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UNDERSTANDING THE ROLE OF IMPLICIT BIAS IN FUELING THE SCHOOL TO PRISON PIPELINE

Reading List Summaries

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I. STUDIES FOCUSING SPECIFICALLY ON SCHOOL ENVIRONMENTS:

Julie Landsman, "Confronting the Racism of Low Expectations" *Educational Leadership* Vol. 62, No. 3 (November 2004).

Although Landsman focuses on understanding the achievement gap, her emphasis on the low expectations of predominantly white teachers for the educational futures of their minority students may easily be applied to other realms. Students of color are affected by teachers who systematically (albeit most often unconsciously) underestimate both their intelligence and their potential for good, productive behavior in the classroom. To open her short piece, Landsman presents us with an image:

In an affluent suburb of New York City, in the midst of large backyards and roses along stone walls and the kind of broken beauty I have always loved from my own childhood there, a black man sits at the breakfast table with his two sons, ages 7 and 9. He looks from one to the other and, with great seriousness and hope, tells them they are spectacular boys. As he does every morning, he tells them they can do anything in this world, dream any dream. Then the boys finish breakfast and go off to the nearby elementary school.

The father has created this daily ritual because he believes that his sons will spend the next six to seven hours being given the opposite message. He is a rich man and has worked in corporate America most of his life. He loves this part of New York and its excellent, well-appointed schools. But he and his family are taking a gamble living here. The cost is great, not just in terms of property taxes, but in terms of potential damage to his sons' psyches. As one of only two or three students of color in each of their classes, these boys have a good chance of being objects of curiosity and condescension, or victims of low expectations. Daily encouragement is this father's way of countering assumptions that his sons are likely to face in school: that they cannot do the work assigned, that they do not come from a functional family, and even—tucked back in a teacher's subconscious— that they are innately less intelligent than their white peers.

Whereas some policy-makers continue to deny and make excuses, this father *assumes* the existence of a pervasive "racism of low expectations" even in his children's well-funded, suburban public school.

Carla Monroe, "Why Are "Bad Boys" always Black? Causes of Disproportionality in School Discipline and Recommendations for Change," *Clearing House: A Journal of Educational Strategies, Issues and Ideas* Vol. 79, No. 1 (Fall 2005).

Monroe talks about the "*discipline gap*," or the "overrepresentation of black, male, and low-income students on indices of school discipline" (46). More specifically, she asks, "how images of African American men and boys in society at large relate to teachers' notions about effective disciplinary strategies based on student race and gender?" (46) *School trends, Monroe says, reflect currents of the national contexts in which they exist.* She discusses three general conditions that contribute to disciplinary disparities: 1) the criminalization of black males, 2) race and class privilege, and 3) zero tolerance policies. Monroe concludes by giving four broad recommendations for closing the gap:

1) Provide opportunities for teachers to interrogate their beliefs about African American students,
2) Incorporate and value culturally responsive disciplinary strategies,
3) Broaden the discourse around school disciplinary decisions, and
4) Maintain learners' interest through engaging instruction.

In general, school inequities involving African Americans are best addressed through race-conscious approaches at the level of teacher preparation and professional development.

Chauncee D. Smith, "Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework," *Fordham Urban Law Journal* 36 (2009).

Like Landsman, Smith acknowledges that the dynamic process leading to the pipeline involves the intersection of zero-tolerance policies and educational "tracking" (1013). The school-to-prison pipeline is, in other words, significantly *inter-institutional.* According to Smith, we need to think about pipeline policies as giving rise to legal claims. She writes:

> For instance, because the administration of zero-tolerance or other exclusionary policies often results in students of color being disparately pushed out of school such policies may give rise to claims under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, § 1983 of Title 42 of

> the US. Code, and state equal protection and right to equal protection clauses. (1020)

Smith focuses on equal protection law. She claims that *our current equal protection paradigms fail to account for systemic inequality* (1014).

Motive-centered approaches to equal protection—like those supported in *Washington v. Davis*—only consider instances of overt, purposeful discriminatory practice. Instead, Smith argues that examining pipeline equal process cases through a *structural racism* framework would allow students of color to be more adequately protected than under a motive-centered approach. By integrating critical race theory and systems science, a structural racism approach to equal protection law would more aptly account for the realities of systemic inequality. We need to consider implicit biases. That is, as Smith explains, "cognitive psychology shows that, even in the absence of an outright intent to discriminate people act according to unconscious biases that make them behave discriminatorily" (1022-23). Discriminatory impact exists apart from discriminatory motive. With regard to the school-to-prison pipeline, fragmented inequities affected by institutional criminalization, sorting and economic dimensions "have a drastically unequal cumulative impact on students of color" (1027). A structural racism framework would meaningfully help to address the pipeline's "systemic invidiousness" (1049).

Josie Foehrenbach Brown, "Escaping the Circle by Confronting Classroom Stereotyping: A Step toward Equality in the Daily Educational Experience of Children of Color," *African-American Law and Policy Rep.* Vol. 6 (2004).

Foehrenbach Brown begins by thinking about the legacy of *Brown v. Board of Education*. After fifty years, she says, it is time to take a closer look at our supposed progress—at the "educational fortunes of African-American children" since May 17, 1954. The view, if considered honestly, ought to be unpleasant. Foehrenbach Brown alleges that American public education remains trapped in Gunnar Myrdal's "vicious circle" (135). In 1944, Myrdal described how white prejudice imposed conditions of deprivation on blacks through discriminatory practices and then looked at the result of those conditions as a confirmation of their prejudiced viewpoint. *In the twenty-first century, children of color are facing patterns of "resegregation" and "isolation" that are striking familiar* (135).

Foehrenbach Brown, in an attempt at explanation, cites Professor Reva Siegal: "Professor Siegal demonstrates how American law too often dismantles formal legal structures but ignores how the injustice imposed by those legal mechanisms continues to be enforced through new variations on old practice." *The consequent characterization of injustice as a sort of obsolete "distant past" distracts us from "evidence of continuing governmental and social practices that perpetuate past hierarchies*" (136). Injustice lives beyond the law.

According to Foehrenbach Brown, in the years following the *Brown* decision, the U.S. has failed to understand the far-reaching implications of "*transitional justice*" (of lack thereof) for the realm of education reform. She argues that those charged with implementing the decision have failed to devote sufficient attention to "the challenge of translating that legal norm into an operational reality in the institutional context of the American public school" (138). She particularly emphasizes the role of teachers in relation to this "inattention to the mechanics of attitude transformation" (138). In other words, Foehrenbach Brown locates the origins of implicit bias in the "attitudinal remnants" of the difficult—and perhaps largely unsuccessful—transition away from school segregation after the *Brown* decision. Even subconscious disparate treatment effects student self-perception, sense of individuality, and cultural belonging. "[U]nconscious bias," she writes, "inflicts a condition of *wounding invisibility* on children of color in our racially stratified school environments" (147).

How should we best deal with the elimination of such harmful "subconscious contaminants" (145)? It is time for the implementation of race-conscious remedial strategies. She makes the claim that especially the "problem of teacher stereotyping of minority students represents a worthy object of corrective action" (142). We need to work to counteract mutual "social distance" and "wariness" in student-teacher relations (145). Foehrenbach Brown returns to the idea of transitional justice and applies it to creation of scientifically constructed programs for anti-stereotyping training for teachers. Again, any change in the right direction requires political will. All the same, "Adoption of the training recommendation would reflect an honest recognition of how the distorted images form our nation's discriminatory past and our often racially and ethnically divided present inhibit our capacity to see each other clearly" (149). This recognition has been inappropriately delayed—but it is certainly not too late.

Carol J. Greenhouse, "Life Stories, Law's Stories: Subjectivity and Responsibility in the Politicization of the Discourse of 'Identity,'" PoLAR: Political and Legal Anthropology Review Vol. 31, No. 1 (May 2008).

Foehrenbach Brown, in the above article, underlines the potentially damaging effects of implicit racial bias to the development of student individuality. Carol Greenhouse highlights the rhetoric of identity and individuality the emerged within the framework of the *Brown* decision and the argument of the plaintiffs. She writes, "The concept of "identity" as it circulates as a theoretical object in the human sciences in the United States is deeply suffused with the federal discourse of the *Brown* era and its legacy" (82).

According to Peggy Davis, a crucial element of the plaintiff's strategy in *Brown* was their evocation of the U.S. as a "multicultural political community" (81). The effect of this strategy, Greenhouse claims, was to "open constitutional interpretation to new participants and perspectives" (81). "Personhood," she writes, was re-conceptualized as "forged out of the elements of federal citizenship" (81). Individuality and individual identity are not necessarily solely functions of the individual. "Identity" is not simply something that every individual "has." Rather, it is a social function with social consequences. The court's language in Brown conjures two futures at once—the outcomes (like the children themselves) entirely vulnerable to social action or inaction. Greenhouse explains:

> One future is promising, as African American children grow up to be fulfilled and productive citizens. The other is bleak, as some African American children are damaged by the stigma of racial prejudice, and grow up discouraged, idle – even dangerous (82).

Education is a right of citizenship. And again, "personhood" emerges from "the elements of federal citizenship" (81). Any conception of identity or individual "rights," in turn, cannot be separated from social reality. Greenhouse implies an understanding of implicit bias that laws like the failed CRA of 1990 failed to encompass. *Inequality should be understood not as "the source of difference, but the symptom of differences beyond the direct scope of law."* (84) At least for now.

Katayoon Majd, "Students of the Mass Incarceration Nation," *Howard Law Journal* Vol. 54 (2011).

According to Majd, "*Schools have—unwittingly or not—served as 'accomplices' to the project of mass incarceration*" (360). Crime control has become the defining paradigm for education of policy. Loic Wacquant calls public schools "institutions of confinement" whose "primary mission is not to educate but to ensure 'custody and control;" (361). Moreover, the students most impacted by highly punitive school policies are similar demographically to those most likely to find themselves within the criminal justice system. That is, poor men of color. Majd writes, "In this way, schools reproduce and reinforce the social inequities that exist in the labor market" (363). African American men, in particular, are often forced out entirely.

Juvenile courts undoubtedly play an important role in the criminalization of students. Schools would not be able to continue having youth arrested within their walls if the courts were not willing to hear cases for offenses like "disorderly conduct" and "disturbing the peace." What's more, once within the system, students often find themselves set up to fail. "Court involvement," Majd points out, "become another, high-stakes means of surveillance rather than a way to rehabilitate youth" (371). The term "school-to-prison pipeline" in itself demonstrates the troublesome inter-institutional nature of mass incarceration. If one entrance point is cut off, it is likely that a new one will emerge somewhere. The "symbiotic relationship" that has developed between the education and criminal justice systems means that challenging policies in just one system is not likely to fully address the problem (372).

In more than one way, schools are casualties of mass incarceration (382). Beyond the fact that schools have imitated the nation's obsession with punitiveness, they have also had to deal with a growing number of students with a parent or guardian behind bars. Additionally, school budgets have suffered as corrections cost have skyrocketed. Dismantling mass incarceration in the U.S. will mean reversing its spread into the realm of education. Collaborative reform efforts, Majd argues, will be key.

Kelly Welch and Allison Ann Payne, "Racial Threat and Punitive School Discipline," *Social Problems* Vol. 57, No. 1 (February 2010).

Using a national sample of 294 public schools, this study tests the racial threat hypothesis within schools to determine if the racial composition of students predicts greater use of punitive controls, regardless of levels of misbehavior and delinquency. Welch and Payne found support for the racial threat hypothesis. Schools with a larger percentage of black students are not only more likely to use punitive disciplinary responses, but are also more likely to use extremely punitive practices (like zero tolerance policies). They also employ few mild practices and restitutive techniques. Moreover, racial threat is more pronounced and influential when school delinquency and disorder are actually at their lowest.

II. STUDIES ADDRESSING IMPLICIT BIAS WITHIN THE JUVENILE AND CRIMINAL JUSTICE SYSTEM, WITH IMPLICATIONS FOR SCHOOL TO PRISON PIPELINE:

Jennifer Eberhardt, R. Richard Banks, Lee Ross, "Discrimination and Implicit Bias in a Racially Unequal Society," *California Law Review* Vol. 94 (2006).

How much bias remains in people's hearts and minds? (1169) What would it mean to be racially unbiased? Eberhardt et al. recognize that, "incorporating inequality into antidiscrimination analysis underscores the difficulty of the challenges we face in attempting to refashion the racial legacy of our past" (1171). In the end, they make an argument that very much resembles Banks' claim about the essential indeterminacy of "nondiscrimination."

This article looks at studies that examine the influence of race and implicit biases on investigative decisionmaking, the use of lethal force, and criminal sentencing. One study (by Eberhardt and colleagues) observed an implicit association between race and perceived criminality. Police officers were exposed to a group of Black faces or a group of White faces and asked, "Who looks criminal?" The study found that police officers not only viewed more Black faces as criminal, but also viewed those Black faces rated as the most "stereotypically Black" as the most criminal of all. Shooting behavior studies have consistently found that computerized images of unarmed Black men in video game simulations were more likely to be "shot" than were images of unarmed white men. And, with regard to capital sentencing research, the most common finding is that killers of White victims are more likely to be sentenced to death than are killers of Black victims. These studies—few among many—demonstrate disparities which point to considerable racial discrimination.

Any effort to eliminate disparities in the realm of criminal justice, however, will be complicated. The elimination of one disparity is likely to produce more and distinct disparities. African Americans both disproportionately commit and are victimized by violent crime. Any conventional solution will be a tradeoff. Moreover, *in a society as chronically unequal as ours, the question of what should count as racial bias is itself contestable.* With this in mind, Eberhardt et al. contend that our apparent national

consensus that "discrimination is wrong" ought to be rejected as a normative fantasy. That is, "*The ascendance of the antidiscrimination principle and the disavowal of racism have relocated rather than resolved disagreement about the meaning of racial equality in this first decade of the twenty-first century*" (1190). Instead, we should realistically consider questions of racial fairness by looking directly at the harms and benefits of particular policies.

Tamar Birckhead, "Delinquent by Reason of Poverty," *Washington University Journal of Law & Policy* Vol. 38 (2012).

This article explores the disproportionate representation of low-income children within the U.S. juvenile justice system. Birckhead argues firmly against what she calls "need-based" delinquency. She explains that "the emphasis on families' needs when adjudicating delinquency has a disproportionate effect on low-income children, resulting in high rates of recidivism and perpetuating negative stereotypes based on class" (54).

In 2008, courts with juvenile jurisdiction handled 1.7 million delinquency cases. More than 500,000 of these cases resulted in children being placed on probation supervision. More than 80,000 youth were confined in juvenile facilities. At the same time, over 300,0000 cases (18% of all delinquency cases) were dismissed at intake and an additional 25% of cases were handled informally. In other words, Birckhead writes, "*police officers, civilians, probation officers, judges, and lawyers make decisions that cumulatively ensure that some children enter and remain in the juvenile court system, while others are diverted out of it*" (58). Race, ethnicity, but also socio-economic stature (separate from both), partially explain this result.

Franklin D. Gilliam Jr. and Shanto Iyengar, "The Superpredator Script," (1998).

Aneeta Rattan, Cynthia S. Levine, Carol S. Dweck, Jennifer L. Eberhardt, "Race and the Fragility of the Legal Distinction between Juveniles and Adults," (May 2012).

Both Gilliam and Iyengar's 1998 study and a much more recent study by Eberhardt et al. demonstrate the effect of race on juvenile justice.

The results of Gilliam and Iyengar's work show that, just by altering the race of the mugshot displayed for 5 seconds in a 15-minute newscast, we can apparently manipulate peoples' attitudes towards harsh juvenile justice. That is, they found that exposure to the study's "superpredator news frame" (an African American or Latino youth) increases a desire for harsher punitive action among whites and Asians by about 11 percent. By contrast, exposure to the same "superpredator news frame" decreases support for this type of solution by 25 percent among African Americans and Hispanics.

Eberhardt's 2012 study examines whether White Americans, a group overrepresented in jury pools, the legal field, and the judiciary would perceive juvenile status as a mitigating factor to the same degree when primed to think of Blacks versus Whites. They similarly found that *simply bringing to mind a Black (vs. White) juvenile offender led participants to view juveniles in general as significantly more similar to adults in their culpability and to express more support for severe sentencing* (such as life without parole). A one-word priming condition—changing the race of the offender—seems to undermine the legal difference between juvenile and adult culpability. *The findings of both studies, in short, suggest the fragility of juvenile legal protections when race is involved*.

Sandra Graham and Brian Lowery, "Priming Unconscious Racial Stereotypes about Adolescent Offenders," *Law and Human Behavior* Vol. 28, No. 5 (October 2004).

Sandra Graham and Brian Lowery conducted another similar study with a participant group of police officers and juvenile parole officers.

Unlike the former two studies, however, Graham and Lowery employed a priming scheme based on Devine's methodology: flashing content-coded words at a high speed such that participants would be primed but would remain unaware of the content of the prime. They primed half of the participants with words stereotypically related to African Americans, such as "Harlem," "ghetto," and "dreadlocks," and primed the other half of participants with race-neutral content words such as "sunset," "mosquito," and "toothache." They then presented participants with two hypothetical crime reports detailing juveniles (whose race was not identified) engaging in criminal misbehavior, and measured whether the priming affected judgments of those behaviors. *The results of the study confirmed that*

the priming activated racial stereotypes of African Americans and affected the way the participants made judgments about a number of traits (e.g. hostility and immaturity), culpability, expected recidivism, and deserved punishment. Both police officers and juvenile probation officers who had been primed with African American words made harsher judgments of the juveniles. Participants in the primed condition reported more negative trait ratings, greater perceived culpability and likelihood to reoffend, and they supported harsher punishments for the hypothetical juveniles. These effects were not related to self-reported, consciously held attitudes about African Americans.

George S. Bridges and Sara Steen, "Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms," *American Sociological Review* Vol. 63, No. 4 (August 1998).

This study examines court officials' perceptions of juvenile offenders, focusing on the relationship between race and officers' judgment about the causes of the crime. Three main findings show the relationship between race, perceived cause of crime, and recommended sentence:

1. *Probation officers consistently portray black youths differently than white youths in their written court reports, more frequently attributing blacks' delinquency to negative attitudinal and personality traits. Their depictions of white youths more frequently stress the influence of the individual's social environment*.
2. These attributions shape officials' assessments of both the threat of future crime and sentence recommendations. Court officials rely more heavily on negative internal attributions than on the severity of the youth's crime or his or her prior criminal history in determining the likelihood of recidivism.
3. Attributions about youths and their crimes, therefore, are a mechanism by which race influences judgments of dangerousness and sentencing recommendations.

Stephen M. Feiler and Joseph F. Sheley, "Legal and racial elements of public willingness to transfer juvenile offenders to adult court," *Journal of Criminal Justice* Vol. 27, No. 1-2 (January 1999).

This study examines the issue of public support for harsher treatment of criminals by analyzing the variables underlying Louisiana citizens' willingness to treat juvenile offenders as adults. Feiler and Sheley explore both legal (e.g. assaultive nature of the crime) and extralegal elements (e.g. race of the offender). 212 New Orleans residents were surveyed by telephone. Each participant was asked to evaluate two vignettes involving either a burglary or a robbery. After listening to the vignette, the participant was asked whether the offender should "be sent to juvenile court or to adult court."

The study found that age of the offender, the type of weapon with which the victim was threatened, and whether or not the victim was physically assaulted were associated with a greater willingness to transfer a case to adult criminal court. Race of the offender, though not strongly, was also influential in a participant's willingness to transfer a youth to adult court. The race of the participant did not moderate this influence. This is important because, as Feiler and Sheley explain, "*Since Black as well as White respondents were more likely to desire differential treatment for Black youth, the possibility of unconscious bias seems quite likely, as it appears to be in actual juvenile court decisions*."

Jeffrey J. Rachlinski, Andrew J. Wistrich, Sheri Johnson, and Chris Guthrie, "Does Unconscious Bias Affect Trial Judges?," (July 2007).

The aim of this study was to measure the influence of implicit associations on legal judgments made by 133 sitting trial judges. The race of the defendant was manipulated in two different ways: first by sublimely priming judges with words associated with African Americans (like in the Graham and Lowery study) and second by explicitly identifying the defendant's race. To measure implicit associations involving race, judges were given the IAT (measuring their associations between white or black faces and positive or negative words).

The study found that, according to the IAT, judges held invidious implicit associations concerning African Americans. These findings were generally consistent with the test results of other Americans. However, these associations were only influential when the race of the defendant was manipulated through subliminal techniques. When the race of the defendant was explicitly identified, implicit associations had no influence on

judgment. *These results suggest that judges are able to control the influence of unconscious racial bias—but only when they are focused on doing so.* That is, judges *can* effectively control their own automatic racial associations if they are *made aware* of the need to monitor these responses.

Rashmi Goel, "Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender," *Law & Inequality* Vol. 27, No. 1 (2009).

This article explores the interrelating issues of race, class, and mental health operating within the juvenile justice system. Goel argues that we need to seriously consider the convergence of race, poverty and ADHD in the determination of delinquency in order to understand the shortcomings of our juvenile justice system. Nearly half of all juveniles in custody (of whom more than half are youth of color) have ADHD. More youth of color than White youth are adjudicated delinquent and then subsequently transferred to adult court. Compounding these statistics is the fact that disparities in ADHD diagnosis are significant along racial and socioeconomic lines. Youth of color face a number of economic and racial barriers to diagnosis—including racial bias within the medical profession. Once the damage has been done and a child has not been properly diagnosed, implicit bias continues to operate potently in the courtroom. Goel writes:

> The operation of unconscious racism and group dynamics is only exacerbated by the fact that the majority of juvenile court judges are still White men. Unconsciously held biases and cultural misunderstandings about families of color may affect judges when they adjudicate cases involving youth offenders. *Judges of all races may have unconscious negative assumptions regarding people of color and unlawfulness*. This is epitomized by the stereotype of the "big Black kid" as bestial, uncontrollable, and aggressive. This stereotype is in direct conflict with the juvenile court's original view of juvenile offenders as misguided but rehabilitatable youth who lacked culpability. (39)

Undiagnosed youth of color suffering from ADHD find themselves on the fast track to delinquency. Goel offers three recommendations to reverse the process: 1) the purpose of the juvenile justice system must be clarified, 2) legal actors in the juvenile justice system

must be educated about ADHD, and 3) screening and diagnostic measures must be drastically improved.

Justin D. Levinson, "Forgotten Racial Equality: Implicit bias, Decisionmaking, and Misremembering," *Duke Law Journal* Vol. 57 (2007).

Memory errors are normal and meaningful. In this article, Levinson makes the argument that *judges and jurors unknowingly misremember case facts in racially biased ways.* These memory failures threaten to propagate racial biases throughout the legal process itself.

Levinson conducted an empirical study that examined how implicit racial bias affected mock jurors' memory of legal facts. Participants were asked to read the facts of two legal stories, briefly distracted, and then quizzed. Race was the independent variable. The results are striking. For example, people who read about "Tyrone" were more likely to remember aggressive facts from the story they read than those who read about "William" or "Kawika," a native Hawaiian. Moreover, Levinson found that there was no significant relationship between memory recall and explicit racial preferences; that is to say, participants who demonstrated more memory bias were not more likely to be explicitly biased (401). These results, along other existing research on implicit social cognition and memory, point to the conclusion that *implicit memory biases most likely operate in legal decisionmaking.*

What, then, are the implications of these findings for social justice? How can the American legal system stand for justice and fairness when it embraces a decisionmaking process that propagates racial bias? (420) Levinson suggests that both debiasing and cultural solutions must be pursued to correct the contradiction. With regard to cultural responsibility, he writes, "it must be understood that the deviation from rational decisionmaking is not simply a cognitive glitch, but a meaningful cultural statement that reflects the way people unknowingly carry society's weaknesses with them at all times, even when encoding and recalling the simplest of facts" (420).

Justin D. Levinson, Huajian Cai, and Danielle Young, "Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test," (August 2009).

In this study, Levinson et al. directly ask the question: do implicit biases affect jury guilty/not guilty verdicts in racially biased ways? They worry that "the still emerging legal model of the human mind has failed to develop new empirical tests that measure how implicit cognitive processes function not just in society in general, but specifically in legally relevant contexts such as jury decision-making" (2). To address this apparent lack, they developed a new IAT (Implicit Association Test): the Black/White, Guilty/Not Guilty IAT, in order to examine whether people hold implicit associations between African Americans and criminal guilt. The study, therefore, tests implicit associations specifically within the important domain of legal decision-making and then examines whether these associations matter in that realm.

First, the Guilty/Not Guilty IAT was found to operate differently than and independent from the well established attitude-based IAT. Most basically, the overall results of the study demonstrate that participants held implicit associations between Black and Guilty compared to White and Guilty, and that these implicit associations predicted mock-juror evaluations of ambiguous evidence. *These findings, in short, confirmed the hypothesis that there is an implicit racial bias in the presumption of innocence*. The study opens much broader questions about our legal system. For instance, we are left wondering whether the same standards of guilt are applied equally to Black and White men. Does the presumption of innocence mean the same thing for a Black versus a White defendant? This study suggests that there is substantial cause for concern.

Justin D. Levinson and Danielle Young, "Different Shades of Bias: Skin tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence," *West Virginia Law Review* Vol. 112 (2010).

This article proposes and tests a new hypothesis that Levinson and Young call the "*Biased Evidence Hypothesis*." This hypothesis supposes that when racial stereotypes are activated jurors automatically and unintentionally evaluate ambiguous trial evidence in racially biased ways.

In an empirical study, half of participating mock jurors were shown an evidence

slideshow that included a security camera photo of a dark-skinned perpetrator. The other half saw an otherwise identical show with a lighter-skinned perpetrator. *The results support the Bias Evidence Hypothesis: participants who saw a photo of a dark-skinned perpetrator judged subsequent evidence as more supportive of a guilty verdict*. The perpetrator's skin tone even affected judgments of how guilty the defendant was (on a scale of 0-100). These judgments of evidence and guilt were found to be unrelated to explicit racial preferences. It seems, therefore, that exposing jurors to simple racial cues (priming) can trigger stereotypes and affect how they evaluate evidence in subtle but harmful ways. Bias evidence evaluations may help explain—to some degree at least—racial disparities in the criminal justice system.

III. STUDIES ABOUT IMPLICIT BIAS MORE GENERALLY, WITH IMPLICATION FOR ITS OPERATION WITHIN THE PIPELINE CONTEXT:

Jerry Kang, "Trojan Horses of Race," *Harvard Law Review* Vol. 118 (February 72005).

According to Kang, we all operate on a day-to-day basis with a full archive of racial schemas that "automatically, efficiently, and adaptively parse the raw data pushed to our senses" (1504). Implicit bias research suggests that we may honestly lack introspective access to the racial meanings embedded within our racial schemas. It seems we have, therefore, the social psychological translation of the critical race studies theme: "the power of race is invisible" (1506). In the United States, using the IAT and similar tools, social cognitionists have documented the existence of implicit biases against numerous outgroups, including: Blacks, Latinos, Jews, Asians, non-Americans, women, gays, and the elderly.

Moreover, Kang argues (citing several important studies examining employment discrimination, shooter bias and stereotype threat, for example), these biases affect behavior. Or, in terms of his "racial mechanics model," we "map individuals to racial categories according to the prevailing racial mapping rules, which in turn activates racial meanings that alter our interaction with those individuals" (1535). Similarly, he explains "*ultimate attribution error*" (UAE) as "the tendency to accept the good for the ingroup and the bad for the outgroup as personal and dispositional, but more importantly, to explain away the bad for the ingroup and the good for the outgroup with situational attributions." Accordingly, when we see a Brown terrorist, we are inclined toward "outgroup essentialism" and interpret the violence as part of their way; by contrast, when we see John Walker Lindh or Timothy McVeigh, we see only wayward souls, saying nothing larger about our White selves. In addition to being found in social cognition research, the UAE has been demonstrated in political science experiments employing the newscast paradigm. After a White mugshot, for example, participants emphasize societal variables in explaining the causes of crime; after a Black mugshot, participants emphasize individual nature.

Jerry Kang and Mahzarin R. Banaji, "Fair Measures: A Behavioral Realist Revision of 'Affirmative Action,'" *California Law Review* Vol. 5 (2006).

The premise of the article is essentially that the science of implicit social cognition can help revise the meaning of certain affirmative action prescriptions by updating our understanding of human nature and its social development. Evidence from hundreds of thousands of individuals across the globe shows that:

> *(1) the magnitude of implicit bias toward members of outgroups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias, and (4) self, situational, or broader cultural interventions can correct systematic and consensually shared implicit bias.*

Behavioral realism takes this science seriously—and forces the law to confront it as well.

Using a behavioral realist methodology, Kang and Banaji aim to reframe the affirmative action conversation in three main ways. First, instead of looking backward or forward, affirmative action programs ought to respond to "discrimination in the here and now." Second, we must rethink the measurement of merit. That is, affirmative action policies should not be consider "preferential treatment;" but, instead, an opportunity to recalibrate merit measurement with implicit biases in mind. And third, Kang and Banaji think about debiasing processes in the affirmative action context. Affirmative action programs, for example, have often been credited for producing the sort of integration that provides positive counterstereotypes and, in turn, works against prejudice—both overt and implicit.

Jerry Kang and Kristin Lane, "A Future History of Implicit Social Cognition and the Law," (2009).

In this article, Kang and Lane offer a so-called "*future history*" of how a new scientific consensus might be reached that integrates implicit social cognition findings into an understanding of the law. This consensus requires really seeing (with an open mind) the research on implicit bias. Kang and Lane summarize one particularly compelling study:

Participants watched a video of computer-generated faces that morphed slowly from a frown to a smile and were instructed to hit a key when they thought the expression changed. In general, people saw hostility "linger" on the Black face for a longer period of time. Moreover, the extent that hostility was perceived as lingering was predicted by implicit bias (as measured by the IAT) against Blacks. Implicit cognition is an emerging science, but implicit biases are very real and already very documentable.

Accomplishing the future history that Kang and Lane envision—one that incorporates implicit cognition science into law—through behavioral realist techniques involves a three-step process:

1) Identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior,
2) Compare that new model with the latent theories of human behavior and decision-making embedded within the law. These latent theories typically reflect "common sense" based on naïve psychological theories.
3) And, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view.

Behavioral realism works against fantasy in favor of reality—against hypocrisy and self-deception in our law.

R. Richard Banks, "Class and Culture: The Indeterminacy of Nondiscrimination," *Stanford Journal of Civil Rights & Civil Liberties* Vol. 5 (2009).

In this article, Banks again interrogates the definitional ambiguities surrounding race, racism and discriminatory practice in the U.S. He writes, *"[N]ondiscrimination is like some other legal concepts: rhetorically potent, if analytically indeterminate"* (3). "Moral intuitions about the demands of racial justice," Banks points out, "are complex and might depend heavily on the specifics of the particular controversy" (8). Our intuitions are highly

context-dependent. More specifically, claims of discrimination often combine and confound matters of race, class, and culture. This intertwining produces the possibility for both empirical uncertainty and, as previously noted, conceptual indeterminacy (15).

Americans occupy different racial—but also entirely distinct—cultural, social, and physical spaces (17). "Race," Banks explains, "*saturates our social world*" (17). Nevertheless, Banks argues that when it comes to what it means to be socio-economically disadvantaged, we necessarily contemplate race. In the case of the most disadvantaged blacks—"racial parallelism" simply does not exist in our society. Any conventional account of principles of antidiscrimination or nondiscrimination would be unable to account for the "social distinctiveness" of disadvantaged blacks.

Banks attempts to understand the classification of "discriminatory" practices and institutions through a pragmatic rather than a problematically indeterminate "philosophical" or conceptual lens (19). He writes, "[A] practice is not permissible because it is discriminatory[;] rather, a practice is racially discriminatory because, on balance, its costs and benefits warrant its prohibition" (19). Discrimination is like many other legal topics: clear in the abstract while comparatively impotent in concrete application. There is no need to define "discrimination" once and for all, "because there is no definition on which one would rely to decide a case" (22). Banks contends, therefore, that the widespread embrace of the nondiscrimination mandate is fundamentally misguided.

IV. STUDIES OUTLINING POTENTIAL REMEDIES/INTERVENTIONS WITHIN THE PIPELINE CONTEXT

Sheri Lynn Johnson, "Litigating for Racial Fairness After *McCleskey v. Kemp*," (2008).

Johnson emphasizes the importance of understanding how prejudice affects particular—in the context of her article—capital cases. She summarizes:

> Psychologists looking at racial prejudice focus on three different, though often related, aspects. From a *cognitive* perspective, prejudice influences the way people think about persons or events, and it involves stereotypes (which are conscious), associations (which are often unconscious), and biased processing of other information about the target subject. From an *affective* perspective, prejudice creates negative emptions, ranging from dislike, to hatred, to revulsion, to fear. From a *connotative* perspective, prejudice alters people's behavior and may involve discrimination, avoidance, rudeness or even violence. (189)

All the same, prejudice, at least in its implicit forms, is—in a sense—trainable. Persons who are made aware of the fact that their reactions are biased, and then allowed to "practice" neutral judgments are more likely to make them on a day-to-day basis. This is especially true if they are personally committed to racial equality norms, as opposed to socially pressured to conform to norms of formal equality. 'The best candidates for non-prejudiced reactions," Johnson writes, "are a group who are called 'chronic egalitarians'—people who monitor their own reactions and behavior in an effort to root out stereotypes and feelings of which they don't approve" (193).

Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin, and William T.L. Cox, "Long-term Reduction in Implicit Race Bias: A Prejudice Habit-breaking Intervention," (2012).

The findings of this study provide the first real evidence that a controlled, randomized intervention can produce enduring reductions in implicit bias. "Our data," Devine et al. explain, "provide evidence demonstrating the power of the conscious mind to intentionally deploy strategies to overcome implicit bias" (28). They developed a "multi-faceted prejudice habit-breaking" intervention that aimed to engage intentional effort to

produce long-term reductions in implicit race bias. The intervention had both an education component and a training component (which instructed participants in five different de-biasing strategies). All measures were assessed prior to the intervention manipulation and at two time points—four and eight weeks—after the manipulation.

The study found that, in the intervention condition, people simultaneously self-reported increased concern about discrimination and tested lower on the Black-White IAT for implicit biases against Blacks. General concern was also shown to grow over time. In this way, the intervention seems to increase both personal awareness of one's bias and a general concern about discrimination in society. Devine et al. stress the need to explore what exact elements of their emphatically multi-faceted intervention were responsible for increasing concern. Future studies, in general, will need to focus on the specifics—on uncovering the specific behavioral, cognitive, affective, and neural mechanisms through which the intervention works. For now, this study importantly demonstrates that an intervention can effect the long-term regulation of implicit biases.

Galen V. Bodenhausen, Andrew R. Todd, and Jennifer A. Richeson, "Controlling Prejudice and Stereotyping: Antecedents, Mechanisms, and Contexts," (2008).

This chapter discusses the most prominent research to date (2008) on the psychology of *controlling* prejudice and stereotyping. Citing Devine, Bodenhausen et al. define "automatic prejudice" as that produced by "the spontaneous activation of mental associations that are not necessarily personally endorsed, but that are ubiquitously found in contemporary society, owing to ongoing cultural representations of minority groups that perpetuate negative or stereotypic associations with the groups" (111-112). Although Devine characterizes automatic prejudice as an ubiquitous phenomenon, there are notable individual and situational differences in stereotype activation. According to Bodenhausen et al., it seems that the key to stereotype activation seems to lie more in the motivations of the perceiver than in the availability of cognitive resources. How the perceived person is categorized (blonde, black, fat, pretty) also matters—not all applicable categories will be invoked in every context. Prejudice control becomes particularly problematic, therefore, when perceivers categorize others in terms of categories for which they are aware of

undesirable cultural associations. Awareness, again, does not necessarily connote endorsement.

Changes in societal norms over the course of the 20th century has made the expression of prejudice a powerful source of social devaluation. This social devaluation constitutes a so-called *external* motivation to control prejudice. Additionally, people may often internalize norms and become personally motivated to avoid expressing prejudice. Regardless, as long as they are cognizant to the potential for bias and are motivated in some way, people resort to a number of cognitive mechanisms to control their prejudices. Bodenhausen et al. consider stereotype suppression, perspective taking, stereotype negation training, and priming people to think "creatively" (119). Regulatory processes, moreover, can become more automatic with practice and time. Nonetheless, initial activation of biased associations does appear to be the default and inhibition the exception. Strategies, like correction, individuation (considering a target's personal attributes), and recategorization, can help to counteract the influence of these associations after activation

Situational factors can make control more or less feasible. For example, we might ask, how do social norms, cultural ideologies, and diverse contexts influence the activation and control of biased thoughts? Social context constrains behavior. The endorsement of endorsement and multiculturalism particularly predicts more positive racial attitudes. In general, increased interpersonal interaction across group lines has been shown to significantly undermine prejudice and discrimination. Prejudice and stereotypes can be deeply conditioned in the human mind. *"The fact that so many people have the desire to control the biases that have been historically so commonplace is a cause for celebration," Bodenhausen et al. claim. All the same, they also maintain that "it is certainly not an occasion for complacency."* There is work to be done.