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*“It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done.”
Art. 2.01, Texas Code of Criminal Procedure*



Uncovering our own implicit biases

True confession: I have an implicit bias against domestic violence victims.

I have been working on overcoming that unintentional bias since it was pointed out to me back in 1996 when I first started working for TDCAA. While I believe I am now capable of checking my bias (and understanding the ignorance from which it arose), this is something I have to know about myself every day on the job.¹

My first day as TDCAA’s Research Attorney involved boarding a plane and flying to South Padre Island for the 1996 Annual Update (unquestionably the best-ever start to a job). After our traditional TDCAA staff dinner on Monday night, a collection of us sat on the porch of another staff member’s hotel room to continue chatting.

Earlier in the day, we had seen a newly married couple happily arrive at a nearby room. Their car in the parking lot was still decorated with streamers and “just married” shoe polish on the windows. But later that night, while four or five of us sat on the porch visiting and laughing, we heard screaming and loud thumping sounds coming from their room. We all froze. Someone eventually called the police. We were frightened about getting involved and in disbelief that this was happening to a honeymooning couple on beautiful South Padre Island. The couple had left the hotel by the next morning. The conference went on. And when we staff members talked during the week about what happened that night, it was always with overtones of horror and a lot of disbelief. (“On their *honeymoon*?!”)

The following week at a post-conference staff meeting, executive director Tom Krampitz brought up the incident



By Diane Beckham

TDCAA Senior Staff Counsel in Austin

and asked us all to share our feelings about what had happened. At some point during the meeting, I said, “I don’t understand why she just didn’t leave him. I would never let someone hit me and get away with it.”²

My beloved officemate, Sarah Buel—a national expert on domestic violence whom we were lucky enough to have on TDCAA staff at the time, and a former victim of domestic violence herself—let me know forcefully that it wasn’t nearly this simple. That the statements I had made about domestic violence dynamics were offensive and came from an ignorance of the complicated issues faced by domestic violence victims.

And she was right. I had never been involved with an abusive partner. I had never been financially dependent on or shared a child or pet or home with a violent partner. I knew nothing about grooming—that the violence rarely starts on date No. 1, or even date No. 5. And while I consider myself an empathetic person generally, I clearly had not ever

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consciously considered a need to put myself in the shoes of a victim of domestic violence.

But I sure learned it that day and have continued to educate myself further since then. I've learned more about the dynamics of domestic violence in my years at TDCAA from generous experts who have devoted their professional lives to combatting it, and I'm grateful for their help.³

I'm ashamed to confess that before I really grasped how complicated and fraught life is for domestic violence victims—and without actively intending to—I believed I was stronger and smarter than those victims, because I would never remain in a relationship where I was being victimized. We can call this my “relationship privilege” that needed quite a bit of checking. You may have seen a similar thing coming from grand jurors or venire members in a sexual assault case, where their first, unstudied reaction is: If the victim wouldn't have dressed a certain way, kissed a man at the bar, jogged alone in the dark, none of this would have happened to her. Bias (explicit or implicit) in the form of victim-blaming, in other words.

While we think of implicit bias as primarily revolving around race, bias can crop up in the criminal justice system in numerous categories. My bias is pretty textbook: While I didn't believe I was biased against victims and didn't consciously act negatively toward them, subconsciously I held a belief that I was better than members of a certain group because of: 1) ignorance about what victims actually go through and 2) a privilege of never having lived through it myself (or seen it with a close friend or family member). Because of this bias, without further education on domestic violence victims, I likely would have continued reacting judgmentally without necessarily intending to. Can you imagine having pre-1996 me on a jury in a domestic violence case? I'm embarrassed to even think of that.

But I've done something about it. And I believe that any willing person can do the same thing.

Types of biases and the brain's role

Our brains love to make mental associations from the direct and indirect messages we receive—in other words, to shortcut the process of going through steps to make a conclusion. The unconscious mind works faster than the conscious mind. The brain wants to reach a conclusion quickly and then move on to other things.

This is known as “heuristics,” a mental shortcut that saves cognitive effort but does not necessarily lead to the correct decision.⁴

Cognitive biases are subconscious tendencies to think in certain ways that deviate from good judgment and rational thinking. “Cognitive bias” is an umbrella term covering a veritable buffet of inherent thinking errors that humans make in processing information. Bias categories include:

1 Explicit bias: Attitudes or beliefs that one endorses consciously and intentionally. You are aware that you like certain things and don't like others. Growing up watching the Dallas Cowboys with my dad every Sunday, I love the Cowboys and dislike the Philadelphia Eagles. The challenge with these biases is making sure you do not convert your own preferences (e.g., I strongly dislike quinoa) into a belief that others who do not share those preferences are lesser beings than you (e.g., everyone who loves quinoa is a tree-hugging snowflake⁵).

2 Confirmation bias: Giving more credence to information that confirms an existing belief system and disregarding information that contradicts the belief system. Think of this as the ostrich-with-its-head-in-the-sand bias, or tunnel vision. For example, if someone truly believes the earth is flat, he may ignore every photo taken from space and any scientific study that suggests otherwise and instead base his opinion on a photoshopped Instagram post purportedly showing his neighbor falling off the end of a flat Earth.

Or if an officer and prosecutor working together have encountered a number of spousal murder cases in which a husband has been found guilty of killing his wife each time, they might tend to ignore evidence in a new murder case that suggests a perpetrator other than the husband could be responsible. Instead, they will focus primarily (or exclusively) on evidence supporting their theory that the husband killed his wife in the new case.⁶

3 Attribution bias: This bias might cause a person to make more favorable assessments of behaviors and circumstances to people like her (“in groups”) and to judge people in her “out groups” by less favorable group stereotypes.⁷

4 Affinity bias: Similarly, this tendency can lead us to gravitate toward those who are more like us, with similar interests and backgrounds, while unintentionally leaving others out.⁸ For instance, people who graduate from Texas A&M University are generally associated

with loyalty (but not exclusive preference) toward other A&M graduates in some hiring or business decisions.

5 Implicit bias: The automatic associations and stereotypes that people assign or make between groups of people without intent.⁹ Under certain conditions, these automatic associations can influence behavior, making people respond in biased ways even when they are not explicitly prejudiced or do not consciously accept the stereotype.¹⁰ Implicit bias:

- is unconscious and automatic—the bias is activated without individuals’ intention or control;
- is pervasive—everyone has them, even people who believe they are impartial or committed to impartiality;
- does not always align with *explicit* beliefs;
- has real-world effects on behavior; and
- is malleable—with work and education, these biases can be uncovered and minimized.¹¹

In prosecutor offices, while all five of the listed biases have potential to interfere with the pursuit of justice, confirmation bias and implicit bias by far have the most potential for eroding the fairness and legitimacy of the criminal justice system.¹²

Bias-affected decisions

Many studies that have looked at bias in the criminal justice system (and speakers who give presentations on the topic) have focused on things that happen before a case gets to a prosecutor’s office—such as arrest rates—or things that happen after a case has been presented and a prosecutor no longer has control—such as judge or jury sentencing results. But there are still many decision points in the middle where undiscovered biases could adversely affect whether prosecutors are achieving just results, including:

- charging decisions;
- bail recommendations;
- plea offers;
- choice of prosecutors to try a case;
- jury selection;
- sentencing recommendations; and
- terms of probation and decisions to revoke.

Implicit biases are most often associated with race—appropriately so, as shown by abundant studies showing inequality in the criminal justice system.¹³ Gender and sexual orientation are also common breeding grounds for bias. But implicit biases can also be directed at other circumstances, such as status as a victim (e.g. victim-blaming), economic or employment status,

weight, types of crimes, or neighborhoods in a community.

Have you ever heard a homicide that happened among a certain group or in a certain part of town called a “misdemeanor murder?” Or heard someone giving a nickname to a crime that happened in a specific neighborhood (such as a “Southside Special”)? Words like these minimize the impact of those crimes and diminish the worth of the victims, thereby displaying an implicit bias against people who fit in certain categories.

Whether our implicit biases deal with race, gender, victims, or neighborhoods, it is imperative for each of us to root them out and combat them. The good news is, those who study implicit bias contend the biases can be unlearned and replaced with new mental associations.¹⁴ Brains are miraculous things. Left to their own devices, our brains—including the subconscious levels of the brain—can take over, like Hal the Computer in *2001: A Space Odyssey*. But with intention, we can override them or rewire them, especially when it comes to bias, with a little work and education.

How to identify your own bias

Attention on the justice system these days is high. Read a newspaper or watch the news and you can’t miss stories that involve our business, from wrongful convictions and exonerations to racial tensions and distrust in the fairness of the criminal justice system. At a time like this, it seems more urgent than ever to ensure that prosecutors demonstrate they are committed to fairness and justice for all.

Studies have shown that by merely exposing, discussing, and understanding our own cognitive biases, we can begin to change them and become aware of other potential implicit bias.¹⁵ In my case with domestic violence victims, it began with exposure of the bias and continued with learning more about the reality of domestic violence victims’ lives. I replaced my subconscious negative views about domestic violence victims with a more educated view of the cycle of violence and victims’ struggles to overcome it. Some studies have shown that something as simple as exposure to positive photos of or interactions with members of the group relevant to a person’s bias can weaken a subconscious bias.¹⁶

It feels a little like jury selection to me. If I had been on a venire panel back in 1996, and a prosecutor had asked me the broad question, “Do you have a bias against domestic violence vic-

Have you ever heard a homicide that happened among a certain group or in a certain part of town called a “misdemeanor murder”? Or heard someone giving a nickname to a crime that happened in a specific neighborhood (such as a “Southside Special”)?

Asking the deeper questions is the only way to unlock the subconscious (implicit) biases. We might ask the panelists in a DV case, "What should a victim do if she is hit by her partner?"

tims?" I almost certainly would have answered, "No," because I believed myself to be a fair and unbiased person who tried hard to treat everyone the same way.

But prosecutors in voir dire never stop with the broad question ("are you biased?"), because those answers will be unreliable. None of us want to think of ourselves as biased. Asking the deeper questions is the only way to unlock the subconscious (implicit) biases. Instead, we might ask the panelists in a DV case, "What should a victim do if she is hit by her partner?" Answers like, "Leave immediately and call the police" may expose potential jurors like me, who thought leaving an abuser is a very simple and praiseworthy act, while answers like "make a safety plan" or "bring in your closest friends and family members for help" indicate a person who is more attuned to family violence dynamics. Or asking "Why do you think a family violence victim wouldn't leave?" could also expose an implicit bias.

The point is, if you stop your search for your own biases by asking, "Do I have a bias?" chances are, you will only uncover those that are explicit. Equally important, I don't believe you can only ask yourself the questions. Just as prosecutors often run the facts of a case by another prosecutor before making critical decisions (charging the case, trying the case) to make sure they aren't missing something, it is important to have conversations with people you trust about potential cognitive bias you may have.

And just as prosecutors don't mean to insult potential jurors by asking venire panelists questions about their bias, we should fight the impulse to be defensive or in denial about our own. No one is free of bias. Our brains won't let us. The first step is realizing this and being open to learning more about your own bias.

Other ways to identify and eradicate your own implicit biases:

1 Take a quiz. A few quizzes readily available online, such as the Implicit Association Test (IAT) offered by Harvard University's "Project Implicit," or MTV's "Look Different" program (biases based on race, gender, and sexual orientation), purport to show biases and affinities.¹⁷ While exclusive use of these results to determine bias has been criticized, consider the results as an interesting diving-off point into your own potential bias. Spend some time asking yourself deeper questions about the subject, as you would during jury selection. Do you have discomfort around certain groups of people or in certain settings?

Do you know less about some cultures than others? Read books about cultures that are unfamiliar to you to gain better understanding of those different from the one in which you grew up.¹⁸

2 Collect data to identify patterns. For instance, look at statistics of plea recommendations to make sure your (or your office's) recommendations do not favor a group based on gender, race, victim characteristics, or other identifiable characteristics. Pay attention to the types of cases you are receiving from officers in your jurisdiction. If patterns emerge there, favoring or disfavoring certain groups, talk about it with those officers (or their supervisors).

3 Shape your message. Pay attention to words you or officemates use to describe crimes with certain characteristics ("misdemeanor murder") and ask yourself whether this shows an implicit bias. If you are a supervisor, take care that you don't rely on catchphrases that denigrate certain crimes or classes of individuals or have racial overtones ("thug"). Doing so sends a message to less experienced prosecutors that the bias underlying the words is acceptable.

4 Recruit and retain a diverse work force that includes a variety of life experiences. Have conversations in the office about issues related to bias and diversity, both in the workplace and in the criminal justice system. Without a diverse workplace and honest conversations, you may be unaware that certain words carry racial overtones or have gone out of favor with regard to gender, race, nationality, or sexual orientation. Encourage programs that allow (or require) prosecutors to engage with all members of your community.

TDCAA's bias initiative

In September 2012, TDCAA released a first-of-its-kind report responding to a claim by the Northern California Innocence Project that prosecutorial misconduct was rampant in Texas. The Innocence Project's study released a list of 91 Texas cases from 2004–2008 involving alleged prosecutorial misconduct. TDCAA's eight-month study of that work contended that only six of those 91 cases actually involved prosecutor misconduct, and the other cases instead involved reversals based on misidentification, faulty science, or procedural errors.¹⁹

But TDCAA's report also noted in one of its findings that cognitive bias can play a negative role in prosecutor decision-making.²⁰ In the months and years ahead, TDCAA will be offering

its members training and resources on dealing with cognitive bias that could affect criminal prosecution, particularly implicit and confirmation bias. One of those projects involves collecting suggestions for combatting cognitive bias in prosecuting cases and in the workplace. TDCAA staff will be working with committees to brainstorm suggestions that would apply to prosecutors' offices specifically (rather than the criminal justice system as a whole), such as:

- Eliminate photos or references to race wherever possible in all documents reviewed by the prosecutor's office pre-charging decision (such as mug shots paper-clipped to the front of a case file and listing race of arrestees on a grand jury docket). Try to make decisions about plea recommendations without any knowledge of the defendant's race.
- Be careful about introducing evidence that may hit on a racial stereotype. Example: Using an African-American defendant's history of listening to rap music as punishment evidence, in a case where the crime committed doesn't match the lyrics of the song (and therefore isn't directly relevant).²¹
- Before trial, get feedback from a variety of employees in your office on a case's strengths and weaknesses. Allow wide-open discussion on where officers or prosecutors might have missed or ignored something important.

TDCAA will continue collecting ideas and periodically offer a list of concrete examples to assist in eradicating bias in prosecutor offices. If you or your office has instituted procedures to try to avoid bias, I'd love to hear about it. Please send any of the procedures (or even ideas that haven't yet been implemented) to me at Diane.Beckham@tdcaa.com.

As past TDCAA Training Committee Chair Bill Wirsky said in a cognitive bias presentation to TDCAA's Prosecutor Trial Skills School in January: "If you care about being a good prosecutor, you will care about this topic." ❄

Endnotes

¹ Tremendous thanks to Richard A. Baker, Assistant Vice Chancellor and Vice President at the University of Houston, and Alim Adatia, Director at Outreach Strategists in Houston. Their work with a TDCAA ad hoc group focusing on bias issues and training (Jarvis Parsons, Tiana Sanford, Bill Wirsky, and me) has been incredibly helpful and inspirational. And equally

tremendous thanks to my fellow group members—Bill, Jarvis, and Tiana—for our courageous conversations, hard work, and friendship. And to my friend Cathy Cramer, who first introduced me to small-group study of racial biases.

² It hurts me to write that sentence and remember that not only did I think that, I actually said it out loud. In a room that included a victim of family violence.

³ Experts including Patricia Baca, Beth Barron, Jaime Esparza, Staley Heatly, Dana Nelson, Jarvis Parsons, Ellic Sahualla, Jennifer Varela, and Jane Waters.

⁴ See Paul Tremblay, "Interviewing and Counseling Across Cultures: Heuristics and Biases," *Boston College Law School: Digital Commons* (Jan. 2002). See also resources on the website of the Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, found at <http://kirwaninstitute.osu.edu>.

⁵ Patently untrue: My black-belt Jiu Jitsu stepson loves quinoa.

⁶ See *Getting Life: An Innocent Man's 25-Year Journey from Prison to Peace*, by Michael Morton (Simon and Schuster © 2014). See more about Michael Morton's story on the TDCAA website under www.tdcaa.com/Resources/Brady-Resources.

⁷ See, e.g., "Colored by Race: Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees," by Nextions leadership consulting firm, Dr. Arin N. Reeves, lead researcher (2015 update from 2005 study), which found that when law firm partners read the same mistake-filled research memo, they graded the Caucasian-labeled candidate more favorably than the minority-labeled candidate.

⁸ Descriptions of the first three biases found in "Strategies for Confronting Unconscious Bias," by Kathleen Nalty, originally printed in 45 *The Colorado Lawyer* 45 (Colorado Bar Association © 2016).

⁹ Described another way: "The attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Activated involuntarily, without awareness or intentional control. Can be either positive or negative. Everyone is susceptible." *State of the Science: Implicit Bias Review*, 2017; Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, p.

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10. Accessed at <http://kirwaninstitute.osu.edu/wp-content/uploads/2017/11/2017-SOTS-final-draft-02.pdf>.

¹⁰ "Bias and its Implications on Prosecutors," presentation by Richard Anthony Baker and Alim Adatia to TDCOA Bias and Diversity Working Group, November 2018.

¹¹ *State of the Science: Implicit Bias Review*, Kirwan Institute.

¹² See "Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence," by Justin D. Levinson and Danielle Young, 112 *West Virginia Law Review* 207-350 (2010); "The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion," by Robert J. Smith & Justin D. Levinson, 35 *Seattle U. L. Rev.* 795 (2012); "Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response," 86 *Fordham L. Rev.* 667 (2018); "Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat," by Rachel D. Godsil and HaoYang (Carl) Jiang, *CDAA Prosecutor's Brief*, Vol. 40, No. 2 (Winter 2018).

¹³ African-American men were more than six times as likely as white men in 2010 to be incarcerated in federal and state prisons and local jails. "Incarceration gap widens between whites and blacks," Pew Research Center Analysis of Decennial Census Data (IPUMS), Sept. 6, 2013. Accessed at: www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens.

¹⁴ *State of the Science: Implicit Bias Review*, 2017; Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, p. 10. Accessed at <http://kirwaninstitute.osu.edu/wp-content/uploads/2017/11/2017-SOTS-final-draft-02.pdf>.

¹⁵ See, e.g., "Durably reducing transphobia: A field experiment on door-to-door canvassing," by David Broockman and Joshua Kalla, *Science*, Vol. 352, Issue 6282, pp. 220-224 (April 8, 2016), accessed at <http://science.sciencemag.org/content/352/6282/220>; "Long-term reduction in implicit race bias: A prejudice habit-breaking intervention," by Patrick G. Devine, et al., 48(6) *Exp. Soc. Psychol.* 1267-1278 (Nov. 2012), accessed at: www.ncbi.nlm.nih.gov/pmc/articles/PMC3603687/.

¹⁶ See Irene V. Blair, et al., "Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery," 81 *J. Personality & Soc. Psychol.* 828 (2001); Brian S. Lowery, et al., "Social Influence Effects on Automatic Racial Prejudice," 81 *J. Personality & Soc. Psychol.* 842 (2001).

¹⁷ The MTV-sponsored test is found here: www.lookdifferent.org/what-can-i-do/implicit-association-test. Harvard's Project Implicit test is found here: <https://implicit.harvard.edu/implicit/takeatest.html>. I took the MTV tests in November 2018, and my results were a slight preference for white people over black, a slight preference for heterosexual people over gay, and no preference on gender. I took the race-measuring test again on Jan. 17, 2019, and my result was a moderate preference for black people. So while the tests aren't what we'd consider hard science, my initial results intrigued me enough to want to explore all of this further.

¹⁸ A potential reading list might include books such as: Ta'Nehisi Coates, "Between the World and Me" (Spiegel & Grau © 2015); Jodi Picoult, "Small Great Things" (Ballantine Books © 2016); Michelle Alexander, "The New Jim Crow: Mass Incarceration in the Age of Colorblindness" (Macat Library © 2017); J.D. Vance, "Hillbilly Elegy: A Memoir of a Family and Culture in Crisis" (HarperCollins Publishing © 2018). To find out more about bias, consider Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux © 2011); and Mahzarin R. Banaji & Anthony G. Greenwald, *Blindspot: Hidden Biases of Good People* (Delacorte Press © 2013).

¹⁹ "Setting the Record Straight on Prosecutorial Misconduct," Texas District & County Attorneys Association, Sept. 10, 2012. Accessed here: www.tdcaa.com/sites/default/files/page/Setting%20the%20Record%20Straight%20on%20Prosecutorial%20Misconduct.pdf

²⁰ "Setting the Record Straight," p. 6, Finding 5.

²¹ Note that many country music songs, such as Johnny Cash's Folsom Prison Blues ("I shot a man in Reno/Just to watch him die") have similarly violent messages but are rarely used as evidence against a defendant who was listening to country music near the time of the crime.