

JUDGING RACISM

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ABSTRACT

The article addresses the fairly recent incident where the Chief U.S. District Court Judge for the District of Montana forwarded a racist e-mail about President Obama that was picked up by the media. When questioned about it, he indicated that though he knew the e-mail to be racist, he was not a racist. The article investigates the accuracy of his assertion, largely through the lens of implicit (subconscious) race bias research from the fields of social and cognitive psychology. In the end, the author discusses what this incident means for how we as a society should think about the racial bias among the judiciary.

I. INTRODUCTION

On February 20, 2012, Richard Cebull, Chief Judge for the U.S. District Court for the District of Montana, forwarded a racially charged e-mail about President Obama from his official courthouse e-mail address.¹ The subject line of the e-mail read “A MOM’S MEMORY” and contained the following text:

Normally I don’t send or forward a lot of these, but even by my standards, it was a bit touching. I want all of my friends to feel what I felt when I read this. Hope it touches your heart like it did mine.

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¹ John S. Adams, *Federal Judge Admits to anti-Obama, Racist E-mail*, USA TODAY, Mar. 1, 2012, at 5A, available at <http://www.usatoday.com/news/nation/story/2012-02-29/Montana-judge-racist-email/53307060/1>.

A little boy said to his mother, ‘Mommy, how come I’m black and you’re white?’ His mother replied, ‘Don’t even go there Barack! From what I can remember about that party, you’re lucky you don’t bark!’²

Judge Cebull later noted that his brother had sent him the original e-mail, which he forwarded to six “old buddies” and acquaintances, as well as to his personal e-mail address. While the judge acknowledged that the content of the e-mail was racist, he said he did not consider himself racist and that the e-mail was meant as a private correspondence.³ In fact, he stated, “it was not intended by me in any way to become public” and “I apologize to anybody who is offended.”⁴ Judge Cebull continued “the only reason I can explain it to you is I am not a fan of our president, but this goes beyond not being a fan. I didn’t send it as racist, although that’s what it is. I sent it out because it’s anti-Obama.”⁵ He acknowledged it reflected poor judgment on his part, but reiterated that he “did not forward it because of the racist nature of it.”⁶ He argued that his actions in court display he is not prejudiced against people of other races or ethnic backgrounds.⁷

But in Judge Cebull’s forwarding of the “racist” e-mail, a serious question must be raised as to whether it indeed highlights his own racial biases despite his protestations that he is a racial egalitarian. And if it does, how do we know? Even more, what concerns might this raise for us about the racial biases, and the influences of such biases on judgment and behavior, among legal actors? To put it bluntly, racial biases and stereotypes are often automatic, if not subconscious. They influence behavior, including those in legally significant ways. Despite efforts to cast racially biased or stereotypical thoughts or actions as mistakes, jokes, or indicia of principled political or ideological differences, the proof is in the pudding. And judges, federal or otherwise, are not free from such biases and stereotypes and their effects.

II. RACIAL MEANING BEHIND THE “JOKE”

Aside from Judge Cebull admitting that the joke was racist, this

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

has not been the first instance of racist imagery used to insult and negatively portray President Obama. Various depictions of President Obama during the 2008 presidential campaign and thereafter have been highly suggestive of racist sentiments. Judge Cebull's message is a mere extension of such imagery.

For example, in October 2008, Diane Fidele, the president of a Republican women's club, mailed a newsletter to 200 club members with the head of President Obama attached to the body of a donkey and placed on a fake ten dollar food stamp.⁸ The "Obama Bucks," as it was called, also had pictures of a bucket of KFC fried chicken, a piece of watermelon, spare ribs, and a pitcher of Kool-Aid.⁹ Ms. Fidele created the image, explaining that she "wasn't thinking in racist terms" when designing "Obama Bucks."¹⁰ While she tried to distance herself from any racist intent stating "[i]t was just food to me. It didn't mean anything else,"¹¹ the creation of the image shows the difference between the ways Obama has been depicted compared to the white presidents before him. Past white presidents have their place on dollar bills, and Obama's face on a food stamp implies the racial connection of state welfare, blacks, and unearned benefits whereby Obama "will only represent the interest of poor blacks and will turn the U.S. into a 'welfare state'."¹²

In February 2009, Los Alamitos, California's Republican Mayor, Dean Grosse, e-mailed a picture of the White House lawn covered with watermelons to symbolize a watermelon patch.¹³ The title of this image was "No Easter egg hunt this year."¹⁴ Associations between blacks and foods like watermelons gained popularity dating back to the pre-Civil War era as they were props in blackface minstrel shows, a form of popular entertainment based on racist humor.¹⁵

Despite these images, the most troubling associations made with the Obamas have been with various forms of non-human (or sub-human) primates. In February 2008, a commentator on the *Huffington Post* stated that Michelle Obama looked like a character from *Planet of*

⁸ Dora Apel, *Just Joking? Chimps, Obama and Racial Stereotype*, 8 J. VISUAL CULTURE 134, 139 (2009); Michelle DeArmand, *Inland GOP Mailing Depicts Obama's Face on Food Stamp*, THE PRESS-ENTERPRISE, Oct. 16, 2008.

⁹ Apel, *supra* note 8.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 140.

¹³ Jaimee Lynn Fletcher, *Mayor's Exit Fuels Debate*, THE ORANGE COUNTY REGISTER (CA), Feb. 24, 2009.

¹⁴ Rebecca Cathcart, *A Mayor Steps Down Over Joke In E-mail*, N.Y. TIMES, Feb. 28, 2009, at A11.

¹⁵ See DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 115-16 (3rd ed. 2007).

the Apes.¹⁶ A few months later, the owner of a Georgia bar began selling tee shirts with the image of the cartoon monkey Curious George and the slogan “Obama in ‘08.”¹⁷ In June 2008, a Utah company was criticized for making a sock monkey (a doll) of President Obama.¹⁸

After winning the 2008 election, President Obama was depicted in a New York Post cartoon displaying two police officers who just shot a chimpanzee.¹⁹ The officers were quoted as saying “They’ll have to find someone else to write the next stimulus plan.”²⁰ Sean Delonas, the cartoonist, is notorious for “his vile cartoons, particularly anti-gay cartoons.”²¹ Not only does the cartoon suggest a presidential assassination, it attempts to add an additional level of comedy for those who seemingly enjoy racial stereotypes of black people as monkeys. This display of the chimpanzee being gunned down by the officers also bears a striking resemblance to the stories of Sean Bell and Amadou Diallo, both of whom were African-American men gunned down by law enforcement.²²

After serving one year in office, the association of President Obama with non-human (or sub-human) primates again presented itself in 2009 at a Coral Gables Barnes & Noble.²³ A customer alerted a store employee that a book about monkeys had been placed in a display window of books about Obama. The store removed the books immediately; however, someone photographed the display and started a chain of e-mails. A corporate spokesperson suggested the display was tinkered with by a customer, perhaps the person who circulated the e-mails. The staff received approximately two hundred calls per day about the incident, and there was a strong backlash from the NAACP. One store employee distanced the store from the event and claimed the act was a terrible joke.²⁴

In early 2011, Pastor Peter Peters’ television show was taken off the air after he referred to President Obama as a “monkey-boy” both on the air and in his church newsletter.²⁵ Peters is notorious for his anti-

¹⁶ Comment by mcnaairbo on *Michelle Obama Predicts Ohio Victory*, HUFFINGTON POST (Feb. 15, 2008, 10:45 PM), http://www.huffingtonpost.com/2008/02/15/michelle-obama-predicts-o_n_86896.html.

¹⁷ Bo Emerson, *Politically Correct? Not This Bar Owner*, ATLANTA J.-CONST., May 15, 2008, at B1.

¹⁸ *Doll ‘Pure Racism’*, GRAND RAPIDS PRESS, June 15, 2008, at A4.

¹⁹ Sean Delonas, *Sean Delonas Cartoon for Wednesday, February 18, 2009*, N.Y. POST, Feb. 18, 2009, at 12, available at <http://www.nypost.com/opinion/cartoons/delonas.htm>.

²⁰ *Id.*

²¹ Apel, *supra* note 8 at 137.

²² Sarah Kershaw, *Police Shooting Reunites Circle of Common Law*, N.Y. TIMES, Dec. 2, 2006, at A1.

²³ Elaine De Valle, *“Monkeys” Amid Display of Obama Books*, MIAMI HERALD, Mar. 8, 2009.

²⁴ *Id.*

²⁵ Monica Drake, *Clarkston Residents: Racism is a Problem Within Community*, THE OAKLAND

Semitic and racist remarks during his sermons.²⁶

In May 2011, an Orange County GOP Central Committee member, Marilyn Davenport, e-mailed an image that imitated a family portrait with chimpanzee parents and a child.²⁷ President Obama's face was superimposed on one of the chimpanzees with the text "Now you know why no birth certificate."²⁸ Ms. Davenport's actions received mixed reviews from California conservatives. Orange County GOP Chairman Scott Baugh stated the e-mail "drips with racism,"²⁹ and the former Chairman of the California GOP Mike Schroeder said he had never seen anything so offensive sent out by an elected official.³⁰ However, other California conservatives were critical of Baugh's and Schroeder's comments. Deborah Pauly, the Vice Chairwoman of the Orange County Republican Party, said the e-mail should have been handled internally and did not deserve public discussion.³¹

What these images suggest is that they arise from latent associations that white Americans hold between blacks and non-human (or sub-human) primates. In fact, there is a long history of some white Americans' views of blacks as sub-human.³² While Judge Cebull did not state specifically why he understood the e-mail to be racist, it would be surprising if it was not because a black person had been reduced to sub-human status—an age-old, racist American archetype.

III. IMPUTING RACISM TO JUDGE CEBULL

It is admittedly difficult to impute the racism found in the e-mail that Judge Cebull forwarded to the judge himself. It is not a complete stretch, however, to impute said racism to a so-called racial egalitarian who forwards admittedly racist e-mails to friends. What may best explain this imputation is the expansive body of scholarship on implicit social cognition—i.e., subconscious biases. This scholarship explains why people may believe they are egalitarians of any stripe, but hold

PRESS (MI), Apr. 6, 2011.

²⁶ *Id.*

²⁷ Brian Martinez, *O.C. Republican Linked to Offensive Obama 'Ape' Email*, THE ORANGE COUNTY REG. (CA), Apr. 17, 2011.

²⁸ *Id.*

²⁹ *Id.* See also *Republican Denounced for Racist E-mail*, UPI.COM (Apr. 17, 2011, 4:16 PM), http://www.upi.com/Top_News/US/2011/04/17/Republican-denounced-for-racist-e-mail/UPI-73041303071387/.

³⁰ Martinez, *supra* note 27.

³¹ Martin Wisckol, *GOP Critics of Obama Chimp Email Face Backlash*, THE ORANGE COUNTY REGISTER (CA), Apr. 19, 2011.

³² See generally Gregory S. Parks & Danielle C. Heard, "Assassinate the nigger ape []": Obama, Implicit Imagery, and the Dire Consequences of Racist Jokes, 11 RUTGERS RACE & L. REV. 259 (2010).

biases against people or groups they claim to be egalitarians toward. In fact, Parks and Rachlinski, in explaining how the conscious and subconscious minds operate in concert, stated:

[P]sychologists now argue that people rely on two distinct cognitive systems of judgment: one that is rapid, intuitive, and unconscious; another that is slow, deductive, and deliberative. The intuitive system can often dictate choice, while the deductive system lags behind, struggling to produce reasons for a choice that comports with the accessible parts of memory.³³

While Judge Cebull may have sent the email as a mere joke and critique of President Obama, consistent with the rationale that many others have used in defense of similar e-mails, a well-known function of humor is to suppress anger, violence, and aggression into a form of expression that is more socially acceptable.³⁴ One form of comic attack is ridicule, which jokes by way of disrupting our sympathy and opening a momentary space for outward antipathy. This way, aggressive jokes are an emotional process where one's unconscious feelings of antipathy are laid bare.³⁵ This ridicule produces a "sudden glory" for the joker.³⁶ While scorn alone does not disarm one's opponent, and physical violence is not an accepted cultural norm, ridicule accomplishes this sudden glory over an opponent without engaging in physical violence.³⁷

While the discourse of black sub-humanity, that for example, casts blacks as a species of ape, remains in the past, its effect on the imagination and cognitive processes have remained in the form of a stereotype.³⁸ The more stereotypes persist over time in a culture, the more they become ingrained into the political subconscious and the less their original roots become consciously known.³⁹ For example, in their studies, Phillip Goff and his colleagues investigated the associations that people have between blacks and apes.⁴⁰ In one study, participants were shown images of black faces, white faces, and neutral images.⁴¹

³³ Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 689 (2010).

³⁴ See MAX EASTMAN, *THE SENSE OF HUMOR* 32-37 (1921).

³⁵ See *id.* at 32-33.

³⁶ *Id.* at 33.

³⁷ *Id.* at 35-37.

³⁸ ELIZABETH EWAN & STUART EWAN, *TYPECASTING: ON THE ARTS & SCIENCES OF HUMAN INEQUALITY: A HISTORY OF DOMINANT IDEAS* 423 (rev. ed., 2008).

³⁹ Parks & Heard, *supra* note 32 at 284-85.

⁴⁰ Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 295-302 (2008).

⁴¹ *Id.* at 295.

They were next shown fuzzy images of both apes and non-apes, which gradually became clearer.⁴² Participants were told to indicate the moment when they could identify the image.⁴³ The study found that participants identified ape images more easily when primed with the black male faces than when not so primed.⁴⁴ Furthermore, the individuals had a more difficult time identifying ape images when primed with white male faces.⁴⁵ Another study found similar results, where participants subliminally primed with images of apes more closely attended to black faces than white faces, as compared to participants who were primed with jumbled line drawings.⁴⁶ A third study showed that white males automatically associate blacks with apes, although the participants denied any knowledge of the stereotype.⁴⁷ These results show that the black-primate association is alive, and may operate outside of explicit cultural knowledge of the association.

Although Judge Cebull might not have consciously known of the implications of his e-mail, Sigmund Freud's theory of jokes and their relation to the subconscious is helpful in interpreting what Judge Cebull really meant, regardless of his intent. According to Freud, jokes serve as a means of expressing repressed thoughts, motives, and feelings relegated to the subconscious through word play.⁴⁸ Freud's joke theory distinguishes between a "non-tendentious" (innocent) and a "tendentious" joke.⁴⁹ Freud's work on dreams led him to recognize this similarity between dreams and jokes, in terms of their masking unconscious thoughts.⁵⁰ Dreams mask forbidden thoughts to keep them from the consciousness, while jokes disguise taboo thoughts in order to let them into consciousness.⁵¹ Tendentious jokes are nonsensical and pleasurable but constructed to "furnish a disguise under which a man hearing it can bear to admit into his own society his own suppressed impulses."⁵² One form of a tendentious joke is a "hostile" joke, where according to Freud the joke focuses on particular persons and can be overtly aggressive, defensive, or designed to enlist a third party against the enemy.⁵³ While Judge Cebull admitted he sent the email because of his distaste for Obama, his hostility is evident through his forwarding

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 296.

⁴⁵ *Id.*

⁴⁶ *Id.* at 297-98.

⁴⁷ *Id.* at 298-301.

⁴⁸ SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS, 90-116 (James Strachey, trans., W. W. Norton & Co. 1989) (1960).

⁴⁹ *Id.* at 106-07.

⁵⁰ *See generally id.* at 159-80.

⁵¹ Eastman, *supra* note 34, at 197.

⁵² *Id.* at 194-95.

⁵³ *Id.* at 115, 121-23.

the aggressive and racist e-mail, which was used to not only attack Obama, but to enlist others against the President as well.

Judge Cebull indicated that he found e-mail “a bit touching” while simultaneously acknowledged that it was racist.⁵⁴ He noted, however, that he forwarded it merely because it was “anti-Obama.”⁵⁵ But that does not provide an end-run around being accurately labeled as a racist. For instance, in one study researchers found that implicit racial associations predict attitudes about legislative proposals that, themselves, have nothing to do with race.⁵⁶ There, Knowles and colleagues collected data on participants (1) implicit racial associations, (2) explicit attitudes President Obama (i.e., American, patriotic, presidential, and trustworthy versus elitist, uppity, and radical), and (3) self-reported vote for the 2008 presidential election.⁵⁷ The researchers then divided participants into two groups: one group completed a questionnaire that solicited ratings for President Obama’s health care reform plan; the second group participated in an experiment designed to test any possible relationship between implicit racial associations and support for President Obama’s health reform policies.⁵⁸ Knowles and colleagues found that participants’ implicit racial associations and their support for Obama’s health care plan were predicted by negative attitudes about President Obama.⁵⁹ Moreover, increased implicit prejudice was associated with concerns over President Obama’s health care policy implications.⁶⁰ That being said, those with higher levels of implicit pro-white associations took greater issues with a proposed health-care plan when the plan was represented as President Obama’s but not when it was represented as President Clinton’s plan.⁶¹

In another study, researchers subliminally primed participants with racial categories, black and white, by having participants write about individuals with stereotypical black and white names.⁶² Then participants read editorials that accused presidential candidate Obama in negative ways (i.e., unpatriotic or the Anti-Christ) or simply listed his positions on major issues.⁶³ Only when the racial category black was

⁵⁴ Adams, *supra* note 1.

⁵⁵ *Id.*

⁵⁶ Eric D. Knowles, Brian S. Lowery & Rebecca L. Schaumberg, *Racial Prejudice Predicts Opposition to Obama and His Health Care Reform Plan*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 420 (2010).

⁵⁷ *Id.* at 421.

⁵⁸ *Id.*

⁵⁹ *Id.* at 422-23.

⁶⁰ *Id.*

⁶¹ *Id.* at 423.

⁶² Tom Pyszczynski, Carl Henthorn, Matt Motyl & Kristel Gerow, *Is Obama the Anti-Christ? Racial Priming, Extreme Criticisms of Barack Obama, and Attitudes Toward the 2008 US Presidential Candidates*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 863, 864 (2010).

⁶³ *Id.*

primed did participants respond to both criticisms with less preference for, and more negative beliefs about, candidate Obama.⁶⁴

Accordingly, these studies highlight the fact that even where Judge Cebull may have thought that his sharing of a blatantly racist e-mail could not be imputed to him, that is a hard argument to make. Despite the fact that he purportedly sent the e-mail as a criticism of President Obama, unhinged from race, that rationale is dubious. This is given the nature of the e-mail and the fact that criticisms of President Obama may be masked—even from the actor—as non-racist, when race indeed is an underlying and driving force behind them.⁶⁵

IV. SUBCONSCIOUS RACE BIAS AND LEGAL DECISION-MAKING

It should be no surprise that legal decision-makers hold racial biases, even of the subconscious variety. In one study, researchers investigated the implicit racial attitudes of capital defense lawyers.⁶⁶ This population would theoretically be relatively free from racial bias, given defense lawyers' ideological commitment to racial equality as exemplified by the poor pay and perceived low status of their work.⁶⁷ The study's findings suggested that participants had automatic good-white/bad-black associations.⁶⁸

Jeffrey Rachlinski and colleagues, in a study of the implicit racial attitudes of judges, found even more disturbing findings.⁶⁹ In their study, they administered the Implicit Association Test (IAT) and three vignettes to trial judges.⁷⁰ On the IAT, white judges exhibited

⁶⁴ *Id.* at 865-66.

⁶⁵ *See supra* notes 57-65.

⁶⁶ Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004).

⁶⁷ *Id.* at 1540.

⁶⁸ *Id.* at 1545-51

⁶⁹ Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

⁷⁰ *Id.* at 1205-06. The IAT assesses the ease, reported in reaction times, with which individuals associate various categories of things. For example, on the "Race IAT," study participants first practice distinguishing black and white faces by responding to images of faces by pressing a computer key on the left side of the keyboard for one racial category and another key on the right side of the keyboard for the other racial category. Participants then practice distinguishing pleasant-meaning words vis-a-vis unpleasant-meaning words in a manner similar to that used for distinguishing black and white faces. The next two tasks, given in a randomly determined order, use all four categories (black faces, white faces, pleasant-meaning words, and unpleasant-meaning words). One task requires one response (e.g., pressing a left-side key) when the respondent sees black faces or pleasant words, whereas white faces and unpleasant words call for the other response (right-side key). In the remaining task, white faces share a response with pleasant words and black faces with unpleasant words. For American respondents who take the Race IAT, response speeds are often faster when whites, vis-à-vis blacks, are paired with pleasant

significantly higher implicit racial bias, with 87.1% of white judges and 44.2% of black judges showing white preference.⁷¹ An analysis of the judges' responses to the vignettes showed that only when race was an explicit factor in the scenarios (i.e., a black defendant assaulting a white victim or vice versa) were white judges equally willing to convict black and white defendants.⁷² In interpreting the results, the researchers posited that the white judges were aware of the potential for race bias in the vignette exercises, they compensated by working to avoid race bias in their convictions, and therefore did not show any racial preference.⁷³

What is most troubling about Judge Cebull's email is not so much what it suggests about racial attitudes, generally. Rather, what is disturbing is what it says about Judge Cebull and his ilk—i.e., legal decision-makers. While, as a society, we operate under the assumption that our jurists are largely free from prejudice, and maybe especially racial prejudice, Judge Cebull's e-mail highlights that such is not the case. Even more, racial prejudice among judges may pose challenges to the notion that there is actually equal justice under the law.

words. Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RESEARCH, & PRACTICE 101-15 (2002).

⁷¹ Rachlinski et al, *supra* note 69 at 1210.

⁷² *Id.* at 1214-19.

⁷³ *Id.* at 1223-24.