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Law As Microaggression

Peggy C. Davis†

In January of 1988, the Chief Judge of the highest court of New York commissioned sixteen citizens to consider whether minorities in that state believe the court system to be biased. The answer was immediately apparent. With striking regularity minority people, in New York and elsewhere in the United States, report conviction that the law will work to their disadvantage. Every relevant opinion poll of which the Commission is aware finds that minorities are more likely than other Americans to doubt the fairness of the court system.¹

Having quickly discovered evidence of a widespread minority perception of bias within the courts, the Commission was left to consider its causes. The causes are not easily established. Those who perceive the courts as biased admit that incidents of alleged bias are usually ambiguous; that systematic evidence of bias is difficult to compile; and that evidence of bias in some aspects of the justice system is balanced by evidence that the system acts to correct or to punish bias in other sectors of the society.

This essay places the perceptions of one minority group, black Americans, in a context that explains the source and the strength of minority conviction that courts (as well as other non-minority social institutions) are capable of bias. In terms informed by the insights of cognitive psychol-

† Professor of Law, New York University. Member, New York State Judicial Commission on Minorities. Research relied upon in this essay was supported by the Filomen d'Agostino and Max E. Greenberg Research Fund of New York University School of Law and augmented by data assembled by the Judicial Commission. Opinions expressed in the essay are the author's and may not reflect the views of other Commissioners.

1. A national survey commissioned in 1977 by the National Center for State Courts reported that 49% of blacks, 34% of Hispanics and 15% of whites agree with the statement "courts do not treat blacks as well as they treat whites" and thought it described a "serious problem that occurs often." NATIONAL CENTER FOR STATE COURTS, *THE PUBLIC IMAGE OF THE COURTS* 36 (1977). A 1988 *New York Times*/WCBS-TV News poll conducted in New York City found that 45% of whites, but only 28% of blacks, believed that judges and courts in New York City generally treat both races fairly. *N.Y. Times*, Jan. 19, 1988, at 1, col. 2. In the same year, a *Newsday* poll of black New Yorkers found that 40% believed the courts "mistreat" blacks "all or most of the time." *Newsday*, Apr. 12, 1988, at 26, col. 1. A national poll, conducted in 1988 by Media General and the Associated Press, found that 40% of whites and 61% of blacks believe that minorities do not receive equal treatment in the criminal justice system. *N.Y. Times*, Aug. 9, 1988, at 13, col. 5. In a *New York Law Journal* poll, also conducted in 1988, 44% of *all* respondents, including 71% of blacks and 31% of whites, believed that if "two people—one white, one black—are convicted of identical crimes" the white defendant would get the lighter sentence. *N.Y.L.J.*, May 24, 1988, at 1, col. 3. *See also* B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* (1977); T. Tyler, *Why People Follow the Law: Procedural Justice, Legitimacy and Compliance* (forthcoming 1989).

ogy and psychoanalysis, Section I explains the heuristics that structure perceptions of and interactions with black Americans. In terms informed by psychiatric studies of black Americans, Section II describes the experience of being perceived in terms of ubiquitous and usually pejorative heuristic structures. Section III draws upon the perspectives described in the preceding Parts to consider ways in which minorities are perceived within the legal system and the relationship between those modes of perception and the minority view that the legal system is an agent of bias.

I. THE LENS THROUGH WHICH BLACKS ARE PERCEIVED

The work of Professor Charles Lawrence² has sensitized legal scholars to basic psychological facts about race and perception. In urging that anti-discrimination laws be liberated from existing standards of intentionality, Lawrence argues that, as a matter of history, culture, and psychology, American racism is pervasive and largely unconscious:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.³

The claim of pervasive, unconscious racism is easily devalued. The charge has come to be seen as egregious defamation and to carry an aura of irresponsibility.⁴ Nonetheless, the claim is well founded. It must be examined and understood, rather than resisted. It is examined here in the context of a small incident. The incident, reported below, will be analyzed first from the point of view of a white participant and as an instance of stereotyping. In Section II, it will be analyzed from the point of view of a black participant and as an instance of the "incessant, often gratuitous and subtle offenses" defined by black mental health professionals as "microaggressions."⁵

The scene is a courthouse in Bronx, New York. A white assistant city attorney "takes the court elevator up to the ninth floor. At the fifth floor, the doors open. A black woman asks: 'Going down?'

2. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

3. *Id.* at 322 (citation omitted).

4. See Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1418 (1988) (explaining relationship between "the stigmatization of overt racial prejudice" and judicial reluctance to impose "the moral opprobrium that the 'racist' label connotes").

5. C. Pierce & W. Profit, *Homoracial Behavior in the U.S.A.* 2-3 (1986) (unpublished manuscript).

'Up,' says [the city attorney]. And then, as the doors close: 'You see? They can't even tell up from down. I'm sorry, but it's true.'"⁶

The black woman's words are subject to a variety of interpretations. She may have thought it efficient, appropriate, or congenial to ask the direction of the elevator rather than to search for the indicator. The indicator may have been broken. Or, the woman may have been incapable of competent elevator travel. The city attorney is led, by cognitive habit and by personal and cultural history, to seize upon the pejorative interpretation.

The city attorney lives in a society in which blacks are commonly regarded as incompetent. The traditional stereotype of blacks includes inferior mentality, primitive morality, emotional instability, laziness, boisterousness, closeness to anthropoid ancestors, occupational instability, superstition, care-free attitude, and ignorance.⁷ Common culture reinforces the belief in black incompetence in that the black is "less often depicted as a thinking being."⁸ If, for example, the city attorney watches television, she has observed that whites, but not blacks, are likely to exert authority or display superior knowledge; that whites, but not blacks, dispense goods and favors; and that blacks are disproportionately likely to be dependent and subservient.⁹

Cognitive psychologists tell us that the city attorney shares with all human beings a need to "categorize in order to make sense of experience. Too many events occur daily for us to deal successfully with each one on an individual basis; we must categorize in order to cope."¹⁰ In a world in which sidewalk grates routinely collapsed under the weight of an average person, we would walk around sidewalk grates. We would not stop to inspect them and distinguish secure ones from loose ones: It is more effi-

6. P. PRESCOTT, *THE CHILD SAVERS* 169 (1981).

7. G. ALLPORT, *THE NATURE OF PREJUDICE* 196-98 (1954). The stereotype also includes over-assertiveness, religious fanaticism, fondness for gambling, gaudy and flashy dress, violence, a high birth rate, and susceptibility to bribery. *Id.*

More recent opinion studies indicate a reduction in self-reported negative associations with blacks. J. DOVIDIO & S. GAERTNER, *PREJUDICE, DISCRIMINATION, AND RACISM* 3-6 (1986). The relationship between self-reported beliefs and actual beliefs is, however, problematic in this context. See *infra* notes 26-30 and accompanying text.

8. Pierce, *Psychiatric Problems of the Black Minority*, in *AMERICAN HANDBOOK OF PSYCHIATRY* 512, 514 (S. Arieti ed. 1974).

For instance, although he is the district attorney in a [television] program, the black solves a case with his fists; an underling, who is a white police lieutenant, uses his brains to solve the same problem. That is, while the district attorney is being beat up, the lieutenant is deploying squad cars, securing laboratory assistance, and reasoning out his next move. Gratuitously . . . the show depicts the lieutenant speaking with a force and an arrogance that would not be tolerated in a real life situation between a district attorney and his subordinate.

Id. See also Pierce, Carew, Pierce-Gonzalez & Wills, *An Experiment in Racism: TV Commercials*, in *TELEVISION AND EDUCATION* 62 (C. Pierce ed. 1978).

9. Pierce, Carew, Pierce-Gonzalez & Wills, *supra* note 8, at 82; see also J. DOVIDIO & S. GAERTNER, *supra* note 7, at 8-9, 64-65.

10. Lawrence, *supra* note 2, at 337.

cient to act on the basis of a stereotyping heuristic. In a world in which blacks are commonly thought to be incompetent (or dangerous, or musical, or highly sexed), it is more efficient for the city attorney to rely on the generalization than to make individuating judgments.

It is likely that the city attorney assimilated negative stereotypes about blacks before she reached the age of judgment. She will, therefore, have accepted them as truth rather than opinion.¹¹ Having assimilated the stereotypes, the city attorney will have developed a pattern of interpreting and remembering ambiguous events in ways that confirm, rather than unsettle, her stereotyped beliefs.¹² If she sees or hears of two people on a subway, one white, one black, and one holding a knife, she is predisposed to form an impression that the black person held the knife, regardless of the truth of the matter.¹³ She will remember examples of black incompetence and may fail to remember examples of black competence.¹⁴

Psychoanalysts tell us that the stereotype serves the city attorney as a mental repository for traits and impulses that she senses within herself and dislikes or fears. According to this view, people manage normal developmental conflicts involving impulse control by projecting forbidden impulses onto an outgroup.¹⁵ This defense mechanism allows the city attorney to distance herself psychologically from threatening traits and thoughts. In this respect, the pejorative outgroup stereotype serves to reduce her level of stress and anxiety.

Historians tell us of the rootedness of the city attorney's views. During the early seventeenth century, the circumstances of blacks living in what was to become the United States were consistent with principles of open, although not equal, opportunity. African-Americans lived both as indentured servants and as free people.¹⁶ This early potential for egalitarianism was destroyed by the creation of a color-caste system.¹⁷ Colonial legisla-

11. *Id.* at 337-38 (footnote omitted).

12. *Id.* at 339.

13. See G. ALLPORT & L. POSTMAN, *THE PSYCHOLOGY OF RUMOR* 99-115 (1947); see also S. Fiske & S. Neuberg, *Alternatives To Stereotyping: Informational and Motivational Conditions for Individuating Processes* 11 (1986) (unpublished manuscript) ("Once perceiver has accessed a social category, it is difficult for the perceiver to respond accurately to the target's individuating characteristics.").

14. See S. Fiske & S. Neuberg, *supra* note 13, at 12-13.

15. See Lawrence, *supra* note 2, at 333-34. Standard psychiatric nomenclature defines defense mechanisms as "[p]atterns of feelings, thoughts, or behaviors that are relatively involuntary and arise in response to perceptions of psychic danger." AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 393 (3d rev. ed. 1987). Projection is defined as "[a] mechanism in which the person falsely attributes his or her own unacknowledged feelings, impulses, or thoughts to others." *Id.* at 394.

16. See Burns, *Black People and the Tyranny of American Law*, 407 ANNALS 156, 157-58 (1973) and authorities cited therein.

17. The color-caste system that has characterized American race relations encompasses more than a set of stereotyped or prejudiced beliefs. It is an "organized system of sentiments and attitudes . . . expressed in the social practices of the [black and white] groups and in the beliefs they hold about themselves." A. DAVIS, B. GARDNER & M. GARDNER, *DEEP SOUTH: A SOCIAL ANTHROPOLOGICAL STUDY OF CASTE AND CLASS* 6 (1941). The social cleavage has been "such that all privileges and

tures enacted slavery laws that transformed black servitude from a temporary status, under which both blacks and whites labored, to a lifelong status that was hereditary and racially defined.¹⁸ Slavery required a system of beliefs that would rationalize white domination, and laws and customs that would assure control of the slave population.

The beliefs that served to rationalize white domination are documented in an 1858 treatise. In many respects, they echo the beliefs identified one hundred years later as constitutive of the twentieth century black stereotype:

[T]he negro, . . . whether in a state of bondage or in his native wilds, exhibits such a weakness of intellect that . . . 'when he has the fortune to live in subjection to a wise director, he is, without doubt, fixed in such a state of life as is most agreeable to his genius and capacity.'

. . . . So debased is their [moral] condition generally, that their humanity has been even doubted. . . . [T]he negro race is habitually indolent and indisposed to exertion. . . .

In connection with this indolent disposition, may be mentioned the want of thrift and foresight of the negro race.

The negro is not malicious. His disposition is to forgive injuries, and to forget the past. His gratitude is sometimes enduring, and his fidelity often remarkable. His passions and affections are seldom very strong, and are never very lasting. The dance will allay his most poignant grief, and a few days blot out the memory of his most bitter bereavement.

The negro is naturally mendacious, and as a concomitant, thievish. . . .

. . . Lust is his strongest passion; and hence, rape is an offence of too frequent occurrence.¹⁹

The laws and customs that assured control of the slave population reinforced the image of blacks as incompetent and in need of white governance. The master was afforded ownership, the right to command labor, and the virtually absolute right of discipline.²⁰ Social controls extending beyond the master-slave relationship served to exclude the slave—and in some respects to exclude free blacks—from independent, self-defining ac-

opportunities, as well as duties and obligations, are unequally distributed between the two groups. . . . Both Negroes and whites recognize . . . that the white group is superordinate in power and prestige, and they exemplify this awareness in both their behavior and thought. . . . [E]ach of the groups is endogamous. . . . [M]uch of the behavior of both Negroes and whites, especially when in the presence of each other, can be called 'caste behavior.'" *Id.* at 15.

18. See Burns, *supra* note 16, at 158.

19. T. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY 34-40 (1858) (footnotes omitted).

20. Higginbotham, *Racism and the Early American Legal Process, 1619-1896*, 407 ANNALS 1, 6-7 (1973).

tivity. The slave could not obtain education, marry, maintain custody of offspring against the wishes of the master, or engage in commerce.²¹ Rights of assembly and movement were closely controlled.²² Social relationships between whites and blacks were regulated on the basis of caste hierarchy: Breaches of the social order, such as "insolence" of a slave towards a white person, were criminally punishable.²³

This history is part of the cultural heritage of the city attorney. The system of legal segregation, which maintained caste distinctions after abolition, is part of her life experience. This "new system continued to place all Negroes in inferior positions and all whites in superior positions."²⁴ The city attorney is among the

two-thirds of the current population [that] lived during a time when it was legal and customary in some parts of this country to require that blacks sit in the back of a bus, give up their seats to whites, use different rest rooms and drinking fountains, and eat at different restaurants.²⁵

The civil rights movement and post-1954 desegregation efforts are also part of the city attorney's cultural heritage. As an educated woman in the 1980s, she understands racial prejudice to be socially and morally unacceptable.²⁶ Psychological research that targets her contemporaries reveals an expressed commitment to egalitarian ideals along with lingering negative beliefs and aversive feelings about blacks. "Prejudiced thinking and discrimination still exist, but the contemporary forms are more subtle, more indirect, and less overtly negative than are more traditional forms."²⁷

Recent research also suggests that the city attorney can be expected to conceal her anti-black feelings except in private, homoracial settings. Many of her white contemporaries will suppress such feelings from their conscious thoughts. White Americans of the city attorney's generation do not wish to appear prejudiced. "[T]he contemporary form[] of prejudice is

21. *Id.* at 7.

22. Pierce, *Stress in the Workplace*, in *BLACK FAMILIES IN CRISIS: THE MIDDLE CLASS* 27, 28-29 (A. Coner-Edwards & J. Spurlock eds. 1988) (citing G. OLSHAUSEN, *AMERICAN SLAVERY AND AFTER* (1983) and G. OLSHAUSEN, *CASE BOOK FOR AMERICAN SLAVERY AND AFTER* (1983)) ("[Slaves] often were unable to assemble (even for purposes of religion or health). Their communications were controlled. Likewise, they were not permitted to 'stroll or be about,' nor could they be 'insolent' or possess weapons or dogs. Interaction with Whites in dancing, game playing, gambling, or sexual contact was regulated.").

23. T. COBB, *supra* note 19, at 273.

24. A. DAVIS, B. GARDNER, & M. GARDNER, *supra* note 17, at 4.

25. J. DOVIDIO & S. GAERTNER, *supra* note 7, at 1.

26. After having confessed to being "very racially bigoted," and attributing this attitude to her experiences in the court system, the city attorney said, "I feel guilty, the way I'm speaking about this problem. But I can only feel about what I see, and I know what I see." P. PRESCOTT, *supra* note 6, at 169.

27. J. DOVIDIO & S. GAERTNER, *supra* note 7, at 84.

expressed [at least in testing situations] in ways that protect and perpetuate a nonprejudiced, nondiscriminating self-image."²⁸ Americans of the city attorney's generation live under the combined influence of egalitarian ideology and "cultural forces and cognitive processes that . . . promote prejudice and racism."²⁹ Anti-black attitudes persist in a climate of denial.

The denial and the persistence are related. It is difficult to change an attitude that is unacknowledged. Thus, "like a virus that mutates into new forms, old-fashioned prejudice seems to have evolved into a new type that is, at least temporarily, resistant to traditional . . . remedies."³⁰

II. THE VIEW FROM THE OTHER SIDE OF THE LENS: MICROAGGRESSION

Return to the fifth floor and to the moment at which the elevator door opened. The black woman sees two white passengers. She inquires and perceives the response to her inquiry. She sees and hears, or thinks she sees and hears, condescension. It is in the tone and body language that surround the word, "Up." Perhaps the tone is flat, the head turns slowly in the direction of the second passenger and the eyes roll upward in apparent exasperation. Perhaps the head remains lowered, and the word is uttered as the eyes are raised to a stare that suggests mock disbelief. The woman does not hear the words spoken behind the closed elevator doors. Yet she feels that she has been branded incompetent, even for elevator travel. This feeling produces anger, frustration, and a need to be hypervigilant against subsequent, similar brandings.³¹

The elevator encounter is a microaggression. "These are subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders."³² Psychiatrists who have studied black populations view them as "incessant and cumulative" assaults on black self-esteem.³³

Microaggressions simultaneously sustain[] defensive-deferential

28. *Id.* The authors show, for example, that anti-black feelings may be masked to the extent that they are displayed only when there is a nonracial factor that can be used to rationalize them. White research subjects led to believe that a person was in distress responded in nearly similar ways to black and to white victims (with a somewhat greater response in the case of black victims) if there was no apparent justification for a failure to respond. If the subjects knew of the availability of another who might respond, they "helped black victims much less frequently than they helped white victims (38% vs. 75%) . . . [and] showed lower levels of arousal with black than with white victims (Means = +2.40 vs. 10.84 [heart]beats per minute). These subjects thus showed much less evidence of personal concern, in terms of both physiological response and helping behavior, for black victims than for white victims." *Id.* at 77-78.

29. *Id.* at 85.

30. *Id.* at 85-86.

31. "[H]eighted vulnerability develops because of the chronic need for hypersurveillance of one's environment and for preparation for the manifestations of whimsical, arbitrary prejudice. The person comes to be at greater risk for fractured pride and mistrust." Pierce, *Stress in the Workplace*, *supra* note 22, at 31.

32. Pierce, Carew, Pierce-Gonzalez & Wills, *supra* note 8, at 66.

33. Pierce, *Psychiatric Problems of the Black Minority*, *supra* note 8, at 515.

thinking and erode[] self confidence in Blacks. . . . [B]y monopolizing . . . perception and action through regularly irregular disruptions, they contribute[] to relative paralysis of action, planning and self-esteem. They seem to be the principal foundation for the verification of Black inferiority for both whites and Blacks.³⁴

The management of these assaults is a preoccupying activity, simultaneously necessary to and disruptive of black adaptation.

[The black person's] self-esteem suffers . . . because he is constantly receiving an unpleasant image of himself from the behavior of others to him. This is the subjective impact of social discrimination It seems to be an ever-present and unrelieved irritant. Its influence is not alone due to the fact that it is painful in its intensity, but also because the individual, in order to maintain internal balance and to protect himself from being overwhelmed by it, must initiate restitutive maneuvers . . . —all quite automatic and unconscious. In addition to maintaining an internal balance, the individual must continue to maintain a social facade and some kind of adaptation to the offending stimuli so that he can preserve some social effectiveness. All of this requires a constant preoccupation, notwithstanding . . . that these adaptational processes . . . take place on a low order of awareness.³⁵

Vigilance and psychic energy are required not only to marshall adaptational techniques, but also to distinguish microaggressions from differently motivated actions and to determine "which of many daily microaggressions one must undercut."³⁶

The microaggressive acts that characterize interracial encounters are carried out in "automatic, preconscious, or unconscious fashion" and "stem from the mental attitude of presumed superiority."³⁷ They are the product of the factors described in Part I. The elevator incident represents their least insidious form. This is so for three reasons. First, the black woman at the elevator initiated an interaction, thereby providing social cues that would predictably result in an expressed judgment. The microaggression she suffered was avoidable. The black woman can in the future decline to initiate an exchange with a white stranger. To the extent that she minimizes such exchanges, she can protect against further insult.³⁸ Moreover, the microaggression was arguably content-based. The

34. C. Pierce, *Unity in Diversity: Thirty-Three Years of Stress* 17 (unpublished manuscript 1986).

35. A. KARDINER & L. OVESEY, *THE MARK OF OPPRESSION* 302-03 (1951).

36. Pierce, *Unity in Diversity*, *supra* note 34, at 18; *see also* Dudley, *Blacks in Policy-Making Positions*, in *BLACK FAMILIES IN CRISIS*, *supra* note 22, at 22 (describing psychic work associated with distinguishing racially influenced from other behaviors and fashioning response).

37. Pierce, *Psychiatric Problems of Black Minorities*, *supra* note 8, at 515.

38. *See* E. GOFFMAN, *INTERACTION RITUAL* 15 (1967) (describing process of avoidance in social interaction, illustrated by "the middle- and upper-class Negro who avoids certain face-to-face contacts

reaction of the city attorney can be interpreted as a response to the woman's question—to the data gathered in the interaction—rather than a response to the person. Susceptibility to content-based microaggression can be minimized or controlled, not only by avoiding interactions, but also by avoiding ambiguity when interactions occur: The black woman might have said, "The indicator is broken. Is this elevator going up or down?" The more frequent and more insidious microaggressions, however, are unavoidable in that they are neither initiated by blacks nor based in any apparent way on the behavior of blacks. Finally, the elevator incident is benign among microaggressions because the white woman's implicit assertion of superiority did not culminate in an achievement of subordination. A fictitious continuation of the elevator incident illustrates microaggressions that are not only unprovoked in the sense described above but also complete in their achievement of subordination:

The city attorney decides to leave the elevator. She is standing at the right side of the car—directly opposite, but several feet away from, the black woman. Although she might easily exit by walking a path angled toward the center of the car, she takes a step directly forward. After a moment's hesitation, the black woman steps aside.

This is microaggression in its most potent form. It is the direct descendent of an aspect of color-caste behavior described fifty years ago as "deference":

The most striking form of . . . "caste behavior" is deference, the respectful yielding exhibited by the Negroes in their contacts with whites. According to the dogma, and to a large extent actually, the behavior of both Negroes and white people must be such as to indicate that the two are socially distinct and that the Negro is subordinate. Thus . . . [i]n places of business the Negro should stand back and wait until the white has been served before receiving any attention, and in entering or leaving he should not precede a white but should stand back and hold the door for him. On the streets and sidewalks the Negro should "give way" to the white person.³⁹

The wordless interchange was not initiated by the black woman. It was not based upon any action taken by her. It was a natural manifestation of an imbedded interactive pattern in which "skin color determines whether

with whites in order to protect the self-evaluation projected by his clothes and manner").

39. A. DAVIS, B. GARDNER & M. GARDNER, *supra* note 17, at 22-23. Matching restrictions were imposed upon whites: "A white . . . must not apply to . . . [blacks] any of the symbols of equality commonly used between whites; and if he disobeys these rules of conduct, he encounters the disapproval of the white world. If he persists in flaunting custom, he may even become an outcast." *Id.* at 24.

or not one is expected to operate from an inferior or superior vantage point. Both races have come to expect and accept as unremarkable that the blacks' time, energy, space, and mobility will be at the service of the white."⁴⁰ The inferiority of the black is more than an implicit assertion; it is a background assumption that supports the seizure of a prerogative.

III. THE LEGAL SYSTEM PERCEIVED BY VICTIMS OF MICROAGGRESSION

We do not know what business the black elevator traveler has in the courthouse. Whether she is a judge, a litigant, a court officer, or a vagrant, it is likely that her view of the legal system is affected by her status as a regular target of microaggression.⁴¹ If she has a role in the system, she will be concerned about the ways in which she is heard and regarded. When a court decides matters of fact, she will wonder whether the judgment has been particularized or based upon generalizations from immutable irrelevancies. When a court decides matters of law, she will wonder whether it considers and speaks to a community in which she is included. She will know that not every legal outcome is the product of bias. Sometimes the person on the sidewalk who will not yield turns out to be blind, or stopping to speak, or also black. Sometimes contrary evidence is so powerful that stereotypes are overwhelmed; a black person may perform in such an obviously competent manner that s/he is *perceived* as competent. Sometimes contrary evidence is so weak that the influence of stereotypes is harmless; a black person who asks a seemingly stupid question may *be* stupid. At other times, the concerns of the black elevator traveler seem justified. The two situations described below are the sort that seem to justify her concerns. The first involves matters of fact and the experiences of three black jurors. The second involves matters of law and the perspectives from which blacks regard legal pronouncements.

A. *Jurors Under the Influence of Microaggression*

Robert Nickey has three times assumed the role of juror in the legal system. On the last occasion, he sat in judgment of a young man of privilege accused of murdering a female companion. Mr. Nickey was one of three black jurors hearing the case of *New York v. Chambers*. Mr. Nickey has worked all of his adult life as a mortician; he considered himself well qualified to evaluate the evidence in a trial dominated by forensic testimony.⁴² When the deliberations began, he felt that his views were un-

40. Pierce, Carew, Pierce-Gonzalez & Wills, *supra* note 8, at 65.

41. A minority of blacks, however, will defend against microaggressions by denying the occurrence. See Dudley, *supra* note 36, at 16, 21-22 (identifying and explaining psychic mechanisms associated with this kind of denial).

42. New York Judicial Commission on Minorities, Public Hearings of June 29, 1988, at 483 (1988) [hereinafter Hearings] ("In my profession, I've seen all types of murder, suicide, homicide, you

heeded by white jurors. At hearings convened by New York's Judicial Commission on Minorities, Mr. Nickey testified that a particular moment in the deliberations confirmed in his mind a growing sense that racial difference lay at the heart of juror disagreement:

MR. NICKEY: [The second black juror] asked the remaining jurors, he said, if this man was black, would any of you all have any difficult[y] convicting him of murder with intent.

MR. CHAIRMAN: He asked that in the jury room?

MR. NICKEY: He asked that in the jury room, and I'm here to tell you there was a hush[ed] sound in that jury room. Nobody spoke for five minutes.

And right then we were convinced there was some prejudice because the young man was white, young, a lot of money was behind him.⁴³

Mr. Nickey interpreted this moment in the jury room in light of a life history of microaggression. He had encountered whites who started or stiffened as he approached on a dark street or subway car but remained relaxed upon the approach of whites whose appearance and demeanor were no more threatening. He had encountered whites who did not give way if he approached on a busy street but yielded to a similarly situated white. He had often sensed that whites heard his ambiguous or perfectly sensible words and formed the thought that he "didn't know up from down."⁴⁴ Robert Chambers did not fit the white jurors' stereotype of an intentional killer.⁴⁵ From Mr. Nickey's perspective, their inability to conceive of Chambers as an intentional killer combined with an inability to credit the views of black jurors to produce intransigence and deadlock. He concluded that "beyond reasonable doubt" meant one thing for white defendants and another for blacks:

[MR. NICKEY:] So I'm saying there is two kinds of justice[] here in the State of New York. One is for the rich and in my opinion, the rich, he gets off. He gets like what they call a hand slap. You know, a little time or no time at all.

But if you are a minority and you don't have any money, you go to jail, it's as simple as that. You go to jail and you do your time.

And I always felt and was taught that justice was blind to race, color, or creed. But that is not so here in New York.⁴⁶

name it, I've seen it.").

43. *Id.* at 483-84.

44. See text accompanying note 6.

45. When the jury was in its ninth day of deliberations, Mr. Chambers pleaded guilty to first degree manslaughter. N.Y. Times, Mar. 26, 1988, at 1, col. 1. He admitted in his allocution that he had "intended to cause serious physical injury to [the victim]." *Id.* at 36, col. 4.

46. Hearings, *supra* note 42, at 484-85. Mr. Nickey's reference to the combined effects of race and economic disadvantage is typical and reflective of the continuing reality of economic disadvantage among black Americans. See CENTER ON BUDGET AND POLICY PRIORITIES, FALLING BEHIND

A second black juror referred to the same moment in the jury room as the basis of a "strong belief of racial prejudice"⁴⁷ that led him to seek to be relieved from further service.⁴⁸ The third black juror, a woman, concluded that "racial prejudice, sexual harassment, sexism, chauvinistic and elitist attitudes . . . permeated the jury's deliberation process."⁴⁹

These jurors experienced microaggression on two levels. In the context of the deliberations, a message of inferiority and subordination was delivered as their views were disregarded. The stereotyped thinking of white jurors caused both a different evaluation of the evidence and an inability to credit the competing views and perspectives of the black jurors. As a result, the black jurors were rendered ineffective in the deliberative process. The theory of microaggression instructs that the black jurors' perception of being disregarded and marginalized in the deliberative process produced stress in direct proportion to the restriction that marginalization imposed upon their ability to function as factfinders.⁵⁰

At a more general level, a social message of inferiority and subordination was delivered. The black jurors were struck not only by their own isolation and ineffectiveness in the factfinding process, but also by the racist⁵¹ character of the process. They took from the deliberations a belief that legal claims are consigned to a system unable in important respects to particularize factual judgments, and prone to deliver judgment in accordance with racial stereotypes. The belief that particular jurors were, as a general matter, inappropriately empathetic or indifferent to the plight of the defendant may have been disquieting, but the belief that they were empathetic or indifferent *in racially determined ways* was an affront. It said to the black jurors that they, as black people, could not expect impartial consideration were they before the court as defendants or complainants. It increased their subjective need to be hypervigilant against manifestations of arbitrary prejudice and contributed to "the ongoing, cumulative racial stress[,] . . . anger, energy depletion, and uneasiness that result from the time spent preoccupied by color-related aspects of one's [life and work]."⁵²

The skepticism with which these jurors now regard judicial factfinding will not be confined to criminal cases involving upper middle class, white

(1984); A. KARDINER & L. OVESEY, *supra* note 35, at 54-57.

47. Transcript of Proceedings, March 25, 1988, at 52, *New York v. Chambers* (N.Y. Sup. Ct. Indictment No. 6394/86).

48. *Id.* at 52, 60-62.

49. Hearings, *supra* note 42, at 928.

50. See Pierce, *Stress in the Workplace*, *supra* note 22, at 31 ("a Black worker is stressed in direct proportion to the inhibition to control space, time, energy, and movement secondary to overt or covert racial barriers").

51. Following the example of Professor Stephen Carter, I use the term "racist" to describe judgments controlled by racial stereotypes without adopting the accusatory tone suggested by the word "racist." Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 443 (1988).

52. Pierce, *Stress in the Workplace*, *supra* note 22, at 31.

defendants. Their experience is not extraordinary. It is an example of the persistent influence exerted by stereotypes—in elevators, on sidewalks, or in courtrooms. These jurors know from experiences inside and outside the courthouse that racial stereotypes and assumptions of white superiority permeate society to create cognitive drifts in the direction of findings of black culpability and white victimization, black incompetence and white competence, black immorality and white virtue, black indolence and white industriousness, black lasciviousness and white chastity, blacks careless and in need of control and whites in control and controlling, blacks as social problems and whites as valued citizens. These cognitive drifts render fragile a wide variety of factual claims: the defense of a black parent charged with child neglect; the claim that the potential and quality of a black life has been impaired by a white person's negligence; the defense of a black accused of malpractice; the credibility of a black witness; the worth of the opinion of a black expert; the merits of a black tenant's request for a stay of eviction; a black woman's claim of rape. To a people under the influence of microaggression, the expectation of unbiased judicial factfinding is naive.

B. *Law As Microaggression*

Mr. Nickey lacks scientific evidence of bias in the court system. He has as a basis for his assertions only his sense of the cognitive dissonance between black and white jurors in a particular case, educated by experiences of American racism and awareness of American history and culture. His beliefs about decisionmaking in the legal system are, however, consistent with the results of a research effort that has been described as "far and away the most complete and thorough analysis of sentencing that [has] ever been done."⁵³ The study addressed the combined effects of the race of the victim and the race of the defendant upon a sentencer's decision of whether to impose the penalty of death.

This research, conducted by Professor David Baldus, established that when a black person has been accused of murdering a white person, the likelihood that the killer will be sentenced to death is far greater than when homicide victims and perpetrators fall into any other racial pattern. The assertions offered in Parts I and II will, if credited, render this fact unsurprising: "If caste values and attitudes mean anything at all, they mean that offenses by or against Negroes will be defined not so much in terms of their intrinsic seriousness as in terms of their importance in the eyes of the dominant group."⁵⁴ It is a fact that certainly would not surprise Mr. Nickey.

53. Kennedy, *supra* note 4, at 1399 (citations omitted) (testimony of Professor Richard Berk, member, Nat'l Academy of Sciences' Comm. on Sentencing Research).

54. Johnson, *The Negro and Crime*, 217 ANNALS 93, 98 (Sept. 1941), *quoted in* Kennedy, *supra*

Two years ago, the Supreme Court considered whether the Baldus research, which contained statistical evidence of an extreme manifestation of this racial pattern of capital sentencing in the State of Georgia, supported a claim that Georgia death sentencing procedures violate equal protection guarantees or prohibitions against cruel and unusual punishment.⁵⁵ The Court found the evidence inadequate to demonstrate "a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."⁵⁶ With arguments that wither (if they do not die) in the light of Professor Lawrence's explication of automatic and unconscious racism,⁵⁷ the Court found McCleskey's equal protection claim wanting by reason of his failure to prove the decisionmakers in his case guilty of intentional discrimination or the State of Georgia guilty of creating its system of capital punishment with a consciously discriminatory purpose.⁵⁸ With respect to the claim of cruel and unusual punishment, the Court also found that too little had been proven to warrant correction of the Georgia death sentencing scheme.⁵⁹

When the Court announces law, as it did in *McCleskey*, it "constructs a response to the question 'What kind of community should we . . . establish with each other . . . ?'"⁶⁰ The law is perceived as just to the extent that it hears and respects the claims of each affected class. James Boyd White explains the point by example:

In evaluating the law that regulates the relations between police officials and citizens . . . the important question to be asked is not whether it is "pro-police" or "pro-suspect" in result, nor even how it will work as a system of incentives and deterrents, but what room it makes for the officer and the citizen each to say what reasonably can be said, from his or her point of view, about the transaction—the street frisk, the airport search, the barroom arrest—that they

note 4, at 1395.

55. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

56. *Id.* at 313.

57. See *infra* note 2 and accompanying text; see also Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Kennedy, *supra* note 4, at 1405, 1419–21.

58. *McCleskey*, 481 U.S. at 279–82.

59. *Id.* at 312–13 ("[A]t most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . '[T]here can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death'' Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.") (citation omitted). This disinclination to find a relationship between racial disparity and attitudes about race will remain a feature of the Court's jurisprudence so long as the mechanisms of contemporary racialism remain unacknowledged. For a recent example of this phenomenon, see *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 723–27 (1989) (discounting evidence of racial disparity among recipients of city contracts and members of contractors' associations as justifications for time-limited minority set aside program).

60. J. WHITE, *HERACLES' BOW: ESSAY ON THE RHETORIC AND POETICS OF THE LAW* 34 (1985).

share. . . . [T]he central concern is with voices: whether the voice of the judge leaves room for the voices of the parties.⁶¹

The relevant voices are not just those of the immediate parties, but those of all persons whose lives, status, and rights are affected by the announced law. The rules governing street frisks will be better rules to the extent that the rulemaker looks beyond the situations of the prosecutor and the frisked person to consider the positions of, *inter alia*, the police officer, the citizen who might be frisked, the citizen who might be victimized, and the community that shares the ambiguous or neutral characteristics that aroused suspicion and provoked the frisk.

Having in mind these questions of “voice,” consider the reaction of James Nickey upon announcement of the *McCleskey* decision. Mr. Nickey will bring a question to the text: When this matter of constitutional law was debated, was there room in the argument for my voice? The accumulated effects of microaggressions give cause for skepticism. If there is a cultural pattern of reacting instinctively to blacks as inferior and subject to control, it is unlikely that blacks will have figured in legal discourse as part of the “we” that comes to mind as courts consider how “we” will govern ourselves and relate to one another. Just as the apparently incompetent elevator traveler will not be a credible witness, the being for whom one does not think of yielding on the sidewalk will not be thought of as an equal partner when the requirements of justice are calculated.

Mr. Nickey’s skepticism will increase when he observes that the *McCleskey* opinion reviews the claim of racially biased capital sentencing with no reference to the perspective of blacks, either as crime victims or as victims of discrimination. When the Court goes beyond descriptions of the trial evidence, other proceedings below, and previously decided cases, the opinion considers four perspectives: that of criminal defendants, who are described as a class more likely to benefit from exercises of discretion than to suffer discrimination;⁶² that of criminal justice decisionmakers, as to whom it is said that the burden of explaining acts with racially disparate outcomes cannot reasonably be imposed;⁶³ that of law enforcement, to which broad discretion is considered essential;⁶⁴ and that of legislatures, to whom the Court defers regarding the appropriateness of punishment and the import of “statistical studies.”⁶⁵

When the Court has canvassed these perspectives, the Georgia death sentencing disparities are seen as an inevitable byproduct of criminal defendants’ opportunity for discretionary leniency; a result of a process with

61. *Id.* at 47–48.

62. *McCleskey*, 481 U.S. at 311.

63. *Id.* at 296–97.

64. *Id.* at 297.

65. *Id.* at 319.

so many players and so much complexity that it cannot be explained; an unavoidable price of effective and efficient law enforcement; and the product of innocent and capable legislative judgments.⁶⁶ The system's discriminatory impact is accepted as constitutionally (and morally⁶⁷) tolerable. The discrimination has no apparent victim.

Mr. Nickey will find in the dissenting opinions a reference to the perspective of one black person; the petitioner. Justice Brennan gives power to his claim that the Georgia system is intolerable as a matter of constitutional law as he finds the voice of the system's most direct victim:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. . . . [F]rankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey, 20 of every 34 would not have been sentenced to die if their victim had been black. . . . The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining whether he lived or died.⁶⁸

Mr. Nickey will appreciate the force of the perspective evoked by Justice Brennan, but he will sense that it does not prompt consideration of all that reasonably might be said about the death penalty and racial justice. In this, as in many constitutional contexts, the most direct of the law's victims is the least important. The bearer of contraband is subjected to an unlawful search and appears before the courts to challenge the official conduct. A judicial rule that respects citizen privacy and autonomy must look beyond that litigant and imagine the innocent others who might be searched on the basis of similar conduct or appearance, balancing the interests of those others against the requirements of law enforcement. The convicted killer is sentenced to die in a process that disproportionately avenges the killing of whites and punishes the killings of whites by blacks. He appears before the courts to challenge the official conduct. A judicial rule that respects the constitutional goal of equal dignity and protection must look beyond that litigant to balance the requirements of law enforce-

66. *Id.*

67. A moral judgment is implicit in the Court's Eighth Amendment holding because the Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

68. *McCleskey*, 481 U.S. at 321. For a perceptive description of Justice Brennan's responsiveness to the voice of McCleskey, see Cole, *A Justice's Passion*, 10 CARDOZO L. REV. 221, 224-28 (1988).

ment against the interests of two categories of innocent others—those whom the official conduct fails to protect and those whom it stigmatizes and subordinates. It is from the perspective of these innocent others that Mr. Nickey is likely to regard the sentencing of Warren McCleskey and the Supreme Court's decision to approve the Georgia capital sentencing system.

Black legal scholars have directly confronted the Court's failure of perspective with respect to black people *qua* actual or potential homicide victims. Professor Stephen Carter writes:

The significant problem with *McCleskey v. Kemp* is not, as its critics contend, that the Court rejected the claim pressed by Warren McCleskey himself. The problem is that the majority wrote in a way that made it possible to evade a more fundamental difficulty raised by the [statistical evidence]—that racialism might be responsible not only for the disproportionate execution of *murderers* who happen to be black, but for inadequate protection of *murder victims* who happen to be black.⁶⁹

Professor Randall Kennedy's critique of *McCleskey* portrays the case "in a community-oriented fashion," and addresses "the plight of black communities whose welfare is slighted by criminal justice systems that respond more forcefully to the killing of whites than the killing of blacks"⁷⁰

Just as Justice Brennan is right to remind us of the affront—palpable despite the defendant's status as a convicted killer—to one who may die as a result of a judgment based upon race, Professors Carter and Kennedy are right in showing us the blatant inequity of maintaining a system that responds more vehemently to the unlawful killing of whites than to the unlawful killing of blacks. But there is more to be said from the perspective of discrimination's victims. As Mr. Nickey reads *McCleskey*, he will sense an inequity that is not captured from the perspective of blacks as potential crime victims. Professor Carter alludes to that inequity when he demonstrates that the *McCleskey* evidence required the Court to condone or correct "racist policy [that] has been made, and continues to be made, as the result of probably unconscious . . . categorizations about the relative values attached to the lives of people of different skin colors."⁷¹ Professor Kennedy alludes to it when he attributes to the Court "a myopia reminiscent of the one that afflicted . . . [it] during the reign of *Plessey v. Ferguson*,"⁷² and accuses its members of "egregious disregard for the sensibilities of black Americans."⁷³

69. Carter, *supra* note 51, at 443 (emphasis in original).

70. Kennedy, *supra* note 4, at 1394.

71. Carter, *supra* note 51, at 445.

72. Kennedy, *supra* note 4, at 1415–16.

73. *Id.* at 1417.

The *McCleskey* decision wronged Warren McCleskey to the extent that it was determined by his race rather than by his culpability. The *McCleskey* decision wronged blacks as potential crime victims to the extent that it reflects a heightened social reaction to unlawful killing when victims happen to be white. But Mr. Nickey has served as a juror and read the social message of inferiority and subordination implicit in the racist character of the jury process. He knows that when decisionmakers in the court system are empathetic or indifferent in racially determined ways, they express attitudes that leave blacks vulnerable, within and without the court system, to judgments based upon cognitive drifts that favor their denigration. He therefore understands that the *McCleskey* sentence, and its appellate affirmations, also wronged blacks *as a people*.⁷⁴ The wrong can be stated simply: The *McCleskey* decisions exemplified and reinforced a pattern of hierarchical judgment predicated upon race. In pronouncing the Georgia capital sentencing system constitutional, the Court gave legitimacy, and a claim of inevitability, not only to the immediate wrong to the defendant and the secondary wrong to blacks as actual or potential crime victims, but, far more importantly, to the invidious racial heuristics that are as embedded in legal decisionmaking as they are in everyday life.

Like the social message of subordination implicit in the deliberations of the *Chambers* jury, the *McCleskey* decisions strike the black reader of law as microaggressions—stunning, automatic acts of disregard that stem from unconscious attitudes of white superiority and constitute a verification of black inferiority. The Court was capable of this microaggression because cognitive habit, history, and culture left it unable to hear the range of relevant voices and grapple with what reasonably might be said in the voice of discrimination's victims.

Sometime before the Supreme Court announced its *McCleskey* decision, five black law students reviewed the record and responded in role, imagining themselves as Justices of the Supreme Court. This Black Supreme Court was mindful of the seriousness of McCleskey's crime and of the need of legislatures and law enforcement communities to act efficiently in the face of unlawful violence.⁷⁵ But it also heard the voices of discrimination's victims. It was equally mindful of the social import of racial patterns in government decisions to take, spare, and avenge life. It found in the statistical evidence an altogether plausible suggestion of "systemic racial discrimination" that "can only be discerned by studies of the kind

74. "[D]iscrimination is not . . . against individuals. It is discrimination against a people. And the remedy, therefore, has to correct and cure and compensate for the discrimination against the people and not just the discrimination against the identifiable persons." Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006, 1006 (1984).

75. Note, *McCleskey v. Kemp*, 4 HARV. BLACKLETTER J. 75, 75 (Spring 1987) ("[T]he criminal act with which we are confronted is a reprehensible act. The sheer viciousness can neither be minimized nor overlooked."); *id.* at 77-78 ("[W]e neither abolish the death penalty . . . nor do we unduly bind the hands of the state of Georgia in administering their [sic] capital punishment statute.").

[offered by petitioner].”⁷⁶ It recalled that the constitutional amendment under which it was to decide the case was fashioned to effect “the full emancipation of the former slaves”⁷⁷ and therefore should be read to reach official action that perpetuates racial subordination.⁷⁸ It understood that a tradition of ignoring group effects had rendered American courts impotent in the face of systemic discrimination.⁷⁹ This court deemed it “imperative, if we are to maintain the integrity of the criminal justice system, to ensure that race plays no role in the imposition of the penalty of death.”⁸⁰ Accordingly, it found McCleskey’s statistical evidence sufficient to require the State of Georgia to respond with proof that his death sentence was not motivated by racial discrimination.⁸¹

The result reached by the student court was not an inevitable product of deliberations that include the voice of discrimination’s victims. Deliberations that include that voice are, however, essential to the perceived legitimacy of the law. So long as legal decisionmaking excludes black voices, and hierarchical judgments predicated upon race are allowed insidiously to infect decisions of fact and formulations of law, minorities will perceive, with cause, that courts are fully capable—and regularly guilty—of bias. Minority communities will therefore continue to struggle with a mixed message of law: announced as the legitimate assertion of collective authority, but perceived as microaggression.

76. *Id.* at 79.

77. *Id.*

78. See Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 171 (1976) (arguing that Fourteenth Amendment be understood to address “state practices that aggravate the subordinate position of [African-Americans and other] specially disadvantaged groups”).

79. Note, *supra* note 75, at 79.

80. *Id.* at 80.

81. *Id.* at 78.

