

## IMPLICIT BIAS DISTORT DECISION MAKERS THROUGHOUT THE CRIMINAL JUSTICE SYSTEM

### PROBLEM

The criminal justice system involves numerous actors—such as police officers, prosecutors, judges, jurors, and eyewitnesses—whose decisions and judgments have a significant impact on the conviction and punishment of criminal defendants. A great deal of research has shown that race significantly affects the decisions and judgments of most people. Some of this research has been conducted on particular actors (or tasks) within the criminal justice system. For example, the research on bias tends to show that a juror who associates Blacks (as opposed to Whites) with a particular crime will be more likely to convict Blacks (as opposed to Whites) of that crime on the *same* evidence. These biases are subtle phenomena that have some influence in any given case, but which have their most substantial effects over time. The research suggests that biased decision-making artificially inflates the proportion of minorities in the criminal justice system, which likely creates more stereotypes and associations, and thus results in a negative feedback loop.

The research and studies discussed below are either well-recognized meta-analyses (that is, evaluations of large collections of similar studies, used to determine the general state of knowledge regarding a particular issue), or particular studies selected for their relevance, elegance, clarity, and methodological rigor. Unfortunately, the vast majority of research to date has evaluated race as a White-Black dichotomy. Nevertheless, the studies that have expanded the race evaluation to other minority groups have tended to show similar results. Thus, no distinction between minority groups is drawn here, and further treatment of that issue is beyond the scope of this summary.

### KEY POINTS

- **Individuals in our society generally associate minorities with criminality; exhibit implicit bias against minorities; and also exhibit divergent behavior in experimental conditions based on the manipulation of race.** Researchers have shown that Whites tend to exhibit relatively increased levels of activation in the amygdala—an area of the brain that is associated with emotional stimulation and most notably fear—when presented with Black as opposed to White faces.<sup>1</sup> This effect has been correlated with performance on the Implicit Association Test (IAT), which measures implicit conceptual associations, and which has been used by researchers to measure implicit bias in individuals.<sup>2</sup> Whites generally exhibit implicit bias against Blacks under the IAT. Namely, Whites tend to find it more difficult to associate positive concepts with Black (as opposed to White) faces or names (and the reverse is true with negative concepts). In

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<sup>1</sup> Elizabeth A. Phelps et al, *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 *Journal of Cognitive Neuroscience* 729 (2000).

<sup>2</sup> *Id.*

particular studies, the IAT also has been correlated with biased behavior and decision-making (although these studies are less rigorous and methodologically clean).<sup>3</sup>

Other findings have been made regarding mental associations of Blacks with criminality. In one study, individuals primed<sup>4</sup> with crime-related concepts attended relatively more to Black faces as opposed to White faces—and this effect was replicated in a group of police officers.<sup>5</sup> Further, when asked whether faces “looked criminal,” a group of police officers judged Black faces to be much more criminal-looking.<sup>6</sup> And these studies involved officers of many races, not only Whites.

- **Criminal investigations and arrests are influenced by the race of potential/actual suspects, and often are based on a faulty application of majoritarian cultural norms.** The racial component of a given case may influence judgments of character and guilt, expectations of recidivism, and decisions to arrest and charge. In one study, priming police and probation officers with Black-related concepts significantly influenced responses to race-neutral vignettes of juveniles committing theft and assault.<sup>7</sup> Specifically, the officers were more likely to rate the juveniles negatively, to expect recidivism, and to recommend arresting the juveniles, if primed with Black-related concepts (such as “homeboy” or “minority”). Another study, of general import, observed that White store employees were more likely to monitor and follow Black (as opposed to White) customers who asked to try on sunglasses with a security sensor removed.<sup>8</sup>

Next, a good deal of work has been conducted on deadly force simulations, in which subjects must decide quickly whether to shoot or not-shoot figures appearing on a screen who are carrying either a gun or an innocuous object (such as a wallet). Whites have been shown to commit substantially more errors regarding Black (as opposed to White) target figures.<sup>9</sup> Further, this biased effect was increased in one study when subjects read newspaper articles involving Black (as opposed to White) criminals prior to testing—once again showing the power of underlying stereotyping.<sup>10</sup> Another such deadly force

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<sup>3</sup> Jeremy D. Heider & John J. Skowronski, *Improving the Predictive Validity of the Implicit Association Test*, 9 N. Am. Journal of Psychology 53 (2007); Allen R. McConnell & Jill M. Leibold, *Relations among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 Journal of Experimental Social Psychology 435 (2001).

<sup>4</sup> “Priming” occurs when a subject is shown an image or word so quickly that the image or word is not registered in consciousness, but nevertheless has a subconscious impact and affects behavior. This is a common and accepted method of investigating underlying mental processes in the field of social psychology.

<sup>5</sup> Jennifer L. Eberhardt et al, *Seeing Black: Race, Crime, and Visual Processing*, 87 Journal of Personality and Social Psychology 876 (2004).

<sup>6</sup> *Id.*

<sup>7</sup> Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 Law and Human Behavior 483 (2004).

<sup>8</sup> George E. Schreer et al, “*Shopping While Black*”: *Examining Racial Discrimination in a Retail Setting*, 39 Journal of Applied Social Psychology 1432 (2009).

<sup>9</sup> Joshua Correll et al, *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 Journal of Personality and Social Psychology 1314 (2002).

<sup>10</sup> Joshua Correll et al, *The influence of stereotypes on decisions to shoot*, 37 European Journal of Social Psychology 1102 (2007).

study was conducted at the University of Washington with similar results.<sup>11</sup> Further, a similar study recently was conducted with Washington police officers, with reportedly similar results, although that study has not yet been published (or peer-reviewed).<sup>12</sup>

Some work also has been done to determine whether non-verbal cues used by police officers to identify likely suspects are accurate across races.<sup>13</sup> Research has shown that minorities—including specifically minorities who have not been engaging in criminal activity—disproportionately exhibit many of these non-verbal cues (such as pauses in speech or avoidance of eye contact). These same behaviors also have been shown in foreign language speakers.

- **Determinations of guilt and sentencing likely are influenced by the race of defendants, in conjunction with other extra-legal factors.** A few substantial meta-analyses have been done regarding mock juror studies involving race (namely, studies in which subjects are provided with trial materials and asked for judgments of guilt and sentencing, and defendant race is manipulated). These studies are limited in various ways (e.g., generally these studies evaluate individual mock jurors as opposed to mock juries engaged in group decision-making), but they appear useful nonetheless. One meta-analysis focused on sentencing decisions made by White mock jurors, and found a small but significant effect of racial bias.<sup>14</sup> Another meta-analysis evaluated verdict and sentencing decisions made by mock jurors (including Black mock jurors) in mock cases involving minority defendants, and that meta-analysis found no significant effect of racial bias (although there were apparent effects within particular types of crime).<sup>15</sup> A subsequent meta-analysis collected more studies and evaluated the effect of out-group bias (including bias by Black mock jurors against White mock defendants).<sup>16</sup> That meta-analysis found a small but significant and reliable effect of race on mock juror verdict and sentencing decisions, which was substantially tempered by jury instructions, or use of binary responses regarding guilt (guilty/not-guilty as opposed to a scale measuring likelihood of guilt). These tempering conditions are more realistic and reflective of actual courtroom processes, and thus, based on mock juror research to date, the effect of racial bias on jury decisions in general appears to be fairly insignificant.

However, subsequent research has shown that race may play a significant role in particular types of criminal cases, or in combination with other factors. For example,

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<sup>11</sup> Anthony G. Greenwald et al, *Targets of discrimination: Effects of race on responses to weapons holders*, 39 *Journal of Experimental Social Psychology* 399 (2003).

<sup>12</sup> Lois James, *Simulated Deadly Force Scenarios: A New Experimental Tool for Measuring Racial and Gender Bias in Policing*, unpublished manuscript.

<sup>13</sup> Robin S. Engel & Richard Johnson, *Toward a better understanding of racial and ethnic disparities in search and seizure rates*, 34 *Journal of Criminal Justice* 605 (2006); Richard R. Johnson, *Race and police reliance on suspicious non-verbal cues*, 30 *Policing: An International Journal of Police Strategies & Management* 277 (2007).

<sup>14</sup> Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 *Behavioral Sciences and the Law* 179 (1992).

<sup>15</sup> R. Mazzella & A. Feingold, *The effects of physical attractiveness, race, socioeconomic status, and gender of defendant and victims as influenced by race, political orientation, and peer group*, 46 *American Behavioral Scientist* 108 (2002).

<sup>16</sup> Tara L. Mitchell et al, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 *Law and Human Behavior* 621 (2005).

some studies have found a substantial effect of racial bias for crimes stereotypically associated with a particular race (for example, relatively higher guilty ratings for Whites charged with embezzlement or Blacks charged with grand theft auto).<sup>17</sup> Another study evaluated the interaction of defendant race, socioeconomic status, and attorney race, on mock juror evaluations, and while no factor was individually significant, the three factors combined were very significant (i.e., all else being equal, Mexican poor defendant with Mexican attorney judged guilty by 55% of jurors, while White rich defendant with White attorney judged guilty by 32% of jurors).<sup>18</sup>

- **Cross-racial eyewitness identification is substantially less accurate, and cross-racial lineup construction is less fair.** The “cross-race bias” eyewitness phenomenon is the finding that “[e]yewitnesses are more accurate when identifying members of their own race than members of other races.”<sup>19</sup> In a survey of 64 eminent experts on eyewitness research, 90% agreed that the cross-race bias phenomenon is reliable enough to be presented in court.<sup>20</sup> Further, a comprehensive and well-regarded meta-analysis of studies regarding cross-racial eyewitness identification found that cross-racial identifications are 1.56 times more likely to be erroneous.<sup>21</sup> Considering the important role that eyewitness testimony plays in criminal trials, this is disturbing. Similarly, another study found that cross-racial lineup constructions (lineups constructed by individuals of a different race than the suspect) are likely to be done with less time and attention to detail in selecting foils, and thus, less fairness.<sup>22</sup> Due to the fact that, as a general matter, minorities are more likely to be identified by White witnesses, and that lineups are more likely to be constructed by Whites, minorities are at a distinct disadvantage regarding the use of eyewitness testimony in the criminal justice system.

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<sup>17</sup> Christopher S. Jones & Martin F. Kaplan, *The Effects of Racially Stereotypical Crimes on Juror Decision-Making and Information-Processing Strategies*, 25 *Basic and Applied Social Psychology* 1 (2003); Randall A. Gordon et al, *Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions*, 128 *Journal of Social Psychology* 191 (2001).

<sup>18</sup> Russ K. E. Espinoza & Cynthia Willis-Esqueda, *Defendant and Defense Attorney Characteristics and Their Effects on Juror Decision Making and Prejudice Against Mexican Americans*, 14 *Cultural Diversity and Ethnic Minority Psychology* 364 (2008).

<sup>19</sup> Saul M. Kassin et al, *On the “General Acceptance” of Eyewitness Testimony Research*, 56 *American Psychologist* 405 (2001).

<sup>20</sup> *Id.*

<sup>21</sup> Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 *Psychology, Public Policy, and Law* 3 (2001).

<sup>22</sup> John C. Brigham & David J. Ready, *Own-Race Bias in Lineup Construction*, 9 *Law and Human Behavior* 415 (1985).