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Decriminalizing Race and Poverty: What's Working & What You Can Do

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IMPLICIT BIAS IN THE CRIMINAL JUSTICE SYSTEM

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I. INTRODUCTION

Simply put, bias is the “tendency to believe that some people, ideas, etc., are better than others that usually results in treating some people unfairly.”¹ Implicit bias, or social cognition, is the process by which the brain uses “mental associations that are so well-established as to operate without awareness, or without intention, or without control.”²

Studies have shown that our minds automatically sort incoming information into categories. This cognitive process is known generally as implicit social recognition. Think, for example, about how Professor Jerry Kang, who has been at the forefront of researching the relationship between implicit bias and the law, has explained this operation: “When we see . . . something with a flat seat, a back, and some legs, we recognize it as a ‘chair.’ . . . [W]e know what to do with an object

¹ *Bias Definition*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/dictionary/bias (last visited Aug. 15, 2016).

² Project Implicit, Harvard University, www.implicit.harvard.edu/implicit/demo/background/faqs/html.

that fits into the category ‘chair.’ Without spending a lot of mental energy, we simply sit.”³

This implicit social recognition and the way it manifests itself in our criminal justice system is the subject of our discussion today. In examining the function of implicit bias in our criminal justice system, it is important to remember that its reach extends far beyond the judge. Rather, it begins with the police officer who makes a decision to arrest; with the prosecutor who makes the decision to bring charges; with the lawyers during the jury selection process; and with the jury in deciding the verdict.

An explosion of research on implicit bias over the last decade shows the far-reaching effects of its impact on our justice system. As an example of its manifestation, researchers that employ the Implicit Association Test (“IAT”)—a frequently cited psychological measure of implicit bias—have found that majority of tested Americans harbor negative implicit attitudes and stereotypes towards blacks or dark-skinned people. The manifestation of these biases cause them to consistently *implicitly* associate “black” with negative attitudes such as “bad and unpleasant,” or with negative stereotypes such as “aggressive and lazy.”⁴ Additional research makes three things clear: (1) we all have biases—they exist as

³ Jerry Kang, NAT’L CTR. FOR STATE COURTS, *Implicit Bias: A primer for Courts* 1 (2009).

⁴ Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795 (2015).

a way for us to process and organize information; (2) our unconscious biases are often in conflict with our egalitarian value system and beliefs; and (3) implicit biases predict and determine our actions and decision more than our explicit values.

The focus of the ABA’s fight against implicit bias is to find ways to proactively address bias within the legal system. As with any problem that we seek to solve, the first step is to acknowledge the existence of the problem and examine causation. With this in mind, I will provide a list of what the National Center for State Courts has termed “risk factors”—i.e., those factors that trigger the influence of implicit biases.⁵ Following that, I will recommend a non-exhaustive list of ways to confront implicit bias in our justice system.

II. RISK FACTORS

1. Emotional States

Extreme emotional states often increase the influence of implicit bias on the decision-making process. Extreme anger, disgust, and even happiness may lead to a breakdown of the ability to consciously control our thoughts, thus allowing implicit bias in judgments of groups that are the subject of the bias.

2. Ambiguity

Ambiguity in the basis for a decision is usually a gateway for implicit biases to manifest. Compared to decisions that are based off of explicit and concrete

⁵ Helping Courts Address Implicit Bias, www.ncsc.org/ibeducation.

criteria, vague and discretionary situations allow for the biases like those fostered by stereotypes to be used as “gap-fillers.” Consider also the role that our “guts” play in uncertain situations. Most likely, our gut reactions are fueled by our experiences and preconceived beliefs. These are very often contaminated by implicit biases.

3. Salient Social Categories

A painfully obvious salient social category is race. Because of its conspicuousness, race is often a basis for implicit bias. A decision maker may unconsciously think in terms of race or use racial stereotypes in making decisions.

4. Distracted or Pressured Decision Making

It is well known that decisions made under pressure are not usually made with as much critical thinking as they may require. Implicit biases play a role in these as well. Decision makers that are often in a rush or being pressured to act quickly are more prone to act with their implicit biases. This applies equally to decisions made in a distracted state. When people are not paying attention, then we see the influence of biases on what they are doing.

5. Low-Effort Cognitive Processing

Like distracted or pressured thinking, when individuals engage in low-effort information processing, they are more likely to rely on their preconceived stereotypes. At this stage, there is no ability to notice what facts are not being

acknowledged, what critical information is missing or being overlooked, or what assumptions and inferences are being made. These stereotypes then guide subsequent information processing, and any recall is tainted by implicit biases.

6. Lack of Feedback

Without the important feedback that may cause individuals to self-reflect and confront their implicit biases, people are less likely to be cognizant of any possible biases and the ways it may affect their perception or decisions.

III. CONFRONTING IMPLICIT BIAS

1. Do not suppress; rather, openly acknowledge one's biases. This is how we raise awareness of implicit bias. It requires adopting the right mindset. It requires the ability to be humble about decisions and recognize one's own infallibility.

2. Motivation to change. This is intentional. It requires an intentional internal motivation to be square and fare: an intention to not only openly acknowledge the existence of an implicit bias, but a willingness to change.

3. Paying attention to when stereotypical responses or assumptions are activated. We need to routinely check our thought processes and decisions for possible bias. Conduct a personal inventory, and even invite criticism from those around us. This extends beyond personal evaluations to paying attention to the manifestation of implicit biases in others and speaking out about it.

4. Practicing new strategies. These strategies include individuation—i.e., moving beyond social categories by gathering specific information about an individual to allow judgments based on personal, rather than group, characteristics; stereotype replacement—identifying a response as stereotypical, evaluating the cause of the response, and replacing the stereotypical response with one that is non-stereotypical; counter-stereotype imaging—thinking about concrete examples that demonstrate the inaccuracy of common stereotypes; perspective taking—imagining, in the first person, what it would feel like to be in the situation of another person who is the subject of a bias; and increasing opportunities for contact—actively seeking out situations where there is a likelihood for positive interaction with stereotyped groups.