IMPLICIT RACIAL BIAS ACROSS THE LAW

Despite cultural progress in reducing overt acts of racism, stark racial disparities continue to define American life. This book is for anyone who wonders why race still matters and is interested in what emerging social science can contribute to the discussion. The book explores how scientific evidence on the human mind might help explain why racial equality is so elusive. This new evidence reveals how human mental machinery can be skewed by lurking stereotypes, often bending to accommodate hidden biases reinforced by years of social learning. Through the lens of these powerful and pervasive implicit racial attitudes and stereotypes, Implicit Racial Bias Across the Law examines both the continued subordination of historically disadvantaged groups and the legal system’s complicity in this subordination.

Justin D. Levinson is Associate Professor of Law and founding Director of the Culture and Jury Project at the University of Hawai‘i at Mānoa William S. Richardson School of Law. Levinson’s research explores the challenges to efficient decision-making, particularly in the context of implicit racial and gender stereotypes. He has written numerous articles and conducted empirical studies on implicit bias, including on implicit gender bias in the legal profession, skin tone bias in the evaluation of criminal evidence, and the implicit presumption of guilt for black males. He has also written about issues of cultural psychology and economic decision-making. Levinson previously practiced corporate and securities law at Wilson, Sonsini, Goodrich, & Rosati in Palo Alto, California, where he counseled technology companies at various stages of development.

Implicit Racial Bias Across the Law

Edited by

JUSTIN D. LEVINSON
University of Hawai‘i at Mānoa
William S. Richardson School of Law

ROBERT J. SMITH
University of North Carolina, Chapel Hill
To our parents
Contents

Contributors ix

Acknowledgments xi

Introduction: Racial Disparities, Social Science, and the Legal System 1
Justin D. Levinson

1 Implicit Racial Bias: A Social Science Overview 9
Justin D. Levinson, Danielle M. Young, and Laurie A. Rudman

2 Property Law: Implicit Bias and the Resilience of Spatial Colorlines 25
Michelle Wilde Anderson and Victoria C. Plaut

3 Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice 45
Charles Ogletree, Robert J. Smith, and Johanna Wald

4 Torts: Implicit Bias–Inspired Torts 61
Deana Pollard Sacks

5 Employment Law: Implicit Bias in Employment Litigation 80
Judge Nancy Gertner and Melissa Hart

6 Health Law: Cognitive Bias in Medical Decision-Making 95
Michele Goodwin and Naomi Duke

7 Education Law: Unconscious Racism and the Conversation about the Racial Achievement Gap 113
Charles R. Lawrence III
8 Communications Law: Bits of Bias
   Jerry Kang 132

9 Corporations Law: Biased Corporate Decision-Making?
   Justin D. Levinson 146

10 Tax Law: Implicit Bias and the Earned Income Tax Credit
    Dorothy A. Brown 164

11 Intellectual Property: Implicit Racial and Gender Bias
    in Right of Publicity Cases and Intellectual Property
    Law Generally
    Danielle M. Conway 179

12 Environmental Law: A Tale of Two Neighborhoods:
    Implicit Bias and Environmental Decision-Making
    Rachel D. Godsil 192

13 Federal Indian Law: Implicit Bias against Native Peoples
    as Sovereigns
    Susan K. Serrano and Breann Swann Nu‘uhiwa 209

14 Capital Punishment: Choosing Life or Death (Implicitly)
    Robert J. Smith and G. Ben Cohen 229

15 Reparations Law: Redress Bias?
    Eric K. Yamamoto and Michele Park Sonen 244

Index 265
Contributors

Michelle Wilde Anderson is Assistant Professor of Law at the University of California, Berkeley, School of Law.

Dorothy A. Brown is Professor of Law at Emory University.

G. Ben Cohen is Of Counsel to the Justice Center’s Capital Appeals Project in New Orleans, Louisiana.

Danielle M. Conway is the Michael J. Marks Distinguished Professor of Business Law at the University of Hawai‘i at Mānoa William S. Richardson School of Law and Director of the University of Hawai‘i Procurement Institute.

Naomi Duke, MD, is the Medical Director of the West Suburban Teen Clinic in the greater Twin Cities area of Minnesota and a PhD candidate at the University of Minnesota.

The Honorable Nancy Gertner is U.S. District Court Judge (retired) for the District of Massachusetts and Professor of Practice at Harvard Law School.

Rachel D. Godsil is the Eleanor Bontecou Professor of Law at Seton Hall University School of Law.

Michele Goodwin is the Everett Fraser Professor in Law at the University of Minnesota and holds joint appointments at the University of Minnesota Medical School and the University of Minnesota School of Public Health.

Melissa Hart is Associate Professor of Law at the University of Colorado Law School.

Jerry Kang is Professor of Law at UCLA School of Law and Korea Times–Hankook Ilbo Chair in Korean American Studies at UCLA’s Asian American Studies Center.

Charles R. Lawrence III is Professor of Law at the Georgetown Law Center and Centennial Professor at the University of Hawai‘i at Mānoa.
Contributors

Justin D. Levinson is Associate Professor of Law and Director of the Culture and Jury Project at the University of Hawai‘i at Mānoa William S. Richardson School of Law.

Breann Swann Nu‘uhiwa is a Post–Juris Doctor Research Fellow at the Ka Huli Ao Center for Excellence in Native Hawaiian Law, which is housed at the University of Hawai‘i at Mānoa William S. Richardson School of Law.

Charles Ogletree is the Jesse Climenko Professor of Law at Harvard Law School and the Founder and Executive Director of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School.

Victoria C. Plaut is Assistant Professor of Law and Social Science and Affiliate Faculty in Psychology at the University of California, Berkeley, School of Law.

Laurie A. Rudman is Professor of Psychology at Rutgers University.

Deana Pollard Sacks is Professor of Law at Texas Southern University Thurgood Marshall School of Law.

Susan K. Serrano is Director of Educational Development at the Ka Huli Ao Center for Excellence in Native Hawaiian Law, which is housed at the University of Hawai‘i at Mānoa William S. Richardson School of Law.

Robert J. Smith is Assistant Professor of Law at the University of North Carolina, Chapel Hill.

Michele Park Sonen is Law Clerk for the Honorable Susan Oki Mollway, Chief Judge, District of Hawai‘i.

Johanna Wald is Director of Strategic Planning and Development at the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School.

Eric K. Yamamoto is Professor of Law at the University of Hawai‘i at Mānoa William S. Richardson School of Law.

Danielle M. Young is a postdoctoral researcher in Rutgers University’s Department of Psychology.
Acknowledgments

We would like to thank the terrific scholars whose work is collected in this book. We also wish to express our gratitude to Aviam Soifer, Dean of the William S. Richardson School of Law at the University of Hawaiʻi, for his generous financial support. Nicholas Costa provided outstanding research assistance.
IMPLICIT RACIAL BIAS ACROSS THE LAW