
12-16-2020

Race on the Brain, by Jonathan Kahn

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Book Review

Citation Information

Ramesh, Shruti. "Race on the Brain, by Jonathan Kahn." *Osgoode Hall Law Journal* 56.3 (2019) : 689-697.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol56/iss3/8>

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Abstract

Canadians and Americans alike are often reluctant to honestly confront our respective nations' histories of racism and discrimination. Unflinchingly describing a legacy of colonialism, genocide of Indigenous peoples, and multigenerational slavery, is a great deal more uncomfortable than the academically "safe" analyses advanced by critical race theory. Simply put, academic conversations around "racism" are increasingly being replaced with conversations about "bias." This is what legal scholar Jonathan Kahn addresses in his book *Race on the Brain: What Implicit Bias Gets Wrong about the Struggle for Racial Justice*. Kahn's book is a response to a trend toward scientism within the interdisciplinary academic communities of cognitive psychology, neuroscience, and the law. Essentially, Kahn contends that there is an ideology of over-reliance on science as a purportedly objective means of understanding complex social issues, such as racism. This trend has resulted in what Kahn argues to be an unwarranted privileging of scientific empiricism in the struggle for racial justice.

Book Review

Race on the Brain, by Jonathan Kahn¹

SHRUTI RAMESH²

Canadians and Americans alike are often reluctant to honestly confront our respective nations' histories of racism and discrimination. Unflinchingly describing a legacy of colonialism, genocide of Indigenous peoples, and multigenerational slavery, is a great deal more uncomfortable than the academically "safe" analyses advanced by critical race theory. Simply put, academic conversations around "racism" are increasingly being replaced with conversations about "bias." This is what legal scholar Jonathan Kahn addresses in his book *Race on the Brain: What Implicit Bias Gets Wrong about the Struggle for Racial Justice*. Kahn's book is a response to a trend toward scientism within the interdisciplinary academic communities of cognitive psychology, neuroscience, and the law. Essentially, Kahn contends that there is an ideology of over-reliance on science as a purportedly objective means of understanding complex social issues, such as racism. This trend has resulted in what Kahn argues to be an unwarranted privileging of scientific empiricism in the struggle for racial justice.

Why is equality so assiduously avoided? Why does white America delude itself, and how does it rationalize the evil it retains? The majority of white Americans ... [b]elieve that American society is essentially hospitable to fair play and to steady growth toward a middle-class Utopia embodying racial harmony. But unfortunately, this is a fantasy of self-deception and comfortable vanity.³

CANADIANS AND AMERICANS ALIKE are often reluctant to honestly confront our respective nations' histories of racism and discrimination. Unflinchingly describing a legacy of colonialism, the genocide of Indigenous peoples, and multigenerational slavery, is a great deal more uncomfortable than the academically "safe" analyses advanced by critical race theory. Simply put, academic conversations around

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1. (Columbia University Press, 2017).
 2. JD Candidate 2020, Osgoode Hall Law School, Toronto, Canada.
 3. Martin Luther King, Jr., *Where Do We Go From Here: Chaos or Community?* (Beacon Press, 2010) at 4-5.

“racism” are increasingly being replaced with conversations about “bias.” This is what legal scholar Jonathan Kahn seeks to address in his book *Race on the Brain: What Implicit Bias Gets Wrong About the Struggle for Racial Justice*.⁴

Kahn’s book is a response to an increasing trend of scientism prevalent within the interdisciplinary academic communities of cognitive psychology, neuroscience, and the law. Essentially, Kahn contends that there is an over-reliance on science as a purportedly objective means of understanding complex social issues, such as racism. This trend has resulted in what Kahn argues to be an unwarranted privileging of scientific empiricism prevalent within the debate surrounding racial justice. In particular, Kahn takes issue with the increasing application of implicit social cognition (ISC) to the law, through a lens he refers to as “behavioural realism.” His primary concern is that behavioural realism is becoming the dominant narrative, rather than a complementary framework for understanding and addressing racism.⁵ Although Kahn’s book is grounded in the sociopolitical context of the United States, it is important to keep in mind that his arguments can easily be applied to the discourse surrounding race in Canada and constitutional jurisprudence around equality. Notwithstanding this, the discussion below will be limited to the American context.

I. UNDERSTANDING BEHAVIOURAL REALISM

ISC includes mental processes that operate without conscious awareness or control, but nevertheless influence fundamental evaluations of individuals and groups.⁶ It manifests as implicit bias at an individual level which, according to Kahn, involves three steps: the mental recognition or construction of a social group, the association of a stereotype with that group, and the layering of positive or negative associations or attitudes on top of that stereotype.⁷ This process is important because, according to ISC scholars, implicit bias is empirically distinct from explicit prejudice; implicit social cognitions therefore uniquely and predictably alter individual judgements that contribute to discriminatory decisions, including judicial decisions.⁸

4. *Supra* note 1.

5. *Ibid* at 10-11.

6. *Ibid* at 21, citing Jerry Kang & Mahzarin R Banaji, “Fair Measures: A Behavioral Realist Revision of ‘Affirmative Action’” (2006) 94 Cal L Rev 1063 at 1064.

7. *Ibid* at 25.

8. *Ibid* at 21. See also Mahzarin R Banaji & Anthony G Greenwald, *Blindspot: Hidden Biases of Good People* (Delacorte Press, 2013).

In the early chapters of the book, Kahn outlines several ways in which implicit bias has been measured and codified, including the use of Implicit Association Tests and cognitive behavioural tasks. Bias has also been measured through utilizing imaging techniques such as fMRI to investigate potential neural correlates of discrimination. Although ISC theorists vary widely in their approaches, there is consensus among them that even though one might seek to be impartial, or know certain biases are wrong to hold, implicit biases nonetheless play a powerful role in determining behaviour.⁹ For instance, in the context of race this would mean that a large part of the behaviour that produces racial discrimination is influenced by unconscious racial biases. Scholars of behavioural realism argue that institutions such as the law should subsequently account for this new understanding of human behaviour and decision making, *i.e.*, that *the law should comport to science*.¹⁰

What would this look like in practice? Kahn details the work of early behavioural realists such as Linda Hamilton Krieger,¹¹ Christine Jolls,¹² and Susan T. Fiske,¹³ crediting them with the introduction of psychology and neuroscience as “sources of authority” used to guide and instruct the courts in their decision making. Krieger and Fiske built much of their initial arguments around the United States Supreme Court decision of *Price Waterhouse v Hopkins*.¹⁴ The US Court in *Price Waterhouse* held that in the context of employment discrimination, so long as the plaintiff could demonstrate that an *impermissible motive* was determinative in making an adverse employment decision, the burden would shift to the defendant to demonstrate the same decision would have been made absent this unlawful motive. This reasoning naturally sparked rebuttal from ISC scholars such as Krieger who argued that the majority’s holding confounded the concepts of motive, intent, and causation by premising liability entirely on the presence of *conscious* discriminatory motive, even though discrimination largely operates below conscious intent.¹⁵ Similar arguments grounded in ISC testimony

9. See generally Kahn, *supra* note 1, chs 2-3.

10. Kahn, *supra* note 1 at 11 [emphasis added].

11. See generally “The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity” (1995) 47 Stan L Rev 1161.

12. See generally “Antidiscrimination Law’s Effects on Implicit Bias” in Mitu Gulati & Michael Yelnosky, eds, *NYU Selected Essays on Employment Law: Behavioral Analyses of Workplace Discrimination*, vol 3 (Kluwer Law International, 2007).

13. See generally Linda Hamilton Krieger & Susan T Fiske, “Behavioural Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment” (2006) 94 Cal L Rev 997.

14. See Kahn, *supra* note 1 at 41; 490 US 228 (1989) [*Price Waterhouse*].

15. Krieger, *supra* note 11 at 1172, 1183, 1216-17.

were used by the plaintiffs in more recent Iowa Supreme Court decisions around racial discrimination claims in employment practices,¹⁶ but it is unclear to what extent such arguments are determinative to the success of the plaintiff's claims.

For Kahn, a defining feature of behavioural realists is the emphasis on the legal and policy applications, particularly when addressing racial discrimination. While he finds this goal laudable, he argues for a deeper examination of the possible externalities that may result from blindly embracing a behavioural realism framework.

II. EXISTING CRITIQUES OF BEHAVIOURAL REALISM AND KAHN'S ARGUMENT

Kahn is clear in his treatise that he is not the first to raise critiques about the application of behavioural realism to advance legal and policy goals. Early in the book, he provides a clear summary of critiques made by other scholars. Scholars of psychology have primarily criticized behavioural realism for its attempt to directly generalize and apply empirical studies, which largely measure bias through individuals' differential reaction time to stimuli in the form of real-world, discriminatory contexts.¹⁷ The highly controlled nature of such experiments, combined with the fact that participants in these studies tend to be what researchers refer to as "WEIRD" (Western, Educated, Industrialized, Rich, and Democratic),¹⁸ calls into question their actual statistical power and suggests the potential for overestimates of "effect size." Ultimately, this raises concerns about the reproducibility of results and whether behavioural realism can reliably predict any form of class-wide discrimination or its tangible outcomes.¹⁹

Kahn's criticisms are more policy than data-driven. He raises two broad critiques of behavioural realism's applications to the law, discussing them at length:

A. BEHAVIOURAL REALISM IS TOO REDUCTIONIST A FRAME FOR ADDRESSING RACIAL JUSTICE

To understand Kahn's concern here, consider the typical implicit bias experiment employed by behavioural realists. An individual is presented with words and is asked to quickly sort them into categories. The words may refer to different combinations of visual (racial) stimuli, race-encoding, and qualitative evaluations

16. See *e.g.* *Pippen v State*, 854 NW (2d) 1 at 6 (Iowa Sup Ct 2014).

17. Kahn, *supra* note 1 at 55.

18. *Ibid* at 56.

19. *Ibid*.

(*i.e.*, good or bad). A score, based on how long on average it takes an individual to respond, is generated. The score is then extrapolated to provide implicit preferences (or the opposite) for one group over another.²⁰

To put it simply, this kind of quantification is seductive. There is intrinsic appeal to finding a technical explanation to complex legal and social problems—science holds the simultaneous power of authority and objectivity. However, this human tendency towards measurement is not without drawbacks. Kahn cites anthropologist Sally Engle Merry for her critique that “counting things . . . [makes] them comparable, which means they are inevitably stripped of their context, history, and meaning.”²¹ Seeking a scientific explanation for discrimination is a dangerous proposition because it looks to source the phenomena of racism to neural mechanisms rather than broader social structures.

Kahn contrasts this framework with the “cultural meaning test” proposed by legal scholar Charles Lawrence III,²² which looks to broader cultural and historical phenomena to evaluate whether a particular act conveys a discriminatory or stigmatizing message. Lawrence acknowledged cultural and historical context in his scholarship to make structural biases visible to jurists tasked with recognizing discriminatory behavior. The problem with racism, according to Lawrence, lies not in the individual actor’s conscious or unconscious motivation, but the continued existence of a widely shared belief in white supremacy.²³ Although this addresses some of the contentions raised by Kahn, it remains unclear whether he is advocating for such a framework to supplant behavioral realism altogether, or to merely inform it.

Kahn also takes issue with the scientism employed by behavioral realists because accepting such a status quo may undermine developing interventions to address the problem. Essentializing racism to individual-level implicit biases tends to promote seeking individual-level and often scientific, solutions. Kahn includes examples of interventions such as the practice of employers name-blinding

20. See *ibid* at 28, citing “Project Implicit” (2012), online: *Harvard University* <www.projectimplicit.net/about.html> [perma.cc/Y5GP-A3VY].

21. *Supra* note 1, citing *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (University of Chicago Press, 2016) at 1.

22. Compare “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism” (1987) 39 *Stan L Rev* 317.

23. See “Unconscious Racism Revisited: Reflections on the Impact and Origins of ‘The Id, the Ego, and Equal Protection’” (2008) 40 *Conn L Rev* 931 at 951.

applications,²⁴ judicial education programs around implicit bias,²⁵ and the task force on implicit bias developed by the American Bar Association, whose programming includes highlights of evidence of the human ability to dismantle and overcome bias using specific techniques.²⁶ Kahn also critiques the neoliberal turn in American politics and society to “commodify everything,” pointing out that diversity management and related applications of behavioural realism have become major, and profitable industries.²⁷ These interventions aim to eliminate bias by increasing self-awareness, and although Kahn concedes they may have the capacity at some level to lessen discriminatory behaviour, they are not a solution to the problem of *racism*.

Of particular concern is that since behavioural realism and neuroscience research portrays racism as a biological and individual-level phenomenon, the stage is set for biological and pharmaceutical interventions. It is this “pathologizing” of racism as an anomalous medical condition, and the potential concomitant “biologizing” of treatments for *anti-racism* that Kahn sees the most dangerous of all,²⁸ as it seeks to find a “silver-bullet” solution to a complex issue, and further, provides the individual with a means to shirk accountability for discriminatory attitudes.

B. BEHAVIOURAL REALISM INVOLVES EMBRACING THE POLITICALLY CONSERVATIVE FRAMES EMBEDDED IN CURRENT AMERICAN CONSTITUTIONAL DOCTRINE

Kahn’s second main critique of behavioural realism deals with the implicit embracing of conservative doctrinal frames that come with applying social scientific evidence of bias to jurisprudence around race and discrimination. There are five aspects of conservative doctrine in anti-discrimination jurisprudence that Kahn discusses: (i) time, *i.e.*, the tendency for ISC to treat racism as a thing of the past, and implicit bias as the present concern,²⁹ (ii) the focus on individual rights over group rights, (iii) the conservative focus on “intent” in identifying

24. See *e.g.* Kahn, *supra* note 1 at 50-51. In the 1970s, to address gender bias in hiring, candidates for the American Symphony Orchestra would audition from behind a curtain so that hiring decisions would be based solely on performance.

25. *Ibid* at 52-53.

26. *Ibid*.

27. *Ibid* at 169.

28. *Ibid* at 216-19. One example that Kahn provides is Propranolol, a drug commonly used to treat hypertension, but which researchers have recently begun asserting abolishes “implicit bias” by affecting response times on Implicit Association Tests (*ibid* at 218).

29. *Ibid* at 64.

discrimination over evidence of disparate impact, (iv) the promotion of the ideal of colour-blindness and transcending past the perception of racial difference, and (v) the privileging of the idea of “merit” over distributive justice.³⁰ Although he goes into each of these aspects in detail, Kahn believes it is the latter two points that prove to be the most detrimental to achieving racial justice.

The Equal Protection Clause in the American Constitution guarantees that the law must protect all people equally.³¹ The “antidomination” school of racial justice, to which Kahn belongs, holds that because of the history of white supremacy in America, it is necessary to *affirmatively* protect racial minorities to meaningfully meet the demands of equal protection. If the law does not actively defend minorities and their rights to equal protection under the law, this is, on its face, a violation of their rights. However, behavioural realism’s tendency to promote a colour-blind ideal and erase the historical context of discrimination raises issues around what the right to equal protection entails in practice. This is perhaps best illustrated in the context of affirmative action.

Kahn gives careful consideration to several cases, notably *Regents of California University v Bakke*,³² the infamous case of the white, male NASA engineer who sued the University of California after being rejected from medical school, arguing that quotas imposed by the university for marginalized students disadvantaged him by affecting his likelihood of admission. According to Kahn and the antidomination school of thought, programming that affirmatively acts in favor of minorities is both consistent with the equal protection clause and is not an attack on the “majority,” *i.e.*, those who have always been protected by the law. Justice Powell’s judgement in *Bakke* is known for being the decision that ended race-based quotas in admissions standards, while simultaneously upholding the consideration of race as one factor among many others used to evaluate applications for admission. According to Kahn, this marked the beginning of the contemporary colour-blind jurisprudence of the US Court.³³ Treating race as merely another factor in affirmative action programming strips race of its distinctive history and meaning. This approach reinforces the behavioural realist frame that racism is merely an individual-level cognitive glitch, easily redressed by focusing on the watered-down and vague notion of “diversity” rather than restorative justice for wronged communities.³⁴

30. *Ibid.*

31. US Const, amend XIV, § 1.

32. 438 US 265 (1978) [*Bakke*].

33. *Supra* note 1 at 81.

34. *Ibid* at 90-91.

Post-*Bakke*, Kahn argues that behavioral realism has resulted in a jurisprudential shift towards a neoliberal and colour-blind vision of meritocracy, resulting in tension between the desire for meritorious hiring and admissions decisions, and the equal protection of minority communities. Kahn flags this as a problematic externality of behavioral realism's perpetuation of conservative frames, stating that "the neoliberal ideal of merit reduces the subject to nothing more than his or her ability to perform specified tasks, whether playing an instrument or taking a standardized test."³⁵ For Kahn, equality for minorities cannot truly be achieved without equity-oriented affirmative action that accounts for historical injustices experienced by disadvantaged groups.

The central thesis of *Race on the Brain* is essentially this: Behavioural realism, and the application of implicit-bias based analyses to the law, have, due to their promotion of conservative doctrinal frames, worked to undermine the Equal Protection Clause and related legislation pertaining to the *Civil Rights Act*. Thus, despite noble intentions, behavioural realism is not a vehicle for promoting substantive equality.

III. CONCLUSION

A surface-level reading of *Race on the Brain* might leave one with the impression that Kahn seeks to leave the reader with a scathing indictment of behavioural realism as a school of thought, one with little credibility in contemporary discourse on race. Without engaging more deeply with his analysis, it is easy to interpret it as painting behavioural realism as too rigid and prescriptive a lens to be applied to the law. It is important to note that Kahn is not arguing that he does not believe humans hold implicit biases favouring certain racial groups above others. Rather, he is merely arguing that by applying ISC to the law, behavioural realists are overly reliant on this concept to explain the complex nature of race relations in North America. Allowing "implicit bias" to replace "racism" allows the society to shirk accountability for addressing the broader social and political climate in which racism proliferates. "It makes racial injustice into primarily a function of individual mindsets and intent," Kahn says. "It makes the past irrelevant,

35. *Ibid* at 113.

it ignores structural factors, and it focuses on the *intent* of the perpetrator rather than on the *impact* of the person who is actually experiencing the harm.”³⁶

Kahn concludes his book with a call to action for white Americans (and really, white individuals at large). He implores them to reflect on their social location and to challenge the contemporary narratives of racism and injustice; that is, to question the way that implicit bias theory has permeated into modern constitutional jurisprudence. While he thinks behavioral realism is a valid field of study, he believes it to be a skewed way to tell the story about racism in America. For him, it is this story, not the science itself, that needs to be contested.³⁷ That the legacy of racism is still very much alive encapsulates Kahn’s key point: Racism is more than a historical relic, and is more than an individual attitude—at its fundamental existence, it is a question of power.

Race on the Brain ultimately offers the reader a provocative analysis of the intersection between psychology, race, and the law. This is a book with the capacity to enrich conversations about the socio-political and legal dimensions of race and racism for years to come. With his book, Kahn has made a timely and thoughtful contribution to an area of research that, perhaps most importantly, does justice to a sensitive topic and the communities affected by it.

36. “Professor Jonathan Kahn Takes On Implicit Bias in New Book” (14 February 2018), online: *Mitchell Hamline School of Law* <www.mitchellhamline.edu/news/2018/02/14/professor-jonathan-kahn-takes-on-implicit-bias-in-new-book/?fbclid=IwAR3RdGBWdoFO7lirriTkfsUq0If7PkPh5QfETlmOcZQLILVcB_-kbknh7I> [perma.cc/6A4B-N4KP].

37. *Ibid* at 233-34.