

# Starting with the man in the mirror

One of the expressions I have used with young prosecutors in my office is that our job is to be the referee.

Prosecutors “throw the flag” or “make the call” on criminal conduct without regard to who the defendant is or where he comes from. It’s something I was taught when I was a young prosecutor.

But I have learned in my 16 years as a prosecutor that we all have lenses through which we see the world. Put another way, we all have biases or prejudices about the world and the people in it. Many times our biases affect the way we “make the call.” Whether a defendant gets probation or prison or the length of a prison sentence depends on how the facts look in our eyes. Is the crime something we ourselves could’ve committed? Are we scared by the defendant’s conduct? Do we identify with the victim? What if, at a subconscious level, we are looking at things other than just the facts of a case? And what effect do these biases have on the decisions we make?

In this issue of the journal, we are speaking about bias from different perspectives. Bill Wirskye, First Assistant Criminal District Attorney in Collin County, and Diane Beckham, TDCOA’s Senior Staff Counsel, have written about their journeys in dealing with their biases, and I am addressing it too. Why are we writing about this topic? Because with great power comes great responsibility. Prosecutors should not only recognize the power we have, but we must also wield that power effectively. To accomplish the mission of justice, we must know the traps and pitfalls that can so easily beset us. This article will highlight the issue of bias, look at the research on it, and—I hope—start the conversation about strategies to decrease bias in our decision-making.

## What is bias?

A bias is simply an inclination or prejudice for or against one person or group. Some biases are completely legitimate. Rooting for your chosen team to win is a situation where having a bias is a good thing. (I’m pretty sure all Texas Aggie fans who are reading this agree with that statement.) This is called conscious or explicit bias.

Another type of bias is just starting to come to light as a pervasive force in our world; it’s



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called implicit bias. Implicit biases are “attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.” These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control.<sup>1</sup> These biases are formed when we are very young and are shaped by our life experiences, what we are taught, and the media, along with a variety of other influences.

Unlike explicit bias, implicit bias operates beneath the surface, informing and shaping our decisions and judgments in ways that we often can’t detect. These views often defy our conscious awareness and self-reported value systems. Because we don’t leave our biases at home when we come to the courthouse, this type of bias can invade and infect our thinking when it comes to handling cases in the criminal justice system. For purposes of this article I am going to focus on one: implicit racial bias.<sup>2</sup>

But before we get too far into this topic, I want to include a couple of caveats. First, my goal in tackling this tough subject is not to sound like I have it all together as a prosecutor. I don’t, as you will read later. My purpose is to shed light on something that can lead to injustice in our communities and that can hamper our ability to fulfill our duty “to see that justice is done.”<sup>3</sup> Second, this is a marathon, not a sprint. The issues we are addressing will take time to work through, and this is the beginning a long conversation, not the end.

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### Reading the research

Since the late 1990s, a vast amount of research on implicit bias has demonstrated that a majority of Americans harbor negative implicit attitudes toward African-Americans and other socially disadvantaged groups.<sup>4</sup> A study published in 2017 showed that people judge identically sized African-American and white men differently, with African-American men seen as larger, stronger, and more apt to cause harm in an altercation.<sup>5</sup> Additionally, people are more likely to remember hostile details about African-Americans than Caucasians, sometimes even wrongly recalling hostile details of incidents involving African-Americans.<sup>6</sup> In one study, mock jurors who were told the facts of an aggravated robbery found the same evidence presented to them more indicative of guilt when the defendant was a darker-skinned person than mock jurors who saw a photo of a lighter-skinned person with the exact same evidence.<sup>7</sup>

Now I assume the individuals in these studies are well-meaning people. In my opinion, most people don't walk around saying, "Today I want to be a racist person." (If this is you, then you can stop reading now.) In fact, in many of these studies the subjects expressed, either before or after the actual experiment, *explicit* attitudes of racial equality. However, over and over again, individuals who don't know each other and from all races and backgrounds are shown to harbor *implicit* biases that could affect how we see people in the criminal justice system.

The effects of implicit bias on lawyers specifically has also been subject of study. In 2014, researchers explored racial and confirmation bias by creating an experiment geared toward partners in law firms.<sup>8</sup> Researchers drafted a memo for a hypothetical third-year law student applying for employment in a firm. In the memo, researchers deliberately inserted 22 writing and analytical errors.<sup>9</sup> The memo was then given to 60 partners at 22 law firms, who were told they were participating in a "writing analysis study." (It's important to note that the individuals who evaluated the writing samples were a diverse mix of men, women, Caucasians, and some racial/ethnic minorities.) While all of the partners received the same memo, half the partners received a note stating that the applicant was African-American while a note to the other half said the applicant was white. The results showed that across the

spectrum, the attorneys evaluated the exact same memo—which was purported to have been written by an African-American and a white lawyer—differently, finding more of the errors in the African-American's memo than his white counterpart.<sup>10</sup> Additionally, the law firm partners ranked the writing ability of the African-American lawyer lower than the writing ability of the white lawyer for the same writing sample.

Dr. Arin Reeves, in diagnosing the implicit racial and confirmation bias in this experiment, put it best when she said:

When partners say that they are evaluating assignments without bias, they are probably right in believing that there is no bias in the *assessment* of the errors found; however, if there is bias in the *finding* of the errors, even a fair final analysis cannot, and will not, result in a fair result.<sup>11</sup>

To reiterate, these are tons of studies that reach the exact same conclusions about our racial biases, whether it be in healthcare, education, judges, jurors, etc. Implicit racial bias is pervasive and insidious. From young to old, male to female, black to white, and conservative to liberal, implicit biases are not held by a select few but are readily observed among all social groups. No one is exempt, including me.

I am subject to the same implicit biases that I just outlined above. About 18 months ago, I first heard about implicit bias and decided to look into it.<sup>12</sup> I found an instrument called the Implicit Association Test (IAT), which anyone can take online (<https://implicit.harvard.edu/implicit>).<sup>13</sup> It gauges whether someone has implicit bias in one or more areas (race, gender, etc.). The IAT measures the strength of associations between concepts (e.g., black people and white people) and evaluations (e.g., good or bad) or stereotypes (e.g., athletic or clumsy).

When I took the IAT, I was surprised by my results, which showed I had a slight preference for whites over African-Americans. It hit me like a ton of bricks.<sup>14</sup> When I reveal my test results to others, most of them look very surprised—they assume that my preference would be different. Interestingly, research shows that my score isn't unusual compared with other African-Americans. In fact, in a study of more than 600,000 implicit association tests, African-Americans showed a slight implicit bias toward whites.<sup>15</sup> Re-

searchers posit that this is a result of the broader culture's impact on our internal preferences, which has been known for decades.

In *Brown v. Board of Education*,<sup>16</sup> for example, the plaintiff's attorneys used psychological research and experiments to look at the impact of segregation on black and white children. In what has been aptly named "The Doll Test,"<sup>17</sup> black children ages 3 to 7 were shown four dolls: two with white skin and yellow hair and two with brown skin and black hair. Each student was asked to identify the race of the doll and which one they preferred to play with. The children were asked questions such as: "Which doll is the good doll? Which doll is the smart doll? Which one is the pretty doll?" The majority of the black students preferred the white doll, assigning positive traits to it. Most of the children discarded the brown doll with black hair, assigning it negative traits. The psychologists concluded that black children formed a racial identity by the age of 3 and attached negative traits to their own identity, which were perpetuated by segregation and prejudice.

This test's conclusions from more than 60 years ago mirrored the findings we see today: African-Americans' own implicit biases *against other African-Americans* reveal the influence of the negative attitudes held by the culture at large toward this group, and those implicit biases, left uninspected, can still lead to unjust outcomes.

My purpose in discussing this research and revealing what I would consider personal details about myself will, I'm hoping, make it OK to start having the uncomfortable but necessary talks in our offices about how bias affects us as prosecutors.

### Why does it matter?

Why should it matter for me or any other prosecutor to inspect our implicit biases? Because prosecutors are afforded an enormous amount of discretion at every level in the criminal justice system.

- Should a person be charged with a crime?
- What type of bond should be set?
- Should I ask for a higher bond?
- Should I dismiss the charges?
- What plea should I offer?
- Do I believe a particular person is violent?
- What sentence do I ask for from a jury?
- Do I feel comfortable putting a particular person on my jury?

These discretionary decisions allow us to become the most powerful actors in the criminal justice system. But as I said earlier—and it bears repeating—with great power comes great responsibility. Prosecutors don't have the luxury of turning a blind eye to implicit bias because it can be a silent driver of our decisions of punishment and mercy. As public servants, we are called to a higher standard, and that standard compels us to be humble, realize our shortcomings, and see that justice is done.

So how do we overcome implicit bias? The truth is that our biases are formed over a lifetime of interactions, and it's next to impossible to eliminate these biases entirely. But we can start using strategies to attack them.

### Strategy One: Raising awareness

Experts who study implicit bias generally agree that awareness of the existence of implicit bias is an important first step in reducing bias. One way to raise awareness is to simply inform people about its existence (e.g., this article). Workshops on implicit bias have become more common in businesses, higher education, police departments, and other enterprises.<sup>18</sup> Learning about these issues helps to decrease our bias by making us deal with the issue head-on and become more sensitized to when bias may be playing a role in our decision-making.

Well-intentioned people can overcome automatic or implicit biases when they are made aware of stereotypes and biases they hold, have the capacity to self-correct, and are motivated to do so.<sup>19</sup> There are literally thousands of articles about implicit bias online and nearly as many books. As for myself, after taking the online IAT test, I had Bill Wirskye, First Assistant Criminal District Attorney in Collin County, come do a talk in my office on cognitive and implicit bias. I also read the book *Blindspot: Hidden Biases of Good People*, by Mahzarin R. Banaji and Anthony G. Greenwald. Seeing my own biases and learning how they can affect my decisions have made me want to learn more how bias affects prosecutors in all areas.

TDCAA is also taking on the challenge of creating awareness among its ranks. At the Prosecu-

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tor Trials Skills Course in January, Bill Wirsky and I spoke on cognitive and implicit biases. (There's a photo of us below at the conference.) We will also have presentations on this subject at TDCAA's Domestic Violence Seminar in April, Annual Criminal & Civil Law Update in September, and Elected Prosecutor Conference in December. We feel this topic is important for everyone in prosecutor offices: attorneys, investigators, and office staff.



### **Strategy Two: Blinding the bias**

If we understand that biases affect us at a subconscious level, we may solve for it with something called blinding. Blinding means removing any indicators of race from the information you're working from so they don't become a factor in decision-making. Police have employed blinding in eyewitness lineups, for example, and I believe a form of it can be used in prosecution to decrease our own implicit bias. One way to incorporate blinding is when you are looking at résumés for a new hire: Ask your secretary to redact the name at the top so you see just the résumé and cover letter. Similarly, you can remove mugshots from folders and race identifiers from lists in your office. These are simple yet effective ways to safeguard against implicit biases that may be playing a role in your decision-making.

Blinding has also been used to decrease gender bias in orchestras. Before 1970, the top five orchestras in the U.S. had fewer than 5 percent women players. In the 1970s and '80s, orchestras began holding blind auditions, where candidates

are situated behind a screen to play for a jury who cannot see them. In some orchestras, blind auditions are used just for the preliminary selection, while others are employed until a hiring decision is made. Even when the screen is used only for the preliminary round, blind auditions have had a powerful impact: Researchers have determined that this step alone makes it 50 percent more likely that a woman will advance to the finals. It's also been shown that the screen has produced a surge in the number of women being offered positions on the orchestra.<sup>20</sup>

This empirically proven procedure has even found its way onto the hit TV show "The Voice," where judges can only hear a singer's voice (and not see his or her race or physical appearance) and must decide if that candidate is worthy of their team based on voice alone. (It just happens to be my daughter's favorite TV show.)

### **Strategy Three: Outsmarting the bias**

One of the premises of implicit bias is that it happens at a subconscious level. You don't know you're doing it. If we *all* have bias, then we can outsmart implicit bias by bringing other people into our decision-making, from pre-trial strategy sessions to the prosecution of cases (and everything in between). This team concept aids not only in bringing good ideas to the table but it also exposes bad ideas and biases. It is important to involve as many people as possible in the strategy session. Others can spot our biases in a way that we ourselves cannot see.

Such a team approach has worked wonders in our office. (Read all about it here: <https://www.tdcaa.com/journal/stop-collaborate-and-listen>.) It doesn't solve every problem, but putting a diverse group of prosecutors, investigators, victim assistance coordinators, and key personnel—men and women, seasoned and newer, of all races, ethnicities, and backgrounds—in a room to talk about the cases makes implicit biases rise to the surface so they can be challenged. We also see powerful concepts and ideas rise to the top: Our best closing arguments, opening statements, and witness orders come when we all get in the room and determine what is the best way to present a case, as opposed to doing things "our own" way. Sometimes the process is exhausting, but in the end it's always worth it.

### **Conclusion**

My first boss, Bill Turner, told me I would learn all the skills I needed to be a prosecutor in about



five years. After that, I would realize that you won't become a better prosecutor until you become a better person. We get the privilege of being prosecutors, and good prosecutors don't hide from issues—we face them head on. I want to be a better prosecutor. I've started my journey by looking first at the man in the mirror because I believe our community deserves the best from us. I hope you will join me in this journey. ✨

## Endnotes

<sup>1</sup> See Cheryl Staats, Kelly Capatosto, Robin A. Wright, & Danya Contractor, *State of the Science: Implicit Bias Review* 2015, p. 62, available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf>.

<sup>2</sup> There are many articles that speak to biases in regard to gender, weight, sexual orientation, etc., and those biases have their own unique issues and concerns. I would not be able to give those issues the focus and detail they deserve by putting them all together in one article.

<sup>3</sup> "It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." Tex. Code Crim. Proc. Art. 2.01.

<sup>4</sup> See, for example, 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), available at <https://digitalcommons.law.seattleu.edu/sulr/vol35/iss3/9/>. Some of these views associate women with family, men with the workplace, Asian-Americans with foreigners, and more. Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, "Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site," *Group Dynamics: Theory, Research, and Practice*, Vol. 6(1), 2002, pp.101-102 (reporting results from 600,000 Implicit Association Tests), available at <https://www.projectimplicit.net/nosek/iat/harvesting.GroupDynamics.pdf>.

<sup>5</sup> John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, "Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat," *Journal of Personality and Social Psychology*, Vol. 113(1), July 2017.

<sup>6</sup> Justin D. Levinson, "Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering," 57 *Duke*

*L.J.* 345-424 (2007), available at <https://scholarship.law.duke.edu/dlj/vol57/iss2/2>.

<sup>7</sup> Justin D. Levinson & Danielle Young, "Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence," 112 *W. Va. L. Rev.*, 307-350 (2010), available at <https://ssrn.com/abstract=1601615>.

<sup>8</sup> Arin N. Reeves, "Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills," *Nextions*, Apr. 2014, available at <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf>.

<sup>9</sup> Seven errors were minor spelling and grammar mistakes, six where substantive technical-writing errors, five were errors of fact, and four were errors in the analysis of the facts.

<sup>10</sup> The overall rating system for the experiment was 1 to 5, with "1" indicating the memo was extremely poorly written and "5" indicating the memo was extremely well-written. The exact same memo submitted by the "African American" scored 3.2 out of 5 as opposed to a 4.1 out of 5 submitted by the "Caucasian American."

<sup>11</sup> *Ibid.*, 5 (emphasis added).

<sup>12</sup> My wife used to be a high school debate coach. One of her former students wrote a law review article that mentioned the term implicit bias and the implicit association test.

<sup>13</sup> Anthony G. Greenwald, Debbie E. McGhee & Jordan L.K. Schwartz, "Measuring Individual Differences in Implicit Cognition: The Implicit Association Test." *Journal of Personality and Social Psychology*, 1998, Vol. 74(6), 1464-1480.

<sup>14</sup> I would've guessed that I had no preference or a preference of African-Americans over whites. I then started to think about my history and how I grew up: who my neighbors were, what I watched on television, and the like. I was raised in an almost all-white neighborhood, and I went to private school for eight years where most of the time I was the only black kid in class. During my most formative years, the kids I hung out with at school, my teachers, and my neighbors were all white.

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the courage to try and answer tough questions like this, we prosecutors can gain—or regain—the trust of all the communities we serve.

Some of us in leadership positions around the state have begun asking the tough questions and having frank conversations about race. We are learning much about ourselves, each other, and our profession. My tactic of “head down, mouth shut” will no longer suffice. We must listen to our critics, actively address the difficult issues, and wring whatever lessons we can from the process. It is sometimes painful, but it’s also absolutely necessary. Both individually and as a profession, we must be prepared to confront our past so that we can confidently face our future.

Under the leadership of TDCAA, it seems that Texas prosecutors are finally ready to train on and talk about implicit bias. I’ve always believed that no one can train Texas prosecutors better than Texas prosecutors, and this sensitive subject is no exception. So along with TDCAA President Jarvis Parsons, TDCAA Training Committee Chair Tiana Sanford, and Diane Beckham and Rob Kepple from the Association, I’m happy to finally be joining the discussion on race and prosecution. ❁

<sup>15</sup> See Nosek et al supra note 4, pg. 112: “Black Americans ... do not show positive implicit in-group effects. Instead their own implicit attitudes reveal the influence of the negative attitudes held by the culture toward those groups. Although the exact origins of all forms of attitude and beliefs are not known, we regard implicit attitudes to reveal the deep influence of the immediate environment and the broader culture on internalized preferences and beliefs.”

<sup>16</sup> 347 U.S. 483 (1954) (*Brown I*).

<sup>17</sup> K.B. Clark, “Effect of Prejudice and Discrimination on Personality Development” (Midcentury White House Conference on Children and Youth, 1950). Their work is cited in footnote 11 of *Brown I*.