

STATE BAR OF MICHIGAN

4th Annual Justice Initiatives Summit
Monday, April 29, 2013

Why Did I Do That?

THE SCIENCE BEHIND OUR DECISIONS



Summary Report

JI Summit “Why Did I Do That?” Summary Report

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Introduction

Nearly 70 leaders representing Michigan courts, law firms, bar associations, and community justice organizations gathered at the State Bar of Michigan on Monday, April 29, 2013 for the fourth annual Justice Initiatives Summit. “Why Did I Do That? The Science Behind Our Decisions” addressed the issue of unintentional bias in the justice system. Judge Cynthia D. Stephens, member of the summit planning group, opened by stating the purpose of the gathering. “We are here today to get better at who we say we want to be.”

Presentation

Background—The Science

Lawyer and scientist Kimberly Papillon led the summit. Her mission was to help participants understand how our brains make automatic judgments about people, who we think they are, and how we unknowingly affect their success or failure within the organizations we lead. MRI tests look at the body’s anatomy and see where oxygen is working in the brain and which area of the brain is activated in response to specific stimuli. Papillon noted the importance of where the oxygen is traveling. MRI tests produce visual evidence of where our brains process information. The area of the brain processing the information determines which judgments we make about the stimuli. The specific area creates a template with automatic judgments and affects the decisions we make about the people we are judging.

- The amygdalae are the brain’s fear, threat, anxiety, and distrust center. These two small, almond-shaped areas of the brain are also the source of human aggression and retribution.
- The ventral medial prefrontal cortex activates when we are asked to form opinions about people who are most like ourselves. It is open and accepting of information about people. This area of the brain allows us to judge others favorably and give ourselves a break.
- The dorsal medial prefrontal cortex activates when we are asked to judge those we believe are not like us. It provides a template that shuts out information. This area of the brain directs us to judge others harshly.
- The basal ganglia act as a cohesive functional unit and assist in deciding which of several possible behaviors to execute at any given time.

Executive functioning is the logical decision-making function of the brain and allows us to solve a puzzle using strategy. Both executive functioning and memory affect our decision making. Executive functioning is seriously reduced during amygdala activation. Memory stores our past experiences, facts, and data and we rely on it to make decisions. Factors affecting our ability to recall information include gender, ethnicity, and the way a person communicates. How we empathize with others matters, too.

Studies and Findings

Kimberly used audience participation to demonstrate the results of several MRI studies. Our decisions are affected by where our brain processes information. People think women are verbal, Asians are good at math, females are associated with family, and males with career. We misremember, judge, and decide based on stereotypes. We also make up information based on perceptions.

Studies show the amygdalae are activated for white people when they view black faces and specific characteristic of the face. This also occurs to a lesser degree with black people viewing black faces. Testing for facial characteristics by ranking afrocentricity on a 1 to 9 scale shows facial features affect decision-making; people believe black is bad and white is good. It is more difficult to assimilate black is good and white is bad. A regression analysis was used to study files of criminal defendants. Participants coded mug shots from 0 to 9 on an afrocentric scale. The findings showed sentences increased by 7-8 months for each point increased on the scale. Amygdala activation accounts in part for these disparities in sentencing.

Kimberly introduced the trust assessment study with drawings of young Superman on the left and Lex Luther on the right to further demonstrate that facial features make a difference. Skin color makes the largest difference in evaluating trust. Other features like shape of the head and eyebrows, level of indentation just above the nose, and area exposed around the eyes influence trust.

We also see the effect of amygdala activation in law firm settings when a minority person makes a mistake. As a result, it may be viewed as a negative on the person's record and be put on his HR file. Subsequently, he doesn't get invited to client meetings and he is talked about badly in the hallways. He may even be fired. An exercise in the afternoon session for law firms further explored this.

The Bob and Jim studies demonstrate the influence of both the ventral medial prefrontal cortex and the dorsal medial prefrontal cortex. Decision makers in appointment, hiring, and punishment settings were asked to identify themselves either as more like Bob (a religious Republican from the South) or more like Jim (a non-religious Democrat from the East Coast.) If you identify as being more like Bob, your ventral medial prefrontal cortex lights up when asked to judge Bob. Your dorsal medial prefrontal cortex lights up when you are asked to judge Jim. Whether a person is in or out of a group is affected by the same factors.

The resume study shows the same result. The same exact resume is provided to those with hiring authority, but one resume has a man's name and one has a woman's name. The man's name is chosen more frequently for hiring, even by women. People don't match women with careers as frequently as men. Similar results occur when the resume has a white-sounding name (Josh Fitzgerald) or a black-sounding name (Tyrone Jackson.) The white candidate will be chosen for hiring a much greater percentage of the time. We invoke an image without having an image to start.

Executive functioning affects our decisions and amygdala activation can influence decisions here. In a job interview, a candidate who does not look like you makes you a little nervous. You start the interview, feel nervous, and say to yourself, "I am a smart person, this candidate makes me nervous, and this candidate is not a good fit." This is sometimes relied upon as a gut feeling when, in fact, it is association with brain activity that leads one to lean in a certain direction respecting the candidate.

This is demonstrated in the pain empathy study. Caucasian people have high empathy for white hands being hurt. They have less empathy for black hands being hurt. Our brain sends a signal to numb our pain-empathy function. Pain empathy, misremembering, and threat levels show our brains working against us.

Conclusions

Bias is based on a lifetime of learning—we are all different. The most difficult people to teach fairness to are those who value fairness the most because they are unaware of their bias. They are uneasy realizing they may not know everything. Those professing bias are easy to teach.

Solutions

Kimberly introduced the group to the Implicit Association Test (IAT) developed by Project Implicit (<https://implicit.harvard.edu/implicit/>). About 4.8 million people have taken the test and the results are studied by Project Implicit. The test helps us understand complex decision making and can be used to begin our own solution seeking process. To make changes, we need to seek education on the topic. Papillon urged participants to take at least three of the 12 different IAT tests. Regression assessments can help. Forward-looking assessments help, too. Fairness increases when we write down factors and explain exactly what we mean. Fairness also increases when you think you are being watched, and even if you are monitoring yourself. Do a systemic self-assessment. Pull 20 to 30 cases every three months. Redact the names and fill out charts. Tell everyone in the office this is being done, and see if there is a pattern. Seek out people not like you to find similarities. Invite others in to your inner circle. Take your thinking out of the dorsal and put it in the frontal. Change your brain and change the process.

Reflection

Rodney Martin provided reflection. Our subconscious minds harbor bias we don't recognize. The good news is science is expanding our knowledge. The bad news is we must come to grips with our own bias. Rodney recommended the book *Thinking, Fast and Slow* by Daniel Kahneman. The book explains two systems of thinking. One is instinctual and uses the intuitive brain. The other is slower to judgment and uses the conscious brain. We need the conscious brain to monitor our intuitive brain, but the conscious brain can be lazy, especially when it is stressed or tired.

We should be aware of the halo effect—finding out one good or familiar thing about a person makes you assume other good things will follow. We also need to be aware of confirmation bias, our tendency to search for and interpret information in a way that confirms our preconceptions. Martin also referred to *Blink* by Malcolm Gladwell. We should slow our thinking and let others help us identify our bias, expand our experiences, and expand our comfort zones.

Breakout Sessions

Detailed notes are available for each of the breakout sessions.

Closing Plenary

Representatives from each breakout session provided a summary of their work.

Courts

The court group identified many things influencing how they judge litigants, especially those who are self-represented. Tone, balance of power, gender, and ability all come into play. The participants concluded training is key to understanding these dynamics and reducing bias. "We are now all advocates for unintentional bias training." Bias training can help decision makers find the middle ground between inaction and the Judicial Tenure Commission.

Bar Associations and Sections

The bar association group realized we each use our own experience to assign characteristics to others. We should look for ways to provide opportunities for others to demonstrate or learn leadership skills. Our leadership should reflect who we want in our group, and we must remember that oftentimes people must be invited to leadership.

Law Firms

This group identified 15 opportunities for bias in the law firm setting. Evaluating for advancement includes both objective and subjective information. Participants were alarmed to see they are using mostly subjective information. They identified a need for training to protect against bias.

Justice Partners

This group determined they have a fairness bias, but cannot stand on that alone. They will take what they learned and apply that knowledge to their respective organizations.

Closing Summary

Papillon commended the group for having the discussion and demonstrating great rigor in the task. She provided the group with “Ten Tools—Strategies for Increasing Fairness and Eliminating Unconscious/Implicit Bias in Decision Making.” She also provided decision-making analysis charts. She cautioned the group about feeling “morally credentialed” because that doesn’t mean there is no more work to do. She urged people to accept a new role to be fair and equitable and use our basal ganglia to correct the situations we find. Papillon developed a post-JI Summit course module with solution steps, periodic forward-looking solutions, and a self-assessment and study. This requires a 10 to 15 minute time commitment each week. In the near future, summit participants will receive the course modules over a four-week period.

Closing Reflection

Linda Rexer shared her response to the day. The studies are shocking, but the brain-function information was liberating for her because it tells us there is a path. She will make this personal. She fits in the group of those who have been morally credentialed for a long time but understand it’s not enough to simply want to be fair. Quoting Shakespeare’s *Hamlet*, Rexer said, “Nothing is good or bad but thinking makes it so.” Fairness is not enough but focus on personal action is the best way to prepare for broader discussions.

Kimberly Papillon

Kimberly Papillon is a nationally recognized expert on the subject of judicial and legal decision-making. She is regular faculty at the National Judicial College. She has delivered over 100 lectures nationally and internationally on the implications of neuroscience, psychology, and implicit association in the analysis of judicial decision-making to multiple audiences including the judges of the High Court of New Zealand, the National Council of Chief Judges of the State Courts of Appeal, the U.S. District Court for the Eastern District, the D.C. Court of Appeals, the National Council of Juvenile and Family Court Judges, and numerous other national judicial organizations. In the recent past she has delivered lectures to the Los Angeles and San Francisco County District Attorney's Offices, the United States Department of Justice, the United States Department of Education, and the judiciaries of Vermont, Washington, Nebraska, Texas, Idaho, and New Mexico. She has been appointed to the National Center for State Courts National Training Team on Implicit Bias, a "think tank" for national judicial education, and the National Center for Cultural Competence at Georgetown University's "think tank" for physician education. She has produced documentaries on neuroscience and judicial decision-making which have received national recognition. She is a member of the Cognitive Neuroscience Society.

Ms. Papillon is an attorney who served as the statewide fairness education project manager and senior education specialist at the California Judicial Council's Administrative Office of the Courts in the Education Division. Prior to that she worked as an attorney in large law firms representing Fortune 500 Companies, government entities, and tech start-ups. Kimberly has a BA degree from U.C. Berkeley and a JD degree from Columbia University School of Law.

Annual Justice Initiatives Summit

The Justice Initiatives Summit is a program of the State Bar of Michigan's Committee on Justice Initiatives. By invitation of the president of the State Bar, prominent public officials and other high-level stakeholders, justice initiatives leaders, individuals with expertise in state and national movements and trends, and "big thinkers" will attend. A Summit Cabinet consisting of the State Bar president-elect and executive director, the executive director of the Michigan State Bar Foundation, and two presidential appointees from the Committee on Justice Initiatives will be responsible for planning and execution. The Summit will provide an opportunity for all major players in justice initiatives issues to come together to exchange perspectives and information on the most important access to justice issues, and the challenges and opportunities facing Michigan and its legal community in the upcoming year. They will be informed of current JI work from a report given by the State Bar of Michigan executive director. The Summit will be convened in April so that the insights and perspectives of the Summit can be used in identifying issues to address and preparing the budget for the next bar year. Under extraordinary circumstances, a biannual Summit might be convened.

2013 Justice Initiatives Summit Cabinet

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Brian D. Einhorn
Rodney D. Martin
Linda K. Rexer
Hon. Cynthia D. Stephens
Janet K. Welch

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