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# RESISTANCE IS NOT FUTILE: CHALLENGING AAPI HATE

PETER H. HUANG\*

## ABSTRACT

This Article analyzes how to challenge AAPI (Asian American Pacific Islander) hate—defined as explicit negative bias in racial beliefs towards AAPIs. In economics, beliefs are subjective probabilities over possible outcomes. Traditional neoclassical economics view beliefs as inputs to making decisions with more accurate beliefs having indirect, instrumental value by improving decision-making. This Article utilizes novel economic theories about *belief-based utility*, which economically captures the intuitive notion that people can derive pleasure and pain directly from their and other people’s beliefs. Even false beliefs can offer comfort and reassurance to people. This Article also draws on interdisciplinary and multidisciplinary theories about *deliberate ignorance*—defined as the conscious choice by individuals to ignore certain knowledge or particular information.

This Article studies how to change people’s beliefs about what a person of a certain race is likely to do, will do, or has done. This Article defines explicit racism to entail hateful racial beliefs, which can be due to disinformation or misinformation. Hateful beliefs can fuel misunderstanding and violence. This Article focuses on challenging AAPI hate due to the author’s experiences with AAPI hate. This Article examines how and why explicit racism is wrong. This Article analyzes subjective beliefs, hate crime laws, and explicit racism. This Article advocates three ways to challenge AAPI hate: positive racial education and mindfulness, positive racial conversations and communications, and positive racial associations, cultures, and norms.

## INTRODUCTION

### I. RACIAL BELIEFS, BIASES, AND AAPI HATE

#### A. *We All Have Many Stories to Share*

#### B. *Racial Beliefs and Doonesbury’s Street Calculus*

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- C. South Pacific's You've Got to Be Carefully Taught
  - D. *Implicit Bias and Implicit Racism*
  - E. *Explicit Bias and Explicit Racism*
  - F. *AAPI Hate, Explicit Bias, and Explicit Racism*
  - II. HOW AND WHY EXPLICIT RACISM IS WRONG
    - A. *Explicit Racism Is Immoral, Unethical, Unfair, and Unjust*
    - B. *Explicit Racism Destroys Value and Wealth*
    - C. *Explicit Racism Is Divisive and Unsustainable*
    - D. *Racism Is Mentally and Physically Unhealthy, Even for Racists*
    - E. *Explicit Racism Is Based on Wrong Racial Beliefs*
  - III. LAW AND ECONOMICS OF SUBJECTIVE BELIEFS
    - A. *Pleasures and Pains from Beliefs*
    - B. *Intentional Obliviousness*
    - C. *Fostering Accurate Beliefs*
    - D. *Economics of Hate*
  - IV. LAW AND ECONOMICS OF EXPLICIT RACISM
    - A. *Explicit Bias and Hate Crime Laws*
    - B. *Economics of Explicit Racism*
  - V. RESISTING AAPI HATE AND EXPLICIT RACISM
    - A. *Positive Racial Education and Mindfulness*
    - B. *Positive Racial Conversations and Communications*
    - C. *Positive Racial Associations, Cultures, and Norms*
    - D. *We All Have Many Stories to Learn*
- CONCLUSION

## INTRODUCTION

The United States is facing three fundamental race and ethnicity-related crossroads: first, the mainstreaming into American consciousness during the summer of 2020 of the Black Lives Matter (BLM) political and social movement<sup>1</sup> after the May 25, 2020, murder of African-American George Perry Floyd Jr. by a Minneapolis police department officer;<sup>2</sup> second, a southwestern border immigration crisis<sup>3</sup> and the “surge in undocumented migrant children arriving at the

1. See BLACK LIVES MATTER, <https://blacklivesmatter.com> [<https://perma.cc/WHA5-SR2N>] (last visited Dec. 6, 2021).

2. Eric Levenson, *How Minneapolis Police First Described the Murder of George Floyd, and What We Know Now*, CNN (Apr. 21, 2021, 3:35 PM), <https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html> [<https://perma.cc/3BN6-RPWA>].

3. Julia G. Young, *The Situation at the U.S.-Mexico Border Can't Be 'Solved' Without Acknowledging Its Origins*, TIME (Mar. 31, 2021, 2:59 PM), <https://time.com/5951532/migration-factors> [<https://perma.cc/NNC8-AGFD>].

U.S.-Mexico border”;<sup>4</sup> and third, and the focus of this Article, the resurgence of AAPI hate, explicit bias, explicit racism, and violence during the COVID-19 pandemic.<sup>5</sup>

This Article analyzes: AAPI hate, that this Article defines as explicit negative bias in racial beliefs; and explicit racism, that this Article defines as racism based on hate. This Article advocates these three ways to resist AAPI hate and explicit racism: positive racial education and mindfulness, positive racial conversations and communications, and positive associations, cultures, and norms.

This Article stands in solidarity with the fictional United Federation of Planets (henceforth the Federation) in opposition to a well-known phrase from the *Star Trek: The Next Generation* television series,<sup>6</sup> “*Resistance is futile.*”<sup>7</sup> This phrase is “part of the standard message” the Borg broadcast upon coming into contact with others the Borg “intend to assimilate into their collective.”<sup>8</sup> The complete message the Borg broadcast is: “We are the Borg. Lower your shields and surrender your ships. We will add your biological and technological distinctiveness to our own. Your culture will adapt to service us. Resistance is futile.”<sup>9</sup> The Borg are recurring adversaries of the Federation in the fictional *Star Trek* universe, appearing in twenty-one episodes of the *Star Trek* franchise,<sup>10</sup> including *Star Trek: Enterprise*<sup>11</sup>

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4. Lauren Egan, *Border Challenge Takes Center Stage at Biden’s First White House News Conference*, NBC NEWS (Mar. 25, 2021, 8:22 PM), <https://www.nbcnews.com/politics/white-house/biden-hold-first-press-conference-questions-loom-about-border-gun-n1262052> [https://perma.cc/CY73-43SR].

5. *Anti-AAPI Hate: A Conversation with Dr. Jennifer Lee*, S. POVERTY L. CTR.: HATEWATCH (May 5, 2021), <https://www.splcenter.org/hatewatch/2021/05/05/anti-aapi-hate-conversation-dr-jennifer-lee> [https://perma.cc/M8RJ-55PZ]; see *Fighting AAPI Hate: Violence against Asian Americans and Pacific Islanders Rising Amid COVID-19 Scapegoating*, S. POVERTY L. CTR.: HATEWATCH (May 13, 2021), <https://www.splcenter.org/news/2021/05/13/fighting-aapi-hate-violence-against-asian-americans-and-pacific-islanders-rising-amid-covid> [https://perma.cc/9AWB-9GNL]; N’dea Yancey-Bragg, ‘A Historic Surge’: *Anti-Asian American Hate Incidents Continue to Skyrocket Despite Public Awareness Campaign*, USA TODAY (May 7, 2021, 10:04 AM), <https://www.usatoday.com/story/news/nation/2021/05/06/racism-us-anti-asian-hate-grows-despite-biden-speech-activism/4969692001> [https://perma.cc/2TDG-9KDK].

6. *Star Trek: The Next Generation* (Paramount Television 1987–1994).

7. Neverpetaburningdog, *Resistance Is Futile*, URBAN DICTIONARY (June 3, 2004), <https://www.urbandictionary.com/define.php?term=resistance%20is%20futile> [https://perma.cc/BL3T-N3NW].

8. *Id.*

9. Diane Adams, *We Are the Borg. You Will Be Assimilated.*, BIT REBELS, <https://bitrebels.com/entertainment/we-are-the-borg-you-will-be-assimilated> [https://perma.cc/572X-BVV3] (last visited Dec. 6, 2021).

10. Paranormal Hub Writers, *Complete List of Appearances of the Borg in Star Trek*, PROJECT WEIRD (Mar. 18, 2017, 10:39 AM), <https://www.higgypop.com/news/star-trek-borg> [https://perma.cc/RP8J-CESM].

11. *Star Trek: Enterprise* (Paramount Television 2001–2005); see also Paranormal Hub Writers, *supra* note 10.

and *Star Trek: Voyager*,<sup>12</sup> in addition to the movie *Star Trek: First Contact*<sup>13</sup> and the new streaming only series, *Star Trek: Picard*.<sup>14</sup> The Borg, partly artificial and partly organic beings, believe they have the right to and should assimilate all other life forms.<sup>15</sup>

The rest of this introduction offers an overview of this Article and also recounts the personal and intellectual genesis of this Article. Part I analyzes racial beliefs, biases, and AAPI hate. Part II analyzes how and why explicit racism is wrong. Part III analyzes novel economic theories of subjective beliefs, including belief-based utility, deliberate ignorance, and hate. Part IV analyzes the law and economics of hate crime laws and quasi-markets for explicit racism. Part V advocates three ways to resist AAPI hate.

The genesis of this Article was in the summer of 2020, in the midst of the very large public protests over George Floyd's killing, my partner asked this, perhaps rhetorical, question: why don't you research and then write a law review article about whether and how law can solve racism? Although she may have been joking, I took her literally and very seriously. I had this immediate response to her prescient question: Martin Luther King, Jr. famously said,

Now the other myth that gets around is the idea that legislation cannot really solve the problem and that it has no great role to play in this period of social change because you've got to change the heart and you can't change the heart through legislation. You can't legislate morals. The job must be done through education and religion. Well, there's half-truth involved here. Certainly, if the problem is to be solved then in the final sense, hearts must be changed. Religion and education must play a great role in changing the heart. But we must go on to say that while it may be true that morality cannot be legislated, behavior can be regulated. It may be true that the law cannot change the heart but it can restrain the heartless. It may be true that the law cannot make a man love me but it can keep him from lynching me and I think that is pretty important, also . . . . So there is a need for executive orders. There is a need for judicial decrees. There is a need for civil rights legislation on the local scale within states and on the national scale from the federal government.<sup>16</sup>

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12. *Star Trek: Voyager* (Paramount Television 1995–2001); see also Paranormal Hub Writers, *supra* note 10.

13. *Star Trek: First Contact* (Paramount Pictures 1996); see also Paranormal Hub Writers, *supra* note 10.

14. *Star Trek: Picard* (CBS Television Studios 2020).

15. See Adams, *supra* note 9.

16. Dr. Martin Luther King, Jr., Speech at Western Michigan University (Dec. 18, 1963), <https://libguides.wmich.edu/mlkatwmu/speech> [<https://perma.cc/22F4-7CF9>].

My partner pressed me for details on how laws address racism. Her persistence led me to think about whether and in what precise sense racism is like a mathematics problem that can be solved or can be proven to be impossible to solve. These thoughts led to a trilogy of law review articles, of which this is the one which finally answers her simple to ask and complex to answer question.

My conceptual breakthrough is to think about hate in terms of negatively biased, not noisy enough, subjective probability beliefs. Racism and racist are contentious words, probability beliefs not so much. A mathematical mindset suggests changing probability beliefs. Such a transformation can be represented by a belief learning function mapping a simplex into itself.<sup>17</sup> For those who are familiar with mathematical economics, in particular game theory and general economic equilibrium theory, the simplex is a familiar set because it also is the domain of Nash equilibrium mixed strategies<sup>18</sup> and related to a unit simplex of canonical Arrow-Debreu competitive market equilibrium normalized price vectors.<sup>19</sup>

This Article approaches hate from the perspective of an AAPI seeing the recent resurgence in AAPI hate. This Article also is based on the seminal work of my Ph.D. thesis<sup>20</sup> principal advisor, polymath economic theorist,<sup>21</sup> and 1972 economics Nobel laureate,<sup>22</sup> Kenneth J. Arrow, about information economics,<sup>23</sup> organization economics,<sup>24</sup> mathematical economic models of racial discrimination,<sup>25</sup> and “the scope and limits of ordinary economic analysis for understanding racial discrimination even in markets.”<sup>26</sup>

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17. See The Free Dictionary, *Simplex*, FARLEX, INC., <https://encyclopedia2.thefreedictionary.com/Unit+simplex> [<https://perma.cc/LS2Y-TBK3>] (last visited Dec. 6, 2021).

18. See John F. Nash, Jr., *Equilibrium Points in N-Person Games*, 36 PROCS. NAT'L ACAD. SCIS. 48–49 (1950).

19. Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265, 268 (1954).

20. Peter H. Huang, *Asymptotic and Structural Stability of Signaling Equilibria* (June 1984) (Ph.D. dissertation, Applied Mathematics, Harvard University) (on file with the Harvard University Library system).

21. See, e.g., Michael M. Weinstein, *Kenneth Arrow, Nobel-Winning Economist Whose Influence Spanned Decades, Dies at 95*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/business/economy/kenneth-arrow-dead-nobel-laureate-in-economics.html> [<https://perma.cc/XAS4-GAEC>].

22. *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1972*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1972/summary> [<https://perma.cc/MK2R-PXH5>].

23. See, e.g., KENNETH J. ARROW, *THE ECONOMICS OF INFORMATION* (1984).

24. See, e.g., KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* (1974).

25. See, e.g., Kenneth J. Arrow, *Some Mathematical Models of Race Discrimination in the Labor Market*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE* 187 (Anthony H. Pascal ed., 1972); Kenneth J. Arrow, *The Theory of Discrimination*, in *DISCRIMINATION IN LABOR MARKETS* 3 (Orley Aschenfelter & Albert Rees eds., 1973).

26. Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12

Intellectually, this Article applies concepts, frameworks, and ideas from economics, law, cognitive and social psychology, cognitive and social neuroscience, mindfulness, and statistical decision theory to reframe, rethink, and resolve a central and thorny problem in human history: namely, that of racial hate. This Article introduces a mathematical and precise language to address, discuss, and think about pragmatic and transformative approaches to challenge hate by changing people's racial beliefs.

The observation that hate stems from certain racial probability beliefs does not imply change is easy or simple. Think of people who hold beliefs that COVID-19 is fake, or COVID-19 vaccines are part of a government conspiracy.<sup>27</sup> Changing beliefs is difficult and complicated if people do not desire to change their beliefs. There is a relevant riddle: how many therapists does it take to change a light bulb? Just one, and only if the light bulb wants to change.

Practically, this Article draws on firsthand experiences with, recollections of family members about, stories of friends involving, and the documented, long history and recent resurgence of AAPI hate.<sup>28</sup> Personally, this Article is the product of my earnest desire and wish to do something helpful and positive about resisting AAPI hate. Before the age of COVID-19 fueled AAPI hate, I downplayed AAPI hate. Tragic recent events have rendered such a position as naïve, unrealistic, and untenable.

Other AAPIs have been moved to take other actions, including encouraging the next generation of AAPIs to be politically active, organized, supportive of businesses owned by AAPIs and other People of Color, and a voter.<sup>29</sup> Some influential and wealthy AAPI business leaders have pledged and raised \$250 million to create a new Asian American foundation to challenge anti-AAPI discrimination, collect

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J. ECON. PERSPECTIVES 91, 91 (1998) (questioning the ability of economics alone to understand the pervasive, social phenomenon of racial discrimination); *see also* Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 367–68 (2004) (raising similar and related concerns about how law and economics provides a narrow and unbalanced approach to racial discrimination).

27. *See* Nina Burleigh, *Why So Many People Are Resisting Vaccination*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/2021/05/18/opinion/covid-vaccine-resistance.html> [<https://perma.cc/ZJ2X-LTFE>]; Sema K. Sgaler, *Meet the Four Kinds of People Holding Us Back From Full Vaccination*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/interactive/2021/05/18/opinion/covid-19-vaccine-hesitancy.html> [<https://perma.cc/E7DF-BSJ4>]; *see also* NINA BURLEIGH, VIRUS: VACCINATIONS, THE CDC, AND THE HIJACKING OF AMERICA'S RESPONSE TO THE PANDEMIC (2021).

28. *See, e.g.*, Cai et al., *infra* note 130 (listing articles of AAPI hate experiences).

29. Joyce Chang, *Hate Will Not Define My Life*, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/2021/04/29/style/anti-asian-hate.html> [<https://perma.cc/EV58-D98A>].

data to inform policymakers, and redesign school curricula to accurately convey the role of AAPIs in U.S. history.<sup>30</sup>

This Article does not follow the current, fashionable trend of emphasizing and focusing on current institutional, structural, and systemic racism due to a long history of implicit bias and implicit racism that still are present in the United States. Instead, this Article analyzes the roots, consequences, and responses to AAPI hate that still are present in today's United States. Explicit racial hate has caused way too much damage, harm, injury, pain, suffering, and violence for far too long in the history of humanity and the United States. The analysis in this Article should also be applicable to challenge and resist explicit sexism, anti-LGBTQ+-ism, audism, ableism, ageism, weightism, classism, and human or even carbon-based speciesism.

### I. RACIAL BELIEFS, BIASES, AND AAPI HATE

Part I is organized as follows. Section A defines racial beliefs and considers how they often contain too little noise.<sup>31</sup> Section B analyzes how people utilize racial beliefs to form risk assessments, as a *Doonesbury*<sup>32</sup> comic strip named *Street Calculus* exemplifies.<sup>33</sup> Section C analyzes a possible origin of hate, suggested by a song titled, *You've Got to be Carefully Taught*,<sup>34</sup> from the musical, *South Pacific*.<sup>35</sup> Section D provides a brief discussion and critical survey of a sizable literature about implicit bias and implicit racism. Section E analyzes explicit bias and explicit racism. Section F is a very brief primer of the history and recent resurgence of AAPI hate fueled by COVID-19-related rhetoric, especially in New York City.<sup>36</sup>

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30. Andrew Ross Sorkin & Edmund Lee, *Asian-American Business Leaders Fund Effort to Fight Discrimination*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/05/03/business/dealbook/asian-american-donation-philanthropy.html> [https://perma.cc/XZ6F-NUMS].

31. See DANIEL KAHNEMAN, OLIVER SIBONY & CASS R. SUNSTEIN, NOISE: A FLAW IN HUMAN JUDGMENT 343 (2021) (arguing that aberrations—noise—in an ordered belief system can accommodate changing social values).

32. Garry B. Trudeau, *Doonesbury* (illustration), WASH. POST, <https://www.washingtonpost.com/doonesbury> [https://perma.cc/2YP5-8X6J] (last visited Dec. 6, 2021).

33. Garry B. Trudeau, *Street Calculus* (illustration), FACING HIST. & OURSELVES, <https://www.facinghistory.org/resource-library/image/street-calculus> [https://perma.cc/G56V-6K5P] (last visited Dec. 6, 2021).

34. See, e.g., Barbra Streisand, *Carefully Taught/Children Will Listen (Live)*, on Live in Concert 2006 (Columbia 2007).

35. SOUTH PACIFIC (Richard Rodgers & Oscar Hammerstein II 1949).

36. See, e.g., Alexandra E. Petri & Daniel E. Slotnik, *Attacks on Asian-Americans in New York Stoke Fear, Anxiety and Anger*, N.Y. TIMES (July 18, 2021), <https://www.nytimes.com/2021/02/26/nyregion/asian-hate-crimes-attacks-ny.html> [https://perma.cc/5YAN-DU58].



This Article analyzes racial beliefs, which this Article defines as probability beliefs about what a specific individual is likely to do now, will do in the future, or has done in the past, conditioned upon observing that individual's race. In other words, racial beliefs equal the probability of a specific individual's present, future, or past actions, all conditional on only that individual's race. In symbols, a racial belief  $B = \Pr(A \mid R)$ . Because  $B$  is a probability belief,  $B$  is a real number, with  $B$  satisfying the pair of inequalities:  $0 \leq B \leq 1$ , meaning that  $B$  is an element of the closed interval  $[0, 1]$ .  $A$  is an action that an individual chooses from a set of possible actions. Alternatively,  $A$  can be an attribute from a set of possible attributes. The vertical bar " $\mid$ " is mathematical notation that stands for the phrase "conditional on" or "conditioned upon" and so  $A \mid R$  means  $A$  given an observation of  $R$ .  $R$  is a specific race.  $B$  is unobservable and unverifiable directly, though can be, and often is, inferred from observable behavior.  $R$  is observable directly, though it could be concealed.  $A$  may or may not be observable or verifiable by a third party.

An example of a stereotypical, false, and (seemingly) positively biased racial belief, exemplifying the so-called model minority myth,<sup>37</sup> would be denoted in the above symbolic notation by  $A =$  can explain the intuition underlying Itô's lemma,<sup>38</sup> from stochastic calculus,<sup>39</sup>  $R =$  Asian American and Native Hawaiian/Pacific Islander (AANHPI),<sup>40</sup> and  $B1$  is the belief that any AANHPI is more likely than not or beyond a reasonable doubt able to explain the intuition underlying Itô's lemma from stochastic calculus. A related racial belief  $B2$  is the belief that AANHPI professionals are more likely than not or beyond a reasonable doubt to face no discrimination in the workplace.<sup>41</sup> Notice the holders of  $B1$  and  $B2$  may include some AANHPIs and many European Americans.

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37. ELLEN D. WU, *THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY* *passim* (2014).

38. See George Lowther, *Ito's Lemma*, ALMOST SURE: A RANDOM MATH. BLOG (Jan. 20, 2010), <https://almostsuremath.com/2010/01/20/itos-lemma> [<https://perma.cc/8D7K-HQ6L>].

39. See, e.g., Stephane Glen, *Stochastic Calculus: Overview*, in CALCULUS HOW TO: CALCULUS FOR THE REST OF US!, <https://www.calculushowto.com/stochastic-calculus> [<https://perma.cc/X8LE-W5NV>] (last visited Dec. 6, 2021).

40. See Joseph R. Biden, Jr., *A Proclamation on Asian American and Native Hawaiian/Pacific Islander Heritage Month 2021*, WHITE HOUSE: BRIEFING ROOM (Apr. 30, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/30/a-proclamation-on-asian-american-and-native-ahawaiian-pacific-islander-heritage-month-2021> [<https://perma.cc/Q5YN-ZS7H>].

41. See MARGARET M. CHIN, STUCK: WHY ASIAN AMERICANS DON'T REACH THE TOP OF THE CORPORATE LADDER 171–72 (2020); Samantha Kubota, *What Is the 'Bamboo Ceiling'? Here's What Asian Americans Want You to Know*, TODAY: TMRW (Mar. 17, 2021, 2:05 PM), <https://www.today.com/tmrw/what-bamboo-ceiling-here-s-what-asian-americans-want-you-t212014> [<https://perma.cc/JR8J-3JXR>].

An example of a stereotypical, false, and negatively biased racial belief, exemplifying white supremacy, would be denoted in the above symbolic notation by A = superior to other races, R = European American, and B3 is the belief that any European American is with probability one superior to other races. A related racial belief B4 is the belief that any European American is with probability one justified to do violence to non-European Americans. Notice that holders of B3 and B4 form a proper subset of European Americans.

A final example of a racial belief is A = is worthy of dignity, love, and respect, R = any race or ethnicity, and B5 is the belief that any individual of any race or ethnicity is with probability one worthy of dignity, love, and respect. This compassionate, empathetic, positive, and transformative racial belief is related to research by University of Colorado professor of law, director of clinical programs, and Schaden chair in experiential learning Deborah Cantrell,<sup>42</sup> exploring transformative silence and protest.<sup>43</sup>

#### A. *We All Have Many Stories to Share*

It is rarely the case that the only feature that people can observe about an individual is that individual's race. Usually, there are other observable aspects of an individual, such as that individual's likely age, ethnicity, gender, and physical size. Sometimes, an individual's race is less probative of that individual's past, present, and future than an individual's name. For example, consider this list of very different famous individuals who have Black skin: Stacey Abrams, Muhammed Ali, Marcus Allen, Maya Angelou, Kofi Annan, Ahmaud Arbery, Arthur Ashe, Anita Baker, Jennifer Beals, Simone Biles, Mary J. Blige, Usain Bolt, Dain Blanton, Toni Braxton, Rayshard Brooks, LeVar Burton, Mariah Carey, Cory Booker, Kobe Bryant, Vanessa Bryant, Wilt Chamberlain, Tracy Chapman, Don Cheadle, Shirley Chisholm, Johnnie Cochran, Natalie Cole, Nat King Cole, Bill Cosby, Stephen Curry, Rosario Dawson, Eric Dickerson, Frederick Douglass, W.E.B. Du Bois, Idris Elba, Omar Epps, Lawrence Fishburne, Ella Fitzgerald, Vivica A. Fox, Jamie Foxx, Aretha Franklin, Morgan Freeman, Cori Gauff, Marvin Gaye, Gloria Gaynor, Althea Gibson, Danny Glover, Whoopi Goldberg, Macy Gray, Danai Gurira, Arsenio

42. See Deborah Cantrell, UNIV. COLO. BOULDER, <https://lawweb.colorado.edu/profiles/profile.jsp?id=262> [<https://perma.cc/JPJ5-M49V>].

43. Deborah Cantrell, *Colorado Law Talk: Exploring Transformative Silence and Protest*, COLO. L. (May 18, 2021, 5:30 PM), <https://www.colorado.edu/law/research/faculty-colloquia-and-distinguished-lecturers/colorado-law-talks> [<https://perma.cc/PV7M-XC9J>]; see also Deborah Cantrell, *Transformative Silence and Protest*, 22 RUTGERS J. L. & RELIGION 84 (2021).

Hall, Lloyd Haynes, Kamala Harris, Kevin Hart, Taraji P. Henson, Anita Hill, Dulé Hill, Gregory Hines, Aldis Hodge, Billie Holiday, Evander Holyfield, Whitney Houston, Sabrina Ionescu, LL Cool J, Janet Jackson, Michael Jackson, Samuel L. Jackson, LeBron James, Lennie James, Katharine Johnson, James Earl Jones, Quincy Jones, Jenny Johnson Jordan, Michael Jordan, Jacqueline Joyner-Kersee, Alicia Keys, Madison Keys, Chaka Khan, Coretta Scott King, Martin Luther King Jr., Regina King, Rodney King, Gladys Knight, Beyoncé Knowles, Kool & the Gang, Queen Latifah, Spike Lee, Carl Lewis, Joe Louis, Patrick Mahomes II, Nelson Mandela, Meghan Markle, Bob Marley, Thurgood Marshall, Trayvon Martin, Garrett Morris, Greg Morris, Phil Morris, Eddie Murphy, Nichelle Nichols, Lupita Nyong'o, Barack Obama, Michelle Obama, Shaquille O'Neal, Naomi Osaka, Jesse Owens, Pele, Rosa Parks, Jordan Peele, Sidney Poitier, CCH Pounder, Prince, Richard Pryor, Chance the Rapper, Phylicia Rashad, Lou Rawls, Shonda Rhimes, Lionel Richie, Nicole Richie, Rihanna, Chris Rock, Al Roker, Diana Ross, Sade, Zoe Saldana, Nina Simone, O. J. Simpson, Wesley Snipes, Sloane Stephens, Donna Summer, Ice-T, Mr. T, Breonna Taylor, Clarence Thomas, Philip Michael Thomas, Lorraine Toussaint, Harriet Tubman, Tina Turner, Desmond Tutu, Cicely Tyson, Mike Tyson, Neil deGrasse Tyson, Blair Underwood, Gabrielle Union, Dionne Warwick, Booker T. Washington, Denzel Washington, Damon Wayans, Carl Weathers, Forest Whitaker, Billy Dee Williams, Clarence Williams III, Doug Williams, Pharrell Williams, Vanessa Williams, Venus Williams, Ciara Wilson, Russell Wilson, Oprah Winfrey, Tiger Woods, Malcolm X, and Jay-Z.

On an episode of Stephen Colbert's *The Late Show*, African-American male actor, comedian, writer, and producer Keegan-Michael Key discussed how very different his experiences have been in encounters with the police, when he was younger and unknown compared to now, because the police recognize him due to his celebrity and see him as an individual as opposed to just another Black adult male.<sup>44</sup> Keegan-Michael Key discussed how the brilliant Nigerian author, Chimamanda Ngozi Adichie,<sup>45</sup> presented a TED talk, *The Danger of a Single Story*,<sup>46</sup> in which she warns that if people hear only a single story about another individual or country, then people risk critically misunderstanding that individual or country. Procter

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44. The Late Show with Stephen Colbert, *Keegan-Michael Key: My Encounters with Police Are Different as a Famous Black Man*, YOUTUBE (June 3, 2020), [https://youtu.be/2A6L\\_a3EJwc](https://youtu.be/2A6L_a3EJwc) [<https://perma.cc/9AFS-KK3P>] (starting approximately at the 4:41 mark).

45. *Id.* (starting approximately at the 5:57 mark).

46. Chimamanda Ngozi Adichie, *The Danger of a Single Story*, TEDGLOBAL (2009), [https://www.ted.com/talks/chimamanda\\_ngozi\\_adichie\\_the\\_danger\\_of\\_a\\_single\\_story](https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story) [<https://perma.cc/XBY2-GEG9>].

& Gamble produced a commercial video called *Widen the Screen to Widen Our View*, aiming to “share the full richness of the Black experience . . . broaden the spectrum of the images we see, the voices we hear, the stories we tell, and the people we understand. Fully.”<sup>47</sup>

In the United States, far too often, and tragically, the only story people know is a person’s skin color. The statistical inference problem of attempting to extrapolate the behavior of complex, dynamic, ever-changing, multidimensional humans from observing the single, noisy variable of skin color is that skin color is not what statisticians call a sufficient statistic.<sup>48</sup> The intuitive meaning of skin color not being a sufficient statistic for predicting human behavior is that much can be learned about any individual besides knowing only the race or skin color of that individual.

Every individual person is a very high-dimensional topological manifold,<sup>49</sup> which means that it locally resembles a very high-dimensional Euclidean space. The topological manifold corresponding to an individual consists of that individual’s evolving time path of emotional, mental, and physical attributes, life choices, beliefs, experiences, memories, personality characteristics, and potential futures. It is intuitive that very high-dimensional human beings cannot be summed up accurately by the single variable of their skin color. Attempting to reduce any individual to merely their skin color is to do that individual a serious injustice and make a categorical mistake. It should be unsurprising that it can be formally proven mathematically that it is impossible to project a very high-dimensional manifold into a single number and be able to capture all of the rich information content of that manifold.<sup>50</sup>

### *B. Racial Beliefs and Doonesbury’s Street Calculus*

Pulitzer Prize winning American cartoonist Garretson Beekman Trudeau, better known as Garry Trudeau, is perhaps best known for creating the comic strip *Doonesbury*,<sup>51</sup> that chronicles the adventures of various people including its titular character, Michael James

47. *Widen the Screen to Widen Our View*, PROCTER & GAMBLE, <https://us.pg.com/widen-the-screen> [<https://perma.cc/5X36-ADZX>].

48. See Ronald A. Fisher, *On the Mathematical Foundations of Theoretical Statistics*, 222 PHIL. TRANSACTIONS ROYAL SOC’Y LONDON SERIES A 309, 330 (1922).

49. See D.B. Gauld, *Topological Properties of Manifolds*, 81 AM. MATH. MONTHLY 633, 633 (1974) (providing a definition of a manifold).

50. A simple and precise statement of this mathematical proposition is: let  $M$  be an  $N$ -dimensional manifold,  $N > 1$ , and  $C$  be a proper subset of the real numbers. Then, there is no 1-to-1 function  $f: M \rightarrow C$ .

51. Trudeau, *supra* note 32.

“Mike” Doonesbury,<sup>52</sup> who started as a college student first-year fifty years ago.<sup>53</sup> Trudeau’s Doonesbury often makes political and social commentary, including a single-frame strip Trudeau titled, *Street Calculus*.<sup>54</sup> In this one-frame comic, a Black man and a white man<sup>55</sup> are walking towards each other on a sidewalk in the evening.<sup>56</sup> The thought bubbles above their heads depict each of their risk assessments in terms of the risk factors and mitigating factors they perceive of the other as they decide whether and how to greet each other.<sup>57</sup>

Among the risk factors for each are the race of the other.<sup>58</sup> Another risk factor for each is being male.<sup>59</sup> The mitigating factors for the white male is the Black male is walking in a pair of loafers, carrying a Federal Express envelope, wearing a polo shirt, and whistling Sondheim.<sup>60</sup> The mitigating factors for the Black male is that the white male is white, carrying groceries, looks to be over forty, and humming Motown.<sup>61</sup> For each male, there are four mitigating factors and two risk factors.<sup>62</sup> Hence, both males decide to politely greet each other—versus perhaps a more aggressive fight or more passive flight response.<sup>63</sup>

Decision scientists note that research in psychology and cognitive neuroscience find that most people assess risks as feelings in experiential, quick modes of system one thinking,<sup>64</sup> instead of risks

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52. Adam J. Kovitz, *Fun Facts About Garry Trudeau’s “Doonesbury,”* FACTS ‘O FUN (Sept. 20, 2011, 8:22 AM), <https://factsofun.wordpress.com/tag/michael-james-doonesbury> [<https://perma.cc/8NXX-VU2B>].

53. See Morning Edition, *Trudeau Reflects on Four Decades of ‘Doonesbury,’* NPR (Oct. 26, 2010, 12:01 AM), <https://www.npr.org/templates/story/story.php?storyId=130815184> [<https://perma.cc/T566-WUEQ>].

54. See Trudeau, *supra* note 33; see also Trudeau, *Street Calculus* (illustration), WASH. POST (Apr. 29, 1994), <http://web.pdx.edu/~tothm/pluralism/street%20calculus.pdf> [<https://perma.cc/ZRJ9-B4X6>]; Stanton Hare, *Street Calculus*, LIT DIGIT. MEDIA (Feb. 3, 2020), <https://stannaveryy.wordpress.com/2020/02/03/street-calculus> [<https://perma.cc/4RAX-SBZ8>] (commenting on the strip); Nylah Lee, *The Strength of Street Calculus: An Analysis of Garry Trudeau’s Political Cartoon*, MIND NY (Sept. 13, 2020), <https://nylahlee.wordpress.com/2020/09/13/the-strength-of-street-calculus-an-analysis-of-garry-trudeaus-political-cartoon> [<https://perma.cc/SFM7-CWW6>] (commenting on the strip).

55. I initially saw the white character as a woman.

56. Trudeau, *supra* note 33.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Trudeau, *supra* note 33.

62. *Id.*

63. See *Fight-or-Flight Response*, OXFORD REFERENCE: A DICTIONARY PSYCH. (4th ed. 2015), <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095817447> [<https://perma.cc/F7RL-ZREB>] (explaining the physiological fight or flight response).

64. See Paul Slovic, Melissa L. Finucane, Ellen Peters, & Donald G. MacGregor, *Risk as Analysis and Risk as Feelings: Some Thought about Affect, Reason, Risk, and Rationality*, 24 RISK ANALYSIS 311, 311–12 (2004).

as analysis in deliberative, slow modes of system two thinking. In both system one and system two modes of thinking, people make risk assessments and hold racial beliefs.<sup>65</sup> Additionally, people's racial beliefs and risk assessments can and usually do influence each other.<sup>66</sup>

An individual also may not perform any sort of street calculus whatsoever. I was walking down an inclined street in hilly San Francisco on the way from the Hilton San Francisco Union Square, located at 333 O'Farrell Street, to participate in *The Integrated Lawyer—A Symposium on Wellbeing and the Practice of Law* at the University of California Hastings College of Law, during the late afternoon of Thursday, January 10, 2019. I was submerged in deep thought about presenting a talk, *Lawyer Wellbeing: Mindfulness, Decision-Making, and Ethics*, early the next morning in the symposium.

Suddenly, a male who was muttering to himself and walking up the same inclined street approached me and punched me in the right, upper thigh before continuing on. I informed one of the symposium's co-organizers of this unexpected event later that evening and she made sure all symposium attendees had car rides back to their hotels that night and the next. I wondered if this incident was motivated by racial hate. We will never know. We do know my presentation was too hurried, because an audience member told me afterwards that it's a shame I was unable to speak slowly, because it seemed like I had a lot of information and knowledge to share!

### C. South Pacific's You've Got to Be Carefully Taught

From where people's racial beliefs originate is a critical and intriguing question.<sup>67</sup> Possible answers include genes, evolution, parents, friends, culture, mass media, and social media. The six words in the title of the show tune, *You've Got to be Carefully Taught*,<sup>68</sup> from Richard Rodgers and Oscar Hammerstein's famous musical play, *South Pacific*,<sup>69</sup> and later movie, *South Pacific*,<sup>70</sup> suggest intolerant

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65. See Stephen A. Wilson, *Racism Is Real, Racism Is Complicated, Racism Is Real Complicated*, 51 SOC'Y TCHRS. FAM. MED. 8, 8 (2019).

66. See Usef Faghihi, Clayton Estey, Ryan McCall, & Stan Franklin, *A Cognitive Model Fleshes out Kahneman's Fast and Slow Systems*, 11 BIOLOGICALLY INSPIRED COGNITIVE ARCHITECTURES 38, 39 (2015) (explaining how system two observes system one and can interrupt its processes).

67. See Susan T. Fiske, *Are We Born Racist?*, in ARE WE BORN RACIST?: NEW INSIGHTS FROM NEUROSCIENCE AND POSITIVE PSYCHOLOGY 7 (Jason Marsh, Rodolfo Mendoza-Denton & Jeremy Adam Smith, eds., 2010).

68. See, e.g., James Taylor, *You've Got to be Carefully Taught*, on American Standard (Fantasy 2020).

69. SOUTH PACIFIC, *supra* note 35.

70. SOUTH PACIFIC (Rodgers & Hammerstein II 1958).

racial beliefs can be taught and reinforced.<sup>71</sup> Just before the character Lieutenant Cable sings the song, he says that racism is “not born in you! It happens after you’re born.”<sup>72</sup> During a touring production of the musical in Atlanta, Georgia legislators were so offended by the song’s lyrics, they introduced a bill outlawing such entertainment.<sup>73</sup> Georgia state representative David C. Jones said a song that justifies interracial marriage covertly threatens America’s way of life.<sup>74</sup> Hammerstein expressed surprise that “anything kind and humane must necessarily originate in Moscow.”<sup>75</sup> You now can judge for yourself this controversy over the song’s propriety, because here are its complete lyrics:

You’ve got to be taught to hate and fear,  
 You’ve got to be taught from year to year,  
 It’s got to be drummed in your dear little ear—  
 You’ve got to be carefully taught!

You’ve got to be taught to be afraid  
 Of people whose eyes are oddly made,  
 And people whose skin is a different shade—  
 You’ve got to be carefully taught.

You’ve got to be taught before it’s too late,  
 Before you are six or seven or eight,  
 To hate all the people your relatives hate—  
 You’ve got to be carefully taught!  
 You’ve got to be carefully taught! . . .

I was cheated before  
 And I’m cheated again  
 By a mean little world  
 Full of mean little men.  
 And the one chance for me  
 Is the life I know best.

To be on an island  
 And to hell with the rest.  
 I’ll cling to this island

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71. See Michele Norris, *Six Words: ‘You’ve Got To Be Taught’ Intolerance*, NPR: MORNING EDITION (May 19, 2014, 3:21 AM), <https://www.npr.org/2014/05/19/308296815/six-words-youve-got-to-be-taught-intolerance> [<https://perma.cc/4DC4-VJKL>].

72. Rodgers & Hammerstein, “*You’ve Got to be Carefully Taught*”—*South Pacific* (1958), YOUTUBE (Aug. 3, 2018), <https://www.youtube.com/watch?v=VPf6ITsjskg> [<https://perma.cc/A79Y-ZYKJ>].

73. Andrea Most, “*You’ve Got to be Carefully Taught*”: *The Politics of Race in Rodgers and Hammerstein’s South Pacific*, 52 THEATRE J. 307, 307 (2000).

74. *Id.*

75. *Id.*

Like a tree or a stone,  
I'll cling to this island  
And be free—and alone.<sup>76</sup>

Individuals usually cherish their beliefs, presumably because those beliefs are theirs.<sup>77</sup> Many individuals often view their beliefs as if those beliefs were prized possessions,<sup>78</sup> or even beloved, and hence to be ferociously protected, babies.<sup>79</sup> Whether people's racial beliefs are innate or learned, and whatever those racial beliefs are, people's racial beliefs matter because people's racial beliefs affect people's racial decision-making. Racial beliefs can be biased or unbiased, negatively or positively, and explicitly or implicitly.

#### *D. Implicit Bias and Implicit Racism*

Hillary Clinton introduced the social psychology concept of implicit bias into popular American lexicon when she stated on September 26, 2016, during her first Presidential debate:

I think implicit bias is a problem for everyone, not just police. I think, unfortunately, too many of us in our great country jump to conclusions about each other. And therefore, I think we need all of us to be asking hard questions about you know why are we feeling this way.<sup>80</sup>

Earlier on April 20, 2016, at St. Paul's Baptist Church in Philadelphia, Hillary Clinton headlined a roundtable on gun violence, where she said "We all have implicit biases. . . . What we need to do

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76. Rodgers & Hammerstein, "You've Got to Be Carefully Taught," <https://rogersandhammerstein.com/song/south-pacific/youve-got-to-be-carefully-taught> [<https://perma.cc/GPF2-P9WW>]; Paulo Szot feat. Matthew Morrison, *You've Got to Be Carefully Taught*, ROCKOL, [https://www.rockol.com/uk/lyrics-84763493/paulo-szot-feat-matthew-morrison-youve-got-to-be-carefully-taught?refresh\\_ce](https://www.rockol.com/uk/lyrics-84763493/paulo-szot-feat-matthew-morrison-youve-got-to-be-carefully-taught?refresh_ce) [<https://perma.cc/TA7W-NYS3>].

77. See, e.g., MICHAEL A. HELLER & JAMES SALZMAN, *MINE! HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES* (2021); David McCraw, *Who Owns the Space Behind Your Airplane Seat?*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/books/review/michael-heller-james-salzman-mine.html> [<https://perma.cc/F7GD-L36E>] (reviewing the book).

78. Robert P. Abelson, *Beliefs Are Like Possessions*, 16 J. THEORY SOC. BEHAV. 223, 223 (1984).

79. GEORGE LOEWENSTEIN, *EXOTIC PREFERENCES: BEHAVIORAL ECONOMICS AND HUMAN MOTIVATION* xiii n.2 (2007) (stating "that people treat their beliefs as they do possessions—e.g. defending them from attack . . . . Given the heat of the emotion behind the protectiveness, 'Beliefs as Babies' strikes me as more on-target.").

80. *Clinton on Implicit Bias in Policing*, WASH. POST (Sept. 26, 2016, 9:00 PM), [https://www.washingtonpost.com/video/politics/clinton-on-implicit-bias-in-policing/2016/09/26/46e1e88c-8441-11e6-b57d-dd49277af02f\\_video.html](https://www.washingtonpost.com/video/politics/clinton-on-implicit-bias-in-policing/2016/09/26/46e1e88c-8441-11e6-b57d-dd49277af02f_video.html) [<https://perma.cc/H9ZU-7C9L>].



is be more honest about that and surface them. Because today, most people believe that they don't have those biases."<sup>81</sup>

There is much evidence that implicit bias permeates human societies.<sup>82</sup> Unconscious bias is responsible for microaggressions,<sup>83</sup> a word that Harvard Medical School psychiatrist Chester M. Pierce coined in 1970,<sup>84</sup> to describe slight, subtle, frequently unintentional, types of prejudice, such as covertly racist expressions, everyday indignities, and understated insults.<sup>85</sup> Columbia University Teachers College and the department of counseling and clinical psychology in the School of Social Work professor of psychology and education Derald Wing Sue,<sup>86</sup> proposed a taxonomy of microaggressions,<sup>87</sup> and popularized the concept and word.<sup>88</sup>

Emory University psychology professor Scott O. Lilienfeld<sup>89</sup> reviewed the psychology research literature about microaggressions and criticized it for being "far too underdeveloped on the conceptual and methodological fronts to warrant real-world application."<sup>90</sup> Lilienfeld urged "abandonment of the term 'microaggression,' and . . . a moratorium on microaggression training programs."<sup>91</sup> Other concerns about microaggressions include the potential abuse for harm exaggeration, resulting in the rise of victimhood and triggering possible retaliation.<sup>92</sup>

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81. Dan Merica, *Hillary Clinton Talks Race: 'We All Have Implicit Biases'*, CNN (Apr. 20, 2016, 8:54 PM), <https://www.cnn.com/2016/04/20/politics/hillary-clinton-race-implicit-biases/index.html> [<https://perma.cc/5ZCM-XVQU>].

82. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 955–56 (2006); Jerry Matysik, *Implicit Bias and Law Enforcement: Reducing Blame and Understanding the Brain*, LEXIPOL (Feb. 15, 2017), <https://www.lexipol.com/resources/blog/implicit-bias-law-enforcement-reducing-blame-understanding-brain> [<https://perma.cc/E9QU-M9LK>].

83. *Implicit Bias and Microaggressions*, HOW. UNIV. SCH. L.: L. LIBR., <https://library.law.howard.edu/socialjustice/bias> [<https://perma.cc/Y2D7-L3GU>].

84. Chester M. Pierce, *Black Psychiatry One Year After Miami*, 62 J. NAT'L MED. ASS'N 471, 471–72 (1970); see also Tori DeAngelis, *Unmasking 'Racial Micro Aggressions'*, 40 MONITOR 42, 43 (2009), <https://www.apa.org/monitor/2009/02/microaggression> [<https://perma.cc/PJN4-SBY6>].

85. *Microaggression*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/microaggression> [<https://perma.cc/6DGP-VM25>] (last visited Dec. 6, 2021).

86. Derald Wing Sue, COLUM., <https://www.tc.columbia.edu/faculty/dw2020> [<https://perma.cc/6QYM-76Q5>] (last visited Dec. 6, 2021).

87. Derald Wing Sue, Christina M. Capodilupo, Gina C. Torino, Jennifer M. Bucceri, Aisha M. B. Holder, Kevin L. Nadal & Marta Esquilin, *Racial Microaggressions in Everyday Life*, 62 AM. PSYCH. 271, 271 (2007).

88. DERALD WING SUE, *MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION* (2010).

89. *Scott O. Lilienfeld*, EMORY UNIV., <http://psychology.emory.edu/home/people/bios/lilienfeld-scott-o.html> [<https://perma.cc/4XHC-WFW4>].

90. Scott O. Lilienfeld, *Microaggressions: Strong Claims, Inadequate Evidence*, 12 PERSP. PSYCH. SCI. 138, 138 (2017).

91. *Id.*

92. Conor Friedersdorf, *Why Critics of the 'Microaggressions' Framework Are Skeptical*,

University of Missouri Kansas City associate professor of law Edward Cantu<sup>93</sup> and Rutgers University Distinguished Professor of Psychology Lee Jussim<sup>94</sup> critique the microaggression notion for its encouragement of psychological fragility, lack of scientific merit, and over-reliance upon subjective evidence.<sup>95</sup> Social psychologist and best-selling author,<sup>96</sup> Jonathan Haidt and Greg Lukianoff, who is a First Amendment expert and the president and CEO of the Foundation for Individual Rights in Education, point out how avoiding perceived microaggressions limits individuals' personal freedom and results in emotional self-harm, and that relying upon authority figures to call out and cancel microaggressions can atrophy the very skills required to self-mediate disputes.<sup>97</sup>

A recent example of the debate about microaggressions erupted after a Caucasian Rutgers Newark first-year law student quoted on October 28, 2020, a racial slur from *State v. Bridges*,<sup>98</sup> a 1993 New Jersey Supreme Court judicial opinion, with many Black students calling for a school policy to ban the utterance of racial slurs regardless of context, in addition to formal, public apologies from both the student who used the N-word as well as the criminal law professor who allegedly acquiesced in the usage.<sup>99</sup> Both did apologize in April 2021

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ATLANTIC (Sept. 4, 2015), <https://www.theatlantic.com/politicsarchive/2015/09/why-critics-of-the-microaggressions-framework-are-skeptical/405106> [<https://perma.cc/G25K-XQF3>].

93. Edward Cantu, UNIV. MO. KAN. CITY SCH. LAW, <https://law.umkc.edu/profiles/faculty-directory/edward-cantu.html> [<https://perma.cc/S628-2W4P>].

94. Lee Jussim *Distinguished Professor*, RUTGERS UNIV., <https://sites.rutgers.edu/lee-jussim> [<https://perma.cc/XJ8S-AJDA>].

95. Edward Cantu & Lee Jussim, *Microaggressions, Questionable Science, and Free Speech*, 26 TEX. REV. L. & POL. 1, 31–32 (2021).

96. See, e.g., FLOURISHING: POSITIVE PSYCHOLOGY AND THE LIFE WELL-LIVED (Corey L. M. Keyes & Jonathan Haidt eds., 2002); Jonathan Haidt, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM (2006); JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2012); JONATHAN HAIDT, ALL MINUS ONE: JOHN STUART MILL'S IDEAS ON FREE SPEECH ILLUSTRATED (2nd ed. 2021).

97. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 4, 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356> [<https://perma.cc/6264-9HM7>]; see also GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE (2018).

98. *State v. Bridges*, 628 A.2d 270, 271 (N.J. 1993).

99. Tracey Tully, *Debate Erupts at N.J. Law School After White Student Quotes Racial Slur*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/05/03/nyregion/Rutgers-law-school-n-word.html> [<https://perma.cc/6P8W-SPYZ>]; Eugene Volokh, *Rutgers Law Students Calling for a "Policy" on Students and Faculty Quoting Slurs from Court Cases*, VOLOKH CONSPIRACY (May 3, 2021, 6:00 PM), <https://reason.com/volokh/2021/05/03/rutgers-law-students-calling-for-a-policy-on-students-and-faculty-quoting-slurs-from-court-cases> [<https://perma.cc/36QX-EDMT>]; Debra Cassens Weiss, *Law Student who Quoted from Opinion, Including its Racial Slur, Finds Herself at Center of Controversy*, ABA J.

during a meeting of students the professor convened after learning about a petition that a group of Black Rutgers Law first-year students circulated on April 6, 2021.<sup>100</sup> This petition was signed by law school students and campus organizations across the United States.<sup>101</sup> Harvard Law School Michael R. Klein Professor of Law, Randall Kennedy,<sup>102</sup> who is Black and primarily teaches race relations law, and UCLA Law School Gary T. Schwartz Professor of Law, Eugene Volokh,<sup>103</sup> who is white and principally teaches First Amendment law, provide other examples of similar microaggressions in addition to a critique of this new taboo.<sup>104</sup>

Many, if not all, of this Article's readers have attended mandatory diversity training sessions about implicit bias and microaggressions. The intentions of employers and educational institution administrators in requiring such programs range from a genuine desire for equity and inclusion to more cynical public relations and litigation defense strategies. What is unfortunately clear is that most, if not all, of such efforts have dubious efficacy and unproven sustained positive impacts. These often quite heavy-handed types of corporate and educational programming may actually provoke sustained negative impacts in the form of backlash and triggered resentment.<sup>105</sup> The desire for Diversity, Equity, and Inclusion (DEI) is understandable based on ethics, fairness, morality, and justice, as well as justifiable based on evidence about how cognitive diversity improves group decision-making.<sup>106</sup>

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(May 4, 2021, 3:26 PM), <https://www.abajournal.com/news/article/law-student-who-quoted-from-opinion-including-its-racial-slur-finds-herself-at-center-of-controversy> [<https://perma.cc/2HBF-HFAJ>].

100. Volokh, *supra* note 99.

101. *Id.*

102. Randall L. Kennedy, HARV. LAW SCH., <https://hls.harvard.edu/faculty/directory/10470/Kennedy> [<https://perma.cc/N3QE-HTYH>].

103. Eugene Volokh, UCLA L. SCH., <https://www.law.ucla.edu/faculty/faculty-profiles/eugene-volokh> [<https://perma.cc/N4GR-N8PY>].

104. Randall Kennedy & Eugene Volokh, *The Case for Quoting the N-word In University Classrooms*, WASH. POST (May 13, 2021), <https://www.washingtonpost.com/outlook/2021/05/13/slurs-classrooms-law-school-taboo> [<https://perma.cc/64YV-297S>] (discussing similar cases); Randall Kennedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAP. U. L. REV. 1, 9 (2021) (analyzing related issues); see also Eugene Volokh, *Letter from USC Marshall School of Business Alumni About the "Neige"/Prof. Greg Patton Controversy*, VOLOKH CONSPIRACY (Sept. 7, 2020, 7:58 PM), <https://reason.com/volokh/2020/09/07/letter-from-usc-marshall-school-of-business-alumni-about-the-neige-prof-greg-patton-controversy> [<https://perma.cc/77RK-YTQ5>] (discussing a similar controversy Volokh later called the Great USC Homonym Panic of 2020).

105. See, e.g., Ginia Bellafante, *Private Schools Brought In Diversity Consultants. Outrage Ensued.*, N.Y. TIMES (Apr. 27, 2021), <https://www.nytimes.com/2021/04/23/nyregion/private-schools-diversity-brearley-dalton-grace.html> [<https://perma.cc/WC2T-CRDW>].

106. See, e.g., Peter H. Huang, *Boost: Improving Mindfulness, Thinking, and Diversity*, 10 WM. & MARY BUS. L. REV. 139, 190–94 (2018) (discussing the decision-making benefits of cognitive diversity).

How to actually, sustainably achieve DEI is less clear and probably unlikely through indoctrination from the cottage industry of currently marketed and packaged DEI training programs.

A plethora of law professors have written many law review articles discussing the prevalence of implicit bias in many areas, including communications law,<sup>107</sup> corporate governance,<sup>108</sup> criminal justice,<sup>109</sup> (legal) education,<sup>110</sup> employment antidiscrimination law,<sup>111</sup> health law,<sup>112</sup> housing and property law,<sup>113</sup> judicial decision-making,<sup>114</sup> mediation,<sup>115</sup> and torts.<sup>116</sup> Because of the concern about effects of implicit bias on jury selection, there are publications and training about implicit bias from a number of legal professional associations,<sup>117</sup> such as the American Bar Association,<sup>118</sup> the National Center for

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107. See, e.g., Jerry Kang, *Communications Law: Bits of Bias*, in *IMPLICIT BIAS ACROSS THE LAW* 132 (Justin D. Levinson & Robert J. Smith eds., 2012).

108. See, e.g., Adrienne Trainor & Byron Loflin, *Conflicts and Biases in the Boardroom*, CORP. BD. MBR. (Nov. 4, 2019), <https://corpgov.law.harvard.edu/2019/11/04/conflicts-and-biases-in-the-boardroom> [<https://perma.cc/SD5K-FYYM>].

109. See, e.g., L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *YALE L.J.* 2626, 2626 (2013); Spearlt, *Implicit Bias in Criminal Justice: Growing Influence as an Insight to Systemic Oppression*, in *THE STATE OF CRIMINAL JUSTICE 2020* 167 (2020).

110. See, e.g., Anne Gordon, *Debias Yourself to Debias Your Teaching*, *INSIDE HIGHER EDUC.* (Mar. 19, 2021), <https://www.insidehighered.com/views/2021/03/19/mitigating-implicit-bias-classroom-opinion> [<https://perma.cc/R92J-VEBE>].

111. See, e.g., Judge Nancy Gertner & Melissa Hart, *Implicit Bias in Employment Litigation*, in *IMPLICIT BIAS ACROSS THE LAW* 80 (Justin D. Levinson & Robert J. Smith eds., 2012); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 *CAL. L. REV.* 969 (2006); L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 *CAL. L. REV.* 1359, 1372 (2012).

112. See, e.g., Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 *AM. U. L. REV.* 275, 289 (2015); Dayna Bowen Matthew, *Toward A Structural Theory of Implicit Racial and Ethnic Bias in Health Care*, 25 *HEALTH MATRIX* 61 (2015); DAYNA BOWEN MATTHEW, *JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE* (2015).

113. See, e.g., Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in *IMPLICIT BIAS ACROSS THE LAW* 25 (Justin D. Levinson & Robert J. Smith eds., 2012); Rachel D. Godsil & James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 *UNIV. HAW. L. REV.* 313, 313 (2015); Sarah B. Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 *YALE L.J.* 1934, 1934 (2015).

114. See, e.g., Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 *CT. REV.* 78, 78 (2021).

115. See, e.g., Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 *S.M.U. L. REV.* 681, 681 (2017).

116. See, e.g., Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 *S. CAL. L. REV.* 507, 507 (2020).

117. *Implicit Bias in the Law: In the Courts*, *UNIV. CONN. SCH. L.*, <https://libguides.law.uconn.edu/implicit/courts> [<https://perma.cc/LBK6-MBGC>] (last visited Dec. 6, 2021).

118. Michelle Silverthorn, *5 Ways Law Students Can Interrupt Implicit Bias*, *ABA:*

State Courts,<sup>119</sup> and the National Council of Juvenile and Family Court Judges.<sup>120</sup>

Implicit bias explains how there can be “racism without racists.”<sup>121</sup> Implicit bias provides a no-fault rationale for unconscious racism.<sup>122</sup> People and society can rely on implicit bias to explain tacit racism in the way analogous to cartoon character Jessica Rabbit’s famous line: “I’m not bad, I’m just drawn that way”<sup>123</sup> from the movie, *Who Framed Roger Rabbit?*<sup>124</sup> Implicit bias is also appealing, comforting, and polite in public because it avoids confronting the contentious issue of explicit bias in racism with racists.

### *E. Explicit Bias and Explicit Racism*

Arizona State University Foundation Professor of Law Michael Selmi cogently observed that many law professors “have fallen hard for implicit bias and dozens of articles have been written espousing the role implicit bias plays in perpetuating inequality. Within legal analysis, a common mantra has arisen that defines implicit bias as unconscious, pervasive, and uncontrollable.”<sup>125</sup> Selmi pointed out how, “the paradox, is that labeling nearly all contemporary discrimination as implicit and unconscious is likely to place that behavior beyond legal reach. And it turns out that most of what is defined as implicit bias could just as easily be defined as explicit or conscious bias.”<sup>126</sup> Selmi calls for challenging “the common narrative by questioning the unconscious nature of implicit bias, and showing that such bias is less pervasive and more controllable than typically asserted.”<sup>127</sup>

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DIVERSITY, STUDENT LAW BLOG (May 29, 2018), <https://abaforlawstudents.com/2018/05/29/5-ways-law-students-can-interrupt-implicit-bias> [<https://perma.cc/D3YJ-A58M>].

119. *Implicit Bias*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/information-and-resources/racial-justice/implicit-bias> [<https://perma.cc/6L3A-XV4T>] (last visited Dec. 6, 2021).

120. Shawn C. Marsh, *The Lens of Implicit Bias*, NAT’L COUNCIL JUV. & FAM. CT. JUDGES (Sept. 11, 2021), <https://www.ncjfcj.org/publications/the-lens-of-implicit-bias> [<https://perma.cc/65P8-TBSZ>].

121. *Implicit Bias*, TR. & JUST., <https://trustandjustice.org/resources/intervention/implicit-bias> [<https://perma.cc/5T37-GFEE>] (last visited Dec. 6, 2021).

122. Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 B.C. L. REV. 1251, 1285–86 (2021) (discussing how calling racism “unconscious” is passive and deflects responsibility away from the actor).

123. Rachel Hinkle, *Who Framed Roger Rabbit: Jessica’s Famous Scene*, YOUTUBE (Mar. 15, 2011), <https://youtu.be/XAnNvnViJpo> [<https://perma.cc/MJ6G-RKBN>] (beginning at the 46 second mark).

124. WHO FRAMED ROGER RABBIT (Touchstone Pictures 1988).

125. Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 AZ. ST. S. L.J. 193, 193 (2018).

126. *Id.*

127. *Id.*

This Article concurs with Selmi and takes up his call by analyzing conscious, explicit negative bias towards AAPIs.

It undoubtedly is the case that Americans face the clear and present danger of unconscious or tacit racism.<sup>128</sup> Just as certainly, American society currently also faces the related, real, and quite pernicious issue of explicit negative bias in the form of conscious or explicit racism, which is racism with racists. This is a far more inconvenient reality to address and more uncomfortable to discuss than unconscious racism due to implicit bias. The rise in AAPI hate and explicit racism after former U.S. President Trump started calling COVID-19 the “China virus,” “Wuhan virus,” and “Kung Flu”<sup>129</sup> included many physical acts of violence by men attackers who yelled anti-Asian epithets and slurs while kicking, punching, and stomping upon elderly Asian men and women.<sup>130</sup> There is also the intermediate problem of ambiguous or contested racism, defined as incidents where some people view racism as clearly involved, while some people do not.<sup>131</sup> A recent example is the Atlanta area spa shootings.<sup>132</sup>

This Article addresses the unfortunate actuality that some people at least sometimes explicitly act more upon their wrong, subjective racial beliefs than evidence-based, objective racial beliefs, and relatedly people form lay theories concerning the social construct of race.<sup>133</sup> This Article details how and why explicit racism is wrong. This Article analyzes how to challenge explicit racism by improving the accuracy of racial beliefs. This Article applies novel economic theories about *belief-based utility*, which capture the intuitive notion that people derive pleasure and pain directly from their and other people’s beliefs,<sup>134</sup> in particular a preference for belief similarity

128. ANNE WARFIELD RAWLS & WAVERLY DUCK, TACIT RACISM (2020).

129. See Phillip Elliott, *How Distrust of Donald Trump Muddled the COVID-19 ‘Lab Leak’ Debate*, TIME (May 26, 2021), <https://time.com/6051414/donald-trump-wuhan-laboratory-leak>; see, e.g., Peter H. Huang, *Pandemic Emotions: The Good, the Bad, and the Unconscious—Implications for Public Health, Financial Economics, Law, and Leadership*, 16 NW. J.L. & SOC. POL’Y 80, 99–102 (2021).

130. Weiyi Cai, Audra D.S. Burch & Jugal K. Patel, *Swelling Anti-Asian Violence: Who Is Being Attacked Where*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/interactive/2021/04/03/us/anti-asian-attacks.html> [<https://perma.cc/TNWS-GMTK>].

131. Peter H. Huang, *Anti-Asian American Racism, COVID-19, Racism Contested, Humor, and Empathy*, 16 FIU L. REV. (forthcoming 2022) (introducing the idea of contested racism).

132. Regina Kim, *Atlanta Spa Shootings: What Korean-Language Media Told Us That the Mainstream Media Didn’t*, ROLLING STONE (Mar. 31, 2021, 3:21 PM), <https://www.rollingstone.com/culture/culture-news/atlanta-shootings-what-korean-language-media-told-us-that-the-mainstream-media-didnt-1149698> [<https://perma.cc/UM22-TYHR>].

133. ERICH KIRCHLER & ERIK HOELZL, ECONOMIC PSYCHOLOGY: AN INTRODUCTION 93–94 (2018) (introducing similar notions to economic decision-making).

134. George Loewenstein & Andras Molnar, *The Renaissance of Belief-Based Utility*

from identity considerations.<sup>135</sup> This Article also applies recent interdisciplinary and multidisciplinary theories of *deliberate ignorance*, defined to be the conscious choice of individuals to ignore knowledge or information.<sup>136</sup> People's racial beliefs can be hateful, compassionate, diagnostic, egalitarian, empathetic, evidence-based, learned, malleable, mindful, noiseless, overconfident, self-compassionate, sticky, and therapeutic.

#### *F. AAPI Hate, Explicit Bias, and Explicit Racism*

The phrase "Asian American" is a created political identity category and self-defining lexicon, which encompasses numerous diverse subcategories of individuals, some of whom neither share that many common experiences, nor view each other as allies.<sup>137</sup> An adjunct professor at UCLA, civil rights activist, and historian, Yuji Ichioka, coined the phrase "Asian American" in May 1968 upon founding the Asian American Political Alliance (AAPA) at the University of California, Berkeley.<sup>138</sup> The AAPA, as the first interethnic pan-Asian American political group, was created to unify all multi-ethnic Americans of Asian descent into a single identity to advocate for political change and social action.<sup>139</sup>

The term "Asian American" has become a phrase most government agencies, research scholars, mass media, and members of the public employ to describe people of East Asian and South Asian heritage. This remains a controversial and contentious issue because the

*in Economics*, 2 NATURE: HUM. BEHAV. 166, 166 (2018); Andras Molnar & George Loewenstein, *Thoughts and Players: An Introduction to Old and New Economic Perspectives on Beliefs*, in THE SCIENCE OF BELIEFS: A MULTIDISCIPLINARY APPROACH (Julien Musolino, Joseph Summer & Pernille Hemmer eds., forthcoming).

135. See, e.g., Ronit Bodner & Drazen Prelec, *Self-Signaling and Diagnostic Utility in Everyday Decision Making*, in THE PSYCHOLOGY OF ECONOMIC DECISIONS 1: RATIONALITY AND WELL-BEING 105 (Isabelle Brocas & Juab D. Carrillo eds., 2003).

136. RALPH HERTWIG & CHRISTOPH ENGEL, *Homo Ignorans: Deliberately Choosing Not to Know*, in DELIBERATE IGNORANCE: CHOOSING NOT TO KNOW 3 (RALPH HERTWIG & CHRISTOPH ENGEL eds. 2021).

137. See Jay CASPIAN KANG, THE LONELIEST AMERICANS (2021) (arguing the phrase Asian American now predominately refers to upwardly mobile East Asians); see also Jane Coaston, *Why Identity Politics Isn't Working for Asian Americans*, N.Y. TIMES: THE ARGUMENT (Nov. 17, 2021), <https://www.nytimes.com/2021/11/17/opinion/the-argument-asian-american-identity.html> (interviewing Jay Caspian Kang and Tammy Kim, as they debate and question the phrase and value of the phrase, Asian American).

138. Viet Thanh Nguyen, *Afterword: Becoming Bilingual, or Notes on Numbness and Feeling*, in FLASHPOINTS FOR ASIAN AMERICAN STUDIES 299 (Cathy Schlund-Vials ed. 2017).

139. Evan Cui, *Asian American Political Alliance (AAPA)*, FOUNDSF, [https://www.foundsf.org/index.php?title=Asian\\_American\\_Political\\_Alliance\\_\(AAPA\)](https://www.foundsf.org/index.php?title=Asian_American_Political_Alliance_(AAPA)) [https://perma.cc/J9FL-YPY4] (last visited Dec. 6, 2021).

concept of Asian itself remains quite contested and very much still what Taiwanese-American businessperson, business/media consultant, journalist, writer Jeff Yang calls an identity “in beta.”<sup>140</sup> The acronym AAPI to represent Asian American Pacific Islander has also become standard in popular lexicon,<sup>141</sup> as has the acronym AANHPI to represent Asian Americans, Native Hawaiians, and Pacific Islanders.<sup>142</sup>

Dating back to the first AAPI immigrants, there is a long history of AAPIs making many patriotic, scientific, and technical contributions in the United States.<sup>143</sup> There is also a long history of AAPI hate and xenophobia.<sup>144</sup> Most of this part of the history of the United States is almost never taught in K–12 of public schools, nor offered at many higher education institutions.<sup>145</sup> Hence, the recommendation to provide such education.<sup>146</sup>

A singular event politically galvanizing and unifying AAPIs<sup>147</sup> was the 1982 murder of Vincent Chin, a Chinese American draftsman, when he was 27 years old.<sup>148</sup> A Caucasian Chrysler supervisor and his stepson, a laid-off auto worker, attacked Chin after all of them had brawled in a strip club.<sup>149</sup> Chin was at his bachelor party to celebrate his upcoming wedding.<sup>150</sup> Chin’s attackers mistook Chin to be of Japanese descent, allegedly uttered racial slurs as they beat Chin, and blamed Chin for recent layoffs at Detroit’s big three U.S. automobile manufacturers due to success of imported cars made in

140. Gil Asakawa, *Jeff Yang In WSJ Deconstructs “Model Minority” & “New Jews” Stereotypes Of Asian Americans*, NIKKEI VIEW (Oct. 30, 2012), <https://nikkeiview.com/blog/2012/10/jeff-yang-in-wsj-deconstructs-model-minority-new-jews-stereotypes-asian-americans> [https://perma.cc/54QA-6KWB].

141. Eileen Rivers & Thuan Le Elston, *AAPI Pride: Asian and Pacific Islander Heritage Helps Lift America to What It Must Be*, USA TODAY (May 17, 2021), <https://news.yahoo.com/aapi-pride-asian-pacific-islander-130016737.html> [https://perma.cc/95JP-N9BB].

142. Angela Suresh, *A Celebration of Cultures: Asian American, Native Hawaiian, and Pacific Islander Heritage Month*, WASH. BUS. DYNAMICS (May 16, 2021), <https://www.wbdynamics.com/a-celebration-of-cultures-asian-american-native-hawaiian-and-pacific-islander-heritage-month> [https://perma.cc/4VR8-YGP3].

143. See, e.g., ERIKA LEE, *THE MAKING OF ASIAN AMERICA: A HISTORY* (2016).

144. See, e.g., ERIKA LEE, *AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES* (2019).

145. See, e.g., Terry Tang, *Racist Attacks Revive Asian American Studies Program Demand*, AP NEWS (May 15, 2021), <https://apnews.com/article/race-and-ethnicity-health-coronavirus-pandemic-lifestyle-education-75e52566e991e492d60b55ec7c38830a>.

146. See, e.g., ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943* (2003).

147. See, e.g., PAULA YOO, *FROM A WHISPER TO A RALLYING CRY: THE KILLING OF VINCENT CHIN AND THE TRIAL THAT GALVANIZED THE ASIAN AMERICAN MOVEMENT* (2021).

148. Judith Cummings, *Detroit Asian-Americans Protest Lenient Penalties for Murder*, N.Y. TIMES, Apr. 26, 1983, at A16.

149. *Id.*

150. *Id.*



Japan.<sup>151</sup> Frank H. Wu,<sup>152</sup> the current President of Queens College, the City University of New York,<sup>153</sup> and former chancellor, dean, and William L. Prosser Distinguished Professor at the University of California Hastings College of Law observed this incident was an example of mistaken identity, twice over because Chin was Chinese, not Japanese, and Chin was an American, not a foreigner.<sup>154</sup> As Wu also noted, this was explicit racism due to explicit in-your-face bias, not unconscious, implicit bias.<sup>155</sup> The anger, economic anxiety, and hate of Chin's killers prevented them from caring about verifying Chin's racial identity.<sup>156</sup> Chin was repeatedly beaten with a baseball bat until he said his last words, "it's not fair."<sup>157</sup> An emergency medical technician at the scene said Chin's "skull was obviously fractured, there was brains [sic] laying on the street . . . Chin was obviously in a fatal condition."<sup>158</sup> A policeman who witnessed Chin's murder said Chin's attacker "was swinging the bat like he was swinging 'for a home run.'"<sup>159</sup> Chin was rushed to a hospital, in a coma where he was pronounced brain dead, never regaining consciousness, and died four days later on June 23, 1982,<sup>160</sup> after being taken off life support. Chin's wedding guests attended Chin's funeral instead.<sup>161</sup>

The charges against Chin's killers were reduced from second-degree murder to manslaughter under a plea bargain agreement.<sup>162</sup> On March 16, 1983, Wayne County Circuit Judge Charles Kaufman fined Chin's murderers \$3,000, \$780 in court costs, and sentenced them to serve three years of probation, without any jail time.<sup>163</sup> The light sentence outraged and shocked Asian Americans.<sup>164</sup> Detroit

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151. *Id.*

152. FRANK H. WU, <https://frankhwu.com> [<https://perma.cc/4ZLV-GW4W>] (last visited Dec. 6, 2021).

153. *President Frank H. Wu*, QUEEN'S COLLEGE, CITY UNIVERSITY OF NEW YORK (CUNY), <https://www.qc.cuny.edu/about/administration/president/Pages/Welcome.aspx> [<https://perma.cc/BUX4-MNMD>] (last visited Dec. 6, 2021).

154. Frank H. Wu, *Asian Americans and the Future of Civil Rights*, SOC'Y AM. L. TCHRS. WEBINAR (May 25, 2021), <https://www.saltlaw.org/video-now-available-asian-americans-and-the-future-of-civil-rights> [<https://perma.cc/2BFH-MYGQ>].

155. *Id.*

156. *Id.*

157. *Id.*

158. Louise Hung, *35 Years After Vincent Chin's Brutal Murder, Nothing Has Changed*, GLOB. COMMENT (June 28, 2017), <https://globalcomment.com/35-years-vincent-chins-brutal-murder-nothing-changed> [<https://perma.cc/8PKN-28PU>].

159. *Id.*

160. Cummings, *supra* note 148.

161. Hung, *supra* note 158.

162. *Id.*

163. Becky Little, *How the 1982 Murder of Vincent Chin Ignited A Push for Asian American Rights*, HIST. STORIES, HIST. CHANNEL (May 5, 2020), <https://www.history.com/news/vincent-chin-murder-asian-american-rights> [<https://perma.cc/N7Q5-PMHY>].

164. *Id.*

Chinese Welfare Council president Kin Yee stated the sentences “amounted to a license to kill for \$3,000, provided you have a steady job or are a student and the victim is Chinese.”<sup>165</sup> The legacy of this case is that it became a crucial turning point for Asian American civil rights engagement and also a rallying cry for federal hate crime legislation.<sup>166</sup> Tragedy spawned activism.<sup>167</sup>

After a while, however, the AAPI diaspora mostly returned to its previous and culturally inclined political inactivity and public silence. It was as if AAPIs decided to keep their heads down, work hard, and mind their own business. Frank H. Wu has also noted there is a Chinese saying that cautions “the loudest duck is shot first by the hunter,” or spoken in Mandarin literally translated as “do not look for trouble,” and meaning generally, “do not get involved.”<sup>168</sup> A related Japanese proverb similarly warns “the nail that sticks up is pounded down.”<sup>169</sup> These idioms all stand in sharp contrast with the United States belief that “the squeaky wheel gets the grease.”<sup>170</sup>

This political dormancy mostly lasted until the COVID-19 global pandemic struck the United States in March 2020. Former U.S. President Trump’s conscious and explicit choice to utter and tweet the phrases, “China virus,” “kung flu,” and “Wuhan virus”<sup>171</sup> fueled a resurgence of anti-Chinese sentiment and AAPI hate.<sup>172</sup> There were 3,800 reported AAPI hate incidents from March 19, 2020, to February 28, 2021,<sup>173</sup> sixty-eight percent against women.<sup>174</sup> Much of the violence has targeted elderly and vulnerable AAPI.<sup>175</sup>

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165. *Id.*

166. *Id.*

167. Wu, *supra* note 154.

168. *Id.*

169. *Id.*

170. *Id.*

171. Sabrina Tavernise & Richard A. Oppel Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [<https://perma.cc/T8XH-ZQV8>]; Catie Edmondson, *Asian-American Lawmakers Call Out Racist Language: ‘I Am Not a Virus,’* N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/us/politics/asian-politicians-racism.html> [<https://perma.cc/Y663-S3ZL>].

172. Catie Edmondson, *Asian-American Lawmakers Call Out Racist Language: ‘I Am Not a Virus,’* N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/03/18/us/politics/asian-politicians-racism.html> [<https://perma.cc/235A-88RC>].

173. Terry Tang, *As Virus-Era Attacks on Asians Rise, Past Victims Look Back*, AP NEWS (Mar. 2, 2021), <https://apnews.com/article/victims-anti-asian-attacks-reflect-0632beaa1726f17dcabb672c224ad86a>; Kimmy Yam, *There Were 3,800 Anti-Asian Racist Incidents, Mostly Against Women, in Past Year*, NBC NEWS (Mar. 16, 2021), <https://www.nbcnews.com/news/asian-america/there-were-3-800-anti-asian-racist-incidents-mostly-against-n1261257> [<https://perma.cc/9WM4-PJR4>].

174. Yam, *supra* note 173.

175. Cady Lang, *Hate Crimes Against Asian Americans Are on the Rise. Many Say*

The new “normal” for many AAPIs is a reality of not leaving their residences unless absolutely necessary and then only protected by pocket-size pepper spray and such other personal-defense devices as keychain whistles,<sup>176</sup> safety from volunteer buddy pairs, security by neighborhood watch patrols,<sup>177</sup> and training in self-defense from such non-profits as the Asian American Federation<sup>178</sup> and the Center for Anti-Violence Education.<sup>179</sup>

## II. HOW AND WHY EXPLICIT RACISM IS WRONG

Whether the United States is a racist country depends on when in the history of the United States you focus on and what particular definition of racist you employ.<sup>180</sup> The United States of the past involved mass genocide of Native Americans, enslavement of African Americans, a legal doctrine of separate but equal, lynching of Chinese Americans, internment of Japanese Americans, and expulsion of Hispanic Americans.<sup>181</sup> The United States of today certainly seems by such metrics as levels of genocide, slavery, lynching, internment, and expulsion to be a less racist country than before, though not anywhere close to a post-racial, color-blind utopia,<sup>182</sup> as recent COVID-19-fueled violence against AAPIs proves.<sup>183</sup>

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*More Policing Isn't the Answer*, TIME (Feb. 18, 2021, 7:00 AM), <https://time.com/5938482/asian-american-attacks>.

176. Jessica Chia, *Keys, Wallet, Pepper Spray: The New Reality for Asian-Americans*, N.Y. TIMES (June 8, 2021), <https://www.nytimes.com/2021/05/20/nyregion/asian-americans-attacks-nyc.html> [<https://perma.cc/4XHD-PSLH>].

177. Alexandra E. Petri, *To Combat Anti-Asian Attacks, New Yorkers Join Neighborhood Watch Patrols*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/04/08/nyregion/anti-asian-violence-neighborhood-watch.html> [<https://perma.cc/T298-7DHM>].

178. ASIAN AMERICAN FEDERATION, <https://www.aafederation.org> [<https://perma.cc/X4EF-4UYT>] (last visited Dec. 6, 2021).

179. CTR. FOR ANTI-VIOLENCE EDUC., <https://www.caeny.org> [<https://perma.cc/TB9Q-Q5VF>] (last visited Dec. 6, 2021).

180. Charles M. Blow, *Is America a Racist Country?*, N.Y. TIMES (May 2, 2021), <https://www.nytimes.com/2021/05/02/opinion/america-racism.html> [<https://perma.cc/PDM3-EUHA>].

181. RACIAL EQUITY TOOLS, <https://www.racialequitytools.org/resources/fundamentals/history-of-racism-and-movements/overview-and-timelines> [<https://perma.cc/2EX8-NCWC>] (last visited Dec. 6, 2021).

182. Ralph Richard Banks, *Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACKLETTER L.J. 41, 41 (2009).

183. See, e.g., Serena Chow, *The Mental Health Implications of COVID-19 Related Violence Against Asian Americans*, ASAM NEWS (Apr. 30, 2020), <https://asamnews.com/2020/04/30/rise-in-anti-asian-hate-crimes-expected-to-adversely-impact-mental-health-of-asian-americans> [<https://perma.cc/3R5G-S865>]; Ivan Natividad, *Racist Harassment of Asian Health Care Workers Won't Cure Coronavirus*, BERKELEY NEWS (Apr. 9, 2020), <https://news.berkeley.edu/2020/04/09/racist-harassment-of-asian-health-care-workers-wont-cure-coronavirus> [<https://perma.cc/5BBT-VTCM>].

If everyone deems themselves racists, then what is the normative significance of being a racist? For everyone to say that they are racists, meaning of the implicit type with implicit bias,<sup>184</sup> actually provides cover, and presumably unintended safe harbor, for those who are genuinely old-fashioned, raging, and in some circles unfashionable racists, of the explicit type with explicit bias.

Similarly Princeton University's president Christopher Eisgruber's charge for his cabinet in June 2020 to develop "Plans to combat systemic racism at Princeton and beyond"<sup>185</sup> conflates unconscious racism from implicit bias with explicit racism with explicit bias.<sup>186</sup> As Princeton University mathematics professor Sergiu Klainerman<sup>187</sup> cogently points out, claiming "that all American institutions, including Princeton, are structurally and systemically racist"<sup>188</sup> proves way too much in terms of its universal scope, lacks critical discernment between different categories of racism and racial harms, and services the dubious agenda of "unearthing allegedly previously hidden forms of oppression, fomenting grievances and creating new and dangerous divisions."<sup>189</sup>

The above real-world stranger than fiction story is reminiscent of a joke about a university interviewing three candidates for its president. When the search committee asks the first finalist, who is an Abel Prize Laureate,<sup>190</sup> Fields Medal winner,<sup>191</sup> and pure and applied mathematics professor, "what is 1+1?" she answers 2 and

184. See, e.g., Carly Ortiz-Lytle, *Northwestern University's Interim Dean Admits to Being a 'Racist' During Digital Town Hall*, WASH. EXAM'R (Sept. 1, 2020, 8:36 PM), <https://www.washingtonexaminer.com/news/northwestern-universitys-interim-dean-admits-to-being-a-racist-during-digital-town-hall> (reporting on a virtual town meeting in which Northwestern Pritzker Law School faculty and staff in attendance admitted to being racists, including the interim dean and Elizabeth Froehling Horner Professor of Law James Speta and Executive Director of Major Gifts, who wrote, "My name is Emily Mullin. I am a racist and a gatekeeper of white supremacy. I will work to be better.").

185. Christopher L. Eisgruber, *Letter from President Eisgruber on the University's Efforts to Combat Systemic Racism*, PRINCETON UNIV.: OFF. COMM'C'N (Sept. 2, 2020), <https://www.princeton.edu/news/2020/09/02/letter-president-eisgruber-universitys-efforts-combat-systemic-racism> [<https://perma.cc/9QGw-VK92>].

186. See Randall Kennedy, *How Racist Are Universities, Really?*, CHRON. HIGHER EDUC. (Aug. 12, 2020), <https://www.chronicle.com/article/how-racist-are-universities-really> [<https://perma.cc/5GR9-KCEE>].

187. *Sergiu Klainerman*, PRINCETON UNIV.: MATH. DEP'T, <https://web.math.princeton.edu/~seri/homepage/seri.htm> [<https://perma.cc/L5SF-3G3L>] (last visited Dec. 6, 2021).

188. Sergiu Klainerman, *Princeton's President Is Wrong. The University Is Not Systemically Racist*, NEWSWEEK (Sept. 9, 2020), <https://www.newsweek.com/princetons-president-wrong-university-not-systemically-racist-opinion-1530480> [<https://perma.cc/JV4H-YUY4>].

189. *Id.*

190. THE ABEL PRIZE, <https://www.abelprize.no> [<https://perma.cc/VEE3-HZNL>] (last visited Dec. 6, 2021).

191. *Fields Medal*, INT'L MATH. UNION, <https://www.mathunion.org/imu-awards/fields-medal> (last visited Dec. 6, 2021).

provides them with a short, elegant proof based on the Peano axioms.<sup>192</sup> When the search committee asks the second finalist, who is a physics Nobel laureate and professor, “what is 1+1?” she answers 2 and provides them with experimental evidence. When the search committee asks the last finalist, who is a law professor, “what is 1+1?” she answers, “what do you want it to be?” and she is hired on the spot! It is easy to imagine additional candidates, such as a business school marketing professor with survey data showing that  $1+1 = 2$ . A friend commented that in real life, all the minority and women candidates are rejected in favor of a white male who was never even asked the question because of his presumed competence. The original joke itself is a university administration version of a scene in the movie *Pretty Woman*,<sup>193</sup> in which Richard Gere’s character Edward Lewis asks, “what’s your name?” to which Julia Roberts’ character Vivian Ward answers, “what do you want it to be?”<sup>194</sup>

Admissions of being racist and self-declarations of systemic racism by leaders of higher educational institutions also excuse calling for,<sup>195</sup> and provide a pretense for justifying,<sup>196</sup> the U.S. Department of Education to formally open investigations for potential violations of Title VI of the Civil Rights Act of 1964.<sup>197</sup> While such woke rites of guilt declarations may temporarily mollify protesting students,<sup>198</sup> these rituals of self-denunciations are mere forms of public theater designed to placate angered students and that fail to address the genuine problems explicit bias causes including the harms of explicit

192. See, e.g., William L. Hosch, *Peano Axioms*, BRITANNICA (Dec. 1, 2010), <https://www.britannica.com/science/Peano-axioms> [<https://perma.cc/EUF2-LGSX>].

193. *PRETTY WOMAN* (Touchstone Pictures 1990).

194. *Id.* Thanks to Max Stearns for his reminder of this movie scene.

195. Ashe Schow, *Members Of Human Rights Commission Ask Education Department To Investigate Northwestern After Law Professors Confess To Being Racists*, DAILY WIRE (Oct. 29, 2020), <https://www.dailywire.com/news/members-of-human-rights-commission-ask-education-department-to-investigate-northwestern-after-law-professors-confess-to-being-racists> [<https://perma.cc/7B7K-7DK4>].

196. Lauren Camera, *Education Department Investigates Princeton After University Admits to Systemic Racism*, U.S. NEWS & WORLD RPT. (Sept. 18, 2020), <https://www.usnews.com/news/education-news/articles/2020-09-18/education-department-investigates-princeton-after-university-admits-to-systemic-racism>.

197. 42 U.S.C. § 2000d, Pub. L. 88-352, title VI, § 601, July 2, 1964, 78 Stat. 252 (stating that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

198. Mike Stetz, *Academic Freedom: More Law Professors Are Treading Lightly in Today’s Classrooms*, NAT’L JURIST (May 11, 2021), <https://www.nationaljurist.com/national-jurist-magazine/academic-freedom-more-law-professors-are-treading-lightly-to-day%E2%80%99s> [<https://perma.cc/BK97-C3UV>] (discussing related examples); see also Eugene Volokh, *Why I Wouldn’t Recommend Adjunct Teaching at Law Schools Now* (Mar. 22, 2021, 9:01 AM), <https://reason.com/volokh/2021/03/22/why-i-wouldnt-recommend-adjunct-teaching-at-law-schools> (offering advice to not be a law school adjunct in the current era).

racism. Such performance art resembles the “voluntary” confessions of being a “running dog of capitalist imperialism”<sup>199</sup> by tortured People’s Republic of China citizens during Chairman Mao Zedong’s Great Proletarian Cultural Revolution’s misguided, forced, and unfortunate re-education through indoctrination efforts.<sup>200</sup>

Instead of joining the currently much in vogue chorus about evils from implicit racial bias and implicit racism’s harms, Part III of this Article answers the perhaps seemingly rhetorical questions of just how and why explicit racism from hate is wrong.

#### A. *Explicit Racism Is Immoral, Unethical, Unfair, and Unjust*

It seems uncontroversial to say that explicit racism violates core principles of ethics, decency, fairness, justice, and morality. Any human presumably subscribes to such universal tenets of humanity. The point is that an explicit racist, defined here to be an individual explicitly holding wrong, hate-filled, negatively biased, subjective racial beliefs rather than evidence-based, objective racial beliefs, would be able to disagree if that explicit racist believed the targets of his explicit racism are less than human or deserve to be targets of hate because of their inferiority. An explicit racist justifies his inhumanity towards so-called others by the alleged, believed, and perceived subhumanity of those others. The othering of an explicit racist’s targets by an explicit racist is crucial for an explicit racist to avoid cognitive dissonance and persist in holding wrong, subjective racial beliefs as opposed to evidence-based, objective racial beliefs that all humans deserve care, compassion, empathy, kindness, love, and respect. Many racial atrocities that have been committed throughout human history have been justified by the claim those who were killed were somehow less than human or less deserving of humane treatment than the killers.

Many people at least claim to subscribe to egalitarian beliefs about how people should treat each other. People generally are intolerant of discrimination, with a tendency for women to overstate and men to understate their tolerance of discrimination in public.<sup>201</sup> In the wake of the Black Lives Matter movement, it is now more than before socially inappropriate to voice discriminatory beliefs or views about treating people based on race or ethnicity.

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199. Paul Mirengoff, *Northwestern Law Dean Says He’s a Racist*, POWER LINE (Nov. 1, 2020), <https://www.powerlineblog.com/archives/2020/11/northwestern-law-dean-says-hes-a-racist.php> [<https://perma.cc/K8FM-P66Z>] (internal quotations omitted).

200. See, e.g., Harry Harding, *Reappraising the Cultural Revolution*, 4 THE WILSON Q. 132, 132–41 (1976).

201. Timur Kuran & Edward J. McCaffery, *Sex Differences in the Acceptability of Discrimination*, 61 POL. RSCH. Q. 228, 228 (2008).

As a comedian once joked, everyone claims to be anti-crack, at least in public. Really, who is pro-crack? Well, drug dealers, pushers, and crack users are pro-crack because their livelihoods depend on crack. Similarly, most people would claim in public to agree that explicit racism is immoral, unethical, unfair, and unjust. An explicit racist can reconcile that public statement with privately maintaining wrong, subjective racial beliefs if those beliefs view the targets of its explicit racism as being inhuman, subhuman, and/or deserving of being hated for some alleged reason, such as causing diseases or stealing our jobs.

Paul Slovic, who is a University of Oregon psychology professor<sup>202</sup> and also the founder and president of Decision Research,<sup>203</sup> a group of scientists from all over the United States and the planet who study decision-making in times when risks are involved, and his co-authors have conducted some intriguing and somewhat related research about how people may see themselves as being engaged in virtuous violence, from capital punishment for murder to use of nuclear weapons to kill millions of enemy civilians in the hope of saving thousands of U.S. troops.<sup>204</sup> Slovic and his co-authors also have conducted ground-breaking research about how the cognitive biases of psychic numbing,<sup>205</sup> pseudoinefficacy,<sup>206</sup> and the prominence effect<sup>207</sup> all combined lead to fading of compassion and human “inaction in the face of some of the world’s largest humanitarian challenges, including genocide, famine, and climate change.”<sup>208</sup> Economist Timur Kuran has written much,<sup>209</sup> including a book,<sup>210</sup> about people misrepresenting

202. Paul Slovic, UNIV. OR.: DEP’T PSYCH., <https://psychology.uoregon.edu/profile/pslovic> [<https://perma.cc/TY2H-P64V>] (last visited Dec. 6, 2021).

203. DECISION RESEARCH, PAUL SLOVIC, <https://www.decisionresearch.org/researchers/paul-slovic> [<https://perma.cc/KS72-BC4D>] (last visited Dec. 6, 2021).

204. Paul Slovic C.K. Mertz, David M. Markowitz, Andrew Quist & Daniel Västfjäll, *Virtuous Violence from the War Room to Death Row*, 117 PROC. NAT’L. ACAD. SCI. 20474, 20474 (2020); Paul Slovic & Herb Lin, *The Caveman & the Bomb in the Digital Age*, in THREE TWEETS TO MIDNIGHT: EFFECTS OF THE GLOBAL INFORMATION ECOSYSTEM ON THE RISK OF NUCLEAR CONFLICT 39 (Harold A. Trinkunas et al. eds., 2020).

205. PSYCHONUMBING, ARITHMETIC OF COMPASSION, <https://www.arithmeticofcompassion.org/psychic-numbing> [<https://perma.cc/2U7Q-CWP2>].

206. PSEUDOINEFFICACY, ARITHMETIC OF COMPASSION, <https://www.arithmeticofcompassion.org/pseudoinefficacy> [<https://perma.cc/9732-3GAA>].

207. THE PROMINENCE EFFECT, ARITHMETIC OF COMPASSION, <https://www.arithmeticofcompassion.org/prominence> [<https://perma.cc/X4RU-GJTH>].

208. ARITHMETIC OF COMPASSION, <https://www.arithmeticofcompassion.org> [<https://perma.cc/99D9-MWBM>].

209. See, e.g., Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623, 623 (2008); Timur Kuran, *Another Road to Serfdom: Cascading Intolerance*, in CAN IT HAPPEN HERE? 233 (Cass R. Sunstein ed., 2018).

210. TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (1995).

their wants under perceived social pressure. Kuran calls this preference falsification and observes its ubiquity in everyday life. For example, a guest may say to a party host, “oh, how very interesting, you’re serving us Cajun popcorn” instead of “this is burnt popcorn.” Kuran draws on economics, psychology, sociology, and political science to present a unified theory of how preference falsification can influence collective decisions, conceal political possibilities, distort human knowledge, maintain social stability, and orient structural change.<sup>211</sup> An explicit racist is likely to hide his explicit racist identity from the general public, even though an explicit racist may disclose his explicit racism to similar explicit racists and may reveal his explicit racism by committing explicitly racist acts.

### *B. Explicit Racism Destroys Value and Wealth*

Explicit racism involves by definition hatred of, and oppression over, at least one other racial group of people. Such behavior produces value for, and/or increases the wealth of, explicit racists at the expense of the targets of their explicit racism. For an obvious historical example, American slavery provided free labor to European American slave-owners at the expense of African-American slaves.<sup>212</sup> Real or alleged economic benefits often motivate and/or justify racial hatred. For another obvious historical example, Trump’s false claims that Mexicans are stealing American jobs<sup>213</sup> or Hitler’s taking “advantage of the existing prejudice that linked the Jews to monetary power and financial gain.”<sup>214</sup> Certainly, explicit racists can for a time appropriate a larger share of a country’s economic output by slavery and/or murder.

Heather McGhee, chair of the board of the nation’s largest online racial justice organization *Color of Change*,<sup>215</sup> and former president of the dynamic “think-and-do” tank “for a just, inclusive, multiracial democracy” *Demos*,<sup>216</sup> cogently explains how much explicit racism costs

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211. *Id.* at 174–75.

212. Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 436–39 (2012).

213. See, e.g., Daniel Politi, *Donald Trump in Phoenix: Mexicans Are “Taking Our Jobs” and “Killing Us”*, SLATE (July 12, 2015, 8:40 AM), <https://slate.com/news-and-politics/2015/07/donald-trump-in-phoenix-mexicans-are-taking-our-jobs-and-killing-us.html> [<https://perma.cc/PXM8-LV9K>].

214. ANNE FRANK HOUSE, *Hitler’s Antisemitism. Why Did He Hate the Jews?*, <https://www.annefrank.org/en/anne-frank/go-in-depth/why-did-hitler-hate-jews> [<https://perma.cc/ZCY8-6X2Y>] (last visited Dec. 6, 2021).

215. *About Color of Change*, COLOR OF CHANGE, <https://colorofchange.org/about> [<https://perma.cc/L93V-GK9K>] (last visited Dec. 6, 2021).

216. DEMOS, <https://www.demos.org> [<https://perma.cc/4B3Y-TEQW>] (last visited Dec. 6, 2021).



everyone in her thoughtful and thought-provoking book.<sup>217</sup> McGhee “discusses how the subprime mortgage crisis was fueled by racism.”<sup>218</sup> McGhee utilizes the compelling visual metaphor of a drained swimming pool to describe how explicit racism hurts us all:

Grand public pools were sumptuous emblems of common leisure in the early decades of the 20th century, steadfastly supported by white Americans until they were told to integrate them. McGhee visited the site of one such pool in Montgomery, Ala., drained and cemented over since 1959 so that nobody, white or Black, could ever enjoy it again.<sup>219</sup>

As one reviewer of McGhee’s book said, “I was reminded of the old saw about ‘cutting off one’s nose to spite one’s face’ . . . [i]t’s a self-defeating form of exclusion, a determination not to share resources even if the ultimate result is that everyone suffers.”<sup>220</sup>

McGhee makes clear how the legacy of slavery in the United States is reflected in today’s “depressed wages and scarce access to health care in the former Confederacy. But it’s a blight that’s no longer relegated to the region.”<sup>221</sup> McGhee observes how in large part, “the story of the hollowing out of the American working class is a story of the Southern economy, with its deep legacy of exploitative labor and divide-and-conquer tactics, going national.”<sup>222</sup>

McGhee realized “how most white voters weren’t ‘operating in their own rational economic self-interest’”<sup>223</sup> by voting for Trump in the 2016 election because Trump’s economic plans “promised to wreak economic, social and environmental havoc on them along with everyone else.”<sup>224</sup> McGhee “persuasively argues that white Americans have been steeped in the notion of ‘zero sum’—that any gains by another group must come at white people’s expense”<sup>225</sup> in such areas as our environment, health care, and voting rights.<sup>226</sup> McGhee says the zero-sum “cramped mentality is another legacy of slavery, . . . which really *was* zero sum—extractive and exploitative, like the settler colonialism

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217. HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER* (2021).

218. Jennifer Szalai, *The Sum of Us’ Tallies the Cost of Racism for Everyone*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/2021/02/23/books/review-sum-of-us-heather-mcgree.html> [<https://perma.cc/38J6-H5XT>].

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Szalai, *supra* note 218.

225. *Id.*

226. *Id.*

that enabled it.”<sup>227</sup> McGhee points out how belief in an zero-sum world “has always optimally benefited only the few while limiting the potential of the rest of us, and therefore the whole.”<sup>228</sup> McGhee convincingly makes her “appeals to concrete self-interest in order to show how our fortunes are tied up with the fortunes of others. ‘We suffer because our society was raised deficient in social solidarity.’”<sup>229</sup>

Another problem with explicit racism is that explicit racists also will invariably and undoubtedly shrink the total size of a country’s economic output. Why? Because murder decreases the quantity and possibly quality of labor supply. For example, many immigrants to the United States have been pioneers in research and development in STEM (Science, Technology, Engineering, and Mathematics), including the NASA (National Aeronautics and Space Administration) moon landing program. For an ironic historical example, Hitler’s persecution of Jews, disbelief in and rejection of so-called “Jewish physics,”<sup>230</sup> and multi-year “final solution” to exterminate the Jewish people through mass genocide<sup>231</sup> led Albert Einstein<sup>232</sup> and many other Jewish physicists to flee Germany and even led some German scientists to not work on the atomic bomb.<sup>233</sup>

Slavery exacerbates the familiar problems in competitive, voluntary labor markets of intrinsic motivation,<sup>234</sup> in addition to also well-known principal agency problems, such as agency costs (including monitoring costs),<sup>235</sup> moral hazard,<sup>236</sup> influence costs,<sup>237</sup> and sabotage.<sup>238</sup> There are theoretical reasons and empirical evidence to

227. *Id.*

228. *Id.*

229. *Id.*

230. Jonathan F. Keiler, *Why the Nazi Atomic Bomb Never Happened*, NAT’L INT. (Oct. 16, 2020), <https://nationalinterest.org/blog/buzz/hitlers-biggest-mistake-why-nazi-atomic-bomb-never-happened-170800> [<https://perma.cc/MR9Y-GNS6>].

231. *The “Final Solution”*, U.S. HOLOCAUST MEM’L MUSEUM (Dec. 8, 2020), <https://encyclopedi.ushmm.org/content/en/article/the-final-solution> [<https://perma.cc/RS5E-CJHN>].

232. Andrew Robinson, *‘I Shall Never Forget the Kindness.’ How England Helped Albert Einstein Escape Nazi Germany*, TIME (Oct. 1, 2019), <https://time.com/5684504/einstein-england> [<https://perma.cc/CD79-N6BR>].

233. Dan Charles, *Heisenberg’s Principles Kept Bomb from Nazis*, NEW SCIENTIST (Sept. 4, 1992), <https://www.newscientist.com/article/mg13518370-300-heisenbergs-principles-kept-bomb-from-nazis> [<https://perma.cc/E3KE-DLVV>].

234. Michael Gibbs, *Job Design, Learning & Intrinsic Motivation* 5 (Univ. of Chi. Booth Sch. of Bus., Working Paper No. 21-11, 2021).

235. *See, e.g.*, James Chen, *Agency Costs*, INVESTOPEDIA (Mar. 28, 2021), <https://www.investopedia.com/terms/a/agencycosts.asp> [<https://perma.cc/64EU-Q7DC>].

236. *See, e.g.*, Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. 324, 324 (1982).

237. *See, e.g.*, Paul Milgrom & John D. Roberts, *Bargaining Costs, Influence Costs, and the Organization of Economic Activity*, in *THE ECONOMIC NATURE OF THE FIRM: A READER* 86–88 (Randall S. Kroszner & Louis G. Putterman eds., 2014).

238. James Nordin, Book Note, 60 PUB. ADMIN. REV. 281, 282 (2000) (reviewing JOHN

suggest cooperation through free trade and voluntary labor market exchanges produce more total economic output than coercion through involuntary, forced labor. While fear motivates compliance in some, fear also motivates rebellion in others.

*C. Explicit Racism Is Divisive and Unsustainable*

While fear is a powerful human motivator, fear is also an aversive, unpleasant emotional state humans are motivated by to creatively find ways to avoid as a permanent state. By definition, explicit racism is divisive. In the long run, such divisiveness is unsustainable because it will foment civil war, revolution, and/or uprisings. Explicit racists divide people into an allegedly superior in-group to which the explicit racists belong dominating over an allegedly inferior out-group to which the targets of explicit racists belong. This hierarchical stratification is created and promulgated by explicit racists to justify explicit racists' hateful racial attitudes and subjective racial beliefs.

While explicit racists may be unconcerned by the divisiveness of explicit racism and might even say that divisiveness is part of the *raison d'être* for their explicit racism, explicit racists should and would be concerned about unsustainability of explicit racism. Explicit racists desire to maintain the culture, institutions, norms, and social structures that keep explicit racists in power and on top. Explicit racism's divisiveness plants the seeds for its demise because the system of explicit racism is based on conflict instead of cooperation, leads to wealth destruction instead of wealth creation, and achieves Pareto suboptimality instead of Pareto efficiency.<sup>239</sup>

Although explicit racism sows its own impermanence and instability, it can exist for centuries in the meantime. For historical examples, American slavery and Roman slavery lasted centuries before their downfalls. The eventual, inevitable, and long-run, collapse of a system of explicit racism does little to help targets of explicit racists in the interim and may not suffice to persuade explicit racists to change their ways if they are like most humans myopic and care not about how the future turns out in the long run. As the famous macroeconomist John Maynard Keynes wrote, "But this *long run* is a misleading guide to current affairs. *In the long run* we are all dead. Economists set themselves too easy, too useless a task if in

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BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC (1997).

239. See, e.g., JACK HIRSHLEIFER, THE DARK SIDE OF THE FORCE: ECONOMIC FOUNDATIONS OF CONFLICT THEORY (2001); JACK HIRSHLEIFER, ECONOMIC BEHAVIOUR IN ADVERSITY (1987).

tempestuous seasons they can only tell us that when the storm is past the ocean is flat again.”<sup>240</sup>

When the inevitable downfall of explicit racism starts, the salad days of explicit racists will be over. Chaos, retribution, and revenge for the violence of explicit racists in the past will be the price that explicit racists pay in the present and future. Even if explicit racists care not about explicit racism’s targets, explicit racists may care about what kind of world their progeny inherit from them in a world of explicit racism.

#### *D. Racism Is Mentally and Physically Unhealthy, Even for Racists*

Unsurprisingly, there is a large body of science-based evidence that being a target of explicit racism is mentally unhealthy in terms of anxiety, distraction, and stress.<sup>241</sup> Being a target of explicit racism is also physically unhealthy in terms of bodily harms from stress-induced diseases, stress-related accelerated biological aging,<sup>242</sup> and injuries from being targets of physical violence.<sup>243</sup> Surprisingly, there is also science-based evidence that being an implicit racist is also mentally and physically unhealthy for implicit racists.<sup>244</sup>

Explicit racists who live and work in large metropolitan regions of the United States unavoidably and repeatedly must interact with people of different races, often in close proximity. Such benign interactions take their toll over time in terms of chronic acute stress reactions causing the release of stress hormones, faster heart rate, constricted blood flow, reduced blood flows to brain and limbs, and increased risk later on in life of such diseases as high blood pressure, type 2 diabetes, and cancer.<sup>245</sup> Explicit racists view such unwanted yet inescapable social interactions as mental and/or physical threats, instead of challenges to grow and opportunities for growth.<sup>246</sup>

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240. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (2000 Great Minds Series, Prometheus Books, 1924).

241. See Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2237 (2017).

242. Arline T. Geronimus, Margaret T. Hicken, Jay A. Pearson, Sarah J. Seashols, Kelly L. Brown & Tracey Dawson Cruz, *Do U.S. Black Women Experience Stress-Related Accelerated Biological Aging? A Novel Theory and First Population-Based Test of Black-White Differences in Telomere Length*, 21 HUM. NATURE 19, 20 (2010).

243. See, e.g., Eve Ekman & Jeremy Adam Smith, *When Racism Makes Us Sick*, in ARE WE BORN RACIST?: NEW INSIGHTS FROM NEUROSCIENCE AND POSITIVE PSYCHOLOGY 34 (2010).

244. See, e.g., Elizabeth Page-Gould, *The Unhealthy Racist*, in ARE WE BORN RACIST?: NEW INSIGHTS FROM NEUROSCIENCE AND POSITIVE PSYCHOLOGY 41 (2010).

245. *Id.*

246. *Id.* at 42.

Explicit racists under such perceived threats experience well-known “fight or flight” physiological responses, including restrictions in blood flow, and the release of the stress hormone cortisol, which in turn interrupts digestive processes and breaks down muscle tissue.<sup>247</sup> The physical bodies and muscles, including the hearts of explicit racists become worn down and the immune system of explicit racists become damaged.<sup>248</sup> Seeing interracial verbal, physical, and social contacts as threats in a multiracial society, as the United States is now and will become more so in the future, impairs the mental and physical health of explicit racists.<sup>249</sup>

Researchers have found evidence of the above consequences in three laboratory studies involving European Americans with implicit racial bias.<sup>250</sup> Although these studies deal with implicit racism, instead of explicit racism, there are no field or experimental laboratory studies with people who claim to be explicit racists. One study involved European American males interacting socially by playing the game of *Boggle* with African-American men.<sup>251</sup> Another study had European Americans and Hispanic Americans disclosing personal information to each other.<sup>252</sup> A third study paired European Americans with European Americans or African Americans who performed job interview evaluations of the European Americans.<sup>253</sup> In these studies, European Americans who were more implicitly prejudiced experienced higher levels of distress, as measured by autonomic nervous system responses, cortisol levels in saliva samples, or levels of dehydroepiandrosterone sulfate, abbreviated as DHEA sulfate or DHEA-S, and also known as androsterone sulfate, a hormone which helps repair tissue damage caused by overtaxing the “fight or flight” physiological response.<sup>254</sup>

It is worthy to note that in all three of the above studies, less implicitly prejudiced European Americans experienced vastly measurably different physiological responses from engaging in interracial interactions.<sup>255</sup> European Americans having positive attitudes about

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247. *Id.*

248. *Id.*

249. *Id.*

250. Page-Gould, *supra* note 244, at 42–44.

251. Wendy Berry Mendes, Jim Blascovich, Brian Lickel & Sarah Hunter, *Why Egalitarianism Might Be Good for Your Health: Physiological Thriving During Stressful Intergroup Encounters*, 18 PSYCH. SCI. 939, 942–43, 948 (2007).

252. Elizabeth Page-Gould, Rodolfo Mendoza-Denton & Linda R. Tropp, *With A Little Help from My Cross-Group Friend: Reducing Anxiety in Intergroup Contexts Through Cross-Group Friendships*, 95 J. PERSONALITY & SOC. PSYCH. 1080, 1083 (2008).

253. Page-Gould, *supra* note 244, at 43.

254. *Id.* at 42–43.

255. *Id.* at 44.

individuals of different races enjoyed adaptive, happy, and healthy responses during interracial interactions.<sup>256</sup> Most hopeful is the fact that people can learn to have positive implicit racial attitudes.<sup>257</sup> In the second study above, after randomly assigned implicitly prejudiced European Americans completed a series of friendship-building tasks with individuals of a different race over several weeks, those European Americans' cortisol levels in their saliva samples dropped over those weeks.<sup>258</sup> Additionally, formerly implicitly prejudiced European Americans who had made a cross-race friend in the laboratory tasks actually sought out more daily interracial interactions even ten days after the final friendship-building task.<sup>259</sup>

Many people do things that are unhealthy for them in the long run, such as unhealthy eating and sedentary lifestyles, simply because they enjoy those activities in the short run. So too with explicit racism and explicit racism. In fact, we will discuss later in the Article how some people can be thought of as being addicts of explicit racism.

#### *E. Explicit Racism Is Based on Wrong Racial Beliefs*

Finally, what is wrong in the technical sense of being incorrect about explicit racism is that explicit racists maintain wrong, negatively biased subjective racial beliefs rather than evidence-based, objective racial beliefs. Racial beliefs can be accurate or inaccurate in quite different ways. First, racial beliefs may or may not coincide with the objective probability distribution of a particular individual. Second, racial beliefs may or not coincide with the objective probability distribution of a specific racial subpopulation.

An individual's racial beliefs might only take on the values of zero or one, instead of any intermediate fraction between zero and one. Such extreme racial beliefs can reflect strong prejudice, adherence to stereotypes, and/or quick, snap judgments. A mathematical difficulty with people having zero probability beliefs as racial beliefs before any interaction is that Bayesian updating can only change priors different from zero or one. Economist Ken Arrow observed, "[v]ast ills have followed a belief in certainty."<sup>260</sup>

Even for non-zero racial mistaken beliefs, what causes these inaccurate racial beliefs to persist? First, this error in beliefs can persist

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256. *Id.*

257. *Id.*

258. *Id.*

259. Page-Gould, *supra* note 244, at 44.

260. Kenneth J. Arrow, *I Know a Hawk from a Handsaw*, EMINENT ECONOMISTS: THEIR LIFE PHILOSOPHIES 46 (1992).

due to a lack of information about people of other races. Hence, proposals to include lessons in K–12 public school education curricula and also as electives in higher education about how BIPOC (Black, Indigenous, and People of Color)<sup>261</sup> played critical, important, and patriotic roles in the history of the United States. Alternatively, this can result from lack of contact with BIPOC. Hence, calls for diversity to encourage positive interactions. Finally, this might be from a lack of paying attention to BIPOC. Hence, suggestions to foster awareness about BIPOC.

Providing information about, experience with, and mindfulness concerning BIPOC each directly addresses three root causes of the continuation of explicit racism. In this way, these are what economists and others call first-best policies, as opposed to what economists and others call so-called second-best policies.<sup>262</sup> For example, in the general equilibrium theory of incomplete asset markets, if security markets are sufficiently incomplete meaning the possible sources of risk exceed the number of marketed financial instruments by at least two, then financial innovation by introducing a novel derivative instrument almost surely increases the inefficiency of risk allocation.<sup>263</sup>

To better appreciate what economists mean by a second-best solution instead of a first-best solution, a baking analogy is helpful.

Consider a frivolous analogy to cookie-baking. If the optimal cookie contains chocolate chips and coconut flakes, but you have no chocolate chips, chances are you don't need the coconut either. The second-best cookie may be the gingersnap. If ingredients (or logical conditions) do their work through a certain combination or complementarity, you may have to aim for something completely different even if you're missing just one of them.<sup>264</sup>

Another perhaps helpful analogy is how to increase the consumption of nutritional foods in developing countries. Organizations can provide information about nutritional foods or direct attention to nutritional foods. Both policies might only have temporary, instead of lasting effects. Both policies can also backfire. Both policies demand cognitive labor and require mental efforts by those for whom the

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261. Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/article/what-is-bipoc.html> [<https://perma.cc/378V-3S6H>].

262. Richard G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956).

263. See, e.g., Peter H. Huang, *A Normative Analysis of New Financially Engineered Derivatives*, 73 S. CAL. L. REV. 471 (2000).

264. Free Exchange, *Making the Second Best of It*, ECONOMIST (Aug. 21, 2007), <https://www.economist.com/free-exchange/2007/08/21/making-the-second-best-of-it> [<https://perma.cc/73XS-F95M>].

policies are designed to assist. In light of these additional time-consuming and cognitively demanding constraints on people digesting, processing, remembering, and utilizing information, it is more effective and simpler to satisfice with a second-best policy, such as distributing nutritional supplements and vitamins.

Mistaken racial beliefs mean that explicit racism is not based on reality. Instead, explicit racism is based on demonstrably false racial beliefs. People often have racial belief distributions that are of lower than realistic variance. This reflects people's overconfidence in their racial beliefs and their lack of humility and humbleness from not having noisier beliefs. Low variance, including zero variance, racial belief distributions imply an unrealistic level of precision about race's predictive power and contradicts the observable heterogeneity and individual differences of the people of any given race.<sup>265</sup> Hence, the oft-quoted suggestion to have a beginner's mind free of preconceived notions and stereotypes.

There are two key central questions about beliefs. First, how are beliefs started? Second, how are beliefs modified. Beliefs can be inherited from parents or adopted from family, acquaintances, friends, classmates, colleagues, and physical or virtual neighbors. Beliefs can be updated adaptively, by Bayes' theorem, via reinforcement learning, with lags, by ordinary least squares estimation, or never. Beliefs and stereotypes can propagate from chat rooms, entrepreneurial politicians, fake news, message boards, political polarization, rumors, scapegoating, and social media.

Some reasons for hate, anger, anxiety, contentiousness, controversy, divisiveness, and fear over such policies as affirmative action, explicit or implicit quotas, and DEI include the perceived, if not actual, constant-sum mentality of resource allocation if there is a fixed or even shrinking, instead of, growing pie.<sup>266</sup> The twin goals of diversity and meritocracy can be mutually incompatible if there is a fixed number of resources being allocated, e.g., admissions to elite higher education institutions or membership on corporate boards. Instead of individuals of different races viewing each other suspiciously as rivals in a musical chairs type of contest, individuals of different races instead should ask why the pie is not growing. Corporate board size can expand. Elite higher education institutions profess "their

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265. Cf. W. Carson Byrd & Victor E. Ray, *Ultimate Attribution in the Genetic Era: White Support for Genetic Explanations of Racial Differences and Policies*, 661 AM. ACAD. POL. SOC. SCI. 212, 228–30 (2015) (explaining how mistaken beliefs about biological and genetics difference impact views of individualism and race simultaneously).

266. Alex Edmans, *How Great Companies Deliver Both Purpose and Profit*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 1, 2020), <https://corpgov.law.harvard.edu/2020/10/01/how-great-companies-deliver-both-purpose-and-profit> [<https://perma.cc/C7BZ-WCTS>].



calling is to educate the best and the brightest—to promote what Stanford University’s mission statement calls ‘the public welfare.’”<sup>267</sup> Elite higher education institutions can prove their claims are not just cheap talk. Remote learning during COVID-19 proves that elite higher education institutions can start up virtual campuses.<sup>268</sup>

### III. LAW AND ECONOMICS OF SUBJECTIVE BELIEFS

The concept of beliefs in economics is based on the definition of beliefs in statistical decision theory,<sup>269</sup> which is canonical in economics and such other fields as clinical medicine, engineering, finance, management, and public policy.<sup>270</sup> People’s beliefs are inputs to making decisions and assessments of information turn on the value of that information for better decision-making. In this mainstream framework, decision-makers do not consume beliefs and information directly. Beliefs and information only have indirect and instrumental value, in terms of higher expected value and real option value.<sup>271</sup>

In addition to people’s beliefs about exogenously given states of nature, economists also study people’s beliefs about other people’s endogenously chosen actions. Multi-person decision theory, also known more colloquially as game theory, studies economic and social interactions in which multiple individuals each make choices that determine an outcome that affects each of those individuals.<sup>272</sup> Well-known examples of economic multi-person decision environments include oligopolies and cartels, such as OPEC (Oil and Petroleum Exporting Countries).<sup>273</sup>

The foundational and influential concept of a sequential equilibrium for extensive form games<sup>274</sup> specifies that each player has beliefs,

267. *Stanford’s Mission*, STANFORD UNIV. (2020), <https://exploreddegrees.stanford.edu/stanfordmission> [<https://perma.cc/5LCQ-PF84>].

268. David L. Kirp, *Why Stanford Should Clone Itself*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/opinion/stanford-admissions-campus.html> [<https://perma.cc/ZQ5F-MBYF>].

269. LEONARD J. SAVAGE, *THE FOUNDATIONS OF STATISTICS* (2nd rev. ed. 1954); see also L. J. Savage, *The Theory of Statistical Decision*, 46 J. AM. STAT. ASS’N 55 (1951) (reviewing the book, ABRAHAM WALD, *STATISTICAL DECISION FUNCTIONS* (1950)).

270. JOHN W. PRATT, HOWARD RAIFFA, & ROBERT SCHLAIFER, *STATISTICAL DECISION THEORY* (2008).

271. See, e.g., Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1267 (2006).

272. See Gholamreza Askari, Madjid Eshaghi Gordji, & Choonkill Park, *The Behavioral Model and Game Theory*, 5 PALGRAVE COMMUNICATIONS 1, 3, 7 (2019).

273. Martin J. Osborne & Carolyn Pitchik, *Cartels, Profits and Excess Capacity*, 28 INT’L ECON. REV. 413, 413 (1987); Steven E. Plaut, *OPEC Is Not a Cartel*, 24 CHALLENGE 18, 21–22 (1981).

274. David M. Kreps & Robert Wilson, *Sequential Equilibria*, 50 ECONOMETRICA 863, 863 (1982).

defined for each information set belonging to a player, to be a probability distribution over the nodes of that information set.<sup>275</sup> An assessment consists of strategies and beliefs for all players.<sup>276</sup> Intuitively, an assessment is a perfect Bayesian equilibrium if its strategies are sensible given its beliefs and its beliefs are confirmed on the outcome path given by its strategies.<sup>277</sup> A sequential equilibrium adds the requirement that there be arbitrarily small perturbations of beliefs and associated strategies with the same property.<sup>278</sup>

Psychological game theory (PGT)<sup>279</sup> offers a mathematical language to study many types of motivation where people's preferences depend directly on their own or others' beliefs about choices in a multi-person decision setting. PGT permits incorporating emotions, fairness, image concerns, reciprocity, and self-esteem into economic analysis. A recent comprehensive and well-written survey offers a detailed guide to basic theory, experiments, applied work, and methodology of PGT.<sup>280</sup> A law related example of a PGT model analyzes anger and surprise in decisions about filing a lawsuit, settlement, and going to trial.<sup>281</sup> Another law related example of a PGT model analyzes embarrassment, guilt, and remorse in maintaining informal social norms.<sup>282</sup> PGT models can help understand the role of emotions and beliefs in leadership.<sup>283</sup> Part III of this Article introduces novel economic theories of *belief-based utility*, and interdisciplinary and multidisciplinary theories of *deliberate ignorance*. These theories are novel and transformative because they are in sharp contrast with and represent significant departures from traditional orthodoxy. Exciting recent empirical, experimental, and theoretical research appreciates that people's minds directly and intrinsically enjoy, or not, beliefs and information, which leads to consumption or avoidance of beliefs and information. Some people often will put off learning about information they fear might be bad news even though doing

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275. *Id.*

276. *Id.*

277. DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 321 (1991) (defining a perfect Bayesian equilibrium).

278. Kreps & Wilson, *supra* note 274, at 873.

279. John Geanakoplos, David Pearce, & Ennio Stacchetti, *Psychological Games and Sequential Rationality*, 1 *GAMES & ECON. BEHAV.* 60 (1989); *see also* Ofer H. Azar, *The Influence of Psychological Game Theory*, 167 *J. ECON. BEHAV. & ORG.* 445, 445 (2019).

280. Pierpaolo Battigalli & Martin Dufwenberg, *Belief-Dependent Motivations and Psychological Game Theory* (CESifo, Working Paper No. 8285, 2020).

281. Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 *INT'L REV. L. & ECON.* 31, 31 (1992).

282. Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 *J.L. ECON. & ORG.* 390, 394 fig. 2, 396 fig. 3, 399 fig. 7 (1992).

283. Huang, *supra* note 131, at 127–29.

so just delays their decision-making and hinders planning. Relatedly, some consumers expect any product information salespeople withhold is unfavorable.<sup>284</sup>

#### *A. Pleasures and Pains from Beliefs*

Playfully creative applied game-theorist and 2005 economics Nobel laureate Thomas C. Schelling<sup>285</sup> once aptly stated “that, as consumers, we live in our minds.”<sup>286</sup> Schelling expanded at length on his pithy statement:

things that make me happy or unhappy, at any level of consciousness that I can observe, are the things that I believe and am aware of. . . . An unavoidable question is whether I could be happier if only I could believe things more favourable, more complimentary, more in line with my hopes and wishes, than what I believe to be true. That might be done by coming to believe things that are contrary to what I know, such as that my health and reputation is better than it is, my financial prospects or my children’s prospects better than they are and that I have performed ably and bravely on those occasions when I did not. Or it might be accomplished by improving the mix of my beliefs by dropping out—forgetting—some of the things that cause me guilt, grief, remorse and anxiety.

Whether I would be happier, whether my welfare should be deemed greater, with those improved beliefs is one of the questions; another is whether, if I had the choice, I would elect a change in my beliefs. . . .

A third question is whether you would encourage me to manipulate my own beliefs in the interests of my own happiness, or permit me to if you had anything to say about it.<sup>287</sup>

Schelling continues his fascinating and prescient discussion of the human mind as a “consuming organ, the generator of direct consumer satisfaction”<sup>288</sup> by inviting readers to consider selecting

284. Paul R. Milgrom, *Good News and Bad News: Representation Theorems and Applications*, 12 *BELL J. ECON.* 380, 381–82 (1981).

285. Robert J. Aumann & Thomas C. Schelling, *Thomas C. Schelling Facts*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2005/schelling/facts> [<https://perma.cc/36S2-3NFR>] (last visited Dec. 6, 2021).

286. THOMAS C. SCHELLING, *THE MULTIPLE SELF* 177, 180 (Jon Elster ed., 1987).

287. *Id.* at 183–84.

288. *Id.* at 193.

their beliefs and adopting their disbeliefs from a menu, including some of the practical constraints about self-belief control related to cognitive dissonance reduction, daydreaming, forgetting, self-deception, and unawareness.<sup>289</sup>

There is currently a renaissance in economics and renewed interest about belief-based utility.<sup>290</sup> Carnegie Mellon University Dietrich College of Humanities and Social Sciences Herbert A. Simon University Professor of Economics and Psychology George Loewenstein<sup>291</sup> and University of Chicago Booth School of Business behavioral decision researcher Andras Molnar<sup>292</sup> are two principal architects of this resurgence of economics research about belief-based utility. Molnar's personal website promptly features this quote that cogently summarizes the personal importance and social ubiquity of belief-based utility: "Most of the things that affect our welfare happen in our minds: we dwell on successes and failures, the past and the future, relationships, fears, regrets, disappointments and triumphs, whether we have fulfilled our goals, and whether other people like and respect us."<sup>293</sup> As Molnar further explains on his website about his research:

My research focuses on various aspects of belief-based utility, especially those related to information disclosure and self-image. I study the psychological background and the economic consequences of these phenomena, their effects on well-being, and their implications for business and public policy.

When and why do we care about what others believe? How do our beliefs about ourselves and about others affect our well-being and actions? Why do we want to feel understood by others, and explain our feelings and choices to our peers? Also, what drives us to seek and disclose information about ourselves?<sup>294</sup>

The above set of questions are central to all of human existence and nature. This Article applies these questions to people's beliefs about race.

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289. *Id.* at 184–85, 189–90.

290. Loewenstein & Molnar, *supra* note 134, at 166–67; Molnar & Loewenstein, *supra* note 134.

291. George Loewenstein, CARNEGIE MELLON UNIVERSITY: SOCIAL AND DECISION SCIENCES, <https://www.cmu.edu/dietrich/sds/people/faculty/george-loewenstein.html> [<https://perma.cc/8KDX-S2P8>].

292. ANDRAS MOLNAR BLOG, <https://www.amolnar.com> [<https://perma.cc/M3AE-AAHT>] (last visited Dec. 6, 2021).

293. *Id.*

294. *Id.*

### B. *Intentional Obliviousness*

In a fascinating book,<sup>295</sup> which is available free online,<sup>296</sup> a group of economists, historians, computer scientists, legal scholars, philosophers, psychologists, and sociologists consider the deep and intriguing question of what it is that some people do not want to know.<sup>297</sup> This book examines the scope of the phenomenon of deliberate ignorance, in which individuals and groups may consciously decide to not seek, or make use of, existing information or attainable knowledge.<sup>298</sup> The authors of the book's chapters analyze the circumstances under which deliberate ignorance is a vice or virtue.<sup>299</sup>

By formally modeling the underlying motives for deliberate ignorance, these researchers seek to understand the normative grounds upon which to evaluate deliberate ignorance.<sup>300</sup> Most relevant for this Article, some of the researchers ask how institutional interventions can prevent or promote deliberate ignorance.<sup>301</sup> Practical, real world examples of deliberate ignorance the authors discuss and consider include orchestral auditions behind curtains in which musicians do not wear shoes, collective amnesia in transformational societies, patients' rights to not know results of genetic screening and testing, and so-called "don't ask don't tell" policies.<sup>302</sup>

### C. *Fostering Accurate Beliefs*

The proposition here is that the human brain is, in large part, a machine for winning arguments, a machine for convincing others that its owner is in the right—and thus a machine for convincing its owner of the same thing. The brain is like a good lawyer: given any set of interests to defend, it sets about convincing the world of their moral and logical worth, regardless of whether they in fact have any of either. Like a lawyer, the human brain wants victory, not truth; and, like a lawyer, it is sometimes more admirable for skill than for virtue.<sup>303</sup>

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295. HERTWIG & ENGEL, *supra* note 136, at 1.

296. See DELIBERATE IGNORANCE: CHOOSING NOT TO KNOW (Ralph Hertwig & Christoph Engel eds., 2021), [https://esforum.de/forums/ESF29\\_Deliberate\\_Ignorance.html](https://esforum.de/forums/ESF29_Deliberate_Ignorance.html) [<https://perma.cc/BAC6-Z55W>].

297. *See id.*

298. *Id.* at 3.

299. *Id.* at 11–14.

300. *Id.* at 3, 13.

301. *Id.* at 9, 16–17.

302. HERTWIG & ENGEL, *supra* note 136, at 13.

303. ROBERT WRIGHT, *THE MORAL ANIMAL: WHY WE ARE, THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 280 (1995).

The above quote analogizes the human brain to a zealous, and quite possibly ethically challenged and compromised,<sup>304</sup> attorney. This quotation reminds us that our brains are heavily vested in keeping our attitudes and maintaining our beliefs.

Because people can directly experience pleasures and pains from their beliefs and the beliefs of other people, people may choose to persist in holding inaccurate beliefs and ignore learning information that would cause the revision of their incorrect beliefs. The possibility of people choosing to maintain objectively wrong beliefs raises the question of whether, and if so, how to convince people with false beliefs to update such beliefs until they learn what is true. Can legal rules and/or institutions help to change people's idiosyncratic beliefs if people do not want such change and even may actively resist such change? Do people have a fundamental personal right of deliberate ignorance? Or does a democratic society have a fundamental social right and perhaps responsibility to require its citizens to be reasonably informed of those social issues that have significant positive or negative externalities, such as hate crimes and public health?

A chapter titled *Deliberate Ignorance and the Law* provides a synopsis of, critical assessment of, and suggests extensions of, various institutions and legal doctrines that discourage, and others that encourage, deliberate ignorance.<sup>305</sup> The chapter starts with emphasizing three possible legal methods to overcome deliberate ignorance.<sup>306</sup> First, treating individuals who could have known specific germane information like those who did choose to learn that information.<sup>307</sup> Second, mandating positive duties to learn certain information.<sup>308</sup> Third, making particular information so conspicuous as to make it harder to ignore.<sup>309</sup> This chapter also engages the issue of collective or societal ignorance.

While writing this Article, a friend, Frances Hom, sent me an email about the U.S. Smithsonian Institution's National Museum of American History and the Asian Pacific American Center and the American Association of Retired Persons (AARP) co-sponsoring a May 2021 Asian Pacific American Heritage Month online event on Saturday, May 15. This event featured an online screening of a

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304. Peter H. Huang & Leo Katz, *Why the Law Is So Perverse*, 63 J. LEGAL EDUC. 131, 138–43, 147–48 (2013) (analyzing the implications of unavoidable loopholes for legal ethics and professionalism).

305. Eyal Zamir & Roi Yair, *Deliberate Ignorance and the Law*, 29 HEBREW UNIV. JERUSALEM 1, 1 (2019).

306. *Id.* at 3.

307. *See id.* at 3, 7.

308. *See id.* at 7–8.

309. *See id.* at 9.

program titled, *We Are American and We Stand Together: Asian American Resilience & Belonging*.<sup>310</sup> Near the conclusion of this interesting and informative digital presentation, Lonnie G. Bunch III, an educator, historian, the current and fourteenth Secretary of the U.S. Smithsonian Institution,<sup>311</sup> and the founding director of Smithsonian's National Museum of African American History and Culture,<sup>312</sup> cogently said, "the unvarnished truth about our history is often hard to hear, but it is also the best way to understand and to heal"<sup>313</sup> and "we believe that knowledge is the best antidote to ignorance and fear."<sup>314</sup> Of course, Bunch's belief is correct. This Article asks how to convince people to be willing to learn knowledge they may rather not know. Professor Arrow observed, "[k]nowledge is a free good. The biggest cost in its transmission is not in the production or distribution of knowledge, but in its assimilation. This is something that all teachers know."<sup>315</sup>

Another highlight of the program was this fascinating conversation CeFann Kim, a reporter for WABC-TV in New York,<sup>316</sup> had with Ronny Chieng, a Malaysian actor, comedian, and currently a senior correspondent on *The Daily Show on Comedy Central*<sup>317</sup>:

[Kim]: Taking a sort of a step back from how this is really affecting the Asian American community. How do you see this from a broader perspective?

[Chieng]: Wow, straight for the difficult question, the broader perspective. I mean it feels like I'm applying for college here. How do you, how do you, let's fix racism in five minutes. You know, we want this master equation that we plug everything into and it gives us the answer and fixes all problems. But I think that is kind of where we all get hung up a bit, you know taking a macro view, I advocate for taking a micro view of it and that this is not

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310. *We Are American and We Stand Together: Asian American Resilience*, YOUTUBE (May 15, 2021), <https://www.eventbrite.com/e/program-we-are-american-and-we-stand-together-tickets-153815914541#> [<https://perma.cc/WU55-X65L>].

311. *Lonnie G. Bunch III: Secretary of the Smithsonian Institution*, SMITHSONIAN INST., <https://www.si.edu/about/bios/lonnie-g-bunch-iii> [<https://perma.cc/XAE2-A4BJ>].

312. LONNIE G. BUNCH III, *A FOOL'S ERRAND: CREATING THE NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY AND CULTURE IN THE AGE OF BUSH, OBAMA, AND TRUMP* (2019).

313. *Supra* note 311.

314. *Id.*

315. Kenneth J. Arrow, *Commentary*, in JOSEPH E. STIGLITZ & BRUCE C. GREENWALD, *CREATING A LEARNING SOCIETY: A NEW APPROACH TO GROWTH, DEVELOPMENT, AND SOCIAL PROGRESS* 507 (2014).

316. CeFann Kim, *EYEWITNESS NEWS*, ABC7NY, W-ABC TV, <https://abc7ny.com/about/newsteam/cefaan-kim> [<https://perma.cc/T8SY-S2UU>].

317. RONNY CHIENG, <https://www.ronnychieng.com> [<https://perma.cc/XZN2-KA6H>].

to avoid answering your question. It's just that you're right. There are so many factors. It's so broad that, race, society, social economic factors factor into it that I personally try to take it, all the news stories one at a time, you know, and try to process it that way. And how do we help people? It feels different in the sense that it feels like this is some lasting change, which is very hard to come by in America. And it's taking everyone's effort to kind of push it forward. Asian Americans have never been really, I would say truly, truly united on many things because we are not a monolith. . . . So Asian-Americans have never been really united on many things, much less race and how Asian Americans should relate to American society, the rest of American society. . . .

[Kim]: This is not an American problem, right. Hate it's a human problem, right. But I'm curious what that's like. Frame it for me in other cultures and countries that you spent time in versus what you're seeing the problem here. Is it different or is it not?

[Chieng]: Anyway, I'm working on this bit about how we keep comparing, like the problem of racism is that we keep comparing the best people in one race to the worst people of another race. And we just need to compare the worst people of all races because they're everywhere.

[Kim]: That's actually very insightful.

[Chieng]: I can tell you every country I've been to, those people are bad. So I mean, man, I, one big difference I will say that it's a very hopeful difference is that in America, I think there is a lot of freedom to tell these stories. . . . The hopeful note is that look, America is very chaotic, but there are more good people here. And also that's lots of organizations and there are leaders who care. They're providing legal help. There's some people who will escort your elder relatives to where they need to go. There's assemblymen and women who care, and who are there. And if you find them, if you find them, you will be inspired by these leaders too, who are actually there to provide help to the community.<sup>318</sup>

#### *D. Economics of Hate*

Although clearly hate is an emotion, and not a probability belief, racial hate is also just as clearly associated with explicit racially biased probability beliefs and explicit racism. The economics of hate is carefully summarized in the final chapter of an undergraduate

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318. *Supra* note 311.



textbook about economics of human rights.<sup>319</sup> The author of that innovative textbook,<sup>320</sup> Elizabeth M. Wheaton, notes the chapter about hate is the last one of the book “[b]ecause hate is at the root of human rights violations.”<sup>321</sup> Wheaton, a senior lecturer in economics at Southern Methodist University, conducts research about child labor and economics of human rights.<sup>322</sup> Wheaton also founded and is the chief executive officer of a non-profit consultancy, which aims to strengthen global non-profit organizations and prepare world changers to fulfil their personal missions.<sup>323</sup>

Wheaton’s timely and unique textbook utilizes microeconomic analysis as one lens to analyze human rights issues, such as violence against women, asylum seeking, terrorism, child abuse, genocide, capital punishment, and hate.<sup>324</sup> Wheaton explains that her book offers a way to integrate the social sciences of economics and human rights to foster novel approaches to important social issues.<sup>325</sup> Each chapter of her book covers a particular human rights issue, relevant decision-makers and pertinent decision-making processes, and the benefits and costs involved in making decisions.<sup>326</sup> Each chapter also contains excerpts by multidisciplinary experts presenting firsthand accounts and diverse analytical perspectives about each human rights issue.<sup>327</sup> The book analyzes potential incentives for the prevention and termination of human rights violations.<sup>328</sup> The book aims to advance interdisciplinary and economic research in the form of a multi-purpose guide for a diverse readership.<sup>329</sup> Students, teachers, researchers, policy makers, non-profits, and other organizations can draw on this topical textbook to face human rights challenges and support victims of human rights violations.<sup>330</sup>

Wheaton in her economics of hate chapter adopts the *Merriam Webster Collegiate Dictionary* definition of hate as “intense hostility and aversion usually deriving from fear, anger, or sense of injury.”<sup>331</sup>

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319. See Elizabeth M. Wheaton, *The Economics of Hate*, in THE ECONOMICS OF HUMAN RIGHTS 256–81 (2019).

320. *Id.*

321. *Id.* at 256.

322. *Id.* at I.

323. *Id.*

324. *Id.*

325. See Wheaton, *supra* note 319, at I.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. Wheaton, *supra* note 319, at 256; see also *Hate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/hate> [<https://perma.cc/WUC4-DZNW>].

As Wheaton observes,<sup>332</sup> neuroscience researchers have found distinct neural correlates of hate, demonstrating “that there is a unique pattern of activity in the brain in the context of hate.”<sup>333</sup> Wheaton analyzes the many costs, few benefits, and economic inefficiencies of hate.<sup>334</sup> Unsurprisingly, haters benefit from hate, and impose costs on the hated. Hate is costly in the sense that hate uses scarce resources which could have been employed in more productive endeavors.

There is a small economics research literature about hate,<sup>335</sup> and related negative valenced emotions, such as envy.<sup>336</sup> 1992 economics Nobel laureate<sup>337</sup> Gary Becker’s analysis of envy<sup>338</sup> forms the basis of a 2002 econometric analysis of empirical hate crime data.<sup>339</sup> Edward Glaeser, Fred and Eleanor Glimp Professor of Economics at Harvard University,<sup>340</sup> developed a fascinating political economic model of the interactions between voters who demand hate and entrepreneurial politicians who supply hate-creating stories.<sup>341</sup> These stories about some out-group’s crimes gain impact due to repetition, instead of truth.<sup>342</sup> Politicians are motivated to start and spread these hate-creating stories to discredit opponents whose policies benefit some out-group.<sup>343</sup> For example, egalitarian, progressives can foment hatred against wealthy minorities, while politicians opposed to economic redistribution can manufacture hatred against poverty-stricken minorities.<sup>344</sup> For hate to endure, voters must accept, instead of investigate, hate-creating stories.<sup>345</sup> Hate weakens if voters have private incentives

332. Wheaton, *supra* note 319, at 256–81.

333. Semir Zeki & John Paul Romaya, *Neural Correlates of Hate*, 3 PLoS ONE 1, 7 (2008).

334. Wheaton, *supra* note 319, at 272–74.

335. Samuel Cameron, *Widening the Economic Approach to Hatred*, 39 F. SOC. ECON. 19, 19 (2009).

336. See, e.g., George A. Akerlof & Janet L. Yellen, *The Fair Wage Effort Hypothesis and Unemployment*, 105 Q.J. ECON. 255, 255, 260 (1990); Vai-Lam Mui, *The Economics of Envy*, 26 J. ECON. BEHAV. & ORG. 311 (1995); Redzo Mujic & Andrew J. Oswald, *Is Envy Harmful to a Society’s Psychological Health and Wellbeing? Longitudinal Study of 18,000 Adults*, 198 SOC. SCI. & MED. 103 (2018); Hal R. Varian, *Equity, Envy, and Efficiency*, 9 J. ECON. THEORY 63 (1974).

337. *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1992*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1992/summary> [<https://perma.cc/J355-K5YT>].

338. GARY S. BECKER, A TREATISE ON THE FAMILY 1, 3, 289, 292 (1981).

339. Lewis R. Gale, Will Carrington Heath & Rand W. Ressler, *An Economic Analysis of Hate Crime*, 28 EAST. ECON. J. 203, 203–04 (2002).

340. Edward Glaeser, *Department Chair, Fred and Eleanor Glimp Professor*, HARV. UNIV., <https://scholar.harvard.edu/glaeser/home> [<https://perma.cc/M99V-MVDR>] (last visited Dec. 6, 2021).

341. Edward L. Glaeser, *The Political Economy of Hatred*, 120 Q.J. ECON. 45, 45 (2005).

342. *Id.* at 45.

343. *Id.*

344. *Id.*

345. *Id.*

to learn the truth,<sup>346</sup> such as increased economic interactions with minority groups.<sup>347</sup> Glaeser's model explains how the hatred of Blacks evolved in the southern United States, recurring anti-Semitic episodes in Europe, and the rise of anti-Americanism in Arab countries.<sup>348</sup> Glaeser's model also provides an eerily prophetic explanation of Trump's anti-Mexican and AAPI hate rhetoric.

#### IV. LAW AND ECONOMICS OF EXPLICIT RACISM

This part of the Article analyzes explicit racism from a law and economics perspective. Section IV.A analyzes explicit bias and hate crime legislation. Section IV.B analyzes the quasi-market for explicit racism in terms of its demand, supply, and competitors or contesters.

##### A. *Explicit Bias and Hate Crime Laws*

A hate crime is a crime in which a motivation for committing the crime is bias.<sup>349</sup> The word hate in the phrase "hate crime" is not meant in the sense of anger, rage, or loathing.<sup>350</sup> Instead, the word hate in the phrase "hate crime" references bias against individuals and groups having particular characteristics protected by legislation.<sup>351</sup> Federal hate crime legislation covers these specific actual or perceived attributes: color, race, national origin, gender, gender identity, sexual orientation, disability, and religion.<sup>352</sup> Most state hate crime laws cover crimes committed based on color, race, and religion.<sup>353</sup> Many state hate crime laws also include crimes committed based on gender, gender identity, sexual orientation, and disability.<sup>354</sup>

Hate incidents are discriminatory or prejudicial acts that do not rise to the legal standard of a crime and involve no property damages, threats, or violence.<sup>355</sup> The crimes in "hate crime" usually are violent crimes, such as arson, assault, murder, vandalism, in addition to threats to commit such crimes.<sup>356</sup> The crimes in hate crimes may

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346. *Id.*

347. Edward L. Glaeser, *The Political Economy of Hatred*, 120 Q.J. ECON. 45, 45 (2005).

348. *Id.*

349. *Learn More About Hate Crimes*, UNITED STATES DEPARTMENT OF JUSTICE: CIVIL RIGHTS DIVISION, <https://www.justice.gov/hatecrimes/learn-about-hate-crimes/chart> [<https://perma.cc/9MJ7-G4RV>] (last visited Dec. 6, 2021).

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Learn More About Hate Crimes*, *supra* note 349.

356. *Id.*

also include conspiracy with or solicitation of others to commit such crimes, even if unsuccessful.<sup>357</sup> Hate is not a crime by itself.<sup>358</sup>

Hate crime legislation intends to deter hate-motivated crimes by enhancing the penalties or sentencing for conduct which is already sanctioned as criminal by other existing legislation.<sup>359</sup> Supporters of hate crime laws believe that hate crime laws do not punish individuals for holding unobservable hateful thoughts.<sup>360</sup> Instead, hate crime laws punish individuals for choosing negative hateful reasons to commit acts that other laws have already deemed to be criminal.<sup>361</sup> Another public policy justification for hate crime legislation is that once someone commits a hate crime, there is a high likelihood of retaliatory crimes, as in the severe beating of Caucasian truck driver Reginald Denny during the 1992 riots after the acquittal of Caucasian Los Angeles police department officers for severely beating up the African-American motorist Rodney King.<sup>362</sup>

The United States has enacted federal statutes against hate crimes, also known as bias crimes.<sup>363</sup> The most well-known federal hate crime law is *The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act*.<sup>364</sup> This law that Congress passed, and President Obama signed in 2009, expanded the federal definition of hate crimes, boosted federal prosecutors' available legal toolkits, and enhanced federal law enforcement ability to assist state and local law enforcement partners.<sup>365</sup> This law eliminated previous jurisdictional hurdles to prosecuting certain race- and religion-motivated acts of violence, and also enacted additional federal protections against crimes motivated by a target's gender, disability, gender identity, or sexual orientation.

The U.S. Senate approved by a vote of 94 to 1 (the lone opposing vote was Republican Senator Josh Hawley of Missouri who argued "that it mandated an overly expansive collection of data around hate crimes that could slide into government overreach"<sup>366</sup>) on April 22,

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357. *Id.*

358. *Hate Crimes*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> [<https://perma.cc/WS55-6K42>] (last visited Dec. 6, 2021).

359. David Brax, *Motives, Reasons, and Responsibility in Hate/Bias Crime Legislation*, 35 CRIM. JUST. ETHICS 230, 230 (2016).

360. *Id.* at 230.

361. *Id.*

362. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, A POLICYMAKERS GUIDE TO HATE CRIMES, x, 20, 22, Mar. 1997.

363. UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, HATE CRIME LAWS, <https://www.justice.gov/crt/hate-crime-laws> [<https://perma.cc/6D9J-DB6G>].

364. 18 U.S.C. § 249 (2009).

365. 18 U.S.C. § 249 (2009).

366. Catie Edmondson, *Senate Resoundingly Passes Bill to Target Anti-Asian Hate*

2021, the COVID-19 Hate Crimes Act,<sup>367</sup> which intends to bolster and expedite the review of COVID-19 related hate crimes, particularly those against AAPIs, in addition to expanding channels to report hate crimes, and establishing a series of public education campaigns about bias against people of Asian descent. The U.S. House of Representatives approved by a 364 to 62 (the opposing votes all came from Republicans) vote on May 18, 2021, the COVID-19 Hate Crimes Act, proposed by Senator Mazie Hirono of Hawaii and Representative Grace Meng of New York.<sup>368</sup> President Biden had already promised to sign the bill into law in April 2021,<sup>369</sup> and on May 20, 2021, Biden did so.<sup>370</sup> At the signing ceremony in the White House in front of a crowd of approximately 70 activists and lawmakers who advocated for the law, Biden said,

All of this hate hides in plain sight, . . . Too often it is met with silence—silence by the media, silence by our politics and silence by our history. . . . We simply haven't seen this kind of bipartisanship for much too long in America. . . . My message to all those of you who are hurting us is, we see you, . . . And the Congress has said, we see you. And we are committed to stopping the hatred and the bias. . . . Of all the good that law can do, we have to change our hearts. We have to change the hearts of the American people. I mean this from the bottom of my heart. Hate can be given no safe harbor in America.<sup>371</sup>

Vice President Kamala Harris said, this “bill brings us one step closer to stopping hate, not just against Asian-Americans, but for all Americans. . . . Racism exists in America,” she said. “Xenophobia exists in America. Anti-Semitism, Islamophobia, homophobia, transphobia, it all exists.”<sup>372</sup>

Biden also called for an end to the “ugly poison” of hate:

I believe with every fiber of my being that there are simple core values and beliefs that should bring us together . . . as Americans.

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*Crimes*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/us/politics/senate-anti-asian-hate-crimes.html> [<https://perma.cc/JB8B-GBEC>].

367. COVID-19 Hate Crimes Act, Pub. L. 117-13, United States 265 (2021).

368. Catie Edmondson, *The House Passes an Anti-Asian Hate Crimes Bill, Clearing it for Biden's Signature.*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/18/us/house-anti-asian-hate-crimes-biden.html> [<https://perma.cc/H75N-RV92>].

369. *Id.*

370. Catie Edmondson & Jim Tankersley, *Biden Is Set to Sign A Bill Addressing Hate Crimes Against Asian-Americans*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/20/us/politics/biden-asian-hate-crimes.html> [<https://perma.cc/G4YH-8FBM>].

371. *Id.*

372. *Id.*

One of them is standing against hate. . . . Every time we're silent, every time we let hate flourish, you make a lie of who we are as a nation.<sup>373</sup>

The U.S. Department of Justice and the Federal Bureau of Investigation, in addition to campus security authorities, are required to collect and publish hate crime statistics.<sup>374</sup> Forty seven states and the District of Columbia have hate crime laws and/or require the collection of hate crimes data.<sup>375</sup> Arkansas, South Carolina, and Wyoming are the three states which have neither hate crime laws nor laws requiring the collection of hate crimes data.<sup>376</sup> The U.S. Department of Justice provides an interactive map of states and territories on which users can click to learn more and “view case examples, press releases, and Department of Justice office contact information for that state or territory.”<sup>377</sup>

In an opinion which Justice William H. Rehnquist wrote, the U.S. Supreme Court unanimously held that enhanced penalties for racially motivated crimes do not violate criminal defendants' free speech rights, because such laws do not punish an individual for exercising their freedom of expression.<sup>378</sup> Instead, penalty-enhancement hate crime laws permit courts to consider a criminal's motives in sentencing a criminal for conduct which is not protected by the First Amendment.<sup>379</sup> This opinion paved the way for states to pass hate crime laws which consider whether a crime was committed or initially contemplated because of an intended victim's status in some protected class.<sup>380</sup> In another earlier landmark case of *Chaplinsky*

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373. “Remarks by President Biden at Signing of the COVID-19 Hate Crimes Act,” WHITE HOUSE BRIEFING ROOM (May 20, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/05/20/remarks-by-president-biden-at-signing-of-the-covid-19-hate-crimes-act> [<https://perma.cc/RDW2-A9F6>].

374. UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, LAWS AND POLICIES, <https://www.justice.gov/hatecrimes/laws-and-policies> [<https://perma.cc/C6V8-QSZB>].

375. *Id.*

376. *Id.* The states with hate crime laws and which do not require the collection of hate crimes data are Alabama, Alaska, Colorado, Delaware, Kansas, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin. *Id.* Among U.S. territories, Puerto Rico has hate crime laws and does not require the collection of hate crimes data, while the American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands have neither hate crime laws nor requiring the collection of hate crimes data. *Id.*

377. UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, STATE SPECIFIC INFORMATION, <https://www.justice.gov/hatecrimes/state-specific-information> [<https://perma.cc/BW7J-C524>].

378. *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993).

379. *Id.*

380. Thomas D. Brooks, *First Amendment—Penalty Enhancement for Hate Crimes: Content Regulation, Questionable State Interests and Non-Traditional Sentencing*, 84 J. CRIM. L. & CRIMINOLOGY 703, 735 (1994).

*v. New Hampshire*<sup>381</sup> the U.S. Supreme Court articulated the “fighting words” doctrine,<sup>382</sup> a limitation of the First Amendment’s guarantee of freedom of speech by defining “fighting words” as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>383</sup>

A significant discrepancy, known as the hate crimes reporting gap, exists between actual versus reported hate crimes.<sup>384</sup> Targets of hate crimes often do not report hate crimes because of several understandable reasons, including English as second language barriers, fear of retaliation, mistrust of law enforcement, fear of the U.S. Immigration and Customs Enforcement agency, and personal feelings of embarrassment and shame.<sup>385</sup> Reporting hate crimes to law enforcement agencies demonstrates support, and can provide help, for victims.<sup>386</sup> Hate crime reporting also provides a strong public message and signal to potential hate crime perpetrators that communities will not put up with the commission of hate crimes.<sup>387</sup> Accurate hate crime reporting permits communities and law enforcement agencies to comprehend the scope of hate crimes in communities and enables the best allocation of scarce resources towards identification and prevention of violent attacks predicated on bias and hate.<sup>388</sup>

Active, lively debates remain over the deterrence value and other possible rationales for hate crime laws.<sup>389</sup> Supporters of hate crime laws believe that hate crimes impose greater harm on individuals and communities than most other crimes. The argument is that hate crimes harm not only the crime’s immediate target(s), hate crimes also injure others who are similar in a specified protected class to the direct victim(s). By this argument, hate crimes have widespread, devastating, and long-term impacts for communities, families, and possibly an entire nation.

Critics of hate crime laws question the above rationales for hate crime laws. Yale law school professor and criminal law scholar Dan Kahan points out how the “greater harm” argument is conceptually

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381. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

382. L.W. Sumner, *Hate Crimes, Literature, and Speech*, in *A COMPANION TO APPLIED ETHICS* 142, 144 (R. G. Frey & Christopher Heath Wellman eds., 2005).

383. *Chaplinsky*, 315 U.S. at 572.

384. *Learn More About Hate Crimes*, *supra* note 349.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *See, e.g.*, RALPH RICHARD BANKS ET AL., *RACIAL JUSTICE AND LAW: CASES AND MATERIALS* 730–59 (discussing hate crime laws and cases); Claire Hansen, *What Is a Hate Crime?*, U.S. NEWS & WORLD REP. (Apr. 27, 2021), <https://www.usnews.com/news/national-news/articles/what-is-a-hate-crime> (asking and answering the question of why pass hate crime laws).

flawed, as it is only because some individuals value their group identities that attacks which are motivated by an animus against such identities are perceived to be worse.<sup>390</sup> In other words, what makes a hate crime have greater harm than most other crimes is an individual's and other group members' reactions to a crime instead of that crime itself.<sup>391</sup>

University of Illinois Law School professors and legal philosophers Heidi Hurd and Michael Moore argue that hate crime laws criminalize hate without proving that: (1) hate is a morally worse motivation for criminal activity than such other possible motivations for crime as greed, jealousy, sadism, or vengeance; and (2) bias and hate are uniquely more responsive to criminal sanctions as compared with other possible motivations for crime.<sup>392</sup> Hurd and Moore also believe that whether or not one particular type of criminal motivation is morally worse than another depends on specific facts of the case in question and therefore it is flawed to claim some motivations for committing a crime are categorically morally worse than other motivations for criminal acts.<sup>393</sup>

Hurd also contends hate crime laws entail governments promoting a specific type of moral character for its citizenry and thus exemplifies the perspective that installing virtue and eliminating vice are legitimate state objectives, which Hurd points out contradicts principles of liberalism.<sup>394</sup> Hurd also claims that enhancing punishments for offences because the offender's motivation was hate in contrast with other possible motivations implies that criminal justice systems are treating same crimes differently, even though a foundational basis of criminal justice is treating similar cases similarly.<sup>395</sup>

Enforcement of hate crime laws depends on prosecutorial discretion. Proving the hate component of hate crimes is often difficult, particularly for cases of hate crimes against AAPIs,<sup>396</sup> as hate towards and explicit bias against AAPIs often intersects with other forms of bias, including sexism and classism.<sup>397</sup> Obviously, racial and

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390. Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate*, 20 L. & PHIL. 175, 183–85 (2001).

391. *Id.* at 183–85.

392. Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1082–84 (2004).

393. *Id.* at 1132.

394. Heidi M. Hurd, *Why Liberals Should Hate 'Hate Crime Legislation'*, 20 L. & PHIL. 215 (2001).

395. *Id.*

396. See, e.g., Nicole Hong & Jonah E. Bromwich, *Asian-Americans Are Being Attacked. Why Are Hate Crime Charges So Rare?*, N.Y. TIMES (July 18, 2021), <https://www.nytimes.com/2021/03/18/nyregion/asian-hate-crimes.html> [<https://perma.cc/2FWY-F7X2>].

397. Jamison Chung, Brinna Ludwig, Brianna Rauenzahn & Jasmine Wang, *Combating*



non-racial motivations for the commission of crimes are not mutually exclusive and both racial and non-racial motivations may coexist for a crime. The horrific 2021 series of Atlanta area spa shootings killing eight people, including six Asian American women,<sup>398</sup> exemplifies the intersectionality of AAPI hate and sexism. The police and mainstream media were reluctant to categorize the murders as hate crimes because the gunman claimed his motivation was “sex addiction.”<sup>399</sup> The Korean media immediately categorized the murders as hate crimes, reporting how eyewitnesses heard the shooter say, “I’m going to kill all Asians” and noting that all four Korean females had ages in the fifties to seventies and that three of the women did not give any massages, only cooked food and opened doors.<sup>400</sup>

Fani Willis, the district attorney of Fulton county, which includes Atlanta, announced on May 11, 2021, that her office will seek hate-crime charges and the death penalty in the Atlanta area spa shootings case.<sup>401</sup> Willis also stated “that she believes her office will be the first to use Georgia’s new law on bigoted attacks and that her charging decisions ‘send a message that everyone within this community is valued.’”<sup>402</sup> The new Georgia hate crime law “mandates that Georgians convicted of felony hate crimes have at least two years added to their sentence.”<sup>403</sup> Georgia passed the hate crime law in the summer of 2020,<sup>404</sup> after outrage over a graphic video of two white men chasing down and shooting dead twenty-five-year-old African-American Ahmaud Arbery,<sup>405</sup> while he jogged near his

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*AAPI Hate*, REG. REV. (May 8, 2021), <https://www.theregreview.org/2021/05/08/saturday-seminar-combating-aapi-hate> [<https://perma.cc/P7RS-QLNJ>].

398. Richard Fausset & Neil Vigdor, *8 People Killed in Atlanta-Area Massage Parlor Shootings*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/16/us/atlanta-shootings-massage-parlor.html> [<https://perma.cc/VV6V-8HA8>].

399. Anna North, *Claims of “Sex Addiction” Are a Distraction in the Atlanta Killings*, VOX (Mar. 18, 2021, 2:18 PM), <https://www.vox.com/22336271/atlanta-shooter-sex-addiction-robert-aaron-long> [<https://perma.cc/EWK7-QGDN>].

400. Kim, *supra* note 132.

401. Nicholas Bogel-Burroughs, *Atlanta Spa Shootings Were Hate Crimes, Prosecutor Says*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/11/us/atlanta-spa-shootings-hate-crimes.html> [<https://perma.cc/HDE2-M8GU>].

402. Hannah Knowles & Haisten Willis, *Prosecutor to Seek Hate-Crime Charges Against White Man Accused in Atlanta-Area Spa Killings*, WASH. POST (May 11, 2021), <https://www.msn.com/en-us/news/crime/prosecutor-to-seek-hate-crime-charges-against-white-man-accused-in-atlanta-area-spa-killings/ar-BB1gCpkE> [<https://perma.cc/NJ22-NGD8>].

403. *Id.*

404. Angela Barajas, Dianne Gallagher & Erica Henry, *Georgia Governor Signs Hate Crime Bill Spurred by Outrage Over Ahmaud Arbery’s Killing*, CNN (June 26, 2020, 3:07 PM), <https://www.cnn.com/2020/06/26/us/georgia-hate-crime-bill/index.html> [<https://perma.cc/S5Z9-MZBS>].

405. Daniel Victor, *Georgia Added A Hate-Crimes Law Last Year After the Death of Ahmaud Arbery.*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/us/georgia-hate-crime-law.html> [<https://perma.cc/D42R-LB8H>].

house.<sup>406</sup> Georgia was the most recent state to enact hate crime legislation because the Georgia Supreme Court struck down in 2004 Georgia's previous hate crime penalty statute,<sup>407</sup> for unconstitutional vagueness.<sup>408</sup> That 2000 statute defined "hate" so broadly that as Justice Carol Hunstein wrote,<sup>409</sup> a "rabid sports fan convicted of uttering terroristic threats to a victim selected for wearing a competing team's baseball cap; a campaign worker convicted of trespassing for defacing a political opponent's yard signs; a performance car fanatic convicted of stealing a Ferrari" could have qualified enough as bias or prejudice to invoke the hate crimes law and enhance punishment.<sup>410</sup>

From a law and economics vantage point, the penalty enhancements of hate crime statutes run into an upper bound problem in the sense that once a crime has the death penalty, there is no additional deterrence possible. This means that a person who commits a hate crime with the death penalty attached to it will not be deterred from committing more crimes to avoid capture. Thus, regardless of your personal ethical and moral attitudes about capital punishment, there is the problem that once a criminal has committed a crime having the death penalty as punishment, that criminal is in effect incentivized to commit more crimes free of any possible further punishment. It is as if the criminal has entered into a no additional penalty zone or penalty free additional crimes zone. This is well-known as the marginal, in the sense of the extra, deterrence problem of capital punishment.

### *B. Economics of Explicit Racism*

It is possible to view explicit racism as a commodity of sorts that certain people desire to consume, and other people are more than happy to supply to meet demand. This perspective undoubtedly will seem to be a strange one to noneconomists. Economists, on the other hand, are trained so as to be able to see anything from an economic vantage point.<sup>411</sup> There are a set of quasi-markets for the

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406. *Ahmaud Arbery Shooting: A Timeline of the Case*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/article/ahmaud-arbery-timeline.html> [<https://perma.cc/SFX4-3N23>].

407. OCGA § 17-10-1 (2000).

408. *Georgia Court Throws Out Hate Crimes Law*, NBC NEWS (Oct. 25, 2004, 6:35 PM), <https://www.nbcnews.com/id/wbna6331341> [<https://perma.cc/D574-QD5D>].

409. *Botts v. State*, 604 S.E.2d 512, 514 (2004).

410. *Id.*

411. See, e.g., Peter H. Huang, *Emotional Reactions to Law and Economics, Market Metaphors, and Rationality Rhetoric*, in THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 163 (Mark D. White ed., 2009); Peter H. Huang, *Dangers of Monetary Commensurability: A Psychological Game Model of Contagion*, 146 UNIV. PA. L. REV. 1701, 1705–06 (1998).

sale and purchase of hate, explicit bias, and explicit racism. In these quasi-markets, there are suppliers, demanders, and resisters of hate, explicit bias, and explicit racism.

There is an economic theory due to William J. Baumol and other economists,<sup>412</sup> known as contestable markets,<sup>413</sup> which are defined to be markets with these three characteristics.<sup>414</sup> First, the market has weak or no barriers to entry and no exit barriers.<sup>415</sup> Second, the market does not require sunk costs, which are costs that once incurred cannot be recovered.<sup>416</sup> Third, in this market, an incumbent has no technological advantage over new potential entrants.<sup>417</sup> Under these conditions and others, three main conclusions follow. First, an incumbent is disciplined by new potential entrants to behave in a competitive fashion. Second, the perpetual risk of new potential contesters entering to grab market share causes an incumbent to focus more on maximizing sales instead of profits. Third, an incumbent realizes that if it is too profitable, new potential contesters could easily enter the incumbent's market and challenge for that market. It is an empirical question whether the contestable markets theory applies to quasi-markets for explicit racism.

Suppliers of explicit racism fall into these three categories. First, producers of explicit racism offer the narratives and stories of explicit racism. Second, enablers of explicit racism provide the ideologies and mindsets underlying explicit racism. Third, investors of explicit racism facilitate and/or are complicit in explicit racism for their personal future economic, political, or other benefits offered by the ideology underlying explicit racism.

2013 economics Nobel laureate<sup>418</sup> and Yale University Sterling professor<sup>419</sup> Robert Shiller is a bestselling author<sup>420</sup> and influential empirical financial economist and macroeconomist. Most recently,

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412. See WILLIAM J. BAUMOL, ROBERT D. WILLIG & JOHN PANZAR, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRIAL STRUCTURE 5 (1982); see also William A. Brock, *Contestable Markets and the Theory of Industry Structure: A Review Article*, 91 J. POL. ECON. 1055, 1060 (1983) (reviewing the Baumol et al. book).

413. Daniel Liberto, *Contestable Market Theory*, INVESTOPEDIA (Mar. 1, 2021), <https://www.investopedia.com/terms/c/contestablemarket.asp> [<https://perma.cc/XUV7-FSNP>].

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Robert Shiller Facts*, NOBELPRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2013/shiller/facts> [<https://perma.cc/54BJ-FG64>] (last visited Dec. 6, 2021).

419. *Home Page of Robert J. Shiller*, YALE UNIV., <http://www.econ.yale.edu/~shiller/> [<https://perma.cc/9VMV-P5N2>] (last visited Dec. 6, 2021).

420. See, e.g., ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* (2000); GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* (2009); GEORGE A. AKERLOF & ROBERT J. SHILLER, *PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION* (2015).

Shiller has also created a new field of economics,<sup>421</sup> known as narrative economics,<sup>422</sup> or “the study of the spread and dynamics of popular narratives, the stories, particularly those of human interest and emotion, and how these change through time, to understand economic fluctuations.”<sup>423</sup>

Three examples of narratives or popular stories that can go viral and move financial and real asset markets are the beliefs that technology stock prices never fall, that housing prices can only rise, or that some firms such as banks, are too big to fail. A more recent and much discussed example is the democratization of stock markets for all,<sup>424</sup> and the saga of how a group of small investors, communicating on the social network Reddit, coordinated buying GameStop, AMC, and Nokia stock to cause losses for hedge fund short sellers.<sup>425</sup> Shiller observes that the notion of narrative should be construed widely and “story may be a song, joke, theory, explanation, or plan that has emotional resonance and that can easily be conveyed in casual conversation.”<sup>426</sup>

Shiller focuses on analyzing narratives that can lead to large asset market price movements. The idea of a powerful narrative or story can also lead to large changes in racial beliefs. Historically, racial beliefs involving hate or animus have often been motivated and justified by a compelling and easy to spread tale about how a certain race of people carry an infectious disease or are responsible for economic woes and other social ills. For example, Hitler’s master race belief scapegoated Jews for many if not all of Germany’s problems. More recently, Trump consciously used rhetoric of the “Chinese virus,” “Wuhan virus,” or “kung flu” to describe COVID-19 spread hate, fear, and anger towards AAPIs.<sup>427</sup>

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421. Susan Fader, *Narrative Economics: Reframing the Roles of Storytelling and Behavioral Economics*, QUALITATIVE RES. CONSULTANTS ASS’N VIEWS MAG. (July 16, 2020), <https://qrcaviews.org/2020/07/16/narrative-economics-reframing-the-roles-of-storytelling-and-behavioral-economics> [<https://perma.cc/9DW9-8YX2>].

422. NARRATIVE ECONOMICS, <https://www.narrativeeconomics.com> [<https://perma.cc/8TA3-X9D7>] (last visited Dec. 6, 2021).

423. Robert J. Shiller, *Narrative Economics*, 107 AM. ECON. REV. 967, 967 (2017); see also ROBERT J. SHILLER, NARRATIVE ECONOMICS: HOW STORIES GO VIRAL AND DRIVE MAJOR ECONOMIC EVENTS (2019) (analyzing how stories help drive economic events—and why financial panics can spread like epidemic viruses).

424. See, e.g., Sheelah Kolhatkar, *Robinhood’s Big Gamble*, NEW YORKER (May 10, 2021), <https://www.newyorker.com/magazine/2021/05/17/robinhoods-big-gamble> [<https://perma.cc/X5ZG-A83X>].

425. See, e.g., John P. Anderson, Jeremy Kidd & George A. Moscaro, *Social Media, Securities Markets, and the Phenomenon of Expressive Trading*, 25 LEWIS & CLARK L. REV. (forthcoming 2021).

426. Fader, *supra* note 421, at 25.

427. Yam, *supra* note 173.

Demanders of explicit racism fall into these three categories. First, consumers of explicit racism derive pleasure from holding explicitly racist beliefs and from other people holding explicitly racist beliefs.<sup>428</sup> Second, addicts of explicit racism are dependent and hooked on explicit racism. Third, beneficiaries of explicit racism benefit from past or current explicit racism.

Resisters of explicit racism fall into these three categories. First, actual and potential targets of explicit racism resist explicit racism by the fact of their mere existence and resilience or persistence. Second, challengers of explicit racism challenge the ideologies and mindsets underlying explicit racism. Third, disputers of explicit racism dispute the narratives and stories of explicit racism by offering reality-based viable alternative narratives and stories.

## V. RESISTING AAPI HATE AND EXPLICIT RACISM

Part V is the finale of this Article because this part advocates three, evidence-based actionable strategies to resist AAPI hate: positive racial education and mindfulness, positive racial conversations and communication, positive associations, cultures, and norms. The roles that law can play are to encourage and foster these positive interventions.

To persist, explicit racism requires not learning about reality. One way to remain ignorant of reality is to avoid experiencing any disconfirming evidence. Another way to remain ignorant of reality is to ignore any experiences of disconfirming evidence. Ignorance precipitates fear, which motivates hate. Overcoming hate and explicit racism necessitates reducing fear, anger, and ignorance.

There is an already robust and still expanding psychology literature evaluating methods of reducing prejudice.<sup>429</sup> A review from 2007 to 2019 of 309 manuscripts involving 418 experiments quantitatively assessed which approaches to prejudice reduction are most successful and why.<sup>430</sup> Using a meta-analysis to estimate average effects found 76% of all studies involve light touch interventions, for which long-term impacts are unclear.<sup>431</sup> The modal intervention employs mentalizing to reduce prejudice.<sup>432</sup> Despite these studies having

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428. This may seem inconsistent with the discussion above about how racism is actually bad for people. This tension is resolved in the way that drinking or eating Twinkies (or doing both at once) is bad for someone who nonetheless enjoys doing so.

429. Elizabeth Levy Paluck, Roni Porat, Chelsey S. Clark & Donald P. Green, *Prejudice Reduction: Progress and Challenges*, 72 ANN. REV. PSYCH. 533, 534 (2021).

430. *Id.* at 533.

431. *Id.*

432. *Id.*

optimistic findings, publication bias may have exaggerated reported effects.<sup>433</sup> The meta-analysis called attention to landmark studies noteworthy for their sustained interventions and transparency.<sup>434</sup> The landmark studies often reported limited effects, suggesting the necessity for additional theoretical research or synergies with other types of psychological or structural interventions.<sup>435</sup> The meta-analysis concluded that much of the currently existing research is neither theoretically nor empirically ready to offer actionable, evidence-based policy recommendations to reduce prejudice. In light of the above conclusion, the remainder of Part V of this Article suggests three possible ways to resist AAPI hate. Each of these interventions is inspired by some related and relevant evidence-based research. Part of the hope of this Article is presenting these ideas here will spur additional theoretical, empirical, and experimental research about the efficacy, interactions, and sustainability of these possible tools.

This part of the Article advocates these strategies to resist AAPI. First, mandating K–12 positive racial education and mindfulness, including about happiness as a skill to be taught and learned. This is controversial and nontrivial given there was substantial resistance to teaching yoga and mindfulness in elementary school, as being the teaching of an alternate “religion.”<sup>436</sup> Second, assisting AAPIs and other individuals to have positive racial conversations and positive communications. Third, facilitating positive associations among AAPIs and other individuals to create and sustain positive social norms and organizational cultures about AAPIs.

#### *A. Positive Racial Education and Mindfulness*

The phrase, “positive education,” means “education for both traditional skills and for happiness.”<sup>437</sup> The key word for this Article is happiness as happiness is a skill which all people can and should learn.<sup>438</sup> Happiness includes positive affect, lack of negative affect, a cognitive sense of life satisfaction, and subjective well-being in the

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433. *Id.*

434. *Id.*

435. Paluck et al., *supra* note 429, at 533.

436. Alia Wong, *Why Schools Are Banning Yoga*, ATLANTIC (Sept. 20, 2018), <https://www.theatlantic.com/education/archive/2018/09/why-schools-are-banning-yoga/570904> [<https://perma.cc/ED7D-6NZZ>].

437. Martin E. P. Seligman, Randal M Ernst, Jane Gillham, Karen Reivich & Mark Linkins, *Positive Education: Positive Psychology and Classroom Interventions*, 35 OXFORD REV. EDUC. 293, 293 (2009).

438. *See, e.g.*, HAPPY (Wadi Rum Productions 2011).

sense of eudaimonia and having meaning in life. It would seem that holding onto hate, explicit bias, and explicit racism is inconsistent and incompatible with living a well-lived life. People like to think well of themselves and thinking one is a fuming, hate-filled, and raging explicit racist does not fit well with having a positive self-image.

This Article defines positive racial education to also include teaching students about positive contributions that AAPIs and members of all races have made to the arts, culture, economy, science, and technology of the United States. Hopefully, the positive framing helps to avoid the racial contentiousness and political controversy of similar efforts to reflect African-American history accurately in Tennessee public schools.<sup>439</sup> In various states, including Alaska, Arkansas, California, Georgia, Idaho, Iowa, Louisiana, Minnesota, Missouri, New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas, and West Virginia, some activists are conflating African-American history and critical race theory.<sup>440</sup>

Experimental research finds that practicing mindfulness meditation can reduce racially discriminatory behavior.<sup>441</sup> This Article defines positive mindfulness to be the practice of mindfulness to reduce human suffering and increase human flourishing. Thus, positive mindfulness is what some scholars call right mindfulness versus wrong mindfulness.<sup>442</sup> An example of wrong mindfulness is that of a sniper lying in wait with the wrongful intent to kill. An illustration

439. Natalie Allison, *Tennessee Republicans Want to Block Lessons on Systemic Racism in Schools*, USA TODAY (May 4, 2021, 8:34 PM), <https://www.usatoday.com/story/news/nation/2021/05/03/tennessee-republicans-take-critical-race-theory-lessons/4921671001>.

440. See Emma Pettit, *The Academic Concept Conservative Lawmakers Love to Hate*, CHRON. HIGHER EDUC. (May 12, 2021), <https://www.chronicle.com/article/the-academic-concept-conservative-lawmakers-love-to-hate> [<https://perma.cc/K3ND-4FKJ>]; Alia Wong, *Teaching Kids to Hate America? Republicans Want 'Critical Race Theory' Out of Schools*, USA TODAY (May 13, 2021), <https://www.usatoday.com/story/news/education/2021/05/13/republicans-see-stop-schools-teaching-critical-race-theory/4993370001>. But see Kimberlé Williams Crenshaw, *Race to the Bottom*, BAFFLER (June 2017), <https://thebaffler.com/salvos/race-to-bottom-crenshaw> [<https://perma.cc/2MNF-89QJ>]; Janel George, *A Lesson on Critical Race Theory*, 46 HUM. RTS. MAG. (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory) [<https://perma.cc/D978-NTLA>]; Victor Ray, *Trump Calls Critical Race Theory 'Un-American.'* *Let's Review.*, WASH. POST (Oct. 2, 2020, 6:40 AM), <https://www.washingtonpost.com/nation/2020/10/02/critical-race-theory-101> [<https://perma.cc/3Y2E-6P7Z>].

441. Adam Lueke & Bryan Gibson, *Brief Mindfulness Meditation Reduces Discrimination*, 3 PSYCH. CONSCIOUSNESS: THEORY, RSCH. & PRAC. 34, 34 (2016).

442. See, e.g., Peter H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?*, 55 HOUS. L. REV. 63, 112–14 (2017) (discussing, citing, and quoting Allan B. Wallace, *A Mindful Balance: What Did the Buddha Mean by "Mindfulness?"*, TRICYCLE, Spring 2008, at 60, 62).

of positive or right mindfulness is that of someone focusing attention on how to help others overcome suffering and achieve happiness in life. The concept of positive mindfulness is thus ethically based and not agnostic about good versus evil applications of mindfulness practice. A type of positive mindfulness is the practice of Loving Kindness Mindfulness (LKM) meditation.<sup>443</sup> It should be unsurprising that “LKM meditation is a way to practice the good habits of caring, compassion, kindness, inclusion, and tolerance—instead of the bad habits of animus, bias, discrimination, intolerance, and prejudice.”<sup>444</sup>

### *B. Positive Racial Conversations and Communications*

This Article defines positive conversations to be conversations based on principles of the phrase, “talk gooder,” which is due to Alison Wood Brooks, O’Brien Associate Professor of Negotiation, Organizations, and Markets and Hellman Faculty Fellow in the Negotiation, Organizations & Markets Unit at Harvard Business School.<sup>445</sup> Brooks researches the newly emerging science of conversation.<sup>446</sup> Brooks also teaches a fascinating business school elective course titled, “How to talk gooder in business and life,” which is an experiential course designed to help master in business administration students refine these four core conversational skills through practice (TALK): Topic selection, Asking questions, Levity, and Kindness.<sup>447</sup>

Professor Brooks details these skills on the course overview section of her spring 2021 course syllabus.<sup>448</sup> Topic selection entails learning how “to prepare, select, shift, change, and end topics effectively.”<sup>449</sup> Asking involves learning how “to ask (and answer) questions well.”<sup>450</sup> Levity is learning how “to create and appreciate moments of humor,

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443. See, e.g., Peter H. Huang & Kelly J. Poore, *Can You Hear Me Later and Believe Me Now? Behavioral Law and Economics of Chronic Repeated Ambient Acoustic Pollution Causing Noise-Induced (Hidden) Hearing Loss*, 29 S. CAL. REV. L & SOC. JUST. 193, 263–65 (2020) (discussing LKM meditation).

444. *Id.* at 269.

445. Alison Wood Brooks, HARV. BUS. SCH., <https://www.hbs.edu/faculty/Pages/profile.aspx?facId=684820> [<https://perma.cc/WAQ2-CAAX>].

446. See, e.g., Alison Wood Brooks, *How to Talk Gooder: The Science (and Serendipity) of Conversation*, YOUTUBE (May 7, 2021), <https://youtu.be/LTrrd94QEdU> [<https://perma.cc/L392-WPJ5>] (presenting a forty-two-minute talk, describing the new science of conversation, including one barrier to achieving shared understanding, and one life hack to manage conversation topics more effectively).

447. Alison Wood Brooks, *How to Talk Gooder in Business and Life*, Course Overview, Spring 2021 (on file with author).

448. *Id.*

449. *Id.*

450. *Id.*



playfulness, jackassery, and joy.”<sup>451</sup> Kindness is learning how “to speak respectfully, listen responsively, and engage receptively with opposing views.”<sup>452</sup>

The possible application of humor to engage non-violent racism against AAPIs is discussed in a related article.<sup>453</sup> That article applies the research of Jennifer Aaker, the General Atlantic Professor at the Stanford Graduate School of Business,<sup>454</sup> and Naomi Bagdonas, a Lecturer at the Stanford Graduate School of Business,<sup>455</sup> and an executive coach, who recently wrote this related book, *Humor, Seriously: Why Humor Is a Secret Weapon in Business and Life (And how anyone can harness it. Even you.)*<sup>456</sup>

The phrase, “positive communication,”<sup>457</sup> is a concept due to Julien Mirivel,<sup>458</sup> professor of applied communication at the University of Arkansas, Little Rock.<sup>459</sup> Mirivel offers six keys to positive communication.<sup>460</sup> First, “greet to create human contact.”<sup>461</sup> Second, “ask to discover the unknown.”<sup>462</sup> Third, “compliment to affect people’s sense of self.”<sup>463</sup> Fourth, “disclose to deepen relationships.”<sup>464</sup> Fifth, “encourage to give support.”<sup>465</sup> Sixth, “listen to transcend differences.”<sup>466</sup>

Mirivel believes that human communication can be more than just the mere transmission of information,<sup>467</sup> because human communication also has the potential to be transformative and create experiences, build relationships,<sup>468</sup> be opportunities to “learn from

451. *Id.*

452. *Id.*

453. Huang, *supra* note 131.

454. Jennifer Aaker, STANFORD GRADUATE SCH. BUS., <https://jaaker.people.stanford.edu> [<https://perma.cc/7LDE-TBYY>] (last visited Dec. 6, 2021).

455. Naomi Bagdonas, STANFORD GRADUATE SCH. BUS., <https://www.gsb.stanford.edu/faculty-research/faculty/naomi-joanne-bagdonas> [<https://perma.cc/5M4E-QAJT>] (last visited Dec. 6, 2021).

456. JENNIFER AAKER & NAOMI BAGDONAS, *HUMOR, SERIOUSLY: WHY HUMOR IS A SECRET WEAPON IN BUSINESS AND LIFE (AND HOW ANYONE CAN HARNESS IT. EVEN YOU.)* (2021).

457. Julien C. Mirivel, *The Six Keys to Positive Communication*, GREATER GOOD MAG. (Apr. 27, 2021) [hereinafter Mirivel, *The Six Keys*], [https://greatergood.berkeley.edu/profile/julien\\_mirivel](https://greatergood.berkeley.edu/profile/julien_mirivel) [<https://perma.cc/A8L4-LL6N>] (last visited Dec. 6, 2021); JULIEN C. MIRIVEL, *THE ART OF POSITIVE COMMUNICATION: THEORY AND PRACTICE* 7 (2014).

458. DR. JULIEN C. MIRIVEL, <https://www.julienmirivel.com> [<https://perma.cc/8Q8G-6CFJ>] (last visited Dec. 6, 2021).

459. Julien C. Mirivel, UNIV. ARK., LITTLE ROCK, <https://ualr.edu/news/expert/julien-mirivel> [<https://perma.cc/U8LS-4TSQ>] (last visited Dec. 6, 2021).

460. Mirivel, *The Six Keys*, *supra* note 457.

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

466. Mirivel, *The Six Keys*, *supra* note 457.

467. *Id.*

468. *Id.*

a position of humility and curiosity,”<sup>469</sup> transmit positive affect,<sup>470</sup> express gratitude,<sup>471</sup> have a positive impact on people,<sup>472</sup> and practice a concept humanistic psychologist Carl Rogers developed calls, “‘unconditional positive regard’: a way of looking at people with warmth, without any conditions.”<sup>473</sup>

### *C. Positive Racial Associations, Cultures, and Norms*

This Article defines “positive racial associations” as conscious, explicit, positive associations with a racial category or group of individuals. Anger, fear, and hate towards AAPIs are negative racial associations. Compassion, empathy, love, kindness, and understanding towards AAPIs are positive racial associations. This Article defines “positive racial cultures” as group or organizational cultures that entail positive racial associations. This Article defines “positive racial norms” as social or societal norms that entail positive racial associations.

This Article proposes replacing such negative racial associations as hatred, scapegoating, and misunderstanding of AAPIs with such positive racial associations as courtesy, respect, and affiliation towards AAPIs. One intuition under DEIJ (DEI, and Justice) is to create situations in which people of differing races interact cooperatively and positively to help each other achieve shared, common goals. If such opportunities are lacking in reality, they always can exist in multiplayer video games and role-play simulations.

The creation and maintenance of positive organizational cultures and positive racial social norms can be supported by leaders providing exemplars of positive racial associations. What a different country the United States is today with President Biden speaking in a heartfelt manner about stopping AAPI hate!

### *D. We All Have Many Stories to Learn*

All the above positive interventions share the common intention to learn more about AAPIs than just the one story of their skin color. Human “skin color is determined by a pigment called melanin, and while everyone has melanin (both fair and dark-skinned people), it comes in different forms and ratios.”<sup>474</sup> The belief that skin color

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469. *Id.*

470. *Id.*

471. *Id.*

472. Mirivel, *The Six Keys*, *supra* note 457.

473. *Id.*

474. John Staughton, *Why Do People Have Different Skin Colors?*, SCI. ABC (Jan. 18,

somehow can reveal so much about someone that skin color is the only story that we have to learn about someone is obviously false. We all every day get firsthand evidence of the heterogeneity and individual differences among people of similar skin color. It bears remembering, “to make a better world, we need to focus on what unites us, not what makes us different. After all, skin color really is only skin deep!”<sup>475</sup>

### CONCLUSION

This Article analyzes how to challenge AAPI hate by reducing anxiety, fear, greed, and perhaps deliberate ignorance. In the spirit of much current research in behavioral economics and other behavioral sciences, this Article focuses on how to help individuals change their racial beliefs by overcoming possible resistance to such change.<sup>476</sup> This Article focuses on changing individuals’ explicit racial beliefs.

This Article is premised on an evidence-based, optimistic, underlying belief, namely that because of adult human neuroplasticity, individuals who have learned to possess hateful, negatively biased racial beliefs can also unlearn such explicit bias and explicit racism and can learn instead compassionate, empathetic racial beliefs. This Article advocates these strategies to resist AAPI hate: positive racial education and mindfulness, positive racial conversations and communications, and positive associations, cultures, and norms. All of these interventions aim to change people’s racial beliefs from hateful, negatively biased ones to compassionate and empathetic ones. Law has many possible roles to play in resisting AAPI hate. Frank Wu cogently observed: legal change is necessary, not sufficient.<sup>477</sup> Law can foster, encourage, and incentivize the above positive racial interventions to help change people’s racial beliefs, and in doing so, change people’s hearts and minds about race.

Humans all too easily form tribes of in-groups and out-groups or haves and have nots. Division of people based on skin color, eye

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2021), <https://www.scienceabc.com/humans/melanin-pigment-definition-meaning-skin-color.html> [<https://perma.cc/7DTP-S8DJ>].

475. *Id.*

476. *See, e.g.*, KATY MILKMAN, *HOW TO CHANGE: THE SCIENCE OF GETTING FROM WHERE YOU ARE TO WHERE YOU WANT TO BE* (2021); LEIDY KLOTZ, *SUBTRACT: THE UNTAPPED POWER OF LESS* (2021); Leidy Klotz, Elke Weber, Eric Johnson, Tripp Shealy, Morela Hernandez & Bethany Gordon, *Beyond Rationality in Engineering Design for Sustainability*, 1 NATURE SUSTAINABILITY 225, 225 (2021); ROBERT LIVINGSTON, CONVERSATION: HOW SEEKING AND SPEAKING THE TRUTH ABOUT RACISM CAN RADICALLY TRANSFORM INDIVIDUALS AND ORGANIZATIONS (2021); Robert Livingston, *How to Promote Racial Equity in the Workplace*, HARV. BUS. REV. (Sept.–Oct. 2020), <https://hbr.org/2020/09/how-to-promote-racial-equity-in-the-workplace> [<https://perma.cc/2WZC-DD94>].

477. Wu, *supra* note 154.

color, class, socio-economic status, age, weight, sexual orientation, education and anything else is very easy to do. In lieu of the currently fashionable and typical focus on strengthening federal and state hate crime legislation, this Article advocates legal policies to encourage and foster positive racial education and mindfulness, positive racial conversation and communications, and positive racial associations, cultures, and norms.

This Article is written in the spirit of hope and under the good, old-fashioned American belief that a nation of people united can accomplish such amazing achievements as landing people on the moon and bringing them back safely. The U.S. moon landing is often hailed as proof that Americans can do anything if we put our minds to it. That technological feat obviously required the shared belief of many individuals that something never done before could be accomplished, and in a decade no less. The Apple TV+ streaming service's science fiction television series, *For All Mankind*,<sup>478</sup> dramatically imagines an alternate reality of world history in which the Soviet Union had landed men on the moon before the United States. In our current version of world history, the United States won the space race because of greater funding levels and better organization.<sup>479</sup> Perhaps, the current U.S. people and their elected leadership can and should proclaim a national goal to engage in the next decade the issues of racial hate. What if we commit sufficient resources to fund policies to encourage and foster positive racial education and mindfulness, positive racial conversations and communications, positive racial associations, cultures, and norms? It is my sincere hope that we make it so and leave a less polarized and more united country for the next generation of Americans.<sup>480</sup>

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478. *For All Mankind* (Apple TV+ 2019–Present).

479. *The Space Race to the Moon*, SCIENCE MUSEUM GROUP LONDON (May 1, 2019), <https://www.sciencemuseum.org.uk/objects-and-stories/space-race-moon> [<https://perma.cc/5MRE-UJK6>].

480. See also Peter H. Huang, *Put More Women in Charge and Other Leadership Lessons from COVID-19*, 15 FIU L. REV. 353–419 (2021) (advocating for having more women leaders); Peter H. Huang, *Put Even More Women and Minorities in Charge*, Symposium, 17(3) S. C. J. INT'L L. & BUS. (forthcoming) (advocating further for having more women and minority leaders).