

Implicit Racial Bias and Public Defenders: Assessing the
Intersection of Implicit Bias with Limited Time and
Resources

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Abstract

Public defenders play a crucial role in preserving justice for all Americans, not just the ones that can afford to hire private counsel. Although many public defenders enter their careers with honest and honorable intentions, implicit racial biases that remain undetected in addition to enormous pressures created by unmanageable caseloads and lacking resources can disadvantage their clients. First this paper will examine the reality of implicit racial bias, and its pervasive impacts both in general society and throughout the justice system. However unintentional the bias may be, it still is a dangerous weapon and needs to be consciously assessed and addressed. This project will then assess the enormous strain the public defender system is under in America. Although criminal defendants in the U.S. are afforded counsel if they cannot pay for one, this right will do little to serve them if their public defender is so overworked exhausted they cannot provide that defendant with an adequate defense. However unintentional the bias may be, it still is a dangerous weapon and needs to be consciously assessed and addressed. Third, this paper will examine how the lack of time and resources granted to American public defenders paired with those attorney's implicit biases they carry can disparage their client in ways even they are not aware of. In conclusion, this paper will suggest ways and resources to mitigate the effects of implicit racial bias so that incoming and experienced public defenders alike can be not only aware of the harmful biases they operate under, but so that they can work to unlearn those biases and provide their clients with a more robust defense even despite their expansive caseloads.

Introduction

The reality of implicit racial bias has been well documented globally and in American society. While implicit biases are important to recognize and attempt to regulate in all areas of human experience, they can cause devastating consequences when they become a factor in the criminal justice system. Entanglement in the criminal justice system can cause life changing and devastating impacts when an individual's freedom and livelihood are on the line and thus unlearning negative and harmful racial biases is essential for public defenders as if they hope to put forth a zealous and honest defense of their client. In addition to anti bias training, public defenders need to be committed to individual improvement and actively focus on learning and unlearning.

Implicit racial biases that public defenders hold intersect with the lack of resources and insurmountable caseload placed on the American public defense system and cause catastrophic results for clients who rely on that system.

Implicit Racial Bias

It is crucial to be aware of biases one may have, even if the truth may be unsettling or cause discomfort. Implicit biases can guide human behavior in ways scientists had previously not considered, "Theories of implicit bias contrast with the "naïve" psychological conception of social behavior, which views human actors as being guided solely by their explicit beliefs and their conscious intentions to act" (Greenwald, Krieger, 2006). Newer scientific understanding has been able to understand and pinpoint the processes that can influence our judgement and decision making and these processes exceed those we are explicitly aware of ourselves (Greenwald, Krieger, 2006). Implicit factors can even motivate how we feel about someone after our first

interaction with them, “the science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions” (Greenwald, Krieger, 2006). The hold complicit cognition has over key elements of attorney-client relationships makes it evident how an attorney's perception of their client could be skewed by their own implicit biases. Because a public defender will often be in a situation where they are meeting a client for the first time and forming an impression of that individual, it is crucial for them to have an awareness about how their own biases could be silently impacting the way they interact and the respect and attention they give to particular clients.

At a basic level, an implicit bias is a bias that is discriminatory in nature and obtains its foundations through implicit stereotypes or attitudes (Greenwald, Krieger, 2006). The mere notion of bias does not always carry with it a negative meaning, but implicit racial biases carry that negative connotation because of their nature of discrimination (Greenwald, Krieger, 2006). “Briefly stated, our mental processes facilitate decision making by making automatic associations between concepts” (Richardson, Goff, 2013). Biases and association help humans process the information we are confronted with daily. Without these types of processes to speed up how we interact with the world, our lives would be much more complicated and we would move through life and our interactions with a lower degree of efficiency. For this reason, biases and associations are needed; however, individuals should also be aware of the level that implicit biases are functioning within their interactions and attitudes about

others. Some automatic associations don't cause harm, but this is not the case for implicit racial biases.

Implicit biases are hard to detect because, "the associations in question are *automatic*, occurring without the instigation of the process being consciously directed or undertaken, and not directly subject to rational revision in the way our explicit beliefs are" (Holroyd, 2012). These types of biases are troubling because they do not require a lengthy process to arrive at and are hard to understand in retrospect, yet they can have such a large impact.

The concept of implicit bias gets even more complicated considering an actor may have biases that don't necessarily mirror their actual beliefs. The concerning reality that "an agent could explicitly entertain non prejudiced thoughts about a member of a stigmatized group while unconsciously making cognitive associations with negative evaluations or stereotypic traits" proves that even those with "good intentions" and honorable motives could be strongly influenced in ways that directly contradict those intentions (Holroyd, 2012). If the belief system and the methods of implicit cognition contradict an actor can produce harmful actions while simultaneously holding an ideology against those very same types of actions. The danger of implicit biases is that "they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles" (Greenwald, Krieger, 2006). This phenomenon is an excellent reason that one should work to understand what implicit biases may be influencing their behavior.

Taking the IAT

Implicit biases may not be surface level, but they produce obvious and apparent consequences. For this reason, it is imperative that public defenders enter their legal

career with a foundational understanding of the implicit biases that influence their actions. Failure to build this understanding will only end up disparaging the clients they have built their career around protecting. Project Implicit created a test for any individual with access to a computer or smart device to take to determine their own bias level. The Test is known as the Harvard Implicit Association Test and it provides a way for the average person to begin to understand how their biases are subconsciously playing a very large role in the choices they make. “The Implicit Association Test (IAT) measures attitudes and beliefs that people may be unwilling or unable to report. The IAT may be especially interesting if it shows you have an implicit attitude that you did not know about” (Project Implicit). The IAT is a test that functions by determining association between words and concepts (Project Implicit). The test moves fast to account for the role that subconscious biases can play when making quick choices (Project Implicit).

Although taking this test can leave people with a result, they were unprepared for, the discomfort that one might experience with the realization that they are more motivated by their distasteful biases than they originally assumed is a price worth paying if the test forces them to approach their own interactions with awareness of the subconscious processes that could be skewing their judgement. These deeply ingrained biases require individuals to commit to unlearning them and recognizing the power they hold over decision making.

Are we Responsible for our own Implicit Biases?

The short answer is absolutely. Although it can seem easy to evade acknowledging and fighting back against our own harmful biases due to their “hidden” nature, when individuals avoid taking responsibility for biases and attitudes they hold,

they allow the harm done by those biases to become magnified. Although implicit biases in nature come from attitudes and associations, they influence actions, and actions bear the weight of responsibility. Tests such as IAT make it possible for regular people to obtain a sense of awareness surrounding their own biases. Although we can't control what biases we have, once we learn what they are and how they impact the way we perceive people and situations we must take responsibility and work to mitigate their harmful effects. Even if it is completely out of the realm of possibility to completely eradicate these biases from our subconscious, all people but especially those who can greatly affect the rest of someone's life need to work as hard as possible to minimize the effect their subconscious has.

Right to Counsel

The right to counsel is a fundamental cornerstone of the American criminal justice system. Originally, the sixth amendment only guaranteed criminal defendants the right to counsel if they were subject to federal prosecution (Legal Information Institute).

This fundamental right was extended to criminal defendants subject to state prosecutions in *Gideon v. Wainwright*, 372 U.S. 335, a Supreme Court case in 1963 by means of the Incorporation Doctrine (Legal Information Institute). In *Gideon v. Wainwright*, the court held that “The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial” (Justia, 2021). The 6th amendment is so fundamental to our legal system that “the Supreme Court has consistently extended the promise of *Gideon* to any criminal case in which a defendant may potentially lose their liberty; including: direct appeals, juvenile delinquency proceedings, misdemeanors, misdemeanors with suspended sentences,

and appeals challenging a sentence as a result of a guilty plea” (Sixth Amendment Center, 2021). The 6th amendment, however, does not make any guarantees that the appointed counsel will function appropriately or will be free from bias or prejudice. Without the promise of the counsel performing their duties effectively, the 6th amendment carries little weight.

Perhaps equally as consequential to the right to counsel, is the right of criminal defendants to obtain counsel that are effective in performing their role and not only defend their client but do so in an appropriate manner. The United States Supreme Court established a test to decide whether counsel is effective in *Strickland v. Washington*, 466 U.S. 668 (1984) (Legal Information Institute). This two-prong test examines both error and prejudice demonstrated by an attorney that lead to consequences for the defendant (Legal Information Institute).

Error Prong:

- Whether counsel's performance is deficient under the circumstances, with performance being measured under the standard of prevailing professional norms (Legal Information Institute)

Prejudice Prong:

- Whether the counsel’s conduct affected, with reasonable probability, the trials outcome (Legal Information Institute)

If it is determined that the counsel subject to scrutiny fails to pass this test, the defendant can automatically be given a new trial (Legal Information Institute). The reality however, is that these standards can be outstandingly difficult to fail making

Strickland v. Washington at times seem like an empty promise, “All manner of poor performance that would shock the average citizen has been held to be above the standard put forth in *Strickland*: lawyers sleeping during capital trials, openly racist lawyers representing black clients, lawyers with no experience representing capital clients, and even lawyers being drunk during trial. If a lawyer can be drunk or asleep and the outcome be deemed "fair," one must ask what horror of bad lawyering is required to be deemed unfair? The right to counsel, to have any meaning, must mean qualified and trained counsel” (Young, 2013). If egregious instances of attorney misconduct like these have been able to remain unpunished through the *Strickland* test, then certainly that type of safeguard would never protect against an attorney having an implicit bias against a client. These examples of extreme attorney misconduct only serve to emphasize how high of a hurdle the defendant must clear to prove that their counsel’s deficiency affected the outcome of their trial. If explicit thoughts and actions can go unaddressed, then the reality of addressing biases that are not even always accessible to the conscious mind seems impossible. For this reason, an attorney may be deemed competent even those they subconsciously hold biases that would directly disparage their client. If outwardly racist lawyers fail to be reprimanded and removed under *Strickland*, then lawyers who hold subconscious biases against their clients most certainly will not be given a second glance, even if their biases cause immediate damage through their representation.

The science and research done on how implicit biases function points to biases impacting the actions of an individual (Greenwald, Krieger, 2006). While the two-prong test in *Strickland* assesses performance and whether the performance had an effect on

the outcome of a trial, not taking a more critical look at how biases could also affect performance is a mistake. The court also needs to be aware that implicit biases can affect action and the actions taken by the counsel of indigent defendants can alter the course of their life.

Public Defender's Time and Caseload Crisis

Although criminal defendants in the United States are guaranteed counsel regardless of their financial standing, that promise can do little to ensure a just trial or fair representation. They also wage an unwinnable war against the time and resources of their public defense counsel. It is well understood that the American criminal justice system places an unrealistic caseload on public defenders, rendering them pressed for both time and resources; “Public defenders are underfunded in so many areas of the country that our criminal justice system fails every day to meet the bare minimum of Gideon’s promise” (Young, 2013). Although in colloquial terms, overworked and underfunded may seem almost normal for the American employment sphere, the unimaginable magnitude of the problem leaves the public defense system in critical condition, unable to deliver on promises of equal and fair representation Gideon v. Wainwright had perhaps hoped for.

A New York Times piece profiled a public defender in Louisiana and found that instead of the ABA recommended 150 felony cases per year he had 194 (Oppel Jr., Patel, 2019). The analysis is troubling; “The bottom line: Mr. Talaska would have needed almost 10,000 hours, or five work-years, to handle the 194 active felony cases he had as of that April day, not to mention the dozens more he would be assigned that year. (The analysis did not include one death-penalty case on his roster, the most time-

consuming type of case.)” (Oppel Jr., Patel, 2019). Instances like this demonstrate just how overworked our American public defenders are. There is no feasible way to do five years worth of work in one year at the high level that attorneys should be working to defend their clients. The serious penalties that can accompany felony cases means that not only are these attorney’s clients facing prison time and consequences that could alter their life course, they are also being represented by an attorney that through no fault of their own is forced to rush through their case and cannot possibly give them the time and consideration they need. James J. Brady, a federal District Judge working in Louisiana expressed frustration saying that Louisiana was “failing miserably at upholding its obligation under Gideon (Oppel Jr, Patel, 2019).

A 2009 report from the National Right to Counsel Committee examined the inability for those working as public defenders to adequately meet the standards that their work required. *Justice Denied: America’s Continuing Neglect of our Constitutional Right to Counsel*, expressed pessimism in the American public defense system being able to function in a way that truly is able to benefit all clients that it represents. The magnitude of the deficiency is staggering: “They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise” (Lefstein, 2009). In an ideal situation, each client would be able to receive all of the services

listed above. If this expectation is not reality, then many clients are missing out on crucial steps in the legal process and undoubtedly their case will suffer as a result.

The concern that not all cases received by a public defender will be thoroughly investigated and prepared signifies an enormous roadblock to achieving just results. No reasonable person could possibly fault public defenders for not having enough time to complete what is required of them and ultimately they need help and support. Even those who have the very best intentions will fall short in a system that physically will not allow them to meet the demand for their services. Meeting the constitutional requirement of providing counsel to those who need it cannot guarantee that that counsel can give their clients the representation that their case would require. The presence of a constitutional right does not entail the functionality of that right, “The constitutional right to be heard is meaningless if it does not include the right to be heard by effective counsel” (Young, 2013). It is therefore evident that not only does implicit racial bias need to be critically examined; so too does the public defense system in America. It is necessary to examine how the presence of implicit biases and the failings of the public defense system combine to create a snowball effect for clients.

Public defenders also face a shortage in funds. Their insurmountable caseload compounded with the lack of funding only intensifies the pressure they are under, “The only way to alleviate the burden on public defenders, and likewise prevent further ethical and constitutional violations, is to find more money for indigent defense” (Baxter, 2012). The unfortunate reality is the oftentimes lower pay that law students would secure in a public defender job creates a work environment that only makes problems worse, “Low salaries cause high turnover, low morale, and recruitment difficulties. Some defenders

work second jobs to pay student loans (O'Brien, 2010). The need to work a second job that some public defenders face only adds to the stress and time pressures they are under. These lower wages lead law students who are entering the workforce to be turned away from public defender work (Schoneman, 2018). The “overworked-underpaid” stigma that surrounds public defenders also unfortunately has an impact on the enthusiasm that these types of jobs can create and although they are absolutely essential in our legal system, the harsher work environments can deter young attorneys from seeking out this line of work.

Racial Bias + Public Defenders

Many who decide to enter the field of public defense are aware of the pervasive evils racism can perpetuate within the criminal justice system. They may even decide to attend law school and accept lower paying jobs with more difficult hours for the explicit purpose of making a positive contribution to racial injustices within our justice system. However, “confidence in one’s own egalitarianism can be an obstacle to identifying IBs, meaning that individuals who became PDs in order to fight racial injustice may be just as susceptible to the effects of IBs as those with less noble motives” (Richardson, Goff, 2013). Believing yourself to be free of bias and negative associations may prohibit you from fully understanding how those bias and associations affect you and your work. If an attorney believes themselves to be fully fair and open minded, they are less likely to think they need to educate themselves about implicit bias and will instead assume that they are acting in a bias free manner. It is preferable to acknowledge bias and work to mitigate its effects than to ignore it as reality and have it adversely affect one’s work later down the line.

Due to the resource shortages and excessive caseloads public defenders must choose how to spend their time and manage their precious resources. The failing public defense system forces them to make difficult decisions regarding their priorities, “PD’s are forced to make difficult resource allocation decisions among their clients. These resources include an attorney’s time and mental energy, as well as purely monetary sources, such as funds to hire experts” (Richardson, Goff, 2013). Because attorneys get to choose how much mental energy and effort they give to each of their clients and because they also have the same decision regarding their time, their bias against a client could have the potential to affect their time commitment. If they have an racially motivated implicit bias, they could give certain clients less of their time and energy without even knowing it, setting that client up to fail in court.

Public defenders have to look into their cases and evaluate the evidence against their client before they make decisions regarding a legal defense. Not all evidence is black and white and “Studies consistently demonstrate that IBs can affect evaluations of ambiguous evidence” (Richardson, Goff, 2013). As previously discussed, implicit biases can translate to behavior so when implicit biases start affecting the choices a public defender makes for no reason other than the race of that client, fair and just representation is no longer taking place.

Public defender Andrea D. Lyon cites Louis Heaney’s position on colorblindness in the courtroom, “Denying the existence of racism...does nothing to correct its effects, inside or outside the courtroom, but rather undermines and jeopardizes the credibility of the justice system, and serves to compound harm to our clients” (Lyon, 2012). Lyon

recognized the dire need for defense attorneys to not act as though they don't see race, but instead understand how race plays a role in the justice system.

Steps Forward

Taking the Harvard Implicit Bias Test should be absolutely necessary upon being hired for a job in the criminal justice system as all actors in that system need to be aware of how their biases detrimentally affect those around them. New public defenders should be required to take this test before they begin practicing law and should repeat the test throughout their career. Taking a test like this forces one to at least somewhat confront the ways in which their subconscious thought processes influence their decision making. Although mandating that a new employee sit down and take this test cannot in turn mandate that they will commit to further education and assessment, at the very least it will plant a seed and hopefully give them resources and a goal of minimizing the harm they can subconsciously perpetuate and cause.

Prioritizing education is of utmost importance to continuing to mitigate the effects that implicit racial biases have on indigent clients of public defenders and the criminal justice system as a whole. "The motivation to break the prejudice habit stems from two sources. First people must be aware of their biases, and, second they must be concerned about the consequences of their biases before they will be motivated to exert effort to eliminate them" (Devine, Forscher, Austin, Cox, 2012). This study looked to measure whether an implicit bias training would have an impact on the level of implicit bias an individual held before and after completing the training and utilized the IAT test to measure the results of participants before and after they were exposed to the implicit bias training (Devine, Forscher, Austin, Cox, 2012). The results demonstrated that

education and training can minimize the effects of implicit bias (Devine, Forscher, Austin, Cox, 2012). This type of result reaffirms how impactful education is and how powerful of a tool being able to understand what biases one may have can be. Not only do those higher up in legal practices need to be committed to educating themselves and providing educational opportunities for their employees, every individual in the practice needs to find internal motivation to pinpoint their internal biases and work on combating them.

Conclusion

When implicit racial biases intersect with a profession that is as a whole overworked and subject to extremely limited time and resources, the snowball effect that results can end in clients not getting adequate representation in their cases, both because of the counsels inability to prioritize their case and the attorneys subconscious bias against particular clients. Public defenders are in a position where meeting new people and having quick interactions is normal, and thus they will inevitably base a lot of their judgements on quick associations their brain makes subconsciously. In situations where implicit racial biases can have a devastating impact on someone's life, training and education are required to attempt to mitigate those affects and public defenders should be aware of the impact of their own biases.

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