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How Subtle Bias Infects the Law

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Abstract

This review describes the ways in which contemporary forms of prejudice and stereotypes, which are often subtle and unconscious, give rise to critical problems throughout the legal system. This summary highlights dominant themes and understudied issues at the intersection of legal and psychological research. Three areas of focus are considered: law enforcement (policing), legal decision making, and the legal profession. Recommendations for future research and practice are offered.

> We have talked long enough in this country about equal rights. It is time now to write the next chapter—and to write it in the books of law.
>
> —Lyndon B. Johnson

INTRODUCTION

President Lyndon Johnson played an important role in urging members of the House and Senate to support civil rights legislation. His remarks reflected a shared belief that equal rights might be achieved under the force of law. And undoubtedly, there has been substantial progress toward equality since the Civil Rights Act of 1964 was codified (see King et al. 2013). The prohibition of discrimination on the basis of race, color, religion, sex, or national origin set a critical standard for equal rights.

Yet legal scholars and practitioners alike recognize that the American legal system is far from perfect. Equal rights laws do not ensure equal rights. Genuinely equal laws must be created and enforced, and infringements prosecuted and adjudicated, free from bias. But people—individual and collective actors—are involved with each of these aspects of the law. And as human beings, these actors are inherently imbued with the biases that are cultivated in society (King et al. 2011, Marchiondo et al. 2018). It follows that the creation and enforcement of laws, and the prosecution and adjudication of offenders, are necessarily imbued with the biases endemic to the human condition. Indeed, the recent Black Lives Matter (#BLM) and Me Too (#metoo) movements serve as visible and distressing reminders of the limitations of laws intended to ensure equal rights for people from a variety of disadvantaged backgrounds.

The purpose of this article is to highlight the challenges that a contemporary form of prejudice—that which is often unconscious and manifests in subtle ways—creates in the legal system. Synthesizing evidence from the sometimes-disconnected disciplines of law and psychology, we hope to not only identify important themes but also bring attention to understudied aspects of subtle bias in the legal domain. After describing subtle bias and its etiology, we identify and review three areas in which a substantial body of psychological research on subtle bias has emerged: law enforcement (policing), legal decision making, and the legal profession. With the ultimate goal of helping to shape legal scholarship and practice, we conclude with future recommendations.

Subtle Bias

Antidiscrimination laws have reduced the rate of overt discrimination in our country; unfortunately, however, they have not impacted the harmful emergence of subtle bias. Subtle bias is a discrete prejudice or preference toward a certain group, person, or thing that can drive one's decisions and actions (Dovidio et al. 2002). Biases are belief systems that can be extremely problematic to both the individual who holds the biased belief and the target or object of these beliefs. Biases begin to form at a young age and stem from our innate need to organize people and groups into social categories and assimilate them into our already-formed schemas (Marsh 2009). As we take in information about different kinds of races, ages, genders, and abilities, we begin to form stereotypes about each of these now "easily recognized groups" (Fridell 2013, pp. 10–11). These stereotypes can be either altered or reinforced based on the new information that we receive from our environments throughout our early development.

Bias can be broken into two types: explicit and implicit. Whereas both types of bias are ingrained in people through experience and exposure to socially shared stereotypes, the difference lies in the degree to which individuals are aware of their biases. Explicit biases are the beliefs that people consciously possess and intentionally express, whereas implicit biases are composed

of well-learned associations that reside below conscious awareness and can automatically drive behavior in a manner that is inconsistent with one's personal attitudes (Dovidio et al. 2002). Implicit biases are most likely to influence major decisions when the person is working under time pressure, multitasking, or engaging in a competition (Kandola 2009). In these situations, people rely heavily on heuristics and less on logic, which allows implicit biases to come to the surface.

Both implicit and explicit biases are problematic because they often lead to discriminatory behavior, but we focus here on the pernicious consequences of implicit or subtle biases. When subtle biases are put into action, the result is generally subtle discrimination. Subtle discrimination refers to "negative or ambivalent demeanor or treatment enacted toward social minorities on the basis of their minority status membership that is not necessarily conscious and likely conveys ambiguous intent" (Jones et al. 2016, p. 1591). In contrast, overt discrimination is obvious and intentional mistreatment based on one's social identity group. Interpersonal discrimination is one of the forms in which subtle bias can manifest as subtle discrimination. Interpersonal discrimination can be reflected in less eye contact, shorter interactions, and colder facial expressions (Hebl et al. 2002). Another way that subtle biases can manifest is in the form of microaggressions, which are "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward the target person or group" (Sue et al. 2007, p. 273). It is important to note that the subtle discrimination that emerges as a result of implicit biases is just as harmful as overt discrimination, if not more so, because the target is more likely to internalize the experience than to discount it as discrimination (Jones et al. 2017).

The legal field is an area in which the biases that plague the human condition can have critical consequences. When a juror, police officer, or law school professor holds or enacts such biases, a range of detrimental consequences can emerge. Luckily, people can reduce their biases with strategies like increasing awareness and perspective taking (Chapman et al. 2013) and education. In the follow sections, we describe evidence regarding the effects of subtle biases on the legal field and the ways that we can reduce this problem.

BIAS IN POLICING

Bias in the American legal system includes biases in law enforcement or policing, where racial disparities have long been documented and continue to persist. Compared with White Americans, Black and Latino men are disproportionately more likely to be stopped, searched, and arrested by police officers (Kahn & Martin 2016). Furthermore, members of these minority groups also experience greater use of force by the police (Goff & Kahn 2012, Kahn et al. 2016). Recently, a string of high-profile deadly cases involving Black men like Michael Brown, Eric Garner, and Walter Scott has increased public awareness of these hostile interactions with law enforcement. An initial analysis of public records revealed that non-White minorities made up almost half (47%) of all people killed by the police, despite comprising only 37% of the population. Furthermore, of those killed, 32% of Blacks and 25% of Latinos were unarmed, compared with 15% of Whites (Swaine et al. 2015). This troubling pattern of statistics has called into question the role that race may play in police decisions.

Psychological research has examined this important social issue by directly investigating the content of racial stereotypes, as well as indirectly assessing how these associations affect perceptions and behavior. Self-report surveys have indicated that hostility, violence, and criminality are commonly associated with Black Americans, even by egalitarian-minded White Americans (Devine 1989, Devine & Elliot 1995, Dovidio et al. 1986). Additionally, priming low-prejudiced individuals with Black versus White stimuli typically results in the faster categorization of negative

than positive attributes (e.g., Fazio et al. 1995, Greenwald et al. 1998, Wittenbrink et al. 1997). Together, these findings suggest that awareness of social stereotypes and exposure to stigmatized group members can affect decision making.

The Impact of Race on Weapon and Crime Perception

Applying the above rationale to police contexts, Payne (2001) developed the Weapons Identification Task (WIT) to better understand the psychological mechanisms that may drive racially biased shootings. This sequential priming procedure involves a series of trials that begin with the presentation of a Black or White face, which participants are instructed to ignore. After 200 ms, the prime is replaced by the target stimulus, which is a picture of either a tool or a handgun. Participants must correctly categorize the object as quickly as possible using one of two computer keys. Across two initial studies, Payne (2001) found evidence of racial bias in both the reaction times and error rates. Following the presentation of a Black versus White facial prime, participants were faster to correctly identify a gun and more likely to misidentify a tool as a gun, depending on the implementation of a response deadline. The results revealed that the racial primes had an automatic influence on the visual identification of weapons (see also Amodio et al. 2004, Klauer & Voss 2008, Payne et al. 2002). As such, Payne (2001) proposed that law enforcement officers may experience bias through the activation of Black stereotypes, especially when the cognitive resources needed to engage behavioral control are depleted.

Correll et al. (2002) extended this line of inquiry by developing a video game that similarly examines the impact of race on weapon processing. In their first-person Shooter Task, participants are randomly presented with a range of one to four real-life photos of public spaces (e.g., parks, offices, courtyards). On the final image, a Black or White male target suddenly appears superimposed holding either a handgun or an innocuous object like a cell phone, soda can, or wallet. Participants must quickly press either a "shoot" or "don't shoot" button on their computer keyboard. When participants are given 850 ms to respond, they are faster to shoot armed Blacks versus Whites and slower to *not shoot* unarmed Blacks compared with Whites. However, providing participants with a 630-ms deadline results in a biased pattern of errors, such that unarmed Blacks are more likely to be incorrectly shot than their White counterparts and armed Whites are less likely to be shot than armed Black targets (see Correll et al. 2014, Mekawi & Bresin 2015). Biased responses were due to participants having lower thresholds for shooting Black compared with White targets (see also Greenwald et al. 2003). Furthermore, the magnitude of shooter bias was related to cultural awareness of Black stereotypes related to danger, violence, and aggression. Consequently, African American participants demonstrated the same pattern of shooter bias, despite holding presumably more positive attitudes about their group. These findings suggest that decisions to shoot may be strongly influenced by negative racial schemas that affect perceptions in ambiguous situations.

Additional research supports the notion that racial stereotypes may serve as perceptual tuners that direct attention in a biased manner. Eberhardt et al. (2004) conducted a series of studies examining how associations between Blacks and crime affected visual processing. In their first study, undergraduates were subliminally primed with a photo of a Black male face, a White male face, or no face at all before completing a supposedly unrelated object detection task. On this critical task, severely degraded images of crime-relevant (e.g., guns, knives) or -irrelevant (e.g., phones, keys) objects appeared on the screen and slowly increased in clarity. Participants needed fewer frames to accurately detect a crime-relevant object following a Black versus White or no-face prime, a pattern of bias that was not related to their explicit racial attitudes. These results were replicated among California police officers who were primed with crime words (e.g., arrest, shoot) and then tested for their memory of the distractor face presented on the task. Compared

with the correct image, officers were more likely to incorrectly choose a Black target with more stereotypical features following the crime primes. Early perceptual processes of the police may therefore be impacted by cultural associations that produce racial profiling of suspects and bias their subsequent treatment.

Plant & Peruche (2005) also used actual law enforcement officers in their research to examine how race influenced their responses to criminal suspects. Police officers completed a more static version of the Shooter Task in which only photos of Black or White male faces appeared with a gun or object superimposed without a background image. The researchers wanted to examine whether repeated exposure to the program would reduce the bias expressed by the officers. As in past studies with undergraduate participants (e.g., Correll et al. 2002), the police were initially more likely to shoot unarmed Black versus White targets and had a lower threshold for shooting Black targets. However, this biased tendency disappeared in the second half of trials, signifying that officers learned to dissociate race from the presence of weapons to make more accurate decisions on the task.

The potential benefit of expert police training on performance is further supported by the findings of Correll et al. (2007b), who compared the performance of three different samples: Denver community members, Denver police officers, and national police officers. In contrast to citizens who demonstrated bias in both their reaction time and error rates, police officers demonstrated it only in their response latencies. In other words, police officers did not make racially biased mistakes on the task but were still faster to shoot armed Black men and slower to not shoot unarmed Black targets. This shooter bias was more pronounced among officers serving high-crime areas with larger Black and minority populations. The findings suggest that exposure to negative racial stereotypes can impact the speed with which police officers make decisions, but that their extensive training and field experience may allow them to exert more control over their behavior than regular citizens.

In sum, independent labs have accumulated a considerable amount of evidence that race can impact crime-oriented perceptions and bias subsequent decision making. Yet, findings are often mixed when comparing data obtained from police officers versus undergraduate or civilian samples. Under certain circumstances, the police express a similar magnitude of racial bias as individuals not in law enforcement; in other situations, their prior experience helps them limit the influence of stereotypes.

Beyond the Impact of Race

The mixed results discussed above point to the importance of conducting research that considers factors other than race to more fully understand the complexity of real-life police decision making. To this end, some studies have explored how personal motivations, situational contexts, and physical cues may attenuate or exacerbate the expression of racial bias.

Personal motivation. Research that has examined motivational processes demonstrates that responses to race are not uniformly biased. For example, Payne (2001) found that motivation to control prejudice moderated the relationship between explicit measures of bias and performance on the WIT. Participants with low motivation to control prejudice tended to show a positive correlation between modern scores of racism and task performance. However, those with higher motivation levels tended to show a dissociation between explicit and implicit bias, indicating a regulatory effort to override stereotyping effects. Similarly, Amodio and colleagues (2006, 2008) have examined the impact of internal (personal) versus external (normative) motivations to respond without prejudice. Participants in their studies completed the WIT while having their

brain activity recorded. The data indicated that internally motivated participants responded more accurately on the task, particularly following stereotypical errors. Because this neural activity occurred below conscious awareness, the researchers proposed that some individuals are able to engage a spontaneous form of control that helps reduce the influence of race on behavior.

In contrast, Swencionis & Goff (2017) proposed that the motivation to view the world in hierarchical terms may increase bias in police decisions. Social Dominance Theory (Sidanius & Pratto 1999) posits that group-based inequalities are maintained by cultural influences that promote social stratification based on factors such as age, sex, and race. Consequently, power is primarily distributed to and legitimized by high-status groups and institutions. Past work has found that people with high social dominance orientation (SDO) are more attracted to hierarchy-enhancing professions, such as law enforcement, politics, and business (Sidanius et al. 2004). Given that police officers tend to report greater SDO levels than public defenders, college students, or community members (Sidanius et al. 1994), they may be more prone to expressing discrimination against low-status groups.

Situational contexts. Recognizing that police decisions do not occur in a social vacuum, some researchers have attempted to recreate ecologically valid situations that may contribute to the expression of racial bias. For example, Correll et al. (2007a) reasoned that frequent media or environmental exposure to stereotypical depictions of Blacks may increase shooter bias. In line with their hypothesizing, they found that participants who were first exposed to stories involving Black versus White criminal activity later showed more bias on the Shooter Task. A similar pattern emerged when they manipulated the amount of Black armed and White unarmed targets appearing on the task. Thus, increasing the accessibility of associations between Blacks and danger resulted in more pronounced anti-Black bias.

Cox et al. (2014) also argued for the use of more complex situational contexts to assess various psychological factors that influence real-life decisions. To this end, they developed a modified version of the Shooter Task that used short video clips along with static photos of the suspect and recorded responses through a gun apparatus instead of computer keys. Because the police usually have prior knowledge and expectations about neighborhoods, they also manipulated where the crimes on the task supposedly took place by providing the exact city location. Wisconsin police officers were randomly assigned to complete the task imbedded within a primarily White or non-White neighborhood. When examining responses on photo trials, the researchers found that police officers did not make racially biased errors but were faster to shoot armed Black versus White targets, as in the work by Correll et al. (2007b). Interestingly, they also found that the composition of the neighborhood interacted with the race of the officers, such that more errors were made when officers were assigned to other-race areas.

Physical cues. Whereas the aforementioned research establishes the persuasive effect of situational contexts, newer studies have examined how physical cues such as clothing can impact the police. According to the theory of enclothed cognition, putting on clothing with symbolic meaning can influence the psychological processes of the wearer (Adam & Galinsky 2012). Civile & Obhi (2017, p. 1) recently applied this model to investigate whether wearing a police uniform would induce "status-profiling," whereby members of low-status groups would become more salient and draw greater attention than high-status individuals. Across three experiments, Canadian participants completed attentional tasks in which they identified an object that appeared in a random portion of the screen with a simultaneously presented distractor image. This image was of a Black face, a White face, a man wearing a hoodie (low status), or a man wearing a business suit (high status). Compared with participants who wore mechanic overalls or had a police uniform placed

nearby, those wearing the police outfit directed greater attention to the low-status versus high-status images but were not biased by the race of the target. Civile & Obhi (2017) argued that the power associated with a police uniform may ultimately increase vigilance toward individuals that are negatively perceived as being dangerous.

Recent researched conducted by Mendoza & Parks-Stamm lends further support for the biasing effect of police uniforms (Mendoza & Parks-Stamm 2019). American undergraduates in their study were randomly assigned to wear or not wear a police uniform while completing the Shooter Task. On the basis of enclothed cognition theory and past power-related research, they hypothesized that wearing a police uniform would increase the tendency to make shooting errors on the task, especially false alarms (i.e., incorrectly shooting on no-gun trials). Compared with control participants who wore their own clothing, uniformed individuals indeed committed more errors overall, particularly on trials involving unarmed targets. A police uniform may therefore not only bias attention toward negatively stereotyped individuals but also impact behavioral responses to them.

Methods for Reducing Bias

Despite the extensive literature showing the automatic influence of race on weapon perception, several studies have demonstrated that biased decision making is not inevitable. For instance, certain forms of training and goal strategies seem to be effective methods for reducing shooter bias.

Training. Past research has suggested that practice can reduce bias on the Shooter Task (Plant et al. 2005), though boundary conditions have emerged for the effectiveness of such training methods. For example, Sim et al. (2013) manipulated stereotype accessibility through pretask exposure to stories involving Black criminals. Compared with novice undergraduates, sworn police officers and expert undergraduates who had received prior practice showed less evidence of racial bias following the stereotype-accessibility manipulation. However, bias was still present when undergraduates received training that promoted racial stereotypes through the increased presence of armed Black targets on a practice task. This pattern of bias also emerged among a special unit of officers who routinely interacted with gang members and therefore had extensive experience being exposed to stereotypical minority representations.

Goal strategies. Another intervention that has shown promise is the use of self-regulatory goal strategies known as implementation intentions. Implementation intentions are if-then plans that aid goal attainment by forming a mental link between an anticipated situational cue to a specific goal-directed response (e.g., "*If* I see X, *then* I will perform Y!"; Gollwitzer 1993, 1999). These plans enhance the cognitive accessibility of the cue, which, upon being encountered in the environment, can spontaneously and efficiently trigger action control. Stewart & Payne (2008) examined whether implementation intentions could be used to reduce bias on the WIT. Participants in their studies were instructed to think safe, quick, or accurate upon seeing the Black facial prime on the task. Compared with those in the control conditions, participants who formed the counter-stereotypical implementation intention to think safe were less likely to make false gun identifications. Process dissociation analyses revealed that this change in performance was due to a reduction in the influence of automatic stereotypes on responses.

Mendoza and colleagues (2010) also applied implementation intention theorizing to improve Shooter Task performance. In their first study, undergraduates were provided with either no strategy or an if-then strategy to ignore the race of the target. Use of this distraction-inhibiting implementation intention decreased overall errors, especially on no-gun trials. Moreover, process

dissociation analyses once again showed a reduction in the automatic influence of Black stereotypes. A follow-up study revealed that implementation intentions (e.g., "If I see a person with a gun, then I will shoot! And if I see a person with an object, then I will not shoot!") increased accuracy on the task compared with a control condition that had the instructions phrased as a simple goal.

Summary

Police shootings involving unarmed Black men have sparked national conversations about institutional forms of racism and evoked outrage over the actions of apparently prejudiced cops. Although these are viable concerns that deserve proper scholarly attention, here we focus more on the subtle factors that may contribute to police bias. Our goal is not to diminish the explicit causes of racial disparities but rather to elucidate the psychological mechanisms that underlie this complicated social issue. In our overview of the research, we identified several sociocultural, cognitive, and motivational processes that can drive racial bias but also highlighted promising scientific efforts that aim to reduce it. Taken together, these intervention studies seem to suggest that targeting behavior may ultimately be a more effective method than trying to alter or disrupt well-learned associations in memory (see Amodio & Mendoza 2010 for further discussion).

BIAS IN LEGAL DECISION MAKING

In the United States, men make up 93% of the total prison population (Fed. Bur. Prisons 2018). Black men are five to seven times more likely (Tonry 2011), and Hispanic men three times more likely (Guerino et al. 2012), to be incarcerated than White men. This disproportionality is striking, considering that Black and Hispanic individuals make up 56% of the prison population but only 30% of the United States population (Humes et al. 2011).

Explanations for these race effects abound, ranging from those related to social, biological, and psychological differences (Moffitt 2001) to actual differences in criminal activity (differential involvement; Blumstein 1982). A significant body of research, however, supports the notion that higher imprisonment rates for some groups compared with others indicate some degree of bias within the criminal justice system (Baumer 2013; Blumstein 1982, 1993; Tonry & Melewski 2009). Morrison et al. (2016) discussed the mechanisms by which subtle bias may impact decision making, suggesting that it alters the way social information is processed and therefore the decisions that are grounded in that social information (Gawronski et al. 2015). Subtle bias may affect the processing of social information by way of influencing interpretations of equivocal evidence (Gawronski et al. 2003b; Hugenberg & Bodenhausen 2003, 2004) and/or systematically distorting memory (Gawronski et al. 2003a). Moreover, subtle bias impacts social information processing without the perceiver's awareness that it is occurring, leading to an inability to correct it even when motivated to be unbiased (e.g., Gawronski et al. 2003b, 2006). Indeed, the influence of biases on legal processes, such as criminal sentencing and jury decision making, has become a prominent area of study in the field of law (e.g., Bennett 2010, Hunt 2015, Kang et al. 2012, Lane et al. 2007, Levinson & Smith 2012).

Subtle Bias in Jury Selection

Racial bias in law has been of such great interest, in fact, that several reviews have been conducted on the topic in the past decade. For example, Levinson & Smith (2012) stated that the United States legal system contributes to the continued subordination of historically disadvantaged racial

groups and, further, that implicit racial attitudes and stereotypes are to blame. More recently, in a recent review, Hunt (2015) concluded that legal decisions are influenced by the race and ethnicity of trial parties, including jurors, defendants, and victims. Research has shown that the impact of subtle racial bias includes the selection of the jurors themselves.

In the United States, jury selection involves a *voir dire* process, during which potential jurors answer questions regarding their experiences, backgrounds, beliefs, familiarity with the case, and capacity to serve on a jury (Sommers & Norton 2008). Based on the information gathered during the *voir dire*, defense attorneys and prosecutors are permitted to request the removal of a limited number of individuals (also known as peremptory challenges; Morrison et al. 2016). Typically, the requests of defense attorneys and prosecutors reflect their own interests, rather than a broad desire for a neutral jury. That is, each side would like the final jury to be sympathetic to their own side of the argument (Hans & Vidmar 1982). Although defense attorneys and prosecutors are not typically required to state a reason for their requests, the reason cannot be based on race [*Batson v. Kentucky* (1986)]. Despite this official rule, in practice, defense attorneys and prosecutors have significant freedom regarding which individuals they chose to have removed from the jury because alternative, race-neutral justifications are easily generated and, most often, accepted by the judge (Gabbidon et al. 2008, Sommers & Norton 2007).

The freedom that defense attorneys and prosecutors are afforded in jury selection leads to circumstances that are ripe for subtle bias. For example, as Hunt (2015) stated, requests for removal of certain potential jurors may be founded in concerns that racial minority jurors will inevitably vote to exonerate minority defendants and/or stereotypes regarding the beliefs of racial minority individuals (e.g., that they will hold animosity toward police officers; Sommers & Norton 2008). Thus, in spite of the fact that peremptory challenges based on race are forbidden, racial minority groups are underrepresented in the majority of both jury pools and final juries, especially in the southern United States (Equal Justice Initiat. 2010, Hannaford-Agor & Waters 2011). This is not surprising, given research that shows that legal professionals are quite skillful at recognizing potential jurors with subtle racial bias[es] that are consistent with their own legal interests (Morrison et al. 2016).

Subtle Bias in Jury Decision Making

Experimental research on jury decisions has elucidated the consequences that subtle bias can have on legal sentencing. For example, two recent meta-analyses examining the effect of defendant race on noncapital jury decision making have provided support for the similarity-leniency effect (Kerr et al. 1995). Mitchell et al. (2005) concluded that mock jurors are more likely to find defendants guilty and recommend harsher sentences if they belong to a different racial group than their own. Similarly, in their recent meta-analysis, Devine & Caughlin (2014) found that White jurors were more likely to recommend harsher sentences for Latino (compared with White) defendants, and Black jurors were more likely to recommend harsher sentences for White (compared with Black) defendants. Importantly, in this experimental research, all aspects of the legal case—other than defendant race—were held constant across conditions. Therefore, the differences that emerged across these studies are attributable to race, specifically.

Research on capital punishment has also produced startling results. Several studies that controlled for nonracial factors (e.g., defendant, crime, and context) have shown that defendants are more likely to receive the death penalty when the victim is White than when the victim is Black (e.g., Baldus et al. 1998, Dodge 1990, Gross & Mauro 1989). Additional research in this area has shown that the racial composition of the jury may also have an impact, as one study showed that when the jury consisted of at least five White men, Black defendants were more likely to receive

the death penalty (Bowers et al. 2001). Moreover, the race of the defendant also influences sentencing: Jurors are more likely to recommend the death penalty when the victim is White and the defendant is either Black or Latino (see Hunt 2015; e.g., Johnson et al. 2012; Lynch & Haney 2000, 2009; Pierce & Radelet 2011; Shaked-Schroer et al. 2008; Thomson 1997). Taken together, this research clearly shows that defendants who are Black or Latino are more likely to receive the death penalty, particularly when the victim is White.

Strategies for Reducing Bias

Given the profound impact that subtle bias has on both jury decision making and jury selection, it is vital that steps be taken to eradicate this bias and remediate its effects. One such strategy is to increase jury diversity. Studies have shown that diverse juries (compared with exclusively White juries) took more time deliberating the case, considered more of the available evidence, and were more accurate in their analysis of the evidence (Sommers 2006). Additional benefits of including racial minority group members in the jury may include that it alerts racial majority jurors to the possibility of unfairness (Sommers & Adekanmbi 2008) and reduces the likelihood that legal professionals will make stereotypical claims or engage in other subtle forms of bias (Fukurai & Krooth 2003). Additionally, as Hunt (2015) proposed, defense attorneys and prosecutors could ask potential jurors to reflect on their own racial biases during *voir dire*, and judges, potential jurors, and legal professionals could be trained on subtle bias.

Engaging in several individual strategies, including explicitly acknowledging the identity of the stigmatized target (whether that is race or another disadvantaged characteristic), increasing the positivity associated with the stigmatized target, and providing individuating information about the stigmatized target (Ruggs et al. 2011), can also reduce bias. For example, acknowledging—or calling attention to—the defendant's minority race might reduce jurors' desire to distance themselves from the defendant owing to race-related tension. Additionally, by increasing their own positivity (e.g., smiling more), minority defendants may be able to compensate for any negative subtle bias related to their race. Finally, by providing personal and counter-stereotypical details about the defendant and/or plaintiff (e.g., mentioning a Black defendant's academic experience), attorneys may be able to decrease the likelihood that jurors will rely on race-related stereotypes when forming their impressions and decisions.

BIAS IN THE LEGAL PROFESSION

Inequities resulting from bias not only exist in law enforcement and legal decision making but also occur within the legal profession itself. Although women, specifically White women, have achieved an equal rate of admission to law school when compared with their White male peers, their rates of hiring, promotion, and retention are dissimilar. Employment trajectories also differ for racial and ethnic minorities, as well as LGBTQ (lesbian, gay, bisexual, transgender, and queer) individuals and employees with disabilities. Traditionally, law firms have relied upon a colorblind approach to promote equal opportunity for all employees; however, this ideology fails to address the impact of implicit biases on diverse individuals, often alienating them while maintaining the status quo that keeps White, heterosexual men in the most powerful roles. Researchers suggest a departure from colorblindness toward multiculturalism and offer additional practical solutions to promote inclusion in the legal profession as a whole.

Racial Bias in Law School Admissions

Bias infects the legal profession at every level, beginning with the law school admissions process. Law school admissions hinge on students' grade point averages and standardized test scores as

paramount to their admission. Whereas other graduate and professional programs have taken a more comprehensive approach to assessing applications—focusing not only on the applicants' scores but also on their skills and experiences—law school admissions "continue to rely upon rigid and ostensibly objective criteria giving little weight to other aspects of the student's experience and skills" (Noblitt et al. 2011, p. 124). Although the traditional reliance of law school admissions on the Index score—a combination of the students' Law School Admission Test (LSAT) score and their undergraduate grade point average (UGPA)—might seem objective or unbiased in nature, many scholars argue that selecting students based solely on these criteria reinforces racial and class privileges (Schultz & Zedeck 2011).

Indeed, the Index score has proved valuable in predicting first-year grades; however, it fails to predict professional potential or any other law school outcomes (Schultz & Zedeck 2011). Prior research demonstrates that an academic achievement gap exists for the LSAT much like for other standardized tests, meaning that affluent White students consistently outperform their less-advantaged or minority peers (Mendoza-Denton 2014, Schultz & Zedeck 2011, Wightman 1997). Standardized testing cannot produce equitable results, because these tests are normed on a bell curve that is largely influenced by the affordances that students in wealthier areas have by virtue of their higher socioeconomic status (Ravitch 2010). It is statistically impossible for schools to close this gap. The demographics of test takers, whether for the SAT or LSAT, are reflected in the bell curve. Family income is also correlated with test scores, with low-income students consistently scoring lower than students from wealthier families (Ravitch 2010). In his 2001 study, Kidder (2001) matched African American, Chicano/Latino, Native American, and Asian Pacific American applicants with White applicants who had equivalent UGPAs from the same universities across the same period of time. Although affirmative action critics have supported the LSAT as an objective method of assessing academic achievement, Kidder's results countered these claims. His findings demonstrated that among law school applicants with equivalent UGPAs, minority students performed substantially differently on the LSAT compared with their White classmates (Kidder 2001). He conducted an additional round of matching, in which he controlled for choice of major within each university, and the gap did not diminish in size at all (Kidder 2001). The gaps in performance were most pronounced for African American and Chicano/Latino applicants (Kidder 2001).

The Law School Admission Council compared performance on the LSAT by gender, race/ethnicity, and gender and race/ethnicity every year from 2007–2008 to 2013–2014 (Dalessandro et al. 2014). The LSAT mean for male test takers was consistently higher than the LSAT mean for female test takers during this period, with the difference ranging from 2.02 points in 2007–2008 to 2.58 points in 2013–2014. They also compared across race/ethnicity, finding first that the number of White test takers is much larger than that of any other group. For example, in 2013–2014, approximately 42,000 White/Caucasian students took the LSAT compared with 9,000 Black/African American students and 6,000 Hispanic/Latino students. The mean score for White/Caucasian test takers in 2013–2014 was 152.75, whereas the mean score for Black/African American test takers was 141.76. Importantly, this roughly 10-point gap in achievement between White and Black students remained wholly consistent from 2009 to 2014; neither group's average score improved or worsened during this time. Additionally, when the researchers compared performance by gender and race/ethnicity in 2013–2014, they found that Puerto Rican females scored the lowest, with a mean of approximately 138, followed by Black/African American females, with a mean of approximately 141 (Dalessandro et al. 2014). Black/African American males earned a slightly higher mean LSAT score of approximately 143. Taken together, these statistics demonstrate the consistency of the academic achievement gap, the lower numbers of minority test takers, and the intersectionality of race and gender, particularly as it applies to minority female test takers

achieving much lower scores than White test takers. As a result of the emphasis on LSAT scores and UGPAs as the principal criteria for law school admission, minority and low-income applicants are much less likely to be admitted. In fact, 88% of the students in America's law schools are White (Robbins 2017).

Strategies for reducing bias in law school admissions. One way to combat the lack of representation that results from standardized testing is to create a new standard on which admissions are based. Schultz & Zedeck (2011) noted the ineffective nature of the LSAT and conducted a study to "create not only a more effective test of lawyering effectiveness than the current standard in the field (the LSAT), but also a more equitable one for minorities and women" (Mendoza-Denton 2014, p. 478). Schultz & Zedeck (2011) involved more than 3,000 law school graduates in their long-term empirical research study to find a better measure of professional competency than the LSAT. Schultz & Zedeck (2011) established a core group of 26 factors that law school graduates, faculty, students, clients, and judges all deemed especially important for lawyering efficacy. Examples of factors include strategic planning, practical judgment, and negotiation skills (Schultz & Zedeck 2011). In accordance with prior research on the LSAT's limited ability to predict lawyering effectiveness, the researchers found that LSAT scores predicted just 8 of the 26 factors, with two being negatively related to LSAT scores (Mendoza-Denton 2014). In their second phase, Schultz & Zedeck (2011) went further to establish measures that could accurately predict the 26 factors—including situational judgment tests (SJTs)—which they found to be correlated with 23 of the effectiveness factors. SJTs involve presenting applicants with a description of a work-related issue or scenario they may encounter and asking them how they would solve the problem or deal with the situation (McDaniel & Nguyen 2001). These tests measure judgment and can be used to measure effectiveness in areas including conflict management, teamwork facilitation, leadership ability, and negotiation skills (McDaniel & Nguyen 2001). Law schools can adopt practices such as administering SJTs in addition to or instead of the LSAT to counter the discrepancies that exist when admissions principally emphasize the Index score.

Bias in the Legal Profession

Even upon successful completion of law school, women and minorities continue to face challenges in their employment trajectories. Indeed, although women have reached parity with men in law school admission, they make up just 32% of law school deans (Am. Bar Assoc. 2018). Thus, sex discrimination remains in hiring, promotion, and compensation for female attorneys and law school faculty (Noblitt et al. 2011). The National Association of Women Lawyers (NAWL) is committed to the promotion and retention of female attorneys. In 2006, the NAWL issued its first challenge to the legal profession, calling on law firms to increase women equity partners to at least 30%, and in 2016, the NAWL reissued this call in their "One-Third by 2020 Challenge" (Peery 2017). The percentage of women equity partners has increased, albeit on a very small scale, in the last 10 or so years, moving from 15–16% in 2007 to 19% in 2017. According to the NAWL 2017 Survey, women constitute "30% of nonequity partners, 46% of associates, 42% of nonpartner track attorneys…and 39% of 'other' attorneys" (Peery 2017, p. 2). Essentially, women are more likely to be found in lower-status or non-partner-track positions in the law firm and are less likely to be represented in the higher-status position of equity partner. In 2016, the Bureau of Labor Statistics reported that female lawyers' weekly salary equated to 77.6% of that of their male counterparts (Am. Bar Assoc. 2018).

When you look at race in combination with gender, women of color (including Black, Asian, and Latina women) constitute just 12% of women equity partners and approximately 2% of all

equity partners (Peery 2017). And 53% of minority female lawyers report having equal opportunities for high-quality assignments compared with 80% of White male lawyers (Williams et al. 2018). Primary reasons for the underrepresentation of women and minorities at the top level and their overrepresentation in lower-status positions include "organizational cultures that do not support diversity, unconscious and concealed biases, extended hours and resistance to flexible work schedules, and lack of access to mentors, sponsors, choice assignments, and business networks" (Rhode 2015, pp. 2241–42). Although the hiring rates of Black attorneys as junior associates, for example, have increased, these Black associates ultimately show a much higher attrition rate than their White counterparts owing to poor job satisfaction, lower-quality work assignments, and lack of opportunity for promotion to equity partner (Woodson 2015). Ultimately, women account for fewer than 20% of equity partners, people of color fewer than 6%, LGBTQ individuals fewer than 2%, and persons with a disability fewer than 1% (Peery 2017). Although firms continue to diversify their personnel in lower-status positions, inclusion at the top level remains abysmally low (Bellows 2013). Subtle bias provides part of the explanation for the lack of representation of people from diverse backgrounds in the legal profession.

Indeed, subtle bias affects minority lawyers both as they enter the pipeline into the legal profession and as they attempt to rise through the ranks. In his study on confirmation bias and racialized perceptions of writing skills, Reeves (2014) drafted and distributed a research memo from a hypothetical third-year litigation associate to 60 different partners from 22 different law firms. The researchers deliberately inserted grammatical, writing, and analysis errors into the memo, and although all of the partners received the same memo, half of them received a memo that indicated the associate was African American, whereas the other half received a memo that indicated the associate was Caucasian (Reeves 2014). The partners were told to edit and rate the memo, and the Caucasian associate was rated higher quantitatively, at a 4.1/5.0 rating, compared with the African American associate, who received a 3.2/5.0 rating. Additionally, the qualitative comments for the Caucasian associate were consistently more positive—he "has potential" and "good analytical skills"—as opposed to the African American associate, who "needs lots of work" and was "average at best"; one rater even noted they "could not believe he went to NYU" (Reeves 2014, p. 4). Strategies for reducing the effects of subtle bias on lawyers' professional trajectories are critical.

Strategies for reducing bias in the legal profession. Much like the seemingly objective treatment of LSAT scores and GPAs, many law firms have adopted and significantly invested in diversity initiatives that favor an identity-blind or colorblind approach as a means to promote equity and increase representation of diverse employees within the firm. Colorblind ideology dictates that instead of focusing on an individual's race or ethnicity, firms should evaluate employees and potential hires based on other, seemingly uniform standards (Pearce et al. 2015). This approach downplays differences based on race and gender, espousing equal treatment and opportunity for all people regardless of their identity (Aragón et al. 2017). In law firms, the diversity policy of colorblindness often acts alongside a business model of atomistic individualism. Atomistic individualism means that lawyers are expected to prosper solely as individuals and are not accountable for others in the firm. Taken together, colorblindness and atomistic individualism fail to promote equity because people cannot help but see color owing to their implicit biases, and the "seemingly meritocratic standards" on which employees are supposed to judge others are applied differently to people of different races and backgrounds (Pearce et al. 2015, p. 2454). Colorblindness systemically and disproportionately keeps White, heterosexual men in the powerful position of equity partner and reinforces the idealized White male leader while relegating women and people of color to lower-level positions (Rhode 2015).

Rather than singularly relying on the colorblindness ideology as a means to foster diversity, firms might adopt an integration and learning approach, using bias-awareness policies and initiatives to create inclusive communities that are conscious of the systems that perpetuate implicit bias and work to combat disproportionate representation (Pearce et al. 2015). Tsai & Rosen (2015) offer other practical courses lawyers can undertake to reduce the impact of implicit bias. Some examples include

- Educating staff, particularly those in leadership and hiring positions, about the role of unconscious bias and how it affects assessments of minority and female employees and potential hires.
- Investigating the reasons why diverse attorneys choose to leave the firm, possibly by conducting more extensive exit interviews, to see if a pattern of implicit bias is affecting diverse employee retention.
- Asking partners and associates questions about diversity and inclusion in the annual evaluation process.

Lindsey et al. (2015) offer additional strategies aimed at reducing employment discrimination and increasing retention rates of underrepresented groups. One such strategy involves creating compensation systems that will ensure women and minorities receive fair pay by linking recompense to measurable performance or results (Lindsey et al. 2015). Another strategy involves creating and implementing career development programs that aid employees at all levels in the company in defining their career goals, assessing their current skills, and attaining the additional skills needed for their preferred career trajectory (Lindsey et al. 2015). Firms also might hire a chief diversity officer or create a diversity management office, as these create formal structures of responsibility for diversity within the organization. These formal structures of organizational responsibility have yielded greater representation over time for women and African Americans in management positions and might provide a longer-term solution to enhancing retention rates for underrepresented groups (Lindsey et al. 2015).

In summary, although objectivity and justice serve as cornerstones of the legal profession in the United States, lawyers are imbued with unconscious biases that allow for the perpetuation of systemic inequality. Bias affects the pipeline at every level. Law school admissions reliance on the Index score as the dominant measure of student potential ensures unequal opportunity for minorities and low-income students, who consistently score lower compared with wealthier, White students, primarily owing to disproportionate access to educational resources. For the diverse students who do garner admission, the uphill battle only continues as they encounter discriminatory hiring and promoting practices that favor their White, heterosexual male peers. Colorblindness, an approach meant to counter overt forms of bias, allows for these unequal practices to go unnoticed, as diverse employees receive much harsher judgments and ratings owing to implicit biases held by employees in senior and hiring positions. The ostensibly objective standards favored by the colorblindness approach as a fair method to evaluate employee performance disproportionately burden minority employees.

Researchers have advised a departure from the colorblindness approach toward diversity and inclusion policies meant to alter these discriminatory systems from within by educating all employees, including senior leadership, on the perniciousness of implicit bias and the importance of increasing representation of lawyers with different backgrounds (see Bellows 2013, Pearce et al. 2015, Tsai & Rosen 2015). One such ideology, multicultural ideology, embraces differences instead of downplaying them (Aragón et al. 2017). Instead of being blind to people's distinguishing identities, such as their race or gender, multicultural ideology addresses these differences and equivocates that equal treatment may not always work to foster inclusion of underrepresented

groups (Aragón et al. 2017). To adequately and positively foster diversity and inclusion at all levels of the legal profession, we need to understand that differences exist, and so do implicit biases that negatively affect treatment of diverse individuals.

CONCLUSION

Subtle biases can infect human thought and behavior, the ultimate result of which can be massive discrepancies in the life trajectories of women and people of color. These dynamics emerge across American society, and—despite beliefs in the fundamental objectivity of the law—the legal field is no exception. Here we have reviewed evidence that bridges legal and psychological scholarship to demonstrate that subtle biases can give rise to unequal treatment in law enforcement, legal decision making, and the legal profession. We have further highlighted evidence-based strategies for reducing bias and its consequences. In so doing, we hope to provide useful information that responds to contemporary social movements and provokes genuine change.

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