

Seminar: Examining and Addressing Implicit Bias

Tuesday, [DATE], 3:00pm – 5:00pm

Location: Law 1404

Readings

- Sue Bryant and Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering in RACE, CULTURE, PSYCHOLOGY, AND LAW* (2004).
- Muneer Ahmad, et. Al, *Teaching Our Students to Challenge Assumptions: Six Practices for Surfacing and Exploring Assumptions, and Designing Action* (HANDOUT)
- Excerpt, GERALD P. LOPEZ, *REBELLIOUS LAWYERING, ONE CHICANO'S VERSION OF PROGRESSIVE LAW PRACTICE* (1992) (HANDOUT)
- Lenoard L. Riskin, *Knowing Yourself: Mindfulness in THE NEGOTIATOR'S FIELDBOOK*
- Take two tests including the race test and one of your choosing at <https://implicit.harvard.edu/implicit/demo/takeatest.html>

Faculty Background Readings/Optional Student Readings

- Angela Harris, *From "The Art of War" to "Being Peace": Mindfulness and Community Lawyering in a Neoliberal Age*, 95 California L. Rev. 2073 (2007).
- Leonard Riskin, *The Contemplative Lawyer: On the Potential Contribution of Mindfulness Meditation to Students, Lawyers and their Clients*, 7 Harvard Negotiation L. Rev. 1 (2002).
- Thich Nhat Hanh, *The Fourteen Mindfulness Trainings* (2012) at <http://plumvillage.org/mindfulness-practice/the-fourtee-mindfulness-trainings/>

Outline

Review: Guiding Principles of Cross-Cultural Lawyering (EAB)

1. All lawyering is cross-cultural
2. A non-judgmental approach towards yourself and your client promotes good learning and good lawyering
3. Remaining present with the client is an essential part of cross-cultural competence
4. Knowing yourself as a cultural being is a necessary process for cross-cultural competency
5. Implicit Bias

Provide background on implicit bias (AEG)– where it comes from, how it is developed, why everyone has it, etc. (goal is to shift blame away from student – no judgment)
<http://www.tolerance.org/activity/test-yourself-hidden-bias>

1. Background: everyone has a “mental residue” of bias. Categories give order to life and every day we group other people into categories based on social and other characteristics. It is important to understand our own possible biases in order to understand the roots of stereotypes and prejudice in society.

2. Naming: I know these are hard conversations, let's sit in the discomfort. If your comfortable you're either not paying attention or you shut down. Go ahead and acknowledge the discomfort. For some of you, this is so uncomfortable you might want to shut down. For example, you might say 'okay, then, we're all racist' or you might want to ease the discomfort by making a joke or you might feel like you already have the tools..." (Depending on the group, incorporate micro aggression and ironic racism.)
3. **Definitions**
 - a. **What is Implicit bias:** a positive or negative mental attitude towards a person, thing, or group that a person holds at an unconscious level. (in contrast: explicit bias is an attitude that somebody is consciously aware of having) cigarette smoking example
 - b. **Stereotype:** an exaggerated belief, image or distorted truth about a person or group – a generalization that allows for little or no individual differences or social variation (based on mass media, reputations passed on by parents, peers, etc.) can be positive or negative
 - c. **Prejudice:** an opinion, prejudgment, attitude about a group or its members. Can be positive but usual negative
 - d. **Discrimination:** behavior that treats people unequally because of their group memberships.
4. **How common is IB:** since 1998, over 4.5M ppl have taken the Implicit Association Test (IAT) online and data strongly suggests that many ppl hold IB toward members of certain groups
5. **Where does IB come from:** psychologists believe that the content of our IB are learned from the society in which we live. From a very early age, we are exposed to certain ideas over and over again (hello! Media) from the people we interact with and from the media. Over time, these ideas become so ingrained in us that they are activated automatically without our realizing it.
6. **Why is IB important:**
 - a. can predict certain behavior (how we treat certain ppl, whether we will binge drink, and even if we may attempt suicide. Can affect how we evaluate job candidates. The more aware of IB and how it can influence us, the more we can limit its impact (this is Habit Five in the Bryant article)
 - b. **A growing number of studies link hidden bias and actual behavior.** In other words, hidden biases can reveal themselves in action, especially when a person's effort to control behavior consciously flags under stress, distraction, relaxation or competition.
 - i. **Also linked to unconscious behavior such as eye contact, blinking rates and smiles**
 - c. In the courtroom: Criminal path
 - i. So many times IB can come up: whether a person is stopped, whether frisked, whether they are arrested (v warning),
 - ii. Minorities are treated worse than whites in prosecutors' charging decisions
 - iii. Judges: no reason to think that judges are immune to IB (they are human too, of course) – study shows that judges who were given the race attitude IAT to judges (representing different judicial districts)

- and white judges showed strong implicit attitudes favoring whites over blacks.
- iv. Researchers went further and did testing on judges with vignettes (designed scenarios to see how this would play out)- and found that judges who had a greater degree of IB against blacks (and relative preference for whites) were harsher on defendants (though the defendants were not racially identified)
- d. Effects of bias on interviewing and client relationships (discuss Tremblay reading)
- i. Much of what we know about interpersonal effectiveness is connected to cultural understanding, learned practices, and traditional customs.
 - ii. Discrete minority communities tend to share certain preferences, styles, patterns, and values that a better lawyer will understand that the culture background of a lawyer or a client matters – can affect how that person will respond to the lawyer –**client’s culture is relevant to being a good lawyer**
 - iii. Heuristics represent a method of inquire which employs generalizations and maxims to guide education or a learning process – they rely on generalizations which are not absolute, but are more tentative and preliminary
 - iv. A lawyer working with an ethnic minority client can neither assume that the CL’s cultural preferences do not matter, nor be certain that the specific difference of which the lawyer is aware will call for predictable variations in their interaction. The former is cultural imperialism; the latter, stereotyping. We need cross-cultural lawyering instead.
 - v. We can try to anticipate where differences may arise and the direction in which the differences are most likely to proceed
 - vi. You face risk of error in the dominant cultural direction if you ignore cultural differences (for fear of being wrong). It is more prudent to assume tentatively that the known generalizations apply, rather than they do not. – it’s just a preliminary orientation.

EAB/AEG: Discuss test

1. Establish that this is a confidential zone – obtain agreement (*We can’t expect/ask students to talk about their results but we can talk about ours and then ask for volunteers*)
2. This discussion will be like a guided reflection)
 - a. What did you think the test would say about you
 - b. What did you think when you were taking the test
 - c. What did the test say about you
 - d. Were you surprised, disappointed, angry, upset, shocked
 - e. Why

Open Discussion

1. Reinforce non-judgment rule
2. **Obtain agreement** that we should try to overcome implicit bias in order to be effective and good attorneys

Strategies for Ensuring Implicit Bias Does Not Affect Your Judgment

Mindfulness

1. Note on strategies: these strategies are also critical to adversarial or problem-solving strategies and techniques – you need a high degree of awareness about own habitual reactions, including thoughts, emotions and behaviors and discipline to decide which to follow to be successful in negotiation, mediation, client interaction, etc.
2. Mindfulness – Awareness Practice
 - a. Definition: being aware, moment to moment, without judgment, of one’s bodily sensations, thoughts, emotions and consciousness.
 - b. Jon Kabat-Zinn, who has worked to bring meditation practice into mainstream medicine, describes mindfulness as the art of paying attention “to what we already know or sense, not just in the outer world of our relationships with others and with our surroundings, but in the interior world of our own thoughts and feelings, aspirations and fears, hopes and dreams.” Mindfulness in the practice of law does not dictate a particular set of projects or a particular model of lawyering. Instead, mindfulness provides a framework for thinking about how individual action is tied to group process, how group process connects to institutionalized relations of power, and thus how transformational change at the interpersonal level is linked to transformational change at the regional, national and global levels.
 - c. It is a systematic strategy for paying attention and for investigating one’s own mind, a skill that one cultivates through meditation and then deploys in daily life.
 - d. Benefits: deal with stress, develop self-understanding (which helps clarify goals and motivations and understanding of others, feel compassion and empathy. Produces brainwaves associated with happiness. Improves emotional intelligence which more important than academic intelligence in predicting success at every occupation or profession. EQ entails five basic emotional and social competencies: self-awareness, self-regulation, motivation, empathy and social skills. Mindfulness develops the first four, which lead to the fifth.
 - e. We have talked a lot about the question – how can you represent clients from subordinated communities without reinforcing the subordination? Mindfulness requires lawyer to be aware of and intentional about the lawyers of the relationship with the client and situation involved
 - f. Employed at multiple large law firms, criminal justice system, law schools including Harvard and Yale
 - g. Allows awareness of deep assumptions and biases including those based on ethnicity or culture, psychological processes that interfere with decision-making.
3. Foundation:
 - a. Means being aware moment to moment without judgment of whatever passes through the senses and the mind – sounds, sights, smells, other bodily sensations, emotions, and thoughts and images.
 - b. We aspire to be aware of that we are hearing what we are hearing, thinking while we are thinking, etc.

- c. Gives us freedom – for example, if we become aware while interviewing a client, that our mind wandered to thoughts of next week’s football game, we can swiftly bring our attention back to client
- 4. **Exercise:** insight mediation.
 - a. focus on the breath – absorbed with it. Sit with feet flat on floor, hands on knees or thighs
 - i. settle yourself in by bringing attention to sound. Observe sounds as they arise, stay present, fall away without judgment – if your thoughts turn to the source of the sounds, notice that and return the attention to sound
 - ii. bring attention to breath at the place where it is easiest for you to notice – nostrils – as air enters and leave, in the chest or abdomen as they rise and fall
 - iii. if your mind wanders and you notice = mindfulness! Gently escort attention back to breath
 - iv. if you have trouble, silently note rising and falling, in and out, up and down
 - v. or count each exhalation until you reach 10 exhalations – then start over. If you lose count, begin again.
 - vi. Notice how your mind wanders and latches onto thoughts, feelings, sensations and then immediately bring back to breath
 - b. Advanced meditation: direct attention, one step at a time to bodily sensations, emotions, thoughts and then “bare attention” – nonjudgmental moment to moment awareness of whatever passes through any of the sense organs or the mind.
 - i. Extended Breath Meditation: allow your mind to follow the distractions
 - ii. How long: 15 minutes 2x/day going up to 30 and then 45 minutes
- 5. How to use Mindfulness
 - a. Before negotiation or mediation
 - i. Keep mind and body calm
 - ii. Give insight into issues or concerns that might bother you
 - iii. Most people have same core concerns: appreciation, affiliation, autonomy, status and role
 - 1. These manifest in thoughts and emotions and sensations – but using mindfulness you can prevent the concern from affecting your focus
 - 2. You may also be able to identify them in your counterpart and can address them.
 - b. If you feel antipathy toward another lawyer or party or insecurity,
 - i. you can use mindfulness to develop empathy and compassion – there are meditations designed to specifically develop positive emotions
 - ii. you can focus your mindfulness on your thoughts and intentions as they arise to make a discerning choice about whether to carry them out
 - iii. ex. Negative thoughts about counterpart or self. You may also notice thoughts or impulses about how to negotiate. Mindfulness allows you

to examine these thoughts and make discerning choice about whether to follow them. In other words, non-judgmental awareness provides a degree of freedom from impulsive and habitual patterns of behavior.

6. How do you remember to be mindful (on board)
 - a. Chose a few routine activities that you will always do mindfully
 - i. Walking, waiting for an elevator, waiting for a traffic light, doing dishes, answering the phone, transitions between activities, things that are irritating, like a horn or alarm.
 - b. When you feel agitated or an impulse or distracted, shift focus to awareness. It will allow you to think more clearly. It will free you from the effects of strong emotions that impair judgment
 - c. STOP technique
 - i. Stop what you are doing/thinking
 - ii. Take a breath
 - iii. Observe and open to the breath, bodily sensations, and emotions
 - iv. Proceed
 - d. Notice distractions to listening and keep listening
 - i. While you are listening to someone speak, try to really pay attention. This means you have to notice what you are not listening to – emotions, thinking about what you will say next, worries, bodily sensations, desires – and to bring attention back to speaker.
 - ii. Notice impulses to interrupt speaker – due to impatience, b/c you think you know what the speaker will say next, because you have something to say – and resist temptation
 - iii. Use silence and notice your and the other persons reactions to silence
 - e. Send good wishes to others
 - i. Try sending good wishes to others, mentally – to people you pass on the street, friends, enemies, lawyers and clients on the other side and observe any resistance you feel to doing this as well as your reactions.
 - f. Use mindfulness to reflect upon or review activities
 - i. Use meditation during a break or shortly after completing a significant activity, such as a negotiation for two reasons
 - ii. Help you in the transition, to decompress and detach, so you are present for what happens next
 - iii. In a pause your mind will automatically generate insights into what happened or about why you or others did what you did.
 - iv. Deliberately reflect on the practice – people find it helpful to call to mind any discomfort, unease, difficulty that might keep them from being more present

Confronting Assumptions (handout)

1. We need to recognize that cultural misunderstanding, bias, stereotyping occurs and to screen for it.
 - a. The Five Habits
 - i. Habit One: Degrees of Separation and Connection: frame work within which to analyze qs regarding how similarities and difference

between lawyer and CL may influence L/C interactions, particularly info gathering

1. Differences focuses us the possibility that misunderstanding/bias/and stereotyping may occur
 2. Similarities help us make connections
 3. Can be achieved via list, ven diagram, etc
 4. Effects of identification: help us see that we may be assuming things (if lots of similarities) or bridge gap of understanding if we have negative judgments (from difference)
- ii. Habit Two: The Three Rings
 1. Analyze the possible effects of similarities/differences on the interaction between the CL, lawyer, and decision maker (legal system) – how does culture affect a case
 - a. Assessing the legal claim
 - b. Assessing credibility
 - c. Legal strategy
 - d. Bones to pick with the law
 - iii. Habit Three: Parallel Universes
 1. Invites students to look for multiple interpretations for client behaviors – especially when the student is judging the client negatively
 - iv. Habit Four: Pitfalls, Red Flags, and Remedies
 1. Conscious attention to cross-cultural communication
 2. Instead of scripts, be conscious of the unique/individualized communication to explain concepts to clients – orient your communication to the client’s understanding; don’t assume that you know what is it
 - a. Look to red flags (are you talking too much and adjust your repertoire to ensure client communication)
 - v. Habit Five: The Camel’s Back
 1. We are cultural human beings – which means we carry with us our own biases and stereotypes – we are products of our communities; everyone has them
 2. We are less likely to allow biases to interfere when we are not stressed – bc we are more aware (we talked about this last week)
2. In practice – two examples
 - a. Assess similarities and differences – think of as many similarities and differences between yourself and your client – the more the better
 - i. *Ethnicity, economic status, marital status, race, social status, role in family, gender, language, immigration, nationality, sexual orientation, language, religion, education, age, physical characteristic, time, form of communication*
 - ii. Analyze the effect of these similarities and differences
 1. If too similar, may have trouble distancing self or make make assumptions about what will work for client based on what works for self
 - b. Practice confronting assumptions

- i. Ask a student to describe a client that that acting “poorly” by societal definitions (was late to an appointment, didn’t pay the rent, etc. another)
- ii. Split them into two teams and assign them one of the tools from handout (or, in smaller group, stay together as a whole)
- iii. EAB and AEG to sit in on each team
- iv. Except when/especially when
 1. example is a client fled her host country leaving her children behind. The inference could be that mothers don’t leave children in dangerous situations. Thus, host country wasn’t dangerous.
 2. People don’t leave their children in dangerous situations
 - a. Except when the mother made a safety plan for children
 - b. Especially when children are adolescents who could be targeted
- v. Parallel Universe
 1. Example - student cheated on closed book exam cutting and pasting wiki answers into exam, including hyperlinks. Parallel universe - that makes the shocking act seem the norm: student thought that closed book and closed notes was literal and that since on internet to take exam, could use internet. Also thought there was only one definition as answer.
- c. Bring group back together to discuss the application of the tool to the stor(y/ies) provided by students together

Take Aways

1. Ask the students to provide the lessons learned and the answer to the final question of the “guided reflection” - what will you do differently going forward. Every student should pick one strategy they will use.