

CHAPTER 10: AVOIDING UNINTENDED BIAS

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Avoiding Unintended Bias

Introduction

One of the special challenges of dealing with self-represented litigants is that judges have to interact with people from a wide variety of cultures and backgrounds without a lawyer acting as the “translator.”

This chapter describes the often serious unintended problems that this can cause for access to justice for the self-represented, takes the experiences and insights of many judges, and suggests ways that judges can work to overcome these dynamics in their judging.

I. The Roots and Dynamics of Unintended Bias

Lawyers have generally been to law school for at least three years. They’ve spent time with other law students and lawyers. They’ve read cases, watched hearings, and often have years of experience in the courtroom. They know the legal shorthand used in most types of cases. Often they’ve appeared in front of a particular judge on multiple occasions. They generally understand what information that particular judge wants, which issues are relevant and which are not, and they are not as emotionally involved in the case as their client is. A judge can therefore interact with all attorneys in pretty much the same way; a judge does not have to adapt his or her style to accommodate the minor differences among the attorneys.

In contrast, most people representing themselves have had very little contact with the court system. They know a lot about the facts in their case, but they often don’t know how to fit that knowledge into a legal solution. They don’t know what to expect in court.

Sometimes they've come from other countries where it may be disrespectful to look a person in authority in the eye—or where going to court means paying money in bribes or being fearful of going to jail. Sometimes they've gone to court in different states or for different types of cases and have expectations based on those experiences. Most have family or friends who've had some type of experience in court, and those people have given suggestions that vary dramatically in their helpfulness. Most people have seen *Judge Judy* or *L.A. Law* or *Perry Mason* or *Judging Amy* or *The People's Court* or *Kramer vs. Kramer* or *My Cousin Vinny*. They know that it isn't all true, but it still forms some part of their understanding of the legal system and shapes their expectations.

The Canons of Ethics require judges to act without bias. But when dealing with litigants directly—people of all colors, economic backgrounds, cultural backgrounds, and mental capacities—it is well-nigh impossible that judges won't have some biases to confront and consider. Most judges aren't even aware of these biases, but it's important to consider these issues while being a judge in one of the most diverse areas in the world.

As a lawyer and now a judge, I've always worked in a culture where most of my colleagues are quite smart and articulate. We all went to school for many years, read a lot, and write well. I was really shocked to learn that half of the American people read at less than fifth-grade reading level—and that doesn't even count litigants who come from other countries, many of whom had few opportunities for organized education. I find that when I read a pleading from someone who clearly has problems with writing or spelling, I remind myself not to confuse literacy with stupidity. I figure they can probably fix a car or my computer much easier than I can. Sometimes it's really frustrating, but overall, I'm really proud that our court system is open enough that everyone can have their day in court (even if they can't spell).

—Judicial officer

II. Social Science and the Dynamics of Unintended Bias

The field of social cognition (the study of the relationship between mental processes and social behavior) offers one way to think about these issues. Research in this field helps us understand the natural

processes of categorization of and preference for people based on group identity. In one study, judges (like other groups) demonstrated the following common cognitive illusions:⁶⁴

1. Anchoring (making estimates based on irrelevant starting points);⁶⁵
2. Framing (treating economically equivalent gains and losses differently);⁶⁶
3. Hindsight bias (perceiving past events to have been more predictable than they actually were);
4. Representativeness (ignoring important background statistical information in favor of individuating information); and
5. Egocentric biases (overestimating one's own abilities).

The following conclusions drawn from cognitive science research provide judges with valuable insight into the human vulnerability to unintended bias.

A. Categorization of and Preference for People Based on Group Identity

In fact, the human ability to categorize experience is an indispensable cognitive device for understanding, negotiating, and constructing the world.⁶⁷

⁶⁴ C. Guthrie, J. Rachlinski, and A. Wistrich, *Inside the Judicial Mind* (2001) 86 Cornell L. Rev. 777.

⁶⁵ For instance, if a class of students is asked whether the Mississippi River is longer or shorter than 2,000 miles and then asked the river's length, and a second class is asked whether the Mississippi River is longer or shorter than 500 miles and then asked the river's length, the first class will invariably provide answers that are higher than those given by the second class.

⁶⁶ For instance, most people will prefer a certain \$100 gain to a 50 percent chance of winning \$200. On the other hand, most will prefer a 50 percent chance of losing \$200 to a certain loss of \$100. In other words, people tend to make risk-averse decisions when choosing between options that appear to represent gains and risk-seeking decisions when choosing between options that appear to represent losses.

⁶⁷ R. Brown, "Prejudice: Its Social Psychology" (1995), p. 39.

The human mind tends to organize everything, including people, into categories. Social scientists believe that this mental process may have prehistoric roots, ensuring the survival of our genetic code. Today it translates into *social categorization*, or grouping people based on any number of characteristics, including race, ethnicity, skin color, gender, age, sexual orientation, physical and mental abilities, religion, economic status, language ability, education level, and so forth.

Within a fraction of a second of encountering another person, human brains register automatically and without conscious awareness that person's race, sex, and age. Our brains take "short cuts" to deal with, organize, and simplify a complex world. These are sometimes referred to as *heuristics*.

B. Human Brains Encode Information About Groups of People Into Memories

These mental constructs are sometimes called "schemas." In this way, brains can be likened to computer hardware—what goes in that hardware will differ from person to person, but humans all process, code, store, and retrieve data similarly.

Similar to categorization, stereotyping is a mental shortcut that forms associations between groups of people and the attributes we believe typical of those groups. Stereotypes can also be either positive or negative. One might, for example, have a stereotype of all lawyers from one law school as smart and another law school as dumb.

C. Humans Strongly Prefer Persons From the Same Social Categories

This phenomenon is sometimes called in-group favoritism and out-group derogation. Whether these preferences are strong or weak, or whether they exist at all (there are instances where people prefer those in groups to which they do not belong, for example) will vary from person to person.

D. Humans Tend to Perceive “Out-Group” Members as All the Same

An example of this is the “they all look the same” phenomenon. We also engage in *in-group overexclusion* whereby ambiguities as to whether someone belongs or does not belong to our group are most likely to be resolved against inclusion.

E. Preference for Members of In-Groups Begins at an Early Age

These preferences become automatic, habitual lenses through which we view the world. Children can show in-group preference before the age of two.

Children exposed to racial diversity at an early age often exhibit a clear absence of in-group favoritism and out-group derogation.

However, contact alone is generally not enough, and other factors must be present:

1. There should be institutional support for the measures designed to promote the contact;
2. The contact should be of sufficient frequency, duration, and closeness to permit meaningful relationships to develop between members of the groups concerned;
3. As much as possible, the participants in the contact situation should be of equal status; and
4. The contact should involve cooperative activity.⁶⁸

F. Human Brains More Readily Process Information That Confirms Our Beliefs, Attitudes, or Stereotypes

In fact, when humans are faced with information inconsistent with our beliefs, we revise them under certain circumstances, but we are more likely to create a subgroup category (an exception), leaving the initial

⁶⁸ *Ibid.*, pp. 268–69.

general belief intact. This is especially true when the out-group is large and the association or stereotype negative.

Some examples of this are “You’re different from (or ‘not like’) other _____”, or “You can come home for Thanksgiving, but don’t bring your _____ friends.” Thus stereotypes are much like *heat-seeking missiles in search of confirming information*.

We also have a propensity to ascribe the mistakes or failures of others to their inherent qualities or flaws but our own mistakes or failures and those of people in our in-groups to external circumstances.

G. These Early Beliefs, Attitudes, or Stereotypes Continue to Exist at an Unconscious Level

These biases may persist despite a commitment to moral and ethical principles such as equal justice, honesty, and integrity in decision making, or to making decisions based only on the facts and circumstances of each case.

H. Implicit Bias Affects Even Nonverbal Behavior

Research indicates that the extent of teachers’ differing expectations about girls’ and boys’ abilities to learn various subjects is directly correlated to girls’ and boys’ subsequent actual learning in those subjects.⁶⁹

This phenomenon has been repeatedly demonstrated in studies of the interview process. Without knowing the purpose of these experiments, interviewers consistently sit farther from, are less friendly to, make more speech errors, and take less time with interviewees who are members of disfavored groups. Conversely, interviewees who are interviewed by experimenters who are instructed to exhibit these behaviors deliberately mirror the behaviors.

⁶⁹ M. Palardy, “The Effects of Teachers’ Expectations on Children’s Literacy Development” (1998) 35(4) *Reading Improvement* 184–86; P. Murphy, and E. Whitelegg, “Girls and Physics: Continuing Barriers to ‘Belonging’” (2006) 17(3) *Curriculum Journal* 281–305.

I. Implicit Bias Increases Under Certain Circumstances

These circumstances include stress, time pressure, distraction, boredom, absence of accountability, and lack of motivation to be fair and accurate.

This poses real challenges for judges, who are often under stress, lack time, and are distracted and bored.

Of course, judges are extremely motivated to be fair and accurate. However, the possibility of implicit bias may arise more in cases with self-represented litigants with no intermediary lawyer to facilitate or carry out the communication, or when some judges may feel less accountability where there is less likelihood of an appeal.

In one interesting experiment on accountability, subjects who were convinced that a (bogus) skin electrode apparatus could detect their “true” feelings were far more willing to report socially sensitive attitudes and stereotypes than those not connected to electrodes.⁷⁰

J. Emotional State Can Also Influence the Tendency to Implicit Bias

Psychologists investigating the link between emotions and prejudice have found that anger increases the likelihood of a negative reaction to members of a different group and that sadness or a neutral emotion does not.

They have also found that the responses of happy people are quite similar to those of angry people—both are more likely to draw on negative stereotypes when judging guilt or innocence. Sad people “may have been in a frame of mind that led them to evaluate the case histories more slowly and to reach more judicious conclusions.” Sad people were, if anything, biased in favor of those linked with negative stereotypes.

⁷⁰ Brown, p. 211.

III. Implications for the Judicial Fact-Finding and Decision-Making Process in Cases Involving Self-Represented Litigants

Therefore cases involving self-represented litigants raise the usual unintended biases that judges have to consider in all cases—biases such as race, gender, language, and economic status. The stereotypes to which we are all vulnerable may be triggered more easily during stressful, high-volume, repetitive, time-pressured, tiring calendars—all too often hallmarks of calendars involving self-represented litigants. Moreover, this likelihood might become even greater in the absence of attorneys who normally act as intermediaries between the judge and the litigant and who also bring to the courtroom certain distancing formalities of language, discourse style, and interaction.

In addition to these usual biases, the issue of self-representation can itself bring up various attitudes and assumptions on the part of judges. Some of these include the following beliefs:

1. High-volume/high self-represented litigant calendars are “punishment” assignments;
2. Self-represented litigant calendars are not real “judge work”;
3. Self-represented litigants are unable to effectively represent themselves and are usually unprepared, and their pleadings and papers are unintelligible, do not raise relevant issues, or both;
4. Self-represented litigants are less educated if not illiterate;
5. Self-represented litigants lie;
6. Cases and calendars where one or both parties are self-represented are longer, slower, more stressful, more frustrating, often volatile, and sometimes unsafe;
7. Hearings in which one side is represented and the other is not are prone to numerous evidentiary challenges and accusations of judicial impropriety when efforts are made to “level the playing field”; and
8. If they really wanted to, self-represented litigants could get a lawyer.

The “kernel of truth” notion asserts that stereotypes and assumptions about people must be based on *something*, so there must be a kernel of truth in each of them. Although some stereotypes (not all) reflect a real difference in averages between groups, it is obvious that

stereotypes are unreliable as a basis for making judgments about individuals.

We also need to remember that litigants come to court with various expectations and biases and that those assumptions and biases may also affect how they act in the courtroom.

I use a script at the beginning of my domestic violence calendar. It takes about 10 minutes, and I use it to explain how the day is going to go and set the tone. I don't even have to think about it any more. I watch to see who's sitting with who, who has a little kid that we'll want to get out early, who is really upset, who's laughing at my jokes. It also gives them some time to get used to the idea that I'm a Chinese American woman hearing their case.

—Judge

IV. Specific Techniques to Minimize Implicit Bias

How do we counter these implicit biases to treat everyone as an individual who deserves his or her day in court? Research has shown that the following techniques minimize the potential impact of implicit bias. Strategies that judges report using are in boxes.

A. Stay Motivated to Be Fair and Accurate

Within our system of justice, there are many safeguards against the operation of personal bias in judicial decision making, foremost among them the ethical imperatives that guide and constrain judges. It is unlikely that any judge is not motivated to be fair and accurate. However, research indicates that good intentions are not enough to offset implicit bias. Conscious attention and effort are also needed.

"Remember the canons relative to bias, prejudice, fairness, etc. Remember the Constitution requires a 'neutral, *detached* magistrate.'"

B. Maximize Accountability

Again, the justice system incorporates various safeguards against the operation of personal bias, including, in most cases, the availability of a record and the opportunity to appeal. Judges have also suggested reviewing their own rulings or decisions for patterns or asking a colleague to periodically observe their courtroom communication or review a difficult ruling.

"Have someone else review my decision if I feel it may contain bias."

C. Take Ample Time

Are hearings with some groups longer? Shorter? Why? Studies in the context of interviewing indicate that interviewers with negative bias toward a certain group take less time, make less eye contact, sit farther from, and make more speech errors (e.g., stuttering, hesitations) when interviewing a member of that group.

"Allow both parties the same amount of time to address the court."

"Prepare in advance about the people and the issues; allot sufficient time for hearings to avoid impatience; listen in the courtroom to make each person become an individual to me."

"Slow down; listen carefully."

D. Minimize Distraction and Pay Attention

Strong emotion, stress, or distraction increase the likelihood of relying on automatic responses. One's physical and mental health will influence one's ability to stay focused.

"Focus hard on the argument being presented to counteract boredom/stress/time pressure."

"Avoid becoming overworked; when overworked, I revert to rote/easy methods of accomplishing things. Bias can creep in when taking the easy way out."

E. Be Conscious of Difference

This may seem somewhat counterintuitive and even dangerous, because we are taught that "justice is blind," that we live in a "color blind society," and that we must "treat everyone the same." In reality, we are acutely aware of differences whether or not we consciously acknowledge them, and we are more likely to make judgments based on implicit biases related to those differences if we attempt to ignore them. Recent research indicates that once the defendant's race in a jury simulation is explicitly referred to and jurors are made aware of the potential for their race bias, they are better able to correct for it.⁷¹

"I affirmatively recognize that I might have a bias about a person and then consciously put it aside."

F. Think About Thinking

To engage in an intentional thought process, judges might make a conscious effort to wait until all facts are present before judging, as jurors are admonished to do.

"Question basis for determinations—assumptions or facts?; question inferences—accurate or caused by bias?"

⁷¹ S. Sommers and P. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom* (2001) 7(1) *Psychology, Public Policy and Law* 201–229.

"I try flipping—pretending that the litigants have switched roles. For example, if a litigant is not well-dressed, I pretend that the other litigant is dressed that way and ask myself if I would rule differently."

G. Confront Cultural Stereotypes

Cognitive scientists have developed an online experimental tool, the Implicit Association Test (IAT), that assesses unconscious attitudes, or implicit bias. Data gathered from over 2.5 million online tests reveals, for example, that at least 75 percent of test takers show an implicit bias favoring the young, the rich, and whites.⁷²

Readers are encouraged to take the IAT by going to www.implicit.harvard.edu. Most test takers report at least some disparity between their conscious intention and the test results. At the very least the test may direct one's attention to areas in need of self-scrutiny.

"Cross-check analysis (e.g., sentence) with substitute category (male for female, or race)."

H. Seek out Images and Social Environments That Challenge Stereotypes

In "How (Un)ethical Are You?" by Mahzarin R. Banaji and colleagues, the authors describe a judge who, despite a strong belief that her decisions were unbiased, was concerned that she might be harboring unconscious prejudices from working in an environment that daily reinforced the association between black men and crime. She decided to create an alternative environment by spending some time in a neighboring court where the criminals being tried were predominantly white. Malcolm Gladwell, in the bestseller *Blink*, recommends

⁷² M. R. Banaji, M. Bazerman, and D. Chugh, "How (Un)Ethical Are You?" (December 2003) *Harvard Business Review* 56–64.

periodically calling to mind positive representatives of groups that are routinely stigmatized by negative cultural stereotypes.

“Get into the community more often with diverse groups.”

“Educate myself about other cultural norms. Take time to talk to interpreters, even if the litigant does not appear, about the culture and language nuances as they relate to the issues we handle.”

I. Maintain Constant Vigilance

What the *Harvard Business Review* says of managers holds true for judges: “Managers who aspire to be ethical must challenge the assumption that they’re always unbiased and acknowledge that vigilance, even more than good intention, is a defining characteristic of an ethical manager.”⁷³

“Keep reminders (nonobvious) notes on the bench not to buy into patterns.”

I know that I’m not going to understand all of the cultures in the world, but I do try to learn about the cultures of people in my community. I go to community events, read books about their cultures and affirmatively work to find out more about their lives. One of my favorite books is *The Spirit Catches You and You Fall Down*, which Ann Fadiman wrote about the Hmong culture in the Central Valley.”

—Family law judge

⁷³*Ibid.*, p. 64.

Conclusion

The roots and dynamics of unintended bias run deep throughout all of life, and the judging enterprise is no exception. A commitment to understanding and eradicating these dynamics can go far in building access to truly neutral justice for all.