Christoph Klauer & Sarah Teige-Mocigemba, *Controllability and Resource Dependence in Automatic Evaluation*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 648 (2007).

148. Implicit stereotypes are typically defined as "the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category." Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 15 (1995).

149. Devine & Elliot, *supra* note 111, at 1139. There can be several sources of a stereotype's content. Culture is very important, as we are incessantly bombarded with stereotypical images.

150. Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 375 (Susan T. Fiske et al., eds., 4th ed. 1998).

151. See, e.g., Nilanja Dagupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 316 (2000); Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCHOL. 1013 (1995); Anthony Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1478 (1998); Samuel L. Gaertner & J.P. McLaughlin, *Racial Stereotypes: Associations And Ascriptions Of Positive And Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23 (1983) (demonstrating that Whites were more quickly associated with positive traits than African Americans). The reverse is true for negative words: people are generally able to associate negative words more quickly with African Americans than they are able to associate negative words with Whites. See *id.*

These results are sensitive to culture. For example researchers have shown that Japanese participants have implicit negative associations regarding Koreans, and Korean participants have similar negative associations regarding Japanese. See, e.g. Greenwald et al., *supra*; Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427 (2007) (lighter skin is associated with positives and darker skin is associated with negatives).

biases in favor of) Whites over African Americans.¹⁵² Other assessment methods of implicit bias, such as priming, have yielded similar results.¹⁵³ Perhaps seventy percent of Whites have implicit negative stereotypes toward African Americans.¹⁵⁴ Moreover, Whites may also hold negative implicit stereotypes about other racial groups, including Asians¹⁵⁵ and Latinos.¹⁵⁶ Members of minority racial groups are not immune from these biases, frequently holding negative stereotypes about their own groups.¹⁵⁷

152. Lincoln Quillian, *Does Unconscious Racism Exist?*, 71 SOC. PSYCHOL. Q. 6, 8 (2008) (arguing that “[t]he majority view in psychology is that these experiments show that the large majority of white and some nonwhites hold negative implicit associations toward minority groups”); see also Lane et al., *supra* note 151, at 427. The Implicit Association Test and unconscious racism in general have also been criticized. See, e.g., Philip E. Tetlock & Gregory Mitchell, *Calibrating Prejudice in Milliseconds*, 71 SOC. PSYCHOL. Q. 12, 12 (2007) (claiming that “proponents have yet to provide compelling evidence for their assertions about the pervasiveness of unconscious bias and its behavioral consequences”); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination and the Perils of Mindreading*, 67 OHIO STATE L.J. 1023 (2006); Frederica Conrey et al., *Separating Multiple Process in Implicit Social Cognition: The Quad Model of Implicit Task Performance*, 89 J. PERSONALITY & SOC. PSYCHOL. 469 (2005). See generally Klaus Fiedler et al., *Unresolved Problems With the ‘I’, the ‘A’, and the ‘T’: A Logical and Psychometric Critique of the Implicit Association Test (IAT)*, 17 EUR. REV. SOC. PSYCHOL. 74 (2006). One important potential problem is that test-retest reliability is relatively low (median $r = .57$). Brian Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265 (2007).

153. John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 522–23 (1997) (showing that Whites are able to recognize positive words more quickly when primed with White faces than when primed with African American faces); Fazio et al., *supra* note 151, at 1019 (finding that Whites showed higher levels of negativity when primed with African American faces than when primed with White faces, and that these attitudes were correlated with the quality of interaction with the African American experimenter); Bernd Wittenbrink et al., *Evidence for Racial Prejudice at the Implicit Level and its Relationship With Questionnaire Measures*, 72 J. PERSONALITY & SOC. PSYCHOL. 262, 273 (1997) (finding the presence of implicit prejudice by using explicit questionnaires).

154. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUSTICE RESEARCH 143, 147 (2004) (finding “White Americans, on average, show strong implicit preference for their own group and relative bias against African Americans”); Dovidio & Gaertner, *supra* note 128, at 20 (concluding that “the vast majority of [W]hite Americans harbor unconscious negative associations about blacks”); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2007) (stating that close to 70% of Whites held implicit biases against African Americans).

155. L. Son Hing et al., *Inducing Hypocrisy to Reduce Prejudicial Responses Among Aversive Racists*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 71 (2002).

156. Eric Uhlman et al., *Subgroup Prejudice Based on Skin Color Among Hispanics in the United States and Latin America*, 20 SOC. COGNITION 198, 198–99 (2002) (finding implicit preferences for lighter skinned subgroups). There is also some evidence of negative implicit attitudes held by people in other countries. Bertram Gawronski et al., *Implicit Bias in Impression Formation: Associations Influence the Construal of Individuating Information*, 33 EUR. J. SOC. PSYCHOL. 573, 582 (2003).

157. Nilanjana Dasgupta, *supra* note 154, at 149.

Impact. It is not, however, enough to demonstrate that people may hold implicit race-based stereotypes. We must also show that implicit stereotypes affect people's judgment and behavior in non-trivial ways.¹⁵⁸ The critical (and somewhat disconcerting) fact is that implicit attitudes, even if consciously rejected,¹⁵⁹ affect people's judgment and behavior.¹⁶⁰

Implicit racial biases have been linked to many different behaviors,¹⁶¹ and in some cases may be a better predictor of behavior than explicit self-reports.¹⁶² For example, one study showed that participants' explicit bias was a predictor of the content of what Whites said to African Americans but that implicit bias was a predictor of the manner (e.g., nonverbal cues) in which something was said.¹⁶³ In other words, people who profess to be unbiased might not say unkind words to African Americans, but they might say neutral words in a manner that is perceived as unkind. Other

158. As early as 1935 a researcher demonstrated that automatic processes could interfere with the conscious desired result. J. Ridley Stroop, *Studies on the Interference in Serial Verbal Reactions*, 18 J. EXPERIMENTAL SOC. PSYCHOL. 643, 659 (1935) (finding that the controlled response, accurately stating the color of a word, was affected by the automatic process of reading the word itself).

159. For example, when stereotypes are activated, ambiguous inputs are more likely to be perceived in a way consistent with the stereotypes. See, e.g., Patricia G. Devine, *Stereotypes and Prejudice: The Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989); Ziva Kunda & Sherman-Williams, *Stereotypes and the Construal of Individuating Information*, 19 PERSONALITY & SOCIAL PSYCHOL. BULL. 90 (2003).

160. Reviews of implicit stereotypes' influence appear in John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effects*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 361, 363 (Shelly Chaiken & Yaacov Trope eds., 1999) and Irene V. Blair, *Implicit Stereotypes and Prejudice*, in COGNITIVE SOCIAL PSYCHOLOGY: THE PRINCETON SYMPOSIUM ON THE LEGACY AND FUTURE OF SOCIAL COGNITION 359 (Gordon Moskowitz, ed., 2001). See also Susan T. Fiske et al., *The Continuum Model: Ten Years Later*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 231, 234 (Shelly Chaiken & Yaacov Trope eds., 1999) (noting how people frequently will automatically "feel, think, and behave toward" individual members of a social category in the same way that they do "toward members of that social category more generally").

161. Anthony G. Greenwald & Linda Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 960–61 (2006) (observing that there is substantial evidence showing that unconscious bias results in discriminatory behavior); William A. Cunningham et al., *Implicit Attitude Measures: Consistency, Stability and Convergent Validity*, 12 PSYCHOL. SCI. 163 (2001) (demonstrating how implicit intergroup attitudes are correlated with automatic and unintended responses without the participants conscious awareness).

162. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 32 (2009) (performing a meta-analysis of numerous IAT studies and concluding that its results "significantly exceeded the predictive validity of self-report measures" for racial and other intergroup behavior).

163. John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002). Interestingly, Whites evaluated the interaction based on content whereas African Americans evaluated the interaction based on the manner.

studies showed that people responded with greater hostility,¹⁶⁴ or perceived others as more aggressive, when primed with words or African American faces, and these reactions did not correspond to consciously expressed prejudice.¹⁶⁵ When faced with a news report, viewers favored greater punishment for a dark skinned suspect than a suspect identical in all respects but with a lighter skin tone.¹⁶⁶ Police officers would shoot more quickly at an African American suspect than a comparable White suspect.¹⁶⁷ Recruiters called back job applicants with typically White names 50% more often than applicants with typically African American names, even though the resumes were identical.¹⁶⁸ Participants were more likely to remember African American-sounding names as criminals than White names.¹⁶⁹ As “physicians’ pro-white implicit bias increased, so did their likelihood of treating white patients and not treating African American patients with thrombolysis.”¹⁷⁰ Implicit preference influenced participants’ reports of harmful discriminatory actions toward African Americans.¹⁷¹ It also predicted participants’ willingness to impose budget cuts on Jewish, Asian, and African American student groups.¹⁷² At a neurological level, the racial IAT has been linked to increased activation of the

164. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996); Mark Chen & John A. Bargh, *Nonconscious Behavior Confirmation Process; The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 552 (1997).

165. Devine, *supra* note 159, at 10–12.

166. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 563–67 (2000).

167. Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1327–28 (2002).

168. See Bertrand & Mullainathan, *supra* note 123; Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553 (2005).

169. Mahzarin R. Banaji & R. Bhaskar, *Implicit Stereotypes And Memory: The Bounded Rationality of Social Belief*, in MEMORY, BRAIN, AND BELIEF 139, 151 (D. L. Schacter & E. Scarry, eds., 2000) (finding that “on average subjects ‘remembered’ 1.7 times as many black than white names as criminals”); REID HASTIE & ROBYN M. DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD* 81 (2000) (citing a 1995 study by Wendi Walsh et al. showing that participants remembered twice as many African American than White names as criminals).

170. Green et al., *supra* note 123, at 1231. *But cf.*, J. A. Sabin et al., *Physician Implicit Attitudes and Stereotypes About Race and Quality of Medical Care*, 46 MED. CARE 678 (2008) (finding evidence that although pediatricians held the implicit stereotype that African American patients were less compliant than White patients, this stereotype did not significantly affect treatment recommendations).

171. See Rudman & Ashmore, *supra* note 146, at 370.

172. *Id.*

amygdala and neurological processes,¹⁷³ lower performance ratings,¹⁷⁴ avoidance behaviors,¹⁷⁵ and negative interpersonal interactions.¹⁷⁶

Based on the above understanding, discrimination is less likely to result from invidious motivation, the deliberate actions of a bigot, and more likely to result from implicit biases stemming from cultural exposure and normal cognitive processes. We (with some frequency) are unknowingly affected by the associations we have learned, i.e. stereotypes. Prejudiced decision-making and behavior are the result.¹⁷⁷ As Park & Rachlinski recently concluded, unconscious bias against African Americans is a “widespread and important phenomenon.”¹⁷⁸ Importantly for purposes of this Article, poll workers drawn from the population at large will also have these biases.¹⁷⁹ They are, however, also somewhat context dependent. Accordingly, we look now at what factors may aggravate or mitigate their impact. More specifically, we look at how what happens on election day in a polling place may serve to aggravate or mitigate the impact of unconscious bias.

173. The amygdala governs the fight or flight response and is one of the oldest parts of the brain. See Greenwald, *supra* note 161, at 962. See also William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 811 (2004) (showing Whites respond at a neurological level to African American faces, even where the African American faces are not consciously perceived); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2006).

174. David Amodio & Patricia Devine, *Stereotyping And Evaluation In Implicit Race Bias: Evidence For Independent Constructs And Unique Effects On Behavior*, 91 J. PERSONALITY & SOC. PSYCHOL. 652 (2006).

175. *Id.*

176. Dovidio, *supra* note 163; Allen McConnell & Jill Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitude*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435 (2001); Wittenbrink et al., *supra* note 153 (finding that participants primed in the African American condition interpreted the behavior of a third party as more threatening and hostile than those in the White condition).

177. Of course, unconscious bias is only one possible cause. Explicit bias, although no longer socially acceptable in polite company, may also be a cause. See, e.g., R. Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, (2008) (unpublished article), available at http://works.bepress.com/context/r_banks/article/1001/type/native/viewcontent/; KATHERINE BLEE, *INSIDE ORGANIZED RACISM* (2002).

178. Park & Rachlinski, *supra* note 15, at 8.

179. Although poll workers are disproportionately elderly, there is no evidence to suggest that they are less likely to be affected by unconscious biases than younger people. Alvarez, et al., *supra* note 78, at 18 (survey showing that 57% of poll workers were estimated to be more than 51 years old).

B. *Why Polling Places Seem to Be an Optimal Arena for the
Operation of Unconscious Bias*

Initially many psychologists thought that unconscious biases operated automatically and indiscriminately, but more recent studies demonstrate that context can serve as an important mediator of unconscious biases. Unfortunately, many of the contextual factors that researchers have shown to reduce the impact of discrimination, unconscious or otherwise, are not applicable in the context of poll workers' interactions with prospective voters. These factors include the nature of the decision, the availability of cognitive resources, the presence of individuating information, and the decision-maker's level of motivation: all can mitigate implicit biases' impact, but few of these mitigators are necessarily present in an election day polling place.

Unconscious bias appears most likely to make a difference for decisions that might be described as judgment calls rather than decisions where the outcome is clear,¹⁸⁰ as several experiments have shown. For example, in the employment context, decision-makers faced with similarly qualified individuals were likely to choose the White candidate over the African American candidate, but where one candidate had clearly superior credentials, that candidate was chosen regardless of whether the candidate was White or African American.¹⁸¹ In the school admission context, decision-makers admitted applicants who had high GPAs and test scores of every race before admitting those applicants who were high in one measure and low in the other. When decision-makers did turn to applicants who were high in one measure but low in another measure (i.e., the ambiguous cases), decision-makers preferred White applicants.¹⁸²

What this suggests in the voting context is that poll workers are likely to allow clearly qualified voters to cast ballots regardless of their

180. Another way of thinking about this is that unconscious bias is more likely when a decision-maker is applying a standard rather than a bright-line rule. For the leading comparison of the relative merits of rules and standards see Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

181. John F. Dovidio & Samuel Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315 (2000).

182. See Gordon Hodson et al., *Processes in Racial Discrimination: Differential Weighing of Conflicting Information*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 460 (2002). When presented with a White applicant with a high SAT and a low GPA and an African American applicant with a low SAT and a high GPA, decision-makers preferred the White applicant. No problem so far, as preference for a high SAT by itself does not show bias. But when presented with the reverse situation (an African American applicant with a high SAT and a low GPA and a White applicant with a low SAT and a high GPA), decision-makers also preferred the White applicant. *Id.* at 467–70. The problem is not whether one criterion is a better predictor than the other, but rather that decision-makers tended to privilege the criterion that resulted in admission of the White applicant. In a sense, African American applicants who were judgment calls were treated in a “heads I win, tails you lose” manner.

race or ethnicity. In other words, a poll worker is not likely to deny the right to cast a ballot to a prospective voter of any race who clearly meets all the legal requirements and who does not need any special assistance or encounter any difficulties in casting a ballot. Thus, an African American voter who walks into an Indiana polling place, whose name is easily found on the registration list, who shows a valid driver's license with a name that exactly matches the name on the voter registration list, and who has no trouble signing the poll book and operating the voting machinery will not likely be denied the right to vote because of unconscious bias.¹⁸³ However, when, for example, the name on the photo identification does not exactly match the name on the voter registration list and the poll worker must make a judgment as to whether or not the name on the photo identification conforms to the name on the registration list,¹⁸⁴ unconscious bias may play a role.

Of course, the distinction between a clear decision and a judgment call is sometimes ambiguous. For example, Indiana law requires poll workers to ask every prospective voter for photo identification. On its face, this is a clear requirement, but *de jure* requirements are not necessarily followed. It is possible that at a particular polling place the norm could be for poll workers not to ask for identification, just as some grocery stores selling liquor may claim that they ask for identification from all purchasers, but actually do not. Some evidence shows that poll workers do not follow consistent rules when it comes to the implementation of photo identification requirements. A nationwide survey of voters from the 2008 general election showed that in states that required all prospective voters to show photo identification, about 25 percent of voters said they showed photo identification because it was convenient and *not* because photo identification was required.¹⁸⁵ If this is the case, the decision to ask for photo identification becomes, from a functional perspective, a judgment call, and one that might be affected by unconscious bias.

Judgment calls tend to create an opportunity for unconscious bias. However, it is less likely that a person will use (and act upon) unconscious stereotypes the more cognitive resources (i.e., brain power) a person has available. A person trying to make a decision in a hurry may be unable to use his or her cognitive resources. If people are allowed time to control their responses, high prejudice people will show more prejudice than low prejudice people.¹⁸⁶ If, however, people do not have time to control (or, in

183. Of course, a poll worker could consciously be biased and, as a result, turn such a voter away. However, this seems less likely to happen in today's polling places. See *supra* notes 9–11 and accompanying text.

184. See *supra* notes 88–96 and accompanying text for a discussion of the ambiguities in the Indiana law.

185. Alvarez et al., *supra* note 78, at III, 22.

186. Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 PSYCHOL. SCI. 56 (2005).

psychological terms, inhibit) their responses, then both high and low prejudice people are likely to demonstrate bias.¹⁸⁷ Put differently, people who aspire not to be prejudiced do better when they have more time to think. This effect can be seen at a neurological level. A part of the brain, the limbic system, automatically activates based on a very brief showing of an African American face.¹⁸⁸ If the face is shown for a longer time, half a second, the prefrontal cortex can act to resist the stereotyped fear.¹⁸⁹

Timing has implications for polling place decisions. When turnout of prospective voters is light—say, for a local election of the proverbial dog-catcher—and poll workers have ample time to deliberate about their decisions, then unconscious bias will likely play less of a role in the administration of an election. However, if lines at the polling place wrap around the block—a not uncommon event at some of the more high-profile and competitive elections, such as Presidential contests¹⁹⁰—poll workers will feel pressure to make decisions more quickly, and quicker decisions are more likely to be affected by unconscious bias.¹⁹¹

The amount of information available to the decision-maker also plays a role in the operation of unconscious bias. The more individuating information people have regarding the people about whom they are making the decision, the less unconscious bias there will be.¹⁹² Typically, people will have less individuating information about those in other racial groups

187. John F. Dovidio et al, *supra* note 163 at 66–67 (2002); Galen V. Bodenhausen et al., *Stereotypes in Thought and Deed: Social-cognitive Origins of Intergroup Discrimination*, in *INTERGROUP COGNITION AND INTERGROUP BEHAVIOR* 311, 319 (Constantine Sedikides et al., eds, 1998) (observing that mental “busyness” exacerbates the use of stereotypes).

188. Cunningham et al., *supra* note 173, at 811. See also Wim De Neys et al., *Smarter Than We Think: When Our Brains Detect That We Are Biased*, 19 *PSYCHOL. SCI.* 483 (2008) (showing the same effect with stereotypes of engineers).

189. *Id.*

190. Katrina vanden Heuvel, *America Needs Electoral Reform*, *THE NATION*, July 21, 2008, <http://www.thenation.com/doc/20080721/kvh> (discussing long lines during the 2004 presidential election in Ohio and long lines during the 2006 mid-term elections in Colorado, Georgia, Illinois, Maryland, Massachusetts, Ohio, Pennsylvania, Tennessee, and Utah).

191. This also suggests that on election day we should be more concerned about unconscious bias during peak voting times, which typically occur at the beginning and end of the workday.

192. Ziva Kunda & Stephen J. Spencer, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-based Theoretical Framework for Stereotype Activation and Application*, 129 *PSYCHOL. BULL.* 522, 528 tbl. 1 (2003) (finding that many studies had shown the benefits of individuating information); Ziva Kunda & Paul Thargard, *Forming Impressions from Stereotypes, Traits and Behaviors: A Parallel-Constraint-Satisfaction Theory*, 103 *PSYCHOL. REV.* 284, 300 (1996); Joachim Krueger & Myron Rothbart, *Use of Categorical and Individuating Information in Making Inferences About Personality*, 55 *J. PERSONALITY & SOC. PSYCHOL.* 187, 194 (1988).

than they have about those in their own group:¹⁹³ “[t]hey are all alike and different from us, besides.”¹⁹⁴ As one would expect, stereotypes operate the most where one has the least information. One might hold the stereotype that men in the United States like sports, but one only need to hear a male co-worker say that he does not like sports to realize that the stereotype does not apply to that particular male.

When it comes to polling places, poll workers have very little individuating information available to them about prospective voters.¹⁹⁵ Poll workers are able to see the prospective voter’s appearance and demeanor. The poll books contain the voter’s name, address, signature, and little else.¹⁹⁶ The prospective voter’s race is one of the few pieces of individualized information available to the poll worker, and is exactly the information that should not be used.¹⁹⁷

Thus, judgment calls made quickly with little individuating information create a foundation for the operation of unconscious bias. However, motivation to avoid bias can help lessen the likelihood of its operation. Motivation can be either internal (“I would like to behave in an unbiased manner”) or external (“People will judge me negatively if I behave in a biased manner”).¹⁹⁸ Either kind of motivation can make a difference, although it is probably easier to change external motivations. Within reason, the more incentives a subject has, the more likely he or she can reach an unbiased decision.¹⁹⁹ In addition, the more that the deci-

193. See, e.g., Patricia W. Linville et al., *Stereotyping and Perceived Distributions of Social Characteristics: An Application to Ingroup-Outgroup Perception*, in PREJUDICE, DISCRIMINATION, AND RACISM 165, 167 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

194. See Susan T. Fiske, *What’s in a Category?: Responsibility, Intent, and the Avoidability of Bias Against Outgroups*, in THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 127, 129 (Arthur G. Miller ed., 2004).

195. If unconscious bias is less likely to occur when poll workers have more information about voters, the fact that the poll worker knows a prospective voter (because they are friends, neighbors, etc.) would serve to reduce the opportunity for unconscious bias. However, in most modern elections, prospective voters are not likely to know the poll workers they encounter, presumably because precincts are so large. See Alvarez et al., *supra* note 78, at 18 (survey of voters at 2008 general election showing that “only 17% of voters reported that they knew the poll worker personally”).

196. The information contained in poll books varies from state to state and can vary from voter to voter. For example, poll books often have a special notation to alert poll workers as to which first time voters who registered by mail still need to present identification to comply with the voter identification mandate of the Help America Vote Act. There will also be whatever evidence the voter is required to present for identification purposes (which can vary from state to state).

197. The poll worker will also likely have the potential voter’s age and sex.

198. See Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835, 836 (2002) (finding the more internally motivated the subject was to avoid prejudice, the lower their measure of implicit race bias).

199. Devine et al., *supra* note 198, at 845; E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL.

sion-maker expects to be accountable for and to have to justify the decision,²⁰⁰ the less likely the decision will be biased.

Unfortunately, poll workers' external motivations may not be particularly malleable. Poll workers tend to be low wage employees working just a couple of days per year with limited training. There are also few or no rewards for success and little or no accountability.²⁰¹ As noted previously, a poll worker makes generally unreviewable and unevaluated decisions, and rarely has the opportunity to learn from mistakes. A poll worker who decides to prevent a prospective voter from casting a ballot is unlikely to learn whether this was the correct decision. Even in those situations where accountability is readily achievable, such as ensuring poll workers correctly complete the paperwork necessary for a provisional ballot to be counted, there is little accountability. Finally, even if there were significant performance evaluation of poll workers, there are no incentives, financial or otherwise, for high performance.

In short, although the ubiquity of unconscious bias remains in dispute, poll workers on election day appear to be in a situation likely to exacerbate such biases. Unreviewed discretionary decisions, potentially made under time constraints, with little individuating information, and no accountability or incentives for accuracy, are particularly susceptible to unconscious bias.

The next step involves identifying concrete instances in which unconscious bias might occur during the interaction between poll workers and potential voters. While we think there are many instances in which unconscious bias might operate, here are several examples where unconscious bias might play a role:²⁰²

- When poll workers make requests for identification, they might choose to request identification from minority prospective voters but not White prospective voters.

811 (1998); Lisa Sinclair & Ziva Kunda, *Reactions to a Black Professional: Motivated Inhibition and Activation of Conflicting Stereotypes*, 77 J. PERSONALITY & SOC. PSYCHOL. 885, *passim* (1999). There is a risk, however, of overcompensation. See Bridget C. Dunton & Russell H. Fazio, *An Individual Difference Measure of Motivation to Control Prejudiced Reactions*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 316, 324 (1997).

200. See, e.g., Phillip E Tetlock & Jennifer S. Lerner, *The Social Contingency Model: Identifying Empirical and Normative Boundary Conditions on the Error-and-Bias Portrait of Human Nature*, in DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY, *supra* note 160, at 571.

201. Steven L. Neuberg & Susan T. Fiske, *Motivational Influences on Impression Formation: Outcome Dependence, Accuracy-Driven Attention, and Individuating Processes*, 53 J. PERSONALITY & SOC. PSYCHOL. 431 (1987) (finding that incentives may reduce bias).

202. In each case the situation is described from a baseline where the poll workers' behavior is wrongful. It is also possible that the poll workers' treatment of the minority potential voter is correct, but for the fact that a non-minority potential voter would be treated better.

- When poll workers make decisions about the adequacy of voter identification, they might be more likely to determine that a type of identification is inadequate when a minority prospective voter presents the identification.
- When poll workers have difficulty finding the name of a prospective voter, they might search less diligently for a minority prospective voter.
- When poll workers are resolving challenges by poll watchers, poll workers might be more likely to rule against minority than non-minority prospective voters.
- When poll workers are filling out forms necessary to legitimate a voter (e.g., provisional balloting forms/affidavits), poll workers might be less careful with the forms or might provide less assistance to the prospective voter when a minority prospective voter is involved.
- When poll workers are providing assistance to the voter in the voting booth (e.g., helping with equipment), poll workers may provide a lower quality of assistance to minority voters.
- When poll workers are deciding whether a voter has exceeded the time limit for occupying the voting booth, they might enforce the time limit against minority persons and not enforce the time limit against White persons.²⁰³
- When poll workers are deciding whether a potential voter has arrived at the polling place before the polls have closed, poll workers might decide to close the polls if it's a minority voter

Importantly, unconscious bias may operate in such a way that it is hard to detect whether the bias is unconscious or even whether there is bias at all. For instance, take a poll worker's decision as to whether a voter has arrived at the polls just prior to closing or just after closing. It is unlikely that one minority prospective voter and one White prospective voter will arrive at the same time at the same polling place and be treated differently. Instead, what may happen is that at one polling place, a minority voter arrives and unconscious bias on the part of a poll worker leads the poll worker to disallow the prospective minority voter from casting a

203. At the 2004 general election in New York City, there were reports that poll workers were pressuring Asian American voters to cast their ballots quickly. See AALDEF, *supra* note 65 ("Several Asian American voters told AALDEF monitors that they felt rushed when they were voting.").

ballot whereas (1) if the prospective voter had been White, the poll worker would have made a different decision; or (2) at a different precinct on the opposite side of town, a White prospective voter has arrived at the same moment and poll workers allowed that prospective voter to cast a ballot. In other words, unconscious bias may operate very subtly.

III. IMPLICATIONS & IMPROVEMENTS

Unconscious bias may well play a role in the interaction between prospective voters and poll workers. The quick, discretionary decisions made by poll workers where they have few points of individuating information may result in poll workers making choices that exclude African Americans and other ethnic minorities who should be allowed to cast ballots.

While the research involving unconscious bias suggests polling places present a theoretical “optimal” opportunity for unconscious bias, it is not possible at this point to say how often unconscious bias plays a role in poll worker decision-making. However, we do know that in federal general elections it is likely that thousands of voters do not have their ballots counted. This is usually due to voter identification issues,²⁰⁴ registration issues,²⁰⁵ or the failure of a voting device to record a vote properly.²⁰⁶ And there is some evidence that White and non-White voters have different experiences at America’s polling places. For instance, a nationwide survey of voters from the 2008 general election showed that African American and Latino voters were far more likely to be asked for photo identification than White voters.²⁰⁷ Another possible example of

204. Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: Pol. Sci. & Pol. 127, 129 (2009) (providing statistics on the number of voters who reported not being allowed to cast a ballot because of identification problems).

205. See Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 1, 24 (2008) (describing how nearly 75,000 provisional ballots were rejected in 2006 because of issues with voter registration).

206. See generally Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711 (2005) (providing statistics on error rates for various types of voting machinery).

207. Alvarez et al., *supra* note 78, at 43 (reporting that 51% of White voters, 65% of Hispanic voters, and 70% of African American voters were asked to show “picture” identification). Importantly, the disparities among requests for photo identification persisted even after controlling for variations among states in their identification laws. *Id.* at 44. It is also interesting that there was actually less disparity in identification requests in states with stricter identification laws than in states with less stringent identification laws. In states with stricter identification laws (i.e., states that require or allow poll workers to request identification from prospective voters), 83% of Whites, 89% of African Americans, and 75% of Hispanics were asked to show photo identification. *Id.* In states with less stringent identification laws, 22% of Whites, 44% of African Americans, and 51% of Hispanics were asked to show photo identification. *Id.*

different treatment due to unconscious bias might be found in racial disparities in provisional balloting rates. A 2004 survey of provisional balloting showed a higher rate of provisional ballots in jurisdictions covered by the minority-language provisions of Section 203 of the Voting Rights Act than in non-covered jurisdictions.²⁰⁸ Relatedly, predominantly Latino jurisdictions had the highest rate of provisional balloting.²⁰⁹

Of course, it bears reiterating that there could be reasons other than unconscious bias for prospective voters being rejected and for the different experiences minority persons have at the polls. For example, the higher rate of provisional balloting in predominantly Latino jurisdictions might be explained by intentional, rather than implicit, bias on the part of poll workers. At this point, is impossible to know how many of these examples of differential treatment are manifestations of unconscious bias. That recognized, our goal here is not to define empirically how often unconscious bias occurs.²¹⁰ Rather, it is to advance the idea that unconscious bias may be occurring and to suggest reasonable steps legislators and election administrators might take to limit the impact of unconscious bias.²¹¹ Put differently, our point here is that unconscious bias should be included in the dialogue regarding election administration.

We think, then, that legislators and election administrators have some options should they attempt to mitigate the role of unconscious bias on election day. Legislators and election administrators can take these steps at both an individual level and an institutional, or structural, level. At an individual level, legislators and election administrators could focus on the poll workers themselves. Broadly speaking, there are measures that at an unconscious level may change a person's implicit associations or may mitigate the impact of these associations. At an institutional level, legislators and election administrators could restructure the overall voting environment so as to reduce the impact of poll worker decisions. This could mean reducing the number and role of poll workers through various forms of automation and computerization, or less ambitiously, by

208. Kimball W. Brace & Michael P. McDonald, *Final Report of the 2004 Election Day Survey* 6–6 (2005).

209. *Id.*

210. It would be difficult to run an empirical experiment to determine the impact of unconscious bias in polling places. One could, presumably, survey poll workers for their racial attitudes and then send similarly situated African American voters and White voters to the same polling place on election day to see if workers approached these voters differently. There would, however, seemingly be high barriers to such a study. First, it would take enormous resources. Second, it would take cooperation on the part of government officials because to conduct such a study, the prospective voters would have to be given matching “attributes” and to do this correctly one would likely have to rely on prospective voters who might be considered fraudulent under criminal law.

211. Judges may also be able to play a role in the application of unconscious bias to election law if, for example, they are willing to use unconscious bias as a rationale to limit the application of laws that explicitly allow poll worker discretion.

clarifying the rules that poll workers must follow so as to reduce poll workers' discretion (and providing effective enforcement to ensure that the bright-line rules are followed).

There are, however, some drawbacks to these approaches. First, it is no simple task to counteract unconscious bias.²¹² On the contrary, counteracting unconscious bias at an individual level takes a lot of effort.²¹³ Professors Wilson and Brekke use a metaphor, contamination, to describe the impact of unwanted unconscious bias on an individual's decision-making.²¹⁴ As the metaphor suggests, restoring something to an uncontaminated state frequently presents difficulties—just ask the Environmental Protection Agency. Second, there is a risk of unintended consequences in changing election administration to offset occurrences of unconscious bias. For example, a change in the way elections are conducted to decrease the potential for unconscious bias might have the unintended consequence of making it more difficult for the groups who need the most protection from unconscious bias (i.e., racial and ethnic minorities) to cast a countable ballot. Such a change might also make the smooth administration of elections more difficult. In short, while we present in the next few pages several ideas to mitigate the impact of unconscious bias at polling places, some of these ideas remain tentative and each likely merits further, more detailed treatment than can be provided within the confines of this Article.

A. Individual Level: Training and Priming Poll Workers Not to Discriminate

Legislators and election administrators could attempt to reduce the operation of unconscious bias in poll workers' decisions, either by reducing poll workers' implicit biases or by helping them to override their biases. Although typically implicit biases are thought to be relatively resilient,²¹⁵ particularly if they have developed over many years,²¹⁶ there is evidence that these biases in some circumstances are malleable or that their effects can be minimized.²¹⁷ Some relatively modest interventions

212. See generally Jeffrey W. Sherman, *The Self Regulation of Automatic Associations and Behavioral Impulses*, 115 PSYCHOL. REV. 314 (2008).

213. See generally *Id.* Cunningham et al., *supra* note 173, at 806 (noting that counteracting individual bias is effortful).

214. Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 119 (1994).

215. See, e.g., Timothy D. Wilson, et al., *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101 (2000).

216. Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 79 (2004).

217. See Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 242–43 (2002) (reviewing studies).

have been shown to have an impact,²¹⁸ which is fortunate for our purposes because more intensive interventions may not be justifiable for employees who typically only serve a few days per year.²¹⁹

One possible approach would be based on the finding that mere exposure to minority groups,²²⁰ and to positive examples of minority groups, can make a difference.²²¹ The former finding suggests that greater diversity among poll workers could result in less individual implicit bias.²²² It is even possible that exposure to a photograph can help.²²³ Simply prominently displaying photographs of positive role models, such as Tiger Woods voting, might have beneficial effects. In addition, if minority group members can be hired for positions of authority, such as the lead poll worker, this too may help.²²⁴ In one study, for example, subjects showed less automatic racial bias when an African American rather than a White gave the subjects their instructions.²²⁵

218. See, e.g., Tiffany A. Ito et al., *The Influence of Facial Feedback on Race Bias*, 17 PSYCHOL. SCI. 256 (2006) (finding that inducing subjects to smile resulted in less racial bias).

219. In addition, interventions that have worked in lab experiments may prove ineffective in the poll worker context.

220. This exposure effect, also referred to as the contact hypothesis, goes back at least 50 years. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (Addison-Wesley 1958) (1954). See also, Thomas F. Pettigrew & Linda R. Tropp, *A Meta-analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006) (providing a review of studies and concluding that contact reduces bias).

221. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 806–07 (2001) (demonstrating that using photographs of admired minority group members like Colin Powell and Tiger Woods, or disliked Caucasians, like the “Unabomber,” reduced unconscious bias); Laurie A. Rudman et al., *“Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 865 (2001) (finding that a seminar on prejudice with an African American professor reduced the differences on an IAT by a considerable amount when compared to a similar class taught by a White professor).

222. As explained *infra* at notes 282–286 and accompanying text, minority group members may have different biases thereby reducing (albeit not eliminating) any systematic impact.

223. See Dasgupta & Greenwald, *supra* note 221 at 806–07.

224. See, e.g., Jennifer A. Richeson & Nalini Ambady, *Effects of Situational Power on Automatic Racial Prejudice*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 177, 181 (2003) (finding that participants showed less automatic racial bias when they expected to be a subordinate to an African American rather than when they expected to be a superior of an African American).

225. Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 851 (2001).

Training might also be effective.²²⁶ For instance, police officers and undergraduates in a computer simulation were initially more likely to mistakenly shoot African Americans than Whites.²²⁷ After extensive practice, however, neither group showed the automatic bias.²²⁸ A follow-up test suggested they were inhibiting racial stereotypes.²²⁹ Perhaps something similar could be done with poll workers. Computer-based training sessions could be programmed so that race was demonstrated to be irrelevant to determining voter eligibility. Encouraging empathy may also have some success, as does exposing people to multicultural viewpoints.²³⁰ Other kinds of training may also be partially effective, such as counter-stereotype imaging,²³¹ "approach behaviors,"²³² or even just practice in

226. See Rudman et al., *supra* note 221, at 865 (presenting research suggesting that diversity education can reduce implicit anti-Black bias). *But cf.* Alexander Kalev et al., *Best Practices or Best Guesses? Assessing The Efficacy Of Corporate Affirmative Action And Diversity Policies*, 71 AM. SOCIOLOGICAL REV. 589, 611 (2006) (reporting on a meta-analysis showing that diversity training had "virtually no effect").

227. E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officer's Response to Criminal Suspects*, 16 PSYCHOL. SCI. 180 (2005) (reporting police officers' responses); Ashby Plant et al., *Eliminating Automatic Racial Bias: Making Race Non-Diagnostic for Responses to Criminal Suspects*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 141 (2005) (reporting students' responses). See also <http://backhand.uchicago.edu/Center/ShooterEffect/> (accessed July 17, 2008) (showing a version of shooter simulation).

228. *Id.*

229. *Id.*

230. Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417, 420 (2004) (finding that multicultural training, but not color-blindness training, led to a reduction in bias). In popular fiction, John Grisham's *A TIME TO KILL* uses this device. A divided jury delivers a defendant's verdict after expressly considering how they would think about the case if the defendant were White rather than African American. JOHN GRISHAM, *A TIME TO KILL* 510 (1992).

231. Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 837 (2001); Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCHOL. 871, 884 (2000) (demonstrating that training subjects to negate stereotypes reduced their unconscious use of stereotypes). Adam Goldyne, for example, suggests a long list of questions that experts may ask themselves to alert themselves to the possibility of unconscious bias, but notes that "[p]roactive bias detection is challenging." Adam J. Goldyne, *Minimizing the Influence of Unconscious Bias in Evaluations: A Practical Guide*, 35 J. AM. ACAD. PSYCHIATRY LAW 60 (2007).

232. Psychologists have demonstrated that "approach behaviors," i.e. pulling towards the body, can create positive feelings about something to which it is linked. So, for example, subjects who flexed their palms towards themselves were more positive about Chinese symbols than those who flexed their palms away from themselves. See J.T. Cacioppo et al., *Rudimentary Determinants of Attitudes: Arm Flexion and Extension Have Differential Effects on Attitudes*, 65 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1993). Training in approach behaviors has been shown to reduce implicit racial bias and increase openness in nonverbal behaviors. Kerry Kawakami et al., *(Close) Distance Makes the Heart Grow Fonder: Improving Implicit Racial Attitudes and Interracial Interactions Through Approach Behaviors*, 92 J. PERSONALITY & SOC. PSYCHOL. 957, 967 (2007).

distinguishing among faces of people of different races from the viewer.²³³ Confronting people regarding explicitly held stereotypes has also proved effective.²³⁴

We recognize that given finite time and money, extensive employee training (or retraining) may not be the most practical option as it will result in less training in other areas. For example, as the machinery used in voting has become increasingly complicated, training poll workers on the proper set-up and operation of the machines undoubtedly needs to be prioritized. Nevertheless, there may be some minor adjustments to training procedures that could help reduce the operation of unconscious bias on election day.

Alternatively (or, perhaps, additionally) legislators and election administrators could help poll workers attempt to consciously override biases.²³⁵ At a minimum this requires that poll workers be aware of the potential for unconscious bias²³⁶ and motivated to minimize its impact.²³⁷ This may be harder than it first appears. Although people are quite ready to find bias in the actions of others, they are much less likely to accept that their own decisions may be biased.²³⁸ We appear to suffer from “bounded ethicality,”²³⁹ a “bias blind spot,”²⁴⁰ or “the illusion of objectivity.”²⁴¹ Part of this results from the commonly held view that we have

233. Sophie Lebrecht et al., *Perceptual Other-Race Training Reduces Implicit Racial Bias*, PLoS ONE, Jan. 21, 2009.

234. Alexander M. Czopp et al., *Standing up for a Change: Reducing Bias through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCHOL. 784, 799 (2006).

235. There is some risk, given that there is evidence that consciously attempting not to use a stereotype can increase its use. Richard M. Wenzlaff & Daniel M. Wegner, *Thought Suppression*, 51 ANN. REV. PSYCHOL. 59, 79–80 (2000) (citing studies).

236. Bertram Gawronski et al., *Implicit Bias in Impression Formation: Associations Influence the Construal of Individuating Information*, 33 EUR. J. SOC. PSYCHOL. 573, 585 (2003) (arguing that knowledge of unconscious biases may result in adjustment).

237. See, e.g. Fazio et al., *supra* note 151 (providing a model); Wilson & Brekke, *supra* note 214. Adequate time for decision-making may also be necessary, and is discussed *infra* at notes 276–279, and accompanying text.

238. People’s ability to see the bias of others is reflected in the biblical quotation, “[a]nd why beholdest thou the mote that is in thy brother’s eye, but considerest not the beam that is in thine own eye?” *Matthew 7:3* (King James), quoted in Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 781 (2004).

239. Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74, 74–75 (Don A. Moore et al. eds, 2005).

240. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002).

241. Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, in 20 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 297, 317 (1987) (arguing that the unconscious allows us “to maintain an illusion of objectivity” regarding how we reach our decisions).

complete knowledge of the causes of our decision-making,²⁴² or that the causes are transparent. Another contributing factor is our general self-enhancement bias: we are better than average decision-makers, and better than average at avoiding biases, just as nearly all of us think we are better than average drivers.²⁴³ Yet another contributing factor is our sense that we see the world as it is, a kind of “naïve realism.”²⁴⁴ Finally, our ability to self-deceive is not only “common, normal, and accepted as constant and pervasive” but almost limitless²⁴⁵ (after all, if we could see that we were fooling ourselves, we would lose the ability to do so).

The fact that people are resistant to acknowledging their own biases is no reason not to try this approach, particularly because there may be an impact at the unconscious level. In the poll worker context, awareness could be as simple as including a short paragraph in poll worker training materials. This paragraph could simply note that people sometimes make decisions based in whole or in part on a person’s race without the decision-maker being consciously aware of these factors, and stress that these decisions are both immoral and illegal. Another way poll workers’ awareness might be improved would be through swearing an oath prior to the opening of the polls. In Indiana, for example, before the polls open each worker swears an oath to, among other things, uphold the United States Constitution and preserve the secrecy of all ballots cast by voters.²⁴⁶ To

242. See, e.g., Ap J. Dijksterhuis & Loran F. Nordgren, *A Theory of Unconscious Thought*, 1 PERSP. ON PSYCHOL. SCI. 95, 98 (2006).

243. See generally Justin Kruger, *Lake Wobegon Be Gone! The “Below-Average Effect” and the Egocentric Nature of Comparative Ability Judgments*, 77 J. PERSONALITY & SOC. PSYCHOL. 221, 221 (1999) (observing that a majority of people seem to believe that they are “more athletic, intelligent, organized, ethical, logical, interesting, fair-minded, and healthy—not to mention more attractive” than average). One author recalls presenting work on unconscious bias in the context of the peremptory challenge. A former prosecutor approached the author after the talk to express his agreement with the claim that *other* attorneys had often shown such biases. The prosecutor, however, claimed that he had no such biases.

244. Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: “Naïve Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 404 (1995).

245. See Anne E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 225 (2004) (observing that “[w]e are creative narrators of stories that tend to allow us to do what we want and that justify what we have done. We believe our stories and thus believe that we are objective about ourselves.”).

246. Before the polls are opened in a precinct, poll workers must take an oath to “faithfully discharge their duties.” IND. CODE § 3-6-6-19 (2006). The oath that must be taken by a precinct election officer reads as follows:

I do solemnly swear and affirm the following:

(1) I will support the Constitution of the United States and the Constitution of the State of Indiana.

mitigate unconscious bias, workers might be required to swear affirmatively that they will not discriminate on the basis of race.²⁴⁷ Although this would appear to have an impact only on conscious decision-making, this emphasis on ideals can also affect unconscious decision-making.²⁴⁸ In psy-

(2) I will faithfully and impartially discharge the duties of inspector (or judge, poll clerk, assistant poll clerk, or sheriff) of the precinct under the law.

(3) I will not knowingly permit any person to vote who is not qualified and will not knowingly refuse the vote of any qualified voter or cause any delay to any person offering to vote other than is necessary to procure satisfactory information of the qualification of that person as a voter.

(4) I am now a bona fide resident of the county in which the precinct in which I am to act as a member of the election board is situated and, if required by law, am a qualified voter of that county.

(5) I will not disclose or communicate to any person how any voter has voted at this election or how any ballot has been folded or marked.

(6) I am able to read, write, and speak the English language.

(7) I have no property bet or wagered on the result of this election.

(8) I am not a candidate to be voted for at this election in this precinct, except as an unopposed candidate for a political party office.

(9) If I am serving as an inspector, I am not the chairman or treasurer of the committee of a candidate whose name appears on the ballot.

(10) I am not related to any person to be voted for at this election in this precinct as the spouse, parent, father-in-law, mother-in-law, child, son-in-law, daughter-in-law, grandparent, grandchildren, brother, sister, brother-in-law, sister-in-law, uncle, aunt, nephew, or niece of that person, unless that person is an unopposed candidate.

(11) I was trained as required by IC 3-6-6-40.

IND. CODE § 3-6-6-23 (LexisNexis 2009).

In addition, IND. CODE § 3-11-8-14 requires the precinct inspector to read Indiana Code § 3-14-4-7 to the election board. Ind. Code Ann. § 3-11-8-14 (LexisNexis 2009). It also requires each member of the precinct election board to take an oath that the member has not violated and will not violate the Indiana Code § 3-14-4-7. *Id.* Indiana Code § 3-14-4-7 reads as follows: "A member of a precinct election board or a person otherwise entitled to the inspection of the ballot who knowingly (1) reveals to another person how a voter voted; or (2) gives information concerning the appearance of any ballot voted; Commits a Class D felony." *Id.*

247. See Irene V. Blair et al., *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142 (1996) (finding that instructing participants to attempt to avoid prejudicial evaluations had some success).

248. In fact, even emphasizing positive goals, like fairness, without the awareness of participants reduces the unconscious use of stereotypes. See John A. Bargh et al., *The Automatic Will: Nonconscious Activation and the Pursuit of Behavioral Goals*, 81 J. PERSONALITY & SOC. PSYCHOL. 1014, 1017 (2001).

chological terms, by raising the salience of our egalitarian norms we make it easier to enact them.²⁴⁹

The second factor, poll workers' motivation, is also malleable.²⁵⁰ Poll workers are likely to have both internal and external motivations. Poll workers operating in good faith are internally motivated to reduce the impact of impermissible unconscious bias on their decision-making. For other poll workers who are less internally committed to unbiased decision-making, it might be possible to create external incentives. Incentives, of course, can take many forms. Most people are motivated to view themselves as competent and moral, and making voting decisions based on permissible criteria is consistent with that view.²⁵¹ For many, the intrinsic reward of knowing that a job was performed well is adequate. This suggests that some form of feedback would be helpful. Positive reinforcement and extrinsic rewards, such as praise and recognition (perhaps certificates for exceptionally good poll workers) could also help.²⁵² Finally, if budgets permit, financial recognition could be used. Punishment could also play a role. Poll workers who are involved with suspect decisions could be ineligible for future employment as poll workers, or be required to undergo extra training for subsequent elections.²⁵³

There are at least three realistic approaches one might take to provide improved feedback and to incentivize better poll worker decision-making. First, instead of using poll workers who have volunteered from the citizenry at large, perhaps it would be better to use government employees as poll workers.²⁵⁴ There may be more incentive for a full-time government employee to properly administer polling place rules than there is for a two-day-a-year employee to properly apply such rules. Moreover, it may be easier to coordinate training of government employees in some of the strategies outlined above. Indeed, training government

249. See Kunda & Spencer, *supra* note 192, at 532.

250. Even when a person's motivation to control bias is itself nonconscious, implicit bias' impact can be reduced. See Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164 (2008); Gordon Moskowitz et al., *Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals*, 77 J. PERSONALITY & SOC. PSYCHOL. 167 (1999) (finding that the higher subjects scored on a measure of egalitarianism the more likely they were to inhibit the use of implicit stereotypes).

251. Chugh et al., *supra* note 239, at 75–76.

252. Many studies have demonstrated that non cash-rewards can be extremely powerful motivators.

253. Granted, given the wage and working conditions of poll workers, on its face this may not be a very effective punishment.

254. Several jurisdictions have already used government employees as poll workers due to difficulties in recruiting and retaining poll workers. See, e.g., OHIO REV. CODE § 3501.28(G)(1); U.S. Election Assistance Commission, *Successful Practices for Poll Worker Recruitment, Training and Retention* 7, 41–43 (2007) (describing how “[r]ecruiting poll workers is an ongoing challenge” and providing tips on recruiting government employees as poll workers).

employees in mitigating unconscious bias on election day could have a secondary benefit of mitigating unconscious bias in the general provision of government services.²⁵⁵ Second, it might be possible to create better election-day oversight of poll workers to facilitate good behavior. For example, in New Jersey, the decision of poll workers to deny the right to vote (or to offer a provisional ballot) can be subjected to an election-day hearing before a state court judge who may then issue an order instructing poll workers to provide a regular ballot to the prospective voter.²⁵⁶ Third, it might be possible to test poll workers at random to determine whether they are engaging in bias. This would, in essence, be an election-day version of the tests conducted for housing discrimination.²⁵⁷

In the end, we make no claim that the elimination of unconscious bias among individual poll workers through training initiatives or incentive structures will be easy. However, we think it would be useful to explore possible approaches to reducing unconscious bias while recognizing that any approach adopted would need to be carefully monitored and studied to ensure effectiveness.

B. Institutional Level: The Voting Environment

This Article suggests that polling places are a particularly fertile place for unconscious bias to operate.²⁵⁸ As such, polling places could be reorganized (or perhaps even eliminated!) so that the effects of unconscious bias are reduced. At the outset, though, we want to re-emphasize that at

255. Although it is possible for authorities to be more sensitive to the possibility of unconscious bias in their hiring decisions, we do not think this is particularly feasible. Cf. AYRES, *supra* note 123, at 424–35 (suggesting that government and nongovernmental hiring could use an applicant's unconscious bias as a hiring criterion). First, there is generally very little selectivity in the hiring of poll workers. The job is not well compensated and election administrators frequently need to hire whoever applies. Second, even if there were more screening, the instruments that measure (or purport to measure) unconscious bias remain controversial. See, e.g., Hart Blanton et al., *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, J. APPLIED PSYCHOL. (forthcoming 2009). In the absence of direct evidence, election administrators could only base hiring on broad stereotypes. For example, older people may show higher levels of unconscious bias. See Project Implicit, <https://implicit.harvard.edu/implicit/demo/background/index.jsp> (last visited Nov. 30, 2009) (reporting that people over the age of sixty show 5–10 percent more bias than people under 60). But even if it was pragmatically feasible to exclude older persons from being poll workers, it might be perceived as immoral discrimination against the elderly.

256. See Askin, *supra* note 48. Of course, the judges who make these election-day decisions could, themselves, be infected by unconscious bias. See Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (concluding that judges can consciously mitigate the impact of their unconscious biases).

257. See, e.g., Jancik v. Dep't of Hous. and Urban Dev., 44 F3d 553, 554–55 (7th Cir. 1995) (describing housing discrimination test where similarly situated African Americans and Whites apply for apartment rentals).

258. See *supra* notes 180–202 and accompanying text.

this point it is not possible to know how many votes are lost due to unconscious bias, so wholesale changes to election administration may be unjustified. However, many of the suggestions below have been advocated for other reasons. For instance, one of the possible solutions we mention below is election-day registration, which has also been touted as a way to improve overall voter access. While we agree that unconscious bias in and of itself may not provide justification for a wholesale structural change, such as election-day registration, we think that unconscious bias provides at least a partial theoretical justification for structural change. In other words, unconscious bias might not suffice as the sole reason for implementing some of the proposals mentioned below, but it might serve as one of several reasons for implementing some of the proposals.

Eliminate (to the Extent Possible) Poll Workers. Unconscious bias has an impact during poll workers' decision-making.²⁵⁹ Reducing the role of poll workers in the voting process would thus lessen the impact of unconscious bias. One obvious way to reduce the role of poll workers in the election process would be to eliminate polling places entirely. For example, the state of Oregon now conducts its elections by mail, thus eliminating the need for poll workers to staff sites on election day.²⁶⁰ Another potential way of eliminating (or at least reducing) the need for polling places would be to use the Internet as a means of casting ballots. Although currently Internet voting is not widely available for the election of public officials,²⁶¹ one county in Florida tested Internet voting for overseas voters at the 2008 presidential election.²⁶² Of course, there could be drawbacks to these approaches—both related to racial bias in particular

259. We recognize that unconscious bias may also have an impact on simple human interaction. For instance, apart from denying voting rights to minorities, unconscious bias could lead poll workers to treat prospective minority voters in a less than civil manner. We also recognize that legislators' and election administrators' decisions could be impacted by unconscious bias, albeit at a very different stage. These are, however, two subjects to be tackled on another day.

260. For a more detailed description of Oregon's vote by mail process, see Oregon Secretary of State's Office, Election Division, *Vote by Mail*, available at <http://www.sos.state.or.us/elections/vbm/index.html> (last visited Nov. 30, 2009); see also Paul Gronke, Ballot Integrity and Voting by Mail: The Oregon Experience 8 (June 15, 2005), available at <http://people.reed.edu/~gronkep/docs/Carter%20Baker%20Report-publicrelease.pdf> (last visited Nov. 30, 2009) (explaining voting by mail process). There would still be a question of whether to count a vote or not, but the race of the voter is unavailable to the vote counter after the ballot has been cast (unless the counter has access on the voter list to the race of the voter).

261. Elections of corporate directors, even for those with hundreds of thousands of shareholders, routinely involve Internet voting. See, e.g. Boeing Investor Relations: Annual Meeting of Shareholders, <http://www.boeing.com/companyoffices/financial/annual.html> (last visited Nov. 30, 2009).

262. Erik Sofge, *Internet Voting in Florida Raises Security Concerns: Geek the Vote*, POPULAR MECHANICS (Oct. 22, 2008), available at <http://www.popularmechanics.com/technology/industry/4288327.html> (last visited Nov. 30, 2009).

and election administration more generally. With respect to racial bias, the racial disparity in Internet access at this point might be too vast to justify such a move.²⁶³ With respect to election administration generally, non-polling place voting might introduce additional opportunities for fraud.²⁶⁴ Nevertheless, a move away from the traditional election day polling place/poll worker model would reduce the operation of unconscious bias on election day.

Even if the current election day polling place model is retained, it may be possible to reduce the element of human decision-making through the use of technology. Although it may not yet be politically acceptable in the United States,²⁶⁵ an extreme version of this would be to allow voting based only on biometric identification. Retinal, iris, or fingerprint scanning and matching could be accomplished solely by a computer. Indeed, some countries have begun such biometric projects.²⁶⁶ A computer program would then determine whether a voter could cast a regular ballot, a provisional ballot, or no ballot at all. Granted, biometric assessments may not yet be fool-proof,²⁶⁷ and there might still be debate on what criteria to use for the computer program, but at least such decisions could be discussed and made transparently in advance (potentially with judicial review), as opposed to poll workers' rapid, largely concealed, and relatively unreviewable decisions.

Eliminate (to the Extent Possible) De Jure Poll Worker Discretion. Biased decision-making is less likely the more precise and complete the rules are. The more rules are like bright-line rules, and the less they are like standards, the less latitude exists for unconscious bias to operate. For example, part of the issue with photo identification results from an ambiguously worded law on voter identification coupled with an absence of clear and comprehensive guidance as to which names on photo identifications will

263. See generally Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOYOLA L.A. L. REV. 1171 (2001) (discussing whether internet voting discriminates against minority voters in violation of the Voting Rights Act).

264. Sofge, *supra* note 262; see also Gronke, *supra* note 260, at 4 (noting the potential for fraud when voting by mail).

265. Matthew M. Johnson, *Souder Says Biometrics the Solution, but Others Curse the Cure*, CQ POLITICS, Nov. 21, 2007, <http://www.cqpolitics.com/wmspage.cfm?parm1=5&docID=hsnews-000002632196> (last visited Nov. 30, 2009) (quoting Indiana congressman Mark Souder recognizing that biometric identification is not politically "palatable yet").

266. See, e.g., *Bangladesh Biometric Voter Identification Project Nearing Completion*, Government Technology, <http://www.govtech.com/gt/articles/374860> (last visited Nov. 30, 2009).

267. Peter P. Swire & Cassandra Q. Butts, *The ID Divide*, CENTER FOR AMERICAN PROGRESS 23-25 (June 2008) (describing some of the flaws with using biometrics as a tool for identification).

be deemed to “conform” to the names in the poll books.²⁶⁸ If Indiana’s law required an *exact* letter-by-letter match of the name on the voter list and on the photo identification, then discretion in this aspect of voting would be eliminated.²⁶⁹ Again, though, one would need to be careful about the unintended consequences of requiring an exact match of names, as some research in the voter registration context indicates that requiring exact matches of names can lead to the disfranchisement of eligible voters.²⁷⁰ Nevertheless, the broader point remains that legislators and election administrators who create the rules for polling places should review each aspect of polling place operation and create specific bright-line rules wherever possible so as to reduce unconscious bias.²⁷¹

Create Fail-Safes for Prospective Voters. Unconscious bias can play a role in the areas where poll workers have been given explicit discretion by the legal and administrative regimes. But there are areas where poll workers engage in what might be termed “softer” or “extra-legal” discretion. For example, the law may require poll workers to find a voter’s name in the poll book. However, if poll workers have trouble finding the name, poll workers have some discretion to decide how long they are going to take to search for the name. A poll worker could take thirty seconds, a minute, or five minutes to find a name. Importantly, the amount of time a poll worker takes to find the name could differ based upon the racial or ethnic characteristics of the voter—poll workers might take longer and make more efforts to find White names than, say, African American names. As

268. *Supra* notes 88–96 and accompanying text. Another aspect of Indiana’s photo identification law relates to comparing the photograph on the identification with the person presenting the photograph. Here, poll workers can exercise discretion when examining the photograph of the identification to determine if the person presenting the photograph is the same person in the photograph.

269. Indeed, research shows that there is less disparity in poll worker application of voter identification laws the more stringent the State’s identification requirement. See Stephen Ansolabehere, *Is There Racial Discrimination at the Polls? Voters’ Experiences in the 2008 Election* 7–8 (Caltech/MIT Voting Tech. Project, Working Paper No. 73, 2009) (“In States that have stricter ID laws, all groups of voters are asked to show identification at approximately the same high rate . . . [where] it is in the States without strict ID requirements that poll workers appear to use their discretion more.”). While it is not clear what causes this divergence between poll worker actions in States with strict identification laws versus States with less strict identification laws, States with stricter identification requirements may leave less overall *de jure* discretion in the hands of poll workers.

270. See generally JUSTIN LEVITT ET AL., *MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR VOTER REGISTRATION* (Brennan Center for Justice 2006), available at http://brennan.3cdn.net/96ee05284dfb6a6d5d_j4m6b1cjs.pdf (last visited Jan. 8, 2009).

271. Some enforcement mechanism would likely also be necessary to ensure that poll workers honor the bright-line rules. However, enforcement is not our focus. We are interested in those poll workers who act in good faith, but perhaps, unbeknownst to them, are still making biased decisions. Poll workers who want to discriminate *deliberately* against groups of voters would have less freedom of action, but, absent enforcement, would be able to disregard the rules ensuring fairness.

the Asian American Legal Defense and Education Fund recently noted, they have “recorded many instances in which eligible voters have been told their names are not [on] the rolls because frustrated poll workers do not want to spend extra time seeking out ‘foreign’ sounding names or reconciling identification inconsistencies.”²⁷² Indeed, in one election an Asian American voter came to a polling place, was told by poll workers he was not on the list, was instructed to go to a different polling place, and then two hours later returned to the first polling place where the poll workers “suddenly” found his name.²⁷³

One of the ways to address this possible unconscious bias on the part of poll workers would be to create fail-safes for voters in these instances. One such fail-safe previously discussed, the ability to go to a judge on election day for a quick ruling on eligibility, can provide a back-up. Another fail-safe might be the possibility of election-day registration.²⁷⁴ If same-day registration were available, when a poll worker could not find a name in the poll book, the voter would nonetheless have the opportunity to register and cast a countable ballot on the spot. Granted, poll workers might still not offer the option of same-day registration to a voter due to bias, unconscious or otherwise, but this could be mitigated by publicizing the right to register on election day. Moreover, same-day registration may have other costs, such as increasing the amount of “cognitive load” (which will be discussed in the next section) of poll workers. Regardless, the existence of a fail-safe such as same-day registration could limit the impact of unconscious bias on election day.

Improve Polling Place Conditions. Various situational factors exacerbate the risk of unconscious bias affecting decision-making. As previously noted,²⁷⁵ when people are making decisions under time constraints they are more likely to be affected by biases. In psychological terms, when under pressure or any kind of cognitive load²⁷⁶ people are less able to

272. Brief of Asian American Legal Defense and Education Fund as *Amici Curiae* in Support of Petitioners at 22, *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25).

273. Asian American Legal Defense and Education Fund, *Asian American Access to Democracy in the 2004 Elections*, 17 (Aug. 2005).

274. A small but growing number of States offer the possibility of same-day registration. See, e.g., Tokaji, *supra* note 205, at 48 nn. 376, 381 (listing States that offer election-day registration).

275. See *supra* notes 186–191 and accompanying text.

276. Cognitive load is just the psychological term for having too many things to think about or attend to. A technology oriented phrasing might use the term insufficient cycles or bandwidth. In experiments, a psychologist might duplicate conditions of cognitive load by requiring the participant to count backwards in threes. The unsurprising corollary of this finding is that the more alert people are, the less likely they will use stereotypes. See Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 PSYCHOL. SCI. 319, 321 (1990).

counteract the impact of unconscious bias. Thus, reducing time pressure and cognitive load is beneficial.²⁷⁷

With respect to time pressure, it seems a safe assumption that the longer the line of voters, the more time pressure poll workers feel in making their determinations. Thus, it may make sense to have more poll workers at busy precincts or to reduce precinct size.²⁷⁸ In the alternative, it may help if additional poll workers are utilized during peak voting hours to reduce time pressure. Again, though, measures aimed at slowing down the process from the perspective of the poll worker come with accompanying costs, such as the need for more funds to pay additional poll workers, and the need to recruit and train more poll workers—already a difficult prospect in some places.

With respect to poll workers' cognitive loads, such loads could be reduced by simplifying the operation of polling places.²⁷⁹ For example, untrained and undertrained workers are asked to make complex computerized voting machines work, often quickly.²⁸⁰ Not surprisingly, occasionally the machines fail. If the machines do not work properly,²⁸¹ poll workers are expected to take action to make them work. And the added brain power necessary to make the machines function increases the risk of unconscious bias. Thus, using the simplest possible system for casting ballots might help reduce unconscious bias on election day. Put more broadly, the more we can design polling places to ease the burden on poll workers' minds, the less unconscious bias there will be.

Increase the Number of Minority Poll Workers. An increase in the percentage of minority poll workers might result in less overall differential treatment between members of different racial groups. While research shows that African Americans are not immune from implicit bias against

277. See Kunda & Spencer, *supra* note 192, at 535–36; John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOL. 462, 476 (1999) (stating that “[t]o consciously and willfully regulate one’s own . . . evaluations [and] decisions . . . requires considerable effort and is relatively slow”).

278. Reducing the number of voters on election day would achieve the same effect, and may also be desirable if such voters became non-polling place voters instead. See *supra* notes 260–264 and accompanying text (describing methods of non-polling place voting).

279. There is an analogy to aircraft cockpits and the control rooms of nuclear reactors. In the early days of flying, cockpits consisted of numerous similar switches. Likewise, control rooms at nuclear reactors involved many hard-to-distinguish switches. After controls were simplified (i.e., made more intuitive), pilot and operator errors were significantly reduced.

280. Frank Emmert et al., *Trouble Counting Votes? Comparing Voting Mechanisms In The United States And Selected Other Countries*, 41 CREIGHTON L. REV. 3, 18–19 (2007).

281. Michael J. Pitts, *Heads or Tails?: A Modest Proposal for Deciding Close Elections*, 39 CONN. L. REV. 739, 742 (2006) (describing failures of voting machines).

African Americans, as you would expect, group members are generally less biased against members of their own group.²⁸²

This solution is no panacea, however. Sure enough, some research indicates that both African American and White poll workers are more likely to request identification from a potential African American than from a potential White voter.²⁸³ The African American poll worker, however, is only 50 percent more likely to ask for identification from a potential African American than a potential White voter, whereas the corresponding figure for a White poll worker is 85 percent.²⁸⁴ Similarly, Latino poll workers were more likely to request identification from prospective Latino voters than from prospective White voters, but by a factor of less than 26%.²⁸⁵ By contrast, White poll workers were 140% more likely to request identification from potential Latino voters than potential White voters.²⁸⁶

Increasing the number of minority workers in polling places, if it also increases diversity in polling places, may also reduce poll workers' unconscious bias.²⁸⁷ Researchers have demonstrated that the presence of a person who shares the social characteristic of the person being evaluated can reduce the decision-maker's bias.²⁸⁸ Mere exposure to members of other groups when certain preconditions are met (of which equality is the

282. Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Website*, 6 GROUP DYNAMICS: THEORY, RESEARCH AND PRACTICE 101, 105–06 (2002).

283. Alvarez et al, *supra* note 78, at 45. The research showed that in States with less restrictive identification laws, White poll workers asked for identification at the following rates: 20% for White prospective voters, 37% for African American prospective voters; and 48% for Latino prospective voters. *Id.* African American poll workers asked prospective White voters for identification 30% of the time and asked prospective African American voters for photo identification 45% of the time. *Id.*

284. *Id.*

285. *Id.* The research showed that Latino poll workers asked prospective White voters for identification 43% of the time and asked prospective Latino voters for photo identification 54% of the time. *Id.* For additional discussion of the different experiences of minority and non-minority voters at the polls, see Ansolabehere, *supra* note 24 (discussing the contrasting experiences of minority and non-minority voters at the polls).

286. See Alvarez, *supra* note 78. The study did not determine the rate at which African American poll workers requested identification from Latino prospective voters, or the rate at which Latino poll workers requested identification from African American prospective voters.

287. See, e.g., ALLPORT, *supra* note 220 (suggesting that contact between ingroups and outgroups could reduce prejudice). There is some evidence that contact between minorities and Whites can reduce conscious bias as well. See, e.g., Greg J. Duncan et al., *Empathy or Antipathy? The Consequences of Racially and Socially Diverse Peers on Attitudes and Behaviors*, (Northwestern University, Working Paper, 2003); Donald P. Green & Jannelle S. Wong, *Tolerance and the Contact Hypothesis: A Field Experiment*, in *THE POLITICAL PSYCHOLOGY OF DEMOCRATIC CITIZENSHIP* (Eugene Borgina et al. eds., 2009).

288. See Lowery, *supra* note 140, at 842.

most important),²⁸⁹ reduces the impact of unconscious bias. However, in order for this effect to occur, it is crucial that minority poll workers not merely be represented at lower job levels within the polling place.²⁹⁰ White supervisors and African American employees would be unlikely to ameliorate the situation.

Wait and See. Given the current state of the psychological research,²⁹¹ and inevitable concerns about the external validity of most psychological experiments,²⁹² perhaps any response should be delayed. There is always a risk that costs, unidentified or otherwise, may outweigh benefits. After all, with respect to benefits, some, looking at the overall size of the electorate, might argue that unconscious bias does not represent a significant problem.²⁹³ For example, a study of the impact of photo identification in Indiana found that in an election with about 1.7 million ballots cast, only about 400 people cast a provisional ballot because of problems related to photo identification.²⁹⁴ Of course, this study likely underestimates the number of voters rejected for lack of valid photo identification because in some instances poll workers do not offer provisional ballots or prospective voters refuse to fill out provisional ballots.²⁹⁵ Nevertheless, it may be

289. See notes 221–226 and accompanying text.

290. See generally Thomas Pettigrew & L.R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006).

291. See Hart Blanton & James Jaccard, *Unconscious Racism: A Concept in Pursuit of a Measure*, 34 ANN. REV. SOCIOLOGY 277, 292 (arguing that “strong conclusions are not warranted at this time”). There remains a significant amount of controversy about the meaning of this research. Compare Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1541 (2005) (“There is now persuasive evidence that implicit bias against a social category . . . predicts disparate behavior toward individuals mapped to that category.”) with Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO STATE L.J. 1023 (2006) (arguing that there is not yet sufficient understanding of implicit bias to justify policy changes).

292. External validity refers to whether the results of a laboratory experiment can be extended to a real world situation. One commonly noted criticism of most psychological studies is that they are based on a population of college students rather than a representative sample of the general population. See, e.g., Blanton & Jaccard, *supra* note 291, at 292. A conventional response is that this matters less for the kinds of research on fundamental cognitive processes that we focus on here. In addition, there are now some studies based on “real world” populations. See, e.g., Green, *supra* note 123; Dan-Olof Rooth, *Implicit Discrimination In Hiring: Real World Evidence*, IZA Discussion Paper, <http://ftp.iza.org/dp2764.pdf> (last visited Feb. 13, 2009).

293. Of course, even if unconscious bias affects a relatively small fraction of voters and thus has little impact on the overall course of an election, it still may affect individual voters. If we take seriously the rhetoric of having every vote count, then we should also take seriously the risk that some do not count or are not counted for impermissible reasons.

294. Pitts, *supra* note 66, at 480.

295. Such a study also does not show how many voters were allowed to cast a regular ballot when they should have been offered a provisional ballot due to the operation of unconscious bias in their favor.

beneficial to take a wait-and-see approach before making changes in election administration to reduce unconscious bias.

CONCLUSION

We have demonstrated that unconscious bias is likely a real phenomenon with troubling implications for the administration of elections in the United States. Poll workers may well have unconscious biases that could lead to a disproportionate number of people from racial and ethnic minority groups either not having their votes counted at all, or at the very least, facing greater inconvenience to having their votes counted by being shifted into the regime of provisional balloting. Unconscious bias could also lead poll workers to allow White voters to cast illegitimate ballots or, in the alternative, to cast regular ballots when a provisional ballot was the correct option. Indeed, polling places on election day possess a number of features that serve to exacerbate the opportunity for unconscious bias to play a role: the need to make quick decisions with little individuating information and few concrete incentives for accuracy.

Unconscious biases, by their nature, are hard to counteract and it is difficult at this point to put a firm number on how often unconscious bias affects decisions made at polling places on election day. In some ways, one can envision objections to many of our proposals for mitigating unconscious bias as grand solutions to a possibly minor problem. For example, an enormous change like same-day voter registration as a solution to the problem of unconscious bias could be viewed as the equivalent of taking a sledgehammer to kill a cockroach.

To such objections, we have two responses. The first response is that voting is a fundamental right and concerns should be taken seriously whenever any persons are denied this core democratic right—particularly when such persons are members of racial and ethnic minority groups that historically have faced discrimination. The second response is more subtle. While it is true that election-day registration no doubt has other costs and benefits not associated with unconscious bias, at the very least unconscious bias provides an additional theoretical justification for election-day registration. In other words, unconscious bias might not suffice as the sole reason for implementing some of the proposals laid out above, but it might serve as one of several reasons. At the very least, we would assert that unconscious bias needs to be a part of the discussion when it comes to determining how elections should be administered in the United States.