

**RACE AND OBJECTIVE REASONABLENESS IN USE OF FORCE CASES:
AN INTRODUCTION TO SOME RELEVANT SOCIAL SCIENCE**

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I. INTRODUCTION

The Black Lives Matter and #SayHerName movements have brought national attention to racial disparities in police violence levied against Black men and women.¹ According to a recent report, young Black men are nine

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1. Kimberlé Williams Crenshaw & Andrea J. Ritchie, *Say Her Name: Resisting Police Brutality Against Black Women*, AFR. AM. POL’Y F. 1, 4 (July 2015), https://timedotcom.files.wordpress.com/2015/07/b28d4-aapf_smn_brief_full_singles-compressed.pdf. The #SayHerName movement calls attention to police violence against Black women, arguing that Black women’s experiences have largely been erased from any media attention or protest focus. This movement seeks to name the Black female victims of police violence and remember their stories, including but not limited to Sandra Bland, Rekia Boyd, and Tyisha Miller. See, e.g., Evette Dionne, *Police Kill Black Women All The Time, Too – We Just Don’t Hear About It*, BUSTLE.COM (Dec. 8, 2014), <http://www.bustle.com/articles/52433-police-kill-black-women-all-the-time-too-we-just-dont-hear-about-it> (“While we grieve with the families of Brown, Garner, and countless others, black

times more likely to be killed by the police than men of other racial groups.² Although Black men only make up 6 percent of the population, a Washington Post report finds that they make up 40 percent of unarmed men fatally shot by the police.³ Black women make up only 13 percent of the female population, but make up one-third of all women killed by the police.⁴

Against this backdrop, in 2015, the U.S. Supreme Court decided *Kingsley v. Hendrickson*, a case involving the proper legal standard to apply in use of force suits brought under 42 U.S.C. § 1983.⁵ In the case, the petitioner, Michael Kingsley, was in jail awaiting trial when he was repeatedly asked by jail officers to remove a piece of paper covering a light fixture above his bed.⁶ When Kingsley refused, officers arrested him.⁷ After placing him in handcuffs, one of the officers tased Kingsley in the back for approximately five seconds.⁸

Kingsley sued under section 1983, alleging that officers used excessive force against him in violation of the Fourteenth Amendment's Due Process Clause.⁹ At trial, the judge instructed the jury that in order for Kingsley to prevail, he had to prove that the officers "knew that using force presented a risk of harm ..."¹⁰ On appeal, the Seventh Circuit held that a subjective inquiry into the officer's state of mind was appropriate, thereby requiring Kingsley to prove that officers had an "actual intent to violate" his rights.¹¹

The Supreme Court granted certiorari to resolve a circuit split about whether pretrial detainees bringing excessive force claims under Section 1983 must satisfy an objective standard or a subjective intent standard in order to prevail.¹² Justice Breyer, writing for the Court, held that an

women are tired of being placed at the fringes of the conversations about state-sanctioned violence. Justice can't only apply to black males.").

2. Jon Swaine et al., *Young Black Men Killed by U.S. Police at Highest Rate in Year of 1,134 Deaths*, GUARDIAN (Dec. 12, 2015), <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men>.

3. Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/>.

4. <http://www.aapf.org/sayhername/>

5. 135 S. Ct. 2466 (2015).

6. *Id.* at 2470.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 2471.

11. *Id.*

12. *Id.*

objective standard was appropriate.¹³ In other words, plaintiffs are not required to demonstrate that an officer intended to use unreasonable force. Rather, plaintiffs are only required to prove that the force used against them was objectively unreasonable under the circumstances.

In this symposium essay, we do not address whether an objective or subjective standard is appropriate in use of force cases. Instead, we introduce lessons from social psychological research that might influence how decision-makers apply the objective reasonableness standard. We discuss implicit racial bias, implicit dehumanization, the empathy gap, superhumanization bias, and social status, and explain how these mental processes might impact use of force analyses. Cumulatively, these concepts raise concerns that decision-makers might be more likely to evaluate violence against people of color as objectively reasonable than identical violence against similarly situated White individuals.¹⁴ We conclude this essay by calling for research to determine whether these processes will influence decisions in use of force cases, and if so, how to mitigate against their effects.

II. IMPLICIT RACIAL BIAS AND IMPLICIT WHITE FAVORITISM

Our brains use simple, efficient rules, known as heuristics, to help us navigate our social worlds.¹⁵ Heuristics streamline complex decisions by reducing cognitive load and allowing our minds to deal efficiently with large amounts of information.¹⁶ We use heuristics without being consciously aware that we are doing so.¹⁷ In fact, it would be extremely

13. *Id.* at 2472.

14. While *Kingsley* only addressed the legal standard for cases involving pre-trial detainees, similar dynamics will likely influence determinations of objective reasonableness in any use of force case, whether brought under the due process clause or under the Fourth Amendment. Claims of excessive force brought under the Fourth Amendment require asking whether an officer's actions were "objectively reasonable" in light of the circumstances confronting the officer, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. *Graham v. Connor*, 490 U.S. 386, 387 (1989).

15. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 98 (2011).

16. *Id.*

17. *Id.* at 97.

difficult for us to function in our daily lives if our minds did not process information quickly and without conscious effort.¹⁸ Just imagine how we would be constrained if we had to remember how to use a fork and knife each time we sat down to eat, or had to relearn how to operate a car every time we wanted to drive. Although we believe we have conscious access to and control over our perceptions, impressions, feelings, intuitions, beliefs, and judgments,¹⁹ automatic and unconscious mental processes often are the primary sources of these cogitations.²⁰

While heuristics allow our minds to work efficiently to reach satisfactory conclusions, heuristics also produce biases. Biases are systematic errors of judgment that predictably recur in certain situations.²¹ One situation where systematic errors occur in perception and judgment is when our minds perceive race. This particular error is referred to as implicit or unconscious racial bias.²² We will use the terms “implicit” and “unconscious” interchangeably throughout this essay.

Implicit racial biases consist of unconscious stereotypes and attitudes that are widely held and can conflict with conscious beliefs and feelings.²³ Very generally, these implicit racial biases tend to disadvantage Blacks²⁴

18. See David H. Ebenbach & Dacher Keltner, *Power, Emotion, and Judgmental Accuracy in Social Conflict: Motivating the Cognitive Miser*, 20 BASIC & APPLIED SOC. PSYCHOL. 7, 7 (1998).

19. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 187-96 (1991); Emily Pronin & Lee Ross, *Temporal Differences in Trait Self-Ascription: When the Self Is Seen as an Other*, 90 J. PERSONALITY & SOC. PSYCHOL. 197, 197 (2006); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002); Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: “Naive Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 404, 414-15 (1995).

20. ROSS & NISBETT, *supra* note 19, at 187-96.

21. KAHNEMAN, *supra* note 15, at 3-4, 130; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124-31 (1974).

22. For an in-depth discussion of the relationship between heuristics and implicit racial bias, see generally L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012).

23. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497-539 (2005) (describing a similar framework that he terms “racial mechanics”); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2043-56 (2011) (citing sources).

24. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1015-22

and other stigmatized social groups while they tend to benefit Whites.²⁵ This essay will focus on the influence of implicit racial biases on the perceptions of and judgments about Black and White individuals since the influence of these processes on these individuals has received the most attention in the social psychological literature.

Social science research over the last few decades suggests that we unconsciously associate Black men with danger, criminality, and violence.²⁶ This is because “violence and criminality have typified the stereotype of Black Americans for well over half a century.”²⁷ Regardless of whether one consciously subscribes to these negative racial stereotypes, the historical association between Blacks and crime in our culture has made the association automatic and unconscious.²⁸ As a result, these implicit racial

(2007); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876, 888-91 (2004); Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 302-05 (2008).

25. Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 891 (2015).

26. “The collective findings suggest that the perceived threat commonly associated with Black men may generalize even to young Black boys.” Andrew R. Todd et al., *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCHOL. SCI. 384, 384 (2016). See also Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. OF SOC. 717, 717 (2001).

27. Jenessa Shapiro, *Following in the Wake of Anger: When Not Discriminating Is Discriminating*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 1356, 1357 (2009) (citing Gordon W. Allport & Leo Postman, *The Psychology of Rumor*, 3 J. CLINICAL PSYCHOL. 402 (1947)). A number of researchers have shown that Blacks have been associated with violence and crime. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989); Birt L. Duncan, *The Effects of Race on Harm-Doer and Victim on Social Perception and Attributional Behavior*, 101 J. PSYCHOL. 103, 103 (1979); James D. Johnson et al., *Race, Media, and Violence: Differential Racial Effects of Exposure to Violent News Stories*, 19 BASIC & APPLIED SOC. PSYCHOL. 81, 81 (1997).

28. Stephanie Madon et al., *Ethnic and National Stereotypes: The Princeton Trilogy Revisited and Revised*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 996, 1000 (2001) (noting that Blacks are unconsciously associated with aggressiveness).

biases do not necessarily indicate conscious bigotry.²⁹ Lessons from social psychology reveal that many well-meaning and consciously egalitarian individuals hold unconscious racial biases that negatively influence behaviors toward and judgments of Blacks, and that positively influence behaviors toward and judgments of Whites.³⁰

Although negative unconscious associations concerning Black individuals are primarily directed toward Black men, they can also affect Black women and children. For example, Black women are more likely than White women to be perceived as male.³¹ This may result in stereotypes associated with Black male criminality being superimposed onto Black women, which could make Black women more vulnerable to violence.³² As for children, a recent study found that the unconscious association between Black men and criminality also applies to Black male children as young as five years old.³³

While significant attention has been paid to unconscious anti-Black racial biases, much less has been given to implicit white favoritism. Professors Robert Smith, Justin Levinson, and Zoë Robinson explain that implicit white favoritism is “the automatic association of positive stereotypes and attitudes with members of a favored group, leading to preferential treatment for persons of that group.”³⁴ In American culture, they argue, “implicit favoritism is white favoritism.”³⁵

Implicit white favoritism can also cause racial disparities in decision-making and judgment even in the absence of both conscious racial bigotry and unconscious anti-Black bias. As Professor Smith and colleagues explain, implicit white favoritism is not the same as race neutrality.³⁶ For example, when subjects were shown White faces below the level of conscious awareness in order to activate unconscious associations, a process known as subliminal priming, they were slower to identify weapons and

29. Devine, *supra* note 27, at 5.

30. David M. Amodio et al., *Neural Signals for the Detection of Unintentional Race Bias*, 15 *PYSCHOL. SCI.* 88, 88 (2004).

31. Phillip Atiba Goff et al., “*Ain’t I a Woman?*”: *Towards an Intersectional Approach to Person Perception and Group-Based Harms*, 59 *SEX ROLES* 392, 397, 399, 401 (2008).

32. *See id.* at 394. *But see* C.D. Navarrete et al., *Fear Extinction to an Out-group Face: The Role of Target Gender*, 20 *PSYCHOL. SCI.* 155, 155 (2009) (suggesting that the bias is weaker for Black women than Black men).

33. Todd et al., *supra* note 26, 384.

34. Smith et al., *supra* note 25, at 874-75.

35. *Id.* at 875.

36. *See id.* at 874-75.

other crime-related objects than when they had not been primed with any faces at all (the race neutral condition).³⁷ In contrast, subjects were faster at identifying crime-related objects when they had been subliminally primed with Black male faces.³⁸ Based on this and other studies, Smith and colleagues concluded that White men “are automatically and cognitively *disassociated* with violence.”³⁹ In other words, it is more difficult and more cognitively taxing for people to associate Whites with criminality.⁴⁰

There is evidence that implicit racial biases can influence behaviors and judgments in ways that can cause unwarranted racial disparities. This is most likely to occur when decision-making is highly discretionary, decision-makers are cognitively depleted (also referred to as cognitive overload), and information is limited and ambiguous.⁴¹ Thus, when judges, lawyers and jurors make decisions under these conditions, a resulting unjustified racial disparity is possible.⁴² Next, we discuss some ways that implicit biases can influence decision-making in use of force cases.

A. Biased Evaluations of Ambiguous Evidence

Numerous studies suggest that implicit biases can influence how individuals interpret ambiguous evidence.⁴³ In one inquiry, subjects read a vignette in which an individual behaved in a manner that could be evaluated as hostile.⁴⁴ The individual in the scenario not only refused to pay his rent

37. *Id.* at 895–98.

38. *Id.*

39. *Id.* at 898 (emphasis added); accord Todd et al., *supra* note 27, at 384.

40. Smith et al., *supra* note 25, at 898.

41. See, e.g., Eberhardt et al., *supra* note 24, at 876.

42. As is the case with most trials, jurors will likely be cognitively depleted as they are bombarded with new information, including testimony from witnesses, information from trial exhibits, and multiple jury instructions. For a comprehensive discussion of juries and cognitive depletion, see, e.g., J.J. Prescott & Sonja B. Starr, *Improving Criminal Jury Decision Making after the Blakely Revolution*, 2006 U. ILL. L. REV. 301, 335-36 (2006).

43. See, e.g., H. Andrew Sager & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 592 (1980).

44. Devine, *supra* note 27, at 10. A 2000 experiment tested a similar theory. Mock jurors were given a trial summary about a domestic assault incident. One version included explicit mention of race by the defendant; the other, though

until the landlord painted his apartment but also demanded reimbursement for a purchase.⁴⁵ After reading the scenario, subjects were asked to evaluate the individual on a number of different traits.⁴⁶ The results from the study suggest that implicit anti-Black racial biases led subjects to perceive the individual's behaviors as being more hostile than when these biases were not activated.⁴⁷ Other examples of how the unconscious association between Blacks and violence can influence perceptions include seeing weapons in the hands of unarmed individuals when none exist⁴⁸ and perceiving identical neutral facial expressions as being more threatening on Black faces than on White faces.⁴⁹

In research involving mock jurors, researchers found that implicit racial biases influenced the interpretation of ambiguous information in racially

identical in every other way, did not. The mock jurors were more likely to convict the Black defendant over the White defendant when race was not made salient. However, when it was, the jurors rated the White and Black defendants equally guilty. See Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 212 (2001).

45. Devine, *supra* note 27, at 10.

46. *Id.*

47. *Id.* at 12.

48. See Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1325 (2002); B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 287, 287 (2006) (noting that split-second decisions limit individual ability to control for racial bias caused by racial stereotypes).

49. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 643 (2003) ("Compared with individuals low in implicit prejudice, those high in implicit prejudice saw hostility as lingering longer and appearing more quickly on the faces of African Americans."). See also Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 342–45 (2004); Jon K. Maner et al., *Functional Projection: How Fundamental Social Motives Can Bias Interpersonal Perception*, 88 J. PERSONALITY & SOC. PSYCHOL. 63, 68 (2005) (Black faces perceived as angrier when implicit biases were activated); Mark Schaller et al., *Fear of the Dark: Interactive Effects of Beliefs About Danger and Ambient Darkness on Ethnic Stereotypes*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 637, 642 (2003); Jenessa R. Shapiro et al., *Following in the Wake of Anger: When Not Discriminating Is Discriminating*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 1356, 1358 (2009).

biased ways.⁵⁰ The subjects in this study were shown “evidence” from a purported convenience store robbery, including a photo of the masked perpetrator with only a sliver of his forearm visible.⁵¹ Half of the jurors saw a light-skinned forearm and the other half, a dark-skinned forearm.⁵² Afterwards, the subjects were asked to evaluate evidence that was ambiguous as to guilt or innocence.⁵³ For instance, they were told that the defendant had been served with a notice of eviction and that he was a member of an anti-violence organization.⁵⁴ The researchers found that the skin tone of the perpetrator influenced the mock jurors’ evaluations.⁵⁵ Those who saw the darker-skinned perpetrator were significantly more likely to judge the evidence as being more probative of guilt than innocence.⁵⁶ They also viewed the darker-skinned defendant as being “more guilty” than the lighter-skinned perpetrator.⁵⁷ These different evaluations were correlated with implicit, but not conscious, racial bias.⁵⁸

There is reason to suspect that implicit racial biases will influence judgments in use of force cases. These cases will often involve ambiguous facts, including conflicting evidence and testimony. For instance, was the victim’s act of reaching for his wallet threatening? Was the officer’s use of a chokehold unreasonable under the circumstances? Was it unreasonable for the officer to use a taser? As the studies suggest, implicit bias can influence the interpretation of these ambiguous facts,⁵⁹ especially when those making the judgments are cognitively depleted. Decision-makers may be more likely to interpret a Black victim’s ambiguous actions as more threatening than the identical actions of a similarly situated White victim.⁶⁰ This is

50. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309-310 (2010). The jurors were Japanese American, Chinese American, European American, Korean American, Native Hawaiian, Pacific Islander, and Latino. *Id.* at 335.

51. *Id.* at 332.

52. *Id.* at 310, 332.

53. *Id.* at 332–33.

54. *Id.* at 310, 333.

55. *Id.* at 337.

56. *Id.*

57. *Id.*

58. *Id.* at 338.

59. See Levinson & Young, *supra* note 50.

60. *Id.* at 399.

consequential because the decision of whether the victim's actions were threatening and the level of that threat will influence determinations of whether the officer's response was reasonable.⁶¹ Since many people shot by the police under "less threatening" or ambiguous circumstances are Black and Hispanic,⁶² the potential for biased evaluations of evidence is particularly concerning. Thus, implicit biases can influence judgments about whether an officer's use of force was an objectively reasonable response to a perceived threat.

B. Biased Memories

Implicit racial bias can also affect decision-making in use of force cases by distorting memories. These errors occur because unconscious stereotypes can influence the way the mind fills in the gaps of fuzzy memories.⁶³ In one study, researchers examined whether implicit racial biases would influence mock jurors' memories.⁶⁴ These jurors read about a fistfight involving either a White man named William or a Black man named Tyronne.⁶⁵ The scenarios were otherwise identical.⁶⁶ Afterwards, jurors were distracted with another task for approximately five to ten minutes and then were asked to answer sixteen yes/no questions about the scenario.⁶⁷ The results indicated that jurors had better recall for aggressive

61. A jury is typically instructed to "judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight." See, e.g., NINTH CIRCUIT JURY INSTRUCTIONS COMMITTEE, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 9.22 (2015) available at <http://www3.ce9.uscourts.gov/jury-instructions/node/160>.

62. Kindy et al., *supra* note 3 ("In the majority of cases in which police shot and killed a person who had attacked someone with a weapon or brandished a gun, the person who was shot was white. But a hugely disproportionate number — 3 in 5 — of those killed after exhibiting less threatening behavior were black or Hispanic.").

63. J. Fyock & Charles Stangor, *The Role of Memory Biases in Stereotype Maintenance*, 33 BRIT. J. SOC. PSYCHOL. 331, 335-36, 339 (1994). See also C. Neil Macrae et al., *Creating Memory Illusions: Expectancy-Based Processing and the Generation of False Memories*, 10 MEMORY 63, 64 (2002)(noting that memories can be altered in systemic and predictable ways).

64. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347-49 (2007).

65. *Id.* at 391, 394.

66. *Id.* at 394.

67. *Id.* at 391-94.

facts when the aggressor was Black as opposed to White.⁶⁸ Jurors who read about Tyronne accurately recalled 80.2 percent of the aggressive details contained in the story.⁶⁹ In other words, they failed to accurately recall only 19.8 percent of the aggressive facts.⁷⁰ However, when the aggressor was William, jurors failed to recall 32.2 percent of the aggressive facts.⁷¹

In addition to this biased recall of facts, mock jurors also created a false memory of aggressiveness when they read about Tyronne as opposed to William.⁷² Seventy percent of the jurors who read about Tyronne falsely remembered that he had made a veiled threat.⁷³ Only 56 percent made this mistake when they read about William.⁷⁴ Importantly, none of these memory errors were related to conscious racial bias.

This study raises concerns that the memories of witnesses and decision-makers in use of force cases may be distorted in ways that disadvantage Blacks. Note that the biased memories found in the study occurred after reading a relatively simple scenario and with only about a 15-minute break between reading and recall.⁷⁵ In contrast, eyewitnesses to a use of force incident may not be interviewed for hours, days or even weeks after the event. If the case goes to trial, this timeline is elongated, with interviews likely occurring months or even years after the initial incident. Furthermore, at trial, jurors and/or judges may hear conflicting testimony from multiple witnesses. Therefore, the influence of implicit racial bias on the memory of eyewitnesses and jurors might be even more pronounced. If witnesses and jurors recall facts in ways that are consistent with existing stereotypes, then similarly situated defendants may be treated differently based on their race.

III. IMPLICIT DEHUMANIZATION

Another potential source for racially disparate treatment of victims in use of force cases is “implicit dehumanization.” Phillip Atiba Goff coined

68. *Id.* at 398-99.

69. *Id.* at 399.

70. *Id.*

71. *Id.* at 399.

72. *Id.*

73. *Id.* at 400-01. The question was as follows: “After James said ‘Let it go,’ [William or Tyronne] replied by saying ‘What if we won’t let it go?’” It was actually William or Tyronne’s friend who made the comment. *Id.*

74. *Id.* at 401.

75. *See* Levinson, *supra* note 64, at 399.

this phrase to reference an automatic and unconscious association between Blacks and apes.⁷⁶ Implicit dehumanization can influence judgments about whether uses of force are justifiable.⁷⁷

In one study, 115 White male subjects ranging in age from 18 to 25 watched a two-minute video of a group of police violently beating either a White or a Black individual.⁷⁸ Then they were asked to determine whether the brutality was justified. Goff and colleagues found that the more closely subjects unconsciously associated Black with apes, the more likely they were to conclude that the beating of the Black victim was justified.⁷⁹ The unconscious association between Blacks and apes did not significantly influence subjects' judgments of whether the beating of the White victim was justified.⁸⁰ These findings suggest that the unconscious dehumanization of Black men might influence decisions about the objective reasonableness of law enforcement uses of force.

The influence of implicit dehumanization in use of force cases might be exacerbated by the use of language that makes the association salient. A 2015 study of courtroom language found a wide array of animal descriptions and terms used by prosecutors in trials. This language included references to how animals act ("howl," "hunt," or "act") and to environments where animals are found ("jungle" or "wild"). They also included describing a defendant's disposition in animal-like terms ("primal" or "predator").⁸¹ There is some evidence to suggest that the use of this type of language can affect decisions in cases involving the use of force against Black victims. For instance, in one study, researchers examined 788 newspaper articles from the Philadelphia Inquirer from 1979 to 1999.⁸² The

76. Goff et al., *supra* note 31, at 292.

77. *Id.*

78. *Id.*

79. Priming with big cats did not influence these judgments. *Id.* Implicit anti-Black bias did not influence how strongly one associated Blacks with apes, showing that implicit dehumanization operates independently from implicit racial bias in the form of stereotypes and attitudes. *Id.* at 300-02. Additionally, the strength of the Black-ape association was unrelated to explicit racial bias and even unrelated to whether the subject was consciously aware of the historical association between Blacks and apes. *Id.* For a discussion of the association between Blacks and non-human primates in our nation's history, see L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 121-22 (2014).

80. *Id.*

81. Shana Heller, *Dehumanization and Implicit Bias: Why Courts Should Preclude References to Animals*, 51 No. 4 CRIM. LAW BULLETIN ART 4 (2015).

82. Goff et al., *supra* note 31, at 303.

articles all discussed death penalty cases involving either a Black defendant or a White defendant.⁸³ The researchers examined whether there was a relationship between animal imagery in the newspaper articles and whether the defendant was sentenced to death.⁸⁴ After controlling for a host of factors, including the defendant's and victim's socioeconomic status, aggravating circumstances, mitigating circumstances, and the severity of the crime, they found that "Black defendants who were put to death were more likely to have apelike representations in the press . . . than were those whose lives were spared."⁸⁵ While the precise mechanism for this correlation between newspaper representations and jury sentencing decisions is unclear, these results suggest that the association of Black defendants with apes was "associated with a higher probability of state-sponsored executions."⁸⁶ In use of force cases, in order to avoid any risk that implicit dehumanization will influence judgments, litigants and witnesses should be prohibited from using animal imagery during the course of a trial.

IV. THE EMPATHY GAP

Empathy is defined by social scientists as "the ability to understand and vicariously share the feelings and thoughts of other people."⁸⁷ This emotion facilitates pro-social feelings and behaviors such as altruism, willingness to help, and cooperation.⁸⁸ As researchers note, "[e]mpathic feelings are fundamental for humans in social and interpersonal life because they enable human beings to tune their mental states to their social environment as well as to understand others' intentions, actions, and behaviors."⁸⁹ Empathy can

83. *Id.*

84. *Id.* at 304.

85. *Id.* The researchers found a similar association for Whites, although it was not statistically significant, potentially because of the low sample size of White defendant death-eligible cases. *Id.* The words that were found to connote images of apes included "animal," "ape," "beast," "savage," and "wild." *Id.* at 304 n.5

86. *Id.*

87. Matteo Forgiarini et al., *Racism and the Empathy for Pain on Our Skin*, 2 FRONTIERS IN PSYCHOL. 1, 1 (2011) (quoting Frederique De Vignemont et al., *The Empathic Brain: How, When, and Why?*, 10 TRENDS IN COGNITIVE SCI. 435 (2006)). See also Luis Sebastian Contreras-Huerta et al., *Racial Bias in Neural Empathic Responses to Pain*, 8(12) PLOS ONE 1, 1 (2013).

88. Contreras-Huerta et al., *supra* note 87, at 1.

89. Forgiarini et al., *supra* note 87, at 1.

also sensitize people to injustice.⁹⁰ If people's empathic abilities are fraught with implicit favoritism for in-group members, one might expect problematic disparities to arise in cases involving similar facts. Unfortunately, research suggests that people experience more empathy for in-group members than out-group members.⁹¹

For instance, when individuals feel empathy for the pain of another, their brains react as if they are experiencing pain themselves.⁹² However, research suggests that these feelings occur with less intensity when White individuals witness or imagine pain inflicted on Black individuals.⁹³ In a study testing this theory, this empathy gap was correlated with implicit racial bias. Higher levels of implicit racial bias were associated with greater differences in empathic responses toward Black and White participants.⁹⁴

The empathy gap might play a role in use of force cases. Decision-makers might feel more empathy for the pain experienced by a member of their racial in-group. However, it is unclear the direction in which this empathy might cut. If the officer and the victim are of the same race, the race-related empathy gap may not make a difference. But, what would occur if the officer is Black and the victim is White? In this scenario, would a White decision-maker empathize more with the White victim, or with the officer? Without more research, it is impossible to say. The point here is that the empathy gap is an important factor to consider in these cases.

106 MARIO MIKULINER & PHILLIP R. SHAVER, PROSOCIAL MOTIVES, EMOTIONS, AND BEHAVIOR: THE BETTER ANGELS OF OUR NATURE 393, 399 (2010) (citing John F. Dovidio et al., *Perspective and Prejudice: Antecedents and Mediating Mechanisms*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1537 (2004)); John F. Dovidio et al., *Empathy and Intergroup Relations*, 393, 397 (2010).

91. See, e.g., Johan M.G. van der Dennen, *Ethnocentrism and In-group/Out-group Differentiation: A Review and Interpretation of the Literature*, in THE SOCIOBIOLOGY OF ETHNOCENTRISM 17 (Vernon Reynolds et al. eds., 1987) (finding that "an individual will discriminate against a member of an out-group even when there is no conflict of interest and there is no past history of . . . hostility.").

92. Forgiarini et al., *supra* note 87, at 1 ("...experimental data indicate that when people witness or imagine the pain of another person, they map the others' pain onto their brain using the same network activated during firsthand experience of pain, as if they were vicariously experiencing the observed pain.") (citations omitted).

93. *Id.*

94. *Id.*

V. SUPERHUMANIZATION BIAS

Another reason for concern that individuals who are victims of excessive force will be treated differently based on race, even under an objective standard, is “superhumanization bias.” Superhumanization is the belief that others “possess[] mental and physical qualities that are supernatural (transcending the laws of nature), extrasensory (transcending the bounds of normal human perception), and magical (influencing or manipulating the natural world through symbolic or ritualistic means).”⁹⁵ The concept is similar to dehumanization in that individuals are not perceived as human.⁹⁶ However, unlike dehumanization, superhumanization does not reduce people to “subhuman animals or objects.”⁹⁷ Rather, “superhumanization implies characterization of others as *beyond* human.”⁹⁸

Superhumanization bias toward Blacks influences pain perceptions.⁹⁹ In one study, subjects were shown a photo of either a Black or a White individual. Then, they were asked to choose which one was more likely to demonstrate superhuman characteristics such as having “skin that is thick enough that it can withstand the pain of burning hot coals” or “strength that makes them capable of lifting up a tank.”¹⁰⁰ The subjects were more likely to conclude that the Black individual possessed these superhuman traits.¹⁰¹

In the next phase of the study, researchers examined whether individuals perceived as superhuman were thought to experience less pain.¹⁰² To assess this, they had subjects answer questions such as “Which of these people do you think requires more pain medication to reduce the pain they have experienced” after a car crash, being burnt, or stapling their fingers?¹⁰³ The results demonstrated that subjects “attributed significantly

95. Adam Waytz et al., *A Superhumanization Bias in Whites' Perceptions of Blacks*, 6(3) SOC. PSYCHOL. & PERSONALITY SCI. 352, 352 (2015).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 357.

100. Matthew Hutson, *Whites See Blacks as Superhuman*, SLATE (Nov. 14, 2014), http://www.slate.com/articles/health_and_science/science/2014/11/whites_see_blacks_as_superhuman_strength_speed_pain_tolerance_and_the_magical.html.

101. *Id.*

102. Waytz, *supra* note 95, at 357.

103. *Id.*

less pain to Blacks versus Whites”¹⁰⁴ and that these differences were associated with superhumanization. As a result of these findings, researchers concluded that “superhumanization appears distinctively associated with the tendency to overlook pain in Blacks relative to Whites.”¹⁰⁵

Superhumanization bias could influence decisions in use of force cases in at least two ways. First, if decision-makers believe that Blacks possess superhuman strength, then they might be more likely to interpret the actions of Blacks as more threatening. Second, if Blacks are viewed as having the capacity to withstand significant pain, then decision-makers may conclude that officers are entitled to use more force against them than similarly situated White victims. In this way, judgments of whether the force used was objectively reasonable would be affected.

VI. PERCEPTIONS OF SOCIAL STATUS

A final reason for concern that judgments of objective reasonableness may be influenced by the race of the victim relates to perceptions of social status. In one study, White and Black subjects answered questions about how much pain they would experience in 18 different situations, including getting a paper cut and slamming their hand in a car door.¹⁰⁶ Then, subjects were asked the same questions regarding either a Black or a White individual pictured in a photo.¹⁰⁷ The data suggested that both Black subjects and White subjects believed that Black individuals would feel significantly less pain than White individuals.¹⁰⁸ These results were not

104. *Id.*

105. *Id.* There is some evidence of superhumanization bias in the shooting death of Ferguson, Missouri, teenager Michael Brown by Officer Darren Wilson. Before the grand jury, Wilson testified that Brown was “super human.” Frederica Boswell, *In Darren Wilson’s Testimony, Familiar Themes About Black Men*, NAT’L PUB. RADIO (Nov. 26, 2014), <http://www.npr.org/blogs/codeswitch/2014/11/26/366788918/indarren-wilsons-testimony-familiar-themes-about-black-men>. He also stated that “when I grabbed him, the only way I can describe it is I felt like a 5-year-old holding onto Hulk Hogan,” and that Brown “looked like he was almost bulking up to run through the shots, like it was making him mad that I’m shooting at him.” Jesse Singal, *Why Did Darren Wilson Think Michael Brown Had Superpowers?*, N.Y. MAG. (Nov. 25, 2014), <http://nymag.com/scienceofus/2014/11/why-did-wilson-call-michael-brown-a-demon.html>.

106. Sophie Trawalter et al., *Racial Bias in Perceptions of Others’ Pain*, 7(11) PLOS ONE 1, 3 (2012).

107. *Id.*

108. *Id.*

correlated with either conscious or implicit racial bias.¹⁰⁹ Instead, the results were correlated with assumptions about social status.¹¹⁰ Subjects viewed Blacks as being less privileged and as experiencing more hardship than Whites, and these perceptions of privilege influenced perceptions of pain.¹¹¹

Why might this relationship exist? The researchers hypothesized that people might systematically underestimate the pain experienced by those of a lower social status because of the assumption that they have lived lives full of adversity and, thus, are tough by necessity. In contrast, those who have led lives of privilege are frail by virtue of being sheltered and coddled. Since Blacks have relatively low status in the United States, people may infer that they must be tougher, and thus, less affected by pain.¹¹² In use of force cases, if decision-makers believe that Blacks experience less pain, they may be more likely to view force against Black victims as being objectively reasonable than identical uses of force against individuals assumed to be more privileged.

109. *Id.* at 3-4.

110. *Id.*

111. *Id.* at 5 (citing study asking subjects to rate their own privilege and the privilege of the target person on a 4-point scale).

112. *Id.* There is other evidence that people tend to underestimate the amount of pain felt by Blacks versus Whites. A study last year published in the *Journal of Medical Care* explored pain treatment discrepancies between different racial groups and found that minorities receive less pain treatment than non-minorities for acute abdominal pain. *See generally* Adil A. Shah et al., *Analgesic Access for Acute Abdominal Pain in the Emergency Department Among Racial/Ethnic Minority Patients: A Nationwide Examination*, 53(12) *MED. CARE* 1000 (2015). Researchers used four years of data collected nationwide by the Centers for Disease Control and Prevention, with a sample size of 6,710 visits to 350 emergency rooms by patients 18 and older. *Id.* After controlling for income, insurance status, age, degree of pain, and other variables, the researchers found that non-Hispanic Blacks and other minorities, compared to non-Hispanic Whites, were 22 percent to 30 percent less likely to receive pain medication. *Id.* The study's senior author theorized that different cultural communication norms might play a part in these results and called for more patient-centered care. *Id.*

VII. CONCLUSION

This essay has traced multiple ways that implicit processes may influence determinations of objective reasonableness in use of force cases. Even under identical or similar circumstances, these processes can disadvantage Black victims in ways that are not discernable to the decision-maker. Yet, this does not make the racial disparities that may result any less problematic. With this essay, we hope to encourage scholars, practitioners, and researchers to study these phenomena in order to determine whether they will influence decision-making in use of force cases and if so, how to mitigate against their influence. Otherwise, there is the risk that we will fail to realize the potential for fairer decision-making using an objective standard of reasonableness.