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Speech

PERSPECTIVES ON CRIMINAL LITIGATION ETHICS: JAMES COLE & JEFFREY ADACHI

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**\*1156 Implicit Bias**

**Jeff Adachi**

Good afternoon. I want to thank U.C. Hastings and Professor Rory Little for inviting me to speak at this Ethics Symposium.

This year is a very special year for public defenders and the indigent defense community. 2013 marks the fiftieth anniversary of the *Gideon v. Wainwright* decision.<sup>8</sup> It's hard to believe that just five decades ago, a person did not have a right to a public defender or court appointed- lawyer except in a death penalty case. Were it not for Clarence Earl Gideon, a poor inmate in a Florida prison convicted of burglarizing a pool hall who wrote a handwritten petition to the U.S. Supreme Court demanding a lawyer, we might not have this basic right that we now take for granted. But even today, the right to counsel is far from fully realized. Public defender offices, for the most part, are still treated as the stepchildren of the criminal justice system-- under resourced and understaffed.

In California, we've had public defender offices since the early 1900's, thanks to Clara Foltz, California's first woman lawyer and a graduate of U.C. Hastings. She spent over twenty years advocating for a public defender system, and finally succeeded in 1921, the year my office was founded.

The crisis in indigent defense is one of the greatest ethical dilemmas in our legal system. If there is to be liberty for all, then a basic contradiction exists if a poor person's justice means being represented by a public defender who is handling 500 felony cases. A few years back, I sat on the American Bar Association's Standing Committee on Indigent Defense, and I was able to see the quality of representation throughout the United States. I can tell you that even today, the poor quality of representation provided to people in the criminal courts remains a major problem. In many states, public defenders do not have the power to refuse cases when their caseloads exceed what any lawyer could possibly handle. Yet the system, including judges, prosecutors, and defenders, often turns a blind eye to what amounts to everyday injustice.

I have chosen a rather unconventional subject for my talk today. Rather than focus on ethical hypotheticals about what a lawyer should do with a smoking gun, I decided to ask each of you to carefully consider **\*1157** a subject that affects every aspect of our practice as lawyers and shapes human affairs: the subject of implicit or unconscious bias.

The premise of my talk today is that we as lawyers and leaders in the legal profession must become more aware of implicit bias in everything that we do, and the implicit bias that lurks within ourselves. It is not an easy thing to do. Because our profession is built on judgment involving other human beings, bias is hard, if not impossible, to escape. There is not a human being, probably not even the Dalai Lama or the Pope, who can claim to be free from bias.

Bias is defined as “an inclination of temperaments or outlook to present or hold a partial perspective at the expense of (possibly equally valid) alternatives in reference to objects, people, or groups.”<sup>9</sup> Note how the definition of bias uses the word “expense” to describe the damaging effect of bias. The harm done by bias is often unintended. In fact, when it comes to implicit or unconscious bias, by definition we are unaware of the manifestation of our bias, and we may be equally unaware of its cause.

As trial lawyers, we know that bias is very difficult to elicit when selecting jurors, particularly in sensitive areas. Who among us likes to identify ourselves as racist or homophobic or classist or unfair or prone to stereotyping? These characteristics may be buried deep below our consciousness, and we may refuse to acknowledge them, even to ourselves or our close friends. Why would we divulge these things in a courtroom?

Judges may shy away from issues that make them personally uncomfortable. I remember as a young public defender, representing a gay man who was falsely arrested for indecent exposure by a homophobic police officer who was harassing gay men who frequented the park. When I asked the judge to ask questions of the panel regarding prejudices they might hold against gay men and homosexuality, the judge replied, “You do it, I can hardly bring myself to say those words.” This was a long time ago, but I was reminded of it when I began thinking about how our biases affect our willingness to address issues as judges or lawyers.

However, there is no one concept that has more application to what we do as lawyers than unconscious bias. Ours is a profession based on judgment. Unconscious biases threaten the very foundation of our justice system.

The concept--or law, if you will--of unconscious bias is not new. There are various terms that are used to describe bias other than “actual” bias. Implied bias and inferred bias are sometimes used **\*1158** interchangeably, though in law these terms can have different meanings depending on how they are applied.

Where bias is recognized as strong, the law will presume bias. The concept of presumed bias dates back in this country at least to Aaron Burr's trial for treason, where Chief Justice Marshall noted that an individual under the influence of personal prejudice “is presumed to have a bias on his mind which will prevent an impartial decision of the case.”<sup>10</sup> “[H]e may declare that notwithstanding these prejudices he is determined to listen to the evidence and governed by it; but the law will not trust him.”<sup>11</sup>

Of particular interest is the ABA Criminal Justice Standards. For the first time, in the new edition of the standards that are currently pending, bias will be prohibited by both prosecutors and criminal defense attorneys.

According to draft Standard 4-1.4, defense counsel should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.<sup>12</sup>

For prosecutors, Standard 3-1.6 will set even a higher bar, prohibiting bias in exercising prosecutorial discretion.<sup>13</sup> The draft rule goes even further, however, by also requiring that “a prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that cannot be properly justified.”<sup>14</sup>

If only it were that easy. And what of unconscious bias? How do we prohibit unconscious bias?

I want to talk about three examples of unconscious bias in three very different contexts.

The first comes from science, or more specifically, neuroscience. Groundbreaking research has shown that not only does unconscious bias influence a person's decisionmaking, but it creates a physiological response. University of Washington and Harvard University psychology professors Anthony Greenwald and Mahzarin Banaji developed the theory that much of human social behavior is driven by learned **\*1159** stereotypes that operate automatically when we interact with other people.<sup>15</sup>

Neuroscience studies have confirmed that when we feel fearful, threatened, or anxious, the regions of our brains known as amygdalae are activated. Using MRI tests, scientists have found that these nodes activate when we see things that frighten us, such as spiders or snakes. They also activate when we see anything or anyone we believe to be threatening.

In one study, they showed an African American male face to a Caucasian person. The amygdala activated more than when viewing the face of a white male. The studies show the amygdalae activate even more when viewing a person with darker as opposed to lighter skin.

These studies demonstrate that the way we react to people of ethnicities different from our own is hardwired into our brains and generate biases of which we're unaware.

Professor Greenwald developed the Implicit Association Test--known as the IAT--to measure implicit or unconscious bias. I highly recommend that you take a few minutes to take one of these tests.<sup>16</sup> These tests not only measure implicit bias, but they also demonstrate how unconscious biases are created. You can find the test at [www.projectimplicit.net](http://www.projectimplicit.net).

The test asks you to consider an image, a product, or a face, and then you are asked to categorize that image as good or bad. Then you are presented with a series of words that connote good and bad. You are asked to use the computer keys to indicate your choice. When our values and rules align with a principle, we are able to process the choice very quickly; when our rules run counter to choice we are presented with, we hesitate. So the IAT measures the hesitation we experience when our rules are incongruent with the choices we are presented.

The tests reveal that Caucasian people, and to a lesser though significant extent, Asian, Latino, and even Native American people, have a strong bias against African Americans. White respondents were more likely to associate positive words with images of white people and negative words with black people. For example, eighty-seven percent of white respondents showed a strong, even overwhelming preference toward whites over blacks.

These preferences do not end with word associations. In another test, respondents were asked to sentence various individuals to jail time for the same crime. The researchers found non-blacks were more likely \***1160** to sentence African Americans to higher sentences based on facial features and skin color alone.

The second example of unconscious bias I'd like to discuss is the Trayvon Martin case. Most of us have become familiar with Trayvon Martin's story through what we've seen on TV or read in the news. There has been much discussion of the impact of race on the outcome of the case. But the lens of neuroscience may give us the greatest insight into this story.

In his 911 call, George Zimmerman said that that Trayvon "looks like he's up to no good" or that "he's on drugs or something."<sup>17</sup> He also said that Trayvon, "looks black."<sup>18</sup> Zimmerman saw Trayvon as threatening even though Trayvon had not behaved in a threatening manner. "F--ing punks, these assholes, they always get away," Zimmerman said.<sup>19</sup> Even though Trayvon was on his way home from the store, holding Skittles and an iced tea, he was not able to convince Zimmerman, at least through his appearance, that he was just walking down the street, minding his own business.

This is where implicit bias comes in. As we discussed earlier, amygdala activation levels match implicit racial bias levels. If someone sees a threat, then implicit bias will increase the threat they feel. As a result, someone can see an African American man, decide that he is a threat because he is African American, and then become overly aggressive toward him. And this is something of which they may not even be conscious.

We may ask how implicit bias may have affected the police who responded to the scene. As the neighborhood witnesses testified, the police immediately acted to protect George Zimmerman. They surmised that his actions were justified and immediately

concluded that he had acted in self-defense. They may have identified more with Zimmerman's predicament than the fact that Trayvon's bloody body was lying on the street. They failed to take witness statements, coached Zimmerman so that his statements would fit within the "stand your ground" law, filed false reports, and did not contact Trayvon's parents for three days.

Why didn't the police feel more empathy for Trayvon? Studies have shown that human beings have a strong physiological reaction to other people's pain. A reaction known as sensory motor contagion or pain empathy happens when we see someone we care about being hurt or **\*1161** injured. Just closing our eyes and imagining the injury suffered by another can create this physical reaction.

In one study, people were shown three videos of three different hands being poked with a hypodermic needle. One hand was white, another was black, and the third was painted purple. People's level of sensory motor contagion or pain empathy was measured. As Caucasian people saw the white hand being poked, they felt a high level of pain empathy. As they watched the purple hand being poked they felt a smaller amount of empathy. But as they watched the black hand being poked, they felt no pain empathy.

It is possible that the police literally looked at Trayvon as he bled and felt nothing. At the same time it is possible that they looked at Zimmerman and felt empathy for his tenuous legal situation.

The same could be said for the jury. With whom did the jury, which did not include any African Americans, empathize? George Zimmerman or Trayvon? Did they have the same reaction that Zimmerman did to a young man in a hoodie in a place he supposedly did not belong? What about the prosecutors who prosecuted the case? Race was not mentioned in that courtroom, and I assume that it was a deliberate choice by the prosecution team, which did not include any African American prosecutors. The defense was credited with a "smart move" of bringing an African American intern to sit at the defense table. It is said she was placed there to prove that Zimmerman was not a racist. But race was not an issue the defense wanted to raise in court. One of the jurors interviewed on CNN summed up the issue of race in the trial by saying, "I think all of us thought race did not play a role."<sup>20</sup>

We must recognize that implicit bias is widespread. It is not uncommon that in our society, thousands of young black men are presumed to be criminals, up to no good, or threatening. Their innocent behavior or minor infractions can be viewed as profound affronts. They are not all shot like Trayvon Martin, but they can be more frequently disciplined, suspended, and expelled from school than their white classmates, relegated to juvenile halls, jails and prisons, not hired, quickly fired, or simply forced to watch as people cross to the other side of the street, lock their car doors, or clutch their purses when they walk by.

There are literally hundreds of neuroscience studies that bear out the biased reactions we have in our brains and how they affect everyday life. The killing of Trayvon Martin is profoundly senseless and no stack of scientific studies will make it make sense. But we can look through the lens of neuroscience to increase understanding and find meaningful solutions.

**\*1162** The third example I'd like to mention is a case that I'm handling. A client I represented at a jury trial was convicted last May in a homicide case. After the verdict, which I felt was unjust, we learned that the jury foreperson had been convicted of a criminal death threats charge four years before he served. He was actually represented by our office, but he did not disclose this on the juror questionnaire he filled out in my case. We immediately filed a motion for a new trial on the grounds that my client's right to a fair jury venire was violated by the juror's failure to disclose his criminal history.

As it turned out, this juror had very strong views about what had happened to him. He felt that he had been wrongfully convicted in his case. At first glance, you might think that this would make him more sympathetic to my client. But when he was called to testify at the hearing, I learned that he was very upset at the public defender who represented him, and he blamed my office for his jailing and conviction. At various points in the hearing on the motion he claimed he was fair, even in the face of all of the animus. But one thing he acknowledged is that he probably held both a conscious and unconscious bias against my office

and my client. We go back to court next week, but one of the things I am exploring is whether to call a psychologist to testify about unconscious bias, and how it may have affected this juror's ability to serve on the jury.

I recently had a chance to meet Kimberly Papillon, an attorney who specializes in unconscious bias and its impact on the legal system, who has studied implicit bias in the legal system. The IAT results for judges have shown that U.S. judges rank within one percent of the general public in bias against African Americans.

Papillon's work explores not only how unconscious bias affects judges' decisions, but also its impact on how district attorneys decide whether to press charges against someone, how public defenders determine whether to push for plea agreements for particular clients, and how jury members will react to certain defendants.

In addition to my work as a public defender, I've also become interested in making films. One of the films I made--the Slanted Screen<sup>21</sup>--was about the stereotyping of Asian Americans that occurs in Hollywood films and television. I interviewed Lois Salisbury, who was then the director of Children's Now, an organization that studies the effect of the media on children. What she found is that both conscious and unconscious biases are the result of exposure we receive as children to stereotypic image. Specifically, television portrayals of minorities can result not only in unconscious bias among non-minorities, but among minorities as well.

**\*1163** As prosecutors and public defenders, it is critical that we continue to work toward recognizing the effects of bias, both on ourselves and in our workplace. We must begin by taking a critical look at what we do. Perhaps start by taking the IAT and see what it tells you about biases or preferences you may hold.

Despite its physiological roots, social scientists are striving to develop ways people can override unconscious bias more consistently. They have found that, among other things, exposure to diversity in social environments such as workplaces and schools can help lower unconscious bias. So the good news is that there is a cure.

So implicit bias can be overridden but it takes a conscious effort. It's not just a matter of awareness. You can't eliminate bias by merely saying, "I'm going to try harder not to be biased." We can override on some occasions, on many occasions, but eventually our brain defaults to our implicit associations. So this is something of which we have to be constantly mindful.

We should open our offices to training about implicit bias. We can rely on those who have pioneered efforts to understand the effect of unconscious bias in the legal profession, civil rights leaders like Eva Patterson and Kimberly Papillon, both of whom have already done a lot of ground work in this area.

I'd like to end my talk with a quote from Judge Learned Hand:

We may not stop until we have done our part to fashion a world in which there shall be some share of fellowship; which shall be better than a den of thieves. Let us not disguise the difficulties; and, above all, let us not content ourselves with noble aspirations, counsels of perfection, and self-righteous advice to others. We shall need the wisdom of the serpent; we shall have to be content with short steps; we shall be obliged to give and take; we shall face the strongest passions of mankind--our own not the least; and in the end we shall have fabricated an imperfect instrument. But we shall not wholly have failed; we shall have gone forward, if we bring to our task a pure and chastened spirit, patience, understanding, sympathy, forbearance, generosity, fortitude, and, above all, an inflexible determination. The history of man has just begun; in the aeons which lie before him lie limitless hope or limitless despair. The choice is his; the present choice is ours. It is worth the trial.<sup>22</sup>

Thank you.

## Footnotes

- 8 372 U.S. 335 (1963).
- 9 Biases, Program on Negotiation, Harvard Law Sch., [http:// www.pon.harvard.edu/tag/biases](http://www.pon.harvard.edu/tag/biases) (last visited Apr. 24, 2014).
- 10 *United States v. Burr*, 25 F.Cas. 49, 50 (C.C.D. Va. 1807).
- 11 *Id.*
- 12 See Draft Standard 4-1.4, “Improper Bias Prohibited,” in Little, *The Role of Reporter for a Law Project*, *supra* note 3, at 747.
- 13 See Draft Standard 3-1.5, “Improper Bias Prohibited,” in Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, *supra* note 3, at 1127.
- 14 Draft Standard 3-1.6, “Improper Bias Prohibited” (2014) (on file with Author).
- 15 See generally Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *Psychol. Rev.* 4 (1995).
- 16 See generally Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 *J. Personality & Soc. Psychol.* 1464 (1998).
- 17 See Sam Baldwin, *Transcript of George Zimmerman's Call to Police*, *Mother Jones*, <https://www.documentcloud.org/documents/326700-full-transcript-zimmerman.html> (last visited Apr. 24, 2014).
- 18 *Id.*
- 19 See, e.g., Richard Luscombe, *Jury Hears Emotional Opening Statements in George Zimmerman Trial*, *Guardian* (June 24, 2013, 6:59 PM), [http:// www.theguardian.com/world/2013/jun/24/george-zimmerman-trial-opening-statements](http://www.theguardian.com/world/2013/jun/24/george-zimmerman-trial-opening-statements).
- 20 Dana Ford, *Juror: ‘No Doubt’ that George Zimmerman Feared for His Life*, *CNN* (July 16, 2013, 4:57 PM), [http:// www.cnn.com/2013/07/15/justice/zimmerman-juror-book](http://www.cnn.com/2013/07/15/justice/zimmerman-juror-book).
- 21 *The Slanted Screen* (Jeffrey Adachi/AAMM Productions 2006).
- 22 *Learned Hand, Speech in Central Park: A Pledge of Allegiance* (May 20, 1945), available at <http://harpers.org/blog/2007/07/hand-on-humanitys-challenge>.