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Law School Rankings and the Impossibility of Anti-Racism

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ARTICLE

LAW SCHOOL RANKINGS AND THE IMPOSSIBILITY OF ANTI-RACISM

RORY BAHADUR*

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INTRODUCTION

This Article uses the U.S. News law school rankings to illustrate how powerful, invisible, and stubborn systemic racism is. This Article does not level allegations of intentionally blameworthy conduct at U.S. News, or any person or entity.¹ More broadly, this Article does not address conscious

1. This Article does not address U.S. News's broader problems with racial diversity that are not necessarily implicit and suggest ignorance of diversity, or the non-white population reflected in its failed attempt to rank law schools based on diversity. See Caroline Spiezio, *U.S. News Delays Law School Diversity Rankings After Deans' Uproar*, THOMSON REUTERS WESTLAW TODAY (Mar. 25, 2021), [https://today.westlaw.com/Document/12ea6be208dc711ebb3b7b5bc2f979fe9/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Default\)](https://today.westlaw.com/Document/12ea6be208dc711ebb3b7b5bc2f979fe9/View/FullText.html?transitionType=SearchItem&contextData=(sc.Default)) [https://perma.cc/56VN-K8S7] ("U.S. News & World Report is postponing plans to release a new ranking of law schools based on their racial and ethnic diversity, after deans raised concerns that the company wasn't counting multiracial students as underrepresented minorities. Robert Morse, U.S. News & World Report's chief data strategist, told University of Oregon School of Law Dean Marcilynn Burke Thursday, in email obtained by Reuters, that the diversity-based ranking that was set to be published on March 30 will now be released at a

and deliberate racism, or the examples of this type of racism with which America's history is replete. Nor is this Article attempting to undervalue the significant impact of deliberately racist actions in American history on the economic disparity between white people and people of color.²

Instead, I make an untrue assumption: All Americans of every phenotype are anti-racist. This assumption is akin to those made in the context of a summary judgment motion. In other words, a summary judgment movant often assumes the other side's facts are true, even when they are not, solely to eliminate factual disputes for the purpose of the motion. The movant then contends even if the facts are as the opponent states they are, the movant's position is still valid, and the movant's thesis of the litigation prevails.

Even if every American were consciously anti-racist and consciously desired to achieve a racially equitable society, unconscious mechanisms resulting in system justification prevent such a realization. In the context of legal education, the U.S. News rankings catalyze and illustrate these system justifying mechanisms. Without understanding these system justifying mechanisms and the conditions mitigating their operation, an anti-racist America is unattainable.

Part I of this Article briefly discusses the rankings methodology. Part II of this Article defines racism and systemic racism, and introduces system justification theory as the mechanism by which racism and systemic racism operate. Part III explains invisible, powerful system justification occurs via unconscious mechanisms among anti-racist Americans, including people of color, reinforcing the white dominant status quo in society. This occurs even though these system justifying actions are often contrary to sincere and conscious individual desires for anti-racism and equality. Part III also provides opportunities to contextualize the operation of system justification.

later, 'undetermined date.' 'After receiving your feedback, we decided to remove the law diversity ranking so we can devote more time to ensuring it accurately reflects the data of underrepresented minorities, including students of two or more races,' Morse said in the email.'). Should we rely on a corporation wholly unaware of the multi-racial complexity of our nation to rank diversity?

2. Although this Article does not discuss slavery, Jim Crow, redlining, the Gnadenhutten massacre, the Battle of Tippecanoe, forced removal, the *Korematsu* and *Iqbal* cases, or the lack of outrage at the dissonance between the Takings Clause of the 5th Amendment and the insignificance of Indian ownership and inability to validly transfer property in *Johnson v. McIntosh*, their absence should in no way, shape, or form be taken as a minimization of these and other deliberately racist events perpetuated in the name of white dominance. See *infra* Part C. Athlete Protests (providing an example of post Jim Crow racism).

Once that context is created, Part IV carefully and precisely explains how the rankings invoke, utilize, and rely on systemic racism, and why we experience no dissonance about this, even if we are anti-racists.

Finally, Part V illustrates why systemic racism based on system justification is so stubborn. System justification is a global phenomenon that automates the creation of in-groups and out-groups. In America, race and whiteness³ is the distinction between the in-groups and out-groups. However, there are other countries where whiteness is not a distinguishing factor between in-groups and out-groups in the existing societal hierarchies.⁴ Therefore, more powerful forces, other than just race, must be at play in perpetuating inequitable social hierarchies.

Most disturbingly, Part V explains why, after the reader becomes aware of how the rankings are infected with systemic racism, we will do nothing to change the system, and the anti-racists among us will likely have a clear conscience about continuing to rely on racist metrics.

I. U.S. NEWS AND WORLD REPORT RANKINGS METHODOLOGY⁵

“The U.S. News’ Best Law Schools rankings evaluate institutions on their successful placement of graduates, their faculty resources, the academic achievements of entering students, and opinions by law schools, lawyers and judges on overall program quality.”⁶

More specifically, peer assessment or what other law school deans, academic deans, faculty recruitment committee chairs, and recently tenured

3. See, e.g., Diversity Councils, *What is Whiteness?* PORTLAND CMTY. COLL., <https://www.pcc.edu/diversity-councils/cascade/whiteness-history-month/whiteness/> [<https://perma.cc/U6JA-9B2P>] (defining “whiteness” as “the construction of the white race, white culture, and the system of privileges and advantages afforded to white people in the U.S. (and across the globe) through government policies, media portrayal, decision-making power within our corporations, schools, judicial systems, etc.”).

4. Examples include: the caste system in India; the fate of the Zhuang, Manchu, Hui, Miao, and Uyghur populations in China; and the Kikuyu as the dominant socioeconomic group in Kenya. See Emily C. Hannum & Meiyang Wang, *Ethnicity, Socioeconomic Status, and Social Welfare in China 2* (Asia-Pacific Educ., Language Minorities & Migration (ELMM) Network Working Paper Series 2, 2010), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=1001&context=elmm> [<https://perma.cc/JN8L-AKC5>] (listing the largest ethnic minority groups in China); see also *East Africa Living Encyclopedia: Kenya—Ethnic Groups*, AFR. STUDIES CTR. UNIV. PA., <https://www.africa.upenn.edu/NEH/kethnic.htm> [<https://perma.cc/J73R-EWA9>] (noting the significant and disproportionate influence of Kenya’s largest ethnic group on politics and commerce).

5. Robert Morse et al., *Methodology: 2022 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 29, 2021, 9:00 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> [<https://perma.cc/9WF4-XL9N>].

6. *Id.*

law professors and members of the legal profession think of a law school account for 40% of the school's ranking.⁷

The other metric accounting for another 21% of a law school's ranking is the school's selectivity.⁸ These selectivity components are broken down into a school's median matriculating LSAT and GRE scores and reflect 11.25% of the total ranking.⁹ The mean undergraduate GPA reflects 8.75% of the ranking.¹⁰

Placement success accounts for 25.25% of a school's rank.¹¹ Employment rates ten months after graduation accounted for eighteen of the 25.25% associated with placement, and bar passage rate accounted for 2.25% of the placement metric.¹² However, the employment rate ten months after graduation is tied to the bar examination rate because jobs requiring bar passage are weighed more heavily than jobs that do not require bar passage.¹³ Law school debt also accounted for a small portion of the placement ranking.¹⁴

The remaining metrics are not relevant to this Article.

But to summarize:

1. 40% of a school's ranking comes from other law school administration and faculty, and members of the legal profession's

7. *Id.*

8. *Id.*

9. *Id.* Only 31% of law schools reported both LSAT and GRE scores; therefore, this Article ignores the impact of GRE scores on the ranking methodology because the vast majority of law schools rely predominantly on LSAT scores. *Id.* For simplicity's sake, we attribute the 11.25% entirely to LSAT scores and argue the assertions in the article are no less valid because the exact same biases impacting the LSAT also impact the GRE. *See Bias and Barriers Have Admissions Officials Asking: Why Require the GRE?*, TAKEPART (Nov 7, 2015), <https://www.yahoo.com/news/bias-barriers-admissions-officials-asking-why-require-gre-155340250.html> [<https://perma.cc/4KKX-6D8K>] (noting an existence of bias in the GRE).

10. Morse et al., *supra* note 5.

11. *Id.*

12. *Id.*

13. *Id.*

For both ranking factors, schools received maximum credit when their J.D. graduates—in alignment with ABA reporting rules—obtained long-term jobs that were full time, not funded by the law school, and where a J.D. degree was an advantage or bar passage was required. In contrast, jobs that were some combination of short-term, part-time, funded by the law school and/or did not require bar passage received less credit by varying amounts, determined by the combination.

Id.

14. *Id.* (identifying indebtedness as a new placement indicator).

quality assessment of a particular law school.¹⁵ Therefore, there is a strong correlation between peer assessment scores and final rankings scores.

2. Median matriculant standardized test scores account for 11.25% of a law school's ranking.¹⁶ We do not distinguish between GRE and LSAT in this Article because only a few schools use both the GRE and LSAT, and the GRE is subject to the same biases regarding minority performance as the LSAT exam.¹⁷
3. Bar passage rate accounts for 2.25% of the law school's ranking.¹⁸ Although bar passage is tied to the employment metric accounting for 18% of a school's ranking, we will assume very conservatively, that bar passage is essentially responsible for 1/3 of the placement metric or approximately 6%.¹⁹

These metrics, therefore, account for 59.5% of a law school's ranking.²⁰ However, the metrics also reflect a societal status quo of white dominance and black disenfranchisement, invoking powerful, quintessential cognitive mechanisms promoting societal stability and preventing societal change. These cognitive mechanisms create system justification, and in America, systemic racism is a feature of system justification. To understand how this can occur even without intentional or conscious racism, it is important to define racism for the purposes of this Article.

II. DEFINING RACISM AND SYSTEMIC RACISM

First, we must agree that racism has nothing to do with "belief," intent or animosity. It is the *result* of actions and policies that create and perpetuate racism. The grand delusion that one can only be racist if there is hate in one's heart is the biggest myth of white supremacy and one of the largest reasons it still exists.

15. *Id.* (considering a participant's quality assessment as "expert opinion" and noting "overall quality on a scale from marginal (1) to outstanding (5), marking '[do not] know' for schools they did not know well enough to evaluate[]").

16. *Id.*

17. *See id.* ("There were 60 law schools—31% of the total ranked—that reported both the LSAT and GRE scores of their 2020 entering classes to U.S. News.").

18. *Id.*

19. *Id.*

20. *Id.*

The reason poor black children are more likely to attend underfunded schools is the result of the legacy of segregation, redlining and government policy. Black people convicted of the same crimes as whites receive longer sentences partly because of resource allocation disparities in legal representation. Implicit biases and lack of training are part of the reason black men are three times more likely to be killed by police.

Black children born to wealthy black parents have a lower chance at economic success than white children born to poor parents. Black students are punished more harshly than white students who commit the same offenses. Black workers with the same education and experience are paid less.

This. Is. Racism. . . .

Every single top-tier educational institution in America is disproportionately white and Asian. White and Asian wages are higher than the wages of blacks and Hispanics with the same education and experience. White people are disproportionately represented in government. They use drugs at the same rate but are arrested at lower rates.²¹

This Article assumes, while much racism is intentional, the iteration of racism described above is unintentional, imbued with normativity, and so subtle we remain unaware it is operating. Nothing in this Article is meant to appeal to individuals who consciously believe white people are superior and black people are inferior. Rather, this Article addresses the unintentional systemic racism, which is unaffected even if every American considered anti-racism normative.

If racism is the marginalization of individuals based on their race, then systemic racism is the reflection of this phenomenon in established cultural institutions.²²

21. Michael Harriot, *Americans Don't Disagree About What Racism Is . . . White People Do*, THE ROOT (Nov. 20, 2018, 4:35 PM), <https://www.theroot.com/americans-dont-disagree-about-what-racism-is-white-p-1830573275> [<https://perma.cc/MW24-42WE>].

22. Kate Slater, *What Is Systemic Racism?*, TODAY (Feb. 4, 2021, 1:49 PM), <https://www.today.com/tmrw/what-systemic-racism-t207878> [<https://perma.cc/N1T8W-5SZX>].

It's when individual attitudes of prejudice and bigotry are baked into the operations of cultural institutions. And as Fleming writes, "The consequences of systemic racism are vast—from the burgeoning racial wealth gap, political disenfranchisement, mass incarceration and racist immigration policies to microaggressions, racial profiling, racist media imagery and disparities in health, education, employment and housing."

Id.

Examples of systemic racism are: “a [b]lack mother is 3 to 4 times more likely to die during childbirth” compared to a white mother; babies are “twice as likely to die during childbirth if the birth mother is [b]lack,” and black people are “more than 3 times as likely to die from” COVID.²³ These results are not the result of genetic or individual shortcomings, but instead represent centuries of disenfranchising black people, which have become invisibly and unconsciously woven into the very metrics we use to assess success and excellence.²⁴

I want to reiterate here that systemic racism is not all implicit or unconscious. As previously mentioned, deliberate and conscious systemic racism exists, but this Article focuses on the unconscious aspects of systemic racism.²⁵

The word systemic in systemic racism is dispositive because it invokes system theory.²⁶ Synonyms, like institutionalized racism, distract from the fact that systemic racism conceptualizes societies as systems, and system theory provides that all systems gravitate towards stability. Stability is anathema to change.²⁷

A tangible result of system justification is a person's motivation, at an unconscious level, “to defend, bolster and justify existing social, economic, and political institutions and arrangements because doing so” satisfies important human psychological needs.²⁸ Those needs include the security

23. *Id.*; see also Ann Choi et al., *Long Island Divided*, NEWSDAY (Nov. 17, 2019), <https://projects.newsday.com/long-island/real-estate-agents-investigation> [<https://perma.cc/NG5M-UVRJ>] (suggesting some real estate agents practice unequal treatment toward minority homebuyers).

24. N’dea Yancey-Bragg, *What Is Systemic Racism? Here’s What It Means and How You Can Help Dismantle It*, USA TODAY (Jan. 29, 2021, 8:53 AM), <https://www.usatoday.com/story/news/nation/2020/06/15/systemic-racism-what-does-mean/5343549002> [<https://perma.cc/GD8H-85ER>].

25. Especially recent is the systematic real estate discrimination on Long Island uncovered in a three-year long investigation. See Choi et al., *supra* note 23 (indicating black home buyers face severe discrimination while house hunting). Another example is the current resistance to the teaching of critical race theory. Mark Keierleber, *Critical Race Theory and the New ‘Massive Resistance,’* 74 MILLION (Aug. 18, 2021), <https://www.the74million.org/article/critical-race-theory-massive-resistance-brown-v-board/> [<https://perma.cc/RW6Q-VL9B>].

26. JOHN T. JOST, A THEORY OF SYSTEM JUSTIFICATION 6 (2020) [hereinafter JOST, SYSTEM JUSTIFICATION] (referring to a system as “those operative forces in society . . . that control your being, guide your behaviour, and generally are an authority over you.”).

27. John T. Jost, *A Theory of System Justification: Is There a Nonconscious Tendency to Defend, Bolster and Justify Aspects of the Societal Status Quo?*, AM. PSYCH. ASS’N (June 2017), <https://www.apa.org/science/about/psa/2017/06/system-justification> [<https://perma.cc/LR7X-68MF>].

28. JOST, SYSTEM JUSTIFICATION, *supra* note 26, at 6.

of being able to live in and belong to a society, even if we do so “wretchedly” as a disfavored group in a society.²⁹

System justification, therefore, perpetuates system structure. And implicit bias is a mechanism by which system justification occurs.³⁰ System justification allows us to operate outside of our conscious moral parameters and we unconsciously differentiate between the dominant social group (the in-group) and the less dominant societal groups (the out-group).³¹ Unlike when we consciously decide to behave differently from our conscious notions of right and wrong, we experience no dissonance and remain unaware we are acting contrary to our beliefs because implicit biases are not subject to introspection.³²

System justification makes people feel better about a society’s status quo.³³ In this way it is palliative, exactly as Marx described religion.³⁴ As a result of system justification, we normalize whatever metric keeps the society unchanging or stable, and a stable society means the perpetuation of

29. *Id.*

30. Rory Bahadur, *Newsworthiness As an Internet-Era Mitigant of Implicit Bias*, 88 UMKCL. REV. 1, 19 (2019).

31. *Id.* at 20.

[T]he attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness.

Id. at 18 (quoting *Understanding Implicit Bias*, KIRWAN INST. (May 29, 2012), <https://kirwaninstitute.osu.edu/article/understanding-implicit-bias> [<https://perma.cc/J9Y3-35F6>]).

32. *Id.* at 19 (warning implicit biases “can override our conscious value systems”); *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1508 (2005) (identifying a connection between the mental process of implicit bias and race theory).

More troubling, we may honestly lack introspective access to the racial meanings embedded within our racial schemas. Ignorance, not deception, may be the problem. Relatedly, our explicit normative and political commitments may poorly predict the cognitive processes running beneath the surface. While connected to the automaticity point, this disconnect between explicit and implicit bias raises a different issue: dissociation. The point here is not merely that certain mental processes will execute automatically; rather, it is that those implicit mental processes may draw on racial meanings that, upon conscious consideration, we would expressly disavow. It is as if some “Trojan Horse” virus had hijacked a portion of our brain.

Kang, *supra* (footnotes omitted).

33. JOST, SYSTEM JUSTIFICATION, *supra* note 26, at 8.

34. *Id.*

the society's structure.³⁵ The very metrics we use to measure success and desirability themselves also ensure society remains stable by resisting change.³⁶

The advantaged or dominant societal group experiences system justification more powerfully than the disadvantaged group because the desire to maintain the status quo combines with forces seeking to maintain the status quo, like “self-esteem, in-group favoritism, and psychological well-being.”³⁷

However, even the disadvantaged or out-groups in society favor the dominant or in-group because of system justification, but the dominant group needs to perpetuate the status quo more than the disadvantaged group.³⁸ In America, the status quo that system justification perpetuates involves whites as the dominant class or in-group,³⁹ and more specifically, white males.⁴⁰

Over a century of scholarship establishes that people favor their own groups over other groups.⁴¹ Powerful unconscious mood swings drive this favoritism that overrides our conscious moral judgments about right or wrong.⁴² People tend to have positive attitudes about one another when

35. *Id.* at 9 (recognizing system justification accounts for a wide range of outcomes, “including appraisals of fairness, justice, legitimacy, deservingness, and entitlement . . .”).

36. *See id.* (summarizing how system justification theory explains “how and why people accept and tolerate, and often vindicate, all of the things they do (and the things that are done to them and on behalf of them) in a wide variety of social, economic, and political contexts[.]”).

37. *Id.* at 8.

38. *Id.* at 9; *see also* David S. March & Reiko Graham, *Exploring Implicit Ingroup and Outgroup Bias Toward Hispanics*, GRP. PROCESSES & INTERGROUP RELS., June 11, 2014, at 1, 10 (“[N]egative ingroup bias may function not only in parallel to outgroup bias, but perhaps more subversively.”).

39. Bahadur, *supra* note 30, at 19.

40. *See generally* JOE R. FEAGIN & KIMBERLEY DUCEY, *ELITE WHITE MEN RULING: WHO, WHAT, WHEN, WHERE, AND HOW* (2017) (providing an intersectional analysis of the reality of being an elite white man in America).

41. JOST, *SYSTEM JUSTIFICATION*, *supra* note 26, at 8.

42. *See generally* Konrad Bocian & Bogdan Wojciszke, *Self-Interest Bias in Moral Judgments of Others' Actions*, 40 *PERSONALITY & SOC. PSYCH. BULL.* 898 (2014) (explaining the interplay between the unconscious mind and self-interest bias).

When the observers were induced to dislike an actor, the self-interest bias disappeared, and the actor remained immoral in the eyes of those who disliked her. . . . This result has some disconcerting implications, which is typical for the self-interest bias. When self-interest is involved, individuals may reframe others' counternormative behaviors as virtuous. For example, a librarian waiving a fee may be reframed as an authority figure who exhibits prosociality toward a beleaguered student—a generous act of human-to-human kindness. A student who cheats on a task during a psychology experiment may be viewed as someone displaying a small, virtuous act

they feel “similarity” with the actor, and this similarity leads to the unconscious creation of in-groups and out-groups, with more favorable moral judgments towards members of the in-group.⁴³

The existence of in-groups and out-groups, and more favorable judgments of in-group actors than out-group actors, are at the core of implicit bias theory.⁴⁴ Implicit bias leads to ethical blind spots—people unconsciously acting in a manner inconsistent with the ethical values they honestly believe they possess.⁴⁵

One theory for the genesis of this bias leading to more favorable judgments about similar phenotypes,⁴⁶ even when inconsistent with a

of rebellion against a powerful, capricious-seeming authority figure (the experimenter). It is possible that the participants were not viewing the actor’s act as immoral.

Id. at 906.

43. *Id.*

44. Kang, *supra* note 32, at 1512.

According to Nilanjana Dasgupta, the “first wave” of research demonstrated that socially dominant groups have implicit bias against subordinate groups (White over non-White, for example). By her count “almost a hundred studies have documented people’s tendency to automatically associate positive characteristics with their ingroups more easily than outgroups (i.e., ingroup favoritism) as well as their tendency to associate negative characteristics with outgroups more easily than ingroups (i.e., outgroup derogation).” These studies address not only automatic attitudes (prejudice), but also automatic beliefs (stereotypes). In the United States, bias has been found against Blacks, Latinos, Jews, Asians, non-Americans, women, gays, and the elderly. Implicit bias against outgroups has also been found in other countries.

Id. (footnotes omitted).

45. *Id.* at 1512–13.

Fascinating is the overwhelming evidence that implicit bias measures are dissociated from explicit bias measures. Put another way, on a survey I may honestly self-report positive attitudes toward some social category, such as Latinos. After all, some of my best friends are Latino. However, implicit bias tests may show that I hold negative attitudes toward that very group. This is dissociation—a discrepancy between our explicit and implicit meanings. This dissociation appears most vividly when “the group averages for conscious and unconscious measures [are] placed side-by-side using a common metric,” which reveals “wide divergences” between the means.

Id.

46. See generally Drew S. Jacoby-Senghor et al., *When Bias Binds: Effect of Implicit Outgroup Bias on Ingroup Affiliation*, 109 J. PERSONALITY & SOC. PSYCH. 415 (2015) (defining the process of implicit homophily); see also B. Keith Payne & C. Daryl Cameron, *Divided Minds, Divided Morals: How Implicit Social Cognition Underpins and Undermines Our Sense of Social Justice*, in HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, & APPLICATIONS 445, 445 (Bertram Gawronski & B. Keith Payne eds., 2010) (“Implicit reactions are often hierarchical, dividing the world into ‘us’ and ‘them[]’ . . .”).

person's conscious morality,⁴⁷ is tribalistic morality or parochial altruism, which suggests:

[W]e spent so much of our evolutionary history in small bands of hunter-gatherers that our brains remain predisposed to a certain *tribalistic* morality, or what researchers have termed *parochial altruism*—in other words, an ingrained, unconscious moral bias toward our in-group members (however insular that group may be), and against those we deem as outsiders.⁴⁸

Recent scholarship using MRI brain scans suggests in-group favoritism and system justification may be deeply ingrained and occurs in the amygdala, or the brain's emotional center, and other areas of the brain typically associated with unconscious processing, like the pre-frontal cortex.⁴⁹

Our biased, unconscious decision making happens quickly, is connected to mood, and is powerful because it is “nasty, brutish, and short-sighted[.]”⁵⁰ overriding our conscious value set. The result of these unconscious processing heuristics is a more immediate and reflexive response than we consciously believe we would have to out-group or dissimilar people.⁵¹ This is true even if that response is one that the responder would consciously consider counter normative.⁵² Daniel

47. Ovul Sezer et al., *Ethical Blind Spots: Explaining Unintentional Unethical Behavior*, 6 CURRENT OP. PSYCH. 77, 77 (2015).

48. Hector A. Garcia, *God, Satan, and Our Moral Bias: Can Science Explain Our Moral Bias Toward God Over Satan*, PSYCH. TODAY (Aug. 2, 2015), <https://www.psychologytoday.com/us/blog/alpha-god/201508/god-satan-and-our-moral-bias> [<https://perma.cc/5YP8-95EW>] (footnotes omitted).

49. See Bernard J. Luskin, *MRIs Reveal Unconscious Bias in the Brain*, PSYCH. TODAY (Apr. 7, 2016), <https://www.psychologytoday.com/us/blog/the-media-psychology-effect/201604/mris-reveal-unconscious-bias-in-the-brain> [<https://perma.cc/29FX-33SX>] (relating areas of the human brain to the process of implicit bias); see also *Understanding Bias and the Brain*, KORN FERRY, <https://www.kornferry.com/insights/briefings-magazine/issue-23/understanding-bias-and-brain> [<https://perma.cc/6L3Q-UCK7>] (discussing the amygdala region of the brain).

The amygdala receives direct input from all sensory organs, enabling it to respond rapidly to immediate threats in advance of more elaborative cognitive processing. It plays a central role in arousal, attentiveness and triggering the flight-or-fight response, reacting to social threats in exactly the same way it reacts to physical ones. Unconscious bias, then, is the immediate, reflexive, defensive reaction to the “other.”

Understanding Bias and the Brain, *supra* note 49.

50. Payne & Cameron, *supra* note 46, at 445.

51. *Understanding Bias and the Brain*, *supra* note 49.

52. Bocian & Wojciszke, *supra* note 42, at 906 (finding a connection between the presence of a self-interest with the self-assuring belief counter normative behaviors are moralistic).

Kahneman's book, *Thinking Fast and Slow*, also explains the power of these processing shortcuts on which all humans rely.⁵³

What makes these implicit biases so powerful is the same thing that creates so much defensiveness about them: They are not subject to introspection.⁵⁴ "Good, moral and antiracist" people never even realize they are acting outside of their own moral construct.⁵⁵ As a result, when their conduct is pointed out as racist, the shock of that reality usually results

53. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 415 (1st ed. 2011) ("The attentive System 2 is who we think we are. System 2 articulates judgments and makes choices, but often endorses or rationalizes ideas and feelings that were generated by System 1.")

This mirrors the idea, developed in psychologist Daniel Kahneman's book "Thinking, Fast and Slow," that we have two systems of thinking: one that is fast, intuitive and impressionistic (System 1), and one that is slow, deliberate and systematic (System 2). System 1 is automatic and efficient, but it's in a hurry and prone to mistakes. It seeks to quickly identify patterns, a skill that has been key to human survival and evolution. But in doing so, it jumps to conclusions of causality based upon even the sketchiest of information, and tries to interpret scant input by creating a narrative, however flawed it may be. System 2 thinking, on the other hand, seeks to test concepts and detect complexity and nuance.

Understanding Bias and the Brain, *supra* note 49.

54. *Supra* text accompanying note 31.

55. See Neil Levy, *Implicit Bias and Moral Responsibility: Probing the Data*, 94 PHIL. & PHENOMENOLOGICAL RSCH. 3, 3–5 (2017) (describing how implicit bias manifests unknowingly to the person); see also Michael Brownstein, *Implicit Bias*, STAN. ENCYC. OF PHIL. (Feb. 26, 2015), <https://stanford.library.sydney.edu.au/archives/sum2017/entries/implicit-bias/> [<https://perma.cc/K7KX-79TU>] (defining implicit bias as "a term of art referring to relatively unconscious and relatively automatic features of prejudiced judgment and social behavior[]"). The example of implicit bias used in *Implicit Bias* is as follows:

Frank, who explicitly believes that women and men are equally suited for careers outside the home. Despite his explicitly egalitarian belief, Frank might nevertheless implicitly associate women with the home, and this implicit association might lead him to behave in any number of biased ways, from trusting feedback from female co-workers less to hiring equally qualified men over women.

Brownstein, *supra*.

There is now persuasive evidence that implicit bias against a social category, as measured by instruments such as the IAT, predicts disparate behavior toward individuals mapped to that category. This occurs notwithstanding contrary explicit commitments in favor of racial equality. In other words, even if our sincere self-reports of bias score zero, we would still engage in disparate treatment of individuals on the basis of race, consistent with our racial schemas. Controlled, deliberative, rational processes are not the only forces guiding our behavior. That we are not even aware of, much less intending, such race-contingent behavior does not magically erase the harm.

Kang, *supra* note 32, at 1514.

in defensiveness and the typical, “but I am not racist, I have a black friend,” or “my best friend from college is black,” response.

What causes the counter normative behavior is an evolutionary mechanism that creates heuristics, or efficiency shortcuts, for processing information. Bias is simply a charged word for an information processing shortcut without which humans would still be cave-dwelling creatures.⁵⁶ “If you have a brain, you have bias.”⁵⁷

“Evolutionarily, biases act as adaptive processes that allow us to use prior knowledge and experiences to inform our decisions and actions in the present[,]” and are in essence the invisible lenses with which every human sees the world.⁵⁸ “[B]ias is not inherently negative; rather, it is a natural part of the human condition, born of survival instincts and reinforced by experiences.”⁵⁹

56. Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332, 398 (2013).

57. Komal Gulati, *Here's Why Having a Brain Means You Have Bias*, NEUROLEADERSHIP INST.: YOUR BRAIN AT WORK (July 22, 2020), <https://neuroleadership.com/your-brain-at-work/unconscious-bias-in-brain> [<https://perma.cc/BTX7-Z67B>].

58. *Id.*

59. Pamela Fuller, *The Nature of Bias*, ASS'N FOR TALENT DEV. (Dec. 19, 2019), <https://www.td.org/insights/the-nature-of-bias> [<https://perma.cc/28S8-3PHD>]; Mary E. McLean & Linelle Campbell, *Implicit Bias Is Both Helpful and Harmful, So What Can We Do?*, EM RESIDENT (June 11, 2020), <https://www.emra.org/emresident/article/implicit-bias> [<https://perma.cc/DA5M-8LK5>].

Implicit bias is present in almost everything we do. Humans have been taught to rely on it as a natural (almost instinctive) survival skill, and our brains are hardwired to use it. A great deal of implicit bias is actually helpful and very necessary. We use it in the absence of complete information, so emergency physicians *especially* use it to make quick decisions for patients. This is a major aspect of essential heuristic decision making.

“A heuristic is a mental shortcut that allows people to solve problems and make judgments quickly and efficiently. . . [They] allow people to function without constantly stopping to think about their next course of action.”

Without bias and heuristic decision making, our careers in emergency medicine would be unsustainable—we might see one patient every three hours, maximum. But improper use of bias and heuristics is harmful too. It can lead to numerous types of cognitive errors in medical decision making. Part of the battle is pinpointing which biases are helpful, and which are harmful.

Think of it this way: an unconscious mystery ED patient who *just looks* like an addict will probably get naloxone. Much of the time, that is a good thing; patients do benefit from the emergency physician's pattern recognition and quick decisions. But what happens when the physician anchors on the idea of opiate overdose, prematurely closes the case after giving naloxone, and fails to consider other causes? After all, this patient *just looks* like an addict and nothing else. The patient's blood glucose of 20 might be missed. That is where the harm appears.

McLean & Campbell, *supra* (footnote omitted).

Generally, bias manifests itself such that humans view people they consider similar to themselves more favorably than people considered different. Similarly, bias heuristics result in the tendency to rush to conclusions and judgments. Finally, bias causes humans to believe that their own world view is more valid than other views.⁶⁰

Before explaining how these theories are reflected in the rankings it is important to create context for the operation of system justification and bias. The following examples of implicit bias should help illustrate its pervasiveness and the power bias wields even though, or perhaps, *because* it is implicit and not subject to introspection.

III. CONTEXTUALIZING BIAS AND SYSTEMIC RACISM

A. *Ships and Soccer*

From 1992 to 1996, I worked as a fisheries biologist for the National Marine Fisheries Service aboard fishing boats in the Gulf of Alaska and the Bering Sea. From 1996 until 2000, when I started law school, and even during the first winter break of my law school experience, I worked as a shipboard environmental consultant for the Army Corps of Engineers. I worked aboard dredging vessels from the Canada-Maine border along the coast of the United States to the Texas-Mexico border near South Padre Island.

A challenging part of these jobs involved walking aboard a commercial fishing vessel or dredge, introducing myself and then proceeding to live among the people whose activities I was reporting to the government for three months. These reports could end the season and livelihood for the people employed on the vessels.

60. Gulati, *supra* note 57. Explaining five results of bias:

1. **Similarity:** The tendency to view people who look or think like us more favorably than people who are different
2. **Expedience:** The tendency to rush to conclusions to minimize cognitive effort
3. **Experience:** The tendency to believe that how we see the world is inherently truer than someone else's perspective
4. **Distance:** The tendency to assign greater value to those things that we perceive to be closer to us, rather than further away
5. **Safety:** The tendency to over-account for negative outcomes instead of positive ones

Id.

On one occasion I walked on board a vessel and introduced myself to the captain, the chief engineer, and the cook. They were all white males. The chief engineer's first words to me were, "Are you a n[fully spoken]r? Because we do not take instructions from n[fully spoken]s." Still in shock and unable to respond, I was processing what had just happened when the cook chimed in and said to the engineer, "He's obviously not a n[fully spoken]r, look at him, he's obviously a sand n[fully spoken]r."

The engineer was deliberately or consciously racist. He chose (conscious action) to "not take instructions" from people like me. He made that decision solely on the color of my skin. It is critical to reiterate this conscious racism is not relevant to the bias this Article explores.

Fast forward to 2007, and I had just accepted a doctrinal position as a law professor at Washburn University in Topeka, Kansas. Very early on, we realized our four-year-old daughter had a knack for soccer. Knowing nothing about the soccer structure we, like any other parent, paid an inordinate amount of money for our daughter to join a competitive soccer team.

Over time, it became clear the coach knew very little about soccer and did not have a United States Soccer Foundation (USSF) license. It also became clear that many girls with immense talent would never get the opportunity to play soccer simply because it was unaffordable. Having played soccer in the Caribbean, I decided to pay my own fees to test for and obtain two USSF soccer licenses. A few years later and a couple of thousands of dollars invested, my wife and I announced we were forming a competitive soccer team for girls with no coaching or training fees. We did this to allow the girls who could not otherwise afford soccer to play the game and have a chance at college scholarships in this sport.

We paid for training facilities and initially bought the uniforms for all the girls, and we did well as a team. Some girls on the team had sisters or friends playing on the other expensive teams, coached by white men generally, some of whom had no licenses and had never played the game.

Many of these coaches were very loud and as corrective of players in the game as I was. But some of them also yelled at referees and got ejected from games for angrily arguing with officials or kicking balls away in anger on the sidelines when they disagreed with the referee. The parents laughed off this conduct: "Ha ha that [white male name] is hilarious. He just got kicked out of the game for yelling and being angry. Oh well, you know it's just [insert white male name] being [insert white male name]."

Yet, when I corrected one of the girls on my team, or assessed for that particular game she should receive less playing time than other girls, I received a different response. Some of the parents⁶¹ would often pull me to the side after the game or the next day and deliver a diplomatic version of, “Who do you think you are, correcting her in front of everyone like that, or not giving her more playing time? She’s trying her best, coming to all the practices, and that is good enough.”

For years I struggled and blamed myself for not doing the right things (whatever they were). I blamed myself for the disparate treatment I received compared to the white male coaches with no experience and no coaching licenses. These parents were my friends, they liked me, and neither they nor I could ever believe my race played a part in the disparate treatment.

Until one day at a team meeting, I mentioned that I was no longer going to coach because the girls were old enough to benefit from playing for different teams based on their different skill levels. At the end of that meeting, an African-American parent, who is now a dear friend, pulled me aside and said,

Your problem is that you never understood that it wasn’t something you were doing, why they treated you differently. They didn’t do it on purpose, it’s just that you aren’t white and what comes out of your mouth will never be given the same credit or validity that they give white people. They don’t even realize they’re doing it, but they just cannot help themselves in giving white people more credibility. You will never be [explicit term] to them because this isn’t something they are doing; it’s just something that is. It happens automatically, even if they don’t want it to, and you can’t explain it to them or change it because it’s not something they even know they’re doing and if you tell them, they will be offended because they honestly and sincerely believe they aren’t racist.

And that was my introduction to implicit or unconscious bias.⁶²

A great danger of unconscious bias is that it is unconscious. As a result, when bias is operating to make people act differently than their conscious

61. I need to emphasize some of the people I had the privilege of meeting as a coach treated me no differently than they did other coaches.

62. This made me painfully reflect on how many times I erroneously coerced my biracial daughter to try to fit in more, and spent time trying to figure out what she was doing wrong that caused people to always treat her like an outsider, or according to her, “an unspecified weirdo.” The truth is that it was my own ignorance of bias preventing me from seeing there was nothing she could do to be considered “normal.” And even if she could have expended tons of effort to try to negate the bias and alter her behavior to try to fit in more, she should not have to!

moral construct and its parameters would allow, they do not experience the dissonance-based alarm bells known as the “sting of guilt”⁶³ like they would when they consciously act inconsistently with their beliefs and moral construct.

This is important and worth exploring briefly before providing other examples of bias at work. Nietzsche explains people only feel responsible for immoral actions⁶⁴ they intend.⁶⁵ And what is moral has been interpreted as what is best for our communities.⁶⁶ For anti-racist Americans, racial equality is consciously normative. So, when an anti-racist American intentionally acts in a racist fashion, they experience dissonance or the sting of conscience. According to Nietzsche, then, this sting of conscience is absent when our conduct, judgment, and decision making is implicit and occurring at the subconscious level because it is unintentional. Likewise, Freud believed conscience was part of the superego that was activated whenever conduct violated moral constructs.⁶⁷

B. *Missing White Woman Syndrome*⁶⁸

Missing White Woman Syndrome (MWWS) refers to the disparate coverage given to abducted females based on their race and the reality that white abducted women receive a disproportionate amount of media coverage compared to women of color,⁶⁹ and that “disproportionate news coverage of cases involving the victimization of certain types of women

63. See Eric Ryan Schaaf, *Health and Great Health: Nietzsche on Overcoming Sickness* 41 (2017) (Ph.D. dissertation, University of Illinois at Urbana-Champaign), <https://www.ideals.illinois.edu/bitstream/handle/2142/99332/SCHAAF-DISSERTATION-2017.pdf?sequence=1&isAllowed=y>; [https://perma.cc/7RDJ-BKT6] (explaining the sting of guilt as developed by Nietzsche).

64. See Avery Snelson, *Nietzsche on the Origin of Conscience and Obligation*, 50 J. NIETZSCHE STUD. 310, 319–20 (2019) (offering Nietzsche’s explanation of the connection between guilt and intention).

65. See *id.* (outlining Nietzsche’s view of the importance of reflection in developing a conscience). And hence the go-to defense for a white person accused of saying or doing something racist is “but I didn’t intend to offend you!”—which generates the anti-racist pushback that your intention is irrelevant.

66. See *id.* at 321–22 (describing a community’s tendency to develop a collective instinct of obedience).

67. *Conscience*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/conscience> [https://perma.cc/6PCV-THWL].

68. See Zach Sommers, *Missing White Woman Syndrome: An Empirical Analysis of Race and Gender Disparities in Online News Coverage of Missing Persons*, 106 J. CRIM. L. & CRIMINOLOGY 275, 278 (2016) (discussing the theory of Missing White Woman Syndrome).

69. See *id.* (illustrating Missing White Woman Syndrome by comparing two similar cases—one involving a young white woman and one involving a young black man).

reinforces a social hierarchy by suggesting that those women are innocent, valuable, and worth saving.”⁷⁰

This likely is not because of conscious racism or the media deliberately deciding that people of color are worth less than white people. Rather, in a society where “the vast majority of journalists are white”⁷¹ the implicit bias and system justification naturally results in the disparate media coverage without any dissonance even on the part of anti-racist journalists.⁷²

C. *Athlete Protests*

There are two related and controversial questions illustrating the power of system justification. First, why not acknowledge the national anthem’s verses, glorifying the recapture of escaped slaves, in the analysis of peaceful protests of black athletes kneeling?⁷³

70. *See id.* at 289 (“In contrast, white women occupy the peak of the social order and are, in turn, spotlighted by the media.” (footnote omitted)).

71. Bahadur, *supra* note 30, at 22; Seth J. Frantzman, *Where Is Diversity in American Newsrooms?*, ALJAZEERA (Feb. 23, 2017), <https://www.aljazeera.com/indepth/opinion/2017/02/diversity-american-newsrooms-170222115636285.html> [<https://perma.cc/BY5J-7FUJ>]; *see* Levy, *supra* note 55, at 3–5 (describing the differences between implicit and explicit bias); Sezer et al., *supra* note 47, at 77 (adding further description of the concept of implicit bias).

Nationally, Hispanic, black and Asian women make up less than 5 percent of newsroom personnel at traditional print and online news publications Numbers from 433 news organizations . . . show a 5.6 percent increase in the minority workforce, now at 17 percent at print and online news sites. But the numbers lag far behind demographic shifts in a country where nearly 40 percent of Americans are part of a minority group.

Tal Abbady, *The Modern Newsroom Is Stuck Behind the Gender and Color Line*, NPR: TEX. PUB. RADIO (May 1, 2017, 2:42 PM), <https://www.npr.org/sections/codeswitch/2017/05/01/492982066/the-modern-newsroom-is-stuck-behind-the-gender-and-color-line> [<https://perma.cc/TR76-P4EJ>].

[I]n 2015 only 12.7 percent of employees at US daily newspapers were minorities. More than 88 percent of reporters and supervisors were white while 83 percent of videographers were. Overall blacks and Hispanics were represented about equally at slightly over four percent for each group. . . . [S]even of 53 correspondents who report on the White House were African or Asian American in 2013. . . . [E]ven in cities such as New York, where Hispanics, blacks and Asians collectively account for 65 percent of the population, The New York Times[] was more than 75 percent white.

Frantzman, *supra*. Clearly then, implicit bias—perpetuating system justification and a status quo with white people as the dominant class—exists in the media. This existence, coupled with implicit attitudes imposing bias on how information is processed, suggests the ethical compass of the mainstream media should not guide what information is considered newsworthy in modern, multiracial America.

72. *See* Frantzman, *supra* note 71 (describing lack of diversity in newsrooms leading to disparate news coverage of minority groups).

73. *See* Bill Chappell, *Olympians Take a Knee Against Racism, Under New Policy Allowing Protests*, NPR: Tex. Pub. Radio (July 21, 2021, 12:12 PM), <https://www.npr.org/sections/tokyo-olympics->

No refuge could save the hireling & slave/
 From the terror of flight or the gloom of the grave:/
 And the star-spangled banner in triumph doth wave/
 O'er the land of the free & the home of the brave.⁷⁴

Second, why is it considered taboo as a society to discuss the reality that while military service is a utopian honor, the WWII-era GI Bill largely exclusively rewarded white people for their service.⁷⁵ We expressed gratitude for the amazing and selfless sacrifices of our armed men and women via the GI Bill, which “offered veterans a year of unemployment pay after their homecoming; guaranties for loans to purchase homes, businesses, or farms; and tuition and living stipends for college or vocational programs.”⁷⁶ Yet the GI Bill is an exceptional example of post-Jim Crow racism in our country’s history. For example:

In 1947, only 2 of the more than 3,200 VA-guaranteed home loans in 13 Mississippi cities went to Black borrowers. “These impediments were not confined to the South,” notes historian Ira Katznelson. “In New York and the northern New Jersey suburbs, fewer than 100 of the 67,000 mortgages insured by the GI bill supported home purchases by non-whites.”⁷⁷

Ultimately:

The original GI Bill ended in July 1956. By that time, nearly 8 million World War II veterans had received education or training, and 4.3 million home loans worth \$33 billion had been handed out. But most Black veterans

live-updates/2021/07/21/1018811516/players-take-a-knee-at-tokyo-olympics-as-the-first-competitions-kick-off [https://perma.cc/HTK7-9R9Z] (reporting on women athletes who took a knee “in a protest against discrimination and racism”); see also Elissa Harrington, *Oakland Raiders Players Sit During National Anthem*, ABC7NEWS (Sept. 24, 2017) https://abc7news.com/nfl-donald-trump-players-knee-national-anthem-taking-during/2450865/ [https://perma.cc/LMA2-5UAW] (describing NFL players sending a message against racial violence through kneeling or sitting during the national anthem).

74. Jamie Stiehm, *The Star-Spangled Banner’s Racist Lyrics Reflect Its Slave Owner Author, Francis Scott Key*, THE UNDEFEATED (Sept. 6, 2018), https://theundefeated.com/features/the-star-spangled-banners-racist-lyrics-reflect-its-slaveowner-author-francis-scott-key [https://perma.cc/M2BU-LQ7Z].

75. Erin Blakemore, *How the GI Bill’s Promise Was Denied to a Million Black WWII Veterans*, HIST. (Apr. 20, 2021), https://www.history.com/news/gi-bill-black-wwii-veterans-benefits [https://perma.cc/G8MS-AGL3].

76. *The GI Bill*, KHAN ACAD., https://www.khanacademy.org/humanities/us-history/postwarera/postwar-era/a/the-gi-bill#:~:text=Commonly%20known%20as%20the%20GI,for%20college%20or%20vocational%20programs [https://perma.cc/YQ8B-B6A7].

77. Blakemore, *supra* note 75.

had been left behind. As employment, college attendance and wealth surged for whites, disparities with their Black counterparts not only continued, but widened. There was, writes Katznelson, “no greater instrument for widening an already huge racial gap in postwar America than the GI Bill.”⁷⁸

The decisions about the administration of the GI Bill were not implicit racism, but Congress’s deliberate decisions.⁷⁹ This illustrates how system justification gives power to untrue, alternative, system-conforming facts that buttress the systemic status quo while making us tangibly uncomfortable to even countenance the truth. Perhaps nothing demonstrates the power of alternative facts, and how they reinforce the system, more than the Trump campaign and presidency. This same power of alternative facts may also be behind the prevalence of attempts to ban the teaching of critical race theory

78. *Id.*

79. *Id.*

When lawmakers began drafting the GI Bill in 1944, some Southern Democrats feared that returning Black veterans would use public sympathy for veterans to advocate against Jim Crow laws. To make sure the GI Bill largely benefited white people, the [S]outhern Democrats drew on tactics they had previously used to ensure that the New Deal helped as few Black people as possible.

During the drafting of the law, the chair of the House Veterans Committee, Mississippi Congressman John Rankin, played hardball and insisted that the program be administered by individual states instead of the federal government. He got his way. Rankin was known for his virulent racism: He defended segregation, opposed interracial marriage, and had even proposed legislation to confine, then deport, every person with Japanese heritage during World War II.

When the bill came to a committee vote, he stonewalled in an attempt to gut another provision that entitled all veterans to \$20 a week of unemployment compensation for a year. Rankin knew this would represent a significant gain for Black Southerners, so he refused to cast a critical proxy vote in protest. The American Legion ended up tracking down the Congressman who had left his proxy vote with Rankin and flying him to Washington to break the deadlock.

Id.

in schools,⁸⁰ even though critical race theory examines the *true* yet uncomfortable facts about our amazing nation's history.⁸¹

D. *Welfare and Farm Subsidy*

You may experience implicit bias and system justification if you experience resentment when you hear “welfare” and Ronald Reagan’s inaccurate statements,⁸² but when you hear “farm subsidy,” you imagine overall-clad, salt of the earth, industrious people.

80. Realizing America is at an inflection point where more people understand the depth of systemic racism, the conservative agenda is to shut down critical race theory, which explores this reality. The resistance to critical race theory may be exactly like what Edward Rubin discusses in the context of morality: A last-ditch attempt to maintain society’s existing power structures. *See* Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 33 (2005) (exploring how traditional values do not easily give way to progress).

To return to the question that began this Essay, moral values loomed so large in the election polls because the issue represents the mobilized resentment of a portion of the population which is finding its moral system under attack. At first blush, the term moral values seems like a code word for sex or sex-related issues, particularly because the opposing side can obviously claim moral values of its own, such as toleration, equality, and freedom. But these sex-related issues are really emblems of a more comprehensive morality, the morality of higher purposes. This morality, which dominated society in premodern times, is steadily being eroded and replaced by a new morality, the morality of self-fulfillment. The more traditional members of society, those furthest from the epicenters of this cataclysmic social change, are committed to the earlier morality, but being so committed, they cannot perceive that the beliefs that are replacing it are moral as well—not the belief in toleration, equality, and freedom, which they would agree with and claim on their own behalf—but belief in the positive value of sexuality as an element of the individual’s self-fulfillment. This conflict is naturally translated in politics, as each major party aligns itself with the opposing sides of this incendiary and divisive issue. In its specifically sexual form, it has been salient for at least twenty or thirty years, and is likely to continue as a major part of our political scene for a good many years to come. The trend, however, is sustained and unmistakable; it has been in process for three centuries or more. When it has finally run its course, our society will have a new consensus morality—the morality of self-fulfillment.

Id.

81. *See generally* Timothy Snyder, *The War on History Is a War on Democracy*, N.Y. TIMES MAG. (June 29, 2021), <https://www.nytimes.com/2021/06/29/magazine/memory-laws.html> [<https://perma.cc/V6NV-JNXC>] (comparing attempts to ban critical race theory to anti-democratic regimes’ memory laws passed in 20th century Europe to prevent the truth from being known).

82. *See* Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html [<https://perma.cc/JJ2W-3EQD>] (describing Ronald Reagan’s use of an actual case of welfare fraud to create widespread fear of so-called welfare queens); *see also* Bryce Covert, *The Myth of the Welfare Queen*, NEW REPUBLIC (July 2, 2019), <https://newrepublic.com/article/154404/myth-welfare-queen> [<https://perma.cc/ZEW6-J3U4>] (recognizing the racist connotations of Reagan’s welfare queen scapegoating).

The reality is there is no clear difference between the two programs, but farm subsidies tend to conjure up images of hardworking white people who toil on the land for our benefit.

Despite the rhetoric of “preserving the family farm,” the vast majority of farmers do not benefit from federal farm subsidy programs and most of the subsidies go to the largest and most financially secure farm operations. Small commodity farmers qualify for a mere pittance, while producers of meat, fruits, and vegetables are almost completely left out of the subsidy game.⁸³

And

[t]hat the current system is a joke is barely arguable: wealthy growers are paid even in good years, and may receive drought aid when there’s no drought. It’s become so bizarre that some homeowners lucky enough to have bought land that once grew rice now have subsidized lawns. Fortunes have been paid to Fortune 500 companies and even gentlemen farmers like David Rockefeller. Thus even House Speaker Boehner call[ed] the bill a “slush fund[.]”⁸⁴

Farmland ownership and relevant socioeconomic realities suggest African Americans were barely able to benefit from homesteading, resulting in white people predominantly farming and the owning farmland.⁸⁵ “Combined with the claimants of the original Homestead Act, then, more than 1.6 million white families—both native-born and immigrant—succeeded in becoming landowners during the next several decades. Conversely, only

As Ronald Reagan and other politicians ginned up anti-government and anti-poor resentment in the 1970s and ’80s, the welfare queen stood in for the idea that black people were too lazy to work, instead relying on public benefits to get by, paid for by the rest of us upstanding citizens. She was promiscuous, having as many children as possible in order to beef up her benefit take. It was always a myth—white people have always made up the majority of those receiving government checks, and if anything, benefits are too miserly, not too lavish. But it was a potent stereotype, which helped fuel a crackdown on the poor and a huge reduction in their benefits, and it remains powerful today.

Covert, *supra*.

83. Deborah White, *What Are U.S. Farm Subsidies?*, THOUGHTCO. (May 29, 2020), <https://www.thoughtco.com/us-farm-subsidies-3325162> [https://perma.cc/YGX6-TCY4].

84. *Id.*

85. See Keri Leigh Merritt, *Land and the Roots of African-American Poverty*, AEON (Mar. 11, 2016), <https://aeon.co/ideas/land-and-the-roots-of-african-american-poverty> [https://perma.cc/U65P-HA DY] (detailing the effort to deny African Americans opportunities to purchase and own land during Reconstruction).

4,000 to 5,500 African-American claimants ever received final land patents from the [Southern Homestead Act].”⁸⁶

Again, system justification and favoring the dominant or in-group explains the powerful, visceral, and mood-like reactions to different programs without making a conscious decision, and if you are viscerally uncomfortable or angry from reading this, now you know why.⁸⁷

This Article thus far establishes two things. First, humans involuntarily and unconsciously process information with implicit biases perpetuating societal status quos and promoting stable societal systems and favoring similar phenotypes, powerful drivers of implicit bias and system justification. Second, in America, where race or phenotype differences are the dividing line between high socioeconomic status (SES) and low-SES, there is a powerful confluence of factors (perpetuation of the societal status quo and favoring the similar) rendering system justification especially potent. The next section explains how the U.S. News and World Report rankings and our powerful desires to be ranked favorably illustrate this confluence.

IV. SYSTEM JUSTIFICATION AND THE U.S. NEWS RANKINGS

A. *Peer Assessment: Similarity and System Justification*

1. The Raw Data

A majority—76%—of American law professors are graduates of just fourteen American law schools, all of which are among the most highly ranked schools in the country according to the U.S. News rankings.⁸⁸ The

86. *Id.*

87. *See* Kang, *supra* note 32, at 1553 (describing the link between race and welfare reform).

In addition to crime, the link between race and welfare reform has been extensively studied by political scientists. There is convincing data that people respond differently to news reports about welfare based on whether a Black or White person is depicted as the welfare recipient. *See, e.g., Avery & Peffley, supra* note 346, at 140–42 (finding that when welfare reform was described as a failure, whether the picture depicted a Black woman or White woman affected how much she was blamed for losing her job).

Id. at 1553 n.347.

88. Sarah Lawsky, *Entry Level Hiring—JD School Total and Over Time*, PRAWFSBLAWG (May 27, 2020, 6:31 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2020/05/entry-level-hiring-jd-school-total-and-over-time.html> [<https://perma.cc/KZ8D-N9NJ>] (including “Yale 17%, Harvard 15%, NYU 9%, Stanford 6%, Columbia 5%, Chicago 5%, Michigan 4%, Berkeley 4%, Georgetown

average black enrollment at these schools is 6.92%⁸⁹ while the average black enrollment at the schools considered unranked is 13.7%,⁹⁰ or almost twice as high as the schools that produce more than 3/4 of American law professors.⁹¹

3%, Virginia 2%, Duke 2%, Northwestern 2%, Penn 1%, [and] Cornell 1%” in the percentage indicated).

89. See *infra* notes 92–93 and accompanying text (averaging the percentage of Black students enrolled at the fourteen law schools from which 76% of law professors graduated).

90. See *infra* notes 93, 95–96 and accompanying text (calculating the average percentage of Black enrollment in law schools based on law school rankings using enrollment download dataset from Analytix for 2020).

91. Lawsky, *supra* note 88. Between 2011 and 2020, on average, roughly 32% of law professors in the country attended Yale or Harvard. *Id.* (providing professor hiring from Yale and Harvard at 17% and 15% respectively). Accounting for professors hired at other schools, 9% attended NYU, 6% attended Stanford, 5% attended Columbia, 5% attended Chicago, 4% attended Michigan, 4% attended Berkeley, 3% attended Georgetown, 2% attended Virginia, 2% attended Duke, 2% attended Northwestern, 1% attended Penn, and 1% attended Cornell. *Id.* (indicating source of JD “is drawn from the Entry Level Hiring Reports from 2011 to 2020[]”).

TABLE 1
DEMOGRAPHICS OF THE FOURTEEN LAW SCHOOLS GRADUATING
76% OF LAW PROFESSORS

	U.S. News 2021 Rank ⁹²	% Black ⁹³	Current Annual Tuition ⁹⁴
Yale	1	7.49	\$68,117
Stanford	2	8.50	\$66,396
Harvard	3	8.10	\$67,081
Columbia	4	8.79	\$74,995
Chicago	4	6.43	\$69,975
NYU	6	7.30	\$71,304
Penn	7	7.43	\$68,130
Virginia	8	5.63	\$67,000 ⁹⁵
Northwestern	9	5.39	\$68,800
Michigan	9	4.54	\$65,698 ⁹⁶
Berkeley	9	5.17	\$61,487 ⁹⁷
Duke	12	6.63	\$66,120
Cornell	13	6.40	\$70,724
Georgetown	14	9.15	\$63,528

92. TAXPROF BLOG (Mar. 17, 2020) https://taxprof.typepad.com/taxprof_blog/2020/03/2021-us-news-law-school-peer-reputation-rankings-and-overall-rankings.html [<https://perma.cc/H8PB-B3VK>] (listing 2021 law school rankings). “University of Chicago” is listed in the chart simply as “Chicago.” *Infra* note 93 and accompanying text. “Penn” refers to “University of Pennsylvania.” *Infra* note 93 and accompanying text. “Michigan” represents “University of Michigan.” *Infra* note 93 and accompanying text.

93. “To customize and export a dataset [for ‘enrollment’], select the years you would like to include and click your preferred format (CSV or Excel file) to download.” *Download Dataset*, ANALYTIX BY ACCESSLEX <https://analytix.accesslex.org/download-dataset> [<https://perma.cc/EA5M-TNAG>] (calculating black percentage for each school by dividing the “Black JD” enrollment number by the “Total JD” enrollment number and multiplying the quotient by 100). The author used 2020 enrollment data from Analytix by Access Lex Database. *Id.*; *supra* note 92 and accompanying text (regarding school names).

94. *2022 Best Law Schools*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> [<https://perma.cc/E75W-7TVC>] (listing the top law schools in 2021 and providing tuition and fees for each).

95. This figure represents the average cost of in-state, full-time student tuition and out-of-state, full-time student tuition displayed as \$65,500 and \$68,500, respectively. *Id.*

96. This figure represents the average cost of in-state, full-time student tuition and out-of-state, full-time student tuition displayed as \$64,198 and \$67,198, respectively. *Id.*

97. This figure represents the average cost of in-state, full-time student tuition and out-of-state, full-time student tuition displayed as \$60,158 and \$62,816, respectively. *Id.*

A similar racially disparate situation exists in the judiciary. For active federal judges 73.9% are white and 11.85% are black.⁹⁸ A 2009 study painted an even bleaker picture for diversity in state courts.⁹⁹ “[O]nly 4.0% of judges chosen in the 1970s and still serving in 2008 were racial or ethnic minorities, 12.6% of judges chosen since 2000 were minorities”¹⁰⁰ This is especially important because state courts entertain upwards of 95% of court cases in America.¹⁰¹

Further,

white men comprise 58 percent of state court judges, even though they make up less than one-third of the population. Less than one-third of state judges are women, and only 20 percent are people of color. Meanwhile, Latinos constitute 17 percent of the U.S. population, African Americans 12 percent, and Asians and other people of color 8 percent. Women of color comprise nearly one-fifth of the overall population but only 8 percent of state judges.¹⁰²

A July 2020 study confirmed that since 2016 the racial diversity of the federal judiciary has decreased.¹⁰³

98. The noted percentages are captured as of July 21, 2021 and have since changed; “ACS compiled these statistics from data made available by the Federal Judicial Center. [ACS] update[s] the graphics continually. . . . Snapshots of data from this page will be archived periodically.” *Diversity of the Federal Bench*, AM. CONST. SOC’Y, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/> [<https://perma.cc/74BU-FDDM>] (providing the disparity of federal justices as an additional example of the disparity among law professionals).

99. See Malia Reddick et al., *Racial and Gender Diversity on State Courts—An AJS Study*, 48 JUDGES J. 28, 32 (2009) (contrasting politics and diversity on state courts).

100. *Id.* at 28.

101. Michele L. Jawando & Allie Anderson, *Racial and Gender Diversity Sorely Lacking in America’s Courts*, CTR. FOR AM. PROGRESS (Sept. 15, 2016), <https://www.americanprogress.org/issues/courts/news/2016/09/15/144287/racial-and-gender-diversity-sorely-lacking-in-americas-courts/> [<https://perma.cc/3KVN-Z6ND>].

102. *Id.*

103. Laura Bagby, *ABA Profile of the Legal Profession: Diversity and Well-Being*, 2CIVILITY (Aug. 13, 2020), <https://www.2civility.org/aba-profile-of-the-legal-profession-diversity-and-well-being> [<https://perma.cc/B2WP-TJ5V>].

Racial diversity in the federal judiciary has decreased slightly since 2016, while gender diversity has seen marginal gains, according to the Federal Judicial Center. As of July 1, 2020, roughly 80% of sitting judges were white, which is similar to statistics in 2016. At the same time, the percentage of Black judges on the federal bench has dropped—from 10.8% in 2016 to 9.8% in 2020.

As of July 1, 2020, the U.S. Senate had confirmed 196 people to 200 federal judgeships during 2017, 2018, 2019, and 2020. Of those, 85% were white, 6% were Asian, 4% were Black, and 4%

The numbers for the practice of law indicate similar levels of racism in the structure of law practice. “Currently, 86% of lawyers are non-Hispanic white people[,]” while about 60% of U.S. residents fit this demographic.¹⁰⁴ Black lawyers make up 5% of all lawyers, the same percentage as a decade ago, while black people make up 13.4% of the population.¹⁰⁵ And just about 2% of law firm partners are African-American.¹⁰⁶

Additionally, the average tuition for schools that produce almost 80% of the law professors was \$67,811,¹⁰⁷ while the average tuition for the twenty-eight schools with over 10% black enrollment was \$36,264¹⁰⁸ and the

were Hispanic. The number of female federal judges has seen minimal gains over the last four years. Females made up roughly 26% of federal judges in 2016 and 28% in 2020.

White men continue to be heavily represented among justices of the 50 top state courts, according to a 2020 study by the Brennan Center for Justice at New York University. More than one-half of all justices (55%) on these courts (usually called supreme courts) are white and male, even though 30% of the U.S. population is white and male. White women make up 29% of top state court justices, which is proportionate to their presence in the general population.

Men and women of color are disproportionately underrepresented on top state courts. Just 8% of justices on these courts are men of color and 7% are women of color, even though they make up 19% and 20% of the U.S. population, respectively.

Id.

104. *Id.*

105. *Id.*

106. NAT'L ASS'N FOR L. PLACEMENT, 2020 REPORT ON DIVERSITY IN U.S. LAW FIRMS 5 (Feb. 2021), https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf [<https://perma.cc/2ZP6-69FU>].

107. The author calculated this average based on U.S. News & World Report law school rankings and tuition rates. *See supra* note 94 (averaging current annual tuition in Table 1).

108. The following schools have over 10% black enrollment: Howard University, Southern University, Texas Southern University, North Carolina Central University, District of Columbia, Florida A & M University, Atlanta's John Marshall Law School, Western Michigan University, University of Memphis, Elon University, University of Mississippi, University of Baltimore, Barry University, Georgia State University, Widener Commonwealth, Florida Coastal School of Law, Loyola University-New Orleans, Faulkner University, Mercer University, University of Maryland, Cleveland State University, Mississippi College, Western New England University, University of Alabama, Widener University-Delaware, Golden Gate University, University of Florida, and UNT Dallas College of Law. *Download Dataset, supra* note 93. The author used a download dataset from Analytix by AccessLex reflecting 2020 student enrollment by race to calculate the percentage of the twenty-eight schools' black enrollment. *Id.* (dividing the black enrollment value by the total enrollment value and multiplying the result by 100 to determine the twenty-eight schools with over 10% black enrollment). The author used school tuition data from Analytix to calculate the average total of the twenty-eight schools. *Id.* (customizing a dataset based on student expenses for 2020 and using the average of full-time resident tuition and full-time nonresident tuition amounts in the overall average).

average tuition for the eight schools with greater than 20% black enrollment was \$30,754.¹⁰⁹

As affordability is also a significant criterion to attend one of the fourteen schools that produce almost 80% of the law professors, it should come as no surprise,

More than three-quarters of the students at the nation's top 20 law schools come from the top one-fourth of the socioeconomic population, and well over half of the students at these schools come from the top 10 percent, according to the study by UCLA law professor Richard Sander. Just 2 percent come from the bottom quarter.¹¹⁰

Quality assessment accounts for 40% of a law school's ranking.¹¹¹ This means that what “[l]aw school deans, deans of academic affairs, chairs of faculty appointments and the most recently tenured faculty members[,]” hiring partners, attorneys and judges think of a law school accounts for 40% of that school's ranking.¹¹² Because of this, it is unsurprising there is a strong correlation, $R^2=0.8913$, between quality assessment ranking and a school's ultimate numerical ranking.¹¹³

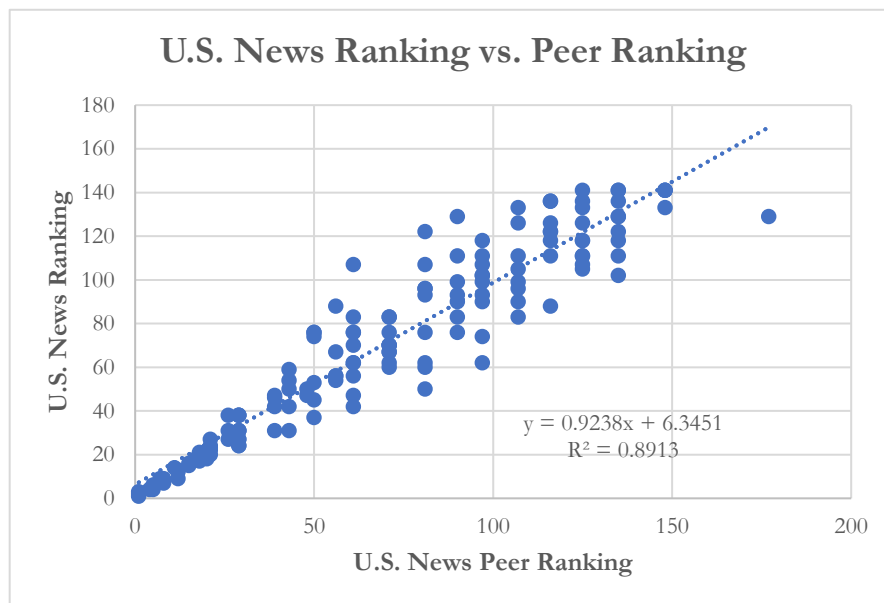
109. The following schools have greater than 20% black enrollment: Howard University, Southern University, Texas Southern University, North Carolina Central University, District of Columbia, Florida A & M University, Atlanta's John Marshall Law School, and Western Michigan University. See *supra* text accompanying note 108 (using the same dataset based on enrollment and student expenses to calculate the average tuition for schools with greater than 20% black enrollment).

110. Debra Cassens Weiss, *Study Finds 'Lopsided' Concentration of Socioeconomic Elites at Law Schools*, A.B.A. J. (Oct. 5, 2011, 11:00 AM), https://www.abajournal.com/news/article/study_finds_lopsided_concentration_of_socioeconomic_elites_at_law_schools [<https://perma.cc/6JKB-9GQP>].

111. Morse et al., *supra* note 5.

112. *Id.*

113. U.S. News only assigned a numerical ranking to 146 of all law schools. The remaining schools ranked lower than these 146 were ranked as Tier 4 and did not have a numerical designation, which would be suitable for a scatterplot. As a result, this plot demonstrates the relationship between peer ranking and the U.S. News ultimate ranking for the 146 schools with a U.S. News numerical rank.



As previously mentioned, implicit bias and system justification result in the high valuation and favoring of the similar. In-groups are favored more highly than out-groups. Given the composition of the peer fields described, non-blackness and wealth are clearly the in-group, or the similar, at the schools that produce the vast majority of the law professors in this country.¹¹⁴ Whiteness is also the in-group in the judiciary and in the practice of law.¹¹⁵

As a result, most of the people asked to rank or value the law schools in the U.S. News ranking unconsciously and unavoidably favored whiteness and wealth because of the relationship between similarity and value, previously explained as self-interest bias.

It is worth reiterating that in the top 100 schools the average black enrollment was 5.76%; in the schools ranked between 100 and 150, the average black enrollment was 7.2%; and the average black enrollment was 13.6% in the unranked schools (150 and greater).

114. See *infra* notes 88 & 91 and accompanying text (finding Yale, Harvard, and NYU as the top three law schools accounting for most entry-level hires of law professors).

115. See *infra* notes 98–106 and accompanying text (reporting the overrepresentation of white lawyers and judges compared with people of color).

This is important data because 14% of the U.S. population now identifies as black.¹¹⁶ The only law schools enrolling black students at the same average rate as the percentage of black people in the population are the lowest ranked schools, or the ones to which U.S. News does not even ascribe a numerical ranking, which enroll black students at 13.6%.¹¹⁷ The top 100 schools' average black enrollment rate of 5.76% is almost 2.5 times lower than the black share of the U.S. population.¹¹⁸

The U.S. News rankings consist only of whole numbers, and they are not considered continuous data. For this reason, linear regression is not a suitable method for modeling black enrollment versus rankings. Therefore, we chose to do analyses of variance (ANOVA) tests instead of linear regressions to determine if there was any statistical difference to these observed percentages of black enrollment, ranking, and tuition.

ANOVA calculations consider the variance within each tier or group, the variance between the groups, and compare the group means using an F statistic which can then be translated into a *p*-value. For our purposes, the null hypothesis is the statement that the groups all have equal means.

A small *p*-value indicates that the observed differences between group means is unlikely to happen randomly, given the assumption of the null hypothesis that the group means are all equal. When the *p*-value is smaller than the significance level of the hypothesis test, we reject the null hypothesis.

As described below, the observed differences are statistically significant.

2. The Statistical Significance of the Data

a. ANOVA for Black Enrollment vs. U.S. News Tier

Because U.S. News schools are often described as top fifty, top 100, ranked 100 and above, and unranked, we created four tiers of law schools. We considered Tier 1 schools as those ranked higher than fifty. We considered Tier 2 schools as those ranked lower than fifty but higher than 100, Tier 3 schools were those ranked lower than 100 that were assigned a numerical ranking, and Tier 4 consisted of schools that were not assigned a

116. Christine Tamir, *The Growing Diversity of Black America*, PEW RSCH. CTR. (Mar. 25, 2021), <https://www.pewresearch.org/social-trends/2021/03/25/the-growing-diversity-of-black-america> [https://perma.cc/DM4G-8KGA].

117. See *supra* text accompanying notes 92 & 93 (referring to enrollment dataset from Analytix for black enrollment in unranked schools and source providing ranked schools).

118. *Supra* text accompanying note 93.

U.S. News numerical ranking. It is important to note “higher ranking” means a lower numerical score in the U.S. News rankings. Because of ties in the rankings, we ended up with forty-nine schools in Tier 1, forty-nine schools in Tier 2, forty-six schools in Tier 3, and fifty schools in Tier 4.

While some statistical analyses apply significance levels of 5% and 10%, we wanted to be more exacting and applied significance levels of 1% for this ANOVA. For simplicity's sake, in statistical calculation, significance level percentages indicate the percent chance the researcher will mistakenly reject the null hypothesis. In the present ANOVA, the null hypothesis is that there is no statistically significant difference in black enrollment between the different tiers of law schools.

So, with a 10% significance level there is a 10% chance the person observing the data will erroneously conclude there is a statistically significant difference in black enrollment among the tiers of law schools. Based on our tier designation, we observed the following:

U.S. News Tier	Num Schools	Avg % Black Enrollment
1	49	5.8
2	49	5.8
3	46	7.3
4	50	13.2

The ANOVA test for black enrollment vs. the U.S. News tier produced a *p*-value of 0.0002. This is a very strong indication that the four tiers do not have an equal mean percent of black enrollment. The ANOVA test did not reveal which groups were different from the other groups, but it revealed only that the four tiers likely did not have equal average black enrollment.

To ascertain which groups were different from each other, we performed Tukey's test and Bonferroni's test, which are post hoc statistical analyses. Both tests indicate black enrollment in Tier 4 is significantly different from the other three tiers, even when we apply a 1% significance level.

b. ANOVA for U.S. News Ranking vs. Tuition

We also did similar analyses comparing a school's tuition to the school's tier in the U.S. News ranking and observed the following:

U.S. News Tier	Num Schools	Mean Tuition
1	49	52365.22
2	49	44664.72
3	46	40156.89
4	50	39430.37

For this ANOVA test, we observed a p -value of 4.2×10^{-7} , which again strongly suggests the four tiers do not have equal mean tuitions. Tukey's test and Bonferroni's test both suggest Tier 1 is different than Tier 2 at a 5% significance level, Tier 1 is different than Tier 3 at a 1% significance level, and critically, Tier 1 is different than Tier 4 at a 1% significance level.

c. ANOVA for Tuition Levels vs. Black Enrollment

We also went a step further and divided tuition into four levels and compared the black enrollment percentages of the four tuition levels. Tuition-level 1 schools had tuition greater than or equal to \$53,500; tuition-level 2 schools had tuition greater than \$43,500 and less than \$53,500; tuition-level 3 schools had tuition greater than or equal to \$33,000 and less than or equal to \$43,500; and tuition-level 4 schools had tuition less than \$33,000. We observed the following data:

Tuition Level	Num Schools	% Black Enrollment
1	48	5.8
2	50	7.0
3	50	8.3
4	46	11.2

An ANOVA test for black enrollment vs. tuition levels had a p -value of 0.047. We would reject the null hypothesis or the assumption that black enrollments are equal across all tuition levels at a significance level of 5%, but we would not reject the same null hypothesis at a significance level of 1%. If we specify a significance level of 5%, Tukey's test and Bonferroni's test suggest tuition levels 1 and 4 are significantly different.

These statistics demonstrate that black enrollment is significantly lower at the higher U.S. News ranked schools and significantly higher in the lowest ranked schools. They also demonstrate that there are significant tuition differences between the Tier 1 schools and the Tier 4 schools which are the only schools where black enrollment is reflective of the current American demographic. Given the established fact that high tuition is a barrier to black enrollment, this discrepancy is not likely to change.¹¹⁹

Even if we assume everyone at these institutions is consciously anti-racist and strongly believes that racism is abhorrent, the majority of people ranking the schools involuntarily favor the similar because of self-interest bias. The similar, in this case, is people in wealthy and non-black in-groups. Ultimately, system justification ensures the elite schools will perpetually be elite. But more fundamentally, system justification means elite equates to a non-black and very wealthy student body. The white dominant status quo is maintained.

Any defensiveness and guilt associated with this reality of system justification is misplaced because this is not a blameworthy reality unless you

119. See *College Tuition as the Ultimate Racial Barrier*, B|E NOTE (Sept. 12, 2019), https://thebenote.substack.com/p/college-tuition-as-the-ultimate-racial?utm_source=url [<https://perma.cc/732F-XKK5>] (correlating the “struggle towards Black degree attainment” and the “war against rising college tuition”).

In 2020, colleges and universities actively promote diversity in their student bodies. Diversity and inclusion programs work to recruit and retain students of color and other underrepresented groups—yet many policies still favor privileged students. For example, about 40% of institutional financial aid goes to students without demonstrated financial need. At some of the most exclusive colleges, the student body contains more students from the top 1% than the bottom 60%. Educational systems created to privilege one group over others resist change. A recent report from Georgetown University's Center on Education and the Workforce concluded that the American higher education system perpetuates white privilege. The most selective colleges still enroll predominantly white students, while students of color largely attend less selective public institutions. This systematic exclusion affects the graduation rate and lifelong earning potential of students of color.

A History of Privilege in American Higher Education, BEST COLLS. (July 17, 2020), <https://www.bestcolleges.com/blog/history-privilege-higher-education> [<https://perma.cc/JW7R-NEZG>].

continue to disregard the reality of system justification. High in-group valuation is an unavoidably human condition that a very specific strategy, discussed later, can mitigate, which legal education will likely not be willing to adopt.

The more pressing question is whether continuing to use the peer assessments metric after its racist impacts have been demonstrated remains *unconscious* bias, or if awareness of the cognitive frailties of all humans means the racial and socioeconomic biases the rankings unavoidably entail is no longer unconscious.

B. *Selectivity: Meritocracy, Confirmation Bias, and System Justification*

Perhaps the most unsettling feature of system justification is where the stratifications in society are deemed merit-based, system justification is stronger.¹²⁰ Because the dominant American ideology bases its belief in meritocratic society,¹²¹ confirmation bias and meritocracy likely combine to buttress the validity of the rankings in a gestalt.

1. Meritocracy and System Justification

A meritocratic society assumes social status and rewards reflect hard work and individual merit and everyone gets what they deserve.¹²² Conversely, those in society who have not succeeded materially and professionally are deemed to have failed solely due to their own lack of effort and drive.

120. See generally Shannon K. McCoy et al., *Is the Belief in Meritocracy Palliative for Members of Low Status Groups? Evidence for a Benefit for Self-Esteem and Physical Health via Perceived Control*, 43 EUR. J. SOC. PSYCH., June 2013, at 1, 2 [hereinafter McCoy et al., *Meritocracy Palliative*] (connecting high-status and low-status groups by their shared beliefs in meritocracy and personal responsibility); Shannon K. McCoy & Brenda Major, *Priming Meritocracy and the Psychological Justification of Inequality*, 43 J. EXPERIMENTAL SOC. PSYCH. 341, 341 (2007), [hereinafter McCoy & Major, *Priming Meritocracy*]; Virginie Wiederkehr et al., *Belief in School Meritocracy as a System-Justifying Tool for Low Status Students*, 6 FRONTIERS PSYCH., JULY 2015, at 1, 2; Ana Filipa Madeira et al., *Primes and Consequences: A Systematic Review of Meritocracy in Intergroup Relations*, 10 FRONTIERS PSYCH., Sept. 19, 2019, at 1, 1–2.

121. McCoy & Major, *Priming Meritocracy*, *supra* note 120, at 341.

Americans adhere to a cultural worldview in which social rewards and status are assumed to reflect individual merit and hard work (Kluegel & Smith, 1986). This worldview is a central component of the American Dream and is reflected in the cultural stories of “Horatio Alger” and “The Little Engine that Could,” which promote the belief that anyone can get ahead if they work hard enough and are talented enough. Although endorsement of this belief in a meritocracy varies at the individual level, it is so widely held that it has been termed America’s dominant ideology . . .

Id.

122. *Id.*

Shannon McCoy explains that for system justification beliefs to exist, both high and low-SES groups need to buy in to the system justified belief.¹²³ For example, belief in a meritocratic society gives low-SES groups some control over their future positions in life.¹²⁴ Meritocratic beliefs, in other words, may have a palliative effect because they offer the benefit that the lower SES, or “have nots,” have a tangible path to becoming a “have.”¹²⁵ In other words, meritocratic beliefs reinforce that outcomes are related to effort and ability, and thus, in our society an individual has what they deserve.¹²⁶ One cannot overstate how deeply entrenched and fundamental to Western society norms based on meritocracy are.¹²⁷ And belief in a just world (BJW) is at the core of meritocratic beliefs.¹²⁸

Yet, stronger BJWs lead to more dishonest behavior¹²⁹ and are linked to system justification and meritocratic society features such as victim

123. McCoy et al., *Meritocracy Palliative*, *supra* note 120, at 2.

124. *Id.*

125. *Id.*

126. *Id.*

127. Wiederkehr et al., *supra* note 120, at 2.

Meritocracy is a widespread belief in our Western Society. Indeed, everyone has experienced the promotion of meritocratic messages, such as in common proverbs (e.g., “If at first we [do not] succeed, try, try again”; “when there is a will, there is a way”), books or movies (*The Little Engine that Could*; *The Pursuit of Happiness*), and political discourses (Democratic National Convention, “Renewing America’s Promise,” . . .). These examples illustrate how Western societies focus efforts on maintaining the belief that we live “in a just world where everyone gets what he deserves—or deserves what he gets.”

Id.; see Madeira et al., *supra* note 120, at 2 (explaining the belief in the Protestant Work Ethic, or the belief hard work leads to success, is a meritocracy based concept).

128. McCoy et al., *Meritocracy Palliative*, *supra* note 120, at 2. One existentially unsettling theory is that religion is the source of BJW. See Katherine Stroebe et al., *Belief in a Just What? Demystifying Just World Beliefs by Distinguishing Sources of Justice*, PLOS ONE, Mar. 24, 2015, at 1, 4, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0120145> [<https://perma.cc/3W8T-ZTQX>] (linking religious belief to belief in a just world).

Religiosity has consistently correlated highly with the BJW. Indeed, attributing unjust and tragic outcomes in one’s own and the life of others to God’s will can be a way of coping with these negative life outcomes and of regaining feelings of personal control by attributing negative outcomes to God’s will. In line with our idea that the perceived source of justice influences action tendencies, those who are religious experience more positive well-being/affect and engage in more prosocial behavior.

Stroebe et al., *supra*. This is unsettling because phrases like “One Nation Under God” and “In God We Trust,” clearly demonstrate the importance of religion to American norms.

129. Kristin Wenzel et al., *General Belief in a Just World Is Positively Associated with Dishonest Behavior*, 8 FRONTIERS PSYCH., Oct. 10, 2017, at 1, 5, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC564>

blaming.¹³⁰ This makes sense because victim blaming and blaming the have nots is easy in a society where we believe everyone gets what they deserve, or in other words, a meritocratic society.¹³¹

The dishonesty may be palliative, though, because it provides us an easier way to cope with the many injustices of our world. Consider how much easier it is to cope with things like child starvation, disease, and suffering by believing it is part of a just world, as opposed to admitting life is unfair and people randomly and without empirical merit are either haves or have nots.

In other words, the calming, palliative effects of dishonesty and reconceptualization associated with BJW are essential “cognitive re-evaluations of unjust events” that are coping mechanisms essential for human existence because of the grave injustice and suffering we observe

1360 [https://perma.cc/6ZU4-WRL8] (discussing a narrowed examination of “the influence of people’s dispositional general and personal BJW on (dis)honest behavior[]”).

130. *Id.* at 6.

Another explanation could be that people with a strong general BJW perceive the harm caused by their cheating as deserved, because others could have cheated as well; therefore, their reduced odds of winning are their own faults if they do not cheat themselves. In line with this, a strong general BJW (which correlates with victim blaming, e.g., Dalbert, 2009) could even lead to (proactively) blaming victims of one’s own dishonest behavior, because in a generally just world only blameworthy or unsympathetic people should actually fall prey to others’ dishonesty and nothing undeserved would happen. Unfortunately, our study is not able to distinguish between these different possibilities. Future research should therefore try to explore the underlying reasons for the present effect, for example, by manipulating the consequences of own dishonesty, the existence of justifications, perceived feelings of deservingness, or by assessing participants’ reasoning.

Id.

131. Stroebe, et al., *supra* note 128.

Lerner describes the manner in which he began thinking about the BJW concept when he saw people working with dying children or being confronted with the bad health and suffering of parts of the American population. How do people function normally under, and cope with, extreme suffering? According to Lerner such injustices are particularly impactful because of people’s fundamental need to see the world as a place in which good deeds are rewarded and bad deeds are punished. Responses to such threats are motivated by the need to uphold one’s BJW: Individuals adapt their perceptions of injustice (or the reality at hand), for example by seeing unjust outcomes as caused by victims of injustice, rather than facing a potentially unjust world. This mechanism functions across many contexts (e.g., with respect to victims of AIDS, rape, robbery, cancer, discrimination). Building on this initial work, scales were developed to assess people’s explicit beliefs about the world as just. This research on scale construction reveals that individual differences in levels of BJW influence, among others, people’s goals in life, personal well-being, achievement behavior in schools, and responses to many types of personal and group disadvantage.

Id. (footnotes omitted).

every day.¹³² BJW systematically reframes injustice in a way that is palliative and less painful than the hopeless reality that it is not part of some greater plan.¹³³

BJW is essential for people to feel safe and positive and to perceive the world as a predictable and manageable place. Therefore, BJW normally serves an adaptive function¹³⁴ and is palliative in terms of system justification. However, it also allows us to be blind to the fact that the haves and have nots are not separated by merit.

The internalization of inequality among low-SES groups may lead to depression and neuroticism, so BJW also provides a comforting justification to low-SES members of society because it externalizes the reason for their lower SES.¹³⁵ Meritocracy based beliefs like BJW make injustice, poverty, and belonging to a lower SES group seem inherently fair and just.¹³⁶ And BJW encourages lower SES members to work even harder because it reinforces the idea that they have some control over their lot in life.¹³⁷ McCoy and her co-authors found a positive correlation “between the belief in meritocracy and . . . [self-esteem and physical health]” in lower SES women and women of color.¹³⁸

Meritocracy is an especially powerful norm in the school environment.¹³⁹ Wiederkehr points out that these beliefs prevail despite compelling evidence that factors other than merit, such as social class, determine school success.¹⁴⁰ She explains belief in school meritocracy (BSM) persists despite evidence to the contrary, because BSM is a system justification mechanism.¹⁴¹

132. Wenzel et al., *supra* note 129, at 1.

133. *Supra* text accompanying note 129–131. For example, consider the unrelenting anger of the black mother whose son is murdered by the police if she did not have the belief that it is all part of some greater plan that is merit based and divine. Sabina Ghebremedhin, et al., *Their Painful Bond: Black Mothers Speak Out Together on Their Unimaginable Loss*, ABC NEWS (July 13, 2020) <https://abcnews.go.com/GMA/News/painful-bond-black-mothers-speak-unimaginable-loss/story?id=71626874> [<https://perma.cc/7ECB-JPNZ>]. Would our society's structure survive the anger those events actually warrant? Is it easier to unconsciously justify the occurrences as part of BJW?

134. Wenzel et al., *supra* note 129, at 1.

135. McCoy et al., *Meritocracy Palliative*, *supra* note 120, at 3.

136. *Id.*

137. *Id.*

138. *Id.* at 1.

139. Wiederkehr et al., *supra* note 120, at 2.

140. *Id.*

141. *Id.* at 2, 5.

Even though the reality is that low socioeconomic status (SES) students are underrepresented at universities, especially in the most prestigious fields,

admitting that school success would be determined not only by merit, but also by social group belonging (e.g., social class, gender) would question the legitimacy of those who are in a high status position and, thus, would threaten the social order. By promoting BSM, the school system is particularly efficient in justifying the social order. Indeed, by making people believe that school success is a result of individual merit, the school transforms, in some way, social class or gender differences into individual merit differences and, thus, into differences that appear to be legitimate, equitable, and fair. Such an idea is congruent with the theory of social reproduction (Bourdieu et al., 1990), according to which school promotes BSM precisely to make people accept—whatever their own status—that high status groups are more “valuable” than low status groups and, thus, deserve a higher status position within the social hierarchy. As such, BSM is a key element for maintaining the social order and rationalizing the unequal position between individuals from high vs. low status groups.¹⁴²

System justification operates on both high-SES and low-SES groups. BSM is palliative and justified in a systemic way by low-SES groups as well. A merit-based system appears as a tangible path to upward mobility for low-SES groups and allows them to not focus on the reality that their status in society may be less about what they do as opposed to who they are.¹⁴³ Because low-SES students might view a merit-based school system as their only route to upward mobility, they are especially dependent on BSM.¹⁴⁴ When people feel more dependent on a system, they more strongly engage in system justification to reinforce the status quo.¹⁴⁵ And this is all particularly relevant to the law school ranking’s metrics of selectivity and placement success.

Selectivity consists in large part on the median LSAT entering score of a school’s matriculants, and placement considers the bar passage rate of a school for first time test takers.¹⁴⁶ Law school admission is the first step on the road to becoming a lawyer, and success on the LSAT is a heavily

142. *Id.* at 3.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See supra* text accompanying note 13 (tying bar exam success with employment opportunities requiring bar passage).

weighted component of the admission process. Yet, the most important preparation steps for scoring well on the LSAT are the ability to afford tutors, preparation books, and time off from work to prepare.¹⁴⁷

Therefore, it should come as no surprise that “[a]t America’s top twenty ranked law schools, . . . seventy-five percent of the students are in the top twenty-five percent of financial brackets, and over fifty percent are in the top ten percent financial bracket.”¹⁴⁸ These are the students who can afford the tutors, bar preparation and dedicated study time necessary for LSAT success. As a result, the average LSAT score at the top 20 law schools averages approximately 168, while at the schools that U.S. News considers unranked or lowest ranked, the average LSAT score is 145.¹⁴⁹

But this should not be news, because we have known that minorities perform poorly on the LSAT for over half a century,¹⁵⁰ and the reasons for this disparate performance are also widely known. They are “prior educational disparities, socioeconomic status, biased questions, family structure, and stereotype threat.”¹⁵¹

The following quote from LaTasha Hill perfectly captures how systemic racism is perpetuated by the U.S. News rankings:

In addition to student performance, LSAT scores are used to calculate the annual U.S. News and World Report law school rankings. “Despite these efforts, it is clear that law schools perceive themselves to be under considerable market pressure to engage in actions that will make them more competitive in the eyes of the consumer and legal employers” Most schools want to impress students with rankings by having higher average LSAT scores. However, “[this] pressure to ‘keep up with the Joneses’ and admit students with higher LSAT scores has created an arms race among institutions that can leave [students of color] outside of a law school’s doors.” There is nothing fundamentally wrong with law schools caring about their

147. Mona E. Robbins, *Race and Higher Education: Is the LSAT Systemic of Racial Differences in Education Attainment?*, PENN LIBRARIES UNIV. OF PA. (Aug. 20, 2017) <https://repository.upenn.edu/cgi/viewcontent.cgi?article=1018&context=spur> [<https://perma.cc/3XHT-EAQ8>].

148. *Id.* (footnote omitted).

149. The author calculated these averages based on 2022 U.S. News Report rankings. *US News Report Law School Rankings 2022*, L. SCH. NOS., <https://schools.lawschoolnumbers.com/rankings/us-news-report-law-school-rankings> [<https://perma.cc/XEN4-SQAV>]; TAXPROF BLOG, *supra* note 92; see LaTasha Hill, *Less Talk, More Action: How Law Schools Can Counteract Racial Bias of LSAT Scores in the Admissions Process*, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 313, 313 (2019) (reporting “grave concerns” about reliability of LSAT scores as predictors of student success in law school).

150. Hill, *supra* note 149, at 323.

151. *Id.* at 314 (footnote omitted).

reputations. *But it is important for schools to be aware that they could be adversely penalizing minority applicants when policies are created in an attempt to move from one rank to the next.*¹⁵²

The quote also demonstrates why it is important to dispel suggestions that the LSAT scores are merit-based¹⁵³ because meritocracy and belief in a just world are deeply entrenched American beliefs. When this reality is combined with confirmation bias and system justification, it results in erroneous merit-based theories much more convincing than the truth.

Subotnik, for example, essentially cautions against doing away with tests and replacing them with other metrics because the standardized tests actually measure knowledge relevant to the practice of law.¹⁵⁴ While recent studies clearly dispute the notion that the bar examination has anything to do with the practice of law,¹⁵⁵ the focus of this Article is not to agree or disagree with Subotnik, but to demonstrate the powerful impact the mere suggestion of a merit-based ranking system can have on implicit bias and system justification.

Suggesting that a system is merit-based, even a discriminatory one, leads to system justifying responses in both advantaged and disadvantaged groups.¹⁵⁶ As previously explained, meritocracy or even suggested meritocracy is:

one mechanism by which inequality and status differences are maintained in America. Subtle cues to meritocracy in the cultural environment may encourage members of low status groups to construe personal and group disadvantage as deserved and to minimize the perception that such disadvantage is due to discrimination. These system justifying responses to meritocracy cues may be most likely precisely when [they should be] least

152. *Id.* at 321 (emphasis added) (footnotes omitted) (quoting Don Corbett, *Stunted Growth: Assessing the Stagnant Enrollment of African-American Students at the Nation's Law Schools*, 18 TEMP. POL. & CIV. RTS. L. REV. 177, 200–01 (2008)).

153. *See* Subotnik, *supra* note 56, at 400 (“As we have seen, the ABA standard for bar passage is only whether the candidate has ‘minimum competence’ to practice law. But why should we be satisfied with less than a robust measure of *how much* the candidate knows?” (footnotes omitted)).

154. *See id.* (acknowledging the LSAT is the best current predictor of grades in law school).

155. Steven Foster, *Does the Multistate Bar Exam Validly Measure Attorney Competence*, 82 OHIO STATE L.J. ONLINE 31, 33 (2021), https://kb.osu.edu/bitstream/handle/1811/92328/1/OSLJ_Online_V82_031.pdf [<https://perma.cc/W3JL-PPZ4>].

156. *See* McCoy & Major, *Priming Meritocracy*, *supra* note 120, at 341 (revealing research shows merit-based systems “favor members of higher status groups over lower status groups”).

like[ly] . . . to occur: in the presence of clear, meritocracy-violating inequality.¹⁵⁷

Ultimately, system justification renders invisible the obvious perversity of measuring merit by LSAT exam scores. For example, Aaron Taylor powerfully suggests,

[L]aw schools should consider the credentials and accomplishments of applicants in the context of “what could have reasonably been expected, given their background.” This type of contextualization is the only fair way to assess merit. Otherwise, you get *the continued propagation of a system that rewards privilege under the guise of meritocracy*.¹⁵⁸

What the illusion of meritocracy and system justification prevents us from fairly considering and giving the appropriate weight to, is the established history of education inequality in this country.¹⁵⁹ As late as the 1960s, African Americans and other people of color attended segregated schools and were even excluded from some universities.¹⁶⁰

Even today, there is inequality of educational opportunity for African-American students and white students because two-thirds of minority students still attend schools in central cities that are funded significantly below neighboring suburban schools.¹⁶¹ Furthermore, approximately one-

157. *Id.* at 351. *See supra* text accompanying notes 121–128 (discussing controlling American ideology reliance on meritocratic society); *see also supra* text accompanying notes 129–131, and 133 (understanding a victim’s unjust outcomes as the victims fault).

158. Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 497 (Spring 2019) (emphasis added) (footnote omitted).

159. *See* Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education> [<https://perma.cc/A38Z-BWUJ>] (recognizing schools in the United States have a history of segregation and providing less funding for schools where the predominant demographic is children of color).

160. *Id.*

161. *See id.* (noticing the educational inequalities African American students face).

Jonathan Kozol’s 1991 *Savage Inequalities* described the striking differences between public schools serving students of color in urban settings and their suburban counterparts, which typically spend twice as much per student for populations with many fewer special needs. Contrast MacKenzie High School in Detroit, where word processing courses are taught without word processors because the school cannot afford them, or East St. Louis Senior High School, whose biology lab has no laboratory tables or usable dissecting kits, with nearby suburban schools where children enjoy a computer hookup to Dow Jones to study stock transactions and science laboratories that rival those in some industries. Or contrast Paterson, New Jersey, which could

third of African-American students compared to 10% of white students live below the poverty line;¹⁶² only 90% of African-American students compared to 98% of Asian students and 96% of white students have Internet access at home; and 45% of African-American students as compared to 8% of white students attended high-poverty schools.¹⁶³

I hope it is becoming clear by now that the U.S. News and World Report rankings is this unintentional “continued propagation of a system that rewards privilege under the guise of meritocracy,” that Taylor describes.¹⁶⁴ Although this propagation is unconscious, this fact does nothing to blunt the force with which it perpetuates the status quo. In fact, the opposite is true. Because it is unconscious, it is all the more powerful.¹⁶⁵

2. Confirmation Bias and System Justification

The selectivity criterion also is infected with confirmation bias because statements or suggestions that hierarchies are merit-based confirm existing beliefs.¹⁶⁶ Confirmation bias is the tendency of people to give more

not afford the qualified teachers needed to offer foreign language courses to most high school students, with Princeton, where foreign languages begin in elementary school.

Id.

162. Jinghong Cai, *Black Students in the Condition of Education 2020*, NAT'L SCH. BDS. ASS'N (June 23, 2020), <https://www.nsba.org/Perspectives/2020/black-students-condition-education> [<https://perma.cc/WT94-6LZJ>].

163. *Id.*

164. Taylor, *supra* note 158, at 497.

165. See Payne & Cameron, *supra* note 46, at 445 (revealing the pervasiveness of implicit biases even in fair-minded situations).

Of all the reasons people study implicit social cognition, a concern with its implications for social justice probably ranks near the top. The message of implicit social cognition is that the thoughts people introspect and report about do not tell the whole story of why they believe the things they believe and why they do the things they do. Instead, many studies have found that implicit reactions are prone to prejudice and stereotyping, even when explicit responses are fair-minded. Implicit reactions are often hierarchical, dividing the world into “us” and “them,” even when explicit responses are inclusive. Implicit reactions are impulsive, even when explicit responses are calculated. Implicit cognition can be, to paraphrase Hobbes, nasty, brutish, and short-sighted. If implicit cognition is a driving force behind our personal choices and public actions, then it offers a new way to understand many puzzles in modern social life. Why do people perpetuate inequalities when they apparently mean to be fair? Why do people on the other side of culture war debates seem so certainly wrong, yet so wrongly certain?

Id.

166. See generally Iqra Noor, *Confirmation Bias*, SIMPLY PSYCH. (June 10, 2020), <https://www.simplypsychology.org/confirmation-bias.html> [<https://perma.cc/6LL4-7WQ3>] (reviewing the results of studies showing how conformation biases effect our everyday lives).

credence and validity to information consistent with their beliefs or hypotheses.¹⁶⁷ And the effect of confirmation bias is strongest for “emotionally charged issues and for deeply entrenched beliefs[,]”¹⁶⁸ like BJW.

As a result, statements such as “black scholars . . . have held that African Americans are the agents of many of their own problems[,]”¹⁶⁹ are more impactful than the following hard empirical data, which suggests otherwise:

1. The most important preparation steps for scoring well on the LSAT are the ability to afford tutors and preparation books and taking time off from work to prepare.¹⁷⁰
2. 49% of black applicants received no offers to law school in the 2016-17 application cycle and much of this was driven by LSAT scores.¹⁷¹
3. 55% of black applicants in the 135-149 LSAT band did not receive offers to law schools while only 39% of white applicants in the same band did not receive offers. This contradicts what most people assume; that black applicants in the lower LSAT range have advantages over white applicants.¹⁷²
4. Black applicants tend to apply later in the application window, likely due to disparities in information access because

[a]pplicants who have access to pre-law advisors and others who can effectively assist in the development of an application strategy tend to [fare] best. Unfortunately, students who attend non-selective colleges, the types of institutions Black students are most likely to attend, have less access to advisors. As one group of researchers asserts, high student-to-advisor ratios at these schools mean that advisors “rarely have time to engage in long-term education planning, discuss career goals, or provide comprehensive support” to students. Therefore, students at these schools tend to have less support in

167. *Id.*

168. *Id.*

169. Subotnik, *supra* note 56, at 391.

170. Robbins, *supra* note 147.

171. Taylor, *supra* note 158, at 496.

172. *Id.*

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pursuing graduate and professional school, including in developing strategies for applying to law school.¹⁷³

5. Applicants who apply to multiple schools have better chances of admission. Applying to ten law schools can cost as much as \$1,300 and financial inability disproportionately impacts black students.¹⁷⁴
6. While merit-based funding has increased at law schools, need-based funding has remained flat and black applicants tend to have lower LSAT scores than white students.¹⁷⁵
7. Compounding this discrepancy is the fact that scholarship awards tend to be LSAT driven and black students tend to score lower on the LSAT.¹⁷⁶

C. *Placement: The Bar Exam and All of the Above Plus Stereotype Threat and the Law School Crucible*

Given all the data involving racial disparities on the LSAT, it should not be difficult to conclude that the bar exam has similar issues but with much heavier consequences. Catherine Martin Christopher noted the stereotype in law schools that those students falling in the lower ranks of their law school class are less likely to pass the bar.¹⁷⁷ Minority students tend to fall disproportionately in these lower rungs.¹⁷⁸ A failure to pass the bar for

173. *Id.* at 498.

174. *Id.* at 498–99.

175. *Id.* at 502.

176. *See id.* at 504 (stating scholarship awards are primarily driven by LSAT scores).

177. *See* Catherine Martin Christopher, *Eye of the Beholder: How Perception Management Can Counter Stereotype Threat Among Struggling Law Students*, 53 *DUQUESNE L. REV.* 163, 170 (2015) (“Among struggling law students, the most damning stereotype is that students who graduate near the bottom of their class are more likely to fail the bar exam. Statistics bear out [this] correlation . . .” (footnote omitted)).

178. *See* Russel A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 *RUTGERS RACE & L. REV.* 1, 5 (2016) (highlighting the trend of students of color predominantly occupying the lower ranks of law school classes). Post 1970s, following greater admission rates of black students to law schools,

Blacks and other students of color got lower grades than Whites, attrition rates for minorities were higher, and minority students failed the bar exam at higher rates These remain issues of concern. Minority law school enrollment has fallen, and those black and brown students who have enrolled still overpopulate the bottom rungs of the class, still fail the bar exam in greater numbers, and still are substantially underrepresented in the legal profession.

Id.

these students will have far reaching consequences, and statistics indicate the stereotype is true: lower GPA appears to mean lower bar passage rates.¹⁷⁹ Aside from the six month, if not more, time commitment following a failing exam, students are forced to draw on other financial resources they may not have as their loans sit unpaid.¹⁸⁰ Minority law students tend to shoulder higher amounts of debt than their white peers, with lower prospects of being able to discharge it.¹⁸¹ These effects loom over students, even if they eventually pass the bar.¹⁸²

This Article has already recounted the difficulties minorities face in LSAT performance, but the implications go far beyond the test. Poorer minority LSAT performance suppresses the minority applicant pool in the rank-driven world, which in turn suppresses the minority numbers for entering classes.¹⁸³ Even disregarding the fact that students are being evaluated on criterion that does not factually reflect their capabilities or academic abilities, this creates another hurdle in the minority law school career.¹⁸⁴

Given a scenario with a white law student and a black law student with similar LSAT scores or law school GPAs, one might think there's an even playing field. But something deeper is happening in the background:

The only difference between these students is the level of risk they face at all levels of academic development. Both bear the risk of embarrassing themselves if they do not answer well or perform worse on school exams or standardized tests. But only the African-American student bears the additional risk of confirming the widely known negative stereotype that Blacks are not as intelligent as Whites. And this additional burden on the African-American student's cognitive processing may, in turn, impede this student's

179. Christopher, *supra* note 177, 170.

180. *Id.* at 169.

181. See Taylor, *supra* note 158, at 502 (comparing the rates of debt between black students and white law students); see also Jonathan P. Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AMER. L. & POL'Y 71, 93-94 (2013) (noting suppressed GPAs have extensive post-graduate effects). Lower GPAs decrease the chances of joining a law journal, complicate finding summer employment, especially paid summer employment, and cuts the student out of valuable opportunities for clerkships or networking events that are available exclusively to high achievers. Feingold & Souza, *supra*, at 94.

182. See Christopher, *supra* note 177, at 170 (calling to attention the long-lasting effects of bar exam failure on an individual).

183. See McClain, *supra* note 178, at 38 (pondering the effects of stereotypes on law school admissions data).

184. See *id.* at 36 (disavowing the idea that standardized test scores reflect the true potential of an applicant or student).

ability to perform up to capacity at any given moment of academic consequence.¹⁸⁵

Stereotype threat permeates the law school experience for minority students.¹⁸⁶ It happens when people act out of fear that they will confirm a negative stereotype about a group to which they belong.¹⁸⁷ This can be any number of stereotypes, like women are bad at math, African Americans are less intelligent than white people, lower socioeconomic students are less intelligent than their affluent peers.¹⁸⁸ These concerns about performance create a feedback loop, where the student is focused on the stereotype, for instance, worried about conforming to it, and keys into places where their performance does so.¹⁸⁹ This requires significant cognitive energy, and ends up causing the student to lose focus, become distracted, and generally fail to perform to the best of their abilities.¹⁹⁰ Many studies have analyzed the effect of this threat on minority students in the context of standardized testing, like the LSAT and bar exam, but the reality is, it is a never-ending battle.¹⁹¹ “[Stereotype-threatened students] pay an extra tax on their investment there, a ‘pioneer tax,’ if you will, of worry and vigilance that their futures will be compromised by the ways society perceives and treats their group. And it is paid every[]day, in every stereotype-relevant situation.”¹⁹²

185. *Id.* at 4–5. *See supra* text accompanying note 178 (reflecting on stereotypes of black students intelligence compared to white students).

186. *Id.* at 35–43 (recounting the effects and persistence of stereotype threat from studying for the LSAT through post graduate employment and career advancement).

187. *See* Christopher, *supra* note 177, at 163 (“When individuals belong to a group about which there is a negative stereotype, their fear of confirming that stereotype will often suppress their performance ability.”).

188. *See id.* at 166–67 (contrasting group response to the simulated threat of confirming a negative racial stereotype). Experiments have shown, interestingly enough, that the framing [of an experiment to the participants] can cause or prevent [stereotype threat]. White men on a mini-golf course, for example, performed worse when told the course was meant to measure athletic ability than when told it measured strategic intelligence. *Id.* at 168. Black men on the same course performed better when told it measured athletic ability, and worse when told it measured strategic intelligence. *See id.* at 168 (illustrating how the framing of a task can affect inherent biases and stereotype threat).

189. McClain, *supra* note 178, at 43; Christopher, *supra* note 177, at 169.

190. *See id.* at 167 (showcasing the negative effects of stereotype threat).

191. *See* Feingold & Souza, *supra* note 181, at 76–77 (“Confronting this challenge, scholars have developed concepts such as racial microaggressions and racial climate to describe and expose the ‘subtle, nebulous, and unnamed nature’ of modern racism and the way in which environmental forces affect ‘the educational experiences and outcomes of Students of Color.’ Others, situated primarily within the tradition of Critical Race Theory, continue to interrogate the way in which implicit biases, institutional and societal forces and identity, among other things, perpetuate racial oppression in [] America.” (footnotes omitted)).

192. *Id.*, at 77 n.31.

The law school classroom can be a particularly dangerous environment for “triggering chronic and intense experiences of stereotype threat.”¹⁹³ A black student could easily walk into a law school, especially in highly ranked institutions with low minority populations, and find themselves the only person of color in the entire classroom.¹⁹⁴ This spotlight on their individual perspective can be burdensome, especially when the class turns to them to become a spokesperson for their race or group on controversial issues.¹⁹⁵ Worse yet, students may volunteer personal experiences only to be told that their telling lacks objectivity, or the logical reasoning provided by law, or worse that problems such as race relations or discrimination do not exist or have no place in the law school classroom.¹⁹⁶ Peers may feed into minority isolation outside of the classroom as well, intentionally or unintentionally excluding minority peers from study groups and social activities, whether

193. Paula J. Manning, *Word to the Wise: Feedback Intervention to Moderate the Effects of Stereotype Threat and Attributional Ambiguity on Law Students*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 99, 103 (2018) (footnote omitted); *see also id.* at 109–110 (explaining in detail why the impacts of stereotype threat are particularly acute in law school).

194. Feingold & Souza, *supra* note 181, at 84–85 (“Students of Color remain underrepresented in most elite American law schools, which remain more than 60% White. In such institutions, which continue to house large majorities of White male faculty and administrators, particular classrooms may contain no more than one or two Students of Color. For these students, simply existing as a racial token can produce a race-dependent harm that race-normed students never confront.” (footnotes omitted)).

195. *See id.* at 86 (listing the ways in which a student of color is affected by classroom conversations explicitly regarding race).

196. *See id.* (explaining the oxymoronic way minority students are asked about their perspectives and are then told their perspectives are wrong or do not matter). In the STEM fields, studies have shown that professors who believe in fixed intelligence, or innate intelligence, tend to give lower grades to minority students. *See* Meagan Phelan, *When Professors See Intelligence as Innate, Grades Go Down*, AM. ASS'N FOR ADVANCEMENT SCI. (Feb. 15, 2019), <https://www.aaas.org/news/when-professors-see-intelligence-innate-grades-go-down> [<https://perma.cc/SRX3-NK4K>]. Those that encourage growth mindset tend to engage in teaching behaviors like student feedback, frequent student self-assessments, and reflection on learning, which are not currently cornerstones of legal education. Phelan, *supra*. Faculty that believed in fixed intelligence, on the other hand, tended to tell students if they were unable to understand the material, maybe the class wasn't for them. Phelan, *supra*. In law school, this can look like professors refusing to cold call minority students, believing they would not know the answer, or being less willing to work with minority students one-on-one, believing that they won't work as hard or are simply unable to learn the material. *See* Phelan, *supra* (extrapolating on the results of studies which show how a professor's subconscious biases can impact a student's learning); McClain, *supra* note 178, at 42 (evaluating situations in which a law professor's inherent bias may affect minority law students).

from a belief that they will bring the group down or a well-meaning thought that they might be more comfortable in a group of their own race.¹⁹⁷

All of this compiles into a torrent of messages screaming, “You do not belong!”¹⁹⁸ Students that may fear that they are not smart enough, prepared enough, or not as deserving as their peers will find a sea of voices purporting to confirm their suspicions.¹⁹⁹ Minority students see ideas that are challenging and see themselves as conforming to the stereotypes they’ve fought so hard against.²⁰⁰ Suddenly instead of just working harder, the student is distracted by how far they’re slipping, losing focus worrying about whether they belong, and still trying to work harder to understand those concepts.²⁰¹ Now, in addition to being exhausting, the stereotype threat begins suppressing student performance and critical law school GPA, not to mention their performance on the arduous multi-day trial of the bar exam.²⁰²

197. See McClain, *supra* note 178, at 42 (showing how the possibly subconscious actions of other law students may feed the feelings of isolation many minority students’ experience).

198. Cf. Feingold & Souza, *supra* note 181, at 95 (describing law students’ subjective views based on first year grades and asking do “I belong here[]” (internal quotations omitted)).

199. *Id.* at 100. (“As in other domains, law schools can too readily frame disparities as a consequence of ‘deficient’ students. Under this typical framing, the achievement gap is the result of students’ inherent inferiority or inadequate preparation. By placing the fault for relative underperformance on students, this framing reinforces the underlying tropes about Black and Latina/o students’ intellectual abilities.”); see also McClain, *supra* note 178, at 42 (asserting the law school community may contribute to “a belief that minority students are less capable of achievement” impeding the learning process).

200. See Christopher, *supra* note 177, at 169 (providing an example of women confronting the stereotype “that men are better at math”).

201. See *id.* at 21 (illustrating the thought process of minority students who encounter the implicit biases of others).

When a stereotype indicts the intellectual abilities of your group, the implication is that, as a member of that group . . . you lack a critical ability. It’s a narrative that makes any frustration a plausible sign that you [cannot] do the work, that you [do not] belong there. And it discourages your taking on academic challenges, for fear you’d confirm the fixed limitations alleged in the stereotype.

Id. (quoting CLAUDE M. STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 168 (2010)).

202. See Christopher, *supra* note 177, at 170 (“[T]he fact that stereotype threat is ‘thought to be the most serious on standardized exams’ puts struggling law students at real risk of bar exam failure over and above any existing academic deficiencies.” (footnote omitted)) (quoting Richard H. Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 88 Denv. U.L. Rev. 889, 938 (2011)).

Aside from the bar exam, bar passage requirements themselves are blocking capable minority lawyers from entering the field.²⁰³ Although the bar is intended to measure minimum competency for the first-year practitioners of law, the states feature a range of acceptable passing scores. A recent study was done on the California cut score and the possibility that it was unnecessarily and disproportionately excluding minority applicants from the bar.²⁰⁴ With one of the highest cut scores in the country, California justified its score with concerns about competency and subjecting the public to more lawyers who might require professional discipline.²⁰⁵ The study analyzed the data from previous bar exams and examined what effects varying cut scores would have on the makeup of the admitted cohort.²⁰⁶ Lowering the score (which, again, is supposed to represent minimum competency) led to higher numbers of minority lawyers being admitted.²⁰⁷ Given what we know about suppressed performance and stereotype threat, having California lower its cut score to even a national median would have enormous effects on the number of minority applicants who are admitted to practice.²⁰⁸ As far as concerns that lower cut scores would increase attorney complaints and disciplines, the study found no correlation between cut scores and misbehavior.²⁰⁹

The employment rate for black law grads in bar passage required jobs 17% less than their white peers.²¹⁰ “Those strugglers who never pass a bar

203. Mitchel L. Winick et al., *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards*, SSRN at 8, 1 (Nov. 11, 2020), <https://www.accesslex.org/sites/default/files/2020-11/Examining%20the%20CA%20Cut%20Score.pdf> [<https://perma.cc/MFD5-UGB3>] (“The study also determined that no relationship exists between the selection of a cut score and the number of complaints, formal charges, or disciplinary actions taken against attorneys. The study results indicate that maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites.”).

204. *Id.*

205. *See id.* (rationalizing the high cut score as a way to keep out potentially problematic lawyers).

206. *See id.* at 10 (illustrating how different cut scores would have affected certain cohorts).

207. *See id.* at 24 (depending on how much the cut score was lowered, from lower but above the national median, the national median, to below the national median (but not the lowest accepted score), created anywhere from a 3.6% increase in admissions of Asians at the above median score to a 15.14% increase in admission of black lawyers at the below median score).

208. *See id.* at 30 (lowering to national median would create a 9.9% increase in black lawyers, an 8.7% increase in Hispanic lawyers, a 7.9% increase in Asian lawyers, and even a 3.39% increase in white lawyers).

209. *Id.* at 32.

210. Mike Stetz, *Black Law Grads Lag When It Comes to Landing Jobs*, NAT'L JURIST, https://bluetoad.com/publication/frame.php?i=695360&p=&pn=&ver=html5&view=articleBrowser&article_id=3965438 [<https://perma.cc/4TCV-CBGC>].

exam lag behind their lawyer peers ‘on every measure—earnings, employment stability, even marriage and divorce rates.’”²¹¹ Not only do those jobs pay less than bar passage required jobs (on top of black men making 82 cents to a dollar and black women making 64 cents on the dollar, even with post-graduate degrees²¹²), but they are also less likely to lead to prestigious judges or professors’ positions.²¹³ Consequently, those highly ranked schools with valuable networks of contacts and placements continue to fester in their lack of diversity.

Underneath it all, “J.D. Advantage”²¹⁴ jobs do not need to be considered the shameful death knell of a legal career.²¹⁵ After a second generational recession and global pandemic, the ABA is reporting lower numbers of employment for recent law school graduates.²¹⁶ The aftermath of pandemic related attorney layoffs has still not reached equilibrium.²¹⁷ The dovetail in the private sector and fundamentally law-

211. Christopher, *supra* note 177, at 169 (quoting Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. OF LEGAL EDUC. 3, 4 (Aug. 2010)).

212. Stephen Miller, *Black Workers Still Earn Less Than Their White Counterparts*, SOC’Y FOR HUM. RES. MGMT. (June 11, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx> [<https://perma.cc/6J9C-YABM>].

213. See Feingold & Souza, *supra* note 181, at 94 (describing the direct conduit law reviews create to coveted career opportunities).

214. Susan D. Carle, *The Current Anxiety About JD Advantage Jobs: An Analysis*, 57 SAN DIEGO L. REV. 675, 676 n.1 (2020).

The American Bar Association (ABA) defines JD Advantage jobs as those that “do not require passage of the bar exam or an active law license or involve practicing law” but for which “[t]he possession of a JD by the graduate was sought by the employer, required by the employer, or provided a demonstrable advantage in either obtaining or performing the duties of the position from the perspective of the employer.”

Id. at 677 n.3 (citation omitted).

215. See *id.* at 677 (explaining JD Advantage Jobs are sometimes considered second best and jobs that law school graduates take only when they are disappointed that they are unable to “secure a Bar Passage Required job”).

216. Stephanie Francis Ward, *2020 Law School Grads Having Harder Time Finding Jobs, Data Shows*, A.B.A. J. (Apr. 20, 2021, 3:57 PM), <https://www.abajournal.com/news/article/data-shows-decrease-in-long-term-full-time-jobs-for-2020-law-school-grads> [<https://perma.cc/W8L8-8J5E>].

217. See generally Danielle Braff, *COVID-19 and a Slow Economy Have Forced Law Firms of All Sizes to Cut Costs*, A.B.A. J. (Dec. 1, 2020, 1:40 AM), <https://www.abajournal.com/magazine/article/covid-19-and-a-slow-economy-have-forced-law-firms-of-all-sizes-to-cut-costs> [<https://perma.cc/Y4J3-9H2J>] (presenting data supporting press claims “about law firms furloughing and laying off staffers and lawyers”).

related skills is growing.²¹⁸ J.D. Advantage jobs have shaped the American landscape for centuries, expanding the reach, prestige, and function of a law degree far beyond what it initially represented.²¹⁹

There is a rise in demand for law graduates who can effectively be “legal engineers,” whose jobs hinge on understanding the law to advise clients on achieving previously unattempted tasks or goals.²²⁰ While this is not the only category of non-bar passage jobs available, removing the stigma of bar failure in legal education could go a long way to opening doors and encouraging students to find alternative legally-based employment because as Susan D. Carle notes, even jobs that do not require a law degree at all can be benefitted by one.

Even if new law graduates could obtain their jobs without going to law school, it may still be entirely rational for them to go to law school to learn the information and skills the law degree provides. It is easy to forget that many degrees are not essential for particular jobs; almost all master's degrees, including the MBA degree, are examples.²²¹

Even aside from non-legal utility, in an economy screaming for the benefits of a diverse workforce, a law degree that may not be helpful in a particular industry may be enough to lend credence to a candidate that might otherwise have been passed over.²²² By staunchly defending placement into bar-admitted positions, U.S. News is not only handicapping the potential expansion of the legal profession but convincing students that could flourish and benefit an extra-legal world that the only way they can give their degree worth is in an industry that requires passing a test designed to fail them.²²³

All law students face challenges. But minority students are saddled with the additional weight of limited, if any, role models in both their peers and

218. See Carle, *supra* note 214, at 703 (“The data show that the overall trend in the past decade has been toward more new law school graduates taking JD Advantage jobs, both in actual numbers and in percentages of overall reported jobs.”).

219. See *id.* at 683 (recounting the progression of non-practicing lawyers in the public sector in the New Deal Era, as policy makers and then lobbyists; how African-American lawyers in the Civil Rights Movement gained legal footholds in activism related litigation; and how M&A work, once thought to be low-skill and menial to an elite practice, became critical to the high powered world of corporate takeovers).

220. *Id.* at 688.

221. *Id.* at 695.

222. *Id.*

223. *Supra* text accompanying notes 206–220.

professors, conscious and unconscious bias from professors and peers, and the isolating experience of existing as a rarity in an elite academy.²²⁴ Pile on top of this a social stereotype that they are less capable, less prepared, and less intelligent, and it's hardly any wonder that about 5% of all attorneys are African-American.²²⁵

At the end of the day, by assigning such a large value to bar passage, and to jobs that can only be gained with bar passage, U.S. News feeds into the cycle of stereotype bias. It serves to suppress minority presence at every step of the law school process. But this burden does not rest with U.S. News alone. The entire legal academy operates in a way that questions minority students on their competency and presence in a continuous barrage that majoritarian students do not deal with. This suspicious eye bleeds into law practice, and minority lawyers who make it into the field, against all odds, are still confronted with daily scrutiny from their coworkers, senior partners, judges, and even clients.²²⁶ This is a threat that never really ends. The insidious nature of stereotype threat means a minor mistake could end a career, providing the in-group an opportunity to point out that minority members really do not belong.²²⁷ And although U.S. News did not create this monster, it certainly feeds it.

V. THE DIFFICULTY OF SYSTEMIC REFORM

A. *Systemic Threat Reinforces System Justification*

When threats or challenges to a system occur, members of society, both low- and high-SES members, exhibit system justification to a greater extent than when no challenge is present.²²⁸ For example, in a study conducted in Israel, Jost identified the Ashkenazi Jews as members of the high-SES group and Sephardic Jews as members of the low-SES group.²²⁹ They surveyed riders on public trains in Israel and noted their responses after they

224. Russell A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1, 42–43 (2016).

225. Stetz, *supra* note 210.

226. McClain, *supra* note 178, at 43.

227. See, e.g., *id.* (“[M]inority lawyers may find themselves having to prove their intelligence to associates, partners, judges, and others in the legal community. This may offer some explanation for the failure of minority lawyers to thrive in law firms.” (footnote omitted)).

228. JOST, SYSTEM JUSTIFICATION, *supra* note 26, at 106–07.

229. *Id.* at 107.

read a message that contained a high-system threat and a message that contained a low system threat.²³⁰

The low system threat message was,

These days, despite the difficulties the nation is facing, many people in Israel feel safer and more secure relative to the past. Many citizens feel that the country is relatively stable in terms of social, economic, and security factors. There is a sense of [optimism] regarding Israel's future and an understanding that this is the only place where Israeli people can feel secure.²³¹

The high-system threat message read,

These days, many people in Israel feel disappointed with the nation's condition. Many citizens feel that the country has reached a low point in terms of social, economic, and political factors. People do not feel as safe and secure as they used to, and there is a sense of uncertainty regarding the country's future.²³²

Both the Ashkenazim and Sephardim displayed in-group favoritism when the low threat message was received.²³³ However, when the high-threat message was received, both the Ashkenazim and Sephardim demonstrated favoritism for the Ashkenazim, or the higher SES group.²³⁴ The Ashkenazim demonstrated stronger in-group favoritism when they received the high-threat message, and the Sephardim demonstrated increased out-group favoritism when they received the high-threat message.²³⁵ The result and lesson for system justification is both high- and low-SES groups demonstrate increased favoritism and support of the societal status quo and stereotypes when the system is challenged.

Similarly, because of system justification, members of disadvantaged groups are more likely to give more weight to explanations based on merit that purport to eliminate discrimination as the basis of their low-SES. Shannon K. McCoy and Brenda Major, for example, demonstrated "women primed with meritocracy were more likely to blame themselves vs.

230. *Id.* at 107.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 107–08 (displaying, in Figure 5.2, "[s]tereotypical in-group and out-group favoritism as a function of group status and exposure to high versus low system criticism . . .").

discrimination for a personal rejection, perceived less sexism, and stereotyped themselves and women in general in subordinate ways.”²³⁶ McCoy and Major made one more observation that affirms how difficult system justification may be to overcome: “These system justifying responses to meritocracy cues may be most likely precisely when individuals would least like them to occur: in the presence of clear, meritocracy-violating inequality.”²³⁷

The 2016 Trump campaign may be an example of the increased system justification, which occurs when threats to the system are suggested. Consider the threat to the system narratives, such as the following created by highlighting in- and out-groups:

The Mexican Government is forcing *their* most unwanted people into the United States. *They* are, in many cases, criminals, drug dealers, rapists, etc.”²³⁸

We’ll get *them* out, secure the border, and once the border is secured, at a later date we’ll make a determination as *to the rest*. But we have some *bad hombres* here and we’re going to get *them* out.”²³⁹

Observe how many times “they” and “them” are used and the in-group or out-group delineation invoked by their use.

In my own form of palliative care, it is easier to convince myself that powerful evolutionary mechanisms hypnotized and deprived many

236. McCoy & Major, *Priming Meritocracy*, *supra* note 120, at 343.

237. *Id.*

238. Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?noredirect=on&utm_term=.e53366e44d90 [<https://perma.cc/Q4AH-W65T>] (emphasis added).

239. Carolina Moreno, *Here’s Why Trump’s ‘Bad Hombres’ Comment Was So Offensive*, HUFF. POST (Oct. 26, 2016), https://www.huffingtonpost.com/entry/heres-why-trumps-bad-hombres-comment-was-so-offensive_us_5808e121e4b0180a36e9b995 [<https://perma.cc/SN5K-Z9EG>] (emphasis added).

people²⁴⁰ of conscious choice when voting for a racist,²⁴¹ sexist,²⁴² and xenophobic²⁴³ candidate. The other alternative, too terrifying to accept, is that enough Americans deliberately and consciously voted for a racist, sexist, and xenophobic candidate for president.²⁴⁴

B. *Economic Impediments to Legal Education Reform*

Cultural narratives, different from our own, may reduce implicit bias.²⁴⁵ This reason is gentle cognitive cues may impact the limbic brain, where bias and justification occur.²⁴⁶

A study at the University of Virginia found that merely exposing people to narratives counter to their own reduced the impact of implicit bias on decision making.²⁴⁷ Even short multi-media presentations illustrating multicultural perspectives were helpful in reducing bias because they created epistemic unfreezing.²⁴⁸

As a result of this, intergroup interaction is important in reducing implicit bias. In experiments where white and black students were randomly assigned to live with each other in college dorms, some interesting findings

240. See, e.g., *Trump Nation*, USA TODAY NETWORK, https://www.usatoday.com/pages/interactives/trump-nation/#/?_k=ehjnus [<https://perma.cc/LS9L-ZGZ3>] (interviewing George Johnson from New York; “I like him because he’s an outsider. I like the idea that he’s an entrepreneur. He’s done very well in business. He’s made some mistakes, but anybody in business makes mistakes. I like the idea that he’s not tied to somebody by taking money, he has nobody to pay back, he has no favors to pay back and, with the idea of being an outsider, I just think he has a good chance to be able to run our country.”).

241. See, e.g., Moreno, *supra* note 239 (finding offensive former President Trump’s use of the Spanish language “while discussing immigrants in a negative fashion” and suggesting such use “prompt[s] voters to link the entire Latino population with something negative”).

242. See generally Barbara Stark, *Mr. Trump’s Contribution to Women’s Human Rights*, 24 ILSA J. of Int’l & Comparative L. 2 (2018) (discussing conduct “Trump bragged about on the Access Hollywood tape clearly constituted sexual harassment as well as sexual assault: ‘[W]hen you’re a star, they let you do it. You can do anything . . .’”).

243. See Ye Hee Lee, *supra* note 238 and accompanying text (“The Congressional Research Service found that the vast majority of unauthorized immigrants do not fit in the category that fits Trump’s description . . .”).

244. See *Trump Nation*, *supra* note 240 (interviewing Michael Akiyama from Hawaii; “What I like about him is that he calls it like it is. He’s going to say what he thinks, whether he offends anybody or not. Some things that he says that are really not right, but he says it, and I have to give him credit for that.”).

245. *Understanding Bias and the Brain*, *supra* note 49 (suggesting bias is combatable due to neuroplasticity).

246. *Id.*

247. See Calvin K. Lai et al., *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCH. COMPASS 315, 316 (2013) (defining evaluative conditioning).

248. *Id.*

regarding bias were observed.²⁴⁹ While intergroup contact reduced both explicit and implicit biases and quality of intergroup contact is important for reducing explicit bias, reductions in implicit bias were observed just based on increased quantity of intergroup contact.²⁵⁰

And yes, if we are interested in mitigating implicit biases, this means the value of diversity is just the diversity itself. The notion of diversity for the sake of diversity is incendiary for some.²⁵¹ However, an even larger problem with increasing diversity is that system justification also operates to prevent increases in diversity.²⁵² For example, if an institution's mission

249. *Id.* at 317.

250. *Id.*

251. See generally Richard Morin & Sharon Warden, *Americans Vent Anger at Affirmative Action*, WASH. POST (Mar. 24, 1995), <https://www.washingtonpost.com/wp-srv/politics/special/affirm/stories/aa032495.htm> [<https://perma.cc/DM8E-HQGL>] (discussing the views of individual Americans who were surveyed on their stance on affirmative action).

252. Simon Moss, *System Justification Theory*, SICO TESTS (June 30, 2016), <https://www.sicotests.com/psyarticle.asp?id=322> [<https://perma.cc/SY7T-5XAG>].

Many organizations introduce diversity programs, without actually improving fairness. They might refer to diversity in the vision and values statement or offer diversity training. Interestingly, people who do not belong to minority or disadvantaged groups tend to assume these organizations are fair, even if these workplaces engage in unjust behavior. That is, they perceive these diversity programs as a signal of fairness and may overlook apparent injustices, called the illusion of fairness. Because of this illusion, these individuals become more inclined to perceive the existing state of affairs as legitimate and fair. For example, they believe that existing inequalities in pay between the sexes is fair and feel animosity towards people who complain about discrimination.

To illustrate, in one study, conducted by Kaiser et al. (2013), participants read the vision and mission of a fictitious company. For half the participants, this vision and mission also alluded to the importance of diversity. Next, they read pie charts that indicated the percentage of White and Black employees who received promotions and scanned an article about an employee who had sued the organization for unfair discrimination. Finally, participants were asked to indicate the degree to which they feel that all races at this company seem to be treated fairly.

If the vision and mission alluded to diversity, participants rated the company as fair to all races. They maintained this perception even if the bar charts clearly showed that White employees were more likely to be promoted than Black employees. Their perception of fairness, therefore, was sometimes unwarranted.

Other studies extended these findings to other facets of the business. For example, if participants were informed that employees receive training on gender diversity, they were more inclined to reject complaints from women about gender discrimination, even if informed that women were more likely to be rejected than men during job interviews despite similar levels of aptitude. They also believed that pay is fair, even when informed that women earn significantly less money than men.

Id.

statement merely includes a statement alluding to an interest in diversity, then system justification means observers tend to ignore all the other compelling evidence indicating that the institution is not pro-diversity.²⁵³

Modern businesses realize that diversity is essential for profitability in America's changing demographic because:

1. "[d]iversity attracts more talent",²⁵⁴
2. "[d]ifferent experiences lead to more innovation"²⁵⁵
3. "[d]iverse thought leads to increased customer satisfaction"²⁵⁶
4. "[a] diverse team resonates with both customers and investors"²⁵⁷

253. *Id.*

254. Jana Turner, *4 Ways Diversity Is Directly Linked to Profitability*, ENTREPRENEUR (Feb. 14, 2020), <https://www.entrepreneur.com/article/346229> [<https://perma.cc/8JEA-92NX>].

Companies that display ethnic, gender and age diversity appeal to a broader spectrum of job seekers, giving those companies a better chance at attracting top talent. Today's companies are in a fierce competition for the best employees and are always looking for ways to draw them in. Simply put, diverse companies appeal to a diverse workforce and have a distinct advantage over companies that do not have a healthy percentage of women and people of color and varying ages on staff. When recruiting, businesses that source candidates from a diverse base are more likely to hire people with diverse characteristics.

Id.

255. *Id.*

If everyone on the team thinks the same way, there's little room for innovation, which creates a stifling environment for inventing the next big thing. On the other hand, people from dissimilar walks of life approach the world from a wide range of perspectives and offer unique intellectual capital to the companies for which they work.

Listening to the viewpoints of those who have had different experiences engenders richer brainstorming sessions, which foster outside-the-box thinking and higher levels of creativity for today's companies. These sessions can in turn lead to an idea or invention that will help a firm distinguish itself from its competitors and become more successful.

Id.

256. *Id.*

Serving the end user is difficult if a company's decision-making team doesn't include people who can relate to that customer. A diverse team is more likely to relate to a particular audience's wants, needs and pain points, creating greater opportunities to resonate with customers. Also, a diverse staff introduces the potential to reach new demographics in ways that might not have come to light with a homogenous group at the helm. Ultimately, customer volume and satisfaction can be improved through higher levels of diversity, which raises profitability.

Id.

257. *Id.*

Facebook, for example, has the diversity

goal of “50 in 5,” which means that by 2024, at least 50% of our workforce will be underrepresented people. In doing this, we aim to double the number of women employees globally and double the number of Black and Hispanic employees in the [U.S.] When we announced this goal last year, people from underrepresented groups accounted for 43% of our staff. Today, that number is up to 45.3%.²⁵⁸

The reverse is probably true for increasing diversity at the schools where diversity increases would do the most to break the U.S. News ranking cycle of privilege perpetuation because increasing diversity will mean decreased profits for these institutions.

Aaron Taylor explains that the schools with the highest LSAT scores must be the ones to increase the percentage enrollment of black students to “foster . . . wide-ranging success” among these students.²⁵⁹ Yet, these schools are doing little and have recently decreased their efforts to foster diversity.²⁶⁰

Taylor observes some startling discrepancies regarding where black students were enrolled. For example, in 2017, only thirty-six of the 200 law

Today’s investors and customers are keeping a keen eye on Environmental, Social and Corporate Governance (ESG) when it comes to the companies they invest in and support. Diversity is playing an increasing role in how these groups assess ESG. As clients and customers become more diverse, they want to work with and support diverse people; therefore, these groups seek out companies that actively and openly champion diversity as a pillar of their philosophy. Having a more diverse workforce gives entrepreneurial firms a better chance of connecting with the investors and customers who will help them grow their businesses.

Growing demand to increase company diversity is leading to a greater emphasis on this characteristic in the business realm. Just as sustainability was once a “nice-to-have” quality in a company and is now a necessity, diversity is fast becoming the norm rather than the exception among businesses. By recognizing how diversity is linked with greater innovation, increased customer volume and satisfaction, better ESG profiles and a higher likelihood of attracting top talent, entrepreneurial firms can begin to incorporate diverse hiring strategies that will lead to rising profitability.

Id.

258. Maxine Williams, *Facebook 2020 Diversity Report: Advancing Opportunity for All*, META (July 15, 2020), <https://about.fb.com/news/2020/07/facebook-2020-diversity-report/> [<https://perma.cc/PMX5-LR5D>].

259. Taylor, *supra* note 158, at 500.

260. *Id.*

schools accounted for greater than 50% of all black law students.²⁶¹ We independently observed the following using the Analytix database for 2020 enrollment statistics when comparing 2020 enrollment demographics to the U.S. News 2021 rankings:

1. There are twenty-seven schools with over 10% black enrollment, and only four of these are in the top fifty, with two of them being ranked forty-eight and fifty respectively, and only six of these twenty-seven are in the top one hundred.
2. There are eight schools with more than 20% black enrollment, and seven of these are in the lowest ranked or unranked tier. Howard University is the only school with greater than 20% black enrollment not ranked in the lowest tier (157–192).

Deborah Malamud suggests money and profit are the reasons the top schools will not admit more black students because currently, unlike in the corporate world, this means their profits will decrease.²⁶² Malamud further explains she does not think these schools are willing to decrease profits to facilitate admission of more low-SES students.²⁶³

261. *Id.* at 508.

One of the most salient characteristics of the law school environment is a lack of racial and ethnic diversity. At the vast majority of law schools, students of color are underrepresented, relative to their proportion of the population in the state and regions in which schools are located. In 2017, the 36 law schools with the largest enrollments of Black law students accounted for more than half of all Black law students nationwide. Put differently, 18 percent of the 200 law schools analyzed accounted for half the enrollment of Black law students. At only 46 schools (out of 200) was Black student enrollment at or above the proportion of Black people in the states in which the law schools are located; at only 40 law schools was Black student enrollment at or above proportion of their regional populations.

Id. (footnotes omitted).

262. See generally Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENVER U.L. REV. 729 (2011) (analyzing the dichotomy between law schools' dual desires of prestige and diversity).

[E]lite law schools (public and private) are not going to cut back on the rising faculty salaries, ambitious programming (e.g., clinical programs), and rising student and other administrative services that have contributed to their steeply rising tuition costs. Rising costs surely help to explain why the increased availability of student loans has not markedly changed the class composition of elite school enrollments.

Id. at 744.

263. *Id.*

[E]lite law schools seeking to reach a broader socioeconomic student population will need to recognize that, as a practical matter, the inclusion of students from the bottom of the SES range

C. *Existential Reluctance to System Justification Theory*

The massive power of implicit bias and system justification is the lack of dissonance previously described and the automatic interpretation of information and stimuli in a way that perpetuates the status quo.²⁶⁴ Additionally, because people are all subject to implicit bias, even those who believe they are not, will process information and make judgments that perpetuate the status quo²⁶⁵ of white dominance.²⁶⁶ This occurs even without the conscious racism that exists in our society because we are wired to make this happen for societal stability.

Ultimately the cost of the emotional comfort decreases “potential for social change and remediation of inequality”;²⁶⁷ system justification explains almost everything we do and make judgments about.²⁶⁸ The very concept of normal and normativity itself is infected with system justification and it destabilizes the entire field of social justice.²⁶⁹ System justification is the very reason we inadvertently tolerate injustice.²⁷⁰

But we resist accepting system justification because it threatens the entire field of deontological liberal progressive social thought.²⁷¹ In fact, American and Canadian societal studies demonstrate a prerequisite for Rawl’s notions of justice is impossible because people can never exist in the “original position,” personal experience and cultural baggage always influences people even when they consciously trying to disregard them.²⁷²

System justification theory is hard to accept because it reminds us that humans have frail reasoning capacities and do not always rationally process information and make sound judgments.²⁷³ This frail reasoning results in processing information to perpetuate the status quo or overvalue things,

is likely to remain a small-numbers phenomenon. To achieve a major downward shift in the class privilege of their top-decile-heavy student bodies of the sort Sander advocates, these schools will need to cultivate their appreciation for (and increase their monetary grants to) the middling-SES candidate. I doubt they will be willing to do so.

Id. at 750.

264. See Bahadur, *supra* note 30, at 23 (discussing the presence of implicit bias in the media).

265. *Id.*

266. *Id.* at 19.

267. JOST, SYSTEM JUSTIFICATION, *supra* note 26, at 8.

268. *Id.* at 9.

269. *Id.* at 14–15.

270. *Id.* at 15.

271. *Id.* at 23.

272. *Id.* at 23–26 (discussing the liberal-progressive tradition and demonstrating practical challenges).

273. *Id.* at 5.

which are already established.²⁷⁴ But there may be even more existentially alarming reasons why we find system justification theory difficult to accept.

Disturbingly, Jost concludes a fundamental tenet of American society, belief in a just God, is also a manifestation of this palliative device.²⁷⁵ He suggests, God (or gods) is “an evolutionary accident, that is, a by-product of psychological adaptations that enabled [humans] to infer agency and other hidden causes of observable outcomes in the social and physical world.”²⁷⁶ He further suggests religion plays an important part in system justification because it “provide[s] ideological cover for the existing social order and communicate[s] that prevailing institutions and arrangements are legitimate and just and therefore worth obeying and preserving.”²⁷⁷

I raise these issues not to debate the merits of belief in a supernatural being or beings, but only to highlight how deeply the foundations of system justification may run. Challenging the status quo would be existentially devastating for a large part of humanity because systemically justifying the status quo is the powerful palliative evolutionary mechanism shielding us from the reality of the randomness of our existence.

CONCLUSION

System justification has significant ramifications for all of humanity. If system justification is at play, inequality is perpetuated not only because of deliberate and conscious oppression by high-SES members, but also because human beings are biologically and evolutionarily wired with powerful unconscious palliative mechanisms that make alternative sense out of their environments rather than facing the hopelessness and cruelty of the truth.

After considering the conscious financial decision making and the system justification involved in the U.S. News Law School rankings, I am not

274. *Id.*

275. *Id.* at 201.

276. *Id.*

277. *Id.* Curiously, other scholars observed a link between religion and racism. See Deborah L. Hall et. al, *Why Don't We Practice What We Preach? A Meta-Analytic Review of Religious Racism*, 14:1 PERSONALITY & SOC. PSYCH. REV. 126, 135 (2010) (describing a 2010 study from the Society for Personality and Social Psychology concluded that, among white American Christians, as having “intergroup dynamics established by religious identification along with conventional life values appeared to drive religious racism.”). In fact, the study went so far as to conclude that even the humanitarian and inclusive interpretations of religious teachings does nothing to decrease religious-based racism, and found racial tolerance was highest among people who identified as agnostic. *Id.*

hopeful the cycle of privilege and of treating unblackness²⁷⁸ favorably, as represented by and perpetuated by the rankings, will ever change without greater and more radical structural changes than we currently consider acceptable. I, like Derek Bell, remain hopeless any real change to the racist status quo will ever occur because it involves restructuring on a scale not many people have truly contemplated.²⁷⁹

The rankings place schools in a difficult position. Students rely on the rankings to pick schools; therefore, schools try to advance their ranking to attract students. But if, after reading this Article, the relevant constituents with the power to bring about change refuse to acknowledge and address the systemic racism reflected and perpetuated by the rankings, then is the racism still unconscious?

Ultimately,

[t]he narcissistic Caucasian notion that black people have been fighting all this time so that white people would have positive feelings towards non-whites fuels the idiotic notion that perpetuates racism because it allows the people playing keep-away with equality to concentrate inwardly instead of actually doing the hard work required to correct the persistent problems of white supremacy.²⁸⁰

This hard work is not impossible. It appears dental schools are the only institutions of higher education with the teeth to resist the rankings because of the previously discussed flaws in the rankings. So, if we as an academy

278. See generally Ta-Nehisi Coates, Fear of a Black President, THE ATL. (2012), <https://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064/> [<https://perma.cc/YNX8-7YB4>] (“Slavery, Jim Crow, segregation: these bonded white people into a broad aristocracy united by the salient fact of unblackness.”).

279. Linda Greenhouse, *The End of Racism, and Other Fables*, N.Y. TIMES ARCHIVE, <https://archive.nytimes.com/www.nytimes.com/books/00/06/04/specials/bell-well.html?scp=26&sq=end%2520of%2520tenure&st=cse> [<https://perma.cc/P8VV-3D2X>].

In Derrick Bell’s view, discourse about race in America is mired in the sugarcoated myth that equality for blacks will be found just around the corner, as soon as the country completes its fitful but inevitably progressive journey toward enlightenment and justice.

The myth is sweet but ultimately disabling and dangerous, he believes, because it denies to both blacks and whites understanding of a truth that is almost exactly the opposite: that racism is not a passing phase but a permanent feature of American life, and that the path is marked not by real progress but by occasional short-lived judicial or legislative victories that serve to obscure the underlying truth even more.

Id.

280. Harriot, *supra* note 21.

wanted to, we could also bite down and make the tough decisions needed to prevent the systemic racism perpetuated by these rankings.

Some have asked why U.S. News doesn't rank dental schools. Initially, there was a ranking for dental schools, but after examining the ranking methodology, there was a backlash by dental educators against the ranking system and all dental schools refused to participate. It was viewed as a popularity opinion poll of the faculty and administrators who answered the survey rather than a true assessment of the schools. Dentistry isn't the only component of higher education to criticize the rankings, but we are the only ones who have been able to keep out of what many consider a flawed system that doesn't fairly represent the quality of programs.²⁸¹

It seems so obvious, but the truth is that if legal education wanted to be more diverse it would be.²⁸² Nothing but profitability and the voluntary use of meritless, racist metrics prevent increased diversity. Stated that way the solution seems simple, but the visceral panic you feel when you merely contemplate abandoning those metrics is system justification at work.²⁸³

281. Thanks to Dean Michael Hunter Schwartz for his insight into the dental school resistance to the rankings. Allan J. Formicola, *An Argument Against a Dental School Ranking System*, 1 JADE 14, 18 (2013).

Given the flawed nature of the U.S. News rankings, are our potential students better off in selecting a dental school to attend without dentistry being included? Potential students for dentistry have to do more research and are far better informed about schools from their research than by blindly following the U.S. News rankings or any other such rankings.

Id. at 18–19.

282. Personal Communication from Eugene Williams, Exec. Dir. & Gen. Manager, KTWU Public Television Station.

283. *Id.* (discussing Mr. Williams's sentiment that the diversity and inclusion efforts, campaigns, and other like aspirational statements are an insincere cover. He opines "diversity would have happened already, if we wanted it to." Just as in the corporate world, where diversity is profitable and it is increasing because companies are hiring greater numbers of diverse people, in the educational field if institutions thought diversity was genuinely valued, they simply would have hired higher numbers of diverse people by now and stopped talking about it and stopped pretending that the solution to low diversity is not simple and straightforward. Hire more diverse people.).