

THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

Review Meeting

Racism: Trends and Patterns in Discrimination

Geneva, 3-4 December 1999

**OBSTACLE ILLUSIONS:
PROFILING AND PRECONCEPTION IN THE POST-CIVIL RIGHTS ERA**

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INTRODUCTION

1. This paper will address the mutability of race and racism in the United States in the wake of the legal successes of the Civil Rights movement of the 1950s, 60s and 70s. The United States is in many ways a vastly better society than when black seamstress Rosa Parks refused to give up her seat to a white man on a public bus and was arrested for it, thus setting into motion a course of passive resistance and civil disobedience that would change history.
2. Yet today the United States remains a deeply divided society, one in which old animosities have taken new forms. No longer is the study of race focussed on the descendants of plantation slaves alone. The global diversity of America's newest immigrants--particularly from Africa, Asia and South America--as well as the export of American popular culture to the rest of the world have made the continuing implementation of the civil rights agenda much more complicated. Indeed, I believe that the great problem for the twenty-first century will no longer be that of the colour line (as historian W.E.B. DuBois put it at the dawn of the twentieth), but of a restlessly mutating hybridisation of caste, class, and religious fundamentalism, all overlaid by disparate access to media conglomerates, technologies like the internet, and (much as one dreads to acknowledge it) genetic engineering.
3. Confounding and unpredictable though this future is likely to be, the American response seems likely to have international impact. Thus, I would like to look at some of the threads that seem to be emerging in current American society. It is not my intention to offer easy or universal solutions, particularly to so diversely international an audience. I offer only some local examples that I hope might be generally interesting in this, our shared discussion of human rights.
4. I will divide my discussion into three sections: (1) a short examination of how fluidly race is defined and marked; (2) the phenomenon of pitting the notion of equality against that of merit; and (3) the problem of statistical bias and suspect profiling.

THE MALLEABILITY OF RACIAL DEFINITION

5. While many Americans today believe that race is exclusively a matter of melanin, race in the U.S. has always been a considerably more complex and politically slippery designation. During the nineteenth century, for example, character was a central ingredient in proving racial identity. In a very fine study entitled “Litigating Whiteness,” (to be found in volume 108 of The Yale Law Journal.) legal historian Ariela Gross demonstrates that as the institutions of slavery and slave breeding evolved in America, there grew a population of those whose descent was ambiguous or questionable, and whose status thereby confounded the clear colour distinctions that had marked Africans from Europeans in earlier times. This group included indentured servants of Irish, Portuguese or German lineage; Native Americans who were dark-skinned but presumed free; a growing number of mulattos trying to pass as white; blacks who had been freed; and those presumptively dissolute white men and women who were mistaken for black, usually because they had “taken up” with black sexual partners. These were people, in other words, who had had to fight to establish or maintain their status as non-slaves. Their legal claims in this regard provide a fascinating and prescient insight into the racial anxiety that, to this day, accompanies the monitoring of the boundary between black and white.
6. Since the litigation of whiteness dealt with inherently “deceptive” racial subjects, colour was not the dispositive evidentiary standard. Of course, appearance counted for a great deal, particularly straightness of hair, width of nose, and thickness of lips—the dimensions of which were sometimes measured ‘scientifically’ by such devices as callipers. But other evidence of whiteness included: (a) ancestry or “blood” (of which the famous “one-drop” rule was but one formulation); (b) exercise of citizenship and voting rights; (c) self-presentation or claimed identity; (d) reputation and acceptance among others, both white and black; and (e) “white conduct and character,” or, as Gross puts it, the “performing” of whiteness. “*A white man’s honour resided in the public sphere,*” explains Gross, “*in his statesmanlike behaviour towards superiors and inferiors, his adherence to the gentleman’s code of conduct, his mastery of slaves, and his exercise of citizenship...For a woman, performing whiteness meant acting out purity and moral virtue.*”
7. In the 1835 South Carolina case of State v. Cantey, the judge observed that, despite an ambiguous appearance, “*it may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste.*” And in an 1845 trial litigating the whiteness of one Sally Miller, a Louisiana judge cited Miller’s “*moral power and weight, and influence. An influence, which I contend no one but a white woman could possibly raise up and control — an influence as inconsistent with the nature of an African, as it would be with the nature of a Yahoo.*”
8. In courts throughout the South, the borderline statuses of the “enslaved white” and the “passing black” were methodically examined, defined and reduced to stereotypes that endure to this day. Putatively enslaved whites came mostly from the ranks of “poor whites,” whom the common law generally disparaged as those with coarse features and bad manners; in contrast, “passing” blacks were those with “fine” features and deceptively good manners. Poor whites were altogether uninspired by the finer civilising arts; “uppity” blacks were those with pretensions of being inspired by the finer things of life, yet who revealed themselves by an amusing propensity for malapropisms, and a tell-tale affection for gaudiness. (Sally Miller’s lawyer argued in her “defence,” against blackness that “[t]he *Quatronne is idle, reckless and extravagant, this woman is industrious, careful and prudent—the Quatronne is fond of dress, of finery and display—this woman is neat in her person, simple in her array, and with no ornament upon her, not even a ring on her fingers.*”)
9. One of Gross’s more interesting insights is the obsession that characterised this monitoring. In the 1864 case of Bryan v. Walton, a Georgia judge cautioned: “*Which of us has not narrowly escaped*

petting one of the pretty little mulattos belonging to our neighbour as one of the family?" Gross documents the rage that some judges expressed in having been “tricked,” and the fervour with which they urged others to be on guard against the “bright” mulatto, the terrible Yahoo—that brute in human form, whose insinuation into white society would stain all that was honourable and good.

10. Transporting Gross’s historical insights to today’s world, one must wonder if this history is not echoed in the chilling belief structures that linger with us still. Today, “real” blacks are not just those who are dark-skinned or impoverished or politically disenfranchised, but those who exhibit that malleable right-wing cipher for black character, the “culture of pathology.” (I will never forget hearing a white friend’s son describing a college classmate as a “nigger.” By that, he explained, he meant not to smear all blacks. That would be bad. It’s just that “it’s true that some blacks are niggers. It’s up to them, it’s how they act.”). “Real” whites, meanwhile, are known by the mobility of their hair in a spring breeze, by lips so thin they need collagen implants before the callipers can get a read, and by adherence to a moral code so pure they need neither abortion nor birth control, just a good clean petrie dish into which to scrape their superior genetic material.
11. In between these two conceptual extremes remains the legacy of enslaved whites and passing blacks, who, in today’s world, seem to occupy a limbo of what one might call pre-whiteness and post-blackness. Pre-whites include downsized poor white factory workers, but also those whom the mainstream media always mark as aspiring, or “good” immigrants—those who don’t yet look like “real” Americans, but who, with hard work at two or more jobs and lots of intermarriage, can hope to be white in no time. A post-black on the other hand is that light-skinned, ubiquitous pretender to victimhood who malaprops his way through the one professional job that should have been divided among ten better qualified white factory workers. Post-blacks exist in the realm of that utterly paradoxical category of social projection: the “New Black Middle Class,” which includes anyone — from office messengers to Oprah Winfrey — deemed not a member of the “real” black underclass.
12. These portrayals are harmful because they disguise so much politically important empirical data. They make white poverty in the United States invisible. They cast welfare recipients as uniformly black although the majority are white. They make invisible the efforts of the actual majority of blacks, those who labour so hard as members of working class with few health or retirement benefits. They exaggerate the accomplishments of the fragile, still-emerging black middle class and make broadly representative the quite exceptional wealth of figures like Oprah Winfrey and Michael Jordan.
13. Indeed, the degree to which these portrayals hold such uninformed and unquestioned sway in our media, in our movies, in our minds, is the degree to which we as a nation may find our best work still ahead.

THE PHENOMENON OF PITTING EGALITARIANISM AGAINST MERIT

14. About two years ago, *The New York Times* ran a front-page story revealing that long-distance running competitions in the United States routinely exclude Kenyan entrants from sharing in top prize money.¹ The reason given was that the Kenyans are “talented but taciturn,” and, though they win most of the actual races, they are “perceived as marketing liabilities”— as losers, in other words – by the corporate sponsors of the nation’s top distance races. In contrast to American runners who wave their arms around, yell, weep, thank mom and the funding patron, the Kenyans aren’t very telegenic; they won’t “do stand-up” (according to an American sportscaster); hence, “nobody” in the viewing public is interested in seeing them compete. In

¹ Marc Bloom, “Kenyan Runners in the U.S. Find Bitter Taste of Success,” April 16, 1998, *The New York Times*, p. A1

order to keep American audiences engaged, therefore, many national competitions have stopped giving any monetary awards, while at the same time, private donors have stepped in to offer lucrative prizes in those same races – but limited to United States citizens (no matter that they place 11th.) “‘We hope to level the playing field,’ said Bill Reef, the director of a race in Boulder, Colorado. ‘It’s our country, our event, our money. American sponsors want American winners...’”

15. This story, in which the Kenyans literally cannot win for losing, is an interesting example of the jumble of contradictory notions by which success is measured in our society. Most notably, media discussion of this news item revealed a basic tension just in the way that sports contests are so often and so carelessly employed as general metaphors for what’s deemed fair in other, unrelated realms of endeavour. We Americans tend to talk about achievements in non-athletic spheres such as education and employment, for example, as though they really were foot races. And we tend to talk about “what it takes” on the football field as though it were precisely the same skill set needed for running for president. This strangely conflated imagery has resulted in a certain kind of sloshiness of reference when conversing about the rules for qualification, the standards of “merit”, and the etiquette of pie-slicing when divvying up spoils.
16. Consider: There are moments when “qualification” is spoken of as though it were solely a physical feature, a “natural ability.” In this configuration, success on the track and success in school are both assumed to be attributable to something innate--an accident of birth, capable of measure with the numbers on a ruler. Long legs rather than practice; I.Q. rather than study; destiny rather than the complexity of factors that go into any kind of achievement. As some people are taller, goes the cranky version of this cant, some people are just born better. Its most annoying use is by people who’ve enjoyed the lifelong benefits of working with great teachers, tutors and trainers only to insult any given graduate of a not-so-good inner city high school for so much as splitting an infinitive.
17. In other contexts, however, we talk about qualification as though it were entirely dependent upon a notion of “personal best” and hard work. It is not those flashy jackrabbits who will reap the great reward, but the persistent ones who stay the course. This is a notion of success pure and wide as the American frontier: you can attain whatever you want because you make all the rules. And, as in Bill Reef’s rather vulgar rendering of the principle, it does seem to work for those in positions powerful enough to make up the rules as they go along. But its most annoying use is by those lucky rule-makers who cannot contain the need to prescribe righteous bromides to those who have less choice. As in: policymakers disparaging requests for public accommodation from those who face real physical constraints (i.e., you don’t need that sign interpreter, those foods-tamps, that bus route, that wheelchair ramp, because if you but dare to dream, you can attain whatever....etc.).
18. Finally, we speak of qualification as though it were contingent upon commerce: merit is related to profit is related to audience approval is related to stimulating demand. And if the customer craves good “stand-up”, you’d better learn to dish it out. In this version of reality, success has little to do either with your innate qualities or with hard work. Rather, it is dependent upon the vagaries of taste at any consumerist moment. Your fate is hitched to the purchasing preferences of others--to tastes, fads and quicksilver shifts in group dynamic. One’s worth is a function of profiles, gossip, groupthink, rumour. The fact that you produce a product that works is not nearly as important as whether people think it works. No matter how productive an eager young striver may be, it is logical within this mindset to fire him if no one is buying his output. Almost any use of this formulation as a standard of merit is annoying because it so completely reduces one’s humanity to a saleable product.

19. By itself, any one of the just-listed measurements is a woefully incomplete determiner of just desert or material accomplishment. Yet what further complicates their use as standards, whether in the social, political or legal realm, is the way they are employed in a facile shell game. You thought you were running a race but the real event was entertainment of the throng. You played fairly but the points went to the efficient. You delivered efficiency but the eligibility requirements changed behind your back.
20. We should be careful about such presumably unconscious sleights of hand, for what Kenyan runners face in the U.S. did not come out of the blue. However much progress has been made in race relations, one of our perpetual failures has been the widespread and reflexive withdrawal of resources from those areas where black faces predominate. Whether in welfare, schools, housing, lending, or on the playing field itself, whether because “too good,” “no good” or some combination thereof (as in “deserving” but “overpaid”), this flight of funding is something with which we need to come to grips, particularly as these values threaten to spill into an emerging global financial order.

THE PROBLEM OF SUSPECT PROFILING

21. I would like to turn now to one of the most pressing issues for those within the American civil rights community, i.e., the use race or ethnicity as a cipher for criminal suspiciousness. At its best, a “suspect profile,” even when backed by solid forensic expertise and data, is a composite providing clues, not a guarantee. At worst, profiling can amount to little more than privileging an individual officer’s “hunch.” Furthermore, many agencies misunderstand or misuse even legitimate data about suspect behaviour. If, for example, one were to find a pattern of documented criminality among Canadian women from an extended family in Saskatoon, all of whom had hidden contraband in their backpacks, this may justify bringing out a drug-sniffing dog in encountering another such a one. It does not, however, justify using this information to strip search every woman who looks like she could be Canadian. Yet, if you change “Canadian” to “Jamaican,” that is precisely the kind of logic by which specific features get stretched into broad ethnic assumptions, by which nationality is expanded into race, and by which enumerated subcategories get stretched into fearsome and ubiquitous apparitions.
22. The concern about using race as the equivalent of suspect has been lent particular urgency in the U.S. since last April, when New Jersey state troopers shot eleven rounds into a van of unarmed black college students during a traffic stop whose purpose remains unclear. The head of the state troopers was later fired for stating that he believed that race was a reliable predictor of certain kinds of criminality. Yet this kind of case is always complicated as it plays out in the court of public opinion.
23. Recently, for example, New York City Police Commissioner Howard Safir exhorted black community leaders not to “play the race card” in addressing the question of police-citizen distrust. He used as an example a police shooting – officers fired forty-one rounds – of an innocent unarmed African immigrant named Amadou Diallo. He insisted that Diallo’s death was a tragic mistake but it was not about race. Yet Commissioner Safir then went on to discuss how the increased policing has reduced the murder rate in black neighbourhoods significantly — simultaneously conceding and skirting the degree to which African-American and Latino communities have been targeted for greater police presence because of higher crime rates, yet dismissing the harassment complaints of innocent minority citizens with a “can’t-have-an-omelet-without-breaking-eggs” style of argument.
24. Is it really “playing the race card” to speak of this directly? Consider the fact that in the New York and New Jersey area, the crime rate for certain categories of offence is higher in African-

American and Latino neighbourhoods than white. However, national statistics also show that in areas where there are significant numbers of poor whites, the crime rate is virtually the same as for poor communities of colour. In New York and New Jersey, however, as in many places in the U.S., white communities tend to be much wealthier than communities of colour. Thus, the degree to which general patterns of crime may have less to do with race than with poverty is complicated by the degree to which economic status itself has long been affected by the ongoing legacy of segregation.

25. These higher rates of crime then become recast as that much-touted bromide, blacks “commit more crime” than whites. There is a great deal one could say about the accuracy of this perception—particularly as it is used to imply that blacks (men in particular) are innately more crime-prone than whites. If blacks are stopped at what every study thus far documents as shockingly disproportionate rates to any other group in the population, then it should not be a surprise that they are subsequently arrested, prosecuted and convicted more frequently than whites, and are incarcerated for longer terms than their white counterparts convicted of similar crimes. But even that reality, so disturbing without any enhancement, about a minority of mostly poor, mostly young black men—one in three of whom are in jail or on probation, more than half for offences related to the desperate industry of self-medication by crack cocaine — becomes exaggerated far beyond itself. In any given year in the U.S., 98 percent of blacks and 99.5 percent of whites are not arrested for any crime. Yet in many people’s minds: “blacks commit *relatively* more crime,” becomes twisted into “they commit most of the crime,” or, most insidiously, “most blacks are criminals.” And in a society where such a perception is pervasive, it is only a short, seemingly logical leap into the habit of viewing all blacks as suspect.
26. In short, no one doubts that police work is the hardest job on earth. But when supposedly “scientific” predictive indicators are applied carelessly or drawn so diffusely as to overlap with already deep class divisions and racial prejudices, we end up with the intolerably burdensome life circumstance that so many blacks and Latinos describe as “driving while black,” or “born guilty.” The alleged practices of the New Jersey state troopers, like the Diallo case, will be investigated and, one hopes, resolved over time. But the questions such investigations raise are not for police departments alone. What happens to the democratic promise of our system of justice when, for some, the American legal system’s presumption of innocence until proven guilty becomes nothing more than a quaint fiction for the courtroom? What happens to us all, when we become a citizenry so thoughtlessly divided against itself—“safe” on one side, “sorry,” like a knell, on the other?
27. Consider the implications in another context: consider Federal District Court Judge Stanley Sporkin’s ruling last year striking down State Department “profiles” of foreign visa applicants that were actually based on skin colour, ethnicity, looks, speech and—remarkably enough—fashion sense. Judge Sporkin struck down State Department guidelines that explicitly encouraged “special handling” of those from black areas and of those with Arab, Chinese, and Korean surnames. State department manuals suggested abbreviations by which to sort applicants, such as “RK = Rich kid, LP = Looks poor, TP = Talks poor, LR = Looks rough, TC = Take care.” The more dutiful consular agents justified rejections of applicants with such addition notations as “slimy looking,” “Wears jacket on shoulders w/earring,” and “No way...Poor, poor, poor.”
28. Perhaps the State Department’s bias is one to which Americans — fox-smart, self-taught, and terribly insecure — may be peculiarly susceptible: we are afflicted with the class-jumping hyper-vigilance of the embarrassed former peasant, trying to suppress the truth of exuberant family origins when what is at stake is not a broken rule of etiquette, but an entire sense of belonging in a yearned-for world.

29. The ritual dismissal of those “beneath” on the social ladder (however defined) too frequently mirrors the internalised admonishment of the anxious *arriviste*—right-fork anxiety, left-foot-in-mouth, the merciless rush to judge others because one’s own humiliation is pre-ordained. The self betrays itself when trying hardest. For the real rules are so silent, so thoughtless, small as a detail—an earring? An inflection? – yet a matter of birthright, imparted in the nursery, hoarded till the grave.
30. This kind of class consciousness is troubling not only for its overtness, but for its insistent orderliness, its authoritarian demand of obedience; it is troubling precisely for the polite cleanliness of its cruelty. As Americans, we abandoned much of the sycophancy of European social hierarchy as a constitutional matter. But race has always been the great stumbling block to our most perfect union, and, ever since the outlawing of explicit racial discrimination, economic classification seems to have re-emerged as a kind of handy cipher for race, for ethnicity, for all manner of historic shortcoming. We are still a nation in which so many of the right things count — the rules for entry into most ordinary social realms are not unduly layered with arcane gestures of empty courtliness. But the ongoing imperative of the civil rights movement urges us well beyond the abolition of segregation. As we reconstitute ourselves into a new global economic what some have called “nobility,” we must be mindful of the mannerist’s protean capacity for a barbarian’s horde of resentments.
31. Finally, and by way of contrast, I would like to turn to my discussion to the town of Littleton, Colorado, a very wealthy community that until recently many would have assumed was a model of the “safe” suburban American small town. Yet in the wake of the horrific events at Columbine High School in May, 1999, when two Littleton teenagers named Dylan Klebold and Eric Harris went on a shooting and bombing spree, it might be a useful context in which to rethink what makes some people look dangerously “suspect” no matter how exemplary their behaviour, while others bask in such beneficent social regard that they can “con” others, literally to death.
32. I do not presume to have any great comprehension of the madness in Littleton. But for what it’s worth, here are a couple of things I will say. First, I want to draw attention to the strikingly consistent protestations of the residents of Littleton, Colorado in the immediate wake of the shooting: “it couldn’t happen here,” “we’re not that sort of people,” and so repeatedly, so unself-consciously, “this is not the inner city.” (As certainly it was not. There were so few minorities – under ten, I believe--among Columbine High School’s two thousand students that although the gunman claimed they were aiming for minorities it looked as though they ended up including in that category all the brunettes in town.)
33. The national conversation about What Went Wrong pinned down the coordinates of our monstrous affliction of violence: Bombs on the Internet! Violent Videos! Single Mothers! Authoritarian Fathers! Guns! And, amazingly enough, Not Enough Guns! But here is what I think: if the denizens of the inner city, in particular young black men like Amadou Diallo and a host of others, have been made so fearsomely “suspect” that their reaching for their wallet can provoke a panic of “preventive” killing, privileged young whites often seem to stumble through life as the victims of what I’ll call innocence profiling. Dylan Klebold and Eric Harris seem to have been so shrouded in presumptions of innocence that after
 - professing their love for Hitler,
 - declaring their hatred for blacks, Asians and Latinos on a public website no less,
 - downloading instructions for making bombs,
 - accumulating the ingredients,
 - assembling them under the protectively indifferent gaze (or perhaps with the assistance) of parents and neighbours,

- stockpiling guns and ammunition,
- procuring hand grenades and flak jackets,
- threatening the lives of classmates, killing thirteen and themselves, wounding numerous others, and destroying their school building—

Still, the community could not seem to believe it really happened “here.”

34. Still their teachers and classmates all continued to protest that they were good kids, good students, solid citizens. Even their probation officers (assigned after Klebold and Harris were caught burgling a car) had released them to their parents while praising them as intelligent young men with lots of promise. What is the force that drives this wilful game of blind-man’s bluff, this devotion to “mystery” and disbelief?
35. There was quite an astonishing little item in The New York Times recently about the national proliferation of so-called “assassination games” among mostly white, suburban, middle-and upper-class youth. High school students across the country, even in the wake of Littleton, organise mock war games as a rite of passage—or of spring. “A.P. Assassination” is what one school in exclusive Westport, Connecticut calls the hunting season that begins right after advanced placement testing. For approximately three weeks, students track one another around town with toy guns. (At one school, five actual car crashes were attributed to the chase.) The student left standing after this gruelling process of elimination “wins.” One exuberant eighteen year-old that aspires to be a physics professor dismissed criticism as politically correct overreaction and likened the game to “playing cowboys and Indians.” (No Indians were apparently available for comment.)
36. Reading about this, it began to dawn on me why perhaps all those kids in Colorado could go on and on about how “normal” Eric Harris and Dylan Klebold were. I began to appreciate why the authorities might find it hard to pick out any further suspects from a student body whose poetic sensibility is suffused the metaphors of blood lust. (Although...you’ve got to wonder...if “assassination games were played in the inner city, I wonder whether those same authorities wouldn’t have cordoned off entire neighbourhoods? Police have gone door-to-door strip-searching people for less in black neighbourhoods—I think of the 3000 police sent to surround the few hundred people who showed up for a rally organised by an admittedly vilely anti-Semitic black neo-nationalist named Khallid Muhammed. This should not be heard as an apology for the rantings of Khallid Muhammed, but rather as a call for a sense of proportion.
37. I think of the long tragic history of what happens to minority kids who wave toy guns in public. I think about Dylan Klebold who for weeks drove around Littleton in his BMW with a trunk full of bombs, and I can’t help thinking about the black dentist in New Jersey who was stopped by the highway patrol more than one hundred times in four years for no reason other than that he was driving a BMW, before he finally traded it in for something more drably utilitarian.
38. Perhaps the power of what we call the normative to induce moral blind spots can be appreciated for its depth and complexity only when the world for some reason gets turned completely upside-down. Perhaps, after all, it is not accidental that so many American school shootings seem to occur in mostly white communities whose populations “fled” to the suburbs to “escape” poor blacks and whose residents have been socialised to think of themselves in such automatic opposition to “inner cities” and imagined “bad neighbourhoods.” Perhaps it is not surprising that the disgruntled children of such invested fears would choose to act out their communities’ worst fantasies by this sad, sad minstrelsy-in-overdrive — these sad white children rendering incarnate the ultimate fantasy of black-masked, black-cloaked super-predators Whose Guns Are Bigger Than Yours.

39. As William Blake described such a psychic state: “The Bat that flits at close of eve / Has left the brain that won’t believe. / The Owl that calls upon the night / Speaks the unbeliever’s fright.”