

# Part I

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## Psychological Science on Stereotyping, Prejudice, and Discrimination

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# Race, Crime, and Antidiscrimination

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## Introduction

Well into the twentieth century, racism was an accepted and fundamental aspect of many of our social institutions. Then, in the course of a few decades, American society came to view racial discrimination and the overt expression of racist sentiments as morally repugnant. The Supreme Court, Congress, and innumerable state and local legislatures prohibited discrimination in a wide array of settings. These reforms aimed to secure racial minorities equal treatment in housing, in the workplace, in the marketplace, and in the courts.

One consequence of the momentous changes during this period was the ascendance of the antidiscrimination principle, which, at its core, prohibits adverse treatment of individuals on the basis of their race. The antidiscrimination principle has achieved broad acceptance and popular legitimacy in American society. It is a principle that constitutional and statutory law alike embrace. Today, in marked contrast to earlier eras, both conservatives and liberals join in condemning racial discrimination. Indeed, leaders of the Civil Rights Movement who once were excoriated as dangerous agitators and agents of civil unrest (and sometimes jailed for that reason), now are universally honored.

Yet there is ongoing debate about racial discrimination in contemporary society. The persistence of significant racial disparities in education, employment, income, and health, for example, has fueled disagreement about the extent and nature of discrimination currently faced by racial minority group members. Social psychological research has played a prominent role in this debate, largely by shifting the focus from the sorts of deliberate, animus-driven forms of discrimination that are clearly proscribed by law, to subtler, less conscious, and less hostile manifestations of racial bias whose legal status and social significance

are far less clear. Indeed, a great deal of social psychological research focuses on bias among individuals who genuinely believe themselves to be racially unbiased and in fact would be distressed to find out that their behavior indicates otherwise (Dovidio & Gaertner, 1986; Eberhardt & Fiske, 1998; Fiske, 1998; Greenwald & Banaji, 1995). This research demonstrates that, notwithstanding the legal and moral condemnation of discrimination and overt bias, negative racial stereotypes remain psychologically salient to virtually all Americans. Moreover, racial discrimination can be documented both inside and outside of the laboratory, and may well shape the experiences of many racial minorities.

These issues are especially salient in the criminal justice system. Overtly race-based laws and sentencing schemes are now nonexistent. Moreover, state actors in the criminal justice system who once staunchly defended racially biased practices now insist that they are affording equal treatment to all. Since the 1980s, however, racial disparities in rates of incarceration have become *more*, rather than less, pronounced. Aggregate increases in incarceration, coupled with growing disparities, have resulted in staggering and unprecedented levels of incarceration for Black men in particular (see Banks, 2003). A study by the Bureau of Justice Statistics found that in 2001 nearly 17% of Black men were currently or previously imprisoned, that Black men are more than five times as likely as White men to enter prison, and that Black women are six times as likely as White women to enter prison, and nearly as likely as White *men* to do so (Bonczar, 2003). The central role of the war on drugs in contributing to such racial disparities has been well established (Mauer, 1999; Meares, 1998; Tonry, 1995). Social scientists also point to a host of socioeconomic factors, including poverty, educational attainment, unemployment, family structure, and neighborhood influences.

This chapter considers some social psychological research that bears on the question of racial discrimination in the decision-making of law enforcement officers, judges, and juries. We make two claims. First, race remains a psychologically and socially salient characteristic that often influences people's perception, judgment, and decision-making. Contrary to any assumption that the criminal justice system has become color blind, the research we review leaves little doubt that race can influence decision-making in the domain of criminal justice. Second, thorny policy questions arise when the findings of the social psychological research are considered in light of substantial, and troubling, racial differences in the likelihood of criminal victimization, criminal offending, and incarceration.

This chapter is structured as follows. First, we present some specific research findings that bear on the issue of unintentional racial discrimination in the criminal justice system. Then we discuss the implications of unintentional discrimination for antidiscrimination law. Finally, we situate the findings of the social psychological research in the context of real-world crime statistics and describe some of the conceptual and practical policy questions that arise.

## The Research

In this section, we examine social psychological studies relevant to controversies regarding decision-makers' use of race in stops and arrests, decisions to shoot, and harshness of sentencing.

### Racial profiling

During the late 1990s, controversy about the racial profiling of African American and Latino motorists prompted changes in law enforcement policies. Law enforcement agencies and government officials now routinely and publicly disavow racial profiling in ordinary policing, including drug law enforcement. Many states and local jurisdictions have prohibited racial profiling, and the Bush Administration has, for the most part, banned its use by federal law enforcement agencies. Racial profiling nevertheless remains of particular interest in the context of this chapter. Well-entrenched beliefs and practices might be expected to survive in spite of legal prohibitions. The stereotype of African American criminality would certainly qualify as well entrenched, and might promote racial profiling.

In a recent series of studies, Eberhardt, Goff, Purdie, and Davies (2004) examined the psychological association between race and criminality. In one study they exposed police officers to a set of either Black faces or White faces and asked simply, "Who looks criminal?" The results of this study not only confirmed the existence of the relevant stereotype, but also showed the importance of a factor widely recognized in minority communities but too often ignored in research on race—racial *prototypicality*. Police officers not only viewed more Black faces than White faces as criminal, they viewed those Black faces rated as most stereotypically or prototypically Black (e.g., those faces with wide noses, thick lips, or dark skin) as the most criminal of all.

Eberhardt and colleagues (2004) also conducted studies to examine how the stereotypic association between African Americans

and criminality might operate in the context of racial profiling. Specifically, they asked whether prompting people to think about crime makes them more likely to visually attend to or focus on Black people. Eberhardt et al. prompted half of the students participating in the study to think about crime by subjecting them to a “subliminal priming” procedure that involved a brief presentation of line drawings of objects associated with violent crime (e.g., guns, handcuffs, and knives). These participants, all of whom were White, were exposed to the crime images so quickly that they were not able to consciously recognize them. The other half of the participants, who were in the control condition, were subliminally exposed to a “dummy” image that consisted of jumbled patches from each crime-relevant line drawing. Next, all of the participants were shown a Black face and a White face simultaneously.

As predicted, the participants who had been primed to think about crime looked at the Black face more than did those participants in the control condition. Moreover, Eberhardt et al. found that explicit prejudice did not moderate this selective attention to Black faces. Students who scored low on measures of explicit prejudice were just as likely as higher scoring participants to attend disproportionately to the Black face when they were primed to think about crime. The researchers suggested that this visual bias may be due to implicit associations between Blacks and crime – associations that are automatic, unintentional, and frequently beyond the individual’s control.

Such associations between race and criminality are not limited to college students. Eberhardt et al. conducted a similar study with police officers and found the same pattern of results. They exposed police officers to words associated with violent crime (e.g., apprehend, capture, arrest, shoot) rather than visual images. Officers who were primed to think of apprehending, capturing, arresting, and shooting were visually drawn to the Black face. Near the end of the study, officers were presented with a Black photo lineup and a White photo lineup and asked to indicate the two faces they saw earlier in the study. Officers who had been prompted to think of violent crime recalled seeing a Black face that appeared more stereotypically Black than the face they actually had seen. The same priming, however, produced no systematic pattern of memory errors when the task involved identification of White faces.

The decision to “shoot” a “suspect”

Perhaps the most volatile charges of racial bias in law enforcement arise from police officers’ use of lethal force against African American or

Latino suspects. Beyond the much publicized cases of Rodney King and Amadou Diallo and scores of other more mundane cases reported in short articles in our daily newspapers, there is the sobering statistic that African Americans are four times more likely than Whites to die during, or as a result of, an encounter with a law enforcement officer (Brown & Langan, 2001).

Anecdotal and statistical evidence of this sort has led a number of social psychological researchers to examine the potential influence of race on research participants' decisions about whether to "shoot" a potential "suspect" (Correll, Park, Judd, & Wittenbrink, 2002; Greenwald, Oakes, & Hoffman 2003; Plant & Peruche, 2005). These studies typically use a videogame simulation in which study participants are presented with a series of images of Black or White men who are either "armed" (e.g., holding a gun) or "unarmed" (e.g., holding a harmless object such as a wallet or cell phone) and instructed to shoot only if the man in the image is armed. Once again, the results of such studies attest to the potential consequences of racial stereotypes that associate Black people with threats of violence. Participants made the fastest and most accurate decisions when deciding whether to shoot *armed Black* men and *unarmed White* men (e.g., see Correll et al, 2002). More specifically, the decision to shoot an armed target was made more quickly and accurately if that target happened to be African American rather than White, and the decision not to shoot an unarmed target was made more quickly and accurately if the target happened to be White rather than African American.

The shooting behavior studies – some of which have been conducted not only with university undergraduates and community members but with police officers as well – provide powerful evidence that racial stereotypes create associations and expectations that may play a role in the sort of split-second decisions that may literally be a matter of life or death for police officers and suspects alike. Two additional findings are worth noting. First, none of the shooting behavior studies found any relationship between standard paper-and-pencil measures of individual racial bias and performance in the shooting task. Second, and perhaps even more surprisingly, researchers found no difference in shooting behavior as a function of the participant's race. In studies that examined the behavior of both Black and White participants, both types of participants were quicker in correctly deciding to shoot when the target was Black and in deciding not to shoot when the target was White (Correll et al., 2002).

## Sentencing decisions

Racial disparities in sentencing, particularly capital sentencing, have long fueled substantial popular and scholarly debate. For most of our history, the debate was stoked by evidence of particular harshness in the penalties meted out to Blacks convicted of killing Whites, or to Black males convicted of raping or assaulting White women (Cole, 1999; Kennedy, 1997). Some researchers continue to find evidence that Black defendants are more likely to receive a death sentence than White defendants (e.g., Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 1998). The more robust finding, however, pertains to the race of the victim rather than the race of the perpetrator: Killers of White victims are more likely to be sentenced to death than are killers of Black victims. This finding, which holds even after researchers do their best to statistically control for a wide variety of nonracial factors that may influence sentencing, has been characterized by the U.S. General Accounting Office (1990) as “remarkably consistent across data sets, states, data collection methods, and analytic techniques” (p. 5).

Racial stereotypes may nonetheless play a significant role in determining which individual defendants receive the death penalty. One recent study has examined whether a stereotypically Black appearance increases the likelihood that a defendant will be sentenced to death. In this study, Eberhardt, Davies, Purdie-Vaughns, and Johnson (2006) presented the photographs of convicted African American defendants eligible to receive the death penalty in Philadelphia between 1979 and 1999 to study participants who were unaware that the photographs depicted convicted murders. The participants were asked to rate the racial stereotypicality of each face. Among African American defendants convicted of murdering a White victim, the findings were dramatic. Whereas 58% of those defendants rated as highly stereotypically Black had been sentenced to death, only 24% of those defendants low in racial stereotypicality were sentenced to death. This stereotypicality effect was statistically significant even after controlling for defendant attractiveness and various other nonracial factors likely to influence sentencing, including aggravating and mitigating circumstances, heinousness of crime, defendant socioeconomic status, and victim socioeconomic status.

In a similar study Blair, Judd, and Chapleau (2004) used sentencing data from Florida to examine the relationship between sentence length and the Afrocentric features of White and Black defendants. Importantly, study participants were asked to rate the Afrocentricity of each defendant’s features relative to other members of the defendant’s



racial group. (In other words, participants were asked to compare White defendants to other Whites, and Black defendants to other Blacks. Thus, overall rating of Afrocentric features was the same across groups, despite the fact that Black defendants, as a group, would obviously have more Afrocentric features than White defendants.) Although Black and White defendants, in the aggregate, received comparable sentences when controlling for defendant criminal history, as predicted, the investigators found that when Black and White defendants were considered jointly, Afrocentric features were associated with longer sentences. The association between Afrocentric features and harshness of treatment is provocative, and may constitute further evidence of the pervasive influence of race-related stereotypes.

Other investigators have employed a subtler methodology to examine this relationship between stereotypes and sentencing. In two studies by Graham and Lowery (2004) – one with police officers and the other with juvenile probation officers – participants were first subliminally primed with either words related to African Americans (e.g., minority, Harlem, basketball) or race-neutral words (e.g., jealousy, accident, pleasure). The participants were then presented with a short vignette describing a crime against a person or property in which the cause of the crime was left ambiguous and the race of the alleged perpetrator was not specified. Finally, the participants were asked to rate the alleged perpetrator's character traits (e.g., maturity level, violent disposition) and to indicate an appropriate punishment.

In each of these studies, participants primed with race-related words proved more likely to attribute negative traits to the alleged offender and, accordingly, to recommend harsher sanctions for that offender – even though they were never asked to guess the offender's race (Graham & Lowery, 2004). The investigators concluded that “at least some of [the racial disparities in the juvenile justice system] might be due to the unconscious racial stereotypes of those who determine the fate of offending youth.” Interestingly, these investigators, like many others who use related methodologies, found no statistically significant association between individual participants' explicit racial attitudes and the effect of the racial prime on their responses.

The findings reviewed above counter any assumption that discrimination is a relic of the past. The research clearly documents the continuing role of race in perception and decision-making, notwithstanding the adoption of the antidiscrimination principle and the moral condemnation of racial bias.

However, the studies identify a different species of discrimination than that which is most familiar to the lay public. The conventional view is that racial discrimination is overt, conscious, intentional, controlled, and categorical. It is assumed that people who discriminate know they are doing so, and indeed intend to do so. Such discrimination is also thought to reflect beliefs about, and attitudes toward, an entire group. In sum, the thought of racial discrimination may often conjure an image of the old-fashioned racist, the sheriff blocking the door to the schoolhouse, for example, because, he says, Negroes are inferior and cannot be permitted to attend school with Whites. This prototypical image of discrimination developed partly as a reflection of the sort of bias and discrimination characteristic of the Jim Crow era. During much of that period, views that would today be regarded as horribly misguided and indefensible were then openly expressed and endorsed. It was the effort to overthrow that form of discrimination that gave rise to the antidiscrimination principle. Thus, it is unsurprising that contemporary lay theories of discrimination continue to draw upon the dominant forms of racial bias from the era during which the antidiscrimination principle arose.

In contrast to the conventional understanding of discrimination, the sort of bias and discrimination captured by the studies we review is unconscious, unintentional, automatic, and sensitive to within-group distinctions. In the shooting studies, for example, there was no evidence that individual differences in shooting behavior could be explained on the basis of individual differences in levels of conscious bias. The same disjunction between behavior and conscious bias arose in the racial profiling studies. The sentencing studies used real-world data to show the extent to which the judges and jurors attend to intragroup distinctions in making sentencing decisions. And, finally, where the conventional account centers on the unreconstructed racist, the studies we review center on the decision-making of individuals who would likely profess, and genuinely believe themselves, to be racially unbiased both in their views and in their intentions. Nevertheless, the evidence shows that race shapes their perceptions and judgments.

The accumulation of social psychological evidence concerning unintentional discrimination has prompted a number of legal scholars to examine the applicability of antidiscrimination law to such discrimination. Our goal in the next section is to briefly describe the implications of unintentional discrimination for antidiscrimination law.

## The Law

We begin by noting the increasingly common view that antidiscrimination law currently prohibits only intentional discrimination. Some commentators have concluded that evidence of unintentional discrimination therefore calls for a reformation of antidiscrimination doctrine. This view is mistaken. Yet the belief that the antidiscrimination doctrine exempts unintentional discrimination is easy to understand. In the Supreme Court's 1976 decision in *Washington v. Davis*, the Court seemed to conclude that a claim of racial discrimination in violation of the Equal Protection Clause of the Constitution requires a finding of discriminatory intent. The Court stated that "a *purpose* to discriminate must be present." During the next few years, the Supreme Court twice reiterated the so-called intent requirement, stating forthrightly that "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Lower federal courts have generally followed the lead of the Supreme Court, speaking of discrimination as intentional, or as the result of a discriminatory purpose.

The Supreme Court's decision in *Washington v. Davis*, though, need not be read as exempting from prohibition racial discrimination that is prompted by unconscious bias. Consider the facts of the case. Unsuccessful Black applicants for employment as police officers in the District of Columbia argued that the personnel test employed to select officers violated the equal protection clause, largely because four times as many Blacks as Whites failed the exam. In deciding this case, the Court had to articulate a standard for evaluating a policy that did not facially distinguish on the basis of race. One possibility was that a formally race neutral policy would violate the Equal Protection Clause if it disproportionately burdens historically disadvantaged racial minorities without sufficient justification. This was the disparate impact standard that had been embraced by the lower court in *Washington v. Davis*, and recently incorporated by the Supreme Court into the federal statute prohibiting employment discrimination. *Washington v. Davis* presented the question of whether the same standard should apply to a claim of racial discrimination in violation of the Constitution. The Supreme Court said "no." A facially neutral policy could be characterized as illegal discrimination under the federal statute on the basis of its disparate impact, the Court said, but a constitutional challenge to a facially neutral policy required a finding of discriminatory intent.

The Supreme Court drew upon the discriminatory intent/discriminatory purpose language, then, to distinguish the constitutional standard from the disparate impact standard that had been adopted in the statutory context, not to distinguish intentional discrimination and conscious from an intentional discrimination and unconscious bias. The Court said, in effect, that invalidation of a facially neutral practice as discriminatory requires not only a disparate impact, but also a discriminatory intent. In neither *Washington v. Davis* nor subsequent cases did the Court say anything about unconscious bias or unintentional discrimination. The Supreme Court, of course, has never stated that discrimination is permissible if it is the unintentional result of unconscious bias. Nor is it obvious that there is any persuasive reason to exempt unintentional discrimination from the nondiscrimination mandate.<sup>1</sup>

Nevertheless, the Court has tended to speak in terms of discriminatory intent or purpose, a choice of terminology that reflects the conventional lay understanding of discrimination as conscious and intended. In this view, when people are treated differently on account of race, it is because the decision-maker has consciously and intentionally done so.

This widespread view of discrimination as conscious and intentional may cause judges and juries not to find discrimination where in fact they should. One might reasonably expect that conventional understanding to shape the inferences that one would be willing to draw from ambiguous evidence. If one believes that most discrimination is conscious and intentional, then in the absence of evidence of conscious ill will or intent to discriminate, one might be likely to conclude that no discrimination occurred. Similarly, if one accepts as genuine the assertion by an alleged discriminator that he did not intend to discriminate, then one likewise would conclude that no discrimination occurred. If judges and juries assume that discrimination is necessarily conscious and intentional, then they may often overlook, much less remedy, discrimination that is unintentional. Further, employers and other institutional actors will wrongly conclude that discrimination will not occur in their organization as long as everyone genuinely commits to the view that racial discrimination is impermissible and immoral. If discrimination is the product of unconscious processes over which

<sup>1</sup> Of course, this is not to say that there is never a reason to distinguish between the two, as they may raise different remedial questions, and may be associated with different levels of moral condemnation.

people have little control, then the desire not to discriminate, by itself, would be insufficient to end discrimination.

The realization that much discrimination may be unintentional, however, does not necessarily resolve the difficult choices that antidiscrimination law confronts. In the case of interpersonal decisions or policies that are formally race-neutral, it will often be extraordinarily difficult to decide whether discrimination occurred. Consider *Washington v. Davis*. The police department had continued to use a personnel test that failed many times more Blacks than Whites even though the test had never been shown to predict performance as a police officer. On the other hand, the same department had also undertaken vigorous affirmative action efforts to recruit more Black officers and diversify the force. Given the ambiguity of the facts, could one confidently conclude that the department's selection of the test reflected a discriminatory purpose.

Determining whether a facially neutral policy or practice is discriminatory entails uncertainty. Absolute accuracy in identifying discrimination is impossible, even more so if discrimination is sometimes unintentional. Thus, antidiscrimination law must balance the tradeoff between leaving some discrimination unremedied and characterizing a challenged decision as discriminatory when, in fact, it was not. An accurate understanding of the social psychology of discrimination may be an important component of this calculus, but the recognition of unintentional discrimination does not dictate how the balance should be set.

One could require strong evidence that a particular decision was discriminatory. Such a standard would be satisfied by evidence that someone intended to discriminate or harbored conscious ill will toward a particular racial group. Such a high standard, however, would capture only the most obvious cases of discrimination, and would leave undetected instances of subtle, unintentional discrimination. But a more capacious approach attentive to the possibility of unintentional discrimination would have problems as well. It might incline judges and juries to impose liability not only in more cases where discrimination occurred, but also in more cases where, in fact, no discrimination occurred. The choice between these two approaches requires a legal determination, a means of balancing the risks of error. That determination is one with respect to which a variety of considerations may be relevant. It is not simply a matter of accurately understanding discrimination.

In sum, the recognition of unintentional discrimination does not call for any major reformation of antidiscrimination doctrine, but it does highlight the error of assuming that discrimination is necessarily conscious and intentional. It is important to recognize that discrimination

may occur in the absence of conscious intent or ill will. However, that recognition cannot, by itself, determine the appropriate legal standard.

## **The Policy**

Antidiscrimination law must not only balance the risks of error, it must also give content to the ideal of equal treatment that is at the heart of antidiscrimination law. Efforts to enforce the nondiscrimination mandate in the domain of criminal justice confront the difficult substantive question of how to implement the equal treatment principle. This dilemma is not a consequence of unintentional discrimination, but it can be well illustrated or dramatized with the findings of the social psychological research that we have reviewed.

The social psychological research is premised on there being no differences between Blacks and Whites, other than race. Experimental studies achieve their power and persuasiveness by controlling for every variable other than race. This approach allows researchers to isolate the significance of race. In the shooting studies, for example, it seems sensible to explain differences in participants' shooting behavior in terms of their responses to a suspect's race, because the suspects were identical in every way other than race.

The assumption that Blacks and Whites differ only in terms of race, however, does not extend readily to the social world. There are substantial differences between Blacks and Whites, in addition to race. What it means to say that racial inequality is deep and pervasive is that Blacks and Whites are not, to put it in terms of legal jargon, similarly situated in the social world. Race as people encounter it in the social world is unlike race as people encounter it in the laboratory. In the laboratory, race is the only thing that differs, as individuals are presumed to be otherwise identical. In the social world, in contrast, the difference of race is coupled with all sorts of other differences. This is especially true in the domain of criminal justice, where Blacks and Whites differ with respect to the likelihood of being a victim of crime, a perpetrator of crime, and being incarcerated. These differences are substantial and consequential.

The differences associated with race complicate the questions that arise at the intersection of race and crime. If groups differ along all sorts of dimensions other than race, then the policy-maker, as we will show, is presented with choices that cannot be resolved simply by a decision to eliminate discrimination. The policy questions, in our view, should not be reduced to, and cannot be adequately resolved by, the goal of elimination of discrimination. Conversely, the desire to eliminate discrimination should not be permitted to obscure the

need for analysis of the race-related costs and benefits of particular policy choices.

In what follows, we consider some of the policy choices that arise when the research findings are situated in a real-world context.

### The decision to shoot a suspect

The findings of the shooting behavior studies are sobering, and resonant with instances in which unarmed Black men have been shot by law enforcement officers. The arresting findings of these studies should not cause us to bypass, however, the difficult policy questions that the studies also highlight. Recall a principal finding of the shooting studies: that participants mistakenly “shot” unarmed Black suspects more often than unarmed White suspects, and failed to “shoot” armed White suspects more often than armed Black ones. While such findings offer strong evidence of racial discrimination, it is less clear how that discrimination should be eliminated. Was the problem that participants did shoot *unarmed* Black suspects, or that they did *not* shoot armed White suspects? This is an important question.

A simple understanding of the antidiscrimination principle would be that race should play no role in decision-making. In the social settings that law enforcement officers and criminal suspects occupy, however, the idea of a race blind criterion against which deviations could be measured is nonsensical. Everyone has a race, and in a face-to-face social interaction, each party is aware of the other’s race. It is difficult even to conceive of how police would behave if they (and criminal suspects) did not notice race, or, less outrageously, if race played no role in their decision-making.

One might say then simply that Black and White suspects should be treated identically. In what manner, though, should we attempt to achieve that goal? Should we train officers to delay a fraction of a second more when confronted with a Black suspect to make sure that he is actually armed before shooting? Or should we train officers to delay a fraction of a second less when confronted with a potentially dangerous White suspect? Either remedy, ironically, requires that the officer be trained to notice rather than to disregard the suspect’s race.

Shoot/no shoot decisions entail tradeoffs that are perhaps most readily addressed in terms of signal-detection theory and the two types of errors classically dealt with in that theory (Green & Swets, 1966). In the present case one error would be to *shoot* an *unarmed* suspect; the other would be *not* to shoot an *armed* suspect. To restate the findings of the shooter studies in signal-detection terms, one would say that participants made more errors of the first type in the case of



Black suspects, and more errors of the second type in the case of White suspects. In other words, there seemed to be a different tolerance for each type of error with Black suspects compared to White suspects.

To say that the tolerance for each type of error should be the same for Black as for White suspects does not indicate which shooting threshold is preferable. Again, should Black suspects be treated as White suspects are treated, or should White suspects be treated as Black suspects are treated? Typically, there is a tradeoff between the two types of errors, with the relative frequency of each type of error dependent on the decision-maker's requisite threshold of certainty that the suspect is armed before discharging his weapon. In particular, fewer shootings of unarmed suspects would be achievable only at the cost of more failures to shoot armed suspects, which would result in more dead police officers (assuming that armed suspects would sometimes use those weapons) and more dangerous felons remaining at large. Conversely, more shootings of armed suspects who might otherwise harm officers and endanger the community would be achievable only at the cost of more shootings of innocent citizens in that community. To balance the possibilities of these different types of errors, one would need to associate a cost with each type of error. The goal would be to train officers so as to minimize the aggregate costs (or, put differently, to maximize the expected aggregate benefits) of their shooting behavior.

One might reasonably conclude that however the balance is struck between protecting the lives of unarmed suspects on one hand, and the lives of officers and other community members on the other, the shooting threshold should be precisely the same for Black and White suspects. But that seemingly reasonable conclusion raises another question: What if the adoption of an identical shooting threshold for all suspects did *not* result in the lowest possible aggregate error? In other words, what if officers made more mistakes when they treated Black and White suspects identically? In the shooting behavior studies, where there is no association between race of a suspect and the likelihood that a suspect is armed, the use of the same certainty threshold would result in identical outcomes with Black and White suspects. In actual police-citizen encounters, however, Black and White suspects may differ in the likelihood of being armed, and/or in the likelihood of using their weapons to avoid arrest. Data compiled by the Bureau of Justice Statistics reveal that Blacks are dramatically overrepresented not only as victims of police violence, but as perpetrators of violence against police officers as well (Brown & Langan, 2001). Indeed, while data show that Blacks are five times as likely as Whites to be killed by



the police, data also show that Blacks are five times as likely as Whites to kill a police officer (Brown & Langan, 2001).

If race is probabilistically useful in deciding whether to take the risk of shooting versus not shooting a suspect, then a dilemma arises. The shooting behavior that minimizes the total errors for both Black and White suspects may be behavior that takes into account the suspect's race. Should suspects be treated "the same" even if that means more errors would result? There will often be a tension between the ideal of race blind treatment and other values that also animate the commitment to nondiscrimination. Although we have illustrated this tension using studies that show differences in "shooting" error rates based on the race of the suspect, the analysis is not limited to that sort of example. Rather, the dilemma potentially arises whenever race is associated with relevant, though difficult to observe, characteristics. Again, our purpose here is neither to prescribe policy nor to suggest what weight should be given to different, competing, desiderata. (As an aside, however, it would surely be reasonable on many grounds to undertake the relevant cost-benefit analysis and decisions with heavy input from the community at risk – especially insofar as the crime in question is largely Black on Black or White on White.) Instead, we simply reiterate that a careful consideration of outcomes will inevitably be an important factor in any designation or identification of a nondiscriminatory baseline.

## Sentencing

The same sort of dilemma that arises with respect to shooting behavior is also apparent when we consider the sentencing studies. More specifically, changes in policy designed to eliminate a sentencing disparity based on the race of the victim would create or exacerbate a sentencing disparity based on the race of the defendant. The statistics that highlight this tradeoff are the ones noted earlier suggesting that killers of Whites were more likely to be sentenced to death than were killers of Blacks (for a review, see Baldus et al., 1998 or U.S. General Accounting Office, 1990). Such racial disparity in sentencing suggests a lack of race-blindness on the part of judges and/or juries, and even more disturbingly a tendency for the decision-makers in question to value the lives of White victims more highly than the lives of Black victims (Kennedy, 1997). Yet, once again, there is the question of how to remedy the racial disparity. Increase death sentences for killers of Black victims or decrease death sentences for killers of White victims?

The fact that most capital sentencing cases concern intraracial rather than interracial murders exacerbates the problem. In particular, there is no decision-rule or sentencing threshold that could simultaneously eliminate sentencing disparities based on race of the victim without introducing disparities involving the race of the defendant. Eliminating the race-of-victim disparity – either by executing more murderers of Blacks or by executing fewer murderers of Whites – would necessarily create a race-of-defendant disparity.

The studies conducted by Eberhardt et al. (2006) and Blair et al. (2004), which linked harshness of sentencing to perceived racial prototypicality, raise less familiar but perhaps no less troubling questions, one normative, the other empirical. Should steps be taken to somehow remedy that form of discrimination? And if so, what might the consequences be of taking those steps? The first question is whether such *intragroup* disparities in sentencing violate antidiscrimination norms, even when there is no *intergroup* disparity. While the legal issue is one about which scholars might disagree, there can be little doubt that the findings in question reflect the impact of the very racial stereotypes, associations, and biases that antidiscrimination laws are presumably designed to address. The second question is whether measures that somehow addressed such stereotypicality discrimination in intragroup sentencing could produce or exacerbate disparities in *intergroup* outcomes.

As with race-of-defendant and race-of-victim disparities, eliminating such stereotypicality discrimination in sentencing could produce a racial disparity in *intergroup* outcomes, thereby presumably violating the antidiscrimination principle. Recall the finding by Eberhardt et al. that racial stereotypicality influenced the likelihood of being sentenced to death for Black murderers of White victims, but not for Black murderers of Black victims (Eberhardt et al., 2006). This finding suggests that eliminating the stereotypicality disparity in sentencing – through the imposition of more death sentences for low stereotypicality defendants, for example – would produce an even stronger sentencing disparity with respect to murders of White victims in comparison to Black victims. The findings by Blair et al. (2004) linking the presence of stereotypically Black features in *White* perpetrators to disproportionately harsh treatment further complicate these issues. Should *White* defendants really enjoy constitutional protection against sentencing biases that are based on their personal appearance, or more particularly, that are based on the degree to which their appearance somehow triggers stereotypic associations that more typically burden the everyday experiences of *Black* citizens in general and Black defendants in particular?

## Racial profiling

While only criminal defendants bear the brunt of discrimination in sentencing, and confrontations with police officers who must decide whether to shoot are fortunately (for all concerned) rare, decisions that officers make about whether to stop or search individuals who arouse their suspicion of wrongdoing are far from rare, and may especially burden minority group members. The application of the antidiscrimination principle to such decisions again raises difficult issues of remedy.

If rates of criminality for all groups or for all neighborhoods (which may of course differ in their racial composition) were similar, the standard for evenhandedness or racial fairness would be obvious. One would look for evidence of different frequencies of stops-searches, and/or for differences in the proportions of stops that failed to yield evidence of wrongdoing. But if rates of overall criminal behavior, or rates of particular types of criminal behavior, differ across groups, then a decision to eliminate racial disparities in stop-search rates would again create other types of undesirable disparities. More specifically, law enforcement officers would be obliged either to subject innocent members of the lower crime-rate group to a greater likelihood of an unwarranted stop than innocent members of the higher crime-rate group, or to allow more guilty members of the higher crime-rate group to escape detection and punishment than similarly guilty members of the lower crime-rate group.

Attempts to provide evenhanded treatment in terms of frequency of stop-searches can introduce treatment disparities in another way as well. If apprehension of the guilty reduces crime in a given neighborhood, then disparities in the apprehension of the guilty would, given high rates of intraracial crime, translate into racial disparities in the protection from crime provided to the relevant communities at large (Farmer & Terrell, 2001). It is not possible to simultaneously eliminate racial disparities in the likelihood of investigation of the innocent, the apprehension of the guilty, and the law enforcement protection provided for communities (Alschuler, 2002). In any case, analysts would be obliged to at least consider and compare the relative costs and benefits of any particular tradeoff (Banks, 2003).

## Conclusion

In this chapter, we have reviewed some recent social psychological research regarding racial discrimination in the criminal justice system.

The research documents, persuasively in our view, the continued psychological salience of race, with respect to criminal justice in particular. The studies we reviewed found evidence of the influence of race on perception, judgment, and decision-making even among individuals who regard themselves as racially unbiased. These important findings rebut any facile assumption that the criminal justice system has become color blind.

When these findings are considered in light of differences across racial groups in criminal victimization, criminal wrongdoing, and incarceration, however, some difficult policy questions arise. Such policy questions extend beyond, and should not be reduced to, the goal of eliminating discrimination. Ultimately, the design of optimal social policy with respect to race and criminal justice system depends on a weighing of individual rights against the common good, both for particular groups and for society as a whole. One goal of such a policy calculus should be to create both the perception and reality of racial fairness.

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