
Litigating Implicit Bias

by Eva Paterson

If you find yourself applying for a job, you may want to make sure your name is Emily or Greg rather than Lakisha or Jamal. A recent study found candidates with more “white-sounding” names received 50% more callbacks for jobs than those with “African-American sounding” names, even when the resumes were otherwise nearly identical. This is not because employers are necessarily weeding out African-American candidates because of overt racism, but because implicit racial biases still affect everyday decisions and behavior.

Racial justice advocates must engage in multi-pronged strategies that include pushing the courts to seek remedies for rights violations. After years of forward momentum in racial justice litigation, the Supreme Court retrenched anti-discrimination jurisprudence in one fell swoop—*Washington v. Davis*. 426 U.S. 229 (1976). In that case, the Court created a new evidentiary standard for victims of discrimination: Plaintiffs needed to establish a perpetrator’s *intent to discriminate*. The “Intent Doctrine,” as it is now known, places a heavy burden on plaintiffs who are alleging discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. It requires them to prove that the discriminating actor or agency “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable [racial] group” under the Equal Protection Clause. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). However, in contemporary society, much racial bias is not overt. Rather, racial stereotypes often infect people’s decision-making processes in a subconscious way. Consequently,

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the courts need to “catch up” to modern forms of racism and allow plaintiffs to prove that race discrimination exists beyond the intentional racial animus that plaintiffs currently have to prove under the Intent Doctrine. Requiring proof of discriminatory intent essentially closes the courthouse doors to victims of racial bias. If there has ever been a law worth the struggle to change in modern society, this is it.

The Intent Doctrine from *Washington v. Davis* needs to be overturned for anti-discrimination law to actually be successful in overcoming racial injustice. After all, the Court has long recognized that the Equal Protection Clause is meant to protect individuals from discrimination. Yet a growing body of research confirms that racism is not an isolated, unconnected,

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and intentional act, but a process that is influenced and internally institutionalized as a subconscious process. In fact, the subconscious processes or implicit biases influence the way in which we perceive and make determinations about other people.

Less than a decade after *Washington v. Davis*, Professor Charles Lawrence wrote a seminal article that addressed the limitations and shortcomings of the Intent Doctrine. Lawrence utilized social psychology to demonstrate that “requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works.” Lawrence’s critique of the intent standard centered on the idea that unconscious racism is a modern form of discrimination that the courts fail to understand and subsequently remedy: “By insisting that a blame-

worthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended.” *Id.* at 324-25. As Judge Charles Breyer recognized in *Chin v. Runnels*, unconscious racial stereotyping and group bias are pervasive, and “these unconscious processes can lead to biased perceptions and decision-making even in the absence of conscious animus or prejudice against any particular group.” 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004) (citing law review articles by Lawrence and other scholars).

Since the publication of Lawrence’s article, psychological and social science research has made great strides in providing a broader understanding of how we all possess subconscious or implicit biases—beliefs, attitudes and expectations that are based on stereotypes about specific discrete categories (i.e., race, gender, age, etc.) to which an individual belongs. There is “increasing recognition of the natural human tendency to categorize information and engage in generalizations, of which stereotyping is a part, as a means of processing the huge amount of information confronting individuals on a daily basis.” *Chin*, 343 F. Supp. 2d at 906.

In fact, implicit bias and unconscious racism received mainstream attention through Malcolm Gladwell’s bestseller, *Blink*. In *Blink*, Gladwell discussed the way in which people engage in rapid cognition based on “instantaneous impressions” which can result in significant—albeit sometimes unintended—harms. As an example of the pernicious impact that may result from acting on instantaneous impressions, Gladwell discusses the 1999 killing of Guinean immigrant Amadou Diallo and the racial prejudices that led to his death. While the New York City police were attempt-

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ing to question him, Diallo, scared and confused, reached for his wallet. Based largely on racial prejudices, the police assumed the wallet to be a gun and shot Diallo 41 times.

In light of our present inability to find adequate redress for racism and racial injustices through the courts because of the impossible (and unrealistic) standard of the Intent Doctrine, we need a new doctrinal paradigm to advance racial justice through Equal Protection jurisprudence. This approach must include psychological and social scientific research to prove that discrimination exists even when it may not be tied to an overt act. Since our society has become somewhat hostile to people holding racial biases, social scientists and psychologists have developed increasingly subtle mechanisms that detect implicit racial biases. Through methods like the Implicit Association Test, litigators have made great strides in marshaling psychological and social scientific research on implicit bias to prove instances of discrimination. It is critical that we find ways to present this evidence in court to establish that implicit bias is the catalyst of discriminatory injustices in this day and age.

Using social science in litigation is not a new phenomenon, nor would it be the first time that the Supreme Court would rely on social science evidence to address historical grievances. Charles Hamilton Houston developed a strategic litigation plan in the 1930s that combined impact litigation, innovative use of social science and collaboration with civil rights organizations across the political spectrum to challenge *Plessy v. Ferguson*'s principle of "separate but equal" from the ground up. The Houston Plan (as it has come to be known) led to overturning *Plessy* in the landmark decision *Brown v. Board of Education*. As part of the Houston Plan, litigators in *Brown* from the NAACP Legal Defense Fund introduced social science data from the "doll test," which illustrated the devastating impact of segregation on the emotions and psyches

of black children. As part of the test, children were shown two dolls, one white and the other black, and asked a series of questions to determine which doll was associated with positive attributes and which was associated with negative attributes. The results overwhelmingly showed that the majority of children—both black and white—attributed positive aspects to the white dolls and negative aspects to the black dolls. The Supreme Court relied upon this study along with six others to support its conclusion that "separate but equal" violated the Equal Protection Clause. *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483, 494-95n.11 (1954)

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Social science research and data coupled with legal arguments have more recently been used in the fight for marriage equality in the courts. This is striking considering the evolution of perspectives and attitudes towards homosexuality in the United States from just seventeen years prior in *Bowers v. Hardwick*. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 941-44 (N.D. Cal. 2010); *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986). As an example of changing attitudes, in August 2011 the American Psychological Association unanimously approved a resolution supporting same-sex marriage, citing numerous social science studies. These studies provide the courts with evidence of discriminatory actions, effects and implications.

While we must continue to address conscious bias, that task is made difficult in a society where few are willing to admit to holding such beliefs. An implicit bias discourse, as opposed to a strict intentional racism approach, allows for a more open societal conversation about racism than could otherwise happen. Implicit bias discourse focuses the attention on the creation of structural inequality and internalized biased actions that entrench such

inequality. My organization, The Equal Justice Society (EJS) has accomplished important groundwork through the introduction of the social science (e.g., implicit bias cognitive theory) of race and racism to judges, racial justice litigators, employment litigators and federal civil rights agencies charged with upholding anti-discrimination laws. Judges are a necessary part of the target group. Training judges on implicit bias can have tremendous results for open-mindedness in the courtroom and helps to cement a deeper understanding of how the reality of race discrimination today conflicts with current legal doctrine.

The judiciary is often concerned about how wide-sweeping their decisions will be and what policy ramifications will result. In particular, trial judges are concerned about making decisions without a strong factual basis, even though they might be sympathetic to plaintiffs. In his dissent in *McCleskey v. Kemp*, Justice Brennan attributed the majority's concern that a ruling for *McCleskey* would lead to increased litigation as a fear of "too much justice." 481 U.S. 279, 339 (1987). Yet this is exactly why litigators need to continue raising implicit bias in the courts and presenting strong social science data to judges. The law should reflect real-life experiences, serve to counter discrimination, and substantively address structural and implicit bias' effects. Our role as litigators is to keep pressing and educating judges both in court and outside of chambers.

Judges do listen and implement techniques to prevent bias from entering their courtrooms. There are also judges who believe that we now live in post-racial America. Recently, Judge Noonan denied relief to transit riders of color, writing: "What is true of the young is already characteristic of the Bay Area where social change has been fostered by liberal political attitudes, and a culture of tolerance. An individual bigot may be found, perhaps even a pocket of racists. The notion of a Bay Area board bent on racist goals is a specter that only des-

perate litigation could entertain.” *Darensburg v. Metropolitan Transp. Com’n*, 636 F.3d 511, 523-24 (9th Cir. 2011). We strongly disagree with Judge Noonan’s assertion that the Bay Area has purged itself of all racial bias.

As racial justice advocates, we understand that racism, bias and discrimination are alive and well. Our focus is to develop remedies for victims of discrimination by providing as many tools as possible to victims and their attorneys, while pushing the courts to be creative in providing solutions. Although in many parts of the country race discrimination has become increasingly subtle over time, the effects of discrimination on victims and society remain as powerful as ever. It is thus crucial to lead a multi-faceted approach to remedying such injustice. Through our work in these areas, there are three lessons we have learned as litigators: (1) implicit bias is a tool that addresses acts of racism that are not overt but still per-

nicious in impact; (2) the use of implicit bias is part of a long-standing tradition of using social science research to provide the courts with evidence of discriminatory actions and effects; and (3) implicit bias provides an entry-point for people to discuss race.

Accordingly, EJS has met with experienced public interest litigators and

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our own legal staff to discuss the many areas in which the Intent Doctrine acts as a barrier to achieving racial justice. Litigation in these areas already exists. EJS’s role is to raise legal arguments based on implicit bias and, as appropriate, structural racism. We have established new relationships and fortified existing ones with key legal advocates. Together, we are addressing some fundamental questions to

best position ourselves to litigate: how best to use social science, what the structure of the arguments should be, and where we can obtain the necessary resources, including legal support and funding, to bolster our litigation. We are focusing on racial disparities in the criminal justice system that could also affect death penalty litigation and municipal disparities in delivering governmental services.

If the goal of racial justice is to acknowledge and ameliorate substantive inequalities, we can never get there by solely focusing on conscious bias. We absolutely must fight the battle against racial injustice on every front: tackling conscious discrimination and unconscious discrimination together; educating the public; advocating in the legislatures for policy reform; and litigating implicit bias in the courts to overturn the regressive Intent Doctrine. Each step takes us closer to having a judiciary that may once again serve as a bastion of justice for victims of race discrimination. □

Implicit Bias, Racial Inequality, and Our Multivariate World

by Andrew Grant-Thomas

Richard Banks and Richard Thompson Ford make a number of potentially important arguments. I focus here on two: first, their assertion that the race Implicit Association Test may measure conscious-but-concealed bias rather than implicit bias; and, second, their claim that attention to unconscious or implicit bias deflects needed attention from substantive inequalities and the policies needed to remedy them. Like Banks and Ford, I refer here almost exclusively to IAT-based work, but underline the fact that evidence for the prevalence and impact of implicit bias extends well beyond

results garnered through use of the IAT and well beyond the racial attitudes arena.

What Does the IAT Measure?

In addition to the possibility that the IAT taps concealed-but-conscious bias, some research psychologists have argued that the IAT may tap other kinds of mental content as well, including the subject’s awareness of biases in the culture, anxiety about being labeled a racist, and sympathy with, or guilt regarding, disadvantaged populations. Some critics also protest the inference, drawn largely from IAT test results reported at the Project Implicit demonstration site, that most

Americans harbor “racist” attitudes against black people. Both criticisms usefully underline the need for greater clarity about the meaning of *implicit*, and wider appreciation of the contingency of our racial attitudes and related behaviors. I take these points in turn.

On the one hand, Banks and Ford are doubtless right to note that some testers will deliberately misreport their explicit attitudes. On the other, they are wrong to believe that that fact poses a problem for the IAT. The main purpose of the IAT, after all, is to probe attitudes people may be unable or unwilling to report. Myriad studies offer strong support for the notion that implicit attitudes, as gauged by the IAT, and explicit attitudes, as in-

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