

Implicit bias deserves our explicit attention.



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The Bar Association of Metropolitan St. Louis (BAMSL) and the Minorities in the Legal Profession Committee of BAMSL recently sponsored a free CLE on “Implicit Bias in the Legal Profession.” Attendees received one hour of Ethics credit for their attendance. Follow up CLEs on implicit bias are forthcoming.

What are implicit biases? In brief, we all walk around with two sets of attitudes and beliefs: our conscious (explicit) attitudes and our unconscious (implicit) attitudes. Scientists believe that human consciousness takes up approximately 10 percent of our brain activity. That means that for most things, our unconscious mind is doing the work. Implicit biases exist within our unconscious mind. Our brains are bombarded with millions of bits of information every second. To avoid overload, our brains automatically categorize information into schemas that we use to guide us in our everyday living. Because nurses have historically been female, our schema tells us that the female medical professional walking up to us in a hospital setting is a nurse. Because the media often represents black males as violent, most of us become fearful at the sight of a black male approaching us. If our mind is exposed to a pairing on some regular basis, even if the pairing is not accurate, automatic associations can link the two in ways that can form stereotypes, some of which can be untrue (all females are not nurses) and negative (all black males are not violent).

We are all very familiar with conscious biases. I happened to be consciously biased in favor of my children. This does not mean that I dislike children who are not mine, but it does mean that I have a preference for my own. This bias I have shared with you is an example of conscious positive bias. Conscious biases can be negative as well. There are people who will readily admit that they do not like homosexuals or who believe that women are not good in math and science. A recent study demonstrated that many companies believe that most

blacks use drugs (this is not true by the way, as the study confirms).

Social scientists have confirmed we all have implicit biases (positive and negative) as well. Being implicit, they are strangers within, *mindbugs* so to speak, designed to make life easier for us to navigate. They often form the basis of those gut feelings and hunches we often rely on when making all sorts of decisions. These mindbugs do a lot of good, necessary work but there can also be improper categorizations. Because there is a clear link between automatic stereotypes and behavior, it is important to untangle automatic associations that can do harm. Part of what social psychologists are doing now is helping us expose our biases so that we can separate the good from the bad and make more informed and correct decisions.

Although there are a variety of techniques used today to uncover implicit biases, the “implicit association test,” (IAT) is probably the most well-known and most used. The IAT is the brainchild of noted psychologist Anthony G. Greenwald. Created in 1994, it can be accessed at: <https://implicit.harvard.edu/implicit/>. Takers of the test are asked, under time pressure, to link pleasant words with white faces and unpleasant words with black faces. They are similarly asked to associate pleasant words with black faces and unpleasant words with white faces. There are various other categories (weight, sexual preference, gender, age, skin tone differences, etc.). As of 2013, over 14 million people have taken these tests. Studies and meta-analyses have established that despite the best of intentions, most people who take the test: are much quicker to associate white with pleasant words than black with pleasant words, black with unpleasant words, than black with pleasant words, etc. Identical results maintain for preferences of lighter skin tones over darker, younger people over older people, heterosexuals over homosexuals and able bodied people over differently abled people.

The IAT has proven to be a good indicator of our cultural norms. Not only do people choose their mates, friends, employees, and political/social club leaders based on unknown biases, studies show that even some medical doctors provide different treatment to patients exhibiting identical symptoms based on skin color.

As in society at large, implicit biases operate in the legal world as well:

1) Studies have shown that federal and state judges and magistrates not uncommonly require higher bails and mete out longer sentences to blacks than to identically situated whites. Some studies even show that the more Afrocentric features a given defendant possesses, the harsher the penalty. Even Administrative Law Judges (ALJs) have documented differences in treatment based on the skin color of lawyers and parties in litigation before them.

2) Prosecutors (and lawyers generally – see Federal Judge Mark Bennett’s law review article) often strike blacks from jury pools on hunches at disproportionate rates, charge blacks for crimes at higher rates (indeed, blacks are arrested at higher rates, even in cases where evidence conclusively establishes that whites engage in the particular activity at higher rates—take drug use for example), are less willing to work out plea deals, and any plea deals offered are more likely to include incarceration for black defendants than with white defendants. Consider the two year study recently concluded by the Vera Institute confirming how race skews prosecutions. This “race effect” holds true for police officers making decisions on the streets as well. Even shooter bias studies show that blacks are more likely to be shot when simply holding a cell phone than a white person actually holding a gun.

3) Jurors are more distrusting of blacks (and the darker the skin, the more distrusting) whether those blacks are defendants, plaintiffs, witnesses or even lawyers.

4) Black judges are evaluated more critically in performance reviews than similarly situated white judges.

5) Some capital defense lawyers do not work as hard on the cases of black defendants as they do for their other clients.

6) In employment (hiring, mentoring, evaluations and promotions), implicit biases affect career trajectories:

a. A study by Nextions demonstrated that law partners across America evaluated the identical writings of ghost associates more harshly when the

Continued on page 21.

Implicit Bias continued from page 17...

writer was believed to be a black male than a white male.

b. The June 2014 edition of *American Lawyer* revealed, in part, as follows: African Americans only make up 4.2 percent of the legal profession (physicians and surgeons are almost double!). They are 3.9 percent of the non-partner minorities in firms and only 1.9 percent of minority partners (equity partners are even less). Black associates speak of being passed by as white associates in their class are invited to lunch, golf outings, and mentored in hallways. Black lawyers also are not hired in the percentages that relate to their qualifications and potential. Studies of resumes with the only difference in the resume being the names reveal that white males are plucked for interviews over black males and over females.

c. Data shows that women lawyers, *of any color*, are not hired in their proportional numbers or qualifications in the market,

they face gender pay gaps at every level, and those differences increase exponentially as those women come up the ranks and these results manifest even when those women are not married and are childless.

Of course, there is the old psychological challenge of in-group/out-group dynamics: people generally tend to connect with and prefer people who look like them. So, if white male lawyers interview at law schools for potential summer associates, they are likely to connect with and recommend calling back white male students. This is a classic example of implicit bias. Unless we pay attention to this in-group favoritism we will continue to perpetuate the existing system. Change will not occur unless there is a positive, conscious shift in mindset.

There likely is a stranger within you, undermining your conscious beliefs, without your consent or knowledge. As Judge Michael B. Hyman on the Illinois Appellate Court, First District recently

noted, justice and fairness require that the legal community recognize the impact of implicit bias in its own environment with “the goal of prompting actions to ameliorate, and perhaps even prevent, its harmful consequences.” Exposure and conscious correction are our only hope of preventing harmful and often unintended consequences. This requires training of judges, lawyers, law students, jury consultants, and indeed everyone involved in the legal system, including jurors.

We are hard wired to automatically process information and place things in categories. But we can teach ourselves to catch potential mismatches and make conscious choices about whether the pair is, in fact, a match. We can do this but we will need willpower, commitment, dedication and sustained, conscious effort. Implicit bias deserves our explicit attention. ■