

Implicit Bias:
Why and How We Need to Alter the Criminal Jury System

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What if I told you that the single most addressable threat to the U.S. criminal justice system was your own subconscious? Americans have advocated for reform of the judicial system since its inception, usually in the form of dramatic upheaval of the entire structure. However, where we could see the most immediate change is the place where we as citizens get to decide on the fate of the accused: the jury panel. The problem is that each one of us has a complex system of implicit biases which cannot be detected by ourselves nor by those who select the jury. So, the accused are subjected to our internal assumptions based on their race, age, sex, or gender. While there are ways to mitigate implicit biases over the course of one's lifetime, it is difficult to do so in the short pre-trial timespan. Therefore, criminal trials must remove the possibility of this bias in the first place: the jury should not be able to see or hear the defendant, and they should only be made aware of the characteristics of the individual that are absolutely necessary to the case.

This solution is necessary for a number of reasons. Firstly, there are well-documented negative implications of implicit bias that we need to mitigate, such as the way racial bias leads to unequal treatment of Black defendants in trial. Secondly, unequal incarceration rates can cause serious harm to communities, and to exemplify these effects this paper will examine the case of the Los Angeles prison system. Finally, this solution is necessary because none of the common methodologies used to mitigate implicit bias are effective in the case of a jury trial. Therefore, the only possible way to remove jury bias from the courtroom is to eliminate all sources of bias by conducting trials in a medium that does not rely on the visualization of the defendant, such as a written transcript.

In order to tackle implicit bias, we'll need to clearly define it and evaluate how it manifests. Implicit bias is an unconscious human tendency to develop associations between a

group of people and events that take place. These associations generally stem from early life experiences, the media, and news programming, from which we take in information and decide what groups we should associate with what events.¹ While this sorting process is a natural human tendency to divide the world into social groups, it can over-do its purpose and create an internal distinction between one's self and the other, establishing an "us versus them" culture.² The reason implicit bias is so undetectable is due to its ability to be surprisingly deviant from our stated intentions and explicit beliefs; we do not notice its presence until we base a decision off of an assumption connected to the bias.³ In relation to the criminal trial, this is important because of the way jurors are shown to reason toward their decision about the accused. According to a publication from the American Association for Justice, jurors often use what is called the "System 1" Cognitive System. System 1 is an automatic, associative, and process-opaque way of reasoning that helps individuals make conclusions when offered dense amounts of complex information.⁴ This is in contrast to the other type of human cognitive system, System 2, which operates via rationalization through information. Using System 1, jurors "look for patterns to categorize the defendant's conduct, relying on personal experiences and social norms," because this form of associative reasoning is often easier than applying the burden of proof.⁵ Here rests our issue. If the juror is able to see or hear the defendant, or is given any other means of characterizing them, then their subconscious will be naturally inclined to take the easier

¹ "Understanding Implicit Bias." *Kirwan Institute for the Study of Race and Ethnicity*, The Ohio State University, 2015, kirwaninstitute.osu.edu/research/understanding-implicit-bias/.

² Bienias, Emma, et al. *Implicit Bias in the Legal Profession*. Intellectual Property Owners Association, www.ipo.org/wp-content/uploads/2017/11/Implicit-Bias-White-Paper-2.pdf.

³ Bienias et al., 3

⁴ Wenner, David A. "Under the surface." *Trial*, Apr. 2017, p. 22+. *Gale Academic Onefile*, https://link-gale-com.libproxy2.usc.edu/apps/doc/A492664013/AONE?u=usocal_main&sid=AONE&xid=d54f7676. Accessed 29 Oct. 2019.

⁵ Werner 2017, 2-5

cognitive route. Jurors then reach conclusions based on biased associations toward the individual. They will be less likely to decide the verdict based on the concrete proof offered against the accused.

Racial bias provides a real world example of how implicit bias can cause tangible harm in our society. While there are a multitude of factors that contribute to the racial disparities present in our criminal justice system, implicit bias on the jury panel gravely impacts the outcomes of trials. We know that there is implicit racial bias amongst the American public, largely because the news is over-saturated with stories that involve serious crimes and crimes committed by people of color and under representative of crimes committed by White people.⁶ Given the fact that roughly 75% of the public develop their opinions on crime from the news, the development of this bias is almost inescapable, and is easily apparent in trials.⁷ To be blunt, according to UCLA Law Review, there is a clear implicit stereotype between being Black and guilty in criminal trials. Using System 1 reasoning, a juror is likely to see a Black defendant and, drawing upon representations in the news or racist stereotypes accumulated over a lifetime, that individual will be more inclined to judge the accused as guilty. The impact of this implicit bias is that if we had one-hundred trials with identical circumstances, eight more Black than White defendants would be decided as guilty by the jury, even after they've been screened for explicit bias.⁸ This means that even when our system takes its current due diligence to get the most

⁶ Nellis, Ashley. "The Color of Justice: Racial and Ethnic Disparity in State Prisons." *The Sentencing Project*, 14 June 2016, www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

⁷ Nellis 2016.

⁸ Kang, Jerry, et al. "Implicit Bias in the Courtroom." *UCLA Law Review*, vol. 59, no. 5, June 2012, p. 1124-1187. *HeinOnline*, https://www.researchgate.net/publication/256016531_Implicit_Bias_in_the_Courtroom/link/0f31752ec0bac50307000000/download.

objective jurors on the panel, the results of trials are significantly skewed by racial implicit bias. The United States Courts website offers only a paragraph explanation on what this screening process, called voir dire, consists of. Essentially, a judge questions potential jurors to ensure that they can decide the case fairly, and then attorneys can exclude a certain number of jurors without having to present their reasoning.⁹ This process is vague, outdated, and still entirely subject to human error; clearly, the established due diligence is not working.

It is important to now look at the depth of the impact that implicit bias holds in the U.S. judicial system. What does this mean for the well-being of our country? For a start, Black Americans are incarcerated at an average of five times the rate of Whites across state prisons.¹⁰ The disparity is in part due to social conditions experienced by Black Americans that are remnants of the effects of the slavery and systemic oppression, but remains perpetually and unfairly reinforced by tainted decision-making in the criminal justice system. Wouldn't it make sense that if there were "no discrimination after arrest, the racial makeup of the prisoners should" look roughly like the racial makeup of arrestees?¹¹ In a system without bias, this would hold true. However, using a study done from the mid 1990s to the mid 2000s by The Sentencing Project, the logic of arrestee to convict proportionality does not hold. During this time period, Black Americans made up about 13% of drug users, but somehow were 46% of the population of those convicted for drug offenses.¹² There was a four-fold over-representation of Black Americans in prison for drug use, relative to the proportion of the population of all races that used drugs. There is no ignoring, of course, that Black Americans also made up 36% of drug arrests, meaning that

⁹ "Learn About Jury Service." *United States Courts*, United States Courts, www.uscourts.gov/services-forms/jury-service/learn-about-jury-service.

¹⁰ Nellis 2016.

¹¹ Nellis 2016.

¹² Nellis 2016.

judicial factors outside of the court were responsible for a larger, more explicit racism. But the American citizens used as jurors are to blame for the remaining disparity.

In Los Angeles, there is an offensively large discrepancy between Black and White imprisonments after arrests. Per 1,000 felony arrests, there are two-and-a-half times more Black than there are White felony arrests.¹³ This pattern holds across the nation, but there is one characteristic of this prison system that makes this statistic particularly detrimental. The Los Angeles County jail system is the largest jail jurisdiction in the United States, making its impact on the surrounding locality equally as large. Million Dollar Hoods, a project which maps the human and fiscal costs of incarceration, has uncovered that Los Angeles has a nearly billion dollar budget which funnels into efforts to incarcerate the people of a handful of neighborhoods: namely Lancaster, Palmdale, and Compton¹⁴. Both Lancaster and Compton have populations which have approximately twice the percentage of Black residents than the national average, and Palmdale is a large majority Hispanic.¹⁵ The combination of focused policing and implicit bias after arrest have a despicable impact: in the Los Angeles county prison jurisdiction there are a striking twelve and a half times more Black than White imprisonments (2676 versus 214.7 per 100,000).¹⁶ What are the implications of these figures?

Comparative to other potential forms of bias, I feel that implicit racial bias poses the greatest threat to our nation. When one race-group is overrepresented in the prison population, the collateral damage is painfully severe. For one, when the representation of, as in the above

¹³ “Los Angeles County.” *California Incarceration*, 2020, <http://casi.cjci.org/about.html#download>

¹⁴ “Welcome.” *Million Dollar Hoods*, Million Dollar Hoods, 22 July 2020, milliondollarhoods.pre.ss.ucla.edu/.

¹⁵ “U.S. Census Bureau QuickFacts: Palmdale City, California; Lancaster City, California; Compton City, California.” *Census Bureau QuickFacts*, www.census.gov/quickfacts/fact/table/palmdalecitycalifornia,lanastercitycalifornia,comptoncitycalifornia/PST045219.

¹⁶ “Los Angeles County” 2020.

case, drug offenders incarcerated is primarily Black, then the implicit association between Black and guilty amongst other race-groups is reinforced. Secondly, larger proportions of Black Americans are being removed from their socio-economic environments than are members of other races. There are less people of the race group able to contribute to the population's economic well-being, and even upon release from prison the incarcerated individuals have much less opportunity for employment. For context, the current unemployment rate for formerly incarcerated individuals is higher than the total U.S. unemployment rate at any period in history, including during the Great Depression, at a staggering 27%.¹⁷ If Black individuals are over-represented in the population of incarcerated individuals, they are then also over-represented in the population of former incarcerated individuals who are unemployed. These effects are the beginning of a long list of sufferings that are caused by the racial disparity in incarceration. This is all to say that though implicit bias operates on an unconscious level, its negative effects are not to be minimized; implicit bias amongst jurors impacts the well-being of entire populations.

There are existing practices used in attempt to mitigate implicit bias, however these efforts are not effective in the case of a jury. Contrary to popular belief, the adoption of a color blind attitude is not effective as a strategy to reduce implicit bias. Where color blindness refers to the willful ignorance of race, my solution completely eliminates physical characteristics to begin with. In fact, the deliberate disregard of race, gender, or any other characteristic results in more implicit bias than if these differences were explicitly acknowledged.¹⁸ Thankfully, this common

¹⁷ Couloute, Lucius, and Daniel Kopf. "Out of Prison & Out of Work." *Out of Prison & Out of Work | Prison Policy Initiative*, July 2018, www.prisonpolicy.org/reports/outofwork.html

¹⁸ "Strategies to Reduce the Influence of Implicit Bias." *Yale Edu*, National Center for State Courts, 2012, horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf.

misconception has been recognized in the judicial system, and judges in several states have begun to undergo training on implicit bias, group and individual differences, and on multi-cultural awareness.¹⁹ These strategies are effective because when an individual is made aware of the potential impact of implicit bias on their decision, they tend to put additional consideration on fairly evaluating evidence without regard to the defining characteristics of the accused. Another strategy that is effective for mitigating bias in judges is exposure to culture-counter typical displays in work environments.²⁰ These displays are of individuals whose defining characteristics would usually make them victim to implicit bias, but who break the cultural stereotype of that sub-group. The success of these strategies should not be disregarded. However, the existing strategies all have one thing in common: they are oriented for judges who will be exposed to these measures on a regular basis. Jurors can undergo one time implicit bias training or see images of counter typical individuals during their time in the court, but it is difficult for these factors to overcome the stereotypical exposures accumulated over a lifetime.

The only assured way to eradicate implicit bias in jurors is to give them nothing to attach their biases to. No face. No voice. Jurors should receive a printed transcript of the trial that has ensued and make their decision based upon the arguments and evidence offered. Unless a characteristic of the defendant is absolutely necessary for the juror to know, there is no point in disclosing their identifying attributes. Until we reach a point where our society is truly unprejudiced and un-predisposed (which may never even occur) it is only fair to give every defendant the fairest criminal trial possible. Though such a measure will not fix issues such as the racial disparity in incarceration rates, it will eliminate the most controllable aspect of bias.

¹⁹ “Strategies” 2012, 7-8.

²⁰ Kang et al., 1169-1124.

The detriments implicit bias have caused its victims are too severe to continue without pointed efforts of correction. Our neighboring communities of Lancaster, Palmdale, and Compton have the odds stacked against them. We must all make a concentrated effort towards reform, or our communities will continue to be disproportionately subjected to punishment derived from the bias of strangers.

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id=AONE&xid=d54f7676. Accessed 29 Oct. 2019