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IMPLICIT BIAS

It seems so simple. Treat everyone fairly and only consider things that are relevant in handling cases. Avoid any effects of race, gender, national origin, religion, appearance, sexual orientation, gender identity, cultural biases, etc. If only that were true.

The desire for a "fair" justice system is nearly universal. In my teaching over the past forty years, I've asked hundreds of new court officials what value is the most important for the system. Well over 90% say "fairness"—over efficiency or promptness or anything else. It's a value that we learn from our earliest days, especially if we had siblings who sometimes got more stuff than we did. It's a primal need. And when the state is about to impose its will on a defendant to imprison or fine or permanently mark a person as a criminal, the desire for fairness (although some defendants prefer mercy) is very strong. That desire is simply made stronger by the reality that many of the decisions (charging, sentencing, bail) that lead to the state's action are discretionary and frequently unreviewable.

Yet if you want to scatter people at a cocktail party, tell them that you want to talk to them about their biases. Or watch when they are told that they are about to hear a presentation on "implicit" biases. It is natural to think that any conversation about bias must be talking about other people and not about you or me. Wrong.

Enter the brain. Everyone has one. And everyone's works basically the same way. It is a marvelous organ in our heads that performs miracles of perception and awareness and decision-making every day. Unfortunately, it is not designed with fairness as the preeminent value. Job #1 is survival. And survival, in today's world, is not about avoiding tigers and lions and snakes, as it may have been for our ancestors. It is about detecting danger and difference and reacting accordingly. The brain does so much more than that, but only after it takes care of survival first.

In a very helpful and important book, *Thinking, Fast and Slow,* Nobel Laureate Daniel Khaneman describes two systems: System 1 (Fast) and System 2 (Slow). System 1 is the workhorse of our existence. It is virtually effortless, quick and automatic. It works without our knowing it. It is also sometimes wrong. It puts survival first. Well over 90% of the decisions we make are automatic System 1 decisions—the underwater part of the iceberg. Mostly it's done without thinking (as we typically think about what it means to think—taking a hand off a hot stove, or recoiling from a snake, etc.). Ever driven somewhere and don't remember anything about how you got there? System One was driving.

System 2 is slow and cumbersome. It is the opposite of unconscious and automatic. Unlike System 1, it has a very limited bandwidth and can only do one thing at the time. Try to remember a number longer than seven digits. You probably can't. Look at this number, 837402118. Now put aside the newsletter, wait 30 seconds and write the number down.

Despite System 2's extremely limited capacity, It is the system we can (and should) use when we have something important to decide. It's the decision-making capacity that separates us as a species.

Here are some examples of System 1 decisions:

- Detect that one object is more distant than another.

- Orient to the source of a sudden sound.

- Complete the phrase "bread and . . ."

- Make a "disgust face" when shown a horrible picture.

- Detect hostility in a voice.

- Answer to 2 + 2.

- Read words on large billboards.

- Drive a car on an empty, familiar road.

- Find a strong move in chess (if you are a chess master).

These are System 2 decisions:

- Brace for the starter gun in a race.

- Focus attention on the clowns in the circus.

- Focus on the voice of a particular person in a crowded and noisy room.

- Look for a woman with white hair.

- Maintain a faster walking speed than is natural for you.

- Monitor the appropriateness of your behavior in a social situation.

- Count the occurrences of the letter a in a page of text.

- Tell someone your phone number.

- Park in a narrow space (for most people except garage attendants) or drive in a congested, unfamiliar city.

- Compare two washing machines for overall value.

- Fill out a tax form.

One way to "feel" the interplay between these two ways of thinking is to take a Stroop Test. First created in 1935, and used in a variety of settings by psychologists, this test requires word and color recognition of letters. Read the words: Red, Blue, Green, Yellow. System One reads words, automatically; it's easy. Then you must recognize colors: Red, Green, Blue. It not so easy to do it quickly because you have to override System's One's automatic reading of letters that make words. System Two has to be used to recognize colors when they are in the form of letters. The conflict between the two will become obvious if you try the exercise.

What does that have to do with implicit bias? The answer lies in the way the same two systems in the brain store and use data, particularly data about other people.

> " **Ask citizens what they want from a court system and an immediate answer is likely to be 'fairness.' A system is fair when cases are decided based on the law as applied to the relevant facts. Bias arising from characteristics such as wealth, social class, ethnicity, race, religion, gender, and political affiliation have no place in a fair decision.** "
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> *North Carolina Commission on the Administration of Law and Justice, Final Report, pp 15-16. Available at:* **https://nccalj.org/wp-content/uploads/2017/pdf/nccalj_final_report.pdf**

The amount of data that a brain processes in a single day is huge. System One's efficiency kicks in and it classifies data into categories. Social scientists tell us that within a second upon meeting a person, we have categorized the person into various categories; male/female, black/white/other, old/young, etc. Each category has various traits or tendencies assigned to it, based on one's experiences. The brain has stored all the previous interactions. For some, the traits for a particular group are positive; that is often the case if the person shares traits with us. Using extensive research including Functional Magnetic Resonance Imaging (FMRI), Social Scientist believe that the part of the brain processing information about people like us is the same part of the brain that processes information about ourselves. But for people who are different, parts of the brain associated with fear and danger may initially interpret the interaction. If we are not careful, where we start may determine where we end up in evaluating a situation.

Khaneman puts it this way:

The normal state of your mind is that you have intuitive feelings and opinions about almost everything that comes your way. You like or dislike people long before you know much about them; you trust or distrust strangers without knowing why.

Khaneman, *Thinking, Fast and Slow*, p. 97

That intuition is framed by the categories you have already put the new person into and the traits that are associated with the categories. They become stereotypes. Stereotypes are formed by the brain's storage of massive amounts of data about the category. Family, personal experience, TV, movies, social media, cultural norms—all of these sources are updating our stereotypical understandings of various categories of people. They may be positive or negative.

Stereotypes are effortless and require little energy. They are powerful because they are often right. They are never always right. And figuring that out in a particular situation may take time. But that is what fairness demands—not relying on first impressions.

In other words, the brain is an "us" vs. "them", as well as a categorizing machine. Stereotypes leave a powerful first impression. As an evolutionary matter, "thems" were initially perceived as dangerous. That might not always be the case, but it was the safest thing to think. False negatives don't get you killed. False positives might.

These initial evaluations are not conscious. They cannot be turned off. But that is not the end of the story. System Two kicks in eventually. And that is where intentionality can play a positive role. Human decision-making and the interplay between System One and System Two is a complex topic (e.g., Stroop Test) and one that is the subject of many books and research studies. But it is pretty clear that Systems One's stereotypes are never completely turned off.

As the Greek maxim puts it, "Know Thyself". Knowing the traits your automatic System One brain has stored is a key to doing that. And being fair, among other things, requires you to follow the maxim to minimize any biases that might be triggered by your personal stereotypes.

How can you know yourself? One way is to take the Implicit Association Test, found online at https://implicit.harvard.edu/implicit/takeatest.html. The test can help us to understand what kinds of associations—negative or positive—are stored in the brain. How much more it can do—can it predict behaviors, for example—is the subject of much debate and study. But it is pretty easy to feel in one's fingers using the keyboard in taking the test when it is harder to associate good traits with a particular category of people. There are tests keyed to race, or gender/work, or religious groups, or sexual orientation, among others. It is a good way to begin to unpack what kinds of associations are stored in your head.

If, for example, you associate negative concepts with a particular race or gender or religion or sexual orientation, what does that mean? Here's what it doesn't mean--that, at your best, you act in a discriminatory way. It does mean that your particular history of family, and experience, cultural norms, and media exposure has filled your stereotype buckets with a peculiar mix of data points. Yours will be different from everyone else's. That's been done automatically. It's not something you can opt out of. And quite likely, some groups of people are stereotypically viewed more negatively than others.

Your first impressions happen beyond your control. When you intuitively feel some one is dangerous, or when you feel that someone is not worthy of trust, it's often a "feeling" that can't be described any better than that. A feeling. That's System One at work. What we do next, after the "feeling", is not important in many contexts. In the context of a justice system where many of the most important decisions are unreviewable and discretionary, it is critical.

It is important to remember that having these unconscious associations (or as it is often described, implicit biases) is not a character flaw. It is part of the universal human condition. The question is not whether you have them. The question is what you do about this part of the human condition. If you want to minimize the impact of your particular set of associations, what can you do?

- Recognize that differences matter. Consciously consider the impact of differences.

- Reverse the parties in your mind.

- Develop a structured way to make important decisions; use checklists to help keep focus on the relevant aspects of a decision.

- Check your decisions with colleagues; the process of articulating a rationale can be very helpful.

- If you are fortunate enough to work in a diverse workplace, learn from your colleagues; seek out opportunities to interact with people of different backgrounds as the opportunity arises.

- If it is available, look at data about your discretionary decisions. Patterns can be a clue to creeping stereotypical decisions.

- Do not make any important decisions when you are angry, tired, stressed or in a hurry. That is when System One's stereotypes are at their most powerful.

Fairness requires more than judging how dangerous or worthy of taking a risk a person is by the group they belong to. Unfortunately, there is no pill, vaccine, or surgery that can do that. It is a daily chore. Some have reduced it to three simple ideas.

- Intention (a commitment to fairness).

- Attention (a commitment to avoiding the easy, automatic decision prompted by stereotypical thinking).

- Taking your time, particularly for important discretionary decisions.

The justice system is not perfect. To paraphrase Judge Jerome Frank in his important book, *The Mind of the Law,* though, we come closer to perfection when we realize that we are not perfect and have the humility to seek out and work on our imperfections.

NOTES ON SOURCES AND REFERENCES

For more information about the concepts discussed in this article, these sources will be helpful.

Web based resources:

Implicit Bias, A Primer for Courts, Jerry Kang, National Center for State Courts (2009) available at http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx.

Project Implicit®, Web site: http://projectimplicit.net/.

Kirwin Institute on Race and Ethnicity, Ohio State University, http://kirwaninstitute.osu.edu/ (Website contains extensive materials on ongoing research studies dealing with implicit bias, along with other resources, such as webinars and other educational materials. Updated frequently).

A Meta-Analysis of Procedures to Change Implicit Measures, Forscher, Lai, Axt, Ebersole, Herman, Devine, Nosek. A continuing effort by multiple scholars to monitor studies in the area, last updated in August, 2018. Detailed analysis of methodology of studies and of difficulty in measuring changes in behavior. Pre-print available at https://psyarxiv.com/dv8tu.

Hidden Injustice: The Prosecutor's Paradox, ABA Legal News Network, https://vimeo.com/176681786/5a69f94cf3 (12 minute video).

Helping Courts Address Implicit Bias: Resources for Education, National Center for State Courts (website) https://www.ncsc.org/ibeducation .

Books:

Thinking, Fast and Slow, Khaneman; Farrar, Straus, and Giroux (2011).

Blind Spot, Hidden Biases of Good People, Banaji and Greenwald; Delacorte Press (2013).