TWENTY-TWO

Implicit Bias and People with Mental Disabilities

Taking Stock of the Criminal Justice System

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A Note from the Editors: There are some chapters of this book where we felt fairly competent or experienced. Admittedly not as experienced as our expert authors, but knowledgeable. As we watched this Chapter develop and had the chance to see and better understand the work of our Criminal Justice Section friend and colleague, Elizabeth Kelley, and her (now our) colleague, Nick Dubin, we understood how much we had to learn about bias and ableism. The need for more awareness and discussion of these issues is obvious and urgent in the context of criminal justice and beyond. We greatly appreciate the contribution and work of Attorney Kelley and Mr. Dubin and look forward to continuing to learning from and with them.

CHAPTER HIGHLIGHTS

- Implicit bias against individuals with mental disabilities deserves more research and recognition in the criminal justice system.
- Ableism causes implicit bias on the part of those in the criminal justice system against those with mental disabilities, which requires training in de-escalation and mental health issues to combat this unconscious bias.
- Cognitive reframing even a single variable can help reduce implicit bias against those with disabilities.

- The criminal justice system is adversarial, and both sides tend to use sanist language to achieve their aims. Members of the legal profession should resist the temptation to do so when it is possible.
- Barriers against the enforcement of the Americans with Disabilities Act (ADA) need to be re-examined to ensure protections are working at every stage, from arrest to post-conviction.
- Judges, prosecutors, defense lawyers, police, correctional officers, and other criminal justice professionals, such as j need to closely examine their own implicit biases toward individuals with mental disabilities.

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Introduction

We are told over and over again in our society not to judge a book by its cover, not to assume what is inside before we have had a chance to read it. Yet humans size up and make assumptions about other humans based upon what

they look like many times a day. We prejudge complicated breathing beings in ways we are told never to judge inanimate objects.[1]

This quote from Isabele Wilkerson's groundbreaking, award-winning book *Caste*, perfectly captures the concept of implicit bias, and in particular, implicit bias against people with disabilities. We know from our lived experience and from the research that this bias exists. In one recent study, researchers found that prejudice against individuals who are developmentally disabled—autism and Down syndrome being the most common—was predominantly hostile. The prejudice reflected dehumanization and correlated with the beliefs that the developmentally disabled may harm others, are dependent on others, and should be kept separate from others.[2]

The criminal justice system is no exception to bias; studies show that implicit bias against those with disabilities is prevalent. One study found that preference for people without disability was among the strongest implicit and explicit biases: 76% of participants exhibited an implicit preference for people without disabilities, in comparison to nine percent for people with disabilities. Particularly disturbing, participants who themselves had disabilities still showed a preference for people without disabilities.[3]

The significance of this implicit bias is underscored by the fact that approximately half the people in our jails and prisons have some form of mental disability; and half the use of force incidents with police involve individuals with disabilities.[4] Indeed, to see a vivid illustration of this implicit bias across society, we need look no further than the local governmental response establishing protocols for treating and allocating treatment for those with Covid-19 in the Spring of 2020. People with both physical and mental disabilities reported disparate treatment when it came to access to facilities and care during the pandemic. These reports were especially disheartening as we celebrated the thirtieth anniversary of the enactment of the Americans with Disabilities Act (ADA). Various groups such as the American Bar Association (ABA), The Arc, and disability rights groups voiced outrage and filed lawsuits.[5] Meanwhile, wardens and courts denied compassionate release to incarcerated individuals with disabilities while the pandemic raged, infecting many who were unable to escape enclosed and shared spaces. The Marshall Project reported that wardens in the Federal Bureau of Prisons denied practically every request made to them before these motions were sent to judges in federal courts across the country. Many of these physically ill and disabled people died while incarcerated.[6]

We often judge people with mental disabilities based on how they act or look. Law enforcement may see a person in the middle of a psychotic episode and assume he or she is a danger to themselves or to others. They arrest or make the decision to shoot. But what about people with mental disabilities who don't "act disabled" or

"look disabled?" Indeed, there are many mental disabilities which are called "invisible disabilities" because there are no obvious visible outward manifestations or because of the individual's seeming ability to function. For example, when jurors see a defendant who fails to make eye contact, they may assume he or she has something to hide, when in fact that person may be on the autism spectrum, and eye contact may be excruciatingly difficult. So too, an autistic defendant who does not look the judge in the eye or twiddles his thumbs or her pencil during a plea colloquy or at sentencing can appear unremorseful. We *do* prejudge (the root of prejudice), often reaching erroneous conclusions, sometimes creating devastating, if not deadly, consequences.

Implicit bias against people with mental disabilities in the criminal justice system is an area that deserves greater research and initiatives, and, more fundamentally, greater awareness and basic knowledge. This Chapter serves as a starting point by exploring key concepts of ableism, essentialism, sanism, and intersectionality. The Chapter then discusses some general strategies to raise awareness of implicit bias against those with disabilities in the criminal justice system and some specific strategies for judges, prosecutors, criminal defense lawyers, jail/prison personnel, and law enforcement.

But first, a note about terminology. While the term "functional diversity" is gaining acceptance in some circles, it is not widely used. In this Chapter, we use the term "mental disabilities" as a global term to include issues such as bipolar disorder, schizophrenia, and depression, as well as intellectual/developmental disabilities such as autism spectrum disorder (ASD) and Fetal Alcohol Spectrum Disorder. In doing so we note that we are not entirely comfortable with this term. For example, it seems inaccurate to describe as disabled those on the autism spectrum who are high-functioning and indeed, brilliant in many ways; what they truly have are communication and social deficits.[7] What is important, however, is to understand and make clear that mental illnesses are not intellectual/developmental disabilities, and vice versa, and at the same time, to acknowledge that many individuals have co-occurring disorders.

1. Types of Prejudices Against Persons with Disabilities

A. Ableism

Broadly speaking, ableism is the intentional or unintentional discrimination or oppression of individuals with disabilities. The term itself dates to the 1990s, but the concept goes back centuries to times when it was believed that people with mental illness were possessed by the devil or evil spirits.[8] This definition applies to people with both physical and mental disabilities, and, for purposes of

our discussion, applies to people with both mental illness as well as intellectual/developmental disabilities.

Bias is a personal preference, tendency, or inclination, toward or against something or someone, especially as related to another. Discrimination, on the other hand, means "to distinguish by discerning or exposing differences, and to recognize or identify as separate and distinct."[9] Intentional discrimination is easy to spot where it involves derogatory and discriminatory remarks against another person based on their appearance or conduct. The law provides some recourse, making intentional discrimination illegal in many settings. Unintentional discrimination is less obvious. For example, the ADA requires that all buildings including courthouses, jails, and prisons be handicap accessible. No architect or building manager would intentionally deprive people of these accommodations, but failure to accommodate, due to neglect or lack of knowledge, is one example of unintentional discrimination.

Unfortunately, children with mental disabilities learn at an early age how ableist the world can be. A disproportionately high number of children in schools who "act out" are suspended, referred to law enforcement, or subjected to school-related arrests. They are disproportionately restrained or placed in seclusion or even taken into custody.[10] By the time many of these children reach middle school and high school, their same-aged peers have "moved on" from friendships involving simple play dates in elementary school to more complex group interactions. School cliques tend to exclude those who are different. If the teachers and school security onsite police can be ableist in criminalizing disability, then their peers are certainly not immune to ableism—the peers know what is considered cool and want to remain in the "cool crowd" due to peer pressure. A lot of autistic teenagers struggle to find and keep friends. Some stumble into the wrong crowd of people willing to take advantage of their gullibility or naivety, leading to encounters with the criminal justice system.

The purpose of recounting these struggles is simply to emphasize that those children with mental disabilities and other developmental differences eventually grow up to be adults. Society at large often thinks of developmental disabilities as "childhood disorders," but these are lifetime struggles, and this important realization requires us to shed our ableism when working with the adult population. It is easier to be ableist to adults than it is to children, even though there are plenty of examples where children are criminalized for their mental disabilities. Think of how much worse it is for adults traversing through the criminal justice system. Moreover, our implicit biases of mentally disabled people are formed in childhood, and are often difficult to shed because these beliefs are unconscious in nature. These biases then influence our perception of others, sometimes with deadly consequences.

There are other tragic examples of ableism at work. Law enforcement expects those being approached, questioned, pursued, or in custody to behave by a certain set of norms. They expect mild-mannered courtesy. Anything that looks outside

of this norm is viewed as suspicious behavior. But for an individual with a mental disability, being approached by the police can be overstimulating and lead to an unregulated emotional response on the part of the suspect. The case of Linden Cameron, a thirteen-year-old boy on the autism spectrum, illustrates these ableist norms. Linden's mother called the police because he was suffering from an anxiety attack. She told the police he was unarmed. Instead of trying to de-escalate the situation, the police ordered Linden to get on the ground, and when he started running, they shot him. He sustained injuries to his shoulder, ankles, intestines, and bladder. Someone like Linden may be intimidated by uniforms, unable to understand commands, not like to be touched, and instinctively flee.[11] Another example is the death of Daniel Prude, a man with a history of serious mental illness who had cycled in and out of jails and psychiatric facilities. Mr. Prude was stopped by the police while he was naked in the freezing cold. Mr. Prude was in the midst of a psychotic break. Police placed a spit hood over his head, handcuffed him, and shot him.[12]

In these kinds of encounters, law enforcement does not set out to be consciously discriminatory. Instead, the response is a combination of a lack of training and a lack of knowledge in dealing with individuals with mental disabilities, especially in what law enforcement perceives to be exigent situations. Thus, the implicit responses officers have must be reprogrammed and reframed during police training in order to prevent such tragic events from happening again.

Ableism happens more frequently in situations where individuals have "invisible disabilities" as opposed to those who are clearly intellectually impaired, or other individuals having a marked break with reality (psychosis), which would be apparent to the casual observer. In their conceptual analysis of autistic masking, Professor Amy Pearson and her colleague Kiernan Rose explain that individuals with invisible disabilities frequently, often unconsciously, use "masking behaviors" to try to appear as neurotypical as possible in order to avoid stigma and get by in the world. Their behavior can be exacerbated by areas of strength that cover up areas of weaknesses. For example, many individuals on the autism spectrum present with extremely uneven levels of development across many areas of functionality throughout their lives. They can use their cognitive abilities as a way to blend in mechanically rather than intuitively. As they attempt to blend in, they do so by mimicking—sometimes clumsily—neurotypical behavior rather than possessing a true sense of social skills or understanding. The effort required by these inhibiting behaviors often take an enormous amount of energy from the individual doing the masking.[13]

A paradox ensues from this behavior in the criminal justice system. For example, in a setting where an individual is being interrogated by law enforcement, masking would render autism as more of an "invisible disability" for as long as the person is able to mask, effectively increasing the ableist beliefs on the part of those intervening. The false thinking would be that if a person looks neurotypical

and acts neurotypical, they must really have a "light" case of autism, or none at all. In the interrogation setting, the result for an individual on the spectrum trying to overrepresent their social abilities could be their false confession.[14] In an encounter with patrol officers, law enforcement may be dismissive of one's autism, seeing it as an excuse to evade a criminal charge. In relationships with defense attorneys, the ableism might result in the attorney overlooking mitigating factors otherwise favorable to their client. From a prosecutor's and a judge's perspective, the individual may seem more culpable than they actually are.

From an ableist viewpoint, all of the above examples reinforce the point that the person should have been "able" to know better because of the disabled person's learned ability to mask. They should know, for example, why their behavior was against the law at the time of their offense due to their masking capabilities, which represent them as close to normal as possible. But as the stress and pressure mounts in criminal justice encounters with autistic individuals, eventually an autistic person's ability to mask abates. Yet by then, it can often be too late. While it is hard to differentiate a mental health episode from an individual on the spectrum who is no longer able to keep the mask on, increased training in criminal justice could help.

B. Essentialism

Essentialism is another cognitive process, both explicit and implicit, where people arrive at conclusions about individuals with disabilities. Essentialism refers to the way people perceive natural categories, fundamental attributes, and the underlying essence of a given thing, which is essential to its nature—perceived to be unchangeable and applying to groups of the same name.[15] For example, avocados have pits, mammals are warm blooded, symphonies have tubas.

Although these are simple examples, this kind of assignment of essential characteristics—characteristics that were seen as unchangeable and defective in the days of institutionalization—to those with mental disabilities has led to some of the most insidious explicit bias, dehumanization, and prejudice imaginable. People were likened to inanimate objects incapable of change and assumed to possess the same characteristics as every other person in their group or category using primitive social constructs. Some individuals with criminal records still are subject to this kind of essentialist explicit bias. Essentialism leads to stereotypical thinking and attitudes toward groups of people, such as a registered sex offender who is shunned by neighbors.

Looking at essentialism in criminal cases, we see that defense attorneys' good intentions have sometimes backfired. Take psychopathy, for example. Some defense attorneys have introduced MRIs at sentencing as a mitigating factor showing that the actions of the person were beyond their control. However, prosecutors use that

same information and argue that the person is predisposed to violence and deserves a harsher sentence. Prosecutors would be playing on the essentialist tendencies of people through an implicit bias that human beings have toward those with a perceived unchangeable nature. In contrast, some research indicates judges are able to overcome their implicit bias in this regard. In a study with 181 state judges who were given explanations of a disability and its impact on behavior in hypothetical cases, most of them gave shorter sentences than judges without explanations. Researchers believe evidence of a disability might produce a net aggravating factor for juries and a net mitigating factor for judges at sentencing.[16]

C. Sanism

The term "sanism" was first used by New York attorney and physician, Morton Birnbaum in an article published by the ABA Journal in 1960 titled *The Right to Treatment*. In this groundbreaking piece, Birnbaum argued that if a mentally ill patient were confined against their will, they had a legal right to proper treatment. Birnbaum defined sanism as "irrational thinking, feeling and behavior patterns of response by an individual or by a society to the irrational behavior (and too often even the rational behavior) of a mentally ill individual." Birnbaum continued that "It is morally reprehensible because it is an unnecessary and disabling burden that is added by our prejudiced society to the very real affliction of severe mental illness."[17]

Professor Michael Perlin defines sanism more pungently as " an irrational prejudice against people with mental illness, [that] is of the same quality and character as other irrational prejudices such as racism, sexism, homophobia, and ethnic bigotry that cause (and are reflected in) prevailing social attitudes." It "infects both our jurisprudence and our lawyering practices [and] is largely invisible and largely socially acceptable." Perlin concludes that sanism is based "predominantly upon stereotype, myth, superstition, and deindividuation and is sustained and perpetuated by our use of alleged 'ordinary common sense' and heuristic reasoning in irrational responses to events in both everyday life and the legal process."[18] Focusing on the legal system, he gives examples of sanism, particularly in the context of adoption, civil commitment, forced medication, and the insanity defense. Professor Perlin also warns against sanism hidden beneath good intentions. The previous story of Daniel Prude is an example of sanism, as well as of ableism.

Paradoxically, while sanist decisions are frequently justified as being therapeutically based, sanism often results in antitherapeutic outcomes. This happens in a wide array of circumstances: for example, those charged with minor felonies found to be insane who are committed to maximum-security facilities for many years longer than the maximum sentence they would have received if found guilty; those who

are indefinitely committed after being found incompetent to stand trial; and those who are forcibly medicated over their own objection even where there is a strong likelihood that neurological side effects may result.[19]

The criminal justice system has some serious sanist tendencies. It utilizes both archaic and demeaning language to describe the point of demarcation between a "sane" and "insane" person, which is still the benchmark terminology today used for criminal responsibility. It measures insanity by mental illness or "defect"—defect being a word we often think about when returning a product that doesn't work, not the description of a human being. Competing expert witnesses on both sides become the conflicting authors of the stories of defendants with mental health struggles or developmental disabilities, not those individuals themselves, who are merely a specimen for observation and description to the court.

Sanism puts defense lawyers who are in opposition to the concept somewhat at odds with their roles as advocates. Good lawyers will try not to exacerbate irrational prejudices but still have to convey why their client with a disability did what they did and is not a risk to the community. Defense lawyers may need to ask themselves how they adjust to represent their clients in an adversarial system that weaponizes sanist language against them while not giving up their integrity of a zealous representation in the process.

D. Intersectionality

The term "intersectionality" was first coined by Columbia law professor Kimberlé Crenshaw in 1989.[20] It describes how overlapping identities contribute to discrimination and oppression. In other words, multiple identities, usually of marginalized groups, raise the odds of becoming ensnared in the criminal justice system. We regularly see the impact of intersectionality, particularly, disability plus other factors such as race and socioeconomic level, in the criminal justice system.

In a chapter in the ABA's *State of Criminal Justice: 2020* titled *Advancing Equity for People in the Criminal Justice System Who Have Mental Illnesses*, social justice advocate Deanna Adams notes that people of color are frequently misdiagnosed, underdiagnosed, or incorrectly not referred for a mental health evaluation despite exhibiting behavior indicative of a mental illness. Black people, in particular, are 44% less likely to be referred for a mental health evaluation than non-Black people.

This misdiagnosis and disproportionality is often due to implicit and explicit assumptions of criminal justice decision-makers who are responsible for making mental health evaluation referrals. For example, as Adams explains, mental health referrals and evaluations may be influenced by biases, misunderstandings of socioeconomic or cultural differences, and other implicit or explicit assumptions, such as

that people of color or people of certain races are inherently criminal. To illustrate this point, people of color who are exhibiting behaviors indicative of mental illnesses are more likely to be seen as being "suspicious" or "criminal" rather than as having a mental health need.[21] Adams describes how screening tools are biased against people of color from low-income backgrounds. For example, screening questions ask if a person is taking medication or has ever been treated for a mental illness. But the significance of this questions is that within correctional settings, people of color with mental health issues are least likely to be given medication and treatment. They are also more likely to be subjected to an involuntary hospitalization, which can adversely impact their other responsibilities such as job and family rather than community-based alternatives.[22]

Use of force against people with mental disabilities is another area where intersectionality is at play, especially where there is a layer of race. For example, in September of 2020, West Sacramento Police shot and killed 88-year-old Robert Coleman, who was Black and in a mental health crisis. Coleman's family had called 911 to report that he had left home, had a gun, and was in crisis. The last point seems to have been lost as police found Coleman and fired at him some 23 times.[23] Coleman was Black, and "over the life course, about 1 in every 1,000 Black men can expect to be killed by police."[24] Coleman was also disabled, and researchers report that the majority of those killed by police have disabilities, including an estimated 27% with mental disability.[25]

Although men of color who are the victims of police-involved shootings are properly mourned and serve as catalysts for reform, there is a growing recognition that women of color—and women of color with disabilities or mental disabilities—are also victims of police shootings.[26] Cases where women of color with disabilities or mental illness are victimized by the police do not get the same attention as men. While many know George Floyd, Sandra Bland, whose death in prison was ruled a suicide, does not share the same name recognition in the media or society in general.[27] This is the inspiration behind the rapidly-growing movement of "Say Her Name," founded by Professor Crenshaw.[28]

Since the 1980s, members of law enforcement across the country have undergone a variety of different programs to assist with dealing with people with mental disabilities including Crisis Intervention Team (CIT) training. This 40-hour training teaches law enforcement how to recognize mental disabilities and de-escalate encounters. However, this is not a panacea, as evident by the number of law enforcement involved fatalities, even in departments where there has been CIT training.[29] It is imperative that individuals with mental disabilities themselves participate in, and help to implement, effective training strategies, as they are best-equipped to advocate their firsthand experiences and share the perspective of the disabled individual.

2. Interventions or Strategies for Participants in the Criminal Justice System

The criminal justice system would be more equitable if all players embraced the following strategies generally and specifically in dealing with persons with disability: (1) add a component dealing with mental disabilities to Implicit Bias Training; (2) incorporate people first language and other bias-free language in its policies, procedures and decisions; and (3) audit all facets of the criminal justice system for assumptions and barriers against people with mental disabilities just as they would assumptions and barriers against people with physical disabilities.

A. Training

Thankfully, more and more organizations and workplaces are sponsoring Implicit Bias Training for their members and employees. However, it is crucial that in addition to raising awareness about implicit bias based on race, gender, age, and sexual orientation, these trainings include a component about the unique concerns of people with mental disabilities.[30]

B. Using Bias-Free Language

Probably no other profession understands the power of words better than the legal profession. Criminal justice professionals should realize the profound impact their words have on the people involved in its proceedings and on the perception of fairness. The danger lies in our unintentional use of offensive terms, statements, and questions. Admittedly our awareness is continually evolving, and the courts are cognizant of this. For instance, in *Hall v. Florida*, 572 U.S. 701 (2014), Freddie Hall argued that he should not be executed because of his mental disability. In deciding that the Florida definition of disability was too rigid (an IQ of 70, while Hall's IQ was 71), Justice Anthony Kennedy opened his opinion with an impactful statement that the Court would use the term "intellectual disability" instead of "mental retardation."[31] Although *Hall* was decided in 2014, many people, including legal professionals, still use the outmoded language, including shortened, more offensive versions of it. After all, we still use the greatly offensive term "mental defect" as a standard for someone who is planning on preparing an insanity defense. Some attorneys, perhaps in an effort to humanize their clients, call them by their first names. But in regards to clients with mental disabilities, particularly those with intellectual or developmental disabilities, this could telegraph implicit bias.

Another way to reduce bias is to use "people first" language, which is now fairly widespread. We now say that someone is "a person with a mental illness" or "a person

with bipolar disorder" rather than saying someone is "mentally ill." Often, in personal encounters, it is wise to ask people what they want to be called and how they are most comfortable being described where a description is needed.

C. Re-examining Barriers and Assumptions

At bottom, the criminal justice system should examine its policies and trainings so as to reduce the assumptions and barriers against people with mental disabilities, the same way it would on behalf of people with physical disabilities or other marginalized groups or statuses.

The ADA defines disability as "A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment…"[32] The statute clearly applies to people with mental disabilities, but this aspect is often not enforced.

From the moment of the initial encounter with law enforcement, through interrogation, court proceedings, probation, and incarceration, the accused should be able to fully access and participate in the criminal justice process.[33] For example, is there any doubt among readers of this book that Part II of the ADA (which prohibits excluding qualified individuals from "the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"),[34] is rarely honored in the incarcerated setting? Prisoners with disabilities who have sensory issues are rarely given accommodations like ear plugs or sunglasses because it would be considered contraband. Individuals on the autism spectrum who are grouped by bunks in dormitory-like settings would find no privacy other than in solitary confinement. A mentally ill individual would have to detox off certain drugs cold turkey instead of being weaned off properly, leading to probable decompensation.

These situations are in part due to a lack of common definition and understanding. For example, no single, agreed-upon screening tool exists for individuals with autism or intellectual impairments upon intake in county jails. If individuals with autism or developmental disabilities show up at a county jail, they can be conflated with individuals with other mental illnesses or even mistaken for being intoxicated or under the influence of drugs. A screening tool could, at least, hint at the fact that the person may have a developmental disability, which would then require further analysis. These are all issues that have yet to be addressed in any meaningful way.

The advice in this section is applicable to all of us. In addition, some group-specific interventions follow to interrupt and mitigate implicit bias against people with mental disabilities.

3. Participant-Relevant Approaches to Implicit Bias

A. Judges

Judges should be keenly aware that mental disabilities are often invisible. They should also be aware that many individuals with mental disabilities, in order to avoid stigma or bullying, may mask or cover their disabilities. Moreover, every person manifests a different constellation of characteristics, and every person is capable of change. Knowledge of someone's disability has varying impacts.[35] All of these factors means that judges need to take time to learn the subtleties of different types of mental disabilities.

Sentencing provides an example. The defense expert opines that based upon psychological testing the accused has an intellectual disability. The presentence report states that the accused has a job at a bank and graduated from high school. Besides this, he "looks normal" and seems well-mannered (apart from his criminal charge). This scenario can be interpreted in more than one way, and judges should understand that these accomplishments do not contradict the presence of an intellectual disability. The defendant is not the president of the bank; he is a janitor. His duties are fairly rote, and he only was able to learn them after intensive work with a job coach. And although he graduated from high school, it was before the days of IEPs (Individualized Education Program), and social promotion was the custom in his hometown. Beneath his "normal" look is a very low IQ, and his good manners are the result of decades of wanting to please others. Therefore, judges should look beyond the initial appearance of those before them and perhaps even ask a series of questions to determine whether the person has a hidden disability.

Of course, judges are not trained mental health professionals. They rely on case-law, statutes, and guidelines in determining sentencing. Two recent California studies focused on autism are insightful on this topic. To determine the attitudes of judges toward autistic individuals who come before them at sentencing, the qualitative studies reviewed data over a course of years.[36] Not surprisingly, judges had varying attitudes and biases. Many viewed autism as a mitigating factor, but some viewed it as an aggravating factor. The study revealed an implicit bias that autistic people have no impulse control and are stubborn; this perceived lack of impulse control led one judge to conclude autistic people are more dangerous if they cannot control their actions. Such explicit or implicit attitudes that autistic people are stubborn could have negative implications when it comes to a judge's perception that treatment would not help the individual rebuild his or her life. Just as we would never send a deaf person into an important meeting without a sign language interpreter, we should not send an individual with a social disability into a presentence interview where the probation officer is using neurotypical standards of behavior to judge remorsefulness. We strongly recommend the client's lawyer be present at such a meeting.

A growing population in the criminal justice system is comprised of older defendants who may manifest dementia. This is certainly an invisible disability, one that might be particularly difficult to accept in what were previously high-functioning, law-abiding individuals. For dementia as well as others with disabilities not readily visible on the surface, we should not assume that because someone doesn't appear to fit a stereotype or preconceived notion of what it means to have a cognitive impairment, that it is not present—and that it may constitute an impediment to functioning including complying with the terms of the court, probation, or perhaps jail or prison. In sum, when presiding over cases involving people with mental disabilities, to use Isabel Wilkerson's words, judges should resist the temptation to "prejudge complicated breathing beings in ways we are told never to judge inanimate objects."

Consider, too, that many nursing homes do not allow elderly residents to live there if they have been convicted of any kind of sex offense. Such was the case for 82-year-old Leonard Bailey of Florida, who hit his head in a fall and could no longer remember to take his medicine.[37] No nursing home would take him in. Who can take care of such a person if that individual has no family or friends in old age? Are we to put them out to pasture and in a complete state of helplessness because of a behavior of which they did not have any volitional control over at the time they committed the offense?

B. Prosecutors

Many people contend that prosecutors are the most powerful players in the criminal justice system, and with good reason. They have the ability to charge, and the power to indict is the power to destroy. The threat of mandatory sentencing can be a persuasive weapon in forcing a plea. They are often the gatekeepers for various diversionary programs, including mental health and other specialty courts. And they are often a powerful force in preventing the exoneration of the wrongly convicted.

Prosecutors should avoid the reflexive response of "he knew exactly what he was doing" when encountering an accused who raises a mental disability as mitigation, or presents an insanity defense. For example, a successful executive may have bipolar disorder, and during a manic episode, have killed someone. Or, a seemingly brilliant computer analyst with Autism Spectrum Disorder (ASD) may have been lured by an undercover police officer posing as an underage female. An often-fallacious argument made by those quick to assign guilt based on implicit bias is that they have met many autistic people, or people with bipolar or with Obsessive Compulsive Disorder (OCD), and those people would never do what the defendant is accused of doing. A common variant on this theme may go something along the lines of: *My mother is autistic, and she would never do that*. Or, *My brother is bipolar, and, even in a manic phase, he knows right from wrong*. Or even, *I am autistic, and I would never do that*.

The kind of thinking illustrated by these remarks is ableist and is classic stereotyping. It assumes that all neurodiverse people manifest their symptoms in exactly the same way in all situations and, thus, everybody in the same category should be held to the same standards. Not all diabetics go into diabetic comas, just as not all individuals with congestive heart failure have the exact same progression. Intuitively, this argument makes no sense on its face, but people still routinely use it. Let's go back to the seemingly brilliant computer analyst with Autism Spectrum Disorder. Is it possible to be brilliant in some areas and mind-blind in other areas? Our implicit bias and ableist assumptions would emphatically say such a discrepancy is not possible in human behavior. If one is a genius-level computer analyst, they cannot have factors that would clearly tell them something obvious to most people is against the law. This "ordinary common sense" attitude is the consensus reality of most prosecutors. Yet consider that a 2017 study by Klin *et al.* found that in a sample of children and adolescents with an average or above average IQ and a mean chronological age of 12.4 years, their mean interpersonal social age was 3.2 years.[38] This fact would have serious implications for the prosecutions of juveniles and adults on the autism spectrum. Also consider that measurements like the Vineland Adaptive Behavior Scales actually decrease with age for autistic people, meaning decompensation is likely for these individuals over the course of a lifespan.[39] Among other things, adaptive functioning involves daily living skills in social domains which rely heavily on interpersonal communication, being able to take the perspective of another person (known as "theory of mind") and emotional regulation. Therefore, it is possible to be intellectually brilliant but at the same time, unaware of social taboos which could actually involve inadvertent law breaking. Prosecutors must be aware of this counterintuitive fact in helping to guide them toward an appropriate adjudication for this population. Moreover, the growing use of neuroimaging is providing visual proof mental disabilities such as dementia and traumatic brain injury, and prosecutors should be open to that proof.

Prosecutors should also be cautious about accusing a defendant of malingering. Granted, a defendant may not have raised the issue of a mental disability before. That could be for a variety of reasons, including defense counsel's failure to recognize the need for an evaluation or to raise the fact that the client may not have had the resources to obtain a diagnosis prior to entering the criminal justice system. One way to guard against malingering would be for a forensic psychologist to use tests with malingering scales built in, such as the MMPI-2. Prosecutors also should keep in mind that to malinger a developmental disability would be extremely difficult for even the most brilliant psychopath. If those who know the defendant historically, such as parents, extended family, former bosses, therapists or former educators can help to verify that developmental milestones were not met and the defendant's file is backed up with data, it can alleviate the concern of malingering for prosecutors even if no current diagnosis existed prior to the arrest. Nonetheless, it might be a

good opportunity to secure the help the defendant needs in order not to re-offend, to keep the community safe, and for the prosecutor to fulfill his or her ethical duty to achieve justice.

C. Criminal Defense Lawyers

As with other segments of society, criminal defense lawyers (present company included) are also susceptible to all sorts of implicit bias, including ableist and sanist assumptions. In the spirit of Isabele Wilkerson's quote, we size up and make assumptions quickly, and then impose our own standards about how a "normal" client should behave. The following anecdote about an initial client meeting by Public Defender Alison Mathis about a young man on the autism spectrum is a good example. It illustrates that even a compassionate, dedicated, smart criminal defense lawyer like her can get off on the wrong foot with a client:

> When a client I'll call Dino and his mom came into my office for the first time, I did everything wrong. Dino was accused of a moderately serious assault against a convenience store owner, and he already had a significant juvenile record of which I was aware. The new offense was captured on video, and there were not really any legal issues to wrangle. This was his first adult offense. Sheepishly, his mother pushed him into my office nearly an hour late for our first appointment. "He was sleeping," she said quietly. "I didn't want to wake him up." I looked over at the clock on my desk. It was 1:45 p.m. I was irritated and showed it. I like my clients to take at least some interest in their own cases, and I disliked that his mother was so tentative that she "didn't want to wake him up" for an appointment in the mid-afternoon. "Sleeping? Isn't this case the most important thing in your life right now? More than that, aren't you supposed to be in school?" I asked. Silence. Dino didn't look up at me. His mom squirmed after a few seconds of me trying to make eye contact with him. "He… dropped out two years ago" she said. "Oh," I said, a little pointedly, "then do you have a job?" More silence. Dino drummed on the side of his chair with his fingers and looked out the window. "No, he's… not working right now." "Oh? What do you do? What do you want to do?" Silence. More drumming.
>
> "Hmmm… " I said, "Well, this isn't great. What are we going to tell the prosecutor and the judge? What are we going to tell them about you that makes them not want to send you to jail?" Silence. More drumming.
>
> At no point in the conversation did Dino or his mother tell me that he had been diagnosed with ASD. What I was reading as "bored, disrespectful, flippant teenager" was actually ASD.[40]

The second type of implicit bias we can fall prey to is that of being paternalistic toward our clients with mental disabilities, that is, presuming that we know best. One way we do this is the tendency to diminish the client with an intellectual/developmental disability, by, for instance, addressing only the parent in a meeting and talking about the client as if he or she were not in the room. And there are many other ways. We are not referring here to instances where our clients are clearly incompetent. Nor are we wading into the debate about standards for civil commitment. Rather, we are talking about our tendency to discount much of what they say because of their disability. When we do this, we may well miss important information. Hidden in their delusions, for example, may be a legitimate alibi or other defense.

What can be done? What strategies can we use to combat our own implicit bias as lawyers? For starters, we may need to get creative with how we communicate with our clients—or rather, be flexible in terms of how they communicate with us. If their preferred method of communication is visual, it might be appropriate to allow them to draw visual representations of what their recollection is, instead of asking them to verbally respond to a series of rapid-fire questions. We might have to illustrate our ideas to them through flow charts or visual depictions, rather than a verbal stream of information. Sometimes using a verbal command such as, "knock once for no, knock two times for yes" can simplify communication and may be appropriate when trying to elicit information from clients. Other times, it may simply just be giving them the space they need while they are overwhelmed until they are less overwhelmed and more comfortable communicating. Finally, like many clients, individuals with mental disabilities may simply take time to develop a sense of trust with their attorneys, and this may not happen at the first meeting.

There is, once again, a delicate balance that needs to be met between not being paternalistic and also appropriately relying on family members for help, more than we would in other cases. Many defense lawyers have made the observation, accurately so, that parents and guardians are much more participatory in the defense of their loved ones involving mental disabilities than the family member of the average client. This is to be expected and not resisted, so long as the client consents. If a client does not consent, the defense attorney's hands are tied. But we cannot emphasize enough the importance of historical accuracy in defending these individuals which may not always be possible to get directly from the client due to their communication challenges.

Make no mistake. We have a difficult task: to advocate for a client with a mental disability within a system not created for them, a system which often punishes them for manifesting the symptoms of their disability, and a system which treats the public health issue of lack of resources for people with mental disabilities as a criminal justice issue.

D. Jail and Prison Officials

When it comes to recommending strategies to end implicit bias in jails and prisons, we freely acknowledge that this calls for a wholesale change in philosophy and that effecting change in this environment may be particularly difficult. To begin, we need to look at the fundamental purpose of our jails and prisons in the first quarter of the 21st Century. Jails are primarily holding facilities for people awaiting the disposition of their case or serving sentences less than twelve months. They were never intended for long-term care, let alone treatment. They are managed by police and sheriffs, and, other than a few part or full-time medical staff, are run by people who didn't sign up to be social workers or medical personnel. In contrast, prisons are intended for people serving sentences of at least a year. And despite some well-intentioned efforts, the primary purpose of prison is to punish, not to rehabilitate, and certainly not to treat. Like jail staff, prison staff did not sign up to take care of people with mental disabilities, although approximately half the inmates have some sort of mental issue.

Both jails and prisons were designed according to ableists assumptions, that is, that all inmates must behave in a certain manner and conform to a strict set of rules. There is no tolerance for those who are incapable of doing so. A person can't follow the rules if they don't understand them. Many prison rules are "unwritten" and expected to be known or understood without any explicit, direct instruction. This presents a problem for many individuals on the autism spectrum, who need rules spelled out in a very clear and formal way. At the same time, any perceived behavioral infractions result in punishment, including the most inhumane practice of putting a suicidal inmate in solitary confinement, sometimes for years. Research shows that autistic people are less likely to encounter empathy from correctional staff due to their behavioral differences, likely due to implicit bias and exacerbating the problem of solitary confinement for this population.[41]

Only when we understand that correctional facilities are inherently not therapeutic environments will we begin to send those with mental disabilities to places where they can be treated and responded to according to their unique needs. We seem to understand this when it comes to, for example, crimes such as possession of methamphetamine, which can carry up to a 10-year prison sentence but where users often get probation. Yet, because many of the crimes committed by the developmentally disabled can be of a sexual nature, like stalking or voyeurism, such an extreme departure from the guidelines is quite rare. These types of crimes have mandatory minimums or plea agreements where probation is not an option, leaving these individuals to most likely to mentally decompensate in a prison setting. Might implicit bias be part of the reason why the default response is punitive and not restorative or therapeutic in these types of cases? After all, autism is not associated whatsoever

with psychopathy[42] and autistic people are likely to complete their probationary periods without a violation.[43]

In her compelling book, *Waiting for an Echo: The Madness of American Incarceration*,[44] Dr. Christine Montross details how Norway completely rethought and reimagined its philosophy of sentencing. Norway used to be like the United States, that is, it harshly punished for long periods of time, and still had a high recidivism rate. Then, it decided to upend that model. Now, their prisons are relatively humane: Inmates have rooms, and are given keys to their own rooms; staff is respectful of inmates; and sentences are short. In particular, inmates with mental disabilities are given medication and treatment with the recognition that they will be re-entering society upon release. The result: recidivism is low.

E. Police and Other Law Enforcement

Just as meaningful and significant change in our jails and prisons will only come through a change in philosophy about the purpose of incarceration, so too, change in law enforcement's behavior toward those with mental disabilities will only come through a change in how we see their roles.

This Chapter has already discussed the practices of police and other law enforcement, how ableism and sanism influence their actions, and how the phenomenon of intersectionality renders some individuals particularly vulnerable. This country is engaged in a dialogue about police reform, and the recent acts of violence against people with disabilities like Linden Cameron and Daniel Prude should inform that dialogue.

But, if we are going to acknowledge the impact of mental disability system-wide, we should also acknowledge that law enforcement itself is also vulnerable to the burden of disability, that is, to the cumulative impact of work-related trauma on their conduct. We should acknowledge that law enforcement sees some dreadful sights. Simply because one officer is able to carry on in the face of danger and after witnessing a horrific event or events does not mean that another officer in immune to this.[45] The movement toward a trauma-informed criminal justice system should include law enforcement.

Conclusion

The issue of implicit bias against people with mental disabilities in the criminal justice system is one worthy of further study, discussion, and analysis. We hope that this Chapter will provoke all this and that this brief introduction to the terms of

ableism, essentialism, sanism, and intersectionality will serve as a foundation. We also hope that our colleagues will adopt the strategies and interventions suggested and share their experiences in doing so.

So, You'd Like to Know More

- Implicit Bias, www.americanbar.org/resources/implicit-bias.
- Legal Reform for the Intellectually and Developmentally Disabled, www.lridd.org.
- Treatment and Advocacy, www.treatmentadvocacycenter.org.
- Nick Dubin, Autism Spectrum Disorder, Developmental Disabilities, and the Criminal Justice System: Breaking the Cycle (2021).
- David M. Perry & Lawrence Carter-Long, The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability: A Media Study (2013–2015) and Overview (2016).
- Disability Language and Style, National Center on Disability and Journalism, Resources Guide, https://ncdj.org/resources.

About the Authors

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Nick Dubin was diagnosed with Asperger's Syndrome (now Autism Spectrum Disorder) in 2004. He holds a Bachelor's Degree in Communications from Oakland University, a Master's Degree in Learning Disabilities from the University of Detroit Mercy, and a Specialist Degree in Psychology and Psy.D. from the Michigan School of Professional Psychology. He has authored many books on autism spectrum disorders including *Asperger Syndrome and Anxiety*, published by Jessica Kingsley Publishers. He also has personal experience of the criminal justice system.

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