admitting statistics, carrying logic and objectivity on the rising and plunging curves of their graphs like Vulcans on dolphin-back, better promotes the accuracy, rationality, and fairness of the fact-finding process than not admitting them.

**Why Rational Discrimination Is Not Reasonable**

The most readily apparent objection to the reasonableness claim of the Bayesian challenges the statistical method he employs to assess the victim’s dangerousness. Neither private nor judicial judgments about a particular member of a class, the argument goes, should rest on evidence about the class to which he or she belongs. Despite the attractiveness of this principle, and occasional court admonitions to avoid statistical inferences about individuals, private and judicial decision makers routinely rely on statistical evidence to judge past facts and predict future behavior. Lenders use statistics concerning age, marital status, location or residence, income, and assets to predict whether a borrower will repay a loan. Parole commissions may also use statistical techniques to predict parole success, considering factors such as number of prior convictions, type of crime, employment history, and family ties. And courts consider nonindividuated statistical probabilities when deciding whether to allow injured litigants to use epidemiological proof of causation in their lawsuits.

To accept the usefulness of statistical generalizations as a general matter, however, is *not* to agree that such generalizations are appropriate everywhere. For the use of statistical generalizations entail significant social costs, notwithstanding obvious benefits to defendants. The fatal flaw in the Bayesian’s argument lies in his failure to take account of the costs of acting on
his racial generalizations. Instead, he assumes that the rationality of his factual judgments is all that matters in assessing the reasonableness of his reactions. Thus, he asserts that if racial identity incrementally increases the likelihood that an ambiguous Black man is about to attack (i.e., if it incrementally bolsters the accuracy of his factual judgment that he is under attack), then it is reasonable for him to use deadly force against the Black more quickly than a similarly situated White. Whether a reaction is reasonable, however, hinges not only on the rationality of its underlying factual judgments, but equally on the consequences of error if those factual judgments are mistaken.

Consider one example of the injustices that lurk in the Bayesian’s lopsided attention to rationality. Ira Glasser of the American Civil Liberties Union tells the story of a Black couple who, some years ago, took in a movie in Times Square. It was raining when they came out of the theater about 11 P.M., so the husband went by himself for the car, which was parked in a garage several blocks away. When he returned to pick up his wife, she had disappeared. The man eventually discovered that his wife, who was five months pregnant, had been arrested by the police, put in jail, strip-searched and booked on charges of loitering for the purpose of prostitution.

The arresting officer in this shocking incident may well have viewed himself as an Intelligent Bayesian. Perhaps wrongly, let’s assume that at the time he made the arrest, there was a high incidence of prostitution in Times Square, most of the prostitutes were unescorted women, a disproportionate number of them were Black, and most transactions occurred between 10 P.M. and 2 A.M. The officer might assert that, from his standpoint, there was significant evidence to support his factual judgment that the woman was a prostitute—she was a woman,
Black, unescorted, and in Times Square at 11 o’clock at night. Even if we assume that his belief was rational in the sense that there was factual support for it, his decision to act on this belief in the way he did was patently unreasonable, not to mention outrageous and reprehensible. The reason his actions were unreasonable is because the costs of potential mistakes were so grievous. Given the enormous costs of potential mistakes, we rightly condemn him for not doing more to reduce the risk of being mistaken before subjecting this woman to such treatment. Many of us may express our concerns about the terrible costs of being wrong in this situation as doubt about whether the officer’s factual judgments were rational. But, upon careful reflection, we see that we are really saying that given the potential for mistakes and the terrible consequences of his mistake, the actions of the officer were unreasonable, even if his factual judgment was rational in the sense that there were circumstances to support it.

To see this, consider two situations, in each of which I claim to know that my pet dog, a temperamental unpredictable Rottweiler, is chained to a tree in our fenced-in backyard. In the first case, I personally hook the chain to his collar three hours before bedtime. As I am turning in for the night, my wife asks me whether the dog is chained. If he really is still chained, he will simply spend the night in his doghouse as usual. But if he is not still chained, he will roam the backyard all night, strategically squirting urine on lawn chairs and fixtures in service of his territorial instincts. It takes fifteen minutes the following morning for me to retrace his steps and hose down all that he has marked—a chore I do not relish but cannot honestly characterize as more than an inconvenience. In such a case I would confidently claim to know the dog is chained and dive into bed.
In contrast, if my sister’s one-year-old infant wanted to play in an area of our backyard beyond the reach of the chain and my sister asked me whether the dog is leashed, I would not claim to know that he is if I haven’t checked on him in three hours. Put differently, it would not be reasonable for me to claim to know he is leashed in this situation. This is true even though the statistical risk of error in my factual judgment that the dog is leashed—that is, the accuracy of my factual judgment about the dog—is exactly the same in both situations. For the costs of error in the second case (the life of my niece) are infinitely greater than the costs of error in the first (momentary inconvenience). Thus, before claiming to know that he is leashed in the second case, I would gather more information to further reduce the risk of error by, for example, double-checking the chain and yanking on the collar several times. Holding the risk of error about the security of the leash constant in the two situations, my willingness to claim to know that the dog is secured varies according to the social consequences of error. Put differently, even if the rationality or accuracy of my factual judgment is the same in two situations, my willingness to claim to know something varies according to the social consequences of error.

The Bayesian tries to avoid discussion of the consequences of error by focusing solely on his subjective factual judgments, specifically, on whether his hastier conclusion that the “ambiguous” Black man was about to attack him was rational given that Blacks pose a marginally greater risk of assault than Whites. It is true that judging that one knows something may be a subjective thought process, a “state of mind.” For example, when the officer, upon seeing the unescorted Black woman in Times Square in the late evening, concluded that she is a prostitute, something purely subjective occurred in his thought processes.
What the Bayesian overlooks, however, is that his hastier conclusion that he is under attack leads him to make a decision to more hastily shoot a Black man. The reasonableness of that decision and act (hastier use of deadly force against Blacks) is just as much at issue in these situations as the rationality of his hastier factual judgment that he was about to be attacked. To return to the Rottweiler example, to claim to know that something is the case is more than a thought process, it is a performance of a social act—it is to say something that lends assurance to others and which they will rely upon. In this respect a claim to knowledge is like a promise, another clearly social act. Thus, when I tell my wife as I hop into bed that I know the Rottweiler is leashed, I am assuring her that the risks of error in my factual judgment about the leash can be safely disregarded in view of the not-too-weighty interests (convenience) that a wrong judgment may injure. Likewise, when I tell my sister that I know the dog is leashed (which I do only after drastically reducing the risk of error by gathering more information on the condition of the leash), I am assuring her that the drastically reduced risks of error in my factual judgment are sufficiently small that they can be safely disregarded in view of the extremely weighty interests that a wrong judgment may injure.

This same analysis applies to factual judgments and acts of the Bayesian. The Bayesian’s hastier conclusion that an “ambiguous Black” is about to attack may be a subjective thought process—a subjective factual judgment. But when the Bayesian decides to act on his race-based factual judgment by using deadly force more quickly against ambiguous Blacks, he implies that the risks of error in his hastier use of deadly force against Blacks can be safely disregarded in view of the interests that wrong predictions will injure.
To determine whether the risks of error in race-based predictions about Blacks can be safely—that is, reasonably—disregarded, it is necessary to balance the costs of waiting for the “ambiguous” or “suspicious” Black to clarify his violent intentions against the costs of not waiting. For all predictions of human behavior present some risk of error. The more information we possess about a given situation, the smaller the risk of error in our judgments about it. Taking the time to gather information is costly, however. And nowhere are information costs higher than in self-defense cases, where the only way to gather more information is to wait for the “suspicious” person to manifest more clearly his violent intentions before responding with force. Here the cost of waiting translates into increased risk for the person who wants to defend herself successfully. If that person considers Blacks to pose a “significantly” greater threat of assault than Whites, she will not wait as long for an “ambiguous” Black person to clarify his violent intentions as for a White person.

On the other hand, the costs of not waiting as long for Blacks with unclear intentions as for similarly situated Whites include both the risks of error in race-based generalizations and the social consequences of error when the predictions prove false. First, consider the risks of error in race-based generalizations. Take the statistic for Black males arrested for violent assaults of approximately 2 percent (which is still much greater than the actual probability that a Black male will rob a stranger, since the violent assaults statistic also includes arrests for domestic violence, barroom brawls, street fights, heat of passion altercations between friends and acquaintances, turf wars between gang members, conflicts growing out of drug transactions, etc.), and assume this number represents the risk that the Black man
entering the bank lobby in our hypothetical scenario was about to attack the woman at the ATM. Further assume that if this scenario occurred fifty different times to fifty different women throughout the city, in 2 percent of the cases—or one out of fifty times—the woman’s belief that she was under attack was correct. This means that of the fifty Blacks against whom defenders use hastier lethal force because of racial generalizations, forty-nine will be innocent.

Next, consider the social consequences of error. The costs of error in race-based predictions of violence go well beyond the physical injuries suffered by the innocent Black victims of false predictions. Not waiting as long for Blacks to clarify their intentions has a profound “chilling effect” on Black participation in core community activities. That is, hastier use of force against Blacks forces Blacks who do not want to be mistaken for assailants to avoid ostensibly public places (such as “White” neighborhoods, automatic tellers, and even tony boutiques) and core community activities (such as shopping, jogging, sightseeing, or just “hanging out”). Further, Blacks who do venture into the public arena are compelled to stifle self-expression and move about in a withdrawn, timorous fashion lest they appear threatening to some anxious gun-toting pedestrian or subway rider.

An analogy may underscore the grim reality of “chilling effects.” When I described the Times Square incident to a Black woman who teaches law at a major Midwestern university, she confided that she had also been mistaken for a prostitute on two occasions. On one, she had an appointment to meet someone at a hotel entrance. As she waited just outside the lobby door, a man in a business suit sidled up to her and asked what her services were going for. Ever since, she has strictly avoided meeting
people at the entrance of hotels or in hotel lobbies, even though many law school conferences take place in hotels. On those occasions when she has no choice but to meet a group of people in a hotel lobby, she makes sure she arrives a little late so that she doesn’t end up standing alone in the lobby before others arrive.

Another cost of not waiting concerns the denial of moral agency inflicted on Blacks by race-based suspicions. Race-based predictions of a person’s behavior reduce him to a predictable object rather than treating him as a moral being capable of personal autonomy. Of course, all predictions of human behavior undermine respect for personal autonomy to some degree. But respect for another’s autonomy is especially undermined when the forecast that a person will choose to act violently is based on a factor—such as race—over which that person has no control.

Moreover, humiliation and stigmatization must be counted among the most painful costs of race-based suspicions. It is too easy for some to trivialize the severe psychological, emotional, and even spiritual costs to Blacks of being treated like criminals. For instance, according to Suzanna Sherry, a vocal critic of progressive feminist and minority perspectives on American justice, “[The] description of the young Black man who felt resentment when a White woman with a baby crossed the street to avoid him naturally invites a comparison: he fears for his emotional well-being, but she fears for her physical safety. I, at least, would rather be snubbed than raped.” In saying that she would rather be “snubbed” than raped, Sherry speciously pits two certainties against each other—the certainty of being “snubbed” against the certainty of being raped. This is a gross distortion of the situation. In truth, the situation pits an extremely remote risk of being raped by a random Black man (nothing in the description of the situation suggested that the
young man was acting in a threatening or erratic way) against the certainty of being “snubbed.” Sherry’s non sequitur vividly illustrates the rationality subverting power of stereotypes, for only by tapping the “Black as rapist” stereotype can she regard a rape by an ordinary Black man on an ordinary street not as an extremely remote risk but as a foregone conclusion.

More telling for “cost of not waiting” analysis is Sherry’s trivialization of the humiliation and resentment suffered by the young Black man who was treated like a rapist. Characterizing the young man’s injury as a case of being “snubbed” lumps it with breaches of social etiquette such as being ignored by an acquaintance or failing to receive an invitation to an ice cream social. The euphemism carries with it nothing of the relentless, cumulative, dehumanizing reality of these manifestations of the Black Tax par excellence. “Here we go again,” muses the young Black man. “She’s tripping all over herself to cross over to the other sidewalk, all the while cutting her eyes at me like I’m Willie Horton on work furlough. Somebody said being invisible was a terrible thing. I know something worse . . . being too visible . . . walking around with a screaming BIG BLACK MAN warning ineradicably tattooed across your forehead. They look right through invisible men, but the too-visible ones they use like movie screens for the projection of their most demeaning, pornographic images. I always feel like taking a bath after these encounters, but with so many to contend with everyday, if I tried to bathe after every one, I’d live in the bathtub.” From the standpoint of doing justice to the severe dignitary injuries inflicted by these “microaggressions,” a better comparison than “I’d rather be snubbed than raped” would be “I’d rather have waves of strangers successively spit in my face than run the extremely remote risk that a random anonymous Black man might rape me.”
Once we consider the risks of error and the grave social consequences of error generated by statistical generalizations about race, we see that much more than number crunching is involved in assessing the reasonableness of using lethal force on the basis of such generalizations. Considerations of fairness and social justice figure as centrally in these assessments of reasonableness as considerations of factual accuracy. Telling defenders that they cannot base their decisions to shoot on racial generalizations may require them to wait slightly longer—as long as they would if the ambiguous person were White—than they would if they were allowed to use such generalizations. The costs of waiting (increased risk for defender) are not trivial. But when balanced against the costs of not waiting (injury or death to numerous innocent victims, exclusion of Blacks from core community activities, objectification, stigmatization, and humiliation), the scales of justice tilt decidedly in favor of the defender assuming the marginal additional risks of waiting.

Citizens are frequently called upon to incur additional risks for important principles and social values. Drafts for military service are obvious examples. Perhaps less obvious but much more pervasive are the health and safety risks we all incur in the interest of values such as freedom of expression, the right to bear arms, and even the less lofty values of technological progress (motor vehicles, for instance, take many more lives each year than they save, including many pedestrians) and convenience (increases in the speed limit for cars exposes everyone on the highway to substantially greater danger, including those who continue to drive at the old lower speed limit). We allow teenagers to drive, even though they generate an astonishingly disproportionate percentage of accidents, because we think it is important that they enjoy access to adult activities as
part of their maturation process. Similarly, we license individu-
als with disabilities and prosthetic devices to drive, and hold
them to a lower legal standard of reasonable care (in effect
allowing them to generate more than ordinary risks without lia-
Bility), because we believe it is important that they have equal
access to core community activities. The list goes on, but this
partial one suffices to show that expecting citizens to incur addi-
tional risks (especially additional risks as small as the ones being
considered here) for the sake of important social interests is a
familiar feature of our legal culture and social morality.

This analysis applies with equal force to shopkeepers, cab-
drivers, and any other class of decision makers prone to screen
“suspicious” persons on the basis of race. Shopkeepers and cab-
drivers incur some risk in admitting “ambiguous” individuals.
Yet, reducing Black Americans to second-class citizens by deny-
ing them equitable participation in social and commercial exist-
tence; subjecting the overwhelming majority of innocent Blacks
to demeaning assumptions and microaggressions; contributing
to the establishment of a de facto system of apartheid by private
discriminatory decisions—these are the costs of race-based
screening and they cannot be morally justified by the incre-
mental risk. Sometimes, tragically, the risk of violent robbery,
albeit small, is realized. By the same token, the risk of death or
serious injury in automobiles and airplanes, albeit small, is real-
ized hundreds of thousands of times every year. Yet we continue
to expose ourselves to the risks of the airways and highways in
ever-growing numbers. We simply do not live in a risk-free soci-
ety, nor are we willing to sacrifice the values and conveniences
that a dramatically less risky society would cost. Viewing our
risk-laden social existence from this broader perspective, incre-
ternal race-based risks are not meaningfully different from
thousands of other incremental risks we assume every day in return for a comfortable, convenient, decent, and democratic way of life. Accordingly, we must accept incremental race-based risks as the price of living in a just, humane, democratic society, as just, humane, democratic citizens.

In sum, the “Reasonable Person” does not discriminate against Blacks on the basis of racial generalizations. The Reasonable Person can be fairly expected to surmount his or her discriminatory impulses and incur incremental race-based risks to protect vital democratic values. Because the reasonable and the moral are flip sides of the same coin, an individual who shoots or screens others on racial grounds engages in blameworthy conduct. Bluntly put, the Bayesian’s decision to discriminate against Blacks on the basis of statistical generalizations is racist.

Some readers may recoil at the use of the value-laden term “racist” to describe ostensibly rational racial discrimination. As we have seen, however, assessments of reasonableness essentially turn on a balancing of values, making the term “reasonable” itself a value-laden expression. Referring to the Bayesian’s discriminatory decisions as racist simply stresses that they strike an unreasonable balance in a way that wrongfully devalues or undervalues the democratic interests of Black Americans in being treated as full and equal citizens.

Saying that so-called rational discrimination is racist is not the same as saying that all cabdrivers, shopkeepers, and others who have historically discriminated against Blacks on grounds they believed to be rational are incorrigible racists. Many well-intentioned people simply have not had the enormous costs and incremental gains of their discriminatory decisions put in perspective. The racist is the person who says, “Yes, I appreciate the