

2014 NAWJ ANNUAL MEETING

WHO DO YOU BELIEVE AND WHY?

Additional Implicit Bias Research

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Jerry Kang et. al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012)

Biases can shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk an individual, and concludes the encounter with an arrest versus a warning. These biases could contribute to the substantial racial disparities that have been widely documented in policing.

Research suggests that when subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces. The idea of Blackness triggered weapons and made them easier to see, and the idea of weapons triggered visual attention to Blackness in implicit association tests among police officers. The increased visual attention did not promote accuracy; however, instead, it warped officers' perceptual memories. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004).

In another study, police officers showed the same bias in favor of shooting unarmed Blacks more often than unarmed Whites that student and civilian populations demonstrated. E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 Psychol. Sci. 180,181 (2005). Cf. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial bias in the decision to Shoot*, 92 J. Personality & Soc. Psychol. 1006, 1010-13, 1016-17 (2007)(police officers showed a similar speed bias, but did not show any racial bias in accuracy, concluding that there was no higher error rate of shooting unarmed Blacks as compared to Whites)

There is some statistical evidence that racial minorities are treated worse than Whites in prosecutors' charging decisions. Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, Wash. Post, A4 (May 12, 1992)(Out of almost 700,000 criminal cases reported, at virtually every stage of pre-trial negotiation, whites were more successful than non-whites).

Meta-analysis found that when a juror was of a different race than the defendant there was an impact on verdict and sentencing. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analysis Review of Defendant Treatment*, 29 Law & Hum. Behav. 621, 627-28 (2005).

In cases that were racially charged, lower rates of juror bias were shown than when race was not an explicit figure in the crime. This is perhaps because jurors in race-central cases want to be fair respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes, but fail to be as vigilant about racial bias influences when race is at issue. Sam R. Sommers & Pheobe C. Ellsworth, *'Race Salience' in Juror Decision-making: Misconceptions, Clarifications, and Unanswered Questions*, 27 Behav. Sci. & L. 599 (2009).

Data shows that when the race of the defendant is explicitly identified to judges in the context of a psychology study, judges are strongly motivated to be fair, prompting different responses from White judges than Black judges. However, when race is not explicitly identified but implicitly primed, the judges' motivation to be accurate and fair is not on full alert. Rachlinski et al, *Does Unconscious Racial Bias Affect Trial Judges?* 84 Notre Dame L. Rev. 1195, 1210 (2009)

Evidence further suggests that African Americans are treated worse than similarly situated Whites in sentencing. Federal Black defendants were sentenced to 12% longer sentences under the Sentencing Reform Act of 1984, and were disproportionately subject to the death penalty (especially when the black defendant killed a white victim). David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 41 J.L. & Econ. 285, 300 (2001)(examining federal judge sentencing under the Sentencing Reform Act of 1984); U.S. Gen. Accounting Office, GAO GGD-90-57, Report to the Senate and House Committee on the Judiciary, Death Penalty Sentencing: Research Indicates Pattern of Racial

Disparities (1990); David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638, 1710-24 (1998).

Research demonstrates that people frequently engage in motivated reasoning in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. Hence, some employment decisions might be motivated by implicit bias but rationalized post hoc based on nonbiased criteria.

In Pretrial adjudication, the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for biases to structure the judge's assessment in the absence of a well-developed evidentiary record.

White students who strongly identified as American set higher standards for injustice; they thought less harm was done by slavery; and as a result, they felt less collective guilt compared to other white students who identified less with America. Anca M. Miron et al., *Motivated Shifting of Justice Standards*, 36 Personality Soc. Psychol. Bull. 768, 769 (2010).

Strategies for reducing bias

1. Exposure to counter-typical associations
2. Juxtaposing ordinary people with counter-typical settings. Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. Personality & Soc. Psychol. 815, 818-19 (2001)
3. Doubt one's objectivity -- Remind judges that they are human and fallible, notwithstanding their status, education, robe.
4. Become educated about implicit social cognitions and be internally persuaded that genuine problem exists.
5. Improve Conditions of Decision-making. – engage in effortful deliberative processing; avoid elevated emotional states when making decisions. Galen v. Bodenhausen et al., *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. Personality & Soc. Psychol. 621 (1994)
6. Increase statistical accountability for decisions

7. Increase individual screening of jurors and juror diversity
8. Educate the Jury about implicit biases
9. Encourage Category-Conscious Strategies – be conscious of social categories
10. Engage in perspective shifting activities

Patricia G. Devine, et. al., *Long-term reduction in implicit race bias: A prejudice habit-breaking intervention*, 48 J. Exp. Soc. Psychol. 1267 (Nov. 2012)

A multi-faceted prejudice habit-breaking intervention produced long-term reductions in implicit race bias in a 12-week longitudinal student. People who were concerned about discrimination or who reported using the strategies showed the greatest reductions. Reductions in implicit bias emerged by week 4 and persisted through week 8, and endured for at least another month. Strategies for reducing implicit race bias include:

- **Stereotype replacement:** replacing stereotypical responses for non-stereotypical responses, recognizing that a response is based on stereotypes, labeling the response as stereotypical and reflecting on why the response occurred, and how to avoid the bias in the future.
- **Counter-stereotypic imaging:** imagining in detail counter-stereotypic others by making positive exemplars salient and accessible when challenging a stereotypes validity
- **Individuation:** preventing stereotypic inferences by obtaining specific information about group members to assist in evaluating out-group members based on personal rather than group-based attributes
- **Perspective taking:** taking the perspective in the first person of a member of the stereotyped group to increase psychological closeness to the stigmatized group and block automatic group-based evaluations
- **Increase opportunities of contact:** engaging in positive interactions with out-group members to alter cognitive representations of the group

Overall, both education and training may be necessary to produce changes in implicit bias. Conversely, short-term interventions must counteract a large accretion of associative learning, and thus are unlikely to produce enduring change in unconscious schematic systems.

Jerry Kang, *Implicit Bias: A Primer for Courts*, National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, National Center for State Courts (Aug. 2009)

Implicit social cognitions guide our thinking about social categories and are formed through experiences with other people and ideas directly or vicariously.

Studies have shown that if someone engages in stereotypical behavior, the person to recall the event just describe what happened. If it is counter-typical, the relayer often feels the need to explain what happened. William Von Hippel et al., *The Linguistic Intergroup Bias As an Implicit Indicator of Prejudice*, 33 J. Experimental Soc. Psychol. 490 (1997); Denise Sekaquaptewa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 Exper. Soc. Psychol. 75 (2003)

Implicit bias predicts more negative evaluations of ambiguous actions by an African American, which could influence decision-making in hard cases. Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 Group Processes & Intergroup Rel. 133 (2002). Further, few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment. R. Richard Banks et al., *Discrimination and Implicit Racial Bias in a Racially Unequal Society*. 94 Calif. Law Rev. 1169 (2006); Irene v. Blair et. al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 Psychol. Sci. 674 (2004)

Implicit bias predicts more negative evaluations of agentic women in certain hiring condition. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. Soc. Issues. 743 (2001)

James McGee, *The Power to Judge: Social Power Influences Moral Judgment*, 25 *Jury Expert* (2013)

Recent findings suggest a link between feelings of social power and moral cognition. High power is associated with harsher judgment of simple moral issues. When participants are presented with moral vignettes complicated by additional information or moral principles, the association between power and moral judgment disappears, except when the moral dilemma pits utilitarian and deontological principles against each other, power is associated with harsher judgment of utilitarian acts. Higher power people judge moral transgressions more harshly when transgressions are simple; high power and low power people show no difference in moral condemnation when transgressions are complex, high power people more readily accept deontological v. utilitarian outcomes. If normal people experience stress when committing immoral acts, power may reduce the psychological cost of immoral behavior, and lead to more of it. Power influences judgment by preparing people to make decisions, buffering them from negative consequences of those decisions, and increasing the clarity with which they view their decisions. These findings are significant when picking a jury and crafting arguments to appeal to the jury.

Everyone has implicit biases to some degree. This does not mean we will act in an inappropriate manner. It only means our first blink sends us certain information. Acknowledging and understanding implicit responses are critical to whose decisions must embody fairness and justice. Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking*, Task Force on Implicit Bias, American Bar Association (2005)

Julia C. Becker & Janet K. Swim, Reducing Endorsement of Benevolent and Modern Sexist Beliefs: Differential Effects of Addressing Harm Versus Pervasiveness of Benevolent Sexism, 43 Soc. Psychol. 127 (2012)

Benevolent sexism consists of endorsing complementary gender differentiation, heterosexual intimacy, and paternalism by characterizing women as being wonderfully weak, affectionate but naïve. Modern sexism rests on the belief that sexism is a thing of the past. Such attitudes can be harmful for women by legitimizing inequality by offering the promise of protection and undermining women's resistance against discrimination, and de-emphasizing task-related competencies. The study showed that providing information about the harm associated with benevolent sexism is far more important than providing information about its pervasiveness in reducing sexism. Learning about the pervasiveness of benevolent sexism had no effect on endorsing benevolent sexist beliefs and resulted in decreased endorsement of modern sexist beliefs only when combined with information about harm. However, there were far greater reductions in discriminatory behavior when information about pervasiveness and harm were presented together.