Working Toward Equal Justice: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat for Legal Aid Lawyers

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Introduction

Legal aid and legal services lawyers are on the front lines in an increasingly hostile environment for poor people and people of color. However, the explicit racism and xenophobia that have become resurgent in our society are not the only barriers to equity and fairness.

While it can be painful to acknowledge, even those of us committed to ideals of equity often fail to act upon our deeply held values. Cutting edge social science provides both an answer to this seeming contradiction and a way forward.

In this article, we seek to make a case that to begin to achieve racially equitable outcomes for clients and the communities in which they live, it is critical to address the risks of our unconscious responses to race, ethnicity, and other lines of difference.

Understanding Implicit Bias, Racial Anxiety and Stereotype Threat

Bias can be explicit — consciously held hostilities or stereotypes about groups of people. By contrast, implicit bias is the automatic, instantaneous association of stereotypes and attitudes with identity groups. These biases are not individual, they emanate out of stereotypes common in our culture. If we fail to acknowledge them, implicit biases may result in decisions or interactions that are contrary to our consciously held values.

Despite nominal progress in recent years, associations and stereotypes linking black and Latino communities with violence, criminality, and poverty continue to be common in the media. These associations have been found to translate into the perception of threat and violence. Recent studies have found that people judge identically sized black and white men differently; with black men seen as larger, stronger, and more apt to cause harm in an altercation (John Wilson et al., Mar. 13, 2017). In addition, when people are primed with black faces, they more quickly identify crime related objects; when primed with white faces, they are faster to see neutral objects (Eberhardt, J. L., Goff, P. A., Purdie, V. J., & Davies, P. G. (2004). In a study of college students in 2016, the association of black faces with crime related objects occurred even when the face was of a five-year boy. Also salient is a study finding that after hearing about an encounter, people are more apt to remember hostile details about a person named “Tyrone” than “William” and even wrongly recall hostile details when the story is about “Tyrone.”

Researchers have assessed the presence of implicit bias using a variety of methods. The most commonly known is the “Implicit Association Test” (IAT), which can be easily accessed on the website Project Implicit.
The IAT is a computer task that measures how quickly participants can link particular groups with positive or negative words (race attitude) or different racial groups with weapons (weapons association) by pressing a particular key on the computer's keyboard. The IAT is not akin to a DNA test — it is not a precise and entirely stable measure of bias in any single individual; rather it reveals patterns and tendencies among large groups of people. Scientists are also beginning to use physiological tools to measure implicit responses to race, including functional Magnetic Resonance Imaging (fMRI) (Phelps et al., 2000), patterns of cardiovascular responses (Blascovich et al., 2001); facial electromyography (EMG) (Vanman et al., 2004), and cortisol responses (Page-Gould et al., 2008).

And research establishes that lawyers are not immune to implicit biases. In one study, sixty law firm partners were given an identical memorandum written by “Thomas Meyer,” identified as a third year associate who went to NYU Law School. The memo contained seven spelling or grammar errors. Half of the partners were led to believe that Meyer was white and the other half that Meyer was black. Though the memos were identical, partners found an average of 2.9 of the 7 errors when Thomas Meyer was depicted as white, and an average of 5.8 of the 7 errors when Thomas Meyer was depicted as black (Nextions, 2014).

Such findings are magnified by studies around priming, or subliminal exposure via words and images. In one example that looked at prosecutorial decision-making, the use of an African American name, specific genre of music associated with African Americans, or “black” neighborhood, can cause racial stereotypes to “be immediately and automatically activated in the mind of a prosecutor, without the prosecutor’s awareness” (Smith and Levinson, 2012). And as noted above, the priming of a black face caused participants in one study to more quickly detect “degraded images” of an object commonly associated with crime (e.g., knife, gun, etc.).

While many of these studies seem most salient to the context of criminal law, they are also relevant in the civil context in credibility determinations, presumptions of trustworthiness, and even the degree to which people are seen as valuable citizens or dangers to society.

While the focus of this article is implicit bias, there are two other concepts that attorneys should be aware of as they navigate lines of difference.

The first is “racial anxiety.” Racial anxiety is the fear or discomfort that people experience when engaging in cross-group interactions. People of color may worry that they will be subjected to discrimination, hostility, or invalidation; white people often fear being considered racist or biased. The anxiety often translates into distancing behavior, lack of eye contact, cognitive fatigue, and avoidance. If either an attorney or a client are experiencing racial anxiety, it has the potential to undermine trust and communication.

The second phenomena is “stereotype threat.” This refers to the “disruptive psychological state that people experience when they feel at risk for confirming a negative stereotype associated with their social identity—their race, gender, ethnicity, social class, sexual orientation, and so on.” Stereotype threat has been studied most commonly in the context of academics, but recent studies focusing on health care are potentially salient in the attorney-client context. This work suggests that in light of life experiences, patients of color have reason to be concerned that health care providers hold stereotypes about them, which has the potential to lead to avoidance, impaired communication, lack of disclosure and trust, and poor adherence to treatment plans. Clients of color may experience similar threat when interacting with a legal aid lawyer.

To learn more about both concepts, readers can visit www.perception.org.

Possible Interventions for Bias, Anxiety and Stereotype Threat

Researchers have identified several interventions to address implicit bias. These interventions fall into two categories: bias reduction and bias override. While bias reduction is the fundamental goal for many, since the biased mindset is itself transformed, research shows the difficulty of overcoming biases that have been acquired over a lifetime and are confirmed by the barrage of stereotypes still present in the culture. As a result, we argue that pursuing bias override simultaneously is crucial.

One avenue to decrease bias is the constant and consistent exposure of legal services attorneys and staff to positive images and associations with non-stereotypical out-group individuals. Depictions that counter negative stereotypes create new implicit associations between those positive attributes and the out-group as a whole (Gawronski & Bodenhausen, 2006). However, such interventions are likely to be short term. According to Devine and colleagues (2012), the most effective...
bias reduction strategies require a series of steps to “break the prejudice habit.” This may require attorneys to engage in more community building activities and outreach, including know-your-rights trainings. The ideal activities are those that bring attorneys into contact with people of other races, ethnicities and class status as peers — rather than in contexts with an inherent power imbalance.

As an example of such an activity, in New York City, during the 1990s, one of us supported a multi-year project to build a city-wide network of public housing residents and support their efforts to shape local implementation of a federal public housing reform law. The effort was a collaboration between resident leaders and local service organizations, including the Legal Aid Society of New York. Through the project, legal services attorneys regularly spent time in public housing communities. In addition to conducting trainings and delivering presentations, they met in resident council offices to plan, strategize and, in the process, deepen relationships. Work like this allows for the practice of individuation. Individuation suggests that if people regularly take the time to learn detailed information about others, particularly those who are different — or we perceive them to be — we can retrain our brains so that we learn to see people for their unique qualities and attributes, versus engaging in the automatic behavior of putting them into stereotypic categories or social groups.

Yet another example comes from the national level. The nonprofit Center for Community Change (CCC) once supported an effort called Residents and Partners or RAPS. RAPS involved linking together leaders of site-based or jurisdiction-wide resident/tenant associations with a local legal services organization.

Ultimately, while there are different ways to approach the above practice, the argument we are making is that attorneys must expand the set of positive pro-social interactions in order to begin a process of bias reduction.

Since the reduction of bias will take a significant amount of time and energy, it will be critically important for institutions and stakeholders to put into place long-term practices that will minimize the effects of such bias. These formal and objective decision-making tools may include the creation of a legal aid attorney checklist, similar to a judge’s bench card, which outlines the necessary questions attorneys should ask before making an important decision that can impact the well-being of clients.

In combating implicit bias, the National Center for State Courts (NCSC) has identified a number of risk factors that increase the severity of bias on the part of prosecutors and judges. Many of these factors may also apply to legal services attorneys. They include: intensified emotional states, ambiguity of information, salient social categories, low-effort cognitive processing, distracted or pressured decision-making circumstances, and a lack of clear feedback loops. As a result, the use of an objective checklist to assist prosecutors in curbing bias is essential to reduce these factors.

As Professor Kirsten Henning writes, “Well-intentioned actors can overcome implicit bias when they are made aware of stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so.” Studies show this self-correction is successful when efforts are made to actively engage in thoughtful reflection, scrutiny, and reasoning efforts regarding the rationale for decision-making. According to the NCSC, this process should be routine, systematized, and intentional. An effective checklist, like the judicial bench cards used in jurisdictions such as Los Angeles County, Omaha, Neb., Portland, Ore., and Mecklenburg County, N.C., have empirically shown to curb biases in judges when considering the appropriateness of foster care for youth of color.

According to an analysis conducted by the Brennan Center for Justice, a number of best practices exist to ensure the effectiveness of judicial bench cards in the reduction of implicit bias.

- For example, the inclusion of implicit bias questions (e.g., “imagine how one would evaluate the defendant if he or she belonged to a different, non-stigmatized group”) both prompts the decision-maker to the possibility of bias and ensures an objective check in the reasoning process.

- Other practices include listing alternatives to placement, reminders on the general process for specific hearings, and listing instances where defendants should have public defenders present.

In addition to an objective decision-making tool, short-term remedies also exist.

- For example, legal services organizations should begin to collect and store information on racial demographics at each point of the client engagement process. Such an information-collecting measure should be shared with stakeholders and consistently reviewed for trends and patterns. As Levinson notes, additional trainings revolving around bias or the systematization of bias

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reduction in new attorney training manuals would go a long way toward providing “explicit reminders” for attorneys to monitor themselves and their peers.

Racial anxiety can be addressed in ways similar to addressing implicit bias: reduction and override. Anxiety in cross-group interactions diminishes as it becomes more common and particularly when people are engaged in authentic relationships.

For consequential interactions, developing “scripts” that allow the attorney to ensure that they are introducing respect into the communication can be critical.

Possible interventions and solutions for decreasing stereotype threat include removing the triggers for stereotype threat, promoting a growth mindset, and providing motivational feedback.

Conclusion

Although reduction and override work can be extraordinarily difficult without the dedication and fidelity to objective measures needed to succeed, we have enclosed a series of short and long-term steps attorneys can take to begin their journey toward a productive and safe workspace. Through combating implicit bias, racial anxiety, and stereotype threat — we hope to shed light on the various ways these intersecting and interconnecting phenomena can undermine the social justice mission undergirding legal aid and legal services in serving both clients and communities.

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