

**THE EFFECTS OF IMPLICIT BIAS ON THE PROSECUTION,
DEFENSE, AND COURTS IN CRIMINAL CASES**

Wayne S. McKenzie

NOTES

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Wayne S. McKenzie, General Counsel
New York City Department of Probation

- I. What is implicit bias? A preference (positive or negative) for a group based on a stereotype or an attitude that we hold and that tends to develop early in life.
 - Implicit bias operates outside of human awareness and can be understood as a lens through which a person views the world and that automatically filters how a person takes in and acts in regard to information.
 - How does implicit bias manifest itself? Through quick judgments (mental shortcuts) we make about another person or group on an unconscious level, based on implicit social cognitions, that can result in discriminatory behavior, inequity, and unfairness, whether intended or not.
 - * Implicit social cognitions = schemas that apply to human interaction and that guide the way a person thinks about social categories. They can start in infancy, and come from many sources (parents, friends, media). They can result in positive or negative associations, and they can strengthen over time to become automatic. Social cognitions include stereotypes (traits we associate with a category) and attitudes (evaluative feelings that are positive or negative).

¹ This outline is based on Units 2 and 3 of the model curriculum provided in the American Bar Association's project, *Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System* 12-35 (2010).

- What are ways that implicit bias affects us, or predicts our behavior? Examples include:
 - * Negative evaluations of confident, aggressive, ambitious women in certain hiring conditions
 - * Negative evaluations of ambiguous actions by African Americans
 - * How we read awkward body language or perceptions of fairness/courtesy
 - * How we read “friendliness” of facial expressions
 - * Memory recall
- How do we know if we are implicitly biased?
 - * Take the Implicit Associations Test (IAT), which measures reactions and reaction times, detects hidden preferences and conscious / unconscious divergences, and measures associations of concepts. To learn more, go to <https://implicit.harvard.edu/implicit//demo>.

II. What is the source of implicit bias? Growing up in the “American cultural soup.”

- Culture can be defined as a community’s shared set of norms, practices, beliefs, values, traditions, customs, history, and means of expression that affects (among other things) how we, as the community, analyze, judge, and interpret information, behavior, and perceptions about behavior.
- The concept of culture is broader than race and gender, and includes such things as language, nationality, religion, ethnicity, physical and mental ability, sex, sexual orientation, and profession.

- Culture is a deep concept, touching on both visible dimensions such as skin tone and religious symbols, and invisible dimensions such as our values and beliefs. Culture can be deeply embedded in us, going to the core of our identity.
- Even within a culture, there are cultural groups, groups of people who consciously or unconsciously share identifiable values, norms, symbols, and some ways of living that are repeated and transmitted from one generation to another. Cultural groups can include historically disadvantaged or excluded groups such as native communities; descendants of enslaved persons; women; immigrants; lesbian, gay, bisexual, transgendered, or questioning individuals; refugees and asylum seekers; individuals with mental, developmental or physical disabilities; members of faith-based communities, and people of similar economic status.
- Culture shapes attitudes about child rearing, sexual roles, care-taking, treatment, dress, spirituality, education, discipline, punctuality, pre-marital sex, drugs/alcohol, homosexuality, employment, politics, the importance of family, authority figures, medications, criminal justice system, protective services, death and dying, living arrangements, marriage, domestic violence, and hospitality.
- Culture also shapes our behavior, communication style, and interactions with others
- Being aware of cultural differences can help us to communicate and interact with one another more effectively. In the criminal justice context, awareness of cultural differences can improve our ability to communicate with colleagues and the communities that we serve.

III. Who is affected by culture and implicit bias?

- Culture affects everyone in the criminal justice system, because the criminal justice system is a cultural group, which has both visible and invisible dimensions.

- * Culture affects how we analyze, judge, and interpret information, behavior, and perceptions about behavior. For lawyers and judges, this means a heavy reliance on and a high value for things like logic, analytical thought, and facts.
 - * Visible dimensions include the structure (judge, prosecutor, defense attorney or defendant), the language we use, our communication styles (especially during cross-examination), the complex procedural rules and precedents that are followed, the adversarial nature of the proceedings, the case process itself, and the clothing we wear. These are things that can be seen and observed.
 - * Less visible dimensions include our values and motives for doing this work. Because they are less visible, it can be easy to forget that we share some of the same values and motivations even though we are adversaries in court. It can also be easy for others to misunderstand our motives and values or to attribute ill-will to our efforts.
- Cultural collisions can occur in the courtroom, between prosecutors, defenders, judges, law enforcement, and court personnel, and also outside the courtroom, when working with clients, victims, and witnesses, in our offices, and among colleagues.
 - * Cultural collision = when individuals or groups with different traditions, world views, values, or languages encounter a situation in which neither side is able to understand or respect the situation from the other's perspective.
- Implicit bias also operates at each and every decision point as a person enters, moves through, and exits the criminal justice system.
 - * For example, implicit bias can impact actions resulting from an observation of an act that is ultimately interpreted as shoplifting: a decision of whether to call parents or police, a decision to charge or arrest, a decision about detention or

diversion, and other decisions all the way through adjudication and sentencing.

- * Implicit bias also influences responses to decision-makers (e.g., judges, prosecutors, police officers, and defenders). In this sense, a reciprocal process between actors sets the stage for a self-fulfilling prophecy that affirms one's implicit beliefs.

IV. How do we prevent, or at least reduce, implicit bias and cultural collisions? Through cultural competence and awareness of implicit bias.

- Cultural competence = awareness, knowledge, and understanding sufficient to value cultural diversity and promote fairness, justice, and community confidence.
- Skills to help us to interact in a culturally competent way with others include:
 - * Personal awareness of one's own culture and values;
 - * Respect for others' culture and values;
 - * Knowledge of a specific culture (e.g., the meaning of eye contact in that culture, or the role of family members in decision-making processes);
 - * Awareness of ways in which personal bias (implicit or explicit) may affect interactions with others;
 - * Knowledge of institutional barriers that prevent some cultural groups from accessing justice;
 - * Flexibility and ability to adapt to differences; and
 - * Ability to communicate and mediate effectively across cultural differences.

- Methods to increase awareness of implicit bias include:
 - * Education: Recognize that race, gender, sexual orientation, and other social categories may influence decision-making. Engage in educational programs to increase your awareness rather than attempt to be color-blind.
 - * Mindfulness: Focus on the task at hand to understand your thought processes, develop awareness, and challenge one's errors (e.g., is this a fact or am I making an assumption?). Put another way, improve conditions of decision-making by "thinking slow" and doubt your objectivity.
 - * Cognitive Load: Decrease the amount and complexity of information you have to process in any given time frame.
 - * High-effort processing: Engage in thought that confronts information rather than retaining information for peripheral and secondary cognition.
 - * Checklists: Develop checklists to use at key decision points. These will help encourage less-biased decisions by providing an objective framework to assess your thinking and subsequent decisions.
 - * Organizational review: Review the structure of a given organization to determine how effectively it fosters bias-free behavior. Evaluate the organization to see how implicit bias may impact interactions with colleagues and community members; hiring, retention, and promotion decisions; management and supervision; and resource allocation (e.g., "triaging" heavy caseloads).

V. Resources

Note: you may need to copy and paste the web addresses in your browser

- ABA Implicit Bias Videos and Toolkit, available at
<http://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission/implicit-bias.html>
- ABA Project, *Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System* (2010), available at
<http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/bctext.authcheckdam.pdf>
- Jerry Kang, *Implicit Bias: A Primer for Courts*, August 2009, available at
http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf
- Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345 (2007), available at
<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1336&context=dlj>
- Shawn C. Marsh, *The Lens of Implicit Bias*, *Juvenile and Family Justice Today*, Summer 2009, available at
<http://www.ncjfcj.org/sites/default/files/ImplicitBias.pdf>