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Rory K. Little
UC Hastings College of the Law, littler@uchastings.edu

James Cole

Jeffrey Adachi

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Speeches

Perspectives on Criminal Litigation Ethics: James Cole & Jeffrey Adachi

Introduction

RORY K. LITTLE*

In August 2013, U.C. Hastings College of the Law was honored to host its first ever MCLE conference addressing "Criminal Litigation Ethics."[1] MCLE, of course, means "mandatory continuing legal education," and I was pleased to organize a conference that addressed, in an academic setting, this vital topic of practical lawyering that appears in the headlines almost every day. Our unique objective was to provide two full days of hands-on training by nationally prominent criminal defense and prosecution lawyers, for litigating lawyers as well as law students, separated by setting and geography from the competition of daily practice. The conference was a huge success, not the least because of our two keynote speakers, U.S. Deputy Attorney General James Cole, and San Francisco Public Defender Jeffrey Adachi—both nationally renowned criminal lawyers *and* U.C. Hastings graduates.

The *Hastings Law Journal* ("*HLJ*") has now graciously agreed to publish the remarks that Mssrs. Cole and Adachi delivered last August, thus preserving and widely disseminating what I think are important insights from leaders of our profession. I am grateful to, and proud of, the *HLJ* editors and staff for their commitment to this project.

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* Professor of Law, University of California, Hastings College of the Law, San Francisco. Many thanks for assistance to Joel Aurora, Executive Articles Editor of the *Hastings Law Journal*, and to Nancy Schneider, U.C. Hastings Class of 2015, for her tireless efforts in making the "Criminal Litigation Ethics" conference at U.C. Hastings a success.

1. *See Criminal Litigation Ethics: Prosecution and Defense*, UNIV. CAL. HASTINGS COLL. OF THE LAW, http://www.uchastings.edu/academics/education/professional/criminal-litigation-ethics/index.php (last visited Apr. 24, 2014).

In his remarks, Deputy Attorney General Cole ("the DAG" as he is known in Washington D.C. circles) makes clear how important high standards of prosecutorial ethics are as a general goal of the federal criminal justice system. Importantly, he notes that "ensuring the safety of the public" includes not just prosecuting the guilty, but also providing for all Americans "safety from the loss of constitutional rights and civil liberties." As I often instruct prosecutors, when a lawyer claims to represent "the people," her "client base" encompasses *all* of the people, including the defendant. Thus the obligation to be fair and respect the rights of "the people" requires prosecutors to protect the rights of criminal defendants every bit as strongly as others.

To this end, DAG Cole notes that the U.S. Department of Justice ("DOJ") has recently implemented further protections for the timely disclosure of exculpatory evidence—*Brady* evidence as it is known in the federal system.[2] DAG Cole also describes a number of other new DOJ initiatives, all designed to further the overall goal of fair criminal prosecution with appreciation for the full scope of the criminal justice system—including even "reentry" programs that have been a special focus of DAG Cole's attention. DAG Cole is well known around the country as an experienced criminal defense attorney as well as a prosecutor, and took a leading role within the American Bar Association on criminal litigation ethics on the defense side before assuming his current position. His deep integrity and strong, balanced judgment has always been recognized, and his conference remarks are important, firm, and enlightening. I hope you will read them in full and cite to them often, and I am proud that U.C. Hastings could provide a forum for their delivery and publication.

Meanwhile, Jeff Adachi has always represented the "other side." He is the long-time Public Defender for the City and County of San Francisco—one of the most diverse and prominent urban locations in the nation. In addition to serving as a criminal defender since his law school days, Defender Adachi is the only *elected* Public Defender in the state of California. This is an important facet of his position that is often unrecognized and undervalued. By being directly responsive, and responsible, to the people of San Francisco, Defender Adachi is freed to some extent from the political constraints that can operate to soften or silence defenders of those charged with serious crimes. The lawyers in Mr. Adachi's office routinely demonstrate the fierce, intelligent independence that Jeff himself has always exemplified in the defense role. His staff has a remarkable record of success in every aspect of their roles, and absolutely no record, as far as I am aware, of ethical misconduct. We are fortunate indeed in San Francisco to have a Public

2. *See* Brady v. Maryland, 363 U.S. 83 (1963).

Defender's office that provides a vigorous and ethical defense in every case for the least able in our community—the indigent—while at the same time being perhaps the most ethically admired such office in the State. This record of ethical-while-zealous lawyering is attributable directly to the leadership that Jeff Adachi has provided for well over a decade.

The remarks that Mr. Adachi delivered at our conference demonstrate this, in a most unusual way. Rather than re-plow the ethical furrows of criminal defense that one so often hears in this context—"What do you do if your client is lying?" or "How can you represent those guilty people?"—Mr. Adachi took on the affirmative role of reminding our attendees that "we as lawyers . . . must be aware of implicit bias in everything that we do." In other words, criminal litigation lawyers have a duty not just to avoid improper biases (based on ethnicity, gender, religion, sexual orientation), but also to be attentive to the *unconscious* biases that can infect the multitude of significant decisions that criminal litigators make in their practices every day. There is powerful and consistent empirical evidence that all people (and lawyers *are* people, I sometime remind audiences with a smile) have biases of which they are not conscious, and that such biases can subtly infect all their decisions. Defender Adachi notes that the American Bar Association's new Criminal Justice Standards for the Prosecution and Defense Functions will embody, for the first time, ethical guidance prohibiting improper bias,[3] but that lawyers should also be on guard against such biases *implicitly* affecting their treatment of clients and legal issues. This is an extremely important point, and it is wonderful to have the elected Public Defender of one of the most important urban environments in the world acknowledge and support it.

I hope that you will find the following remarks, from leaders of "both sides" of the criminal justice function, as electrifying as they were when we heard them live in August 2013. Whether or not criminal litigation is your area of practice or study, I am sure you will find these remarks stimulating and refreshing in light of the cynicism with which lawyers are sometimes received. As their remarks reveal, DAG Cole and Defender Adachi represent the best of what the law offers for our society as a whole.

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3. *See* Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1127 (2011) (reprinting draft Prosecution Function Standard 3-1.5: "Improper Bias Prohibited"); Rory K. Little, *The Role of Reporter for a Law Project*, 38 HASTINGS CONST. L.Q. 747, 769 (2011) (same for the Defense Function Standards).

Remarks at Criminal Litigation Ethics Conference:

University of California, Hastings College of the Law, August 2, 2013

JAMES M. COLE**

Thank you, Rory, for that kind introduction. It is an honor to address you all on the ethics of being a prosecutor. It is a topic that we face every day at the Department of Justice and goes to the heart of whether our system of justice not only operates in a fair and just manner, but also is respected by our citizens.

Justice George Sutherland, who served on the Supreme Court from 1922 to 1938, set out what is probably the best description of the role of a prosecutor. In the case of *Berger v. United States*, he wrote:

> The United States is the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[4]

Almost eighty years later, his words ring just as true: The role of today's prosecutor is not to "win" a conviction, but rather to bring about justice.

So what does it mean to bring about justice? Fundamentally, it is ensuring the safety of the public. But only if "safety" is defined in the broadest sense. Safety from physical or financial harm, to be sure, but also safety from the loss of constitutional rights and civil liberties.

No prosecutor wants to have someone die or get hurt on her watch. And if we just want to keep people safe from physical harm and are willing to sacrifice their constitutional rights and civil liberties, that's actually not so hard to do. But no prosecutor wants to go out and violate people's rights. In fact, our Civil Rights Division prosecutes and sues people for doing just that. And if prosecutors were focused on only protecting constitutional rights and civil liberties and were willing to

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** Deputy Attorney General of the United States. J.D., University of California, Hastings College of the Law, 1979.

4. Berger v. United States, 295 U.S. 78, 88 (1935).

sacrifice public safety, that's not so hard to do either. It is doing *both* that is hard—and it is doing *both* that defines the job of being a prosecutor. Because without both, we risk losing all the things that we hold dear about our country—our safety, our security, *and* our freedoms.

In order to do them both, our judicial system gives prosecutors enormous powers. These powers have direct impact on life and death, freedom or prison, and whether a victim finds peace. But a prosecutor's impact isn't limited to the decision to prosecute. The decision merely to open a criminal investigation—a power that is not subject to review by any court—can ruin a person's reputation, bankrupt them while defending against allegations, and devastate their families—even if charges are never brought. Indeed, as former Attorney General Robert Jackson put it, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."[5]

The vast majority of prosecutors are ethical, idealistic lawyers, who forego generous salaries to become prosecutors, not to throw people in jail, but to "do justice," to "do the right thing."

But we have to keep in mind that certain realities of the job can have an effect on even the best, most ethical prosecutor. In the course of handling a wide variety of cases over a number of years, a prosecutor will have sat down with a mother whose son was killed in a drive-by shooting, or will have seen the gut wrenching evidence of child pornography and abuse, or will have tried to console an elderly couple whose entire life savings was drained by a Ponzi scheme. These experiences can't help but change them. They have seen the havoc that criminals wreak on people's lives and realize that they are actually in a position to do something about it. And so, without even realizing it, they may lose some of their objectivity. Yet that objectivity is the cornerstone of being an ethical prosecutor. Indeed, the entire premise of having a public prosecutor, as opposed to letting private people who were victims of crime seek retribution, is to take that sense of personal outrage and revenge out of the decisionmaking process—to have prosecutorial decisions made dispassionately, based on the facts and the law, and the best interests of the community as a whole. But while these decisions must be made dispassionately, they must also be made with compassion and an understanding that on all sides of the equation—including that of the suspect or defendant—we are dealing with human beings.

At the start of the process, a prosecutor is involved in the investigative and charging phase, trying to find out what happened, who did it, whether what happened was a crime, and, if so, whether it is worth

5. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

charging. To do this a prosecutor has to keep several important things in mind.

First, a prosecutor must keep an open mind and suspend judgment until she has *all* the facts. I know this sounds obvious, but too often a prosecutor will begin an investigation, develop a theory of what happened early on, and then try to fit everything she learns into that theory. This mindset is misguided. Prosecutors need to force themselves to be led—*reluctantly*—to a conclusion about what happened, only after a cold hard evaluation of all the available facts, and having questioned each of those facts at every opportunity. To do otherwise risks not only convicting someone who did not commit the crime, but also leaving the real perpetrator, the person who is dangerous, on the street to commit another crime.

At the end of an investigation, a prosecutor will have a decision to make: whether to bring charges or not. Obviously, the first question is whether, under the facts and the law, there is proof beyond a reasonable doubt that the proposed defendant is guilty of a crime. If the answer to that question is yes, there is still another important question that a prosecutor must ask herself: Is what the person did worthy of prosecution?

Sometimes the answer is clear, and the public's safety demands that the person be punished and taken off the streets. But other cases can be more difficult, and a prosecutor must ask: Is the case worthy of devoting the limited resources of the prosecutor's office to it? Was the conduct something that was truly harmful to the community? Do the facts and circumstances of this person's life—his or her medical condition, past contributions to the community, history of prior illegal conduct, or lack thereof, and numerous other valid considerations—when compared to the wrongful conduct—warrant prosecution? Are there other ways to address the wrongful conduct besides prosecution?

This is a tremendous responsibility to put into the hands of one person, but because we are dealing with human beings and human behavior, and at times in areas with no bright lines, there has to be a place for these questions in our system in order for it to be seen as fair.

The power not to bring charges is tempered by the reality that one of the hardest and riskiest things for a prosecutor to do is to decline a case—particularly a big, high profile case. A prosecutor is only rarely criticized for bringing a case. Even if they lose it, it can be explained as the quirks of a jury or judge. But if a prosecutor declines a case, she can be criticized for giving in to the powerful and the wealthy, or having some bias, or being afraid of the defense counsel, or having wasted all that time and taxpayer money investigating without anything to show for it.

Nonetheless, a good prosecutor needs to be prepared to decline a case when the facts, the law, or the equities lead to that decision. The

consequences that flow from a prosecution are so great that it should not be done unless the prosecutor believes not only that the defendant can be proven guilty beyond a reasonable doubt, but also that the person's conduct is worthy of prosecution as well. This willingness to decline a case, when justice demands it, is an essential ethical aspect of a prosecutors' job.

If, at the end of the investigation, a prosecutor brings charges, she must make sure those charges accurately and fairly describe the nature and severity of the conduct at issue. This is an area on which we at the Department of Justice have focused in recent years. Prior to Attorney General Holder taking office in 2009, the policy of the Department of Justice was to require every federal prosecutor, in every case, to file the most serious charge that could be supported by the evidence. While there is some merit to requiring a level of consistency in the work of the Department, that policy did not appropriately take into account the individual circumstances of each case and each defendant. And frankly, the policy at times resulted in harsh, unfair results. So in 2010, Attorney General Holder changed that policy. Now, our prosecutors are directed to consider the particular facts and circumstances of each individual case and make decisions based on those unique facts. The role of the prosecutor is to be part of the conscience of the community. Prosecutors need to make judgments that reflect that role and demonstrate that they are doing their jobs always with the goals of justice and proportionality in mind. It is only by doing this, that we establish credibility with the community and earn its trust.

Once a case is brought, the role of the prosecutor changes, but the dedication to ethics does not. As I have described, prior to charging, an ethical prosecutor takes on an almost judicial role, trying to balance many difficult factors and make wise decisions that are in the best interest of the community, almost becoming his own adversary. But once an indictment is returned, the prosecutor becomes an advocate, and that advocacy requires adherence to a whole new set of ethical principles. As Justice Sutherland explained, while a prosecutor may "strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every means to bring about a just one."[6]

In other words, a prosecutor must fight hard, but must also fight fair. She of course may not lie to or mislead the court or opposing counsel, manufacture evidence, or prejudice the jury through improper pre-trial publicity. But today, the most frequently raised concern is whether a prosecutor is living up to her obligation to provide the defense with exculpatory evidence. This is an area that the Department of Justice

6. *Berger*, 295 U.S. at 88.

takes very seriously. After it was learned that the government had failed to provide exculpatory materials in the Ted Stevens case,[7] we took a hard look at our discovery policies. We wanted to know how common a problem this was and, to the extent it was occurring, what was the cause. As a result of this review, we learned several important things. First, the failure to provide exculpatory materials occurred very infrequently. Between 2003 and 2012, the Department had filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent of these cases warranted inquiries and investigations of any kind of professional misconduct by the Department's Office of Professional Responsibility. Less than three-hundredths of one percent related to alleged discovery violations, and just a fraction of those resulted in actual findings of misconduct. However, we did not take comfort in these numbers because even one instance of failure in our *Brady* obligations is one instance too many. So we reviewed our policies on disclosing exculpatory evidence, and while we found that we were already going beyond what was constitutionally required, we went further and instructed our prosecutors to provide broader and more comprehensive discovery than before. We also required that every attorney in the Department—including me and the Attorney General—take a yearly refresher course on discovery practices. We appointed a National Criminal Discovery Coordinator, who reports directly to me, to ensure uniform best practices in this area throughout the country, and designated a discovery coordinator in each U.S. Attorney's Office to make sure that experienced, seasoned prosecutors will guide younger, less experienced prosecutors in this area. And we made sure to emphasize throughout the Department how important this issue is to the administration of justice.

As much as investigations, charging decisions, and trials are an essential part of a prosecutor's job, and no matter how many resources and how many cases we bring, the cold hard truth is that we can't prosecute our way out of the dangers that crime presents to our communities. All too often we see the vicious cycle of drugs, crime, prison, and release from prison—and then it starts all over again. To stop that vicious cycle, prosecutors need other tools besides indictment and incarceration. They have to look beyond the court system and approach public safety in a more comprehensive way.

During my tenure as Deputy Attorney General, the Justice Department has taken this comprehensive approach very seriously and embraced a three-part violent crime strategy based not only on enforcement, but also on prevention and reentry.

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7. *See* Charlie Savage & Michael S. Schmidt, *Inner Workings of Senator's Troubled Trial Detailed*, N.Y. TIMES, Mar. 15, 2012, at A19.

Through programs like the National Forum on Youth Violence Prevention, we have established a national conversation about youth and gang violence and created a new model of federal and local collaboration, encouraging partners on all sides to change the way they do business by sharing common challenges and promising strategies—all leading to coordinated action.

Through our COPS program, we develop community policing strategies, which focus on problem solving and partnering with the community to address all aspects of threats against public safety. This approach gets community stakeholders involved in the work of fighting crime, builds trust between police officers and local residents, and ultimately improves public confidence in law enforcement's effectiveness and the integrity of the criminal justice system.

Drug courts provide an alternative to prosecution for people who can really benefit from being given an off-ramp from the vicious cycle of drugs and crime. By treating drug addiction as a disease instead of a crime, we provide a better outcome for the defendant, the criminal justice system, and society.

Another off-ramp that was demonstrated in South Carolina was featured on *Dateline* earlier this year. It was called Operation STAND (Stop, Take A New Direction), a combined effort of federal and local law enforcement, including prosecutors, as well as local community and faith-based groups. Police had identified a particular drug market in North Charleston that had become so bad the residents couldn't walk the streets. With intelligence gathered during several months of undercover buy operations, the police identified thirty-one individuals who were responsible for this activity—twenty-three were the most culpable and were targeted for arrest. But eight others, who played a lesser role and had less extensive criminal histories, were chosen as candidates for a *call in* program.

On the same day that the twenty-three were arrested, the Chief of Police gave the other eight men letters indicating that the police knew who they were, knew they had been dealing drugs, asked them to appear at City Hall on a certain date and time, and promised them that they would not be arrested as long as they showed up. All eight men showed up and, during the program, listened to the concerns of the community and learned how their criminal conduct was destroying the neighborhood. They also heard from local residents and community groups who were offering to help them, and from prosecutors willing to forego charges if these men worked to turn their lives around.

All eight men pledged that night to do just that. While some returned to crime, a number have not and are now employed and moving their lives in a positive direction. Moreover, the community has seen a

remarkable improvement in its quality of life, as the open air drug market is gone.

The third prong of our violent crime strategy is reentry. Today, some 2.3 million people—or more than one in one hundred American adults—are behind bars in the United States. At some point, ninety-five percent of these prisoners will be released, meaning some 700,000 people are coming out of our state and federal prisons every year. Our re-arrest rates after three years are about sixty-five percent in the state and local systems and forty-five percent in the federal system. These numbers are simply too high. While we need to hold accountable those who commit crimes, at the same time we need to provide former offenders the opportunity to acquire the skills and resources they need to successfully reenter society when they finish serving their sentences. This is absolutely critical if we have any hope of them becoming productive members of the community, rather than a danger to the community.

When I became Deputy Attorney General, I found that the Justice Department had an old policy in place that actually discouraged prosecutors from participating in reentry programs. When I saw that policy, I sent a memorandum to all U.S. Attorneys' Offices reversing it. Now, all federal prosecutors are required to work with their communities to strengthen reentry strategies and programs—and these programs are beginning to produce results. U.S. Attorneys' Offices across the country are initiating outreach events for employers to explain potential opportunities and advantages in hiring former inmates. They are convening Reentry Councils with state and local partners to devise policies for cooperatively improving reentry practices across the states. If we ever hope to have a real impact on stopping crime, this has to be a major part of the effort.

Finally, a prosecutor's ethics requires her to think of those who may not be directly involved in the criminal justice system, but are certainly affected by it. One of the most vulnerable groups are children born into families where crime is the norm. We can't just let the consequences of what we do fall where they may. We have to do something to make sure these sometimes forgotten victims are safe as well.

The Department of Justice is focusing on these children through several initiatives. One example that is near and dear to my heart was established in 2011, and I am proud to chair it: the Federal Interagency Task Force on Drug Endangered Children. Over nine million children—almost thirteen percent of the child population—live in households where a parent or other adult uses, manufactures, or distributes illicit drugs. In eighty-one percent of the reported cases of child abuse and neglect, substance abuse is rated as either the worst or second worst problem in the home. And a sad fact is that drug-endangered children are almost sixty percent more likely to be arrested as juveniles. To

attempt to end this cycle of violence, the Drug Endangered Children Task Force has brought together federal, state, tribal, and local law enforcement to identify ways to better serve and protect these children. We educate law enforcement officers and first responders on how to deal with a drug-endangered child found on the scene when they raid a meth lab or a crack house. And we set up systems to get these children the help they need. Early intervention in this area is not only the right thing to do—but it is one of our best hopes of stopping the cycles of crime.

These and other programs are a necessary part of our efforts and responsibilities. Without them, we are just putting band-aids on the problem and never dealing with it at its roots.

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So I end where I began - the ethical obligation of a prosecutor is to deliver justice, and by doing so, ensure the safety of *everyone* in our communities. Justice so that those who cause harm are punished and prevented from hurting people again. Justice so that those who have committed no crime have nothing to fear from their government. Justice so that the constitutional rights, the civil liberties, and the freedoms we hold dear are protected. Justice so that the criminal justice system not only *is* fair, but is *recognized* as fair so people trust it and respect it. Justice in that we don't just prosecute people and walk away, but we dig into why things happen, find the causes, and deal with them. And justice in making sure that the most innocent and vulnerable among us, who are impacted by crime, are not overlooked. Because it is our obligation, as prosecutors, to care for them as well.

The place I work is not called the Department of Prosecution. It is called the Department of Justice—because in everything we do, delivering justice is our ethical obligation.

Thank you for allowing me to share these thoughts with you.

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.[8] 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.

*** Public Defender for the City and County of San Francisco. J.D., University of California, Hastings College of the Law, 1985.

8. 372 U.S. 335 (1963).

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 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."[9] 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.

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9. *Biases*, PROGRAM ON NEGOTIATION, HARVARD LAW SCH., http://www.pon.harvard.edu/tag/biases (last visited Apr. 24, 2014).

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 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."[10] "[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."[11]

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.[12]

For prosecutors, Standard 3-1.6 will set even a higher bar, prohibiting bias in exercising prosecutorial discretion.[13] 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."[14]

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

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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).

theory that much of human social behavior is driven by learned stereotypes that operate automatically when we interact with other people.[15]

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.[16] 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.

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

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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).

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."[17] He also said that Trayvon, "looks black."[18] 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.[19] 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

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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.

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."[20]

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.

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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.

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[21]—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.

21. THE SLANTED SCREEN (Jeffrey Adachi/AAMM Productions 2006).

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.[22]

Thank you.

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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.

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