

Foreword

*Paulette Brown, President of the
American Bar Association, 2015-2016*

As I write this foreword, my hometown of Baltimore, Maryland, is experiencing its own version of Ferguson, Missouri. This timely book addresses the deeply rooted perception of inequality and injustices experienced in Ferguson, Missouri, with a keen focus on the legal and social reverberations following the death of Michael Brown. But, it is also about Freddie Gray and Baltimore; Eric Garner and Staten Island; Walter Scott and North Charleston; Tamir Rice and Cleveland; Sandra Bland and Waller County, Texas; Miriam Carey and Washington D.C.; Laquan McDonald, Quintonion LeGrier and Bettie Jones and Chicago; and it is about so many other people and communities for whom we are not even aware. It is about recognizing that this perception is not a new phenomenon. At the core of this book is the serious need to address, in very broad terms, the state of our justice system, not only in Ferguson, but in America as a whole. It is about confidence in the judicial system and maintaining the rule of law.

In almost every highly publicized case of police using deadly force and killing unarmed individuals, the person killed was an African American male. These incidents have caused dramatic erosion in public confidence in the justice system and America's promise of equal treatment under the law.¹ Following the investigation of the incidents in Ferguson, former U.S. Attorney General Eric Holder found numerous injustices that were "not merely unconstitutional, but abusive and dangerous."²

I believe in America's promise of liberty and justice for all. We are a nation bound by principles undergirded by the rule of law. Those of us who are a part of the legal community can do better. As lawyers we are viewed as leaders. As members of the communities we are charged to serve; people naturally look to us for solutions. As the first woman of color to lead the American Bar Association (ABA) as its president in its

137-year history, one of my goals is to review and analyze diversity and inclusion in the legal profession, the judicial system, and the ABA. I created a Diversity and Inclusion 360 Commission to formulate methods, policy, standards, and practices to best advance diversity and inclusion over the next ten years. The Commission's work includes training resources concerning how neuroscience can affect decision making (known in some circles as implicit bias training). We will explore, for example, the possible impact of implicit bias in the decision by a Baltimore judge to set bail for a teenager who committed a misdemeanor offense and who turned himself in to the police at twice the amount of that set for police officers charged with murder, an obvious felony offense. Solutions must be developed to sustain confidence in our judicial system.

Change is necessary and begins at many levels, but it starts from within. First, we must recognize our own biases. We all have them. No one is exempt. I encourage everyone to take an Implicit Association Test (IAT). The test measures the test-taker's associations between groups of people, such as African Americans, LGBT people, and women; evaluations such as good or bad; and qualities such as nurturing, clumsy, or mathematically gifted. These implicit biases are often subtle and unbeknownst to us. Many people are surprised after taking the test, but come to understand its importance particularly in how our biases can unwittingly cause us to engage in behaviors that are not productive.

The biggest challenge, however, is not to merely identify these biases. The struggle is to figure out what we do once we recognize them. For those working in the justice system, from police to prosecutors and judges, and yes, even public defenders, the consequences have broad, far-reaching, and sometimes even fatal consequences.

Arguably, implicit bias is at the heart of our nation's "School-to-Prison Pipeline." It is the antithesis of the dream we had for *Brown v. Board of Education* 60 years ago. This phrase has become shorthand for the continuing failures in the education system where students of color are disproportionately, incorrectly, or overcategorized in special education; disciplined more harshly; stigmatized by lower than average achievement levels; and funneled directly from schools into juvenile justice facilities and prisons. Youth in America are processed in the criminal justice system and imprisoned at much higher rates than in other nations, and youth of color are disproportionately overrepresented at all levels of the juvenile justice system. For nonviolent youth,

interaction with the justice system often does more harm than good. A 2013 study, conducted by Brown University and the Massachusetts Institute of Technology, showed that young offenders who were incarcerated were a staggering 67 percent more likely to return to jail by the age of 25 than similar young offenders who did not go to prison. Moreover, youth who were incarcerated were more likely to commit “homicide, violent crime, property crime and drug crimes” than those who did not go to jail.³ It is with this type of backdrop that we find ourselves in Ferguson and places that are similar to Ferguson where residents don’t have the opportunity to experience access to justice.

There is no shortage of statistics to show us that implicit bias permeates our justice system. The disparities in police stops, charges filed by prosecutors, and sentencing decisions clearly show us that bias, race, and punishment are inextricably entwined. As legal professionals we have a role in ensuring that there are open and frank discussions so that we will not be contributors to the “fault lines.”

To that end, we, as legal professionals, also must do better to educate ourselves, our clients, and our legislators about the collateral consequences of criminal conviction. Oftentimes the consequences of sentences punish people in ways that are unknown at the time of sentencing. These actions that are triggered as a consequence of conviction disqualify people with criminal records from so many activities, including jobs and licensing, education and housing, and voting, among others. There are more than 1,100 federal collateral consequences alone, to say nothing of local and state laws, that operate so often as an insurmountable barrier for persons with a criminal record to get a job and pursue a normal life. In short, these collateral consequences can result in never-ending punishments that disproportionately impact minority communities, especially African Americans, who are incarcerated at nearly six times the rate of Caucasians.

For the last decade, the ABA has focused its advocacy efforts on overincarceration and federal policies that contribute to it. We have long had the view that federal sentencing policies are the single most important factor in the skyrocketing build-up of our state and federal prison populations over the past 30 years. The enactment and operation of mandatory minimum sentences for nonviolent drug offenders are the most fundamental and critical areas to reform. The ABA has never supported mandatory minimums and believes they are unsound as guiding principles in sentencing. They have resulted in very large numbers of low-level offenders going to prison, disproportionately

from African American and Hispanic communities, and today, an unsustainable fiscal and human burden.

Finally, implicit bias may play a deadly role in states where “Stand Your Ground” laws are in effect. The ABA’s National Stand Your Ground Task Force embarked upon a comprehensive legal analysis of the impact of the Stand Your Ground statutes, which have dramatically expanded the bounds of self-defense law in over half of jurisdictions in the United States. The study analyzes the degree to which racial or ethnic bias impact the construction, application, and/or operation of Stand Your Ground laws. In particular, the role bias may play in influencing the perception of threat precipitating the use of deadly force as well as its effect on the likelihood of selective or prejudiced investigation, prosecution, and/or immunity determinations.

This book comes at a critical time in our nation. It comes at a time when there is bipartisan agreement on over incarceration, the inappropriate use of deadly force, and the lack of fairness in sentencing. Now is the time for lawyers to take their rightful leadership role, use the power of our law licenses to ensure fair, just access to justice for all. I thank the contributors to this book for sharing their insights on the intersections of race, inequality, and justice in Ferguson, because as we have seen in Ferguson, Baltimore, and elsewhere, Ferguson’s fault lines not only are national, but have consequences for us all.

Notes

1. Cara Tabachnick, *Young People Have “Little Confidence” in Justice System*, CRIME REPORT, Apr. 29, 2015, <http://www.thecrimereport.org/news/articles/2015-04-young-people-have-little-confidence-in-justice-system>.

2. Rebecca Kaplan, *Eric Holder: “Implicit and Explicit Bias” in Ferguson Policing*, CBS, Mar. 4, 2015, <http://www.cbsnews.com/news/ferguson-policing-eric-holder-implicit-explicit-racial-bias/>.

3. Zack Beauchamp, *Study: Throwing Kids in Jail Makes Crime Worse, Ruins Lives*, THINK PROGRESS, June 17, 2013, <http://thinkprogress.org/justice/2013/06/17/2166481/study-throwing-kids-in-jail-makes-crime-worse-ruins-lives/>.