

# On Race, Judgment, and Ideology

By Samuel R. Sommers\*

Upon being asked to contribute to a journal for the “Legal Left,” I immediately focused my cognitive energy on the effort to identify the basis for the invitation. This was an automatic response that I could not help. After all, as a psychologist I chronically seek attributions for others’ actions and ponder influences on social judgment.<sup>1</sup> So why was I singled out and contacted for a submission? Is there something about my academic affiliation, my departmental website, or even my name that implies a particular ideological bent? Has the editorial board used my published work to draw inferences regarding my political beliefs? Or does my research focus on issues that are of particular interest to people who self-categorize as “on the left?”

As is often the case in with such attributional efforts, my sleuthing came to no definitive conclusions. But for the purposes of this article, I choose to endorse the final possibility above, namely that my work generates findings that intrigue the intended audience of this journal and are consistent with its priorities. Why? For one, this conclusion makes for a more interesting piece, as I can write about my research as opposed to myself. So, despite its informal and somewhat introspective style, this article does not follow the lead of some contributions to the debut volume of this journal, as it does not rely on personal anecdotes or reflections on, for example, how I became interested in studying race and legal judgment. This decision, I am quite sure, will disappoint few readers not related to me by blood or marriage.

The other, more important reason for my decision to presume that this invitation was based on the topic of my work—and not on an inference about my personal politics—is that this conclusion allows me to maintain the belief that these two entities are distinct, or at the very least unidirectional in their causal relationship. Perhaps this is naïve or even deluded, the idea that a researcher’s conclusions can remain uninfluenced by his or her ideological beliefs. But this assumption is important to me as a scientist, and not—as a skeptic might suggest—as a mere façade to maintain the pretense of impartiality. My research conclusions are based on empirical data and interpreted through theory. To the

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<sup>1</sup> In addition to such cognitive tendencies, we psychologists have an aversion to footnotes. Please bear with me as I provide citations in the main text and include a References section at the end of this article. Consider the few footnotes herein to be interdisciplinary olive branches, if you will—tokens of good will offered to the reader more accustomed to Bluebook style.

extent that my work and my politics intersect, I prefer to believe that the data affect my ideology, and not vice versa. In fact, it is important to me that this be the case.

I strive for this objectivity in my teaching as well. When I talk to my undergraduate psychology students about affirmative action, for instance, I go to great lengths not to tell them what to think. Rather, I have general theoretical points to convey to them so that they can make up their own minds in an informed manner. When I was pursuing my Ph.D. at the University of Michigan, it shocked me to discover that my students—many of whom had strong attitudes about the *Gratz* and *Grutter* lawsuits still underway at that time—knew so little regarding the specifics of the University admissions process. So we spent one class reviewing the undergraduate college's point-based policy and considering it in light of psychological findings. When I teach this topic at Tufts, I take a similar approach. I tell the students that I do indeed have very strong attitudes about this issue, but the classroom is not the venue in which I will share them. Instead, we focus on how psychology informs the debate. We review the old Michigan policies, and I challenge students to scrutinize their own opinions. If they harbor a principled objection to “race as a plus factor,” are they also opposed—and equally so—to preferences based on gender or legacy status? Why, in their opinion, does the controversy regarding college admissions focus almost exclusively on race and not these other factors?

I have decided to adopt the same strategy in this article. I do have strong political beliefs, and I will present to the reader the same offer that I extend to my students: if you ever want to meet over coffee—or more realistically in my case, over soda<sup>2</sup>—I would be happy to share them with you, to argue with you, and perhaps to agree with you. But the rest of this article will focus elsewhere, namely on three major conclusions of my research that have implications for the legal system, and on the intriguing (to me at least) question of why these findings are of particular interest to the “legal left.” Because to my thinking, these are conclusions derived from objective data about issues of great importance. It is hard for me to fathom why they would appeal to one side of the political continuum and not the other. I see little in traditional definitions of “left” and “right” that would bestow upon one group proprietary rights to an interest in understanding bias in legal judgment (or, for that matter, that would imply a disproportionate lack of concern by one group for the rights of individuals within the legal system). And, to be fair, I have no way to confirm that the issues I study do not interest the legal “right” or even the “center.” For whatever it is worth, all I have to go on is the fact that to this point, no representatives of either of these entities have extended to me an invitation to submit to their journals.

### *Race Colors Judgment*

Time and time again, when asked what take-home message I would like my research to provide, I utter this phrase: *race colors judgment*. Even in this day and age, when many

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<sup>2</sup> Here, two birds with one stone: a personal disclosure as well as another footnote. What a liberating change of pace from my typical scientific writing experiences... I could get used to this.

people are motivated by a desire to be fair-minded and in some instances colorblind, race has the potential to profoundly affect social perception and judgment. Sometimes I add an epilogue to my response: *race colors judgment, even when we least expect it to*. This is a conclusion with profound implications for the legal system. In collaborations with Phoebe Ellsworth, we have demonstrated that jury-eligible Americans sometimes make different decisions about the same trial scenario when nothing other than the defendant's race is varied between versions (Sommers & Ellsworth, 2000; 2001). White mock jurors tend to render more punitive judgments and form more negative impressions when a criminal defendant is depicted as Black as opposed to White; Black mock jurors show the opposite pattern.<sup>3</sup>

The "even when we least expect it" conclusion comes from a result among White mock jurors. When we initially started this research, we assumed that racially-charged cases would be most likely to elicit discrepancies in the evaluations of White and Black defendants. Our results indicated the exact opposite, however. In racially-charged trials—one example we have used is a case involving a locker room assault between members of a high school basketball team with a history of racial hostility—White mock jurors tend to make similar judgments when a defendant is portrayed as White or Black. It is in more run-of-the-mill cases with no blatantly racial issues that we have observed the biasing influence of race. Such findings are consistent with theories of contemporary racial attitudes, which suggest that Whites are often able to avoid the influence of race on judgment and behavior when they are reminded of their motivations to appear egalitarian (see Gaertner & Dovidio, 1986). Absent red flags regarding racial issues, however, when Whites let down their guard, the subtle biases and associations that most people carry with them (see Greenwald & Banaji, 1995) can bubble up to the surface and influence judgments.

Our studies are by no means the only ones to use an experimental research design to conclude that a defendant's race can influence juror judgments (for review, see Sommers & Ellsworth, 2003). Other psychologists have found that a defendant's race can determine the extent to which mock jurors consider inadmissible evidence (Johnson, Whitestone, Jackson, & Gatto, 1995) as well as how carefully they evaluate an alibi (Sargent & Bradfield, 2004). In addition, there is little reason to believe that the influence of race in the legal domain is confined to the judgments of jurors. Indeed, in more recent work, Mike Norton and I have examined the influence of race on attorneys' judgments during jury selection (more details provided below).

That race can have these effects in the legal system should not be surprising, and need not be interpreted as a problem unique to the legal domain. Psychologists have documented the impact of an individual's race on judgments in a variety of settings, including clinical diagnoses of mental illness (Neighbors, Trierweiler, Ford, & Muroff, 2003), medical diagnoses (Laveist, Arthur, Morgan, Plantholt, & Rubinstein, 2003), ratings of profes-

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<sup>3</sup> Per American Psychological Association style, I use the capitalized "White" and "Black" throughout this paper.

sors (Vescio & Biernat, 1999), assessment of students (Staiger, 2004), perceptions of political candidates (Sigelman, Sigelman, Walkosz, & Nitz, 1995), and evaluations of job resumes (Bertrand & Mullainathan, 2004). Thus, the real surprise would be if such effects did *not* occur in the legal domain, if the legal system somehow emerged as the notable exception to the rule.

Daily judgments are frequently colored by social category information. I would assume that for most readers, expectations regarding this article changed somehow when they noticed that the author was a professor of psychology. What if I now tell you that although my research focuses on juries, I have never served on one myself? Does that impact, even ever so slightly, your confidence in my legal analysis? How about the fact that I am, by almost any standard, young for an academic, having recently celebrated my 30<sup>th</sup> birthday? Do I seem less qualified or competent now? If we move beyond your perceptions of this article, how would these same characteristics influence your evaluations of me were we to meet in person? What if I tell you that I am Jewish? That though I live and work in Boston, I remain a devoted Yankees fan? Or that I am a black belt in shuhitsu?<sup>4</sup> Certainly my membership in these categories influences in some way your perceptions of me, even if in a subtle, imperceptible manner. Accordingly, how could race not have similar effects on social judgment? Logically, it must, and empirical data suggest that it does. Why would this be a controversial conclusion? Why would it find a more receptive audience among legal professionals and scholars with particular political beliefs?

I am inclined to believe that any divergence in reactions to this conclusion emerges from the looming, foreboding, to-be-avoided-at-all-costs specter of the “racist.” In contemporary America, few if any labels are as aversive and unshakeable (Sommers & Norton, 2006). Regardless of political ideology, most people seek to distance themselves from the mere insinuation of racism. For many Americans, it is similarly threatening to admit that racism is still pervasive in our great society. This threat can lead to knee-jerk rejections of what the data indicate compellingly: the vast majority of us are racists, at least by colloquial definitions of the word as referring to individuals whose cognition, affect, or behavior towards a target is biased by that target’s race (psychologists would differentiate between these tendencies as representing—respectively, stereotyping, prejudice, and discrimination). Consider that when taking the Implicit Association Test (IAT)—a task requiring participants to categorize and pair with one another positive/negative words and stereotypically White/Black names—civil rights activists and even one of the co-creators of the test tend to demonstrate bias (Berdik, 2004; Vedantam, 2005). If these individuals exhibit bias, who are the rest of us to think that we have somehow escaped this tendency? Does this qualify as “racism?” Well, this is a largely semantic debate, to

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<sup>4</sup> I would be lying, but only on the last count. I am fairly confident no such martial art exists; I am entirely confident that if it did, I would be quite bad at it. However, my fellow psychologists may skim right over this footnote and develop an entirely new impression of me, thereby illustrating the malleability of social perception, as well as providing me with a good laugh. And with this, I end my experimentation with footnoting.

which I return below. If it helps you sleep better at night, I will offer a wording change to my conclusion: the vast majority of us *exhibit racial bias*, which has at least the potential to impact social judgment and behavior.

To borrow from Mahzarin Banaji, the aforementioned co-creator of the IAT, such bias seems to be ordinary, not extraordinary. This conclusion is not damning; to the contrary, it presents an opportunity. Given that race has automatic and nonconscious effects on social perception, a first step towards overcoming bias and preventing its influence on judgment is to recognize its pervasiveness. These tendencies are not ones to deny or shirk, but rather to discuss, confront, and wrestle with. Acknowledgement of bias need not lead to the indictment of an individual as a “bad person” or to the conclusion that a broader system or society is a failure. Instead, studies that identify the particular circumstances under which racial bias is most likely to impact judgment give us our best chance to work to eliminate it. Though members of the “left” and “right” would likely differ in their preferred methods of accomplishing this goal, I would expect that individuals in both camps should find this objective of reducing disparate treatment by race laudable and consistent with their ideological beliefs.

### *Denials of Racism Do Not Preclude the Possibility that Bias Has Occurred*

Admittedly less pithy than the first proposition above, this is nevertheless another conclusion of my work with implications for the legal system. Consider mock juror studies in which a defendant’s race is influential. Had we asked those jurors to list the factors that influenced them, I doubt that race would have been mentioned often if at all. As I wrote above, few social categories in contemporary society are deemed as undesirable as that of “racist” (Sommers & Norton, 2006). Recall, for example, the statement of President Bush in an interview in the aftermath of Hurricane Katrina, which indicated his preference for literally any other pejorative label that one can imagine: “you can call me anything you want, but do not call me a racist” (Williams, 2005). Along the same lines, people are loath to admit that race has influenced their judgments in any way. In fact, in some circumstances, Whites take concerns about avoiding the appearance of racism to an almost comical extreme, avoiding even the mere mention of race as a descriptor in casual conversation (Norton, Sommers, Apfelbaum, Pura, & Ariely, 2006). If Whites are hesitant to use racial category labels to describe other people (even when this information is diagnostic and useful), just imagine how unlikely the average White person is to admit that her judgment has been colored by race.

Data from the jury selection studies I mentioned above also illustrate this conclusion. In those experiments, we asked participants—college students, advanced law students, as well as experienced attorneys—to play the role of prosecutor and evaluate prospective jurors for a case (Sommers & Norton, in press). The trial in question involved a Black defendant, and intuition and “juror folklore” (Fulero & Penrod, 1990) suggest that a Black juror would be less likely to convict in such a case (and, thus, would be less desirable to the prosecution). Consistent with this prediction, participants were more likely to report

that they would use a peremptory challenge when the prospective juror was Black as opposed to White. But when asked to explain the basis for their judgment, participants almost never cited race. Instead, their justifications focused on race-neutral aspects of the juror profiles. When the Black prospective juror was an investigative journalist who had written about police misconduct, participants cited familiarity with corruption as their principal concern. When the journalist was depicted as White and another prospective juror—who expressed unfamiliarity with science and skepticism about statistics—was depicted as Black, participants suddenly reported that attitudes about science were more important considerations than those about the police.

In this manner, these studies demonstrate not only that race influences jury selection judgments, but also that attorneys' self-report justifications for peremptory use (obtained in accordance with *Batson v. Kentucky*, 1986) are unlikely to produce information useful for identifying the influence of race. These findings go a long way towards explaining why so few peremptories are ultimately rejected by trial judges as violations of *Batson* (Melilli, 1996; Raphael & Ungvarsky, 1993): people are notoriously good at recruiting ostensibly neutral justifications for biased judgments (Norton, Vandello, & Darley, 2004), not to mention that in many instances, we remain genuinely unaware of the influence of factors such as race on judgment.

For all of these reasons, I offer the more general conclusion that denials of racism by no means preclude the possibility of bias. In fact, with the exception of the rare contemporary American who proudly boasts of racial bigotry, an immediate denial is the expected response to almost any allegation of racism. This tendency renders it all the more difficult to pinpoint the influence of race on any given judgment, a conclusion with implications for jury selection proceedings, job discrimination lawsuits, and a variety of other decision-making processes in the legal domain (see Norton, Sommers, Vandello, & Darley, 2006). That these denials are often heartfelt and genuinely believed by those who issue them further complicates matters.

Mind you, I am by no means suggesting that accusations of racism are always accurate, or that denials of racism are always invalid. Some allegations can be assessed using empirical data, and others are subjective determinations left for juries to sort out. What I argue is that denials of racism are expected, ubiquitous, and seemingly inevitable. They therefore provide little assistance in determining whether bias has actually occurred. People are often genuinely unaware of the influence of race on their judgments, as well as unwilling to admit this influence to others or to themselves. I do not propose that denials of racism be summarily rejected, but rather that the mere existence of such a denial does not preclude the possibility that bias has occurred. Other, often elusive information is necessary to allow such a conclusion, including how the individual judged other comparable targets with different racial group memberships, or whether the act in question was an isolated event or part of a more systemic pattern. I recognize that my argument here is not wholly consistent with traditional legal perspectives on discrimination. I propose that data aggregated across multiple judgments are most useful for identifying bias, but the traditional jurisprudence of discrimination focuses more narrowly on the individual

decision under dispute (e.g., *McCleskey v. Kemp*, 1987). And though recent Supreme Court rulings have recognized that racial bias can be ambiguous and the result of mixed motives (e.g., *Desert Palace v. Costa*, 2003), legal precedent typically requires plaintiffs to prove that employment discrimination was conscious and intentional.

Not long ago, I was contacted by an attorney for an expert consult regarding a workplace discrimination suit. Of course, I cannot provide many details of the confidential conversation, but the gist of the attorney's request was for me to evaluate the plaintiff's claims regarding a hostile work environment. The attorney emphasized how committed her clients were to creating an inclusive, welcoming atmosphere, citing in particular the extensive diversity training implemented at the company. It was clear that in her mind, the fact that the executives made a public commitment to inclusion rendered it impossible for them to be biased. Accordingly, by her logic, the plaintiff's complaints must have been misguided and inaccurate—a conclusion she hoped I could confirm. I told her that I doubted I would be able to do this, and I certainly could not offer an informed opinion without reading through the specifics of the complaint. She seemed flummoxed that her assurance of the executives' good will was insufficient for me to give them the benefit of the doubt; among other disparities between her and my impressions of the case was that she was operating under the assumption that racial bias required conscious, pernicious intent.

I understand why plaintiffs' and defendants' attorneys would have different reactions to the conceptualization of bias as subtle, sometime unconscious, and perpetrated even by individuals with no malicious intent. An old-fashioned, narrowly-tailored definition of bias serves some attorneys better than others. But does it serve the "legal left" better than the "legal right?" I suppose it does to the extent that these ideologies are distinguished by adherence to traditional values and resistance to departure from precedent. However, I do not think that the potential divergence between "left" and "right" in this instance would occur in terms of recognition that race can impact thought associations, perceptions, or affective reactions—the data are fairly convincing on these points. Differences in the attitudes of "left" and "right" seem more likely to reside in the determination of whether such differential cognitions and reactions amount to "racism." Does the automatic, nonconscious association of "African American" and "violent" render someone a racist? Or do only blatant, unambiguous, hit-you-over-the-head, make-me-feel-better-because-at-least-I-don't-do-things-like-*that* actions of the sort depicted in overrated Academy Award-winning films qualify?

As I suggested above, to me this argument is more semantic than substantive. Unless it occurs in the context of an employment discrimination action, debate regarding whether a particular behavior meets conventional definitions of "racist" is less interesting and important than the conclusion that race is often associated with disparate perception and judgment. This is why my research focuses not on labeling people or behaviors as "racist," but rather on determining the extent to which we associate specific characteristics with certain racial groups and on identifying the circumstances under which such beliefs are (and are not) likely to predict judgment and behavior. These should be questions

of interest to scholars regardless of ideology, as should be the conclusion that—when it *is* essential to determine whether a particular judgment was or was not influenced by race—the investigation cannot begin and end with self-assessments (i.e. denials) by the parties involved.

### *Diversity Affects Group Performance*

I end with a conclusion about which I have less to write, as it is a newer research focus. My previous work on race and the judgments of individual jurors leads to the obvious follow-up question of how race affects legal decision-making at the group, or jury level. To examine this issue, I conducted a study in which the decision-making of racially-diverse and all-White 6-person mock juries was compared (Sommers, 2006). All participants were jury-eligible, and most were recruited in the midst of their actual jury duty at a county courthouse. In total, 29 mock juries watched the same video summary of a criminal trial involving a Black defendant. Juries were then read pattern jury instructions before deliberating on the case for up to one hour.

The objective of this study was to assess the observable effects of a jury's racial composition on its decision-making processes. Many have speculated about the effects of jury composition; consider, for example, the following quotation from Justice Thurgood Marshall in *Peters v. Kiff* (1972): "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable" (p. 503). Other legal scholars have echoed both of Justice Marshall's propositions, regarding the effects of jury composition (e.g., Hans & Vidmar, 1982) as well as the untestability of this proposition (e.g., Marder, 2002). Through the use of experimental methodology, I sought to begin an empirical examination of the heretofore "unknowable" impact of a jury's racial composition.

The data from my study indicated that, indeed, racially-diverse and all-White juries differed in noteworthy ways. Diverse juries considered a broader range of case facts and personal perspectives during deliberations than did all-White juries. Diverse juries made fewer factual errors during deliberations, and when errors were made, they were more likely to be corrected on diverse juries. Interestingly, Black jurors were not entirely responsible for these effects. Traditional assumptions about the importance of jury diversity—such as the one conveyed by Justice Marshall above—are usually based on the intuition that Black and White jurors bring to the table different experiences, attitudes, and interpretations. Therefore, diversity of jurors leads to diversity of ideas and information. Black jurors in this study were indeed active participants during deliberations, but the data indicated that White jurors were largely responsible for these results, as they behaved very differently depending on the racial composition of their jury. Whites on diverse juries raised more case facts, made fewer errors, and were more amenable to the discussion of controversial, race-related issues than were their counterparts on homogeneous juries.



To me, these findings make a compelling case for that which Justice Marshall implied over 30 years ago: jury representativeness is more than a moral or Constitutional ideal, it can also be an ingredient for superior performance. These findings have implications for more general efforts to ensure racial representativeness on juries, as they emphasize the importance of jury pool selection procedures that do not undersample minority citizens (see Cohn & Sherwood, 1999) as well as stricter enforcement of the prohibition against race-based peremptory challenges. Measures such as these not only protect the rights of venirepeople and defendants (and improve the perceived legitimacy of the system) but they also may lead to more thorough, systematic, and open-minded juries in some circumstances. Furthermore, it is important to bear in mind that the benefits of diversity in the present study were not wholly attributable to the performance of Black jurors. That the positive effects of jury diversity were more widespread—that membership on diverse juries actually led Whites to act as “better,” or at least more accurate and systematic jurors—is a provocative and noteworthy result.

This research is exciting to me because it also has potential implications for a wide range of domains, including the educational system, the corporate boardroom, and a variety of other contexts in which people interact and make decisions as groups. Are students in diverse versus homogeneous classrooms exposed to a wider range of informational perspectives, as well as motivated to process information more systematically? Do heterogeneous committees make “better” (or at least more thoughtful or less biased) decisions than less representative groups? I have now begun to examine these wide-ranging questions, and I believe this is work of theoretical as well as practical importance. Though the notion of “diversity” has become a catchphrase or buzzword in contemporary America, we still have a lot to learn about its actual influence on the performance of groups and their individual members.

To me, examining the observable effects of a group’s composition is an ideal way to assess diversity efforts. Discussing the Constitutional and moral issues related to diversity is certainly important, but such debates are polarizing, difficult to resolve, and typically conducted by ideological camps firmly entrenched in their respective positions. Consideration of the circumstances under which diversity has positive or negative effects on group performance may be a route through which common ground can emerge: Certainly, both the legal “left” and “right” would be in favor improving the fact-finding and decision-making of juries. Of course, it would be premature to suggest, based on just one study, that jury representativeness leads to such performance benefits in all cases. But to the extent that these findings can be replicated and extended, perhaps individuals of all ideological tendencies will gain, or at least reacquire an appreciation for the importance of representativeness. More generally, to the extent that diversity is revealed to be a positive influence on the performance of majority as well as minority group members in a variety of settings, perhaps policy discussions on the topic will become less antagonistic and polarizing.

### *Concluding Thoughts*

As I have made redundantly clear by now, I do not believe that investigations of the influence of race on legal judgment need be driven by political ideology. I do not have a political agenda in pursuing these lines of inquiry; in fact, for many of the investigations I have reviewed herein, my first data collection forays produced surprising results. I expected that to the extent that a defendant's race influences juror judgments, it would be most likely to do so in racially-charged cases. The data revealed otherwise. I was surprised at the degree to which the effects of jury diversity turned out to be attributable to the performance of White jurors, as well as by the finding that self-reported conflict during deliberations did not vary by jury composition.

If anything, these experiences leave me more convinced than ever regarding the importance of behavioral data when it comes to analyzing the legal system and social judgment more generally. A choice between conclusions based on anecdote, intuition, and ideology, and those based on data is no choice at all. I am not naïve enough to think that ideology never warps the filter through which data are interpreted; I fully recognize that two researchers can interpret and extrapolate the same finding in very different ways. But as I tell students in my research methods course, that is why we have follow-up studies. Competing interpretations produce empirical questions for future investigation. I have supreme confidence in the scientific method, in the peer review process, and in the incremental steps forward and backward that we take as researchers conducting studies regarding social judgment and behavior. In this article, I present to you my research findings not in an effort to advance a particular argument or set of political beliefs, but rather to add data to the otherwise controversial and polarizing dialogue regarding the role of race in the legal system and contemporary society at-large. I am gratified to learn that—at least in the opinion of the present editorial board—my continued efforts towards that end are of interest and perceived importance to the readership of this journal.

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