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Gideon Symposium Essay

IMPLICIT RACIAL BIAS IN PUBLIC DEFENDER TRIAGE

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ABSTRACT. Despite the promise of Gideon, providing "the guiding hand of counsel" to indigent defendants remains unmanageable, largely because the nation's public defender offices are overworked and underfunded. Faced with overwhelming caseloads and inadequate resources, public defenders must engage in triage, deciding which cases deserve attention and which do not. Although scholars have recognized the need to develop standards for making these difficult judgments, they have paid little attention to how implicit, i.e., unconscious, biases may affect those decisions. There is reason to suspect that unconscious biases will influence public defender decisionmaking due to generations of racial stereotypes specific to stigmatized groups and crime. This Essay urges legal scholars and practitioners to consider how implicit biases may influence the rationing of defense entitlements and suggests ways to safeguard against the effects of these unconscious forces.

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*2628 INTRODUCTION

As we commemorate the fiftieth anniversary of the Supreme Court's landmark decision in Gideon v. Wainwright, there is little doubt that its promise to provide "the guiding hand of counsel" to indigent defendants remains largely unrealized.[1] There are many reasons for this, including the lack of political will to fulfill Gideon's promise by guaranteeing adequate funding and imposing caseload limits. Although some jurisdictions created public defender (PD) offices to meet the demand for services, attorneys in the majority of these offices handle cases well over the maximum recommended limit.

Scholars rightly bemoan the current state of indigent defense. However, insufficient attention has been paid to the fact that, until much-needed changes in the provision of indigent defense services occur, PDs will engage in triage, the process of prioritizing

cases for attention. This reality raises important questions about how to guide attorney decisionmaking in order to avoid ad hoc judgments. We focus on state PDs rather than on assigned counsel and contract systems because state PD offices handle the majority of indigent cases in state criminal proceedings.[2]

Almost no attention has been paid to the effects that unconscious, i.e., implicit, biases may have on PD decisionmaking.[3] This is surprising because over three decades of well-established social science research demonstrates that these biases are ubiquitous and can influence judgments, especially when information deficits exist. Worse, these biases are likely to be particularly influential in circumstances where time is limited, individuals are cognitively taxed, and decisionmaking is highly discretionary-- exactly the context in which PDs find themselves. Thus, the domain of PDs and triage presents a rare confluence of factors ripe for the influence of implicit biases (IBs) and consequently deserves far more scholarly treatment than it has received.

We argue that it is critical to consider the probable effects of IBs on PD decisionmaking because zealous and effective advocacy is a scarce resource in the current environment. Thus, the distribution of this resource should not be based on unconscious judgments tied to a defendant's race. In the Parts that follow, we consider how IBs may affect PD decisionmaking and end with some suggestions for safeguarding against their influence. This Essay focuses on the ***2629** effects of IBs on black clients because psychological research disproportionately addresses anti-black prejudice. However, IBs are likely to impact judgments of other clients who are similarly stereotyped as dangerous and criminal.

I. OVERVIEW OF IMPLICIT RACIAL BIASES

Implicit social cognition is a branch of psychology that studies how mental processes that occur outside of awareness and that operate without conscious control can affect judgments about and behaviors toward social groups.[4] These unconscious processes are simply an extension of the way humans think and process information. Briefly stated, our mental processes facilitate decisionmaking by making automatic associations between concepts.[5] For example, people might automatically associate "doctor" with "hospital" and other related ideas. These associations are linked in our minds because they often occur together.

Implicit racial biases refer to the unconscious associations we make about racial groups. The existence of these biases is consistent with the conclusion of more general research that we automatically and unconsciously use heuristics[6] to cope with the enormous amount of information that bombards us.[7] Implicit racial biases facilitate our ability to "manage information overload and make decisions more efficiently and easily"[8] by "filtering information, filling in missing data, and automatically categorizing people according to cultural stereotypes."[9] Like all unconscious mental processes, implicit racial biases

are unintentional because they are not planned responses; involuntary, because they occur automatically in the presence of an environmental cue; and effortless, in that they do not deplete an individual's limited information processing resources. Those characteristics can be ***2630** contrasted with conscious processes, or mental activities of which the person is aware, that they intend, that they volitionally control, and that require effort.[10]

The fact that these biases are unconscious means that they "are not consciously accessible through introspection."[11]

We use the term implicit racial biases to refer both to unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups). Implicit stereotypes and attitudes result from the practice we get associating groups (e.g., blacks) with traits (e.g., criminality). This practice stems from repeated exposures to cultural stereotypes that are ubiquitous within a given society. For instance, the cultural stereotype of blacks as violent, hostile, aggressive, and dangerous persists within our society.[12] Merely being aware of these stereotypes, without

personally endorsing them as correct, is sufficient to activate unconscious stereotypes in a person's mind--often resulting in chronic associations that we call implicit attitudes.[13] The underlying theory is that some groups (again, like blacks) are so commonly associated with negative traits (again, like criminality) that there is a general tendency to categorize the group with anything negative because of the overall negativity of the associations.

IBs can be activated by racial cues present in the environment,[14] including another person's skin color, age, gender, and accent.[15] Where blacks are concerned, even thinking about crime may be sufficient to activate IBs. This is because the association between blacks and crime is so pervasive that it has become bidirectional--thoughts of criminality unconsciously activate thoughts of blacks, and reciprocally, thoughts of blacks activate thoughts of crime.[16]

Over three decades' worth of research repeatedly demonstrates that IBs, ***2631** once activated, influence many of our behaviors and judgments in ways we cannot consciously access and often cannot control.[17] Furthermore, IBs can predict real-world behaviors.[18] For instance, one study found that for every additional standard deviation of added IB, employers were five percent less likely to hire a job applicant with an Arab- or Muslim-sounding name than a white-sounding name.[19]

There is ample reason for concern that IBs will affect public defenders' judgments because IBs thrive in situations where individuals make decisions quickly with imperfect information[20] and when they are cognitively depleted,[21] anxious,[22] or distracted.[23] As we discuss next, PDs work in precisely this type of environment.

II. PUBLIC DEFENDER TRIAGE

Indigent defense is in a state of crisis. Defender offices are chronically underfunded, resulting in crushing caseloads. Most offices do not have caseload limits, and those that do regularly surpass them.[24] Thus, despite the existence of dedicated and committed PDs, the lack of adequate resources coupled with unmanageable caseloads make it virtually impossible to provide ***2632** zealous and effective representation to every client.

The financial impediments to realizing the promise of Gideon must be remedied. In the interim, however, PDs 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 resources, such as funds to hire experts.

In an ideal world, defenders would have unlimited opportunities to interview and investigate all of the state's witnesses, canvass the neighborhood where the crime occurred, and otherwise thoroughly investigate the case. Furthermore, defenders could conduct legal research, file motions, request funds for expert assistance, and engage in extensive plea negotiations. They also would have the time to develop relationships with clients, which is critical because clients have important information that can aid attorneys in their trial preparation and their arguments for pretrial release, better plea offers, and reduced sentences.

However, most PDs do not work in an ideal environment. They cannot realistically provide each client with zealous and effective advocacy. PDs are forced by circumstances to engage in triage, i.e., determining which clients merit attention and which do not. As one defender put it, "The present M.A.S.H. style operating procedure requires public defenders to divvy effective legal assistance to a narrowing group of clients, [forcing them] to choose among clients as to who will receive effective legal assistance."[25]

It is no wonder that the provision of indigent defense is often likened to medical triage.[26] Similar to hospital emergency rooms, PD offices face demands that far outpace their resources. In order to save time to defend the cases that they find deserving, attorneys may plead out other cases quickly[27] or go to trial unprepared.[28] This reality means that for most PDs, the question is not "how do I engage in zealous

and effective advocacy," but rather, "given that all my clients deserve aggressive advocacy, how do I choose among them?"[29]

We are unaware of any PD office that has formal triage standards to help attorneys make these difficult judgments. Even if standards do exist, they ***2633** cannot completely eliminate attorney discretion. For instance, even with standards, attorneys must still make judgment calls about whether to advise clients to take a case to trial or to accept a plea offer, and IBs can affect these evaluations. As a result, two similarly situated clients may be treated differently.

On this point, a comparison to medical triage is illuminating. Hospitals have developed objective triage standards to guide medical decisionmaking.[30] Despite this, implicit racial biases still affect decisions. In one study, researchers determined that emergency room doctors' implicit racial biases predicted their treatment decisions.[31] More specifically, "[a]s physicians' prowhite implicit bias increased, so did their likelihood of treating white patients and not treating black patients" with procedures to abort a heart attack.[32] Hence, while objective triage standards are important, they are not a panacea for implicit bias.

Given the similarities between PD offices and emergency rooms, it would be surprising if IBs did not affect defender judgments. One study of the implicit attitudes of death penalty defense lawyers found evidence of IBs.[33] Furthermore, abundant research demonstrates that IBs affect individuals who, like defenders, work in cognitively taxing environments and must make complex decisions under time pressure and in the face of ambiguous facts.[34] No group appears immune to the possibility of influence. Moreover, IBs can affect judgments even if PDs are committed to zealous advocacy, and consciously and genuinely reject negative stereotypes and attitudes about marginalized populations.[35] In other words, individuals' conscious attitudes are weakly ***2634** related to their implicit attitudes. As such, even the most egalitarian individual can fall victim to IBs absent other precautions.[36] In fact, confidence in one's own egalitarianism can be an obstacle to identifying IBs,[37] 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. Additionally, research suggests that even if PDs are nonwhite themselves, they are in danger of being influenced by IBs.[38]

Next, we examine how IBs may affect defender judgments. While factors other than IBs can influence triage decisionmaking, this Essay focuses solely on the possible effects of IBs. We will provide some discussion of the research; however, given the constraints of this Essay, we refer the reader to our prior work and other useful sources for an extended discussion of the underlying studies, including their validity, reliability, and effect sizes.[39]

III. IMPLICIT BIASES' EFFECTS ON TRIAGE JUDGMENTS

Defender triage involves choices about how to allocate precious resources. These triage decisions begin from the moment the PD receives the case. Attorneys likely use a number of different criteria to make these decisions. For instance, they may prioritize cases based upon their assessment of whether the state can prove its case beyond a reasonable doubt. Or they may expend more effort on cases in which they believe their client is factually innocent.[40] While the science on IBs does not permit us to identify when IB is operating in any ***2635** particular case, the concern of this Essay is the aggregate probability that, given the prevalence of IBs, PDs' decisions may be frequently affected without correction for the negative consequences. What follows is a discussion of how IBs may influence a host of triage decisions.

A. Biased Evaluations of Evidence

Of necessity, defenders must begin evaluating cases from the moment they are assigned. Their initial evaluations will affect a variety of subsequent decisions important to the ultimate resolution of the case. For instance, after reviewing the discovery, they may decide that expending resources to conduct a fact investigation

would be a waste of time because the state's evidence is strong. On the other hand, if attorneys determine that the state's case has weaknesses they can exploit, they may expend more resources to defend the client, including investigating the case and engaging in vigorous plea bargaining. Thus, early appraisals of cases can become self-fulfilling prophecies. While attorneys must evaluate a case's merits, the problem is that IBs may influence these judgments.

Studies consistently demonstrate that IBs can affect evaluations of ambiguous evidence. In one, a researcher activated IBs by subliminally priming subjects with words associated with blacks, such as slavery.[41] Afterwards, the researcher asked subjects to read a vignette about a racially unidentified male and to rate his ambiguous behaviors on a number of traits. The results established that IBs made subjects more likely to rate his behaviors as hostile. Another study utilizing the identical method found that, when IBs were activated, police and probation officers judged a male juvenile as being more culpable and more deserving of severe punishment than when these biases were not activated.[42] IBs can even influence how mock jurors evaluate evidence that is ambiguous as to guilt. These biases not only caused jurors to be more likely "to judge the evidence as tending to indicate criminal guilt," but "also more likely to believe that the defendant was guilty."[43]

*2636 When translated to the context of PD triage, these studies suggest that when clients are black or otherwise criminally stereotyped, IBs can influence evidence evaluation, potentially causing PDs to unintentionally interpret information as more probative of guilt. Consequently, PDs may determine that the state will have little difficulty meeting its burden of proof and thus, that the case does not warrant much effort.

The effects of IBs on triage judgments can occur even before defenders meet their clients. At this point, attorneys likely have information about the client's race. This knowledge, coupled with reading the discovery, is sufficient to activate IBs and their attendant effects.[44] The consequences for the defendant can worsen once his attorney meets him, particularly if the client has stereotypically African features such as very dark skin.[45]

Furthermore, the influence of IBs will be facilitated if the charge itself is associated with the client's race. For instance, young black men serve as our mental prototype of the violent street criminal and drug dealer.[46] If the client is black and the charge involves a drug offense, a judgment of guilt may be cognitively easier to make because of the strong implicit association between blacks and crime.[47] This gut feeling can then affect the attorney's views about the merits of the case. Of course, additional investigation might change her initial hunch. However, part of what defenders regulate is how much effort to expend in acquiring additional information. Hence, unless defenders have reason to second-guess their initial impressions, IBs can negatively affect judgments about cases involving clients stereotyped as criminal and crimes stereotyped as black.

B. Biased Interactions

The defender's initial client meeting is another domain likely to influence triage decisions. For instance, during the meeting, attorneys will inevitably make judgments about client credibility. If lawyers do not credit their clients' version of events, they may not follow up on leads or may forgo possible motions to suppress government evidence. Additionally, clients are important *2637 sources of witnesses and exculpatory and mitigating information. If the initial meeting goes badly, however, clients may not be willing to share information that might be crucial to the case, and attorneys may determine that the client will not be cooperative, forthcoming with information, or otherwise helpful to an investigation. Thus, an unpleasant interaction can influence how much time an attorney is willing to devote to a case.

Unfortunately, IBs can adversely affect interactions with negatively stereotyped individuals. First, IBs can influence how attorneys interpret a client's ambiguous behaviors and facial expressions. In one study, identical expressions were deemed

more hostile on black faces than on white faces by subjects with high IB.[48] In another, subjects with more IB assessed hostile expressions as lingering longer on black than white faces.[49] Research also demonstrates that study participants interpret black actors engaging in ambiguous behaviors as more aggressive than white actors engaging in identical behaviors.[50] In fact, when the actor is black, white subjects are more likely to attribute the negative behavior to the individual's character rather than to the situation.[51]

Second, IBs can negatively influence attorneys' behaviors. In one study, when interacting with negatively stereotyped individuals, people tended to maintain a greater physical distance, make more speech errors, and end the contact earlier than with positively stereotyped individuals.[52] Furthermore, unconscious stereotypes can cause people to act in accordance with them.[53] For instance, research subjects who were subliminally primed with a black male face reacted with more hostility to bad news than those primed with white faces. This occurred, the researchers concluded, because subliminally priming participants with black male faces unconsciously activated the stereotype of black hostility, which then influenced the participants' behaviors.[54] These behavioral effects of IB are problematic because individuals on the receiving ***2638** end of negative behaviors may respond in kind. However, because the originators of the behavior are unaware of their own role in triggering the unpleasant response, they may attribute the negative behavior solely to the other. This "behavioral confirmation" effect[55] explains how IBs can adversely influence interactions.

Third, IBs can cause attorneys to treat stereotyped individuals in stereotype-consistent ways. Research demonstrates that stereotypes of blacks as untruthful lead police to push black suspects harder for confessions and to adopt more accusatory interrogation techniques.[56] This approach may yield more anxious behaviors in suspects that, in turn, may produce perceptions of guilt.[57]

With these studies in mind, imagine the interactions between negatively stereotyped clients and defenders. As a result of IB, the attorney may unconsciously exhibit hostility. The attorney may also be more likely to interpret the client's body language and facial expressions as antagonistic. Furthermore, the attorney's unconscious negative expectations may produce perceptions and attributions consistent with them.

If the client mirrors the attorney's behaviors, this will confirm the attorney's initial negative expectations, and the attorney may attribute this behavior to the client's disposition rather than to the attorney's own behaviors or the situation. The resulting negative interaction can create a vicious cycle of mutual distrust and dislike, adversely affecting the attorney's triage decisions. Spending time with a client can, of course, change these initial impressions. However, an unpleasant initial interaction may reduce the defender's desire to do so.[58]

C. Biased Acceptance of Punishments

We have been discussing the effects that implicit stereotypes and attitudes may have on defender judgments. Here we will consider two additional types of implicit racial bias that can also influence decisionmaking: implicit ***2639** dehumanization and features-based IB.

1. Implicit Dehumanization

Implicit dehumanization stems from a tendency to unconsciously associate highly stigmatized groups with nonhuman animals. Here, we focus on the unconscious association between blacks and apes because of its long history in our culture.[59] Remarkably, this unconscious association can be activated even when people are not consciously aware of the association.[60] However, once triggered, it predicts real-world behaviors.

For instance, Goff and colleagues had subjects watch a video of police viciously beating a suspect. If subjects were subliminally primed with images of apes before watching the video, they were more likely to find the beating justified when the victim was black.[61]

However, when the victim was white or when the subjects were not subliminally primed, they did not endorse the beating.

To determine whether implicit dehumanization could predict real-world behaviors, these researchers examined Philadelphia newspaper articles reporting on death-eligible cases, looking for ape-related metaphors. After controlling for factors other than race, they found that "Black defendants who were put to death were more likely to have apelike representations in the press . . . than were those whose lives were spared."[62] Importantly, in previous experiments, the researchers found that implicit associations between blacks and apes (but not explicit associations) predicted similar behaviors in the lab, leading to the hypothesis that implicit dehumanization likely contributed to both the media representations of death-eligible defendants and the sentencing judgments.

Recently, Goff and colleagues built on these findings in a juvenile justice context.[63] They found that the more individuals unconsciously associated blacks with apes, the less innocent they thought black children suspected of a crime were. Worse yet, implicit dehumanization predicted racial disparities in the violent treatment of children by police officers. When the researchers ***2640** compared police officers' actual use-of-force history against juveniles with their implicit dehumanization score--the implicit association between blacks and apes--they found that police officers who held the association more strongly were also more likely to use force against black as opposed to white children.

Taken together, these studies raise concerns that defenders may be more accepting of higher sentencing recommendations for black versus white clients and, thus, less likely to negotiate aggressively for lower sentences or to conduct mitigation investigations. While the effects of implicit dehumanization on PDs have yet to be demonstrated, the fact that implicit dehumanization shapes other actors' behaviors in criminal-justice-related settings suggests that defenders are probably not immune.

2. Features-Based Implicit Bias

Research demonstrates that individuals with more stereotypically black features (i.e., darker skin, broader nose, and fuller lips) are unconsciously judged to be more dangerous and culpable than others.[64] One study demonstrated the effect of features-based IB on outcomes in death penalty cases. After controlling for a wide range of factors, researchers found that fifty-seven percent of black defendants in the half of the sample determined to have more stereotypically black features received death sentences, compared to twenty-four percent in the other half of the sample. The effect only appeared when the victim was white.[65]

In another study, researchers examined whether "the degree to which . . . inmates manifested Afrocentric features" would predict sentence length after controlling for race, criminal history, and the seriousness of the crime.[66] Their results were troubling. When comparing white defendants to each other, they discovered that those with more stereotypically black features received longer sentences.[67] They found the same results when comparing black defendants to each other.[68] This finding confirmed prior research that people unconsciously "use Afrocentric features to infer traits that are stereotypic of African ***2641** Americans."[69] As a result, even within races, people with more stereotypically black features are perceived as being more criminal.[70] In fact, one recent study found that subjects were more likely to shoot black individuals with more stereotypically "black" features than those with fewer stereotypically "black" features.[71]

In sum, features-based IB may result in defenders unconsciously being more accepting of harsher sentences for some clients than others. Because of their belief that a tougher sentence is appropriate or likely to be imposed, PDs may be less likely to fight for their client's release on bail and spend time, effort, and scarce resources negotiating a better plea deal. Hence, features-based IB can affect a host of triage decisions that can disadvantage clients of all races who have stereotypically black features.

IV. RECOMMENDATIONS

As the previous discussion demonstrates, IBs may have pernicious effects on PD decisionmaking. However, while IBs are ubiquitous, they are also malleable.[72] Consequently, defender offices may be able to implement strategies to help debias their attorneys. What follows are five recommendations that have the potential to mitigate or safeguard against the probable effects of IBs on defender judgments. However, given the constraints of this Essay, we only trace the broad outlines of each recommendation and do not address possible limitations.

A. Office Culture

A person's motivations[73] and ideological commitments may be important to ***2642** reducing IBs.[74] People highly motivated to be nonprejudiced can reduce or eliminate IBs' effects on their behavior,[75] especially if they are internally motivated.[76] Additionally, high epistemic motivation--that is, requiring more information to feel comfortable making a decision--is associated with reduced reliance on stereotypes because it "increase[s] the tendency to engage in systematic information processing."[77] Furthermore, people committed to egalitarian goals may be better able to control the activation of IBs.[78] This is good news for defender offices because many attorneys become defenders as a result of their commitments to equal justice.

Since motivations appear to affect implicit bias, public defender offices should reward these motivations and also consider them when making hiring decisions.[79] Some defender organizations are already attempting to transform the culture of their offices through "values-based" recruiting.[80] For instance, Gideon's Promise (formerly the Southern Public Defender Training Center) screens new lawyers "for their receptiveness to client-centered values."[81] Paying attention to a new recruit's client-centered values is important because the desire to develop relationships with and form positive impressions of members of stereotyped groups may help to reduce the activation of negative racial ***2643** stereotypes.[82]

Another important consideration during recruitment is the potential hire's experiences navigating diverse environments. Research demonstrates that significant positive contact with individuals who do not fit our stereotypes about their group can reduce IB.[83] For instance, one study found that people reporting more positive personal contacts with blacks were less likely to have negative beliefs about their criminality and violence.[84] These considerations are job-related because any defender will almost certainly have negatively stereotyped people as clients. Furthermore, racial diversity among defenders themselves can be important to reducing IBs because it increases opportunities for positive interactions between racial group members of equal status, helps to create positive associations, and motivates people to make more accurate, nonstereotyped judgments.[85] All of these factors reduce implicit bias.

Finally, promoting people who demonstrate the desire to be fair and egalitarian will help to demonstrate the importance of these values within the office, thereby encouraging a culture that motivates attorneys to live up to such values. Group norms are among the most influential factors in changing attitudes of any kind.[86] Individuals operating within an organizational culture of tolerance tend to become more tolerant--particularly when influential others such as supervisors perform that norm.[87] Conversely, individuals operating ***2644** within an organizational culture that does not value egalitarianism will tend to become less tolerant.[88] Consequently, adopting office norms that demonstrate a commitment to equality will likely increase behavior in keeping with that norm. In sum, being deliberate about instilling a culture that strives for the provision of equitable public defense will not only better serve indigent clients but will also create an environment conducive to reducing the effects of IBs.

B. Objective Triage Standards

Offices should develop triage standards because the wholly discretionary decisionmaking that currently exists does nothing to curb IBs. While we do not

advance specific standards in this short Essay, we suggest some criteria offices should utilize when developing them.

First, offices should not rank cases based upon the perceived possibility of factual innocence, as some have suggested.[89] Given the limited time defenders have to prioritize cases, innocence determinations can only be speculative hunches based upon inadequate information. Implicit biases thrive under these circumstances.

Second, triage standards ought to be based upon criteria that are objectively measurable, i.e., criteria that are not subject to interpretation. An example is to prioritize cases based upon custody status, with in-custody clients being given priority. Another is to prioritize cases randomly, or to reserve a subset (e.g., twenty-five percent) to be prioritized at random. Alternatively, defenders could prioritize cases based upon the speedy trial date. What these suggestions have in common is that they do not rely upon attorneys' subjective or idiosyncratic judgments. While imperfect, these proposals exemplify the types of objective criteria offices can utilize to focus attorney decision-making away from client stereotypes.

Although objective standards are important, attorneys cannot avoid subjective decisionmaking altogether. For instance, even if offices decided that attorneys should focus their energies on cases where clients are in custody, or on cases with clients facing the stiffest potential punishment, attorneys would still have to make subjective judgments about how to prioritize cases within a given category. Unfortunately, IBs may affect these judgments. Thus, while ***2645*** triage standards are important, they are not the panacea for IBs. Rather, offices should also employ the additional strategies mentioned in this Part to reduce IBs' effects.

C. Accountability

Offices should also institute accountability mechanisms. Creating checklists that attorneys can use when evaluating their cases is one such mechanism.[90] Checklists can help reduce biased judgments because having predetermined criteria to guide decisionmaking can hinder people's unintentional tendency to change the criteria upon which their decisions are based in order to fit their preferred course of action.[91]

Additionally, offices should collect data about attorneys' decisions. This data will not only inform attorneys and offices about trends, but will also give offices the ability to monitor their attorneys' judgments. This data should include information about guilty pleas, sentencing outcomes, time spent on cases, and the number of meetings with clients broken down by race and initial charges. Once this data is collected, we recommend that PD offices use a simple accountability rule: defenders must be able to explain any racial disparities in how they allocated their resources. This rule can reduce IB because people exercise more care when they know their decisions are monitored and will have to be explained,[92] and because thinking more carefully and deliberately helps to debias.[93]

D. Awareness

Reducing IBs is more likely when individuals are aware of the potential for biased decisionmaking and are aware of the possibility of safeguarding against ***2646*** the influence of implicit bias.[94] Accordingly, we recommend that attorneys be taught about implicit biases and their probable effects on behaviors and judgments. This type of education is already occurring with judges, so it should be fairly simple to implement this suggestion.[95]

Additionally, offices should consider requiring or encouraging defenders to take the Implicit Association Test (IAT), the most widely used mechanism for revealing the existence of implicit bias.[96] A recent study suggests that receiving feedback about IAT results can debias.[97] Because the sole purpose of any such requirement would be to inform defenders of their own probable biases, they must not be required to disclose the results. This suggestion will be easy to implement because the IAT is available online and provides immediate feedback. If individuals are made aware of the fact that

IBs may affect their behaviors and judgments in ways they would not consciously endorse, they likely will be motivated to exercise more care in their decisionmaking and to engage in efforts to reduce the potential for bias.

E. Intentional Goals

Defender offices can also utilize a variety of techniques that, in research contexts, have allowed people to reduce the effects of IB on their behaviors and judgments. These include repeated practice denouncing stereotypes,[98] affirming counterstereotypes,[99] and using mental imagery.[100] Even thinking ***2647** about ourselves as being less objective than we imagine ourselves to be can reduce the effects of IBs.[101]

One successful technique involves people developing intentional and specific plans for what they will think or do in situations likely to activate IBs. These are "consciously formed if-then plans that indicate the specific cognitive or behavioral response that is to be made at a specific time and place."[102] The "if x, then y" formulation is critical because simpler goals such as "I will not use stereotypes in my judgments" are generally ineffective.[103]

In a recent study demonstrating the efficacy of this technique, researchers had subjects watch a video that contained photographs of either black men or white men posed in front of different backgrounds and holding either guns or crime-irrelevant objects such as cell phones.[104] Participants were asked to determine as quickly as possible whether or not the men were armed by pressing buttons labeled "shoot" or "don't shoot." Similar "shooter-bias" studies typically demonstrate that subjects mistakenly shoot unarmed blacks more often than unarmed whites because of IB. They also shoot armed targets more quickly when they are black as opposed to white.[105] In this particular study, however, researchers found that when subjects formed a specific, goal-directed plan to ignore race before beginning the task, they were able to reduce shooter bias.[106]

Of course, in PD offices, it may not be advisable to tell attorneys to ignore the client's race, especially because in criminal justice contexts, IBs are less likely to be expressed when race is made explicit.[107] Fortunately, research demonstrates that these "if-then" plans are effective even when social ***2648** categories are salient. For instance, in a recent study published in 2012, researchers found that when subjects formed a specific plan to associate Muslims with peace as opposed to terrorism, they showed reduced IB.[108] These researchers also found that "if-then" goal-directed thinking can reduce IBs in real-world decisionmakers, and that this reduction can be sustained over time.[109]

These studies suggest an intriguing strategy for reducing IBs' effects on defender decisionmaking. For instance, when reviewing the discovery in a new case, attorneys could form a specific plan to focus on the weaknesses of the state's case or to think of the client as innocent. In other words, defenders might be asked to form the following specific intention: "If my client is black, then I will think 'innocent' when reviewing the discovery." While it may be difficult to believe that such a simple intervention would reduce the effects of implicit bias, its simplicity is similar to the specific intention that reduced the effects of shooter bias.[110] The utility of this strategy has not been tested in the public defense context, but, in light of its success across numerous studies in other contexts, there is reason for optimism.

CONCLUSION

Despite the fact that many public defenders are committed to zealous and effective advocacy, there is abundant reason for concern that implicit racial biases may affect their decisions. By highlighting the effects of implicit bias, we do not suggest that other structural inequities in the provision of indigent defense are unimportant. Rather, we seek to supplement existing critiques with our observations. Furthermore, some PDs might believe that their experiences making difficult resource allocation decisions immunize their intuitive, gut-driven triage judgments from the effects of IBs. However, IBs are likely to have their most damaging effects precisely when individuals fail to

question their gut instincts. Moreover, without data collection, it is simply impossible to *2649 know whether similarly situated clients are being treated alike.

As public defenders seek to provide the best legal representation possible for indigent clients in order to fulfill Gideon's promise, it is crucial not only that they remain open to the possibility that they are being influenced by IBs, but also that they be given the full array of tools necessary to protect the values of equality and fairness on which the legitimacy of our criminal justice system rests. Thus, we hope that public defenders will engage in data collection and create partnerships with social psychologists to determine when IBs are likely to influence defenders' judgments and to develop specific defender-oriented approaches for reducing IBs' effects. [111] Indigent clients deserve no less.

Footnotes

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