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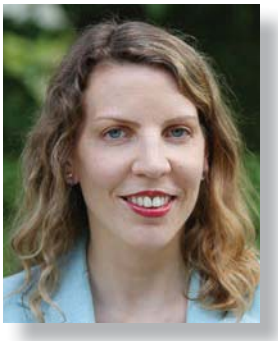

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Recognizing Implicit Bias within the Equal Protection Framework

by Alyson Grine and Emily Coward

Public Defender Davis can't shake a bad feeling she has about her case, which started with a traffic stop. Her African American client, Mr. Clark, was stopped for driving 45 mph in a 35 mph zone. Video evidence revealed that six other drivers were traveling on the same stretch of road at that time of day; five of them were going the same speed as Mr. Clark and one passed him. The police officer, who was staked out on a side road, did not stop any of those drivers, all of whom were White. The stopping officer is known to be professional and a "straight shooter," who doesn't embellish the facts. Defender Davis knows the stop was supported by reasonable suspicion and therefore justified under the Fourth Amendment. She isn't sure, however, if the evidence supports some other good-faith ground for challenging the stop.

The Equal Protection Clause

Like many criminal defenders, attorney Davis has experience litigating Fourth Amendment claims, but has never raised an Equal Protection challenge. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the N.C. Constitution recognize the right to equal protection under the law. Both provisions prohibit "selective enforcement of the law based on considerations such as race."[1] Thus, a law that appears racially neutral on its face (such as one that prohibits exceeding the speed limit) is unlawful if it is applied in an unequal way, for example, based on a person's race.

The Equal Protection Clause was intended to provide protection to African American people who confronted explicit discrimination after the Civil War. Southern states like North Carolina had enacted "Black Codes," laws that barred Black people from owning land, serving on juries, and voting; and punished Black people more harshly than White people for crimes. The Equal Protection Clause guaranteed African Americans the rights of citizenship, and eventually served as grounds for overturning the doctrine of "separate but equal."[2]

Today, the Equal Protection Clause is an important source of rights for defendants challenging unequal treatment in criminal cases. Defendants may rely on it to challenge practices like selective enforcement of the laws, discrimination in pretrial release, racially biased jury selection procedures, and considerations of race at sentencing.[3]

The Intent Standard

To succeed on a claim of racially selective enforcement, a defendant must show that the challenged police action was: 1) motivated by a discriminatory purpose; and 2) had a discriminatory effect on a racial group to which the defendant belongs.[4] The United States Supreme Court announced the "discriminatory purpose" standard in *Washington v. Davis*.[5] In *Davis*, plaintiffs argued that the exam for people seeking jobs as police officers

in the District of Columbia discriminated against Black applicants, who failed at rates four times higher than White applicants. The Court found that the plaintiffs' evidence showed a discriminatory impact, but did not show that the government's actions resulted from an "invidious discriminatory purpose," and therefore did not violate the Equal Protection Clause.[6]

Later cases reaffirmed the intent standard, perhaps none more significantly than *McCleskey v. Kemp*.[7] In that case, McCleskey, a Black man sentenced to death for murdering a White police officer in Georgia, argued that the state administered the death penalty in a racially discriminatory manner. In support of his argument, McCleskey introduced a study analyzing over 2,000 Georgia murder cases and concluding that "black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty" in Georgia.[8] In fact, the study indicated that "over half—55%—of defendants in white-victim crimes in Georgia would not have been sentenced to die if their victims had been black."[9] The U.S. Supreme Court rejected McCleskey's claims, however, concluding that the study failed to prove that a specific person or group of people acted with a racially discriminatory purpose in McCleskey's case.

Problems Caused by the Intent Standard

Daunting Evidentiary Standard.

Since its adoption, scholars and advocates have expressed concerns that "the intent doctrine . . . places a heavy burden on plaintiffs who are alleging discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."[10] For example, when a criminal defendant challenges a statute on the ground that it is racially discriminatory, it is "almost impossible to detect, sort out, and quantify the motives of individual legislators who vote [] on the basis of their own disparate beliefs, values, interests, and circumstances."[11] Thus, there is a real danger that "[r]equiring proof of discriminatory intent essentially closes the courthouse doors to victims of racial bias."[12]

Outdated Notion of Discrimination.

As one advocate observed, "equal protection jurisprudence has failed to keep pace with the way discrimination is now practiced and experienced in contemporary society."[13] While individuals may still commit overt acts of discrimination such as refusing to serve a Black customer at a lunch counter, scholars believe that racial inequity more often arises from a more subtle and complex mix of factors, including historical legacies, uneven distribution of opportunity, implicit bias, and covert bias.[14]

Clash between Intent Standard and Science of Implicit Bias.

The emerging science of implicit bias raises difficult questions about the meaning and viability of the intent standard. Implicit biases are attitudes and stereotypes that we are not aware of, and that may even conflict with our consciously held beliefs, but that can influence our thoughts and behavior.[15] If we are unaware of our own biases and their influence on our decisions, how can we expect judges to determine our intent?[16] The tension between the science of implicit bias and the demands of the intent standard has become more evident in recent years, as social scientists have gained insights into the pervasiveness of implicit biases. For example, researchers have concluded from the results of the Implicit Association Test, which has been administered over six million times, that "the majority of tested Americans harbor negative implicit attitudes and stereotypes toward blacks [and] dark-skinned people . . . among others."[17] Such unconscious biases could produce discriminatory results in settings including health care, education, housing, and criminal justice.

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Recognizing Implicit Bias within an Evolving Standard

For practitioners discouraged by the "intent standard," it is important to remember that the Supreme Court's definition of discrimination prohibited by the Equal Protection Clause is always in flux. Each case that interprets the intent standard gives the court a chance to reconsider its meaning and scope. Notably, the intent standard does not arise from the text of the Equal Protection Clause or from the history of its adoption.[18] The *Davis* Court embraced the standard based largely on a "floodgates" type of rationale: the Court was concerned that a broader understanding of discrimination "would be far-reaching and would raise serious questions about, and perhaps invalidate, [a wide range of laws]."[19] As practitioners become more adept at bringing evidence of implicit bias into the courtroom, the standard may expand to encompass a broader understanding of factors—conscious and unconscious—that are relevant to the determination of intent.

Consideration of social scientific evidence in cases interpreting the Equal Protection Clause is not new. The Supreme Court's willingness to consider such evidence when reviewing equal protection claims dates back at least as far as *Brown v. Board of Education*. In that landmark 1954 decision strik-

ing down the "separate but equal" doctrine, the Court relied in part on the famously poignant "doll test" when it declared school segregation unconstitutional.[20] While it is still relatively rare for courts to consider implicit bias in criminal cases, some judges reviewing equal protection claims raised by criminal defendants have acknowledged that discriminatory results can be produced by unconscious bias. For example, the Ninth Circuit observed that "racial stereotypes often infect our decision-making processes only subconsciously. Thus, Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so."[21] When considering a criminal defendant's equal protection claim in *Chin v. Runnels*, the federal district court noted that grand jury foreperson selection involves "subjective judgments entail[ing] subtle and unconscious mental processes susceptible to bias".[22] In a number of different cases, U.S. Supreme Court justices have recognized the existence of implicit bias and expressed concern that the Equal Protection Clause may not effectively regulate it.[23]

Gathering Evidence of Intent to Support a Selective Enforcement Claim

Returning to our example involving Public Defender Davis, does she have any proof that the officer had a discriminatory purpose when he stopped her client? She should bear in mind that the purpose prong does not require proof that race was "the sole, predominant, or determinative factor in a police enforcement action."[24] Nor must a defendant show that discrimination was based on "ill will, enmity, or hostility."[25] It is sufficient to show that a "discriminatory purpose has been *a* motivating factor" in the challenged action.[26] This line of cases suggests that discriminatory action motivated by implicit bias *does* violate the Equal Protection clause, as there is no exception to the intent doctrine for discrimination that is motivated by race but not consciously so.[27] Discriminatory purpose may be demonstrated using direct, statistical, and circumstantial evidence, including:

- data demonstrating a disparity between the overall population and the population targeted by the officer;[28]
- data demonstrating a disparity between the population targeted by the officer and the population targeted by similarly situated officers;
- the officer's failure to comply with state law mandating reporting of traffic stop data;

- the officer's questions or statements to the defendant or others related to race during the encounter;
- the officer's history of racially motivated behavior, as evidenced by interviews with community members or internal affairs investigations;
- a police department's history of racially motivated behavior, as reflected in reports, investigations, or complaints; or
- data demonstrating that when the suspect is a racial minority, the officer more frequently conducts discretionary stops (e.g., for regulatory violations), consent searches, or canine searches.

The officer did not make any statement to indicate that he consciously decided to stop Mr. Clark based on his race, and defense counsel does not have any reason to believe that he set out to discriminate against her client. However, the circumstance that six White drivers passed the officer while driving as fast (and faster) than Mr. Clark and were not stopped is relevant, circumstantial evidence that the court may consider when evaluating the officer's intent.[29] Defender Davis' claim that the officer's stopping decision was influenced by bias that was perhaps unconscious in nature would be strengthened by the introduction of data suggesting that the officer has a pattern of racially disparate stops, as well as studies documenting the influence of implicit bias on all of our decision-making. ◆

Conclusion

Given the difficulty of demonstrating purposeful discrimination under the intent doctrine, particularly where bias is operating at an unconscious or covert level, some scholars have suggested that it is time to reform or expand the standard. For example, Reggie Shuford, Executive Director of the ACLU of Pennsylvania, has argued that it is time to "dismantle or reformulate the intent doctrine, and introduce concepts of unconscious or implicit bias . . . into legal jurisprudence."[30] In adopting the intent standard, the Court effectively required consideration of the mind sciences in order to uphold the guarantee of equal protection under the law. It is therefore necessary to take proper account of the latest research in the mind sciences when interpreting discrimination claims raised under the Equal Protection Clause. The good news is, emerging developments in social science, law, and education all support the importance of acknowledging unconscious and institutional bias within our judicial system.[31] Implicit bias training for court actors, juror education and instruction on the topic of implicit bias, and reform of the *Batson* framework are some possibilities that have been proposed. In the meantime, practitioners can play an important role by introducing evidence of implicit bias whenever discrimination is an issue in their cases. As one Supreme Court Justice observed, "[o]nly by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization."[32] ◆

1. *State v. Ivey*, 360 N.C. 562, 564 (2006) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)), *abrogated in part on other grounds by State v. Styles*, 362 N.C. 412 (2008).
2. *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).
3. *See United States v. Armstrong*, 517 U.S. 456 (1996); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc);
Peters v. Kiff, 407 U.S. 493 (1972); *State v. Cofield*, 320 N.C. 297 (1987); *Batson v. Kentucky*, 476 U.S. 79 (1986);
United States v. Smart, 518 F.3d 800, 804 n.1 (10th Cir. 2008).
4. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *S.S. Kresge Co. v. Davis*, 277 N.C. 654 (1971).
5. 426 U.S. 229 (1976).
6. *Davis*, 426 U.S. at 242.
7. 481 U.S. 279 (1987).
8. *McCleskey*, 481 U.S. at 287.
9. 481 U.S. at 326 (Brennan, J., dissenting).
10. Eva Paterson, *Litigating Implicit Bias*, Poverty & Race, Sept./Oct. 2011, at 7, 7.
11. K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 Wm. & Mary Bill Rts. J. 525, 530 (2001).
12. Paterson, *supra* note x. *See also* Theodore Eisenberg & Sherri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 Cornell L. Rev. 1151, 1153 (1991) (concluding based on a study of cases that intent standard discourages victims of racial discrimination from seeking relief in court).
13. Reggie Shuford, *Reclaiming the 14th Amendment*, Daily Journal, Feb. 3, 2011.
14. Alyson Grine & Emily Coward, Raising Issues of Race in North Carolina Criminal Cases, at 1.3: Potential Factors Relevant to Racial Disparities in the Criminal Justice System (2014).
15. Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 St. Louis L.J. 1139, 1139 (2010).
16. Many jurists have expressed concern about how this problem may play out in the *Batson* context. *See, e.g., Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring).
17. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 802 (2012).
18. As one scholar explained,
"The Court has never attempted to authenticate the invidious intent doctrine by reference to the text or legislative history of the Equal Protection Clause. Indeed, to pave its way for the adoption of the doctrine, the Court in *Davis* had to abandon some of its important precedents and disagree with sixteen lower court decisions that 'impressively demonstrate[d] that there [was] another side to the issue . . . ."
Pillai, *supra* note xi, at 529 (quoting *Davis*, 426 U.S. at 245). *See also* Nathanial Persily, *The Meaning of Equal Protection: Then, Now, and Tomorrow*, ABA GP Solo, Nov./Dec. 2014, at 13, 14 ("The Court could have gone in a very different direction in a series of cases in the 1970s and developed rules for prohibited discrimination that did not rely, in effect, on reading the minds of decision makers responsible for discriminatory state action.").
19. *Davis*, 426 U.S. at 248.
20. *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 494 n.11 (1954) (discussing the "doll test" which demonstrated that Black children preferred White dolls to Black dolls and other studies considering the psychological impact of segregation).

21. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994) (internal citation omitted).

22. 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004), *aff'd sub nom.*, *Chin v. Carey*, 160 F. App'x 633 (9th Cir. 2005) (unpublished).

23. *See, e.g.*, *Texas Dept. of Public Housing v. Inclusive Communities Project, Inc., et al.*, 576 U.S. ____, 135 S. Ct. 2507, 2522 (2015) (noting that disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment"); *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J. dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically.").

24. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013).

25. *Id.* (quotation omitted) (citing *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 & n.7 (11th Cir. 1999)).

26. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (emphasis added).

27. *See* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 Emory L. J. 1053, 1089-1100 (2009) ("One might conclude that the [claimant] need not prove bias at all, but instead simply that the decision would have been different but for the races of the parties"); Sheila Foster, *Intent and Incoherence*, 72 Tul. L. Rev. 1065, 1094-97 (1998) (explaining that peremptory strikes motivated by race may be challenged successfully without proof of conscious intent to discriminate). *See also* Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 Geo. Mason U. Civ. Rts. L.J. 219, 247 (2005) (while the "*McCleskey* Court believed that the Baldus study was insufficient to support an inference of discrimination, a properly conducted analysis of an individual officer's traffic stop patterns can produce exceptionally clear evidence of purposeful discrimination" (quotation omitted)).

28. North Carolina law requires law enforcement officers to file reports "[i]dentifying characteristics of the drivers stopped, including the race or ethnicity" and "the race or ethnicity . . . of each person searched." See G.S. 143B-903. This data can be searched by the public at https://opendatapolicing.com/nc/.

29. *See United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997) ("[o]ften, it is difficult to prove directly the invidious use of race[,]" so "'an invidious discriminatory purpose may often be inferred from the totality of the relevant facts'" (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976))); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) ("Discriminatory intent can be shown by either direct or circumstantial evidence.").

30. Shuford, *supra* note xiii.

31. Eva Paterson et al., *The ID, the Ego, and Equal Protection in the 21st Century*, 40 Conn. L. Rev. 1175, 1194-95 (2008).

32. *Fisher v. United States*, 328 U.S. 463, 494 (1946) (Murphy, J., dissenting).