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Afterword: Criminal Justice and the Problem of Institutionalized Bias—Comments on Theory and Remedial Action

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Introduction	935
I. The Assertions	936
II. What Is Racial Bias?	939
Conclusion.....	943

INTRODUCTION

Each of the articles included in this symposium addresses a critical problem of inequality within the criminal justice system, beginning from the moment that the criminal law, via police, comes into contact with citizens¹ through to its continued reach well after, or even without, conviction and sentencing.² Multiple stages of process are examined here, including detention,³ criminal charging by prosecutors,⁴ jury trials,⁵ and prison disciplinary practices that occur postsentence.⁶ The authors are concerned with how disadvantages fall upon marginalized communities, namely the poor, persons of color, and women. These disadvantages can occur when members of these communities are suspected of, charged with, or convicted of crimes as well as when they are victims of crime.

Each article also asserts a theory about how or why inequality occurs in the

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1. See Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735 (2015).

2. See Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the "War on Drugs,"* 5 U.C. IRVINE L. REV. 783 (2015).

3. See Bryan L. Sykes et al., *The Fiscal Savings of Assessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013*, 5 U.C. IRVINE L. REV. 813 (2015).

4. See Jonathan Markovitz, *"A Spectacle of Slavery Unwilling to Die": Curbing Reliance Upon Racial Stereotyping in Self-Defense Cases*, 5 U.C. IRVINE L. REV. 873 (2015).

5. See Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843 (2015); Markovitz, *supra* note 4.

6. See Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759 (2015).

particular site of analysis, either implicitly or explicitly. In my comments, I want to examine these theoretical assertions to offer a more holistic and comprehensive model of institutional inequality, as exists in the U.S. criminal system. In Section I, I offer a reading of each article in this symposium as to how it frames the problem of racial and other inequities in the given site of inquiry and what it offers by way of remedial intervention. In Section II, I briefly delineate the prevailing social science theorizing about the problem of racism, especially as applied to legal contexts. I then suggest an integrated model that may have more utility in explaining and remediating institutionalized bias in the criminal justice system. I conclude by asking whether this model might generate further possibilities for intervention in the sites interrogated by the symposium articles.

I. THE ASSERTIONS

Eric Miller begins his analysis at the point of police encounters, wherein (typically) beat officers intervene with members of the public in interactions that range from “the non- or minimally-intrusive (such as ‘exchanges of pleasantries or mutually useful information’), up to the very intrusive (such as asking for identification, following an individual for an extended period of time, or questioning them).”⁷ Miller leaves aside the question of how members of the public are identified and selected for encounters, focusing instead on how those selected are treated once encountered.⁸ Miller argues that contestation against police encounters has the potential to strengthen democratic institutions, but that this strategy can differentially harm those who contest, depending upon their own identities. Specifically, he suggests that “minorities and the poor”⁹ are especially likely to be mistreated when they contest encounters. He offers a two-part explanation for why this is so. First, he turns to the prevailing individual-level explanation of racism—implicit bias—to explain that officers are not immune from cognitive biases that make them view minorities as more hostile, aggressive, and criminally involved.¹⁰ Thus, he argues, the encounter is more likely to happen to minority members of the public, and minority members’ contestation of the encounter will be interpreted by police as more hostile than it will for contestations by white members of the public.¹¹ Second, he suggests that contestation by members of subjugated groups, especially women, escalates the gravity of the encounter under the prevailing conditions of authoritarian policing.¹² While he does not offer an intervention into the identified problem of implicit bias, he does argue

7. Miller, *supra* note 1, at 736 (citing *Terry v. Ohio*, 392 U.S. 1, 13 (1968)).

8. *Id.* at 736.

9. *See id.* at 739–44.

10. *Id.* at 750.

11. *See id.* at 753.

12. *See id.*

13. *See id.* at 753–54.

that reorienting policing away from its authoritarian stance might mitigate against the escalation of contested encounters.¹⁴

Andrea Armstrong also relies substantially on implicit bias theory as an explanation for racially discriminatory problems at the other end of the criminal system. She goes behind prison walls to examine how staff judgments about disciplinary rule violations are shaped by prisoners' racial identity.¹⁵ Armstrong, like Miller, views the interpretation of words, behavior, and nonverbal cues for possible rule violations by an authority figure (here a correctional staff member) as potentially tainted by implicit bias.¹⁶ She argues that, in particular, ambiguously defined disciplinary rules, such as those governing inmate attitudes and demeanor, can be and are differentially applied depending upon the racial identity of the suspected rule violator.¹⁷ Additionally, once identified as rule violators, nonwhite inmates are likely to be punished more severely due to biased perceptions of the seriousness of the underlying offense.¹⁸ Further, according to Armstrong, the law facilitates racial inequality in the prison disciplinary context by upholding the constitutionality of vague and ambiguous rules, contributing to an environment ripe for the influence of implicit bias.¹⁹ Rather than recommending a specific intervention for the problems she identifies, Armstrong calls for more data collection and analysis to establish more conclusively the role of implicit bias in disciplinary violation outcomes.²⁰

Cynthia Lee and Jonathan Markovitz are both primarily concerned with the potential for biases to influence adjudication processes, especially in the case of jurors as fact finders and decision makers. They examine cases in which criminal defendants rely upon negative stereotypes that portray black homicide victims as dangerous or threatening in an effort to justify the killing. Each author begins with an iconic contemporary case that exemplifies how this can happen: Markovitz uses the killing of Trayvon Martin by George Zimmerman in Sanford, Florida to propel his analysis,²¹ and Lee opens with Michael Brown's killing by Officer Darren Wilson in Ferguson, Missouri.²² Consistent with Armstrong and Miller's articles, Markovitz and Lee agree on the source of the problem. Both argue that implicit racial bias and negative stereotypes can powerfully shape how fact finders interpret and assess evidence in criminal cases, and both assert that court actors can and do prey upon these biases as an adversarial strategy.²³ They also agree that there is a need for

14. *See id.* at 756–57.

15. *See* Armstrong, *supra* note 6, at 762–73.

16. *See id.* at 764–68.

17. *See id.* at 770–72.

18. *See id.*

19. *See id.* at 773–78.

20. *See id.* at 781–82.

21. *See* Markovitz, *supra* note 4.

22. Lee, *supra* note 5, at 843–46.

23. *Id.* at 863–69; Markovitz, *supra* note 4, at 927–30.

intervention to mitigate this problem.²⁴ While they differ over what kind of remediation would be most effective, both maintain the individualistic, cognitive theoretical approach in crafting their interventions.

Lee argues that using voir dire to explicitly discuss the problem of bias, thereby making race salient for jurors, can remediate against the effects of bias.²⁵ Under this interventionist model, putting jurors on notice about “racial issues” that are inherent in the case and/or identifying racial bias as a potential problem for jurors will help inoculate them against the influence of unconscious biases that they may hold.²⁶ Markovitz further calls for an affirmative instruction to jurors, based on the Thirteenth Amendment’s prohibition of “badges or incidents of slavery,” that as a matter of law, it is unreasonable to rely upon racial stereotypes “to determine the nature of a violent threat” in self-defense cases.²⁷ He also recommends developing “methods of actively patrolling for legal actors who rely upon racial stereotypes, consciously or not.”²⁸

Conversely, the articles by Lahny Silva and Bryan Sykes, Eliza Solowiej, and Evelyn Patterson implicate structural conditions, both within and beyond the system, in producing inequalities.²⁹ Neither of these articles explicitly articulates a theory of how inequality is produced, but implicit in each is a model of its production. Sykes et al. are concerned foremost with fiscal costs associated with excessive pretrial detention in Cook County, Illinois.³⁰ Yet they make clear that this county’s system of managing suspects in the earliest stages of custodial detention, prior to formal charges being filed, not only contributes to added expenses for the county. It also produces injustices for detained suspects.³¹ In this case, detainees have the right, in theory, to representation during interrogation, but the procedure in place bars most suspects from actually exercising that right prior to formal court proceedings.³² This denial especially impacts poor defendants because public defenders, as a matter of policy, may not be appointed to represent defendants until the initial court appearance.³³ One consequence for justice, argue Sykes and his colleagues, is a higher risk of faulty convictions as defendants are compelled to waive their rights and submit to coercive interrogations without counsel. The authors also point to the potentially devastating disruption of work and family obligations that comes with sustained pretrial detention as a collateral injustice

24. Lee, *supra* note 5, at 866–69; Markovitz, *supra* note 4, at 926–33.

25. Lee, *supra* note 5.

26. *Id.*

27. Markovitz, *supra* note 4, at 877.

28. *Id.*

29. See Silva, *supra* note 2; Sykes et al., *supra* note 3.

30. Sykes et al., *supra* note 3, at 829.

31. *Id.*

32. *Id.* at 817.

33. *Id.*

produced by this policy.³⁴ Thus, Sykes et al. identify an institutionalized barrier, rather than biased individuals, as a causal force in inequality and injustice and offer a structural reform—appointment of counsel at initial detention—as the appropriate intervention.

Silva, as well, pinpoints policy—on the books and in practice—as the core problem underlying inequities in public housing. While she does not make an explicit claim about race, gender, or class bias in her contribution, she details how the policy of excluding otherwise eligible persons from public housing for their own or other household members’ “drug-related criminal activity” negatively impacts those so identified.³⁵ Specifically, she points to the enormous amount of discretion built into federal law and bestowed upon local public housing authorities to define and determine what constitutes actionable drug-related activity and who constitutes “household members” as responsible for producing systemic inequities.³⁶ Given the nature of the problem as she has identified it, her remedial intervention is also systemic, that is, to impose procedural standards adapted from criminal law. This would, in her view, set a higher evidentiary bar for finding criminal activity and offer protections to the accused households under the Fourth Amendment.³⁷ The examples Silva provides in the article sketch a portrait of those who have been subject to seemingly unreasonable evictions under existing policy. Caregivers, primarily women, are held responsible for behavior of others even when that behavior would be very difficult to detect.³⁸ Consequently, whole families lose their homes, sometimes based on activity that took place miles away, years prior, or by relative strangers to the leaseholder.³⁹

II. WHAT IS RACIAL BIAS?

The articles in this symposium replicate a bit of a theoretical divide in the social scientific literature about the nature and mechanisms of racial bias, inequality, and discrimination, that is, between individual-level, psychologically based explanations and group- or structural-level explanations more prevalent in sociology. The “implicit bias” line of theorization that is featured in the majority of these articles emerged from a subfield of psychology, social cognition, and currently dominates the discipline as an explanation of racism.⁴⁰ Generally, social cognition research suggests that “[m]any mental processes function implicitly, or outside conscious attentional focus.”⁴¹ Stereotypes, which are conceptualized as categorization

34. *Id.* at 833.

35. *See* Silva, *supra* note 2.

36. *Id.*

37. *Id.* at 810.

38. *Id.*

39. *Id.* at 799.

40. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

41. *Id.* at 947.

heuristics, and biases, which also include an evaluative component, are among those mental processes that can operate in such a manner.⁴² Thus, under the predominant implicit cognition model, racial bias is pervasive, even among those in subjugated groups, but it operates outside of the conscious control of those holding the bias.⁴³ The most well-known method for measuring implicit racial stereotypes and biases is the Implicit Association Test (IAT), which uses timed tests of association between race-based “attitude objects” and positive or negative terms.⁴⁴ Some evidence exists that implicit bias can predict discriminatory behavior under some circumstances,⁴⁵ however the cognition-behavior relationship is not very robust.⁴⁶

The discipline of sociology has not fully embraced the individual-level, “implicit bias” model as an explanation for discriminatory outcomes. As an epistemological matter, this is unsurprising given sociology’s concern with groups rather than individuals as units of analysis. Within sociology and the subfield of criminology, racially disparate outcomes are more commonly explained by variants of conflict theory, which posits that when minority groups threaten or challenge the majority group’s power, the majority group uses its institutional resources (such as the criminal justice system) to impede that effort.⁴⁷ This line of theorization, then, seeks to identify which groups control power and resources, as well as to pinpoint the kinds of structural resources, like laws, policies, and capital, that are wielded to maintain power. Empirical tests of conflict theory typically examine the relationship between various measures of minority group threat and aggregated measures of political, legal, and economic power.⁴⁸

As I have argued previously, in order to understand and remediate the pervasive inequalities in the criminal system, the ongoing tussle between the sociological and psychological approaches needs to be resolved.⁴⁹ Thus, I proposed an integrated theory that incorporates individual-, group-, and structural-level understandings of racism, since not one level of analysis can adequately explain the

42. David M. Amodio & Patricia G. Devine, *Stereotyping and Evaluation in Implicit Race Bias: Evidence for Independent Constructs and Unique Effects on Behavior*, 91 J. PERSONALITY & SOC. PSYCHOL. 652, 655 (2006).

43. See generally Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2007).

44. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18 (2009).

45. *Id.* at 32.

46. See generally *id.* (reporting relatively small correlations between measures of implicit and explicit bias and behavioral outcomes).

47. HUBERT M. BLALOCK, TOWARD A THEORY OF MINORITY-GROUP RELATIONS 116 (1967). For a test in the criminal justice context, see also David Eitle, Stewart J. D’Alessio & Lisa Stolzenberg, *Racial Threat and Social Control: A Test of the Political, Economic, and Threat of Black Crime Hypotheses*, 81 SOC. FORCES 557 (2002).

48. BLALOCK, *supra* note 47, at 119.

49. Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 92 (2013).

multiple processes that give rise to racial inequality in complex social systems.⁵⁰ I first documented the shortcomings of the mainstream psychological model, which inadequately accounts for situational, contextual, and structural forces that impinge upon the individual's autonomy to act.⁵¹ Indeed, the bulk of psychological research on implicit bias seems to assume that the behavior that results from biased cognitions is relatively unconstrained, discounting the large body of social research indicating that forces external to the individual powerfully shape individual action, more so than internal cognitions under many conditions.⁵² Nonetheless, much of the implicit bias research maintains the atomized individual-level approach. As a consequence, "the 'group' or the 'organization' is simply the additive sum of its individual members, so identifying and taming individuals' level of bias will solve the problem of group-based or organizational-level discriminatory decision making."⁵³

In macrolevel models, the sociological version of racism is also incomplete, but for very different reasons. The individual is not well theorized, if at all, and action can seem to have no agent whatsoever propelling it. Reading into sociological theorizations of racism for a theory of the person, there is often an implicit conception of the individual as a rational actor whose actions are driven by clearly defined (and rational) interests. Moreover, the mechanisms by which racism happens are under-theorized in many empirical and theoretical macrolevel treatments, so the causal process between, say, "threat" on one end of the hypothesis and discriminatory outcomes on the other is a bit of a black box.⁵⁴

For a robust theory of how bias occurs and persists in institutional settings like those that constitute the criminal justice system, the individual actor needs to be embedded in the institutional setting in which she operates. This requires thinking through how people and their environments interact to produce outcomes, including the kinds of troubling outcomes detailed in this symposium's set of articles. In order to do this, we must first clearly articulate the institutional parameters, including the institution's stated missions, policies, decision-making criteria and processes, and rules and regulations, as well as the less formal norms and ideological paradigms that comprise the setting and define the universe of possibility for organizational actions and responses. We also must delineate the

50. *Id.* at 107–08.

51. *Id.* at 110–11.

52. See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991). A good example from the social psychology of intergroup relations is that of "stereotype threat." Numerous studies have demonstrated that persons subject to racial or other stereotypes can be situationally "cued" that others see them stereotypically, and their behavior then conforms to the stereotype. For a review and summary of this body of research, see CLAUDE STEELE, *WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US* (2011).

53. Lynch, *supra* note 49, at 111.

54. *Id.* at 111–12.

duties, responsibilities, and modes of power inherent in the roles that institutional actors are assigned within each organization, as well as how those roles can be variably embodied depending upon who is filling them. Finally, we need to identify what constitutes outcomes, formally intended or not, within the institutional setting in question.

When thinking about how each of the various organizations within the criminal system operate and do business, it becomes clear that some *roles* will allow actors' biases (implicit or explicit) to have more room for influence; that some *decision-making criteria and processes* provide more opportunity for the decision makers' bias to influence judgments; and that some *outcomes* will be more or less vulnerable to inequities in their distribution. It should also be clear that in most cases it takes both actors and organizational conditions to produce a pattern of discriminatory outcomes. Yet, as a practical matter, it is more feasible to design remedial interventions that change organizational structures than it is to change individual cognitions. Both Lee and Markovitz grapple with that very conundrum as they debate how to contain and tame biases that are described as pervasively present in society and readily available for exploitation by attorneys in criminal cases.⁵⁵ Whether by instructing jurors or educating them about racial bias, such interventions may mitigate in individual cases, but they cannot address the deep structural problems that produce both the interracial violence at issue and the biased processes that precede the formal court adjudication processes.

Conversely, a sole reliance on adding or reforming law and policy, whether to heighten legal protections or to decrease ambiguity, will surely have limited remedial success without considering how laws and policies are put into action in the specific contexts in which they are deployed and by sets of actors who operate according to both role demands and more generalized ideologies, explicit and implicit, that shape their worldviews. A decades-long line of sociolegal research confirms that the gap between "law on the books" and "law in action" is fundamental to legality;⁵⁶ laws *always* get reshaped on the ground as a function of both proximate and distal forces that impinge on agents' actions.⁵⁷ This means that reforms must take into account the multiple ways laws and policies can be interpreted and deployed within the specific contexts of existing, localized criminal justice regimes.⁵⁸ And it means recognizing the adaptability and creativity of human actors to use laws and policies in furtherance of their own ends, while dressing up the outcomes to fit within the official parameters and goals of the organization.

55. See Lee, *supra* note 5, at 869–72; Markovitz, *supra* note 4, at 926–33.

56. Richard L. Abel, *Law and Society: Project and Practice*, 6 ANN. REV. L. SOC. SCI. 1, 5 (2010).

57. Mona Lynch & Marisa Omori, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court*, 48 LAW & SOC'Y REV. 411, 416 (2014).

58. *Id.*

CONCLUSION

The articles in this symposium expand the sites of inquiry to reveal evermore ways that contemporary American criminal justice systematically produces inequalities. Beyond the more well known and talked-about problems of racially disparate arrest patterns and sentencing disparities, the articles have detailed problems that precede and succeed both of these formal stages of process. More critically, they shine much-needed light on some of the darker corners of discretionary activity—the critical first moments of contact with the system via police encounters, as Miller details;⁵⁹ the period of legal purgatory before suspects become defendants, as Sykes et al. examine;⁶⁰ the black box of jury decision-making, as detailed by Markovitz and Lee;⁶¹ the add-on punishment practices that take place behind prison walls, as Armstrong elucidates;⁶² and as Silva describes, a critical instance of collateral sanctions that have seeped into the social welfare system: public housing exclusions for drug-related criminal activity.⁶³

In each of these sites, there is a critical need for tailored policy interventions that are cognizant of the diverse ways in which they may actually be applied by different actors and under different conditions. The authors start us down roads that have promise in this regard and open up space for thinking through more possibilities for sustainable remediation of the systemic inequalities that are deeply entwined with the everyday operation of American criminal justice.

59. Miller, *supra* note 1.

60. Sykes et al., *supra* note 3.

61. Lee, *supra* note 5; Markovitz, *supra* note 4.

62. Armstrong, *supra* note 6.

63. Silva, *supra* note 2, at 796–98.

