Race, Prison Discipline, and the Law

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INTRODUCTION

> Indeed, the most important thing to know about the nature of prejudice is that it is ever present in human behavior and cognition. It remains sufficiently in the background such that it eludes conscious awareness and immediate individual control, yet it is often consequential in everyday life. Its capacity to affect social judgment and behavior without personal animus or hostility is dismissed or ignored at some peril . . . .[1]

Prisons are closed institutions, with little transparency or oversight.[2] Judicial oversight of prison administrative decisions is deferential in almost every respect. Courts apply deferential standards of review to a range of prison administrative decisions, from the restriction of otherwise fundamental rights[3] to discipline of the

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1. Curtis D. Hardin & Mahzarin R. Banaji, *The Nature of Implicit Prejudice: Implications for Personal and Public Policy*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 13, 23 (Eldar Shafir ed., 2013).

2. Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 469–75 (2014).

3. Turner v. Safley, 482 U.S. 78, 89 (1987) (upholding restriction on inmate correspondence but denying restriction on inmate marriage).

incarcerated. From lesser expectations of privacy to limited rights of association and speech, the Supreme Court has deferred to the judgment of prison administrators that the curtailment of rights is essential to maintaining order and security within the prison walls.

Incarceration, by definition involuntary, demands that penal institutions have the means to ensure compliance from the detained. Thus some abbreviation of rights for the incarcerated is not only understandable but also necessary. Moreover, penal institutions, by virtue of maintaining custody of individuals, are also responsible for protecting inmates from harm by other inmates and staff. Similarly, as employers, penal institutions must also ensure the safety of their staff. The threat of violence within penal institutions is real.[4] Faced with balancing the heavy burden of protection and more searching judicial oversight, courts have adopted a deferential approach to the management of penal institutions.[5]

Nevertheless, the people who work in these closed institutions are subject to the same biases and psychological phenomena as the general public. Studies increasingly demonstrate the prevalence of unconscious racial bias in the general public,[6] but we have yet to examine the influence of unconscious racial bias within the prison system. While the intersection of prison and race is not new, only a few scholars have examined this intersection within the prison walls. Michelle Alexander's book, *The New Jim Crow*, has significantly expanded the conversation on how criminal justice laws and policies disproportionately incarcerate African Americans.[7] Loïc Wacquant demonstrates that our laws and policies result in the hyperincarceration of urban African Americans.[8] Discussions about prison and race have, by and large, mostly focused on the demographic flows to and from prisons, not the potential interactions within prison walls.

Nor has the Court engaged with the implications of unconscious racial bias in prison administration. Unlike the Court's deferential review of most other constitutional claims by prisoners, for claims of racial discrimination in prison, the Court applies strict scrutiny, the most difficult level of scrutiny to satisfy.[9] But to invoke this standard, the Court requires proof of discriminatory intent.[10] Proving such intent is often insurmountable for plaintiffs, particularly when multiple decision makers are involved and the ease of cloaking improper motives in race-

4. Jens Modvig, *Violence, Sexual Abuse, and Torture in Prisons*, in PRISONS AND HEALTH 19, 19 (Stefan Enggist et al. eds., 2014).

5. Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 32–35 (2008).

6. *See infra* Part I.

7. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012).

8. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74.

9. Johnson v. California, 543 U.S. 499, 511 (2005).

10. Washington v. Davis, 426 U.S. 229, 239 (1976) (creating an intent requirement for allegations of disparate impact under the Equal Protection Clause of the Fourteenth Amendment).

neutral considerations exists.[11] Despite the lack of engagement by the Court, I trace the ways in which unconscious racial attitudes may still play a role in prison disciplinary decisions and argue that the legal standards governing prison decisions may facilitate and validate the use of these racial norms.

This Article surveys three previously unconnected areas of analysis: implicit bias, prison disciplinary rules, and judicial deference to correctional decisions. It traces the possible connections from the statistical evidence on the significance of race to the potential impact of race on prison disciplinary decisions and to the legal validation of these racial norms through judicial deference. In so doing, this Article hopes to begin a dialogue that identifies several entry points for discussing the ramifications of race within correctional facilities.

In 1980, Eric Poole and Robert Regoli published a groundbreaking statistical analysis of the role of race in prison disciplinary decisions in a medium security Southern prison.[12] Their analysis demonstrated that the race of an inmate was correlated with the disciplinary decisions of correctional officers.[13] Scholars such as Sharon Dolovich and Philip Goodman have analyzed the role of race in California facilities based on extensive ethnographic research.[14] Professor Michael Mushlin has noted that judicial standards on racial discrimination, focusing exclusively on discriminatory intent, fundamentally misunderstand race as a psychological process.[15] More generally, this Article is part of a broader critical race praxis that incorporates social science findings to distill the ways in which race is embedded in our social, legal, and economic institutions.[16]

Building on these important insights, I first explore how implicit bias could influence prison disciplinary decisions, and second, I examine the role of the law in validating these race-based decisions. The law arguably facilitates the influence of implicit bias on prison disciplinary proceedings by requiring proof of conscious discriminatory intent. Implicit racial biases by correctional officials may then be validated through judicial deference to prison disciplinary rules and decisions.

It is also important to clearly state what this Article does not address. As

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11. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 319 (1987) (recounting criticisms of the intent requirement established in *Washington*).

12. Eric D. Poole & Robert M. Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 LAW & SOC'Y REV. 931 (1980).

13. *Id.* See also *infra* Part II for a deeper discussion of this study.

14. *See generally* Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011) (analyzing the role of race in her ethnographic study of Los Angeles county jail's K6G unit for gay men and transgender women); Philip Goodman, *"It's Just Black, White, or Hispanic": An Observational Study of Racializing Moves in California's Segregated Prison Reception Centers*, 42 LAW & SOC'Y REV. 735 (2008) (arguing that prison housing decisions are racialized through collaborative settlements between offenders and correctional staff based on observational study).

15. Mushlin & Galtz, *supra* note 5, at 40–41.

16. *See* Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. SOC. SCI. 149, 149–51 (2014) (summarizing the increasing collaborations between critical race theorists and social scientists and assessing the benefits and costs of such collaborations).

noted earlier, there is little public information on prison disciplinary decisions, particularly with regard to the race of the punished inmate. There is little to no information about whether certain disciplinary charges are actually used or only exist on paper. And there are no modern studies examining unconscious biases by correctional employees. It is possible that race does not play a role (or at least not a significant one) in prison disciplinary decisions today. In over 150 interviews with correctional staff and inmates across three facilities in California, Professors Kitty Calavita and Valerie Jenness noted the "relative absence" of race during these discussions.[17] Perhaps, as some have theorized with regards to the police,[18] race is simply less salient than one's status as an inmate or correctional officer. Calavita and Jenness caution that race is clearly "embedded" in the carceral institution, even if race was not central to their interviews of prisoners and correctional staff.[19] For example, they note that certain California Department of Corrections and Rehabilitation facilities remain de facto racially segregated.[20] Hence, I do not argue that prison correctional officials are racially biased against minorities, nor do I argue that this bias is present in prison disciplinary decisions. Rather, this Article considers the potential implications of implicit bias research in the prison disciplinary context in light of existing legal doctrine. As such, this Article presents a thought experiment that assesses the implications of existing research.

Part I of this Article discusses how implicit bias could affect prison decision-making. Given the lack of modern psychological studies of correctional officials and implicit bias, this section draws on studies of implicit bias in the population at large as well as implicit bias in the criminal justice system. Part II discusses how courts may facilitate the influence of implicit race bias by requiring discriminatory intent, even in penal facilities where circumstances would favor allowing implicit bias claims. Part III examines the legal standards governing judicial review of prison disciplinary rules and decisions and concludes that judicial deference may validate the improper influence of race on prison-staff decision-making.

I. THE SIGNIFICANCE OF RACE?

This Article starts with the premise that race is a social construct.[21] While there may be biological markers of race, such as a person's skin tone, facial features, or hair, the significance (or meaning attributed to) race is a result of

17. KITTY CALAVITA & VALERIE JENNESS, APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC 190 (2015).

18. Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 789–90 (2005).

19. CALAVITA & JENNESS, *supra* note 17, at 191.

20. *Id.* at 18.

21. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994).

historical patterns of power and interactions among races.[22] In American history, a person's (perceived) biological race was used to structure family,[23] access to the State,[24] and goods or services.[25] Laws regulated the relationships between members of different races.[26] White supremacy in American history was built and maintained through ensuring the superiority of White persons in the political, economic, and social spheres. Moreover, White supremacy was justified through denigrating other races.[27] Blacks were "shiftless" and "criminal."[28] People of Asian descent were "sneaky."[29] Latinos were "dirty" or "less intelligent."[30] While the Supreme Court has rejected the once-blatant discrimination of yore, many of the cultural tropes about the characteristics of members of particular races persist.

We see this persistence when a White male "find[s]" food from a grocery store in the immediate aftermath of Hurricane Katrina, whereas an African American in the exact situation is described as "looting."[31] Associations between race and character are clear when the media portrays a Black teenager killed by police as a "thug,"[32] but a headline for a White teenager pleading guilty to killing

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22. *See id.* Professor Jerry Kang further deconstructs this idea into the following three steps:

> [An individual] classifies [another] individual into a (1) racial category according to relevant (2) mapping rules provided to us by culture and any specific rules relevant to the context. Once that mapping is performed—typically instantaneously—a set of (3) racial meanings is activated that alters the way that the perceiver interacts with the target.

Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1143 (2010) (citation omitted).

23. For example, African American slaves lost the right to raise their children, since the children of slaves were considered to be property of the owner and therefore eligible for sale or legal transfer to a new owner. *See* Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161, 1162–63 (1996) (arguing that legal institutions facilitated the separation of slave families through conducting court sales and masking individual human decisions to sell slaves as individual and not group items).

24. *See Ex parte* Shahid, 205 Fed. 812, 813 (E.D.S.C. 1913) (noting that naturalization was limited to free White persons and those of African descent, necessarily excluding Native Americans, Chinese, Japanese, and Malays from the benefits of citizenship).

25. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

26. *See* Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia's miscegenation law forbidding marriage between members of other races).

27. Dred Scott v. Sandford, 60 U.S. (1 Black) 393, 421–22 (1856) (arguing that the character of "Negroes" justified denial of U.S. citizenship for jurisdictional purposes); *see, e.g.*, Johnson v. M'Intosh, 21 U.S. (1 Wheat.) 543, 589 (1823) (noting the "habits" of Native American tribes also justified White ownership of the land).

28. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988).

29. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1258 (1993) (placing the "model minority" myth in context and demonstrating its harms).

30. Juan F. Perea, Buscando América*: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1442–43 (2004).

31. Cheryl I. Harris, Whitewashing Race*: Scapegoating Culture*, 94 CALIF. L. REV. 907, 931 (2006) (reviewing MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY (2003)).

32. Rasheena Latham, *Who Really Murdered Trayvon? A Critical Analysis of the Relationship Between*

three students at school notes the teenager was described as a "fine person."[33] When employers choose to interview a White applicant over a Black applicant, and the only difference between the two resumes is the name, racial stereotypes are present.[34] When professors are more likely to answer an email from a student with a White-associated name versus a student with a minority-associated name, racially-based assumptions may play a role.[35] While the above situations are drastically different, a common theme in each is implicit associations between character and race.

A word of caution is appropriate here. The racial associations in the above situations may or may not be consciously "racist" (i.e., the individuals making the associations may or may not explicitly assign value to racial differences to benefit themselves or harm their victims to justify the actor's "own privileges or aggression").[36] Indeed, cognition studies demonstrate that "the operation of prejudice and stereotyping in social judgment and behavior does not require personal animus, hostility or even awareness."[37] Rather the point in raising evidence of implicit bias and cross-cultural issues is to demonstrate that, even absent such explicit intentions, our unconscious associations and understandings have meaning[38]—a meaning that is particularly relevant within prisons.

A. Racial Bias and the Implicit Association Test

Statistical evidence indicates that race could matter in prison disciplinary decisions. Poole and Regoli's 1980 study, finding that race influences discretionary disciplinary decisions, was relatively narrow.[39] First, the authors did not study the entire disciplinary process, including disciplinary hearings or appeals, but rather

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Institutional Racism in the Criminal Justice System and Trayvon Martin's Death, 8 S.J. POL'Y & JUST. L.J. 80, 82 n.15 (2014) (contrasting media coverage of Trayvon Martin, an African American homicide victim, with Adam Lanza, a non-Black assailant at Sandy Hook Elementary School); *see also* Bill Chappell, *People Wonder: 'If They Gunned Me Down,' What Photo Would Media Use?*, NPR: THE TWO WAY (Aug. 11, 2014, 2:17 PM), http://www.npr.org/blogs/thetwo-way/2014/08/11/339592009/people-wonder-if-they-gunned-me-down-what-photo-would-media-use (discussing the #IfTheyGunnedMeDown hashtag and the media choice of photos for Black victims).

33. Nick Wing, *When the Media Treats White Suspects and Killers Better than Black Victims*, HUFFINGTON POST (Aug. 14, 2014, 8:59 AM), http://www.huffingtonpost.com/2014/08/14/media-black-victims_n_5673291.html [http://perma.cc/VS5W-M774] (collecting examples of headline descriptions of Black victims and White suspects).

34. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), http://www.nber.org/papers/w9873.

35. Katherine L. Milkman et al., *What Happens Before?: A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations* 17 n.5 (2014), http://ssrn.com/abstract=2063742.

36. ALBERT MEMMI, DOMINATED MAN: NOTES TOWARDS A PORTRAIT 194 (1968).

37. Hardin & Banaji, *supra* note 1, at 3.

38. *But see* L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 119–20 (2014) (noting that self-threats, such as threats to status, perceived disrespect, and chronic stress or self-loathing may also play a role in hegemonic racial violence).

39. Poole & Regoli, *supra* note 12, at 932.

focused on front-line correctional officer decisions as to whether to report a prison violation.[40] Second, the authors only analyzed seven major violations,[41] specifically excluding "ambiguous" charges such as "being disrespectful to staff, menacing or disruptive language," and "using improper or indecent language or gestures."[42] But even within this narrow study, the authors found that race played a role.

The Poole and Regoli data indicate that "[w]hile black and white inmates were equally likely to engage in rule-breaking activity, they were not equally likely to be reported for rule infractions."[43] The race of the offender affected discretionary disciplinary decision-making in two distinct ways. First, a prison guard was more likely to report an offender for a rule violation if the offender was African American.[44] Second, race produced an indirect effect by enhancing the importance of a prior disciplinary record.[45] Since Black inmates were more likely to be reported, they were also more likely to have prior disciplinary histories.[46] Moreover, the importance assigned to a prior disciplinary history differed depending on the race of the offender.[47] "For whites, rule violations and prior record explain 13.5 and 3.6 percent, respectively, of the variation in disciplinary actions. For blacks, prior record alone accounts for 48.8 percent of the variation in formal response, with rule infractions contributing an additional 2.4 percent."[48] Poole and Regoli focused on statistically identifying the probability that a prisoner's race correlated with his or her disciplinary experience.[49] Although we lack modern studies similar to the Poole and Regoli study to prove that race is a statistically significant factor in prison disciplinary decisions, other psychological studies suggest that race may continue to play a role.

The "Implicit Association Test" (IAT) is one of many social cognition studies examining an individual's automatic and unconscious response to certain stimuli as distinct from his or her explicit or consciously stated responses.[50] "The IAT measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)."[51] Associations between race and evaluations are not static, but they can

40. *Id.*

41. *Id.* at 934–35 n.3. The major infractions surveyed included: out of area, gambling, possession of contraband (e.g., drugs, weapons, monies), refusal to obey staff order, theft, fighting, and destroying property. *Id.*

42. *Id.* at 936 n.7.

43. *Id.* at 944.

44. *Id.* at 943–44.

45. *Id.*

46. *Id.*

47. *Id.* at 944.

48. *Id.* at 942.

49. *Id.* at 933.

50. *About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html [https://perma.cc/63PA-RX2B] (last visited Oct. 4, 2015).

51. *Id.*

be difficult to change.[52] Moreover, these implicit racial associations are moderately better predictors of future behavior than explicit or conscious associations.[53]

In general, these social cognition tests demonstrate that we are not "cognitively colorblind."[54] Brian Nosek examined the results of seventeen IAT tests over a six-year period with a cumulative total of 2.5 million study participants.[55] He found a preference for Whites over Blacks, White children over Black children, and lighter skin over darker skin.[56] Participants more quickly associated the word "bad" with Black or darker skin and "good" with White or lighter skin.[57]

The IAT data is generally consistent, regardless of the race of the participant. For example, in an IAT study of fifty participants, thirty-one of whom were White, with the remaining members of minority groups or multiracial, eighty percent of the participants demonstrated a preference for White over Black, i.e. a positive association of White with good and Black with bad.[58] Thus, a Black person may have an implicit bias or preference for Whites over Blacks.[59] This is especially important in the field of corrections. Blacks and Latinos are disproportionately incarcerated relative to their overall population demographic,[60] but correctional officers come in all colors and are increasingly diverse.[61] Thus the analysis of implicit bias is not limited to pairings of White correctional officers and Black offenders but rather is instructive regardless of the race of either the correctional officer or the offender.

These implicit associations matter in the real world, particularly when perception of threat or crime is concerned. In one study, participants were asked

52. Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprising Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 145 (2010); *see also* Hardin & Banaji, *supra* note 1, at 7.

53. CHERYL STAATS & CHARLES PATTON, KIRWAN INSTITUTE, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 26–27 (2013).

54. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010).

55. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1 (2007).

56. *Id.* at 3–4.

57. *Id.* at 17.

58. Damian A. Stanley et al., *Implicit Race Attitudes Predict Trustworthiness Judgments and Economic Trust Decisions*, 108 PROC. NAT'L. ACAD. SCI. 7710, 7713–14 (describing results and demographics of Study 1, which focused on the relationship between an individual's implicit bias and his/her determinations of whether an unfamiliar Black or White man was trustworthy).

59. Hardin & Banaji, *supra* note 1, at 11 ("[A] surprising number of African Americans exhibit implicit preference for whites over blacks."). These findings should not obscure the fact, however, that studies also demonstrate that eighty percent of Whites and Asians have an implicit bias against Blacks. *Id.* at 18.

60. *See* SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 410–11 (1996) (describing the historic disproportionate incarceration of Blacks in the U.S.).

61. *Id.* at 410 (describing equitable representation of Blacks in correctional supervision and custodial staff, while noting that employment of Latino/as in the correctional field is lacking).

to categorize images as either a weapon or a tool.[62] Prior to categorizing the image, a picture of a Black or White face flashed onscreen.[63] Participants were more likely to falsely identify an item as a weapon when a Black face appeared on screen than when a White face appeared on the screen.[64] This weapons bias is present in other studies, including one where participants were quicker to shoot an armed Black person than an armed White person.[65] Participants were correspondingly slower to "not shoot" when confronted with a picture of a weaponless Black person compared to a weaponless White person.[66] These results were consistent regardless of the race of the deciding participant.[67] The perception of non-White individuals as "threats" is also clearly demonstrated in studies on police use of force.[68] Psychological studies document pervasive associations between Blackness and criminality.[69] One of the leaders in implicit bias studies concludes that, "police consistently use greater lethal and non-lethal force against non-white suspects than white suspects."[70]

An implicit preference for Whiteness is also evident in harder to measure interpersonal relations. Where a person's IAT reflects a preference for Whites, studies show that person is more likely to trust a White person over a Black person.[71] In addition, another study indicates that "implicit racial prejudice among whites predicts quickness to perceive anger in black faces but not white faces."[72] Together, these two studies could be interpreted to imply that individuals with an implicit preference for White are more likely to give the "benefit of the doubt"[73] to a White individual over a Black individual. This "benefit of the doubt" advantage may also play a role in guilty/not-guilty determinations. For example, in a study of mock jurors, the IAT, and guilty/not-guilty determinations, study participants held strong associations between Black-and-guilty relative to White-and-guilty.[74] These implicit associations predicted the way mock jurors evaluated ambiguous evidence, such that where the evidence was unclear, the race of the mock defendant helped tip the balance.[75]

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62. B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 287, 287 (2006).

63. *Id.*

64. *Id.*

65. Kang & Lane, *supra* note 54, at 482.

66. *Id.*

67. Hardin & Banaji, *supra* note 1, at 8.

68. *Id.* at 8–9.

69. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 889–91 (2004).

70. Hardin & Banaji, *supra* note 1, at 9.

71. Stanley et al., *supra* note 58, at 7711.

72. Hardin & Banaji, *supra* note 1, at 10.

73. Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 913 (2015).

74. Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190 (2010).

75. *Id.*

The application of these general implicit bias studies to decisions made within a penal facility raises additional questions. The IAT research to date demonstrates that most individuals have an implicit preference for White over Black. But perhaps correctional officers, due to their training, are different? An IAT study by Joshua Correll et al. specifically examined the differences between police and members of the general community and found that police training could decrease the influence of racial bias on shoot/nonshoot decisions.[76] But notably, the study authors did not conclude that training eliminated the influence of implicit biases. One potential implication of this study is that we should not assume a 1:1 application of the IAT data from the general public to the decisions by correctional officers. Rather, depending on the training in a given facility, the salience of racial implicit bias may be lessened.

B. Implications in Prisons

Prisoners are subject to disciplinary rules that penalize behavior that otherwise would not be punishable outside the prison walls. Disciplinary codes prohibit inmates from minor acts (such as disrespect) as well as major acts (such as fighting or possession of contraband).[77] If an inmate is caught engaging in a disciplinary violation, correctional staff may, at their discretion, issue a conduct report citing the behavior and the violation.[78] Under the Court's due process jurisprudence, prisoners are entitled to notice and a meaningful opportunity to be heard prior to the imposition of sanctions if a liberty or property interest is at stake.[79] At a disciplinary hearing, the inmate may offer evidence or testify to rebut the disciplinary charge.[80] The hearing officer (or committee in some circumstances) will decide whether the inmate is responsible and, if so, authorize sanctions as a punishment for the violation.[81] Punishments may be relatively minor, such as losing canteen purchasing privileges, or major, such as losing good-time credits or disciplinary segregation in a single cell for twenty-three hours a day.[82] Despite the impact of these potential punishments, federal courts have denied challenges that specific disciplinary provisions are unconstitutionally vague.[83] These decisions are particularly noteworthy given the interplay between

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76. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1022 (2007).

77. *See, e.g.*, TENN. DEP'T OF CORR., DEFINITIONS OF DISCIPLINARY OFFENSES 2–3 (2014), https://www.tn.gov/assets/entities/correction/attachments/502-05.pdf [https://perma.cc/F983-5DFQ].

78. *See* Donald F. Tibbs, *Peeking Behind the Iron Curtain: How Law "Works" Behind Prison Walls*, 16 S. CAL. INTERDISC. L.J. 137, 147–50 (2006) (summarizing the disciplinary process in Wisconsin).

79. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 556–59, 563–71 (1974).

80. *Id.* at 566.

81. *Id.* at 571.

82. *See, e.g.*, Tibbs, *supra* note 78, at 145–46 (listing types of punishment).

83. *See infra* Section II.B; *see also* James E. Robertson, *"Catchall" Prison Rules and the Courts: A Study of Judicial Review of Prison Justice*, 14 ST. LOUIS UNIV. PUB. L. REV. 153, 166 (1994) (discussing cases).

the broadly defined provisions and the potential influence of implicit racial preferences.

In general, disciplinary rules are a necessary tool for maintaining order and security in prisons by imposing consequences beyond incarceration on noncompliant inmates. Inmates, by virtue of their criminal conviction and sentence to incarceration, are involuntary twenty-four-hour residents in institutions. As a consequence, prisoners forsake many of the rights and privileges enjoyed in their prior lives. These rules "simultaneously structure daily life and provide the means, or at minimum the rationale, to mete discipline as a form of social control."[84] Institutional imperatives, such as efficiency and order, may also play a role by requiring uniform treatment of all inmates, such as lights-out policies and meal times.

Disciplinary rules may cover the mundane (dress code violations[85]) to the criminal (prohibition on assault[86] or arson[87]). In some cases, disciplinary rules may even be counterintuitive. For example, in Tennessee, attempted suicide is a midlevel disciplinary infraction.[88] An unsuccessful suicide could be punished by up to five days in punitive segregation and/or a loss of up to two months of good-time credit.[89] While the intent of the policy may be to prevent suicides, it simultaneously provides an unintended incentive to make sure that suicide attempts are successful. But many of the disciplinary rules—even though punishing conduct that would be noncriminal outside of the prison walls—are directly related to prison security. For example, prisons prohibit the possession of "free-world money"[90] to curb illegal sales within prisons. If a prisoner is found responsible or guilty of a violation, punishments can include loss of certain privileges.

Disciplinary violations are all too common in carceral institutions. The latest data from 2004, which is based on nationally representative subsamples, indicates that just under half of all state and federal inmates were found guilty of a disciplinary offense.[91] Some scholars have focused on how the experience (and deprivations) of prison, such as overcrowding or sentence length, predicts the

84. Tibbs, *supra* note 78, at 138 (ethnographic study of prison life in Wisconsin).

85. *See, e.g.*, TENN. DEP'T OF CORR., *supra* note 77, at 2.

86. *Id.* at 1.

87. *Id.*

88. *Id.* Attempted suicide is defined as a "[s]ituation in which an individual has performed an actual or seemingly life-threatening behavior with the intent of jeopardizing his/her life or presenting the appearance of such intent, but which has not resulted in death." *Id.*

89. TENN. DEP'T OF CORR., DISCIPLINARY PUNISHMENT GUIDELINES 7 (2012), https://www.tn.gov/assets/entities/correction/attachments/502-02.pdf [https://perma.cc/U4WM-R5XL].

90. *See, e.g.*, TENN. DEP'T OF CORR., *supra* note 77, at 6.

91. Katarzyna Celinska & Hung-En Sung, *Gender Differences in the Determinants of Prison Rule Violations*, 94 PRISON JOURNAL 220, 227 (2014). The Celinska & Sung study relied on data from the 2004 Survey of Inmates in State and Federal Correctional Facilities by the Department of Justice. *Id.* at 224.

probability of disciplinary infractions.[92] Certainly, some of the rule-breaking behavior can also be attributed to the steady increase of the mentally ill in our carceral institutions.[93] "Jails and prisons have become, in effect, the country's front-line mental health providers."[94] Other scholars argue that the disciplinary violations may be predicted based on an inmate's personal characteristics, such as prior abuse, criminal history, age, race, or sex.[95] Even without the benefit of modern implicit bias studies within the correctional setting, it is nevertheless worth thinking about the implications of the existing IAT studies for prison discipline.

First, minority offenders may be more likely to be *perceived as a disciplinary threat* by correctional officers, regardless of an offender's actual behavior.[96] For example, a correctional officer may be more likely to perceive contraband in a Black offender's hand than in a White offender's hand. A prison guard may also decide more quickly that a Black offender is a threat as compared to a White offender, leading perhaps to increased citations for Black offenders. It is also possible that the threat is exaggerated for minority offenders, and therefore, minority inmates may face more serious conduct reports than their fellow White inmates for the same type of behavior.

Implicit bias studies may also implicate the *severity of the punishment* an offender would receive for a rule violation. In the death penalty context, researchers found that a defendant is more likely to be sentenced to death when the defendant has more stereotypical Black features, even controlling for the type of crime and mitigating evidence presented.[97] Underlying this study is the implicit association between a person's race and whether that person is intrinsically good or bad. Thus, a defendant with stereotypical Black features may be more likely to be perceived as fundamentally bad and therefore beyond rehabilitation. These results are consistent with evidence of implicit racial bias by prosecutors in discretionary requests for downward departures in federal sentencing.[98] Blacks and Hispanics in particular were less likely to receive lesser sentences in return for a defendant's "substantial assistance," even when controlling for the severity of the

92. *Id.* at 222–24.

93. HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 16 (2003), http://www.hrw.org/reports/2003/usa1003/usa1003.pdf [http://perma.cc/S2QR-V4C4].

94. *Id.*

95. Celinska & Sung, *supra* note 91, at 222.

96. Certainly these attitudes implicate the likelihood of the use of force on inmates, but use of force is beyond the scope of this Article. Instead, I focus on the implications of these attitudes for disciplinary proceedings.

97. Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL'Y REV. 113, 127 (2012).

98. John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 696–97 (2014) (linking implicit bias studies of law enforcement with decision-making by prosecutors).

crime.[99] In the prison disciplinary context, this implicit bias could lead to enhanced or more severe punishments for Black inmates than for White inmates committing the same violation.

Finally, implicit bias may be particularly relevant for the *minor or ambiguous* conduct charges[100] excluded from the Poole and Regoli study. Some prison rules are designed as "vaguely worded 'catchall' rules" (i.e., rules that are so broadly defined that they provide wide discretion to prison guards tasked with maintaining order).[101] These "catchall" rules almost always pertain *to an inmate's attitude rather than conduct*, and they can include prohibitions on "insolence," "insubordination," and "disrespect."[102] In a 1994 survey, Professor James Robertson noted that at least twenty-four states could punish an inmate's demeanor.[103] An inmate's attitude is also relevant for broadly defined disciplinary charges, such as "disruptive"[104] or "disorderly" behavior or to charges prohibiting "any conduct" indicative of a security threat.[105]

But what exactly do these terms mean? In *Shaw v. Murphy*, an inmate was charged with "insolence" for writing a letter *to a fellow inmate* offering assistance defending against a charge of assaulting a correctional officer.[106] "Insolence" was defined as "words, actions or other behavior which is intended to harass or cause

99. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 293, 308–09 (2001).

100. See *infra* Part II for a deeper discussion of the prison disciplinary system and vague or ambiguous charges.

101. Douglas Dennis, *Foreword: A Consumer's Report*, 14 ST. LOUIS U. PUB. L. REV. 1, 12 (1994); *see, e.g.*, Robertson, *supra* note 83, at 168–69 (1994).

102. *See* ILL. ADMIN. CODE tit. 20. 504. App. A, § 304 (West, Westlaw through 2015 Ill. Register) (defining insolence as "[t]alking, touching, gesturing, or other behavior that harasses, annoys, or shows disrespect"); AL. DEP'T OF CORR., MALE INMATE HANDBOOK 47 (2013) (defining insubordination as "[a]ny act, gesture, remark, or statement that reflects disrespect to authority"); N.C. DEP'T OF PUB. SAFETY PRISONS, INMATE DISCIPLINARY PROCEDURES 4 (2014), http://www.doc.state.nc.us/dop/policy_procedure_manual/b200.pdf [http://perma.cc/8WFY-B5EW] (prohibiting "[d]irect[ing] toward or us[ing] in the presence of any State official, any member of the prison staff, any inmate, or any member of the general public, oral or written language or specific gestures or acts that are generally considered *disrespectful*, profane, lewd, or defamatory" (emphasis added)); OR. DEP'T OF CORR., PROHIBITED INMATE CONDUCT AND PROCESSING DISCIPLINARY ACTIONS, RULES OF MISCONDUCT § (2)(h), 2.12 (2014), http://arcweb.sos.state.or.us/pages/rules/oars_200/oar_291/291_105.html [http://perma.cc/JEU7-9DG2] ("An inmate commits Disrespect III when he/she directs *hostile*, sexual, abusive or *threatening* language or gestures, verbal or written, towards or about another person." (emphases added)).

103. Robertson, *supra* note 83, at 170.

104. *See* MICH. DEP'T OF CORR., POLICY DIRECTIVE NO. 03.03.105, PRISONER DISCIPLINE 18 (2012), http://www.michigan.gov/documents/corrections/0303105_382060_7.pdf [http://perma.cc/E4C7-H882] (defining "Creating a Disturbance" as "[a]ctions or words of a prisoner which result in disruption or disturbance among others but which does not endanger persons or property"). In contrast to many of the other disciplinary infractions, there are no common examples listed to narrow the circumstances in which this could apply.

105. Robertson, *supra* note 83, at 170–71.

106. Shaw v. Murphy, 532 U.S. 223, 225–26 (2001) (holding no First Amendment right to provide legal assistance to fellow inmates and remanding for consideration of *Turner* factors for the prisoners' vagueness claims).

alarm in an employee" and could include "cursing; abusive language, writing or gestures directed to an employee."[107] In *Smith v. Mosley*, "insubordination" consisted of writing a letter to the assistant warden complaining of being forced to go outside in subfreezing weather.[108] Georgia defines "insubordination" broadly to include "cursing, demeaning, or *acting in a sullen, uncooperative, or disrespectful* manner toward any employee."[109] Professor Donald Tibbs recounts a disciplinary hearing where an inmate asking a guard why he received a disciplinary ticket that amounted to "disruptive conduct."[110]

> In this case, the inmate received a conduct report for disruptive conduct while he was at work in the kitchen. Upon receiving the ticket, he loudly asked the guard, "man what about my warning? Don't I receive a warning?" The guard claimed that the inmate's actions disrupted the work environment with loud talking because the other inmates stopped work to look in their direction. The guard also charged that speaking to him loudly and referring to him as "man" amounted to disrespect according to DOC 303.25.[111]

Ambiguous disciplinary rules, particularly those regulating an inmate's attitude, are especially susceptible to the influence by an individual prison guard's implicit racial preferences. Remember that three IAT studies, on trust, anger perception, and perceptions of guilt, suggested that race may play a role in interpersonal communications. In the prison context, a lack of trust could implicate perceptions of whether an inmate is lying in a disciplinary hearing for the cited violation. It could also implicate whether an inmate is cited for conduct that may be difficult to objectively determine, such as "insolence" or "disrespect," particularly where there is ambiguous evidence. A less trustworthy person may be more likely to be perceived as disrespectful of the rules of conduct by a correctional officer. White and Black inmates may experience differential treatment (being cited or disciplined) for "insolence," even when acting identically, since a prison guard may be more likely to perceive anger from a Black inmate than a White inmate. Where violations rely at least in part on interpersonal communications, the IAT studies would suggest that race plays a role.

One side effect of an ambiguous statute is that it provides broad discretion for individual prison officers to "redefine prison rules as they see fit" since officers lack guidance as to enforcement.[112] In such situations, biases not under our conscious control provide a lens through which to interpret inmate behavior.

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107. *Id.* at 232 n.* (Ginsburg, J., concurring) (emphasis omitted) (quoting Mont. State Prison Policy No. 15-001, Inmate Disciplinary Policy, Rule 009 (App.10)).

108. Smith v. Mosley, 532 F.3d 1270, 1272–74 (11th Cir. 2008).

109. GA. DEP'T OF CORR., ORIENTATION HANDBOOK FOR OFFENDERS 27, http://www.dcor.state.ga.us/pdf/GDC_Inmate_Handbook.pdf [http://perma.cc/78RB-CQVM] (emphasis added).

110. Tibbs, *supra* note 78, at 160–61.

111. *Id.* at 160.

112. Robertson, *supra* note 83, at 168.

Enforcement then expands beyond the specific conduct at issue to include the "attitude" of the defendant. Yet, social cognition studies demonstrate that we perceive "attitudes" differently depending on our racial preferences.[113] By upholding ambiguous attitude disciplinary rules, courts facilitate the influence of racial preferences in prison disciplinary proceedings.

This survey of IAT literature helps to explain the outcome of the 1980 Poole and Regoli finding that race affects prison disciplinary decision-making in three distinct ways. First, non-White inmates are more likely to be perceived as a threat, regardless of the inmate's actual behavior. Because they are more likely to be perceived as a threat, non-White inmates may be cited both more often and for more serious conduct than White inmates. Second, the types of punishments for these citations may be more severe for non-White inmates than for White inmates. Third, the impact of implicit bias may be particularly salient when dealing with more ambiguous disciplinary provisions, such that race plays an even larger role in determining whether a violation occurred. Despite these potential impacts, the jurisprudence to date exclusively penalizes only explicit, and not implicit, bias.

II. FACILITATING THE INFLUENCE OF RACE

A. Requiring Intent for Racial Discrimination Claims in Prison

The consideration of race—whether it occurs outside or inside the prison walls—is subject to strict scrutiny. In *Johnson v. California*, the Supreme Court held that strict scrutiny should apply to prison officials' use of race in determining housing assignments for offenders.[114] Strict scrutiny, the most searching level of judicial review available, requires that the policy be "narrowly tailored measures that further compelling governmental interests."[115] In so doing, the Court decided not to apply the more lenient doctrine of judicial deference to prison administrators under *Turner v. Safley*.[116] And yet, even with a heightened standard of review, implicit racial bias claims are rarely legally cognizable because they lack the "intent" requirement established in *Washington v. Davis* for racial discrimination claims.[117]

Washington v. Davis, an employment law case, fundamentally changed the equal protection landscape by requiring an actual intent to racially discriminate to qualify for strict scrutiny review by the courts.[118] In cases where a law explicitly conditions protection or benefits by race, the intent is clear and courts will apply

113. *See generally* Stanley et al., *supra* note 58.

114. Johnson v. California, 543 U.S. 499, 515 (2005).

115. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

116. Turner v. Safley, 482 U.S. 78, 89 (1987) (upholding restriction on inmate correspondence but denying restriction on inmate marriage).

117. *See* Washington v. Davis, 426 U.S. 229, 237–38 (1976).

118. *Id.* at 237–38.

strict scrutiny.[119] But in cases where a law is facially neutral, such as the disciplinary codes discussed above, a plaintiff must show evidence of discriminatory purpose to avoid application of "rational basis review," a much more forgiving and lenient standard of judicial review.[120]

Despite considerable criticism, the Court continues to apply *Washington v. Davis* to Fourteenth Amendment disparate impact cases.[121] In practice, the Court is requiring evidence of explicit racial bias, i.e. racial preferences that are under the conscious control of the decision maker. Proving an explicit bias is incredibly difficult absent a "smoking gun" statement indicating a desire to harm a person because of his or her race. While technically possible to infer such an explicit preference from surrounding circumstances, successful claims under the Equal Protection Clause are rare.[122] For cases concerning implicit bias, where the racial preference is not under the conscious control of the decision maker, the burden of proof to establish discriminatory intent is exponentially harder.

A court would likely require evidence of discriminatory purpose to challenge prison disciplinary decisions as imposing a disparate impact on a racial group under *McCleskey v. Kemp*.[123] In *McCleskey*, the petitioner confronted the Court with stark statistical evidence of the disparate imposition of the death penalty on Black defendants convicted of killing White victims in Georgia. A defendant was 4.3 times more likely to receive the death penalty if the defendant was Black and the victim was White.[124] While acknowledging the validity of the statistical study, the Court nevertheless refused to apply strict scrutiny because McCleskey had failed to

119. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (holding racial classification for purposes of student school assignment violated the Equal Protection Clause under strict scrutiny).

120. Discriminatory purpose includes a showing that the law was enacted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

121. *See, e.g.*, Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 963–67 (1993) (arguing that the discriminatory purpose requirement in environmental racism cases fails to account for different types of racism); Lawrence III, *supra* note 11, at 323–24 (arguing that the "cultural meaning" of an act better predicts underlying racism than the discriminatory intent requirement). It would appear that the Supreme Court is more approving of "disparate impact" cases based on statutory rights, such as the Fair Housing Act, than for claims arising solely under the Fourteenth Amendment. *See, e.g.*, Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc., 135 S. Ct. 2507 (2015) (holding that the language of the Fair Housing Act indicates a concern for the consequences of an act as compared to the intent of the actor).

122. *See, e.g.*, City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 194 (2003) (holding that while intent may be inferred from the circumstances, evidence was nevertheless insufficient to attribute a discriminatory purpose to state actors in allowing a referendum to take place); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977) (listing factors to be considered for inferring discriminatory intent in disparate outcome cases including the historical background, the legislative history, the specific sequence of events leading up to the decision, and any procedural or substantive departures from normal practice).

123. McCleskey v. Kemp, 481 U.S. 279 (1987).

124. *Id.* at 287.

demonstrate discriminatory purpose in his specific case.[125] At a superficial level, the similarities would be striking. Like McCleskey, prisoners would present statistical evidence on racial differences in disciplinary decisions. Like McCleskey, prisoners would likely lack specific evidence of explicit bias in their particular disciplinary cases.

Nevertheless, there are important distinctions between the criminal appeal by McCleskey and a prisoner's civil claim of implicit racial bias in prison decision-making. First, the Court justified the outcome in *McCleskey* by arguing that the state lacked a real opportunity to explain the alleged racial disparity, in part because the convicting jury members could not be called to testify.[126] While disciplinary processes may differ from facility to facility, in most cases, disciplinary hearings do not provide for jury decision-making.[127] Instead, much like the Title VII cases where disparate impact evidence is allowed,[128] prison disciplinary hearings are conducted by a single officer. Like an employer, that officer is available to rebut a prima facie case of alleged racial discrimination.

Second, the Court hinted that the decision makers in McCleskey's case were simply too varied to attribute racial bias from any one actor or to conclude that the particular actor's bias controlled the sentencing decision.[129] Prison disciplinary cases could be distinguished on the basis that the prison disciplinary system is unitary and lacks the variation implicit in hundreds of juries. But such subtle distinctions are unlikely to receive judicial approval given the unwavering adherence to *Washington v. Davis* in equal protection cases since 1976.

B. Undermining the Intent Requirement in Prisons

In *Johnson v. California*, Garrison Johnson, an African American who had been incarcerated since 1987, challenged an unwritten policy of temporary racial classification in California state prisons as a violation of the Equal Protection Clause of the Fourteenth Amendment.[130] The policy, acknowledged by the California Department of Corrections, assigned new and transfer inmates to temporary quarters based primarily on their race.[131] The Department of Corrections argued that the racial classification policy was necessary to protect new and transfer inmates in two-person cells from racially motivated gang violence.[132]

The Court specifically justified applying strict scrutiny under the Equal Protection Clause, instead of the more lenient *Turner* standard, to racial

125. *Id.* at 293–94.
126. *Id.* at 296.
127. *See, e.g.*, Calavita & Janness, *supra* note 17, at 33–37.
128. *See, e.g.*, *McCleskey*, 481 U.S. at 226 (approvingly citing Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981)).
129. *Id.* at 295.
130. Johnson v. California, 543 U.S. 499, 503 (2005).
131. *Id.* at 502.
132. Brief for Respondents at 30, *Johnson*, 543 U.S. 499 (No. 03-636).

discrimination claims within prisons.[133] Some of the arguments for strict scrutiny apply regardless of whether a person is incarcerated or not. For example, in her majority opinion, Justice O'Connor first relies on precedent, namely *Adarand*,[134] *City of Richmond*,[135] and more recently, *Grutter*,[136] for the proposition that racial classifications imposed by the government are subject to strict scrutiny because only a searching judicial review will "smoke out" invidious uses of racial classifications.[137] Thus, the purpose of employing strict scrutiny is because improper racial motivations may be hidden or not easily discernable. But O'Connor's majority opinion also justifies the use of strict scrutiny specifically because of the potential impact of race-based decision-making *within the prison walls*.

Applying a more stringent standard to racial discrimination claims in prison, according to the majority opinion, does not impede a prison's responsibility to maintain order and security. The more lenient *Turner* standard only governs those rights that must be "compromised for the sake of proper prison administration."[138] Thus, the right to freedom of association, for example, may be subject to a lower level of review under *Turner* because full recognition of those rights would harm orderly operation of the prison.[139] But Justice O'Connor reasoned that individualized consideration of a prisoner's criminal and disciplinary history is more conducive to the goals of order and security than generalized race-based decision-making.

In fact, consideration of race can enhance threats to the security and order of a prison. The Court noted that prohibiting racial discrimination could actually assist in the maintenance of order and security by "bolster[ing] the legitimacy of the entire criminal justice system."[140] In the prison disciplinary context, order and security depend in part on the consent of the governed.[141] If prisoners believe that disciplinary violations improperly take the race of the inmate into account, prisoners are less likely to respect both the rules themselves and the prison guards who enforce them.[142] But to the extent that the rules and enforcers are perceived to be race-neutral, inmates are more likely to cooperate.[143]

133. *Johnson*, 543 U.S. at 510.
134. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
135. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J., plurality opinion).
136. Grutter v. Bollinger, 539 U.S. 306 (2003).
137. *Johnson*, 543 U.S. at 506.
138. *Id.* at 510.
139. *See* Overton v. Bazzetta, 539 U.S. 126, 131 (2003).
140. *Johnson*, 543 U.S. at 510–11.
141. Jonathan Jackson et al., *Legitimacy and Procedural Justice in Prisons*, 191 PRISON SERVICE J. 4, 4 (2010).
142. *See id.* at 5.
143. *Id.* at 10.

Justice O'Connor also noted that the use of race in prison decision-making may actually enhance the potential for racial hostility.[144] To the extent that inmates are aware of the influence of race in the prison disciplinary process, inmates may attempt to use that advantage along racial lines to minimize being caught violating the rules or receive a more lenient punishment. Minority inmates may resent not only the prison guards for their implicit biases, but also White inmates as the beneficiaries of the bias.

Last, the majority opinion relied on the unique situation of custodial incarceration where the government's power is at its "apex."[145] In the context of prison disciplinary policies, the government's power is even further amplified beyond the power inherent in maintaining twenty-four hour custody and control of the incarcerated. For disciplinary violations, the prison administration assumes all of the traditionally separate criminal justice roles of police, prosecutor, judge, jury, and appellate court. These roles are separate within the criminal justice system in part to facilitate nonarbitrary decisions by dividing responsibilities among several actors. The combination of these responsibilities within one decision maker presents the opportunity for decisions that are not impartial. This danger is amplified by the potential for arbitrary decisions, given the lack of standard checks and balances in the disciplinary process.[146]

The underlying rationales in the *Johnson* opinion would appear to support an argument that because of the unique circumstances of incarceration, race-based decision-making within prisons is different. The three prison-specific rationales (the importance of individualized consideration, the danger of racial hostility, and the breadth and depth of the government's power) are applicable in situations of implicit as well as explicit racial bias. An implicit racial preference undermines individualized consideration just as much as an explicit bias, where race becomes a proxy for certain attitudes and assumed behaviors. Causation, i.e. whether the preference improperly influenced the outcome, is unclear. Whether racial bias caused the outcome may matter less than the *perception* of whether race matters and thus the potential for racial hostility. And it could be argued that implicit racial bias is more pernicious in carceral situations than explicit racial bias because of the lack of traditional checks and balances. Use of explicit racial preferences is widely unacceptable and thus improper reliance on explicit racial biases is more likely to be quashed, even in systems without adequate checks and balances. And yet,

144. *Johnson*, 543 U.S. at 507.

145. *Id.* at 511.

146. The traditional separation of powers into three branches is simply not present in the correctional context. Outside of the prison walls, the legislature defines the crimes, the executive prosecutes the crimes, and the judiciary assesses the culpability of the accused. Within the prison walls, the definition of violations, the prosecution, and the assessment are all performed by the prison administration itself. *See, e.g.*, Tibbs, *supra* note 78, at 147–50 (summarizing the disciplinary process in Wisconsin); *see also* James E. Robertson, *Impartiality and Prison Disciplinary Tribunals*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 334 (1991) (recommending "outsider" adjudication of major disciplinary charges because of a lack of impartiality by prison officers).

jurisprudence to date dictates that this higher level of scrutiny is only available for claims of intentional, not implicit, racial discrimination.

As implicit bias research has progressed, there is overwhelming evidence that implicit racial preferences affect everyday decision-making. Extrapolating the results of these tests to the prison disciplinary context indicates that implicit biases have the potential to influence prison disciplinary decisions. And even though the Equal Protection Clause prohibits the inappropriate use of race, the influence of implicit bias—by definition—eludes judicial notice. By requiring discriminatory purpose in all cases of unequal application of facially neutral laws, courts may facilitate the undercover use of race in prison disciplinary decision-making.

III. VALIDATING THE INFLUENCE OF RACE IN PRISONS

Thus far, the Article has focused on the potential influence of race on prison disciplinary decisions and how courts may facilitate that influence by failing to give doctrinal credence to implicit bias research. But courts potentially do more than passively facilitate—through extended deference to prison disciplinary rules and decisions, courts may effectively validate the improper influence of race on prison disciplinary decisions.

Deference to prison administrative decisions is usually justified on two basic grounds. First, the Supreme Court has noted that, "[w]e must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."[147] Deference, then, is appropriate because courts lack the special knowledge to administer correctional institutions.[148] Second, deference is preferred because prison administrators need flexibility to fulfill their primary obligation of maintaining order and security.[149] This flexibility is essential because of the "volatile" nature of the prison environment.[150]

Inmates have contested their disciplinary violations, in part, by arguing that the disciplinary rule is unconstitutionally vague in both facial and as applied

147. Overton v. Bazzetta, 539 U.S. 126, 132 (2003); Lewis v. Casey, 518 U.S. 343, 361, 391 (1995); Turner v. Safley, 482 U.S. 78, 89, 91 (1987) (upholding restriction on inmate correspondence but denying restriction on inmate marriage); Block v. Rutherford, 468 U.S. 576, 588 (1984); Bell v. Wolfish, 441 U.S. 520, 546, 562 (1979); Procunier v. Martinez, 416 U.S. 396, 404 (1974); *see also* Pell v. Procunier, 417 U.S. 817, 826–27 (1974).

148. Beard v. Banks, 548 U.S. 521, 525 (2006). Even if the Court's claim that it lacks expertise in prison management is true in general, I would argue that courts to do have relevant expertise as to the specific topic of prison disciplinary hearings. Prison disciplinary hearings, similar to standard judicial proceedings, allow for evaluations of credibility, the presentation of evidence, witness testimony, and determinations of responsibility. *See, e.g.*, Tibbs, *supra* note 78, at 148–58 (describing the disciplinary process for minor and major violations).

149. *See* Thornburgh v. Abbott, 490 U.S. 401, 408 (1989).

150. Sandin v. Conner, 515 U.S. 472, 482, 484 (1995) (holding that an inmate demonstrates a protected liberty interest when the prison decision enacts an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life").

challenges. Drawing from the First Amendment context, prison disciplinary regulations are considered vague when they fail to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited."[151] Due process requires that disciplinary rules be sufficiently clear to give notice to prisoners of the scope of prohibited conduct.[152] Except for a few cases from the 1980s, courts have rarely held disciplinary rules to be vague on their face regarding attitudinal disciplinary rules.[153] Courts have been more willing to find disciplinary rules as unconstitutionally vague as applied,[154] although by and large courts have upheld ambiguous disciplinary rules. The Supreme Court has specifically noted the relevance of deference to correctional officials, even while declining to address a prisoner's due process claim.[155]

In *Murphy v. Shaw*, the Ninth Circuit upheld a prison regulation prohibiting "insolence" even while noting that "clearer language could be imagined."[156] The Supreme Court reversed the Ninth Circuit on other grounds (whether Mr. Murphy's speech was protected under the First Amendment), and Justice Ginsburg concurred to note that the Court did not address Mr. Murphy's due process challenge.[157] Nevertheless, the case is significant for understanding how malleable prison disciplinary rules can be. As noted previously, "insolence" constitutes "words, actions or other behavior which is intended to harass or cause alarm in an employee" and can include "cursing; abusive language, writing or gestures directed to an employee."[158] Mr. Murphy wrote a letter offering his legal assistance to a prisoner criminally charged with assaulting a prison guard.[159] In addition, Mr. Murphy shared his knowledge that the guard in question had previously engaged in sexual assaults and retaliation against other inmates at that

151. *See* Chatin v. Coombe, 186 F.3d 82, 89 (2d Cir. 1999) (quoting U.S. v. Strauss, 999 F.2d 692, 697 (2d Cir. 1993)). *Chatin* held that a disciplinary rule barring unauthorized religious services was vague as applied to a prisoner's individual silent prayer. *Id.* at 91; *see also* Cassels v. Stalder, 342 F. Supp. 2d 555, 564–67 (M.D. La. 2004) (holding that rule prohibiting "spreading rumors" was vague when prison officials testified that a rumor could be either true or false and was designated as such pursuant to prison administrative discretion).

152. *Chatin*, 186 F.3d at 87; Noren v. Straw, 578 F. Supp. 1, 6 (D. Mont. 1982).

153. *See* Jenkins v. Werger, 564 F. Supp. 806, 807–08 (D. Wyo. 1983) (holding statute barring "unruly or disorderly" conduct was void for vagueness); *Noren*, 578 F. Supp. at 6 (finding rule requiring inmates to act in an "orderly decent manner with respect for the rights of the other inmates" was vague).

154. *See* Adams v. Gunnell, 729 F.2d 362, 369 (5th Cir. 1984) (noting no need to decide if prison rule prohibiting "disruptive conduct" was facially unconstitutional but finding rule was unconstitutional as applied since no prior notice that signing a petition would be considered disruptive).

155. Shaw v. Murphy, 532 U.S. 223, 229 (2001).

156. Murphy v. Shaw, 195 F. 3d 1121, 1129 (9th Cir. 2000), *rev'd on other grounds sub nom.* Shaw v. Murphy, 532 U.S. 223 (2001). The Ninth Circuit only addressed whether the rule was facially vague and not as applied to Mr. Murphy's circumstances. *Id.*

157. *Shaw*, 532 U.S. at 232.

158. *Id.* at 232 n.* (Ginsburg, J., concurring) (quoting Mont. State Prison Policy No. 15-001, Inmate Disciplinary Policy, Rule 009 (App.10)).

159. *Id.* at 225–26.

institution.[160] According to the prison, Mr. Murphy's comments were deemed "insolent," even though his comments were directed to another inmate and not the officer in question.[161] Moreover, the hearing officer upheld the disciplinary charge because the "statement indicates unprofessional actions which tend to intimidate the employee."[162] But the record also lacked evidence that the statements made to another inmate were intended to "harass or cause alarm in" the prison guard.[163] In sum, statements to another inmate regarding arguably criminal conduct by a prison guard, even if not directly conveyed to the prison guard, may constitute insolence.

Though the Ninth Circuit did not address his "as applied" due process challenge, the court hinted that deference was appropriate for his "facial" challenge. The disciplinary regulation is of the "sort that every prison enforces in order to maintain order."[164] Implied in this justification is the same institutional competence idea underlying judicial deference to prison officials. Prisons, rather than courts, are best positioned to determine the regulations necessary to preserve order. And while most observers may agree with this proposition as a general matter, the Supreme Court also recognized that there must be limits to prison decision-making because "prisoners do not shed all constitutional rights at the prison gate."[165]

This general standard of deference is also a feature of judicial review of prison disciplinary decisions. An inmate may challenge the validity of her disciplinary conviction through seeking a writ of habeas corpus.[166] Courts will review claims that a prison disciplinary conviction violated due process under the "some evidence" standard.[167] The "some evidence" standard is satisfied when

160. *Id.* at 226.

161. *Id.*

162. Brief of Amici Curiae Legal Aid Society of N.Y., et al. in Support of Respondent at 21, Shaw v. Murphy, 532 U.S. 223 (2001) (No. 99-1613), 2000 WL 1845914.

163. *Id.* at 29.

164. Murphy v. Shaw, 195 F. 3d 1121, 1128–29 (9th Cir. 2000), *rev'd on other grounds sub nom.* Shaw v. Murphy, 532 U.S. 223.

165. Sandin v. Conner, 515 U.S. 472, 485 (1995). The *Sandin* Court held that placement in administrative segregation must be an "atypical and significant hardship" to implicate a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 500.

166. Edwards v. Balisok, 520 U.S. 641, 648–49 (1997) (holding that a 42 U.S.C. §1983 suit for damages for biased disciplinary hearing under due process necessarily implied the invalidity of his disciplinary conviction and therefore must be brought as a habeas corpus action under 28 U.S.C. § 2254); *see also* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (holding that a damages suit under 42 U.S.C. § 1983 is prohibited where the claim challenges the substance of the disciplinary conviction). *But see Edwards*, 520 U.S. at 649–50 (Ginsburg, J., concurring) (agreeing that bias claim would undermine validity of disciplinary procedure, but that the inmate's claim that the disciplinary hearing violated due process by failing to provide written statement of reasons and evidence would not undermine disciplinary conviction and therefore is cognizable as a damages action under 42 U.S.C. § 1983).

167. Note that federal appellate courts are currently divided on whether an inmate must claim a protected liberty interest at stake in order to claim a due process violation. The Ninth Circuit has held that minimal procedural safeguards apply even when the prisoner lacks a demonstrated liberty

"there is *any* evidence in the record that could support the conclusion reached by the disciplinary board."[168] The "some evidence" rule is even less than the "preponderance of the evidence" standard and essentially only protects against arbitrary decisions.[169] Nor must the reviewing court fully review the record. Determining whether there is "some evidence" "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence."[170]

Inmates can be unruly and difficult. For many, it is a challenge to cede complete control over their lives to the prison administration. Some inmates may in fact rebel against this control by actively challenging prison authority or by manipulating events to their advantage. But the point of this discussion is not whether the inmates were in fact insolent or insubordinate, however those terms are defined. Rather the point is to recognize that courts almost never reach these questions, thus giving legal imprimatur to disciplinary decisions that may have been influenced by implicit racial preferences.

Courts that have reviewed disciplinary conviction challenges almost universally conclude that the "some evidence" standard is met in reviewing disciplinary convictions for attitude offenses. The Seventh Circuit found the standard satisfied in *Portee v. Vannatta*, noting that, "the conduct report alone provides 'some evidence' that he was guilty of insolence."[171] In *Cardenas v. Adler*, a California federal district court found "some evidence" to support the disciplinary charge for insolence even though "the evidence [could not] be characterized as overwhelming."[172] In that case, the evidence consisted solely of a prison staff member's testimony that the inmate "yelled" and "threw" a bottle of cream.[173] But we also know that depending on the prison guard's implicit biases, whether someone "yelled" or "threw" something can be a subjective determination, much

interest. *See* Burnsworth v. Gunderson, 179 F.3d 771, 774–75 (9th Cir. 1999) (finding procedural due process violation when "no shred of evidence of the inmate's guilt is presented" at disciplinary hearing, even when a protected liberty interest is not at stake). *But see* Lee v. Karriker, No. 6:o8cv328, 2009 WL 2590093, at *4, *8–9 (E.D. Tex. Aug. 17, 2009), *aff'd*, 383 F. App'x 491 (5th Cir. 2010) (noting that Fifth Circuit does require a protected liberty interest to claim due process protection, even where the claim is that no evidence was presented to support the disciplinary conviction).

168. Walpole v. Hill, 472 U.S. 445, 455–56 (1985) (emphasis added) (upholding right to due process protection for prison disciplinary proceeding that affected inmate's good time credits, but finding sufficient evidence to satisfy the "some evidence" standard). *But see* Swarthout v. Cooke, 131 S. Ct. 859, 862 (2011) (holding that "some evidence" standard did not apply to state-created liberty interest in parole decision).

169. McPherson v. McBride, 188 F.3d 784, 786 (7th Cir. 1999).

170. *Walpole*, 472 U.S. at 455.

171. Portee v. Vannatta, Nos. 04-1080, 04-1082, 2004 WL 1662289, at *2 (7th Cir. July 20, 2004).

172. Cardenas v. Adler, No. 1:09-cv-00831, 2010 WL 2180378, at *5 (E.D. Cal. May 28, 2010).

173. *Id.* at *4.

like whether a person is holding a weapon or a tool or whether a sentence is considered threatening based on the speaker.[174]

CONCLUSION

This Article has endeavored to discover the potential linkages between implicit biases and their potential influence on prison disciplinary decisions. The cognitive studies on implicit preferences are clear that preferences outside of a person's conscious control can influence perceptions and behavior. But the failure to recognize implicit racial preferences as indicative of racial discrimination facilitates the continuing influence of race in prison decision-making by allowing the role of race to escape judicial review. Ambiguous attitudinal disciplinary charges may then enable the use of these implicit biases by prison officials, particularly where prison officials have broad enforcement discretion. By upholding these "catchall" disciplinary rules against vagueness challenges, courts may allow the improper influence of implicit racial preferences. The influence of these preferences may then be validated by courts reviewing prison disciplinary decisions under the deferential "some evidence" standard.

These linkages are possible, but certainly not proven in this Article. Data on the use of attitudinal charges by prison disciplinary officials are either lacking or outdated. Social cognition studies to date have not examined the role of implicit racial biases specifically in the prison disciplinary context. It may well be that a prisoner's status as an "inmate" takes precedence over perceptions of a prisoner's race. Hence, it would be premature to offer suggestions to decrease the potential influence of unconscious racial biases on prison disciplinary proceedings. But perhaps, by sketching out the potential interactions, we can strategically advocate for more responsive legal doctrines from the courts and more detailed information from prison administrators. Elsewhere, I have argued for enhanced data collection from prisons under a federal incentive regime, similar to the data collected for schools.[175] In that piece, I argued specifically for the collection of data regarding the disciplinary and grievance process in prisons.[176] Such data is critical for further exploration of the potential linkages identified in this Article.

174. Payne, *supra* note 62; Poole & Regoli, *supra* note 12.
175. Armstrong, *supra* note 2, at 469–75.
176. *Id.* at 472–73.