

Unconscious Bias and the Criminal Justice System¹

Introduction

There is a centuries-old association of blackness with criminality and violence. In recent years, courts have consistently allowed police officers to use race as a sign of an increased risk of criminality. Throughout the urban criminal justice system, being young, black and male has become “probable cause” justifying the arrest, questioning, search and detention of millions of African-American males every year. The disproportionate use of deadly force by police officers against young black and brown men is starting to receive the attention it deserves. Much of the disproportionality in the criminal justice system is attributable to unconscious stereotypes that affect decision making.

The Civil Rights laws of the 1960s were enacted in the context of long-standing public policies and private practices that enforced discrimination and segregation. At the time, discrimination was stark, overt and ubiquitous. There were black jobs and white jobs; men’s work and women’s work. In the South schools were segregated as were restaurants, hotels and other places of public accommodation.² In the Jim Crow South it was unthinkable for blacks to consider residing in a white neighborhood. In the North, African-American families were excluded from white neighborhoods by discriminatory practices, many of which were imposed by the federal government as it required racially restrictive covenants on federally insured mortgages.³ Whites

¹ Leland Ware, Louis L. Redding Professor University of Delaware. This presentation is derived from, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 Ga. J. Int'l & Comp. L. 89 (2007).

² Taylor Branch, *At Canaan’s Edge: America in the King Years, 1965-68* (2006); John Lewis, *Walking With the Wind: A Memoir of the Movement* (1998); Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (1998).

³ Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 18 (1995).

and Blacks were born in separate hospitals, educated in separate schools, and buried in separate graveyards.

The antidiscrimination laws of the 1960s were enacted in this context. They were structured to identify and penalize individuals and organizations that engaged in overt discrimination or companies that had policies or practices that excluded a disproportionate percentage of minorities without a legitimate business justification. Antidiscrimination jurisprudence does not address a species of discrimination that racial minorities frequently experience. With very limited exceptions, cases interpreting civil rights laws assume that discrimination is motivational rather than cognitive. As a consequence, racial minorities are frequently subjected to different and less favorable treatment, but their experiences are essentially *damnum absque injuria* (a loss without injury) as the law does not provide redress for their injuries.

Unconscious Bias

Over the last three decades a substantial body of empirical and theoretical work in cognitive psychology has confirmed that the causes of discriminatory actions often operate at an unconscious level without the perpetrator's awareness of the source. In a path-breaking article published in 1987, Professor Charles Lawrence employed social cognition and Freudian theories in his critique of the limitations of antidiscrimination law. In *The Id, the Ego and Equal Protection Reckoning with Unconscious Racism*, Professor Lawrence stated

the theory of cognitive psychology states that the culture--including, for example, the media and an individual's parents, peers, and authority figures--transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not

experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.⁴

In the years following the publication of *The Id, the Ego and Equal Protection*, legal scholars have published a large body of research and commentary building on the foundation Lawrence laid. In a 1995 article, *The Content of Our Categories*,⁵ Professor Linda Krieger explained that much of the discrimination that occurs now is not the result of conscious animus. Relying heavily on the work of behavioral psychologists, Krieger deployed social cognition theory to explain that decision making relies on “categorization”-- grouping like objects together-- which is a fundamental a part of the process of human cognition. Categorization simplifies the task of processing and retaining information. It allows individuals to identify objects, make predictions about future events, infer the existence of unobservable traits and to attribute causation to specific events.

⁴ Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L. Rev. 317, 323 (1987).

⁵ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995).

Categorization operates at an unconscious level. Individuals perceive, categorize, and evaluate information differently depending on the ways in which information is presented and the context in which it is received. The danger of categorization is that it can cause judgment errors that bias decision making. Categorization can make it difficult for an observer to recognize a person's individual characteristics. When an individual is seen as a member of a social group, perceptions about that group's characteristics and behavior influence judgments made about them.

Stereotyping, Krieger explained, is a form of categorization.

Stereotyping involves, among other things, the creation of a mental image of a "typical" member of a particular category. Individuals are perceived as undifferentiated members of a group, lacking any significant differences from other individuals within the group. Common traits are assigned to the entire group. When a particular behavior by a group member is observed, the viewer evaluates the behavior through the lens of the stereotype. This causes the observer to conclude that the conduct has empirically confirmed his stereotyped belief about the group. As Jody Armour explained "[s]tereotypes consist of well-learned sets of associations among groups and traits established in children's memories at an early age, before they have the cognitive skills to decide rationally upon the personal acceptability of the stereotypes."⁶ Stereotypes can be so deeply internalized that they persist even in the face of information that directly contradicts the stereotype.⁷ In a 2006 article, Linda Krieger and Susan Fiske explained, among other things, that

⁶ Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 Calif. L. Rev. 733 (1995) Professor Armour cited the case of a 3-year-old child, who upon seeing a black infant said to her mother, "Look mom, a baby maid." This showed that the child had already developed a stereotyped association between African American women and low-status service occupations.

⁷ See also Peggy C. Davis, *Law as Microaggression*, 98 Yale L.J. 1559, 1561-62 (1989) (explaining how racial stereotypes affect the cognitive processes of categorization in individuals).

[s]ubtle forms of intergroup bias can infiltrate decision making long before any decision is made. These biases can latently distort the perceptual data set on which that decision is ultimately premised. Often operating outside of the decision maker's attentional focus, and therefore outside his or her awareness, stereotypes can covertly but powerfully influence the way information about the stereotyped target is processed and used. They can shape the interpretation of incoming information, influence the manner in which that information is encoded into and stored in memory, and mediate the ease or difficulty with which the information is retrieved from memory and used in social judgment. A decision maker can act because of or on the basis of a target person's race, sex, or other group status, while subjectively believing that he or she is acting on the basis of some legitimate, nondiscriminatory reason.⁸

In *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, Professor Gary Blasi surveyed experiments, theories and models in cognitive social psychology and social neuroscience that explain how unconscious stereotypes function in the human mind.⁹ The extensive body of research that Blasi catalogued showed that individuals behave in ways that demonstrate that they are heavily influenced by stereotypes, including those that they consciously disavow. Dovidio and Gaertner use the term “aversive racism” to describe the conduct of individuals who support policies that promote racial equality and regard themselves

⁸ Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Calif. L. Rev. 997, 1034 (2006).

See also, James M. Jones, *Psychological Knowledge and the New American Dilemma*, 54 J. Soc. Issues 641-662 (1998) (discussing, among other things, categorization and stereotyping); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 954-58 (2006).

⁹ Gary Blasi, *Advocacy Against Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. Rev. 1241 (2002); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005). See also John F. Dovidio, Samuel L. Gaertner and Kerry Kamakami, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 Journal of Personality and Social Psychology 62, (2002).

as not prejudiced, but act in ways that disadvantage minorities. Aversive racists often experience feelings of uneasiness or fear in the presence of African-Americans. Their negative attitudes towards minorities are usually unacknowledged because they conflict with their egalitarian value systems. The negative attitudes of aversive racists are rooted in cognitive, motivational and socio-cultural forces that affect many White Americans. Aversive racists typically do not discriminate against African-Americans when it would be obvious to others and themselves, but they are likely to engage in discrimination when there are race-neutral justifications for their behavior.¹⁰

In one frequently cited study concerning the provision of emergency assistance, White bystanders were as likely to help a Black victim as a White victim when they were the only witness to an emergency and their personal responsibility was clear. In circumstances in which there were other witnesses to the emergency, they would justify not helping on the belief that someone else would intervene. In this situation, Whites helped the Black victim half as often as they helped the White victim. Racial bias was expressed in a way that could be justified on the basis of a race neutral reason.¹¹ Unconscious discrimination of this sort has a heavy influence on the actions of police, prosecutors and others in the criminal justice system.

Institutional Discrimination

¹⁰ Samuel L. Gaertner and John F. Dovidio, *The aversive form of racism*, In *Prejudice, Discrimination and Racism: Theory and Research*, John .F. Dovidio and Samuel L. Gaertner (eds.), 61-89 (1986).

¹¹ ¹¹ Samuel L. Gaertner and John F. Dovidio, *Reducing Intergroup Bias: The Common Ingroup Identity Model*, 24-26 (2000)

Unconscious discrimination is a ubiquitous species of bias which should be recognized and redressed by antidiscrimination laws, but that is not the extent of the problem. Many individuals still actively discriminate against racial minorities. Moreover, intentional and unintentional discrimination frequently combine to create a discriminatory environment. Although the terms are sometimes used interchangeably, there is a difference in unconscious discrimination and institutional discrimination. Institutional discrimination refers to organizational customs, practices and norms that operate to deprive non-whites of treatment as equals in a broad range of economic, social, and political relationships.¹²

Institutional discrimination is reinforced by media images,¹³ political discourse and everyday interactions. Institutional discrimination is pervasive; it functions at the societal, institutional, social, and individual levels. It manifests itself in the workplace, in educational settings, in financial transactions¹⁴ and other more informal settings. Manifestations of systemic discrimination are so common that they appear to be “normal” and are unnoticed by those not adversely affected.

In *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*,¹⁵ Professor Ian F. Haney Lopez presented a theory of institutional analysis that examines the behavior of individuals in organizational settings. Incorporating New Institutionalism theory, a genre of organizational sociology, Haney Lopez explained that individuals engage in unintentional discrimination relying on unexamined understandings that influence their behavior.

¹² James M. Jones, *Prejudice and Racism*, 436-469 (2nd ed. 1997).

¹³ Robert M. Entman and Andrew Rojecki, *The Black Image in the White Mind: Media and Race in America* (2000).

¹⁴ Cassandra Jones Harvard, *Democratizing Credit: Examining the Structural Inequities of Subprime Lending*, 56 *Syracuse L. Rev.* 233 (2006) (Lenders target minority communities for higher cost loans)

¹⁵ 109 *Yale L.J.* 1717 (2000).

In organizations, these actions take place without the actor's conscious reflection on the reasons for his conduct. Institutions perpetuate discriminatory practices by establishing "scripts and paths" that guide the individual's behavior. Haney Lopez argues that institutional racism explains how discriminatory actions operate as every day, "taken-for-granted" understandings of the social contexts in which individuals operate. The understandings are deeply embedded in an organization's internal culture. They are the unwritten rules; the customs, practices and usages—the way things are done.¹⁶

To illustrate his theory, Haney Lopez examined the prosecution of a group of Latino activists in Los Angeles Superior Court in the late 1960s. The defendants lodged an Equal Protection challenge to the prosecution on the grounds Los Angeles grand juries excluded Mexican Americans. During a hearing on the motion, the evidence showed that trial judges nominated only their friends and acquaintances for grand jury service. The evidence also showed that Mexican Americans were not in those circles. Between 1960 and 1969, less than two percent of grand jurors seated in Los Angeles County were Mexican Americans. Despite this evidence, the trial judge rejected the Equal Protection claim after concluding that defendants had not shown that the judges acted with an intent to discriminate against Mexican Americans.

Haney Lopez argued persuasively that the Los Angeles case was an example of institutional discrimination. The case showed how individuals who engage in conduct that will have an adverse impact on minorities can do so without discriminatory animus even though the

¹⁶ See also Ian Haney López, *Racism on Trial: The Chicano Fight for Justice*, (2004). In *Racism on Trial*, Haney López explained, among other things, how race functions as a "common sense" set of ideas that are taken for granted in daily routines. See also Philomena Essed, *Understanding Everyday Racism, An Interdisciplinary Theory* (1991).

likelihood of a discriminatory outcome was clearly foreseeable. When racial exclusion is institutionalized, as it was in the Los Angeles County jury selection system, discriminatory actions can appear to be legitimate and routine. Yet, the effect on the criminal justice system was the same irrespective of judges' motives: a significant segment of the community was excluded from jury service; Anglo jurors decided the fate of Latino defendants.

Workplace Cultures

Workplace cultures are a site for institutional discrimination. Social science researchers have found that recruitment, selection practices, performance evaluations, and the culture of organizations can foster discriminatory practices that are not the product of a conscious intent to discriminate.¹⁷ Culture is rooted in deeply-held beliefs; it consists of shared beliefs, attitudes, assumptions and values. Workplace cultures shape the ways individuals interact and influences how tasks are accomplished. It fosters the behavioral norms and organizational goals. Workplace culture defines the social and behavioral expectations of an organization. Modes of dress, ways of communicating, subjects of informal, "water cooler" conversations reflect behavioral expectations that occur on a day-to-day basis in the workplace.

All employees must adapt to their workplace cultures but this can be more difficult and burdensome for minority workers. Workplace cultures foster an unstated image of the model employee. The attributes of the model employee are not explicitly connected to race, but they tend to be associated with historically privileged categories of workers. Every individual has

¹⁷ Tristin K. Green, *Work Culture and Discrimination*, 93 Calif. L. Rev. 623 (2005). See also Philip Moss and Chris Tilly, *Raised Hurdles for Black Men: Evidence from Interviews with Employers* (Russell Sage Foundation, November 1995). (The researchers found that a demand for literacy and communication skills; reliance on the face-to-face interviews and employer's perceptions of a deficit in the typical black male's "soft skills", disadvantaged less educated black men. They also found widespread negative employer perceptions of black men in addition to those related to soft skills.)

attributes that are independent of group identities, but each person's affinities, sense of history and identity are shaped in part by a group identity. The dominant group's norms are seen as universal rather than reflections of their own ethnic specificity. This assumption devalues minorities' group identities and creates powerful pressures to conform to the norms of the dominate group.

There is implicit pressure for minority workers to engage in what Kenji Yoshino describes as "covering;" taking actions (modes of dress, speech and mannerisms) that minimize a disfavored racial identity.¹⁸ To succeed, minority workers must "cover" and conform to the values and behavioral expectations imposed by the organizational culture. This is even more burdensome on minority women as the dominant culture has been shaped by a White male norm.¹⁹ Minority women also experience "intersectional discrimination," a unique form of bias that does not affect minority men or White women.²⁰

A study of a mid-Atlantic state agency provides an example of the interaction of conscious and unconscious conduct that created a discriminatory work environment. The study found that the agency's African American employees were subjected to disadvantageous employment conditions which interfered with their work performance, but in most instances, fell short of conduct that courts would construe as actionable claims of discrimination.²¹ However, because these employees were treated differently and less favorably than similarly situated White workers, there should be a remedy for their dilemma. The study showed that many African

¹⁸ Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (2006)

¹⁹ African American students in predominately white schools face similar pressures which often adversely affect their academic performance. Jacqueline J. Irvine, *Black Students and School Failure: Policies Practices and Prescriptions*, 21-42 (1990).

²⁰ Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. Gender Race & Just. (1997).

²¹ Stephanie A. McClellan, *Race at work: Demystifying the dominant race-neutral narrative*, (Ph.D. diss., University of Delaware, 2004).

American employees, while generally describing their workplaces in positive terms, experienced a wide variety of actions that evidenced detrimental conditions to which White employees were not exposed. These included the imposition of what the workers described as “White cultural norms” and other assumptions that displayed an anti-minority bias.

The experiences created negative feelings about White co-workers and the workplace itself. Many workers responded to the conditions with adaptive behaviors that affected their work performance, their sense of opportunity in the agency, and other opportunity-seeking behaviors. The interviewees observed these activities in a wide variety of circumstances including informal workplace conversations; the selection process; discipline; training; work assignments and the distribution of power and authority.

White cultural norms concerning dress, style, appearance, communication, behavior, decorum, and conflict resolution were brought to bear when White co-workers spoke disparagingly about black norms in informal conversations. Whites in positions of authority implicitly demanded conformity to White norms through non-selection of African Americans for desirable assignments and by the imposition of discipline for non-conformity. The study’s participants described negative stereotypes of African Americans that were discussed in the workplace. The stereotypes included African American’s work ethic, competence, criminal tendencies, character, temperament, and socioeconomic status. African American interviewees reported that their work assignments, promotion opportunities, access to training and discipline were frequently shaped by negative assumptions about them. For example, stereotypes about African Americans kept one employee pigeon-holed in social service work. She was unable to utilize her planning,

policy, and evaluation training and skills. She was told that because she “knows the problems of Black people,” she was more valuable to the organization in her service position. Other interviewees reported that assumptions concerning Black criminality and volatility affected decision making, especially in disciplinary actions involving Black males.

Many of the study’s participants reported observing direct anti-minority bias. Many interviewees overheard negative comments made by white workers about minorities. More than one-half of the interviewees reported that whites were hired and promoted over equally qualified minority candidates. Agency statistics supported these reports. Most of the White employees hired during the year of the study were placed into higher level jobs than minorities who were hired. The majority of the minority employees were hired into lower level positions. During the same period, White employees were awarded 72% of all promotions. One-third of the minority interviewees reported experiencing or observing racial bias in the agency’s disciplinary process, citing racial disparities in the infractions noticed by White employers and the severity of disciplinary actions taken. This was corroborated by agency statistics. The majority of those discharged in every job classification were minorities. The interviewees also reported that white employees were given the most desirable shifts in a 24-hour facility; White employees made training opportunities known only to other white workers; and White supervisors were granted more authority in their positions than African American supervisors.

The interviewees reported that their experiences demonstrated to them the significance of race in the workplace and the resulting disadvantages. Their experiences generated a host of negative feelings including: anger, mistrust, lowered motivation, feeling excluded, and experiencing the

imposition of a hostile culture. These experiences also indicated that the potential for discrimination was always present, heightening their fears of discrimination and diminishing their sense of opportunity. The Black employees responded to the conditions reported with a variety of adaptive behaviors. Most of them reported “watching and waiting” to see if additional problems would occur; discussing their experiences with fellow minority co-workers; directly challenging racially biased actions at the individual level, and by trying to adjust to their environment.

The adjustments took many forms: working harder for some, working less hard for others; presenting a positive image to overcome negative assumptions; “code switching” by conforming to the norms imposed; engaging in race-related work; diminishing the value of advancement; no longer seeking advancement; and seeking employment elsewhere. The participants rarely reported discriminatory conduct through the agency’s complaint system. This corresponded to the study’s finding that the rate of formal complaints was far below the rate of perceived discrimination, as reported in the interviews. Interviews of White employees in positions of authority indicated that they did not perceive that race played a significant role in the agency except in the isolated cases of a few “bad apples” and in the minds of overly sensitive minority employees. Discussing their experiences and feelings, and their responses to them, the study’s participants described a psychological environment that was burdensome.

Much of the conduct of White supervisors and co-workers reported in the study fell short of what courts would construe as actionable because their actions would be viewed in isolation rather than cumulatively. Courts view discrimination as the product of a single decision maker at a

particular time. There also must be an adverse personnel action such as a failure to hire, a discharge, a demotion, or a promotion denial to be actionable under Title VII. The Supreme Court has also stressed that Title VII “does not set forth a ‘general civility code for the American workplace’ ...An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.”²² The work conditions that the African American employees experienced in the mid-Atlantic state agency were not sufficiently “severe and pervasive” to constitute a hostile work environment.²³ The comments made by White workers reflecting racial bias would likely be dismissed as “stray remarks” in the workplace “unrelated to the decisional process.”²⁴ This shows that there are significant differences in how discrimination is experienced by racial minorities, how it is perceived by non-minorities and how it is understood by the courts. Traditional theories of discrimination do not address this problem.

Conclusion

The stereotype of young black men as dangerous criminals is deeply embedded in the American psyche. It is almost certainly a factor contributing to the stark racial disparities in the criminal justice system. Decisions about whom to arrest, how much force to use, what charges should be lodged and jury verdicts to convicting minority defendants are adversely influenced by unconscious bias. A recently developed experimental model involves Implicit Association Tests

²² *Id.*

²³ *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993)

²⁴ “Stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff’s burden in this regard.” *Watson*, 490 U.S. at 277 (O’Connor, J. concurring).

(IAT). The IAT measures automatic association response times between representations for race, gender, and age, and other classifications and positive and negative characteristics.²⁵ To measure racial associations, test takers' preferences are measured by their response times in pairing positive words or negative words with depictions of alternating White and Black faces. Quicker response times to pairing black faces with negative words and White faces with positive words indicate an implicit preference for a Black or White face with a negative or positive word.²⁶ The test is premised on the conclusion that it takes participants longer to associate words and faces that the test takers consider incompatible.

The test developers determined that the time differential could be quantified to provide an objective assessment of a test taker's unconscious attitudes. Using the IAT, researchers have documented a marked preference for Whites among test takers of different races who consciously believed that their views about race were neutral. The test results indicate that the test taker's attitudes about race were influenced by unconscious bias.²⁷ Recognizing the influence of unconscious bias is a starting point in reforming the criminal justice system.

²⁵ The tests were developed by Professors Anthony Greenwald and Mahzarin Banaji.
<https://implicit.harvard.edu/implicit/demo/>.

²⁶ Christine Jolls and Cass R. Sunstein, *The Law of Implicit Bias*, 94 Calif. L. Rev. 969 (2006) (implicit bias should be controlled through a strategy of "debiasing" the law).

²⁷ Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 Harv. C.R.-C.L. L. Rev. 481 (2005).