



Implicit Bias: A New Plaintiff Class Action Strategy  
– First Wal-Mart and Iowa –  
What is next?

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# Implicit Cognition

- What is Implicit Cognition?
  - The identifying feature of implicit cognition is that past experience influences judgment in a fashion not introspectively known by the actor. (Greenwald, 1995)
  - Large and growing body of research on implicit attitudes since 1995
    - Social Psychology
    - Attitudes
    - Jury behavior
    - Addiction and substance abuse
    - Employment discrimination

# Implicit Stereotypes (based on Implicit Cognition Theory)

- **implicit stereotypes** are the
  - unconscious attribution of particular qualities to members of social groups.
  - Implicit stereotypes are influenced by experience, and are
  - based on learned associations between various qualities and social categories, including race or gender.

# Implicit Stereotypes (based on Implicit Cognition Theory) , **Ctd.**

- Individuals' perceptions and behaviors can be affected by these implicit stereotypes, even without the individuals' intention or awareness.
- Implicit stereotypes are an aspect of implicit social cognition, the phenomenon that perceptions, attitudes, and stereotypes operate without conscious intention.
- The existence of implicit stereotypes is supported by a variety of scientific articles in psychological literature.

# Implicit Bias

- **Implicit Racial Bias:**
  - Unconscious
  - Research with the Implicit Association Test suggests a large percentage of people have implicit (i.e. subconscious) racial bias
  - Studies tend to show that a percentage of minorities and women often show the same implicit biases about their own group that whites and men harbor against them (Samuel R. Bagenstos, Harvard Law & Policy Review, 2007)

# Implicit Association Test (Anthony Greenwald, et. al (1998))

- Developed in 1998 and reported in the Journal of Personality and Social Psychology (vol. 97, No. 1, p 17-41)
- Presents stimuli to the individual taking the test
  - The examinee makes quick choices concerning the stimuli
  - In the race IAT the examinee pairs photos of Black or White faces with words with either positive or negative connotations.
  - Their score is intended to represent either a positive or negative bias toward either Black or White faces

# Implicit Association Test, ctd.

- Implicit Association Tests have been developed to assess attitudes toward a wide variety of stimuli, such as:
  - Race
  - Sexual Orientation
  - Weight
  - Religion (e.g.. Muslim, Christian, etc.)
  - Age
  - Weapons
  - Almost any other attitudes of interest

# Demonstration of Implicit Association Test

- Project Implicit

<http://www.projectimplicit.net/about.html>

- IAT Demonstration

Implicit Association Test Demo

<https://implicit.harvard.edu/implicit/demo/>





## Select a Test

### Skin-tone IAT

**Skin-tone ('Light Skin - Dark Skin' IAT).** This IAT requires the ability to recognize light and dark-skinned faces. It often reveals an automatic preference for light-skin relative to dark-skin.

### Arab-Muslim IAT

**Arab-Muslim ('Arab Muslim - Other People' IAT).** This IAT requires the ability to distinguish names that are likely to belong to Arab-Muslims versus people of other nationalities or religions.

### Asian IAT

**Asian American ('Asian - European American' IAT).** This IAT requires the ability to recognize White and Asian-American faces, and images of places that are either American or Foreign in origin.

### Gender-Career IAT

**Gender - Career.** This IAT often reveals a relative link between family and females and between career and males.

### Disability IAT

**Disability ('Disabled - Abled' IAT).** This IAT requires the ability to recognize symbols representing abled and disabled individuals.

### Race IAT

**Race ('Black - White' IAT).** This IAT requires the ability to distinguish faces of European and African origin. It indicates that most Americans have an automatic preference for white over black.

### Age IAT

**Age ('Young - Old' IAT).** This IAT requires the ability to distinguish old from young faces. This test often indicates that Americans have automatic preference for young over old.

### Weight IAT

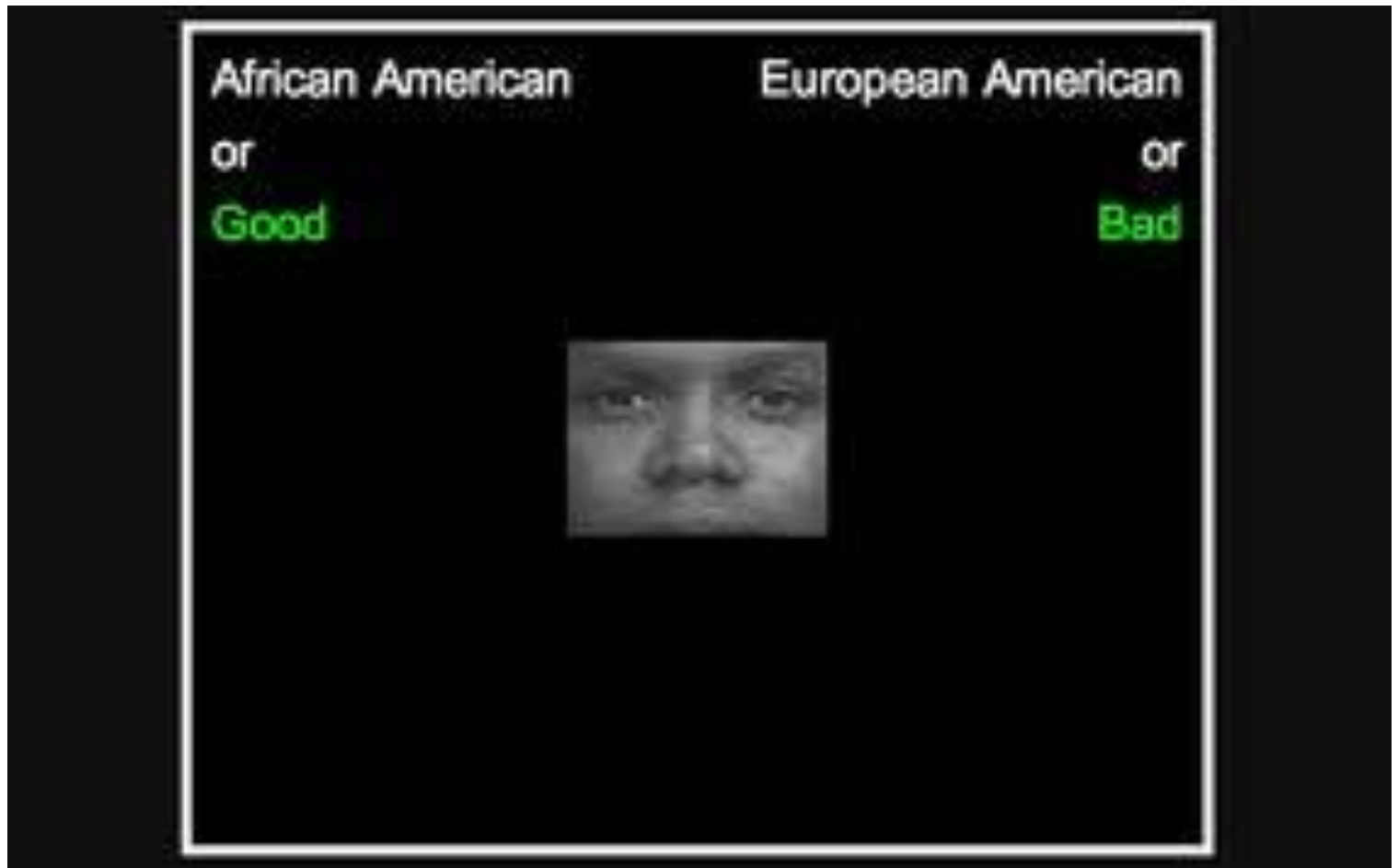
**Weight ('Fat - Thin' IAT).** This IAT requires the ability to distinguish faces of people who are obese and people who are thin. It often reveals an automatic preference for thin people relative to fat people.

### Sexuality IAT

**Sexuality ('Gay - Straight' IAT).** This IAT requires the ability to distinguish words and symbols representing gay and straight people. It often reveals an automatic preference for straight relative to gay people.

# Description of Implicit Association Test

- Presents photos paired with adjectives



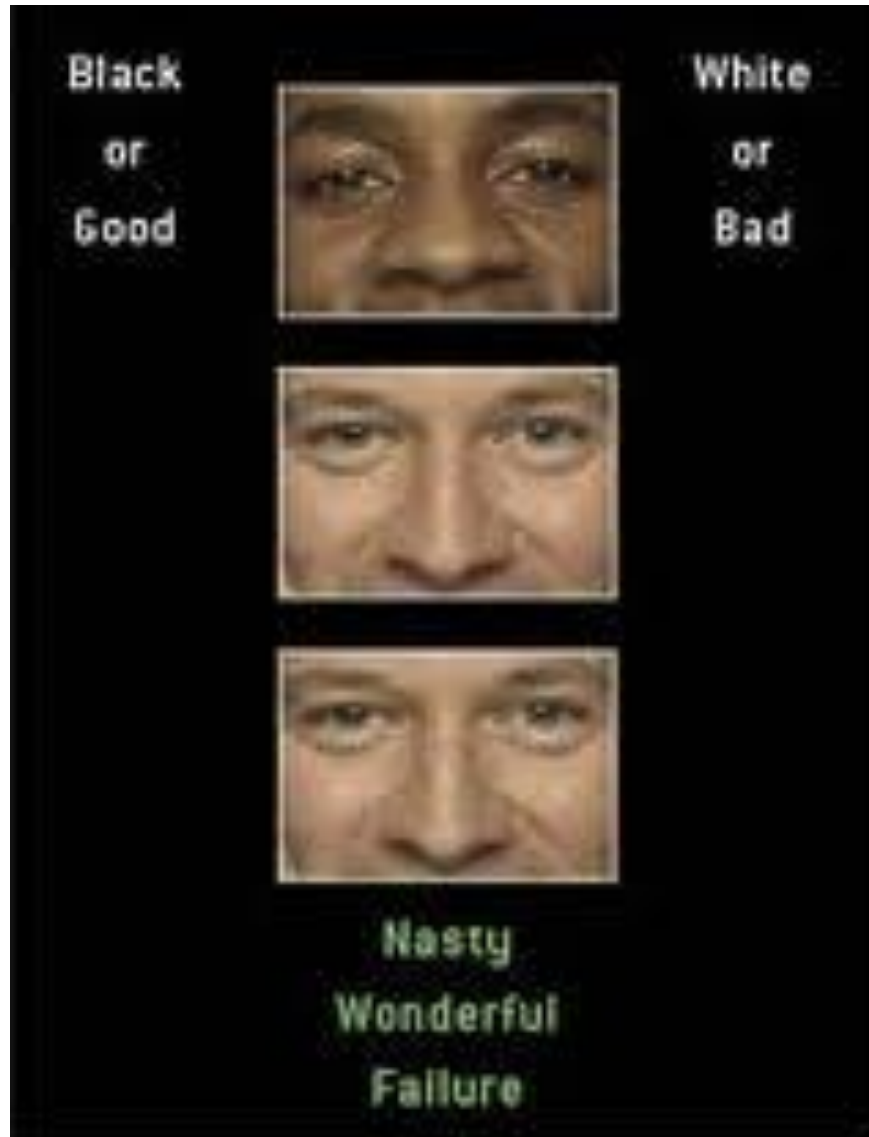
# Face Examples - Race



# Face Examples - Age



# IAT ctd.



## Some important areas for IAT research

- **Employment**
  - Interviews
  - Promotions
  - Pay
- **Subjective decisions**
- **Jury selection and jury behavior**
- **Consumer Attitudes**

# Gladwell, in his book Blink (2005)

The Implicit Association Test (IAT).... measures a person's attitude on an unconscious level, or the immediate and automatic associations that occur **even before a person has time to think**. According to the test results, unconscious attitudes may be totally different or incompatible with conscious values. This means that attitudes towards things like race or gender operate on two levels:

1. Conscious level- attitudes which are our stated values and which are used to direct behavior deliberately.
2. Unconscious level- the immediate, automatic associations that tumble out before you have time to think.

Clearly, this shows that aside from being a measurement of attitudes, the IAT can be a powerful predictor of how one **[may]** act in certain kinds of spontaneous situations.

# Remaining questions on IAT

- To what extent do unconscious attitudes affect behavior?
- Are unconscious (implicit) biases moderated by conscious (explicit) attitudes and norms?
- Do organizational values and training trump unconscious attitudes?
- What is the relationship of Implicit Bias to Employment Discrimination?



# Theories of Discrimination

- Disparate Impact
  - Griggs vs. Duke Power (US Supreme Court 1971)
  - Uniform Guidelines on Employee Selection Procedures, 1978
  - Disparate Impact theory of liability prohibits an employer from using a facially neutral employment practice that has an adverse impact on members of a protected class unless it is justified by job relatedness or job necessity
- Disparate Treatment, or intentional discrimination
  - Disparate treatment occurs when rules or policies are applied differently to members of protected classes on the basis of their class membership

# Where does implicit racial bias fit in?

- Implicit bias theory has been applied in two recent class action cases
- Two recent cases in which implicit bias was alleged by plaintiffs:
  - **Wal-Mart v. Dukes**: Class action involving a class of 1.5 million women (US Supreme Court, June 2011)
  - **Pippen v. Iowa**: Class action involving a class of 6,000 African Americans involving many types of employment decisions throughout the Iowa civil service (Iowa District Court for Polk County, April 17, 2012)

# Wal-Mart v. Dukes

- Major Issues:
  - Discrimination in Pay
  - Discrimination in Promotions
- Class - 1.5 Million female class members
- 3,400 stores
- Store Managers have discretion in pay and promotion matters
- Alleged that
  - pervasive corporate culture permits bias to infect managerial decisions
  - Unconscious bias affects managerial decisions of each of the Wal-Mart managers
  - All women at Wal-Mart were victims of this bias

# Wal-Mart v. Dukes, ctd.

- Supreme Court's Decision on Unconscious Bias
  - Dukes failed to convince the Court
  - Decisions made by individual managers were not under central control and cannot therefore be lumped together
- The Court concluded that:
  - Wal-Mart's announced policy forbids sex discrimination, and
  - the company has penalties for denials of equal opportunity.
  - Respondents' only evidence of a general discrimination policy was a sociologist's analysis asserting that Wal-Mart's corporate culture made it vulnerable to gender bias.
  - But the sociologist expert could not estimate what percent of Wal-Mart employment decisions might be determined by stereotypical thinking,
  - **The Court concluded that the expert's testimony was worlds away from "significant proof" that Wal-Mart "operated under a general policy of discrimination."** Pp. 12–14.

# Pippen v. Iowa

- Issues
  - Plaintiffs alleged that that unconscious bias influences decisions throughout the Iowa State civil service
  - Class 6000 African-Americans who sought employment with or promotion within the State of Iowa merit-based employment system

# Pippen v. Iowa, ctd.

## Key holdings:

- Plaintiffs' burden goes beyond merely showing statistical disparities in the employer's workforce. As a condition precedent, they must identify a specific employment practice that is challenged. *Watson*, 487 U.S. at 997
- Dr. Killingsworth, whose statistical computations were the bulwark of Plaintiffs' case, did *not* opine that a particular employment practice (however that might be defined) caused different outcomes in the hiring and promotions of African-Americans. Nor could he say whether the differences in outcomes that he found were the result of objective or subjective decision-making, which is the premise of implicit bias. His opinions also did not account for or exclude explicit bias or intentional discrimination. Nor did he correlate any of his findings to any particular screening-device.

# Pippen v. Iowa ctd.

- Not all departments showed an advantage for Whites. Some of the departments fail the 80% rule at one or all the stages; and at many stages
- in many departments there is what Dr. Killingsworth termed a “black advantage,” i.e., where African-Americans fared better than whites in being referred on a hiring list, being granted an interview and in being hired.
- Judge Blink quotes the Wal-Mart decision in saying:

"This case, much like *Wal-Mart*, involves Plaintiffs and a “multitude of different jobs,” at different levels, held “for variable lengths of time,” in numerous different departments, with a “kaleidoscope of supervisors (male and female),” subject to a variety of hiring approaches contingent upon the goals and duties of the various agencies. “Some thrived while others did poorly. They have little in common but their [race] and this lawsuit.” *Wal-Mart*, \_\_\_ U.S. \_\_\_, 131 S. Ct. at 2557.”

# Some Conclusions from Wal-Mart and Phipps

- Bottom Line from the Wal-Mart and Phipps decisions
  - Plaintiff has a burden to show a specific policy or practice that caused the disparity
  - All members in the class must be affected by the same policy or practice
- Implicit Bias was not clearly linked to discriminatory behavior



# Recent EEOC Settlements

## **EEOC v. Wal-Mart Stores Inc.**

**(E.D. Ky., No. 01-339, 3/1/2010)**

- \$11.7 million, plus preferential hiring of women
- Why? No effective selection system — only unstructured interviews, subject to stereotypes that women could not do physically demanding warehouse work.

# Recent EEOC Settlements

## **EEOC v. Outback Steakhouse (Colorado, 2010)**

- \$19 million for non-promotion of women to managerial positions.
- Why? “Tap on the shoulder” by supervisor identified managerial prospects, followed by more formalized procedures, including tests, that were not challenged.

# RFOA

- The extent to which supervisors had unchecked discretion to assess employees subjectively;
- The extent to which employees were evaluated on factors known to be subject to age-based stereotypes; and
- The extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

This list is non-exhaustive and the employer does not necessarily need to address each item.

# RFOA

We HR folk should rejoice in the emphasis on “objectively reasonable” procedures and “guidance & training” for those doing ratings.

# HUMAN HEGEMONY

Hey Jiminy – like the cricket

- Prey or Predator
- My Tribe or Not My Tribe
- Friend or Enemy
- Edible or Poisonous
- Safe or Dangerous

# Future of Implicit Cognition

- Much research continues to be performed using the IAT and Implicit Cognition
- Many research articles continue to be published in a wide variety of fields, using many types of IATs, including issues including:
  - Disability
  - Obesity
  - Drinking behavior
  - Drug abuse
  - Many other applications

# Future of Implicit Cognition, ctd

- Phippen v. Iowa plaintiff attorney states he plans to appeal
- Implicit cognition continues to be a very popular topic for research in Social Psychology
- Reginald Shuford, Executive Director at ACLU of Pennsylvania stated that a goal of ACLU is to modify the application of disparate treatment as a result of work on implicit bias
- We can expect to see more attempts to apply implicit cognition theory to employment discrimination litigation as well as in diversity training and other applications

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# Discussion and Questions

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