Are All Rulings Created Equal?

The Cause and Effect of Implicit Bias on Minorities in Criminal Justice

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INTRODUCTION

On November 20th, 2014, Tyrone Tomlin walked home from his job as a construction worker. Having just hung drywall, the 53-year-old was covered in white powder—a stark contrast to his black skin—when he stopped at a grocery store to buy a soda. The clerk handed it to him wrapped in a brown paper bag with a straw. After he paid, he was chatting with friends at the street corner when two police officers walked up to him. The officer asked what he was holding, but before he could respond, Tomlin was handcuffed as the officer brandished the straw, declaring it "drug paraphernalia."

When Tomlin finally met with his public defender, she told him that straws are "a commonly used method of packaging heroin," and it would take the lab some time to verify claims otherwise (Pinto 2015). His history of petty crimes, such as shoplifting food, didn't help his case, and the judge would likely set bail. As he could hardly afford basic necessities, Tomlin knew he would be unable to make bail. In court, the District Attorney offered Tomlin an impossible deal: plead guilty to a misdemeanor charge of criminal possession and serve a 30-day sentence, or wait in jail until trial. An added charge would only further exacerbate Tomlin's difficulty in finding work, but could Tomlin really afford to sacrifice his income, the sight of his family, and his freedom for months, because of a crime he did not commit?

The situation Tomlin faced is not uncommon to a large population of Americans. According to the Prison Policy Initiative, on any given day, 630,000 people are in jail. Of these people, 443,000 (70%) are held for pretrial detention, unable to pay bail (Yoffe 2017). Minorities are disproportionately represented in the pretrial detention population; 50 percent are Black or Latino, even though this demographic only makes up about 30 percent of the United States population. Millions of these people are kept away from their families and jobs because they are unable to pay bail.

This inordinate fraction of Black and Latino people in the incarcerated population can be largely attributed to the bias of judges and attorneys in the pretrial phase. Factors seemingly unconnected to a court case tend to have significant and usually unjust impacts on these processes. As Adam Benforado explains in his book *Unfair*, factors as unpredictable as stimuli in the world and courtroom, time of day, and scheduling of breaks can affect a judge's ruling. Judges grant parole to prisoners 65 percent of the time in the morning or after a break, as compared to at the end of the workday when chances "[drop] almost to zero" (Benforado 2015, 166). When these factors play a role, the severity of the crime often has no impact on the judge's decision to set bail. Furthermore, chaotic or violent events shared in the news, but unconnected to the trial at hand, can make judges more aware of their own mortality, making them more likely to assign punishment to feel as though they are protecting themselves (Benforado 2015, 200).

Though all of these factors play a role in judge bias, the most consistent biases, with the largest impacts, are founded in race—a key factor in Tyrone Tomlin's case. The officer that arrested Tomlin had no reason to assume his straw was a vehicle for drugs, but he was biased at the sight of Tomlin's skin. Features associated with stereotypes of Black Americans, such as "the

broadness of a defendant's nose, the thickness of his lips, and the darkness of his skin," correlate to longer punishments and more severe penalties than those given to white counterparts (Benforado 2015, 199). This discrimination is a reflection of America's racist beginnings, manifesting in the criminal justice system.

American history is ripe with racial strife—strife that is now ingrained the criminal justice system. Post-slavery America was no haven for equality, and much of what Americans take for granted as Civil Rights history has been severely misconstrued. Many of the policies and events surrounding emancipation and Civil Rights that are celebrated today actually had profound and lasting negative impacts on the oppressed peoples of the country. Laws and political rhetoric ranging from the 13th Amendment to The War on Drugs have established a social perception of Black Americans that ties them to crime. This social perception informs negative biases in our legal system which manifest in policies such as the bail and plea deal systems. Although bail and plea bargains are advertised as emancipatory and equalizing measures, they have only hurt marginalized communities. These policies affirm the negative perception of minority groups by causing innocent people to plead guilty to crimes they didn't commit, and by placing them in unfair and difficult situations that promote high levels of crime. This positive feedback loop simply continues to propagate the social perspective that was created by unjust and racist policies and mindsets to begin with.

IMPLICIT BIAS IN THE COURTROOM

The word "bias" is a very broad term that is applicable in a multitude of contexts. Benforado details biases that can affect judge's courtroom decisions, but more commonly known biases include availability bias, framing bias, and confirmation bias. Thus, it is important to

clarify that the biases we are discussing in this paper are **implicit** biases, which are defined as "attitudes or stereotypes that one unwittingly holds, whether or not one endorses those beliefs." In contrast, **explicit** biases are "attitudes or stereotypes that one consciously endorses," while **concealed** biases are explicit biases that someone might "hide from others in order to adjust to society's [norms]" (Williams 2018, 6). In the context of the criminal justice system, it is important to address the implicit biases judges and other officers of the law may exhibit, as they have resulted in an unconscionable imbalance in the results of our pre-trial mechanisms.

The definition of implicit bias raises the question, how do we measure something that we aren't sure exists? After hundreds of years of cognitive research, scientists and scholars have confirmed and measured the existence of implicit bias. Similar to how a thermometer transforms the abstract idea of temperature into something tangible, scientists use a tool called The Implicit Association Test (IAT) to measure implicit bias. This test uses the speed with which a person matches a noun to certain adjectives as a proxy for implicit bias. The faster this matching speed, the stronger the bias (Rachlinski et al. 2009, 1198).

These associations begin to subconsciously develop as early as during one's childhood and are reaffirmed over a lifetime. A variety of studies reflect the power that implicit biases can have even on children. A study published in the Indiana Journal of Law and Social Equality showed that children exposed to different fictitious groups of varying socioeconomic standings favored the wealthier groups within minutes (Williams 2018, 51). Another study showed that introducing gender labels, such as boy and girl, to preschool students led them to believe that boys, and not girls, should become scientists, only after a few weeks of exposure. Multiple other studies emphasize how "automatically and effortlessly" cognition occurs outside of conscious awareness (Jost et al. 2009, 43). These studies demonstrate the powerful role of implicit bias in

decision making and emphasize how impactful negative biases can be towards minorities in pre-trial cases.

It follows that studies conducted, using the IAT as a metric, support the conclusion that judges, like the rest of us, carry implicit biases concerning race. These implicit biases can affect judges' rulings—at least in contexts where judges are unaware of a need to self-scrutinize their decisions for racial bias (Rachlinski et al. 2009, 1221).

ADDITIONAL EXPLANATIONS OF JUDICIAL BIAS

Various modern theories try to explain why judicial bias exists, however, few are framed within the context of implicit bias. An article published in the American Bar Association's (ABA) Journal details a conversation with U.S. District Judge and Columbia Law Professor Jed S. Rakoff regarding judicial bias (Cohen 2017).

Rakoff asserts that an unreasonable workload contributes to bias in the courtroom. Judges are overburdened, and thus try to finish cases as quickly as possible. This situation is analogous to learning proper techniques in playing an instrument or sport. Though we might focus on small details in order to correct bad behavior during practice sessions, when it comes to a game or recital, muscle memory takes over so that we can focus on performing at the highest level. If judges' priorities are simply to get a case off the docket as quickly as possible, they spend less time focusing on suppressing their biases and instead rely on muscle memory—which is where implicit bias lives—to carry them through each case.

The second reason Rakoff presents for judicial bias is that judges see too many similar cases, and thus assume that cases that are even slightly similar to the "norm" will have the same outcome. The Innocence Project, an organization that uses DNA testing and other technology to

exonerate wrongly convicted people, is replete with examples of this—where judges were "totally blind to suggestions that this particular defendant may or may not be as guilty as others in cases that the judge had seen before" (Cohen 2017).

Aside from the rapid fire and repetitive nature of cases, Rakoff argues that a judge's former profession can also explain judicial bias. He says that most judges are former prosecutors and very few are former defenders. Since most judges come from the same school of thought as prosecutors, they often lend their decisions to favor their former colleagues, thereby skewing results in court.

While Rakoff's theories hold merit, the evidence supporting significant implicit bias in judicial rulings suggests that the current prejudice against minorities in our criminal justice system is far more related to racial bias. Current bias is shaped by historical patterns of oppression, perpetuated by the criminal justice system itself, which shapes judges' views today. These interact with features of the contemporary criminal justice system, specifically bail and plea bargaining, feeding back into a cycle of racist and classist perceptions. Without research, it's not obvious this cycle exists, making it even more dangerous to leave unaddressed. By analyzing the cycle and unveiling it to the critical eye of the public, we can hope to change social perceptions and perhaps break this cycle once and for all.

INSTITUTIONAL RACISM AS THE IMPETUS FOR IMPLICIT BIAS

For the most part, the public isn't fully aware of the bias, simplifications, and conveniences of most of the stories told in American history, particularly those surrounding the Civil War and 13th Amendment. The passing of the 13th Amendment is regarded as a major turning point in United States history, however, the undesirable consequences of this

Amendment are often overlooked. History books neglect to address the fact that a clause in the 13th Amendment allowed prisons to force convicts into a quasi-slavery, fueling modern mass incarceration of Black Americans.

According to Amendment 13 in Section 1 of the Constitution of the United States of America, "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This clause essentially gave former slave owners a way to re-enslave their freed slaves simply by convicting them of some crime. As time went on, more and more Black Americans were arrested.

Immediately after slave emancipation, Southern states banded together and developed a system, coined "convict leasing," which allowed private contractors to use the convicts for any labor-intensive work they so desired. The high demand for convicts pushed local law enforcers to continue arresting former slaves (Plantation to Prison 2018).

By 1928, new economic, political, and industrial changes had abolished convict leasing, but a new form of enslavement, called chain gangs, sprung up to replace it. The State openly marketed the image of Black Americans as criminals by having chain gangs work in public areas. The Virginia Supreme Court even went so far as to say that an incarcerated person was in fact "a slave of the State" (Delaney et al. 2019). However, the public manner in which Black Americans were associated with crime wasn't confined to the South. The Great Migration, from the 1920's to the 1970's, sent a large group of Southern Black Americans to the North. This migration incited a great deal of public fear, and media coverage of violent crimes only enflamed the public and branded Black criminals as public enemies. In addition, false scientific papers

coupled with films such as "The Birth of a Nation" only added to the portrayal of Black men as criminals.

The 1960's marked the era of mass incarceration and political rhetoric that increasingly included racist undertones. Policies stemming from this rhetoric were necessary to curb the influx of Black Americans to urban centers and allowed law enforcement to efficiently arrest large numbers of Black people. Politicians used the riots that broke out during the Civil Rights Movement as a campaigning point. They gained public support by enacting harsher punishments on Black people in these riots. This strict policing of Black Americans strengthened the association between Blacks and criminal activity.

The epitome of this era's motivations was the War on Drugs. This War on Drugs kicked into full force in the 70's when President Reagan strengthened drug laws, resulting in a massive swell of prisoners by the end of the decade. Despite the fact that the War on Drugs conveyed an easily supportable message—to reduce drug use—it actually served as a method to clear the streets of minorities and other impoverished people in order to restore social order. Policy makers enacted harsher punishments on drugs that are associated with the Black and Latino demographics than those associated with Whites, once again finding a way to clear the streets of Black Americans and imparting this bias that minorities are more associated with crime.

In his book *High Price*, Dr. Carl Hart discusses drug use, addiction, and its role in society. Hart offers a unique perspective on this situation as a Black American who grew up in a community of poverty, replete with crime and drug use. In his scientific studies, he found that only 10 to 15 percent of the people who use illegal drugs are chemically addicted. Despite this fact, the use of crack cocaine is more heavily enforced than powder cocaine. Possession of 28 grams of crack cocaine results in a five-year minimum federal sentence, however, it takes 500

grams of powder cocaine to mandate this same punishment (Cocaine and Crack 2019). This raises the question: why are these punishments so extremely different? Looking at the demographics that use each kind of drug gives rise to an answer. For the most part, crack cocaine is associated with the Black population, while the White demographic are more likely to use the powdered form of the drug (Hart 2014, 56). As a result, Black people were more harshly punished than White people who committed similar offenses, supporting the cyclic incarceration and re-incarceration of Black populations under the guise of public health, while leaving White populations largely untouched. Not only did this further oppress a marginalized group, but it also further perpetuated the figure of the Black criminal and the Black drug user. This realization is just one piece of evidence supporting the theory that movements such as the War on Drugs were actually just wars on minorities.

Thus, it isn't surprising that 38 percent of prison populations are Black Americans, despite being only 13 percent of the overall American population (Balko 2018). Considering this history in light of the results of the IAT tests—which showed a negative correlation against Black people—conducted on the public and judges, it is not difficult to see that the cause of much implicit bias present today is the result of a historic focus on disproportionately prosecuting minority groups.

THE ROLE OF RACIAL BIAS IN THE COURTROOM

It is this social perception of racial bias, founded in American history, that affects judges' and prosecutors' implicit biases in today's criminal justice system. These implicit biases make an impact in three ways, each ultimately resulting in the reaffirmation of the social perception that caused the bias to begin with. First, a higher number of Black Americans are stopped, frisked,

and subsequently arrested by police than other demographics. Second, judges in pre-trial deliberations are more likely to assign higher bail to Black Americans than other racial groups. Finally, prosecutors and judges are more likely to offer plea bargains to Black people than any other demographic.

The impacts of drug discrimination are negative even beyond the stricter punishments, like those shared by Dr. Hart, doled out by laws. The narrative relating black people to drug and other criminal activity has resulted in biases in police activity as well. Minorities and Americans of low socioeconomic standing are much more likely to be stopped and searched than White Americans. This results in a higher percentage of these demographics going to court to begin with, compared to White Americans. Empirical evidence shows that this prosecution is unwarranted. According to Van Jones, the founder of a company working on reducing the number of inmates in prisons, Black and White youth use illegal drugs at the same rate, yet Black youth are six times as likely to be arrested (Plantation to Prison 2019). The history of unfair treatment against Black Americans unconsciously influences police officers to target this population today, resulting in a disproportionate number of these people exposed to the other two mechanisms mentioned.

Bail has been a part of the criminal justice system for centuries, founded in the hope of making the trial process more equal and respectful of people's daily lives. However, its tie to wealth as well as the nuanced methods in which bail is assigned only adds injustice to the pre-trial system.

According to Title 18, Section 3553 of the U.S. code, the factors to be considered when deciding a bail sentence include "the nature and circumstances of the offense and the history and

characteristics of the defendant," the "need for the sentence imposed," and "the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

The law code doesn't account for the implicit bias that we see in judges—specifically in how they account for "the need for the sentence imposed," namely analyzing risk of the defendant. A paper published in the Boston College Law Review links this idea of implicit bias in judges to their rulings saying that they "may consciously or subconsciously perceive race as a proxy for recidivism or latent criminality" (Berdejo 2017, 1198). Furthermore, a paper by Arnold et al. published in The Quarterly Journal of Economics adds that "judges rely on inaccurate stereotypes that exaggerate the relative danger of releasing black defendants" (Arnold et al. 2018, 30). These biased behaviors result in an increase in bail for Black defendants. According to a 2010 survey, this increase could be up to ten thousand dollars (Bushway and Gelbach 2010, 9).

This increase in bail directly impacts the success that Black Americans have in defending their cases. In his paper "Should the Wealthy Be Able to 'Buy Justice,'" John Lott notes that "the evidence suggests that high-income people have a greater probability of making any given level of bail and that making bail lowers the probability of conviction" (Lott 1987, 1313). With higher bail prices, there is a higher probability that Black Americans will be convicted, potentially for crimes they did not commit, furthering the narrative that Black people are more associated with crime and more likely to be guilty. In addition, inability to make bail forces those who are already at or below the poverty line to miss work and sacrifice their income. This can quickly devolve into property seizure and family strife, compounding on an already disadvantaged situation. This new dire position, after what could be a faulty arrest, might only incentivize crime necessary for sustenance.

The situation only deteriorates further once plea bargaining comes into play. At arraignment, a defendant is faced with a charge—typically, this is the maximum charge or punishment to which the defendant will be held if he or she goes to trial. A plea bargain is a deal prosecutors can offer to the defendant which lessens the charge given if the defendant admits to committing the crime. While an acquittal is the best way for defendants to avoid jail time and other penalties, going to trial is perceived as risky since it is impossible to predict what a jury will decide. Additionally, it could take a significant amount of time for the defendant's case to go to trial, and an inability to afford bail means the defendant would be waiting in jail. In return, prosecutors and courts hope to alleviate their workloads by avoiding trial in some cases (Devers 2011, 1). A caveat is that plea deals guarantee a felony conviction, even if the defendant is innocent.

A glaring flaw in the plea deal system comes to light when considering implicit bias. Studies show that minorities and low-income demographics are often targeted by plea deals. Black defendants are 19 percent more likely than White defendants to receive plea deals that include prison time. In addition, Black people charged with misdemeanor offenses or drug offenses were more likely to be held in jail or prison at their arraignment (Demby 2014). These statistics show that the District Attorney and judges can implicitly compel minorities into accepting plea deals at a higher rate than other demographics, both by offering them a greater number of deals and by holding them in conditions that make plea deals look more favorable. Plea bargains simply make it easy for prosecutors to exercise their implicit bias against Black Americans by convicting defendants who may not be guilty or whose "crime" may be a result of poverty, thus only reaffirming society's implicit bias.

Accepting a plea deal and obtaining a criminal record greatly restrains economic and social mobility. According to the Pew Trust, having a record "reduces hourly wages for men by approximately 11 percent, annual employment by 9 weeks and annual earnings by 40 percent." Moreover, a criminal record impacts Black males the most, depressing their income by 9 percent compared to just 2 percent for White males (Collateral costs 2010, 4). These statistics show that the results of a criminal record can shift lifestyles to favor those with more criminal behavior. Individuals in low socioeconomic standing really have no good option, which makes it easy to coerce plea deals out of them. Any choice they make will likely result in a reaffirmation of this negative social perception.

The scale at which plea bargains happen is enormous. Scholars argue that "approximately 90 to 95 percent of both federal and state court cases are resolved through this process" (Devers 2011, 1). With millions of cases passing through courts every year, plea offerings result in a large number of minorities admitting to crimes (May 2018). These plea bargains contribute to the skewed incarceration rates of different races. According to 2010 census data, the incarceration rate for White people is 0.45 percent, 0.831 percent for Latino people, and 2.31 percent for Black people ("Not in it" 2017). Seeing minorities admitting guilty to a significant greater amount of crimes than Whites continues to drive the negative social perception that minorities are inherently criminal and reaffirm the identical implicit biases.

The implicit bias created by years of racial injustice associated with the Criminal Justice System has left much of America with a tough choice, one similar to the one Tyrone Tomlin faced in 2014. Either commit to your innocence and potentially spend months waiting for trial, where you are unable to make a living and spend time with family, or plead guilty to a crime you

may not have committed, pay a lesser price, but live with the consequences of this conviction on your record for the rest of your life.

IS THERE AN END TO THE CYCLE?

In order to try and reduce some of the bias that exists, people have tried to use machine learning to classify this recidivist factor. Though it appears like change is being made, the use of algorithms in risk assessment for determining bail prices can be extremely faulty, especially when trained on biased data—data that we, biased people, provide. The most popular of these algorithms is called COMPAS and is used in virtually every state. Research conducted by Julia Dressel, a Dartmouth alumna, showed that COMPAS isn't any better at predicting the chance defendants recidivate than asking a random group of people for their prediction. Specifically, the same accuracy of COMPAS's collection of 137 features can be achieved with a simple linear model of two features (Dressel et al. 2018, 1). This means that all of the fancy and complicated technology that is working behind the scenes in COMPAS is only as good at predicting the chance defendants commit another crime as a simple linear regression — a mathematical method taught in high school. At the end of the day, biases in the courtroom still exist.

The data that is being fed into this algorithm is padded with counts of minorities accepting plea deals. With 70 to 90 percent of misdemeanor and felony cases pleading out before trial—according to the same HRW report mentioned earlier—due to the mechanisms enforced by implicit bias, there is no way to get accurate enough data to train these models on.

With no easy or obvious solution to this cyclical problem in sight, it is important to continue to raise awareness. The problem is founded by faulty social perceptions against minorities, so it is us up to us as a society to change these views. Thus, in interacting with your

daily activities, take time to analyze what the story behind someone else's position might be. Continuous reflection and understanding can lead to new ideas. A redistribution of funding could ameliorate this problem: with ten to sixty thousand dollars being spent every year on inmates, perhaps funding could be siphoned off into more productive mediums. If not an economic solution, perhaps a social policy solution could offer more traction against this problem. Regardless, social awareness is needed to force communities to address the matter at hand.

More accurate information leads to more fair decision making and continuing to vocalize what the real story is behind implicit judge bias, and the distribution of "criminals" in American prisons, is a must. With millions of people's livelihoods affected by factors out of their control, spreading awareness is a right step down a path after hundreds of years of wrong ones.

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