Negrophobia and Reasonable Racism

Armour, Jody David

Published by NYU Press


Project MUSE. muse.jhu.edu/book/7872.

For additional information about this book
https://muse.jhu.edu/book/7872

For content related to this chapter
https://muse.jhu.edu/related_content?type=book&id=172376
physical characteristics to trigger hypersensitivities or pathological fears in assault victims. Hypersensitivity to hair color, for instance, should be at least as common among assault victims as Negrophobia. But the reason victims do not link their assailants’ hair color to violence with anything resembling the patterned regularity with which they link race to violence is that in our culture hair color—but not race—is strictly a matter of superficial physiology. Eye color, too, is viewed as a superficial and easily overlooked characteristic. (In a popular Elton John release from the 1970s, the singer croons of his lover’s eyes, “excuse me forgetting, but these things I do / You see I’ve forgotten if they’re green or they’re blue . . .”) Like hair and eye color, skin color would signify nothing beyond superficial appearances in a culture that did not attach the peculiar significance to the social construct “race” that ours does. It is precisely because we do attach (irrationally and often unconsciously) such significance to “race” that Negrophobic assault victims forge lasting psychological links between a single violent encounter and the “race” of their assailant.

Because much of the bias that drives race-based discrimination is unconscious, the Equal Protection Clause must reach such bias if it is to serve its protective function. Since assault-induced phobias of Blacks rests on conscious or unconscious bias, admitting evidence of such a phobia, even if the defendant claims it is involuntary, employs an explicit racial classification and gives effect to racial bias in violation of the Equal Protection Clause.

**Restructuring the Maze to Serve Justice**

The fault line running between instrumentalism and noninstrumentalism, the leitmotif of the last chapter, figures centrally here, too. The foregoing equal protection arguments, perhaps
especially those of the Negrophobe, undoubtedly strike noninstrumentalists as irrelevant in view of their conviction that punishing individuals for psychological conditions beyond their control—or knowledge—is unjust. This is the “just deserts” school of criminal justice. From this perspective, punishment is just only if measured by the desert of the offender, and the desert of an offender is gauged by his character—that is, the kind of person he is. In the self-defense context, where a defendant’s mistaken or premature use of deadly force is attributable to a posttraumatic stress disorder, her act does not indicate what kind of person she is. Therefore, concludes the noninstrumentalist, it is unfair to punish the Negrophobe in this situation.

This argument, however, ignores the historical application of the Equal Protection Clause along instrumentalist lines. One central and long-standing concern of the courts applying the Equal Protection Clause has been the elimination of racial stigmatization.\textsuperscript{19} The essence of stigma is being forced to wear a badge or symbol that degrades the stigmatized person \textit{in the eyes of society}.\textsuperscript{20} Because stigmatizing actions injure by virtue of the meaning society gives them, courts must weigh the social implications of legal doctrines in judging whether they infringe on protections guaranteed by the Equal Protection Clause. The courts’ application of equal protection doctrine to eradicate racially stigmatizing practices, therefore, necessarily involves an instrumentalist assessment of the social consequences of adopting certain legal rules.

In the case of the panic-stricken bank patron, granting legal recognition to her self-defense claim communicates the state’s approval of racial bias regardless of what theory she pursues; it sends the message that “your dread of Blacks is a valid excuse for taking the life of an innocent Black person.” In conveying
such messages, the court reinforces derogatory cultural stereotypes and stigmatizes all Americans of African descent.

The antithesis between instrumental and noninstrumental conceptions of the law stems from a deeper antinomy between two paramount functions of the law with respect to human behavior—the responsive function and the channeling function. In its responsive function, the law merely responds to the behavior of ordinary people by adjusting its rules to their beliefs, attitudes, and assumptions, including their “tacit assumptions.” In its channeling function, the law proactively disciplines behavior and guides it into proper channels. (This distinction precisely parallels the one between “observing” and “defining” the reasonable man standard discussed at the end of chapter 2.) To return to the maze analogy, the law cannot merely be concerned with adjusting its rules to fit a cultural belief system that induces individuals to repeatedly traverse stereotypical channels (and make some of us susceptible to pathological phobias). The law must also strive to lay out the channels of the maze, and to eliminate those pathways that foster the oppression of minorities. It must weigh the costs and benefits of conforming to prevailing assumptions against the costs and benefits of reshaping those assumptions.21

Under the noninstrumental model, the law must take the human animal as he is conditioned and simply ask whether society can fairly expect individuals to overcome their conditioning under the circumstances. According to the instrumentalist view, the law should seek to alter the maze and retrain individuals by formulating rules that prevent the stigmatization of Blacks, reflect the community’s moral aspirations of racial equality, and help eradicate racial discrimination.

The dilemma posed by the Reasonable Racist, the Intelligent
Bayesian, and the Involuntary Negrophobe stems directly from the law’s roots in both instrumentalist and noninstrumentalist conceptions of legal liability, and from the justice system’s effort both to accommodate the behavior of ordinary persons and to encourage desirable behavior. The dilemma does not lend itself to facile solutions; we must submit ourselves to one or the other of its horns. In this case, the least destructive horn is the one that refuses to give the state’s imprimatur to racial bias—whether conscious or unconscious, voluntary or involuntary.