

Winter 1-1-2019

Explicit Bias: Why Criminal Justice Reform Requires Us to Challenge Crime Control Strategies That Are Anything But Race Blind

Jonathan Simon
Berkeley Law

Follow this and additional works at: <https://scholarship.law.berkeley.edu/facpubs>

Part of the [Law Commons](#)

Recommended Citation

54 *Tulsa L. Rev.* 331 (2018-2019)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

EXPLICIT BIAS: WHY CRIMINAL JUSTICE REFORM REQUIRES US TO CHALLENGE CRIME CONTROL STRATEGIES THAT ARE ANYTHING BUT RACE BLIND

Jonathan Simon¹

ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (HARVARD UNIVERSITY PRESS 2017). PP. 464. PAPERBACK \$18.95.

NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (STANFORD UNIVERSITY PRESS 2016). PP. 272. HARDCOVER \$16.95.

These books rely upon different methodologies. They examine America's distended criminal justice system at different scales. They ask fundamentally different research questions. Despite these important differences (to which we will return), they converge in a central aspect of their many impressive findings. Both books strongly suggest that race based bias in our criminal justice practice is not just the implicit kind, but a product of explicit, conscious, strategic uses of language and action to direct racial meanings of crime and punishment that have been promoted at the highest levels of our national government, and that are actively reproduced day after day by frontline professionals.

Recently, implicit bias² has received growing attention in accounting for the striking inequities in the distribution of penal harm of all sorts from police shootings of unarmed suspects to life sentences under California's notoriously harsh "Three-Strikes and You're Out" law. A host of robust experimental studies demonstrate that sub-conscious cognitive associations between race status and threatening conduct (e.g., presenting a weapon) make it hard to produce equitable results in tasks that involve sorting people by their potential threat. These findings are hugely important, especially in understanding why bias persists despite measurable declines in racially hostile attitudes in frontline criminal justice workers.

1. Robbins Professor of Criminal Justice Law, UC Berkeley.

2. L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 893 (2017) (discussing supporting evidence on implicit bias and asserting its importance in sustaining race inequities).

Neither author sets out to challenge the importance of implicit bias in criminal justice system inequity, yet their research reminds us that inequity is also the product of quite explicit efforts to shape institutions and practices of criminal justice around the surveillance and control of people marked by non-white racial status (especially African-Americans). The important task of trying to identify mechanisms to correct for implicit bias must not lead us to avoid the probably harder (and certainly more politically contentious) work of dis-embedding these forms of explicit bias.

Let me turn to each of the distinctive features of these books before returning to the problem of agency and structure in accounting for the racialized severity of American criminal justice that hangs over reform efforts.

BUILDING A NATIONAL WAR ON CRIME

Elizabeth Hinton's book³ is part of a wave of outstanding new historical work on the era of mass incarceration.⁴ Writing about the political context of mass imprisonment until now has relied primarily on analysis of public statements by political leaders and media coverage.⁵ Hinton and other historians are now able to draw on government archives that often have margins of twenty years or more before scholars can access them.

Unlike many recent sociological histories of mass imprisonment which have highlighted the importance of state specific contexts in shaping mass imprisonment,⁶ Hinton's study focuses on the national level and indeed at the Presidential level but with depth and precision unavailable in past studies of national crime policy. While earlier studies relied on public documents like campaign speeches. Hinton's study draws on archival research into executive branch memoranda that provide new insight into what the war on crime was about.

As her title suggests, her research question is how the war on poverty, a central plank of the liberal Kennedy and Johnson administrations turned into a war on crime by the beginning of the 1970s. Republican Presidents, particularly Nixon, Reagan and Bush have gotten the most attention for promoting tough on crime policies (along with failed Republican candidate Barry Goldwater).⁷ Goldwater and especially Nixon made fighting crime primary aspects of their campaigns. Reagan and the first Bush advocated a war on drugs and presided over a decade that saw prison populations continue a surge that had commenced during the late 1970s. Bill Clinton is often credited with bringing the

3. See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

4. See, e.g., HEATHER ANN THOMPSON, *BLOOD IN THE WATER* (2016) (showing the impact of the Attica prison uprising in on public ideas about imprisonment); JAMES FOREMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017) (showing how a black majority city addressed tough on crime policies); JULILLY KOHLER HAUSMANN, *GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA* (2017).

5. See DAVID W. GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN SOCIETY AND CREATED A CULTURE OF FEAR* (2007).

6. See MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2009); HEATHER SCHOENFELD, *BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION* (2018).

7. KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997).

Democratic Party into alignment with the politics of tough on crime. This account sees crime as part of the larger “Southern strategy” of the Republican party in which parts of the previous New Deal Democratic alignment (southern whites and northern blue collar whites) were brought into the Republican party through “dog whistle” politics about race.⁸

Hinton’s research shows a more complex picture. The Kennedy administration made juvenile delinquency a central focus of its first steps in the war on poverty. Although Johnson defeated Goldwater by a famous landslide, his administration immediately made the crime problem a central focus, launching a presidential crime commission whose 1967 report helped support shift in national spending toward building up local law enforcement. Even before Nixon won the 1968 presidential election, the liberal Johnson administration had largely abandoned the community empowerment strategy of the war on poverty programs in favor of a law enforcement led war on crime.

A pivot point in Hinton’s account is the 1965 Los Angeles (Watts) civil disorders in which thirty-four people were killed and over 1000 injured. The multi-day episode of looting, arson, and assaults, was concentrated in one of the city’s segregated black neighborhoods and ultimately drew national guard intervention. The rioting was triggered by community anger over the heavy handed police role in enforcing the city’s still palpable racial boundaries. But for the Johnson administration, the national media spectacle in a state that was also led by a prominent liberal governor was a moment for recalibrating the strategy. The bottom up approach of community empowerment and building up neighborhood efficacy might have helped address rising crime in many high poverty areas, but it would not work fast enough to further events like Los Angeles. A top down, law enforcement led effort to repress crime in these same neighborhoods would become the priority for federal spending. This shift began even before the massive Omnibus Crime Control and Safe Streets Act of 1968, one of Johnson’s last major legislative accomplishments.

The urban riots of the 1960s were not the only factors driving media attention toward crime and government policy toward crime repression. Assassinations, police violence against protestors, and media coverage of rising violent crime were all part of the picture. Hinton highlights the role of the riots in moving crime from a domestic policy issue, related to civil rights, welfare, and labor, to a national security issue, aligned with the military and the national security agencies.⁹

The arc of the book follows the war on crime through the succeeding presidential administrations up to and including the administration of George W. Bush (son of former president George H.W. Bush) in which a variety of different anti-crime strategies are promoted from aggressive street policing to selective incapacitation through the use of federal drug sentencing laws permitting extended terms for people with previous state drug offenses.¹⁰ The common thread, and a key take away of the book, is that all involved an explicit focus on black people in mostly segregated areas with high concentrations of poverty. Whether in the enlargement of local police forces or the extension of prison

8. See IAN HANEY-LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2013).

9. See HINTON, *supra* note 3.

10. See *id.*

sentences through “truth in sentencing laws,” the national war on crime and drugs made suppressing the potential for crime by black communities a clear priority. Those patterns and routines, incentivized through scores of programs across multiple agencies constitute a strong racial orientation of the punitive state that is not implicit even though it may often be coded, suppressed, and denied. While individuals may seek to escape condemnation for it, from themselves and their peers, the racial focus of the system cannot be purely implicit to the cop that stops a person for driving black, or a prosecutor who picks out a gang member from a list of possibilities to recommend for lengthy federal sentencing. Removing that legacy will require concerted action.

DEGRADATION CEREMONIES FOR COLOR BLIND TIMES

*Crook County*¹¹ is the most recent (and first in quite a spell) in a great tradition of court ethnographies that were at their peak in the 1960s and 1970s prompted by the court procedure reforms of the Warren Court era, and the growth of empirical studies of law generally. Ethnographers gather data by embedding themselves in a community in order to learn how members of that community understand their activities and forge collective meanings. As with history, we are in the midst of a new wave of ethnographic research on the punitive state and on the people that now massive sector of government impacts.¹² *Crook County* stands out in this literature because it includes observations from prosecutors, judges, defense lawyers, and court staff. It is very unusual for the same observer to gain access to these different and opposing sides in the courthouse. In addition, Gonzalez Van Cleve utilized trained law student court observers to supplement her direct observations with carefully coded observation of routine activities in multiple court rooms.¹³

As with most ethnography the scale is, in contrast to the United States as a national polity, quite local, one county, one courthouse. In this case however the county is Cook, which includes the city of Chicago (the nation’s third largest) and the court due to being the only felony one for the whole city and county, the nation’s busiest. One of the most segregated cities in America, Chicago’s police department has had a violent relationship with the Black community that goes back decades, reaching a visible peak during the 1960s and 1970s and in recent years has again become a national symbol of the #BlackLivesMatter movement.

As noted above, one important trend in studies of the punitive state has been away from national studies toward examining states which formally control most of the penal law in our federalist legal system (Hinton’s book is an important reminder that we can still learn more about the national government’s role). Focusing on the city/county level is a productive extension of that trend since those units control the police forces and the court

11. See NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (2016).

12. See BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* (2018); ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014); VICTOR RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011).

13. Ethnography often faces difficult problems of generalizability. Court observation, although not as close to the action as Gonzalez Van Cleve’s direct observation, provides an important source of validation to her general claim.

systems where the discretion resides to determine what those penal laws will mean in substance.

Chicago's volatile history of police antagonism toward equal treatment for African Americans may make it an extreme example, but also a revealing one for considering Gonzalez Van Cleve's central research question: how do legal professionals produce a highly racialized distribution of punitive action while conforming to a color blind vision of respect for the equal dignity of all citizens (and especially in a sector dominated by legal professionals)?¹⁴

The promise of ethnographies like Gonzalez Van Cleve, and other qualitative studies, is to help us understand the organizational mechanisms and inter-personal dynamics behind the broader trends that have dominated discussion in the field including mass incarceration, aggressive policing, and the hyper concentration of both on minorities (particularly black communities). What Gonzalez Van Cleve in Chicago is a dense bundle of common narratives and routine practices (or *habitus* to use the term that she draws from the late French anthropologist, Pierre Bourdieu) that pin points lower class black people, especially men, as the central challenge to public safety and order.

As Gonzalez Van Cleve demonstrates in her memorable opening sequences, this ordering of the court space into a punitive hierarchy begins at the very entrances, where from even some distance one can detect different entrance lines for professionals and visitors, with different racial patterns, and different norms of treatment.¹⁵ It is reinforced in the theater of the courtroom where professionals stand behind a railing enforced by the equivalent of court police officers and often conduct themselves in ways that are openly contemptuous of the dignity of those in the public galleries. Drawing on the classic sociological concept of degradation ceremonies, Gonzalez Van Cleve's observations show legal and court professionals engaged in a steady flow of gestures designed to diminish the social status of those whose role in court is to be processed into the criminal system or observe their loved ones in being processed.¹⁶

The construction of a racial order in Chicago's main criminal court works at a very deliberate narrative level in an age where colorblindness has achieved a kind of consensus as a public value. At the center of this is the reconstruction of the black citizen subject into a sub-human actor whose behavior is both immoral and incompetent, both deserving of punishment and requiring the permanent supervision of the police and the courts. The colloquial term for these subjects who seem to make up the vast bulk of defendants before the lower courts, is "mope." Narratives, jokes, and references to mopes allows the court house world to code the justification for innumerable coercive decisions as non-racial. But, and this is brilliant on the part of the Professor Gonzalez Van Cleve, a world of mopes could not legitimize the world of punishment and violence that courts envelope even internally.¹⁷ What makes police, prosecutors, and judges feel motivated is protecting the community from the monsters among us: murderers, rapists, serial killers. It is the dialectic of monsters and mopes that keeps the system working. Most of the work is one

14. See GONZALEZ VAN CLEVE, *supra* note 11.

15. *Id.* at 1–14.

16. *Id.*

17. See *id.* at 51–92.

mopes, but they must be processed and efficiently in order to create the capacity for taming monsters.

In contrast to the promise of the ABA model rules that prosecutors will educate and supervise police, Professor Gonzalez Van Cleve portrays a system of deference to police judgment and discretion.¹⁸ By turning its analytic gaze on the lawyers, this book bravely reverses a standard pattern of being outraged by the police and mollified by the legal professionals who mediate at times of public anger at police violence.¹⁹ Prosecutors are often touted as the most powerful part of the court room team, and Gonzalez Van Cleve leaves little doubt that they are, but if so it as agents of the police who arguably drive the system through their arrest and evidentiary decisions.²⁰

Gonzalez Van Cleve shows that defense counsel not only sacrifice fully zealous advocacy to maintain social capital in the working group, but how signals of racial ideology (hidden behind the mopes narrative) fit into that process.²¹ Only lawyers willing to degrade their clients in front of the court work group get treated as serious players. We also learn how defense lawyers choose to triage those few cases that do get aggressive treatment.²² It is here we can see the other cost of the racial solidarity work that framing legal narratives around the mope ideology exacts. Those defendants who appear worthy of serious advocacy are those who escape the mope model.

One of the most unique aspects of *Crook County*, and extremely valuable for law school and college classes on criminal justice, is the extensive appendices providing guides for conducting court observation assignments for students. I have long found that sending both law and undergraduate students to observe ordinary criminal court proceedings, no matter what their content, is as illuminating as many lectures or reading assignments. Gonzalez Van Cleve provides a detailed template for students to follow and a compelling argument that court observing can return at least some measure of public accountability to criminal courts like those in Chicago which experience themselves as largely unanswerable to democratic publics.²³

By documenting the processes by which people caught up in the court system are subjected to humiliating and sometimes tortuous conditions both physical and emotional, *Crook County* truly brings the qualitative dimension to mass incarceration to the forefront. By analyzing how frontline legal workers distance themselves from these processes, Gonzalez Van Cleve expands our knowledge of how organizations and narratives can promote human rights violations both every day and spectacular ones like the murder of Laquan McDonald.

CONCLUSION

These different books tell very different stories. Elizabeth Hinton's history shows

18. *See id.* at 127–56.

19. *See* GONZALEZ VAN CLEVE, *supra* note 11, at 127–56.

20. *Id.*

21. *Id.* at 157–80.

22. *Id.*

23. *See id.* at 195–216. That may be changing thanks to the Black Lives Matter Movement. In Chicago Mayor Rahm Immanuel declined to run for a third term just ahead of the verdict in the trial of a former police officer.

us how presidents from different parties built a multi-dimensional national war on crime out of mostly state and local efforts subsidized and guided by Washington D.C. with the aim of preserving national security against a threat of crime and disorder associated explicitly with minority neighborhoods of concentrated poverty, especially African American ones. Nicole Gonzalez Van Cleve shows us how a racially conscious system of status degradation plays out on a day to day basis in the largest criminal court in America through a dense assembly of routines and narratives that constantly signal race without naming it. The forms of a color-blind democracy are met, but if we try hard not to look at its reality. These different stories call for a reckoning with these conscious racial projects of state building.

Some argue that even if explicit discrimination were eliminated, the pressure of the system's caseload would drive reliance on quick choices most vulnerable to implicit bias. But this overlooks the role that the historical shaping of the criminal justice mission on African American communities, and its ongoing reproduction in the routine practices of frontline criminal justice professionals (from police officers to judges) create the very case load burdens that seem to require heuristics (with one eye closed). I would invite readers of these books to consider whether we might not rather prioritize an effort to reshape the mission of the major organs of our criminal justice system, police, probation and parole agencies, prisons and jails, away from containing and surveilling the bodies of people who live in typically segregated neighborhoods of concentrated poverty or related contexts that our long tradition of explicitly racially coded thinking about crime and punishment marks as likely to be "high crime." Trying to address implicit bias first risks normalizing a level of coercive social control that has been build up through a historically specific racially constructed urban crisis and sustained on a day to day basis through degradation ceremonies playing out in the center of our supposedly color blind courts.
