

IMPLICIT BIAS AND ITS APPLICATION IN THE LIFE OF A LAWYER

Vol. 93, No. 2 March/April 2019 Pg 10 Yasir Billoo Featured Article

Early in my career, while I was litigating in Arizona, I met men and women from a local Native American tribe who believed it was disrespectful to look someone in the eyes during a conversation. Before I learned about their beliefs, every time I met with witnesses who were members of that tribe, I thought they were being untruthful. Later I found out they thought I was the one being untruthful because I was looking directly at them and trying to make eye contact. This is implicit bias.

The basic concept of “implicit bias” has been studied by academics for decades. Implicit bias does not involve overt prejudices, but rather learned biases gained from life experiences. These are ideas and preconceptions that reside just below the surface in our subconscious and guide our daily decisions and routines. Everyone has implicit biases, which range from largely benign preconceptions to extremely damaging prejudices.

Because the bias is implicit, as opposed to explicit, many people refer to it as a “hidden” bias. But, in the practical sense, it is not hidden because it appears in our normal daily tasks. Some biases are useful and need not be discarded. Believing all sharks are dangerous, for example, is a stereotype and an implicit bias, but also a healthy attitude for most individuals to hold. But any bias that reduces an individual to a simple idea or characteristic is likely wrong and harmful. For example, if you hear the word “religion,” does that have a positive or negative connotation? If you hear the term “Asian,” what image conjures in your mind? These are all examples of implicit bias, and each implicit bias affects our daily decision-making.

As lawyers, self-reflecting on implicit biases is particularly important. It is worth considering which of the implicit biases we hold are harmful, particularly to those individuals we come across in our professional lives. For example, if you implicitly believe religious people are not rational, how will that affect the way you treat your overtly religious clients? How will that affect the way a judge rules for or against a specific issue involving an overtly religious litigant?

The most widely used measure of implicit bias is the Implicit Association Test (IAT), a test developed by social psychologists Anthony Greenwald and Mahzarin Banaji in the 1990s.[1] The premise of the IAT is straightforward. If two concepts are closely associated or linked in the test-taker’s mind, they should be easier to pair.[2] If you believe, for example, that whites are better than blacks, then you should be able to pair white faces with positive adjectives more quickly than you can pair black faces with positive adjectives. If you do, you are said to have an implicit bias, making the following associations: white = good and black = bad. The IAT is not perfect, and there are questions as to whether it can predict the behavior of individuals based on their implicit biases.[3] For example, if I have an implicit bias against tall people — that all people taller than six feet seem angrier than those shorter than six feet — then does it not necessarily correlate to me making less tall friends and avoiding tall people altogether? Or can I overcome my bias against tall people? Still, the test helps to identify biases through simple associations.

According to Marianne Bertrand, an economics professor at the University of Chicago Booth School of Business, “[identical] applicants with white-sounding names are 50 percent more likely to get called for an initial interview than applicants with African-American-sounding names.”[4] Similarly, the Nextions 2014 “Written in Black & White” report[5] showed how identical memos written by hypothetical African-American and white individuals had substantially different feedback resulting from bias associated with race. A study by the American Bar Association[6] also uncovered a double standard for male and female parents working at law firms. New mothers tend to be penalized in pay and promotions because some employers assume they’ll be less committed, while fathers often get raises on the assumption their motivation will increase with a family for which to provide.[7]

A presentation on implicit bias by Schulman and Fong referenced a 2007 corporate leavers survey showing “24.6 [percent] of people of color would have stayed at their jobs if they had a more respectful work environment.”[8] They proposed that a firm’s understanding of implicit bias can help protect it against unnecessary turnover resulting from relatively insignificant, unnoticed subconscious acts — “small events which are often ephemeral and hard-to-prove, often unintentional and unrecognized by the perpetrator.”[9]

Thinking about implicit bias can help each of us navigate our own subconscious mind and challenge the ideas we have learned (either through education or through experience). If we are interviewing candidates, do we immediately believe a man will be less competent to work as a legal assistant than a woman? If we are meeting a client for the first time, and the client does not make eye contact with us, do we automatically believe the person is being less than truthful?

When we are aware of our biases, we can be cognizant of where they lie and not allow the negative biases to affect our decision-making within our professional lives. Such self-awareness will break down barriers and make our profession more diverse and inclusive.

[1] Project Implicit, Origins and Measurement with the IAT, Harvard University, <https://implicit.harvard.edu/implicit/demo/background/posttestinfo.html>.

[2] Project Implicit, Frequently Asked Questions, Harvard University, <https://implicit.harvard.edu/implicit/faqs.html>.

[3] Olivia Goldhill, *The World Is Relying on a Flawed Psychological Test to Fight Racism*, Quartz (Dec. 3, 2017), <https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism/>.

[4] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 *American Economic Rev.* 991 (Sept. 2004), available at https://cos.gatech.edu/facultyres/Diversity_Studies/Bertrand_LakishaJamal.pdf.

[5] Dr. Arin N. Reed, Nextions, *Written in Black & White* (2014), available at <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf>.

[6] ABA, *A Current Glance at Women in the Law* (Jan. 2017), available at https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf.

[7] *Id.*

[8] Janie Schulman & Stephanie Fong, Presentation, *Implicit Bias in the Legal Profession* at 39 (Jan. 17, 2014), available at <https://www.acc.com/chapters/sandiego/upload/Implicit-Bias-in-the-Legal-Profession.pdf>; Level Playing Field Institute, *The Corporate Leavers Survey, The Cost of Employee Turnover Due Solely to Unfairness in the Workplace, Executive Summary* (2007), available at <https://www.smash.org/wp-content/uploads/2015/05/cl-executive-summary.pdf>.



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