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## Implicit biases exist; it's now a question of not whether, but how much

**T**he guy next to you on the plane says, "You know, I do not have a biased bone in my body. But I am constantly amazed by how many biases I can spot in other people. I just wish everyone else could be as totally free from bias as I am."

Ironically, of course, your seatmate is exhibiting a bias all his own. Experts call this "blind spot bias." Blind spot bias is the inability to see our own biases while recognizing bias exhibited by others.

Let's face it; we are all biased in one way or another.

Last month Michael B. Brennan was confirmed as a judge on the 7th U.S. Circuit Court of Appeals. When asked by Sen. Cory Booker if he would concede that implicit racial bias existed in the American judicial system, Brennan expressed no opinion. He said that he perhaps could offer an opinion if he could "take a look at all those statistics and studies" that Booker has read.

So here is my reading list for Brennan as well as anyone else who wishes to learn about implicit bias.

First, consider an observation recently made by professor Nancy Hopkins, a professor at Massachusetts Institute of Technology. She said that the three most important discoveries made during the past half-century are the Higgs boson particle, the internet and the concept of implicit bias.

For a quick overview, take a look at an Emmy-nominated video "Who? Me? Biased?" produced by The New York Times and PBS' "POV" unit ([nytimes.com/video/us/100000004818663/peanut-butter-and-jelly-racism.html](http://nytimes.com/video/us/100000004818663/peanut-butter-and-jelly-racism.html)). It identifies 2016 as the year the concept of implicit bias went mainstream.

Implicit bias refers to thought processes that occur without a person even being aware of them. It is important to understand that implicit bias can be attributed to the ordinary workings of our brain. It is literally how our minds work.

Thus, implicit bias is something to be recognized, not something to be defensive about. Recognizing that someone harbors an implicit racial bias is different from concluding that he is an explicit "racist."

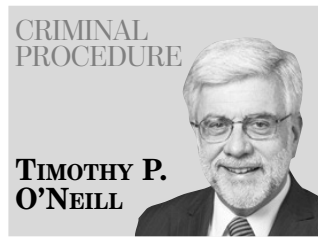
Implicit bias is the result of a host of factors that have influenced our thinking over the years, including media images, news images, conversation and education. If you see "peanut butter" you will probably automatically think of "jelly" rather than "apple butter." This is a harmless kind of implicit bias. But where it becomes pernicious is when cultural images cause people to associate "black men" with "violence."

What kinds of implicit associations do you personally make? To find out, take the Implicit Association Test online ([implicit.harvard.edu/implicit/education.html](http://implicit.harvard.edu/implicit/education.html)).

It measures "attitudes and beliefs that people may be unwilling or unable to report." It does this through a series of tests that asks you to sort words into categories. Your score is based on the length of time it takes you to do this. For example, it could be said that "one has an implicit preference for thin people relative to fat people if he is faster to categorize words when Thin People and Good share a response key and Fat People and Bad share a response key."

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Combating implicit bias can be a challenge. The video relates the story of a problem auditioning performers for symphony orchestras. There was strong evidence that male musicians were being selected over female musicians at an unfair rate. The solution? Put up a screen so that the judges could not see the gender of the auditioner. But the screen did not change the results. Men were still being selected at an inordinate rate.



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Then someone made an interesting observation. Although the screen prevented the judges from seeing the gender of the auditioner, they could still hear the footsteps of the auditioner getting into place. And the footsteps of a person in high heels sounded very different from other footsteps. The solution? Have the auditioners remove their shoes. The result? A significant increase in the number of women winning spots in the orchestra.

So what effect does this have on the American criminal justice system? First, consider the views of Mark W. Bennett, a U.S. District Court judge in the Northern District of Iowa. He has said that "I and many others argue [that]

length of sentences in proportion to darker skin tones of offenders.

Also take a look at Jeffrey J. Rachlinski, et al., "Does Unconscious Racial Bias Affect Trial Judges?" 84 Notre Dame Law Review 1195 (2009). It reports the results of a study of 133 state court judges who were administered the IAT. The results showed that judges indeed held implicit racial biases and that these biases could influence judgments.

And implicit bias is not only restricted to race. This is clear from a new article by Justin D. Levinson, et al., "Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes." 69 Florida Law Review 63 (2017). This study concludes that "judges harbor strong to moderate negative implicit stereotypes against Asian-Americans and Jews, while holding favorable implicit stereotypes towards whites and Christians."

In short, it is clear that the issue is not "whether" implicit bias exists in the justice system, but rather "how much."

Finally, for those inclined to be suspicious of new-fangled social science ideas being applied to law, you might want to take a look at a motion for a new trial filed in 1928 by Lena Olive Smith, the first black female member of the Minnesota bar. It was a rape prosecution involving a black defendant and a white victim before an all-white jury. It is worth quoting at length: "[P]erhaps [the jurors] were, with a few exceptions, conscientious in their expressions [of no race prejudice]; yet it is common knowledge a feeling can be so dormant and subjected to one's subconsciousness, that one is wholly ignorant of its existence. But if the proper stimulus is applied, it comes to the front, and more often than not one is deceived into believing it is justice speaking to him; when in fact it is prejudice, blinding him to all justice and fairness."

As Mark Bennett notes, Smith in 1928 describes implicit racial bias as well as any social scientist could today.