

# COLOR-CONSCIOUSNESS IN THE COURTROOM

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*Editors' Note: The following essay synthesizes Professor Armour's contribution as a panelist at the Association of American Law Schools' (AALS) 1998 presentation on gender and race in evidentiary policy. It essentially distills Professor Armour's previous article, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit,\*\* which examined in-depth the research underlying his contribution as an AALS panelist.*

## I. INTRODUCTION

A core purpose of the rules of evidence is to promote the rationality of the fact-finding process. It is impossible to determine whether a particular rule achieves this end *a priori*. Rather, a rule promotes its underlying purpose only if certain assumptions about the way the world works—especially assumptions about human psychology—hold true. If a rule is rooted in false assumptions about human psychology, following it may be counterproductive from the standpoint of its underlying purpose. If this is so, courts should replace the self-defeating rule with one more attuned to modern psychology's emerging insights.

Currently, some courts follow rules on the appropriateness of racial references in courtroom proceedings that are counterproductive in this sense. They prohibit references to a litigant's racial identity even when the litigant's own attorney is making the reference. For example, in *Jackson v. Chicago Transit Authority*,<sup>1</sup> a black plaintiff brought a negligence action against a municipal corporation for personal injuries sustained when the bus he boarded collided with a truck.<sup>2</sup> During his closing argument, the plaintiff's counsel "alluded to

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\*\* The article in its entirety can be found at 83 CAL. L. REV. 733 (1995).

1. 273 N.E.2d 748 (Ill. App. Ct. 1971).

2. See *id.* at 748-49.

the fact that his client was Negro, as contrasted to the jurors, the attorneys, and the court itself, who were all Caucasians."<sup>3</sup> The jury returned a verdict for the plaintiff,<sup>4</sup> but the appellate court granted the defendants a new trial on the ground that such a racial reference "should not be made before any tribunal. *It is an unmitigated appeal to prejudice and its effect could only be destructive of the proper administration of justice.*"<sup>5</sup>

Another example of a court adopting a color-blind approach to trial advocacy comes from a tort case pitting a pharmaceutical company against a low-income black infant and her mother.<sup>6</sup> The mother and child sought damages for serious injuries the child suffered from using the pharmaceutical company's allegedly defective drug.<sup>7</sup> In his opening statement to a mostly white jury, plaintiffs' counsel characterized the case as "a test of our judicial system to see if a child who is at the lower end of our society . . . can come before a jury and receive fair and just compensation for [her] injuries."<sup>8</sup> Plaintiffs' counsel then directly addressed the racial dimension of the case:

[W]e were concerned about the effect of having black people come to an area where there are not many black people and expecting to get justice from a jury which is mostly white people. We decided to confront this issue and we asked you the questions this morning, and we were really pleased with the responses that we got and we think that this is an impartial jury and everyone here has sworn that they will try this case not on the basis of passions, or prejudice, or economic basis, but on the basis of the facts and the law.<sup>9</sup>

Criticizing counsel's comments, the Court of Appeals for the Third Circuit warned that "the remarks should not be repeated in the opening statement at the retrial."<sup>10</sup> According to the court, counsel's remarks were "beyond the realm of appropriate advocacy," for "there must be limits to pleas of pure passion and there must be restraints against blatant appeals to bias and prejudice."<sup>11</sup>

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3. *Id.* at 751.

4. *See id.* at 749.

5. *Id.* at 751 (emphasis added).

6. *See Stanton v. Astra Pharm. Prods., Inc.*, 718 F.2d 553 (3d Cir. 1983). I am indebted to Professor Frank McClellan for bringing this case to my attention. Professor McClellan was co-counsel on this case. Both he and his partner are black, and they frequently try cases before predominantly white juries on behalf of black plaintiffs.

7. *See id.* at 555.

8. *Id.* at 578 (quoting the trial transcript).

9. *Id.* at 578-79 (quoting the trial transcript).

10. *Id.* at 579.

11. *Id.* (quoting *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978)). Notwithstanding this court's efforts to compel Professor McClellan and his partner to adopt a color-blind approach to

The doctrine of colorblindness applied by the courts in these two cases rests on the psychological assumption that attending to race subverts a fact finder's capacity to form rational judgments about a minority litigant. This psychological premise is wrong. This Essay examines recent research in human psychology that demonstrates that a color-blind approach—the effort to ignore a person's racial identity in making social judgments concerning that person—can promote the very discrimination it seeks to prevent. Specifically, this Essay argues that in many situations it may enhance the rationality of the decision-making process for attorneys explicitly to challenge fact finders to confront their biases against blacks and members of other stereotyped groups.

## II. THE COGNITIVE STRUCTURE OF STEREOTYPES AND HOW TO COMBAT THEM

Before discussing the rationality-enhancing potential of explicit racial references, it is important to understand the ubiquitous tendency of fact finders and other decisionmakers to unconsciously discriminate against members of stereotyped groups. Stereotypes consist of well-learned sets of associations between groups and traits established in children's memories at an early age, before they have the cognitive skills to rationally choose their own personal acceptability of stereotypes.<sup>12</sup> For example, Phyllis Katz reports the chilling case of a three-year-old child who, upon seeing a black infant for the first time, says to her mother, "Look mom, a baby maid!"<sup>13</sup> By the time this child turned three, before she had developed the cognitive ability to make decisions about the appropriateness of this stereotypic ascription, the associational link between black women and certain social roles was already forged in her memory.

Understanding stereotypes as ingrained mental reflexes carries enormous implications for judgments and evaluations of stereotyped groups. When cues of group membership such as race trigger well-learned associations such as stereotypes, people may unintentionally, but automatically, make biased judgments against members of stereotyped groups. Numerous psychological studies have demonstrated

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trying cases for black clients, Professor McCellan reports that he and his partner still frequently challenge jurors to be unbiased in judging the claims of their black clients.

12. See, e.g., Patricia A. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1989).

13. Phyllis A. Katz, *The Acquisition of Racial Attitudes in Children*, in TOWARDS THE ELIMINATION OF RACISM 125, 147 (Phyllis A. Katz ed., Pergamon Press, Inc. 1976).

that when decisionmakers are presented with *identical* information about a black and a white actor, they tend to make much more negative social judgments about the black actor. For example, Birt Duncan found that whites interpreted an ambiguous shove committed by a black actor as hostile or violent; but they interpreted the same act as merely “playing around” or as “dramatizing” when committed by a white actor.<sup>14</sup>

To see how a stereotype (essentially a kind of habit) can unconsciously drive a person’s responses to others, consider how habits are formed. “A habit is an action that has been done many times and has become automatic. That is, it is done without conscious thought.”<sup>15</sup> They “are the results of automatic cognitive processes.”<sup>16</sup> In contrast, a “decision to take or not to take an action . . . [necessarily] involves

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14. See generally Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 24 J. PERSONALITY & SOC. PSYCHOL. 590 (1976). Duncan had 96 white undergraduates individually rate a series of interactions between two other bogus study participants that culminated in an ambiguous shoving event. See *id.* at 592, 594. The two “other subjects” (both male) were actually confederates acting out a script. See *id.* at 592. The experimental session consisted of a videotape of the two “actors” discussing a hypothetical problem; “however, the subject who observed the tape was led to believe that the discussion was actually taking place in another room. The subject was asked to evaluate the behavior of the actors six times at precise intervals, which were signaled to him by the experimenter during the tape.” *Id.* To evaluate the actors’s behavior, the subjects had to fit the behavior into one of 10 major categories on their rating form; the 10 major categories were *dramatizes, gives information, gives opinion, gives suggestion, asks for information, asks for opinion, asks for suggestion, playing around, aggressive behavior, and violent behavior*. See *id.* at 594. The subjects’ final evaluations—the sixth rating—were designed to coincide with the heated discussion and an ambiguous shove near the end of the interactions; thus, this sixth rating was the major dependent measure. See *id.*

The major independent variables were the racial identities of the actor who initiated the ambiguous shove (the “protagonist”) and the actor who received the shove (the “victim”). See *id.* at 593. The subjects were randomly assigned to one of the following experimental conditions (tapes): black protagonist-white victim; white protagonist-black victim; black protagonist-black victim; white protagonist-white victim. See *id.* The results of this experiment are disturbing and unequivocal. When the protagonist was black and the victim white, 75% of the subjects characterized the ambiguous shove as “violent behavior,” whereas when the protagonist was white and the victim black, only 17% so characterized it. *Id.* at 595. On the other hand, 42% of the subjects perceived the shove as “playing around” or “dramatizing” when the protagonist was white and victim black, compared with only 6% in the black-protagonist/white-victim conditions. *Id.* The discrepancy between white-protagonist/white-victim condition and black-protagonist/black-victim condition is also drastic: 69% of the subjects perceived the within-group (black-black) condition as violent compared with 13% in the white-white conditions. See *id.* Thus, subjects are much more likely to characterize an act as violent when it is performed by a black than when the same act is committed by a white. See *id.* at 596-97.

15. David L. Ronis et al., *Attitudes, Decisions, and Habits as Determinants of Repeated Behavior*, in ATTITUDE STRUCTURE AND FUNCTION 213, 218-19 (Anthony R. Pratkanis et al. eds., 1989).

16. *Id.* at 219.

conscious thought and the consideration of at least one alternative to the selected course of action.”<sup>17</sup> As Devine points out, “[a]utomatic processes involve the unintentional or spontaneous activation of some well-learned set of associations or responses that have been developed through repeated activation in memory.”<sup>18</sup> Controlled processes, in contrast, “are intentional and require the active attention of the individual.”<sup>19</sup> Learning to drive a car provides a useful illustration of this distinction. When a person first gets behind the wheel, virtually every maneuver is a controlled response. Deciding when and how to apply the foot pedals while turning the steering wheel or manually shifting gears to complete a turn demands concentration and effort. But after enough practice these maneuvers become automatic. A person will soon be accustomed to accelerating, braking, and steering while contemplating health care reform or talking to a travel companion. Well-learned motor responses occur without conscious effort.

Understanding the cognitive underpinnings of habits sheds light on the mechanism by which well-intentioned people may routinely discriminate against blacks and members of other stereotyped groups. Just as habitual responses (like putting on a seat belt) may be automatically triggered by the presence of relevant environmental cues (like sitting in a car) without conscious attention,<sup>20</sup> stereotype-congruent responses may also be automatically triggered by a group membership cue, such as a person’s racial identity (or its symbolic equivalent). Consequently, unless a racially liberal person consciously monitors and inhibits the activation of a stereotype in the presence of a member (or symbolic equivalent) of a stereotyped group, she may unintentionally fall into the discrimination habit. The whites in Duncan’s study who interpreted the same ambiguous shove as hostile when the actor was black and as innocuous when the actor was white,<sup>21</sup> for example, could have had well-internalized nonprejudiced beliefs, yet they may not have consciously monitored the automatic activation of the black stereotype in the presence of the black actor. Because blacks are frequently stereotypically viewed as hostile, activation of the stereotype would have made the hostility category more accessible for making social judgments about the black actor. And inasmuch as the black stereotype is subject to automatic processing, it

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17. *Id.* at 218.

18. Devine, *supra* note 12, at 6.

19. *Id.*

20. See, e.g., Ronis et al., *supra* note 15, at 232.

21. See *supra* note 14 and accompanying text.

could have biased their judgment of the black actor without their awareness.

The upshot of this analysis is that for a person who rejects the stereotype to avoid stereotype-congruent responses to blacks (i.e., to avoid falling into a bad habit), a person must intentionally inhibit the automatically activated stereotype<sup>22</sup> and activate a newer (racially liberal) personal belief structure.<sup>23</sup> As Devine points out, such inhibition of learned behavior and activation of new responses involves controlled processes.<sup>24</sup> That is, the formulation of habitual, prejudiced responses into newer nonprejudicial responses takes "intention, attention, and time."<sup>25</sup>

There is considerable empirical evidence that responses based on automatic processes can be inhibited and replaced by responses based on controlled processes.<sup>26</sup> Focusing on the effect of gender stereotypes on memory, for example, Higgins and King demonstrated that, in experiments where gender was not brought situationally to the subjects' attention or made "salient,"<sup>27</sup> the subjects' descriptions of self

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22. As discussed earlier, the referred to black stereotype may be established in children's memories before children develop the cognitive ability to critically evaluate and decide on the stereotype's acceptability. *See supra* notes 12-13 and accompanying text.

23. This stereotype is frequently and incessantly reactivated by the social environment, including the mass media. *See Focus on Racism in the Media*, 5 EXTRA!, July/August 1992 (reporting that strong evidence of systematic and wide-spread manipulation of stereotypes in news reporting and other aspects of the mass media has been well-documented by FAIR (Fairness & Accuracy In Reporting), a national media watch group). Thus, whereas the stereotype is a well-learned set of associations (i.e., a habit) that involves automatic processes, nonprejudiced personal beliefs, on the other hand, are necessarily newer cognitive structures that result from an inherently low-prejudiced person's conscious *decision* that the common stereotype-based responses to blacks are unacceptable. Moreover, these decisions to renounce the already established stereotype do not come to mind nearly as frequently as the social environment may unconsciously yet automatically activate the stereotype.

24. *See Devine, supra* note 12, at 6.

25. *Id.* at 16.

26. *See, e.g., James H. Neely, Semantic Priming and Retrieval from Lexical Memory: Roles of Inhibitionless Spreading Activation and Limited-Capacity Attention*, 106 J. EXPERIMENTAL PSYCHOL. 226, 226-54 (1977). By using a semantic priming task, Neely demonstrated that when automatic processing would produce a response that conflicted with conscious expectancies (induced through experimenter instructions), the subjects inhibited the automatic response and intentionally replaced it with one consistent with their conscious expectancy. *See id.*

27. The salience of the subjects' gender was manipulated by varying the sexual composition of the different experimental groups. For example, in one series of experiments, a female experimenter conducted 20 groups of subjects each composed of two or three other females and one solitary male, and a male experimenter conducted 20 groups of subjects each composed of two or three other males and one solitary female. *See E. Tory Higgins & Gillian King, Accessibility of Social Constructs: Information-Processing Consequences of Individual and Contextual Variability*, in PERSONALITY, COGNITION AND SOCIAL INTERACTION 86 (Nancy Cantor & John F. Kihlstrom eds., 1981). Researchers reasoned that gender should be more salient for a group

and others reflected traditional views of gender-linked attributes.<sup>28</sup> They suggested that under such conditions traditional gender stereotypes, with their longer history and greater frequency of activation, were automatically activated and influenced recall.<sup>29</sup> When gender was brought to the subjects' attention or made salient, however, subjects apparently inhibited the traditional stereotype and descriptions were more consistent with their more recently developed, modern views of gender-linked attributes.<sup>30</sup>

Thus, consciously averting to a characteristic that automatically triggers stereotypical responses is an effective strategy for avoiding unconscious discrimination. Conscious self-regulation, in a word, is the key. The effectiveness of this strategy can be seen in another experiment. White research subjects, led to believe that a person was in distress, helped black victims just as much as white victims when no

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member whose gender is in the minority than for a group member whose gender is in the majority. *See id.* at 85.

28. In Study 1, subjects (all college students) in half of the groups read a paragraph supposedly describing a female undergraduate at Princeton (Barbara), and subjects in the other half of the groups read the same paragraph ambiguously describing a male undergraduate (Bob). *See id.* at 86-87. The paragraph was constructed to unambiguously exemplify the following eight traits: two evaluatively positive, stereotypically male traits (active, ambitious), and two evaluatively negative, stereotypically male traits (aggressive, selfish); two evaluatively positive, stereotypically female traits (polite, sensitive), and two evaluatively negative, stereotypically female traits, (emotional, dependent). *See id.* at 86. After reading the paragraph, the subjects were given a 20-minute filler task to take their minds off the paragraph they had just read. They were then asked to reproduce the paragraph about Bob or Barbara as best they could, word for word. *See id.* at 87.

When the person described in the paragraph was ostensibly male (Bob), the subjects recalled less stereotypically male and more stereotypically female information about him when their gender was in the minority (i.e., high gender salience) than when their gender was in the majority (i.e., low gender salience). *See id.* When the person described in the paragraph was ostensibly female (Barbara), the subjects recalled less stereotypically female information about her when their gender was in the minority than when it was in the majority. *See id.*

Similar results were found in a different study in which subjects (all college students) were again put into groups composed of a solitary male or female and simply asked to describe themselves in writing. *See id.* at 103. Males in the minority described themselves as more stereotypically female and less stereotypically male than males in the majority, whereas females in the minority described themselves as more stereotypically male and less stereotypically female than females in the majority. *See id.* at 104. Thus, when the college students' gender was relatively salient, they were more likely to describe themselves in terms of nontraditional or modern views concerning the attributes of males and females. *See id.* Otherwise, their spontaneous self-descriptions (as well as their descriptions of others) tended to reflect the prevailing sexual stereotypes. *See id.* at 86-88, 103-05.

29. *See id.* 85-86.

30. *See id.* 86-88, 103-05.

ostensible justification for a failure to help existed.<sup>31</sup> If, however, the subjects knew of the availability of another who might help, they “helped black victims much less frequently than they helped white victims (38% vs. 75%).”<sup>32</sup> This initially puzzling finding begins to make sense when viewed in light of the analysis presented in this Essay. According to this analysis, when the subjects believed that they were the only potential rescuer, they were required consciously to think about what their responses to the black victim’s call of distress implied about their nonprejudiced self-concepts. When the conflict between their nonprejudiced personal beliefs and the stereotype of blacks is made salient in this way, this analysis predicts that low-prejudiced persons are likely to resolve the conflict by inhibiting their prejudice-like responses and reaffirming their nonprejudiced self-concepts. On the other hand, when the subjects believed that there were others who might help, the stereotype-personal belief conflict was less salient and the low-prejudice subjects were therefore less likely to monitor and inhibit responses based on the negative black stereotype.

Thus, to resist falling into the discrimination habit in the presence of a member of a stereotyped group, a decisionmaker must practice color-consciousness. Accordingly, appeals to fact finders by attorneys representing members of stereotyped groups to resist succumbing to automatic negative responses should not be barred by courts. The doctrine of colorblindness currently applied by courts, rooted as it is in mistaken assumptions about human psychology, may often subvert the very purpose for which it is applied.

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31. See SAMUEL L. GAERTNER & JOHN F. DOVIDIO, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 77 (John F. Dovidio & Samuel L. Gaertner eds., 1986). The subjects also “showed lower levels of arousal with black than with white victims.” *Id.*

32. *Id.*