Race, Law, and Neuroscience

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Implicit Association Test

- “The Implicit Association Test (IAT) measures attitudes and beliefs that people may be unwilling or unable to report. The IAT may be especially interesting if it shows that you have an implicit attitude that you did not know about. For example, you may believe that women and men should be equally associated with science, but your automatic associations could show that you (like many others) associate men with science more than you associate women with science. “

What It Measures

- The IAT measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key.

How It Measures It

- When doing an IAT you are asked to quickly sort words into that are on the left and right hand side of the computer screen by pressing the “e” key if the word belongs to the category on the left and the “i” key if the word belongs to the category on the right.
- E.g. categories on the left hand side would be Fat People/Good and the categories on the right hand side would be Thin People/Bad.
- Then flip

FEMALE or career	A	MALE or family	FEMALE or career	B	MALE or family
○	SHE	○	○	WOMEN	○
○	garden	○	○	home	○
○	HER	○	○	MAN	○
○	office	○	○	manager	○

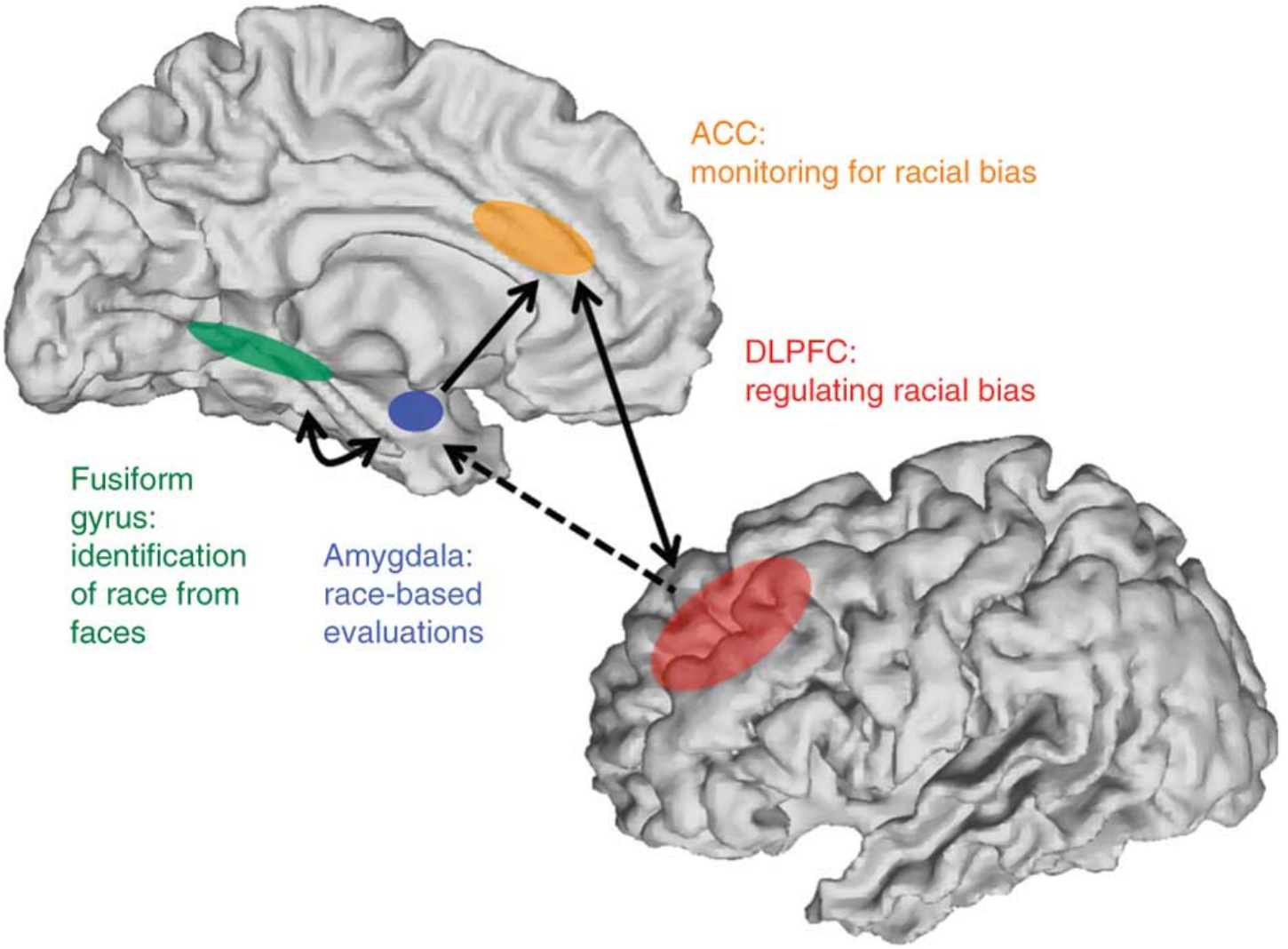
How It Analyzes Results

- We would say that one has an implicit preference for thin people relative to fat people if they are faster to categorize words when Thin People and Good share a response key and Fat People and Bad share a response key, relative to the reverse

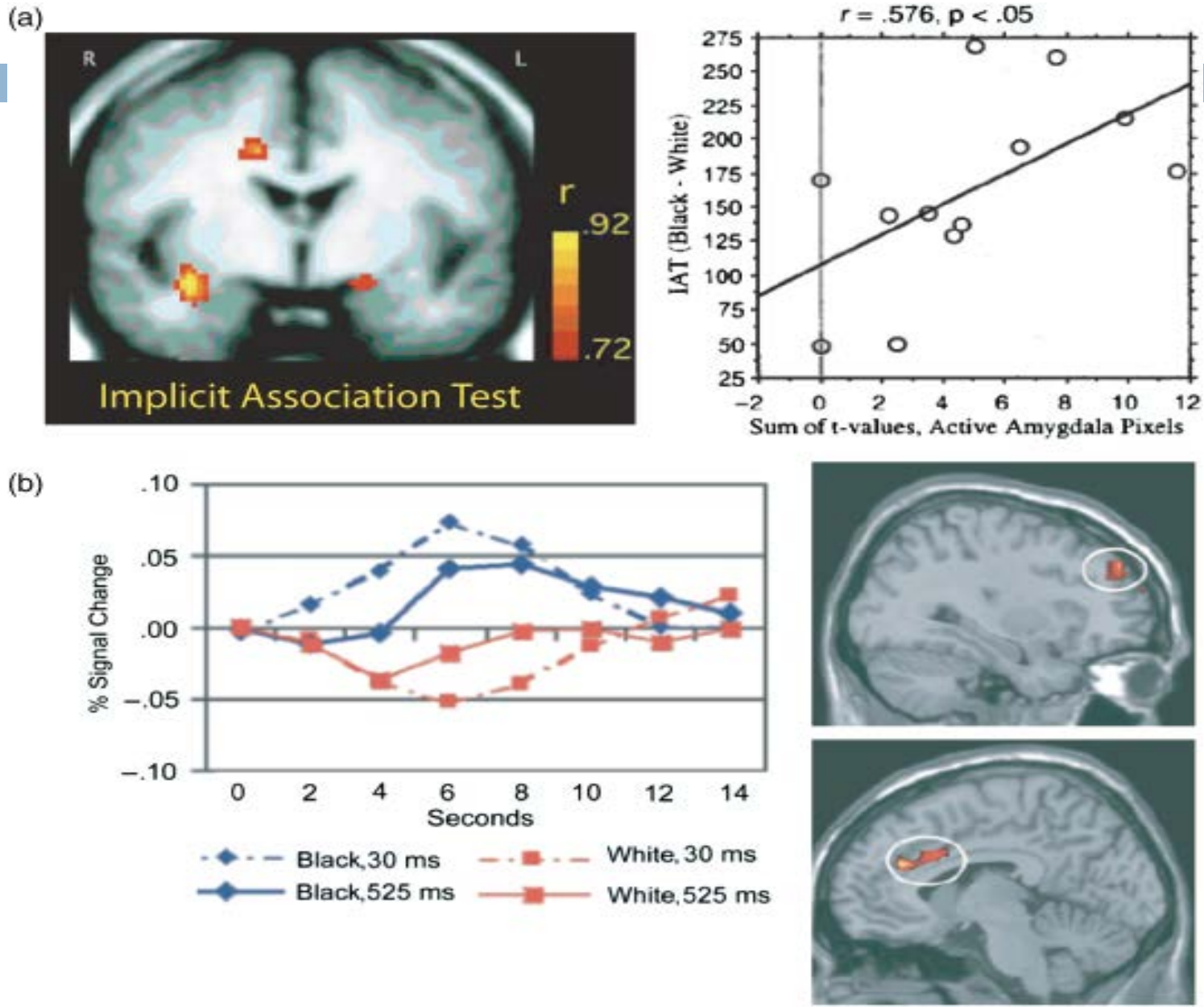
What it Finds

- Lots of Implicit Bias
- Reluctant to call this racism
- Some call it “aversive racism”

Your Brain on an IAT



"Neural Correlates of Race"



Social Manifestations

- General behavior
  - Eye contact, proximity,
- Health Care Encounters
  - Diagnosis, pain medication
- Employment Settings
  - the right “vibe”
- Judicial Proceedings
  - Assessments of guilt or credibility
- Law Enforcement
  - Shooter tests

Legal/Policy Implications

- Employment Discrimination
  - Progress under Disparate treatment (Krieger/Fisk)
- Affirmative Action
  - Debiasing as compelling interest (Jolls/Sunstein)
- Fair trial
- Racial Profiling in Law Enforcement
- Media Regulation and Stereotypes (Kang)
- Housing Discrimination

General Concerns for Unintended Consequences

- Accepting the Conservative Frame
- Deracinating the Legal Subject
- Obscuring Power
- Seeking a Technical Fix
  - Subordinating Democracy to Expertise
- Biologizing Racism

Accepting the Conservative Frame

- Accept Frames of Bakke and Washington v. Davis
- Focus on individual attitudes (intent v. impact)
  - Racism as measurable/quantifiable
- Weakness of "Diversity" as Sole Compelling interest
  - Race as just one of many "factors"
- Structure relevant primarily as a shaper of attitudes
  - Racism as (f)attitudes translated in behavior

Ideal of Color Blind Amygdala

- Norm of no difference in IAT responses
  - Implicit White Norm

- Echoes of Scalia, Roberts and O'Connor
  - Transcend race
    - Explicit Racism as thing of the past
  - No Debtor or Creditor amygdalas

Deracinating the Legal Subject

- The Unencumbered Brain
  - Erasing history and culture
  - Uncritical embrace of objective meritocracy
    - Unencumbered observer and observed
- Dilemma of Difference
  - Maybe Race *Should* make a difference
  - Problem of Intersectionality
    - Binary structure of IAT + fMRI

Obscuring Power

- Submerged Anti-Racism
  - Casting racism as pervasive and invisible
  - Responses are similarly subliminal "nudges"
- Narcissism
  - Focus on "my" attitudes v. understanding experience of the subordinated gorup
- Thin Proceduralism
  - Possible to have everybody "pass" the IAT without disrupting substantive structures of power
  - Behavior/Measurement/Cause v. Meaning/Interpretation

Distrusting the Citizen

- Nudges v. Engagement
  - Invisible interventions
  - Manipulate v. challenge
  - Progress without Conflict (1954-1974 v. 1974-present)
- Training for "Unconscious" Bias vs. Consciousness Raising
  - Training: centralized, expert, monologic, apolitical
  - Consciousness Raising: decentralized, democratic, dialogic, political

Seeking a Technical Fix

- "Law Should Follow the Science"
  - Discomfort with Uncertainty and Judgment
    - Metric-philia
  - Contrast with Charles Black on *Brown*
    - Focus on history meaning and judgment v. "neutral principles" – false algorithms of justice

- Racism Identified, Defined and Remedied via Expert Interventions

Biologizing Racism

- IAT + FMRI = Biological Frame
  - Biologizing race .v biologizing racism
- Racism as (f) biological Measurement →

  Racism as susceptible to biological intervention
- The Ultimate Technical Fix: Propranolol – Pills for Racism
  - Saveluscu and "Moral Enhancement"