



Implicit Bias and Crime Victims: An Overview

Explicit bias—whether based on race, age, ethnicity, gender, religion or any other basis—has long been recognized as detrimental to justice, and this recognition has informed much anti-discrimination law in the United States. Only in recent years, however, have we begun to recognize the existence and negative impacts of implicit biases. This new recognition is attributable, in part, to research from the field of cognitive psychology, which has revealed that “our seemingly neutral, logical, and reasoned judgments are actually influenced by unconscious frameworks of thinking about the world.”¹ Understanding implicit bias and its negative impacts, and moving to disrupt those impacts, can help us improve justice for survivors.

A. *Understanding implicit bias.*

Each of us carries attitudes² and stereotypes³ that affect our perceptions and inform our actions. This is true because we use heuristics (mental shortcuts based upon knowledge gained from previous experiences) and schema (groupings of like information) to quickly process stimuli and make decisions.⁴ These heuristics and schema can aid the speed of decision-making, but when the automatic associations are based on inaccurate or overgeneralized information they can support negative, discriminatory actions and outcomes.

There are many types of biases that can impact justice, including those that are explicit⁵ and structural.⁶ Implicit biases are among the most insidious of the biases because they operate outside of our consciousness, shaping our attitudes and actions to conform to stereotypes that we may consciously disavow.

Although there are many studies of and tools for measuring implicit bias,⁷ perhaps the most widely recognized instrument used to test for implicit bias is the implicit association test (IAT).⁸ The IAT works by pairing “an attitude object (such as a racial group) with an evaluative dimension (good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes.”⁹ The theory underpinning the IAT is that it takes longer for

an unconsciously biased person to connect a positive evaluative dimension with a disfavored attitude object.¹⁰ IAT results over decades have shown that a significant number of people have biases based on race, ethnicity, religion, gender, age, sexual orientation, and more.¹¹

Judges, lawyers, and law students who operate in, or aspire to operate in, a profession that values objectivity and analytic thinking, and who work hard to eliminate explicit bias in their decision-making, often assume they lack implicit bias.¹² It is important to realize, however, that “[e]ven those who consciously renounce prejudice have been shown to have implicit or automatic biases that conflict with their nonprejudiced values[.]”¹³ To believe otherwise is to operate in what is known as a “bias blindspot.”¹⁴ Thus, recognizing the existence of implicit bias in our decision-making is not a condemnation of an individual, it is simply acknowledging fact.

B. Impacts of implicit bias on criminal justice.

Evidence indicates that you are not immune from implicit bias whether you are a judge,¹⁵ a prosecutor,¹⁶ an attorney representing a defendant,¹⁷ or an attorney representing any client.¹⁸ The impacts of implicit bias can be particularly acute for justice, as Professor Jerry Kang has noted:

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities.¹⁹

Although most studies and analysis of implicit bias within criminal justice focus on the impacts of such bias on criminal defendants of color, we also understand some of the impacts on victims. First, at least some attention has been paid to bias as it relates to victims, particularly in the context of violence against women.²⁰ Second, when looking at the studies of impacts on defendants, the necessary corollary when defendants are receiving disparate treatment based upon, for example, race or gender, is that the victims of those defendants’ crimes are also being impacted. For instance, statistical evidence suggests that persons of color receive harsher treatment than others in pretrial charging and plea decisions²¹ as well as in sentencing.²² Based upon these results, the victims of these same offenses are being impacted at these same decision

points. Finally, there is simply no evidence to support the idea that when law enforcement, prosecutors, judges, jurors, or attorneys assess or make decisions regarding victims they somehow become aware of and shed their implicit biases.

If we are all “guilty” of operating pursuant to implicit bias, and implicit bias leads to discriminatory treatment impacting victims and defendants in our criminal justice system, then we must act to disrupt these impacts if we are to have a fair justice system.

C. Interventions to mitigate impacts of implicit bias.

Fortunately there is at least some evidence that we can mitigate the impacts of implicit bias. This mitigation effort starts with acknowledging the existence of implicit bias in ourselves and others, and requires consciously and regularly questioning our objectivity. Beyond this, interventions that may help include:

- (1) exposing oneself and others in the system to counter-typical associations;²³
- (2) improving the conditions of decision-making, including timing;²⁴ and
- (3) increasing the salience of bias by moving social categories to the foreground rather than background.²⁵

Conclusion

The science is getting clearer on a near daily basis—everyone is influenced by their own implicit biases and those biases impact our justice system. Thus, although it may seem difficult to admit to oneself and to say aloud, “I am biased,” this is the foundation for a necessary disruption. As John Erskin has said:

[T]o be as intelligent as we can is a moral obligation—that intelligence is one of the talents for the use of which we shall be called to account—that if we haven’t exhausted every opportunity to know whether what we are doing is right, it will be no excuse for us to say that we meant well.²⁶

We are at a critical juncture in criminal justice with much focus being properly paid to implicit bias and its impacts; to know whether what we are doing is right requires us to ensure consideration of impacts on victims as well as defendants.

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¹ Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 St. Mary's J. Legal Malpractice & Ethics 278, 280 (2014) (citing Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structure on Law and Legal Theory*, 77 S. Cal. L. Rev. 1103, 1217 (2004)).

² Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1128 (2012) (defining an attitude as “an association between some concept . . . and an evaluative valence, either positive or negative”).

³ *Id.* (defining stereotype as “an association between a concept . . . and a trait”).

⁴ Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 Nev. L. J. 537, 545 (2015) (citing Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 Cornell L. Rev. 549, 555-56 (2002)). *See also* Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. Va. L. Rev. 305, 317 (2012).

⁵ Explicit biases are those attitudes and beliefs that we consciously acknowledge and claim as our own; concealed biases are explicit biases that we hide in order to manage impressions.

⁶ *See* Kang, et al., *supra* note 2, at 1133 (defining structural biases as those processes or systems built upon past inequalities and which reproduce and exacerbate them).

⁷ *See, e.g.*, Cheryl Staats, Kelly Capatosto, Robin A. Wright & Victoria W. Jackson, *State of the Science: Implicit Bias Review* (Kirwan Inst. for the Study of Race & Ethnicity, Columbus, Ohio) (2016 Edition), <http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf> (collecting and summarizing implicit bias studies from 2015, and noting that it is the fourth edition of the annual publication collecting such studies); Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 Ala. L. Rev. 871 (2015) (collecting work of criminal law scholars looking at implicit bias impacts in police stop-and-frisk rates, arrest rates, prosecutorial charging and bargaining, and sentencing).

⁸ For an overview of the IAT, reviewing an article by one of its originators is useful. See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. Personality & Soc. Psychol. 1464 (1998). See also Project Implicit, General Information, <http://www.projectimplicit.net/generalinfo.php> (last visited March 28, 2017).

⁹ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 355 (2007). See also Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol’y Rev. 149, 153 (2010).

¹⁰ See Levinson, *supra* note 9, at 355 (2007) (citing Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. Personality & Soc. Psychol. 800, 803 (2001)).

¹¹ See Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 Nev. L. J. 537, 549-50 (2015).

¹² Curcio, *supra* note 11, at 540 (discussing studies revealing that law students believe that legal training in rational and analytical thinking makes lawyers less susceptible to having or acting upon bias); See also Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1225 (2009) (reporting that 97 percent of judges in an educational program rated themselves in the top half of all of the judges in attendance in their ability to “avoid racial prejudice in decisionmaking”).

¹³ Curcio, *supra* note 11, at 550 (quoting Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They? Introduction to the Special Section*, 81 J. Personality & Soc. Psychol. 757, 757 (2001)).

¹⁴ See Kang, et al., *supra* note 2, at 1173-74 (citing Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 Trends Cognitive Sci. 37 (2007)).

¹⁵ See Rachlinski, *supra* note 12, at 1225 (reporting findings that judges harbor the same types of implicit biases as others).

¹⁶ See Kang, et al., *supra* note 2, at 1139 (collecting journalist reports of disparate impact of prosecutor charging decisions on persons of color); see also Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795 (2012) (discussing intersections at which prosecutorial decision-making may be impacted by implicit bias).

¹⁷ See, e.g., A.D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 Seattle U. L. Rev. 755, 755-68 (2012); T. Eisenberg & S.L. Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539, 1556 (2004).

¹⁸ See, e.g., Bide Akande, *Implicit Bias and Clients: An Overview*, 18 Com. & Bus. Litigation 14, 15 (Fall 2016) (discussing studies revealing that bankruptcy attorneys disproportionately recommend black clients file for Chapter 13 bankruptcy rather than Chapter 7). See generally Negowetti, *supra* note 1.

¹⁹ ABA, Section of Litigation’s Implicit Bias Initiative, What is Implicit or Unconscious Bias, <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/what-is-implicit->

bias.html (quoting Jerry Kang, *Implicit Bias: A Primer for Courts*, Prepared for the National Campaign to Ensure Racial and Ethnic Fairness of America's State Courts (Nat'l Ctr. State Courts) (August 2009)).

²⁰ See U.S. Dep't of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* (2015), <https://www.justice.gov/opa/file/799366/download> (discussing how implicit bias may affect law enforcement's perceptions of sexual assault and domestic violence—crimes that disproportionately impact women—and prevent effective responses).

²¹ See Smith & Levinson, *supra* note 16 (collecting studies and discussions regarding disparate treatment during charging and pleas).

²² See, e.g., David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & Econ. 285, 300 (2001) (noting that black defendants received 12 percent longer sentences than white defendants under the Sentencing Reform Act of 1984).

²³ Kang, et al., *supra* note 2, at 1169.

²⁴ *Id.* at 1177 (noting that because implicit bias functions automatically, countering it may rest with effortful deliberative processing; further noting that because there is evidence that elevated emotional states prompt more biased decisionmaking, taking time to ensure these are not present should reduce bias). See also Saaid A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 Personality & Soc. Psychol. Bull. 512, 514-15, 520 (2010).

²⁵ Kang, et al., *supra* note 2, at 1184.

²⁶ John Erskine, *The Moral Obligation to be Intelligent, in American Character and Other Essays*, 1915 (Chautauqua Press, 1927).