
The Race-Neutral Workplace of the Future

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INTRODUCTION

It is an interesting time, politically speaking, to think about race neutrality. The Supreme Court has, for some time, evaluated laws and policies related to race for “neutrality.” In doing so, it asked whether those laws treat different racial groups differently. Race-neutral laws receive only rational basis review, while race-conscious ones must be justified under strict scrutiny.¹

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¹ Under the Equal Protection Clause of the Fourteenth Amendment, laws that single out particular groups on the basis of race are subject to strict scrutiny, meaning that the government must show both a compelling interest for the law and that the law is narrowly tailored to further that interest. This form of review is much more demanding than rational basis review, which is the default level of review for laws and requires only that the government show a legitimate government interest and a rational relationship between the government interest and the law. In order for the law to receive strict scrutiny, however, discrimination must be intentional — that is, the government must have singled out a particular racial group on purpose. If the law has a disparate impact on a group, but that impact is not intentional, then strict scrutiny does not apply. *See, e.g., Washington v. Davis*, 426 U.S. 229, 246 (1976) (applying rational basis review to a race-neutral law).

Neutrality is a slippery concept. A number of divergent groups have cautiously embraced something that might be called race neutrality. One version of neutrality is what we could call the Justice John Roberts position: as he wrote in *Seattle School District No. 1*, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”² Proponents of this version think that race should not matter. They might claim that they “don’t see race,” either literally or as a way of claiming that race does not matter to them. They believe that laws should not distinguish among people on the basis of race and that policies should not take race into account.

While the position above is associated with conservatives, there is also a version of race neutrality that has many fans among progressives. This contingent believes that discrimination is a serious problem that should be addressed through law, policy, education, and institutional design. They believe that race matters, and that we should acknowledge this reality and address it with both law and policy.

Yet progressives also believe that we should address these issues proactively and with all the means at our disposal, including — relevant to this symposium — developments in technology. Interestingly, this begins to look a lot like race neutrality as well. The difference is simply that conservatives believe we can impose race neutrality on our own, while progressives think we need outside interventions to get there.

This Essay aims to explore the idea of race neutrality from a liberal perspective, one that accepts the salience of race yet also finds promise in the ability of technology to blind us to it. Part I describes the way that, by combining research on racial bias with information about new technology, we can evaluate the feasibility of making parts of the workplace race neutral and the effect these measures would have on the workplace itself. Part II discusses some of the ways these developments could play out in the law. Finally, in Part III, the Essay concludes with a philosophical question: if we could make an entire workplace race neutral — that is, if we could truly ensure that no one saw race at any time — should we do so? The answer is more complicated than it might seem at first.

² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

I. BIAS AND TECHNOLOGY

This Part surveys existing research regarding bias in the workplace, with an emphasis on racial bias. It then considers how that bias is filtered, changed, or amplified as new technology is introduced. Research demonstrates that the same biases that infect the traditional workplace also affect new workplaces, such as the platform economy, and workplaces that include new technology.

A. *Bias in the Workplace*

The social science evidence shows that racial bias is a problem in the workplace. We see evidence of bias at the hiring phase. Any number of studies reveal such bias;³ one of the most famous is a field study in which identical résumés were sent out with either a black-identified name like Lakisha or Jamal or a white-identified name like Emily or George.⁴ The résumés with white-sounding names got 50% more interviews.⁵

We also see evidence of bias at the evaluation phase. For example, a study recently showed that law firm partners rate the same memo 20% higher when they think a white person wrote it as compared to a black person.⁶ Likewise, many studies have shown that teaching evaluations tend to rate women and people of color less favorably.⁷

And, of course, we see bias during the day-to-day interaction that occurs in nearly every brick-and-mortar workplace. Indeed, we only have to scratch the surface of the Title VII case law to find all sorts of

³ See Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1289-90 (2017) (summarizing various studies regarding race in the workplace).

⁴ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

⁵ *Id.* at 992.

⁶ See Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perception of Writing Skills*, NEXTIONS YELLOW PAPER SERIES (Apr. 2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf> (finding that an identical memo averaged a score of 3.2 out of 5.0 when reviewers thought the author was black and 4.1 out of 5.0 when reviewers thought the author was white).

⁷ William Arthur Wines & Terence J. Lau, *Observations on the Folly of Using Student Evaluations of College Teaching for Faculty Evaluation, Pay, and Retention Decisions and Its Implications for Academic Freedom*, 13 WM. & MARY J. WOMEN & L. 167, 173-82 (2006); see, e.g., Kaitlin Mulhere, *Students Praise Male Professors*, INSIDE HIGHER ED (Dec. 10, 2014), <https://www.insidehighered.com/news/2014/12/10/study-finds-gender-perception-affects-evaluations>.

examples.⁸ And anecdotes of unequal treatment in the workplace are so common that they really require no citation.

Low-tech solutions to the problem of bias have been around for as long as people have actually cared about bias (so not really all that long, but that is a topic for a different essay). In the hiring context, one example is that of placing a screen between musicians auditioning for an orchestra and the people judging them. Research shows that female musicians are scored higher when judges cannot tell they are female.⁹ Likewise, at the evaluation stage, some work environments have also imposed blindness on some efforts at the review process. An example is that of blind peer review, which is the norm in several disciplines, albeit not law. In many instances the placement of an article affects an individual's likelihood of receiving tenure and promotion. Seen through this lens, blind peer review is in some sense imposing race neutrality on the promotion and tenure process.¹⁰

These examples are the low-tech predecessors to measures that take place in the platform economy. As a preliminary point, research demonstrates that race discrimination is alive and well in the platform economy. One study showed that Airbnb renters with black-identified names had sixteen percent more difficulty finding places to rent to them.¹¹ For example, a profile with the name Latonya Robinson gets a positive response from hosts thirty-five percent of the time; Anne Murphy gets a positive response fifty-six percent of the time.¹² Other research shows if you take two rental spaces, of the same quality and in the same area, the one owned by a white host will cost an average of

⁸ See e.g., Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 854-58 (2002) (discussing "covering" as a form of discrimination resulting from explicit or implicit pressure to downplay identity); see also Devon W. Carbado & Mitu Gulati, Symposium, *Discrimination and Inequality Emerging Issues: Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) (arguing that members of outsider groups "are often likely to perceive themselves as subject to negative stereotypes," and therefore "likely to feel the need to do significant amounts of 'extra' identity work to counter those stereotypes").

⁹ See Curt Rice, *How Blind Auditions Help Orchestras to Eliminate Gender Bias*, THE GUARDIAN (Oct. 14, 2013, 7:00 AM), <https://www.theguardian.com/women-in-leadership/2013/oct/14/blind-auditions-orchestras-gender-bias>.

¹⁰ Cf. Peter Casserly, *Benefits and Drawbacks of Double-Blind Peer Review*, EX ORDO FOR ACAD. (Jan. 29, 2014), <https://www.exordo.com/blog/double-blind-peer-review> (finding a significant increase in the publication of female first authored papers when double-blind peer review was implemented).

¹¹ Benjamin Edelman & Michael Luca, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9(2) AM. ECON. J. APPLIED ECON. 1, 2 (2017).

¹² *Id.* at 13.

twelve percent more than the one owned by a black host.¹³ More recent research shows that black Uber passengers wait thirty-five percent longer to be picked up and are twice as likely to have the driver cancel a ride on them.¹⁴ Although the focus of this paper is race, women also suffer discrimination: they are more likely to be taken to their destination by a longer route and to spend more time in the cab.¹⁵

An arguable benefit of the platform economy is that it is much easier to conduct studies such as these. Transactions leave more of a data trail, so it is easier to identify when discrimination happens. And we can potentially extrapolate the platform economy findings to the traditional economy. In particular, names and photographs tend to trigger racial awareness and, often, race discrimination.

B. *Technological Solutions?*

Against this backdrop, technology has begun to offer ways of imposing race neutrality in various aspects of workplace culture. With respect to hiring, developers have created recruitment systems that use algorithms to do the initial screening of candidates. Other commentators have thoughtfully noted the possibility of discrimination by algorithm,¹⁶ which I will bracket for purposes of this Essay. Assuming a completely unbiased algorithm, the mechanisms

¹³ Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com*, (Harvard Bus. Sch., Working Paper No. 14-054, 2014) (finding that non-black hosts charge approximately twelve percent more than black hosts for equivalent rental properties).

¹⁴ Yanbo Ge et al., *Racial and Gender Discrimination in Transportation Network Companies* (The Nat'l Bureau of Econ. Res., Working Paper No. 22776, 2016), http://www.nber.org/papers/w22776?utm_campaign=ntw&utm_medium=email&utm_source=ntw; Julia Carrie Wong, *Study: Uber and Lyft Have 'Pattern of Discrimination' Against Black Passengers*, *GUARDIAN* (Oct. 31, 2016, 7:52 PM), <https://www.theguardian.com/technology/2016/oct/31/uber-lyft-racial-discrimination-us-boston-seattle> (highlighting the discrimination by Uber and Lyft drivers against passengers with African-American sounding names).

¹⁵ See Yanbo Ge et al., *supra* note 15 (finding that Uber and Lyft drivers in Boston take women on longer, more expensive rides).

¹⁶ See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 9-18 (2015) (suggesting that algorithms, created in part to reduce judgment in corporate decision-making, actually further entrenched biases); Anupam Chander, *The Racist Algorithm?*, 115 *MICH. L. REV.* 1023 (2017) (acknowledging algorithmic biases and proposing algorithmic affirmative action, the design of algorithms in race- and gender-conscious ways, to account for existing discrimination).

described in this section have the potential to eliminate or diminish bias at the hiring phase.

One such system is Unbias.io, a Google Chrome extension that removes faces and names from LinkedIn profiles to reduce the effects of unconscious bias in recruiting.¹⁷ Another is Interviewing.io, an anonymous technical interviewing platform designed to eliminate bias at the initial screening stage.¹⁸ Interviewing.io allows candidates to practice interviewing with former executives at tech companies. When a candidate becomes proficient at the practice interviews, they can be invited to interview anonymously at tech companies and can skip directly to the tech phase of the interview — that is, the part of the interview where the candidate is tested on solving algorithmic coding problems or some other technical problem. In other words, Interviewing.io allows people to skip the initial in-person screening that is currently one point at which bias can creep in during traditional interviews. Finally, if a candidate feels they have done well at the tech interview, they can choose to “unmask” themselves — at which point the next phase is generally an onsite interview. So, while the face-to-face interaction that sometimes triggers bias does still occur with Interviewing.io, it occurs at a much later stage. By this time many candidates will have already demonstrated facility for many of the tasks associated with the job and perhaps any bias is reduced or counteracted by awareness of their technical skill.

Past the hiring stage, technological interventions can also affect the evaluation of people who hold a particular job. Within the platform economy, businesses like Airbnb, Uber, and Handy use rating systems to allow customers to evaluate the people who offer services through their platform. After an Uber ride concludes, for instance, the driver rates the passenger from one to five stars (and vice versa).¹⁹

Suppose, then, that an Uber driver picks up a passenger who is racially biased, and either consciously or unconsciously that passenger gives the driver an undeserved low rating. That rating then goes into the driver’s average, which is displayed to future passengers, creating a vicious cycle: drivers of color have lower ratings; those lower ratings prime passengers to view them in a more negative light; and that negative perception leads to more negative ratings. The consequences

¹⁷ *A Chrome Extension that Removes Faces and Names from LinkedIn to Reduce the Effects of Unconscious Bias*, UNBIAS, <http://unbias.io> (last visited Sept. 29, 2017) (explaining how to activate Unbias.io on a LinkedIn profile).

¹⁸ See INTERVIEWING.IO, <https://interviewing.io/> (last visited Sep. 29, 2017).

¹⁹ *Star Ratings*, UBER, <https://www.uber.com/drive/resources/how-ratings-work/> (last visited Nov. 28, 2017).

for drivers can be severe: if an Uber driver's rating drops below 4.6, sources report that they are suspended from driving.²⁰

The solution Uber has provided is partial, but it helps to point the way toward a more complete way of addressing the issue. Uber currently provides boxes that riders can check after the star rating — at the five-star end, things like “great conversation!” or “expert navigation!” and at the low end the reverse.²¹ One measure Uber could take would be to ask these questions before the numerical rating because it forces people to think about whether there is any real justification for their numerical rating. Likewise, it would improve matters if Uber allowed freeform comments at least for internal evaluation of drivers. By way of comparison, on Yelp, people read a scathing negative review and can often draw a conclusion about whether the problem is as much or more to do with the reviewer rather than the business; a lengthy and poorly organized rant would serve the same function on Uber.

There is, of course, another aspect to racial bias in employment. Even if we could use technology to completely leach bias out of the hiring and evaluation processes, that still leaves the part of employment where we actually have to interact with each other. Thus far technology has made the fewest inroads into this realm, but a few offer a sense of the possibilities for the future.

We might, for example, think about virtual reality in the workplace — or about reality in the virtual workplace. A soft version of virtual reality might involve using virtual reality technology to conduct debiasing training. Natalie Salmanowitz, for example, has examined in the courtroom context the possibility of putting both judges and jurors through either pseudocompulsory or voluntary debiasing training.²² The same could be implemented in many other workplaces as well, from office environments to blue-collar settings, and employers could create incentives for workers to engage in the trainings.

²⁰ See, e.g., James Cook, *Uber's Internal Charts Show How Its Driver-Rating System Actually Works*, BUS. INSIDER (Feb. 11, 2015, 11:53 AM), <http://uk.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2>. This standard has changed several times during the past few years, and may well be updated again after this Essay goes to print.

²¹ See Mike Truong, *Introducing Compliments*, UBER NEWSROOM (Nov. 21, 2017, 3:00 PM), <https://www.uber.com/newsroom/compliments-2/>.

²² See generally Natalie Salmanowitz, *Unconventional Methods for a Traditional Setting: The Use of Virtual Reality to Reduce Implicit Racial Bias in the Courtroom*, 15 U.N.H. L. REV. 117 (2016) (suggesting the implementation of virtual reality training with judges and jurors as a potentially effective means to reduce implicit racial biases).

More intriguingly, we might consider an aggressive version of virtual reality. What if everyone in a workplace were not only allowed or encouraged, but actually *required*, to interact exclusively in a virtual reality setting? Perhaps an employer could create a virtual environment inspired by the popular online environment Second Life,²³ in which employee avatars work in cubicles and offices mimicking those in a physical office. It would also be possible to have an entirely different office environment limited only by imagination — imagine avatars floating among planets or sitting outside on a beautiful day — or to have an environment that changed daily, perhaps depending on the dominant work of the office. Still, there might be value in importing the professional norms associated with a “normal-looking” virtual office.

Within that virtual environment, we can imagine a workplace where employees have a consistent identity via a name of their choosing, and would appear to one another as virtual reality avatars, but no one knows what anyone else is named or looks like in real life. Voice altering software could be used to obscure identity characteristics such as gender and dialect. In one permutation of this possibility, every person would have a consistent avatar, with a race and gender of their choosing. In another permutation, perhaps employees could be required to change either race or gender every few weeks, with the result that their coworkers would eventually come to decouple one another from race and gender identity. People could use email addresses with aliases rather than their real names, and even human resources could employ a system for scrambling payroll and other paperwork identifiers. Virtual reality could be used for purposes of social engineering within the workplace.

Perhaps this idea sounds like science fiction, but the technology to do so is mostly there — it was there a decade ago in the Second Life game. Moreover, there are already workplace environments where people never interact face-to-face: think of home medical transcriptionists, digital media producers, and online tutoring companies.

We are, of course, a long way from implementing a full-blown virtual reality workplace environment in lieu of more traditional environments. Employers are using virtual reality and augmented reality in a number of fascinating ways,²⁴ but not yet in any kind of

²³ See generally Jonathan Strickland & Dave Roos, *How Second Life Works*, HOW STUFF WORKS (Nov. 8, 2007), <https://computer.howstuffworks.com/internet/social-networking/networks/second-life.htm>.

²⁴ See Bernard Marr, *The Amazing Ways Companies Use Virtual Reality for Business*

way to address race relations in the workplace. My point here is that, at some point not very far in the future, they could do so. And, moreover, that it is not too early to consider whether they should.

II. LEGAL IMPLICATIONS

Technology in the workplace raises many complicated legal issues. In this Essay, I will briefly discuss three ways in which technology implicates workplace law.

One way in which identity-filtering technology implicates the law is by changing the expectations we place upon companies to avoid discrimination. This issue could influence the question of proof in employment discrimination lawsuits under Title VII. Under the burden-shifting approach of *McDonnell Douglas*, a plaintiff bears the burden of making out a prima facie case of discrimination; a defendant then bears the burden of offering a legitimate nondiscriminatory reason for its decision; and the plaintiff then bears the burden of rebutting the legitimate nondiscriminatory reason.²⁵ Many of the issues in technology I have raised might go to the third stage in this analysis. So, for example, if ninety percent of companies in a business use an automated technology for their initial hiring cut that blinds them to the name, photograph, and other racially identifying information — and a company who is sued for discrimination does not — then that omission could help establish a plaintiff's case that the company engaged in discrimination.²⁶

The technological measures I have discussed might also influence the outcome with respect to questions of intent.²⁷ In general, an employee does not have to demonstrate intentional discrimination under Title VII; rather, a showing of disparate impact is enough.²⁸ But

Success, FORBES (July 31, 2017, 12:28 AM), <https://www.forbes.com/sites/bernardmarr/2017/07/31/the-amazing-ways-companies-use-virtual-reality-for-business-success/#4a16d2ad1bae> (identifying application of virtual reality technology in a number of business contexts, including customer service, marketing, employee training, finance, human relations, and production).

²⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

²⁶ Cf. Leong & Belzer, *supra* note 3, at 1310-13 (applying the *McDonnell Douglas* approach to instances of affirmative discrimination by platform companies).

²⁷ For an early discussion of the role of intent in the legal analysis of an employment discrimination suit, see Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L. REV. 1201, 1201-04 (1982).

²⁸ See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, FEDERAL LAWS PROHIBITING JOB DISCRIMINATION QUESTIONS AND ANSWERS (2009), https://www.cnic.navy.mil/content/dam/cnic/cnrj/cnrj_hro_yokosuka/cnrj_hro_yokosuka_pdfs/cnrj_hro_yokosuka_services/

that does not mean that intent is entirely irrelevant to the Title VII inquiry. While a detailed examination of the role of intent in the Title VII inquiry, and its relationship to technology, is a project for another paper, here I will point out a few points of intersection. For example, intent can bear on the correct amount of compensatory and punitive damages. Or, in a situation where an employer has in place some sort of merit-based pay system, disparate impact is generally allowed, but only if that impact is not undergirded by discriminatory intent. The same analysis might apply to questions of platform design. So, for example, if a company affirmatively chooses to use a customer rating system that has been shown to introduce bias, one might argue that the company's decision should help to establish intent.²⁹

A third way in which technology might affect workplace law cuts in the other direction, tending to favor employers. Having available tools, and making use of them, may exonerate employers who do not really deserve it. In a court's eyes, the fact that an employer invested in one or more of these products may be seen as evidence — perhaps even conclusive evidence — that it did not intend to discriminate. This presents a fairly obvious strategy for employers: use the tools and be insulated from legal liability.

While a full treatment of these issues is a project for another article, the impact of neutrality-imposing technologies on workplace law will inevitably arise in legal disputes before much time has passed. Courts must consider how the use of neutrality-imposing technology should weigh in the calculus in evaluating discrimination — particularly with respect to the ever-vexing question of intent.

III. PHILOSOPHICAL IMPLICATIONS

It is worth pausing and considering the implications of imposing race neutrality on the workplace, using technology, from the top down. It is easy to install a Chrome extension that blinds your hiring process in its early stages. It is easy to use software that creates mechanisms for blind evaluation. It is not even that farfetched to create a virtual workplace purged of identity characteristics like race and gender.

cnicp_a139460.pdf (“Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.”).

²⁹ See Leong & Belzer, *supra* note 3, at 1312 (discussing how a plaintiff can prove intentional discrimination by showing a platform company knowingly used a technology shown to be biased).

What is hard to do is to reshape people's minds. It is hard to recognize and acknowledge that in some situations all of us experience implicit bias. And it is hard for people to identify these tendencies in their own minds and take steps to counteract them.

With this in mind, one problem with technology that makes us blind to race is that it also potentially makes us blind to racial bias and how much racial bias is out there. Virtual reality, perhaps, can do wonderful things, but I also worry that we should not be inviting more reality-altering technology into our lives — up to and including virtual reality — at a time when it seems that our grasp, as a society, on reality and facts is becoming more tenuous.

And so, while I think that this technology has tremendous potential, I also worry that trying to change the workplace from the outside using technology may displace our attempts to make the workplace a place where people are not just better shielded from racial bias, but where people are *actually less biased*.

To be clear, I do not think that the short-term goal of reducing the effects of bias in hiring and the long-term goal of reducing racial bias in people's hearts and minds are incompatible. What I worry about is that the technology that screens out racial bias will be viewed as sufficient, rather than merely as helpful.

CONCLUSION

Race discrimination is as much a part of the new economy — both the platform economy and businesses that rely heavily on technology — as the old economy. The pressing question is how we will use our knowledge and understanding about race discrimination to shape the new economy and the workplaces that drive it. Whether we are talking about screening software that reduces bias or virtual reality software that eliminates bias entirely, our decisions about how to incorporate new technology into the workplace will shape both the workplace environment and the laws that govern it. While I have offered preliminary thoughts in this Essay, the overarching priority is simply that we do think about the decisions we make, and that we do not simply head blindly into a misinformed attempt at race-blindness.