

Implicit Bias and Clients: An Overview

By Bide Akande – November 29, 2016

Increasingly, the legal profession has examined how implicit racial biases affect our justice system. This newfound interest is well deserved. Though our justice system relies on objectivity, we practitioners are not beyond the influence of our own humanity. Research from the fields of cognitive psychology, neuroscience, and social psychology reveals that "our seemingly neutral, logical, and reasoned judgments are actually influenced by unconscious frameworks of thinking about the world." See Nicole E. Negowetti, "[Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators](#)," 4 *St. Mary's J. Legal Malpractice & Ethics* 278, 280 (2014) (citing Ronald Chen & Jon Hanson, "[Categorically Biased: The Influence of Knowledge Structure on Law and Legal Theory](#)," [login required] 77 *S. Cal. L. Rev.* 1103, 1217 (2004)).

Our past experiences, prior assumptions, and even our unconscious attitudes greatly influence our present feelings, judgments, and actions. See Negowetti, *supra*, at 280 (citing Ziva Kunda, [Social Cognition: Making Sense of People](#) 211 (MIT Press 1999)). Underlying the thoughts and actions of every human being "is a complex system of unconscious judgments of people, places, and situations, of which we are unaware." Timothy D. Wilson & Nancy Brekke, "[Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations](#)," 116 *Psychol. Bull.* 117, 121 (1994). These unconscious associations cause us to have implicit biases toward others based on characteristics such as race, ethnicity, age, and appearance.

Unlike *explicit* biases (i.e., the attitudes and beliefs that we consciously acknowledge as our own), implicit biases infiltrate our automatic thought processes—unconsciously shaping our attitudes and actions to conform to stereotypes that we may not even know we possess. These implicit biases can pervade our thoughts and unknowingly influence our actions, causing us to act in ways inconsistent with our declared, and genuinely held, explicit beliefs. See G. Beattie, [Our Racist Heart? An Exploration of Unconscious Prejudice in Everyday Life](#) (Routledge 2013). All people are susceptible to implicit biases; even the most circumspect and socially conscious individuals can act according to their unconscious, implicit biases, which can lead to automatic, unintentional discrimination. See N. Dasgupta, "[Implicit Attitudes and Beliefs Adapt to Situations: A Decade of Research on the Malleability of Implicit Prejudice, Stereotypes, and the Self-Concept](#)," 47 *Advances in Experimental Soc. Psychol.* 233–279 (2013) (describing implicit bias as an "equal opportunity virus" that infects everyone). Implicit biases can affect our attitudes toward any group, although the recent focus within our profession has been on the implicit biases we form as applied to race and ethnicity.

Though the American justice system is designed to be colorblind, research suggests that the persons overseeing its operation are not. Our own implicit biases permeate our justice system, influencing how we interact with our clients, altering the trajectory of our cases, and shaping our legal practices. To stop implicit biases from distorting our justice system, we must learn to identify where, and understand how, our unconscious biases influence the judicial process. This article focuses on just one of these areas—how implicit biases work against our clients and affect their cases.

As litigators, we have an ethical obligation to pursue the best possible outcome for our clients. This is especially true for commercial litigation and white-collar criminal defense—two practice areas with high stakes. Effective advocacy may require looking beyond the merits and identifying other factors that may influence case outcomes. Given that all people hold varying degrees of implicit bias, a litigant must identify those individuals whose biases may come into play and how those unconscious biases can affect him or her. Broadly speaking, clients face implicit biases from two sources. First, a client's own counsel may possess biases that can influence the litigation strategy. Second, investigators, opposing counsel, judges, and jurors may have biases that influence the trajectory of a client's case.

How Our Own Implicit Biases Affect Our Litigation Strategy

Research suggests that our implicit biases can influence how effectively we represent our clients—even going so far as to affect what litigation strategies we pursue. Jean Braucher, Dov Cohen, and Robert M. Lawless demonstrated that lawyers disproportionately recommended that their black clients file for Chapter 13 bankruptcy, a more expensive and burdensome form of consumer bankruptcy than the less onerous Chapter 7 bankruptcy, which they recommended for white clients. See Braucher et al., "[Race, Attorney Influence, and Bankruptcy Chapter Choice](#)," 9 *J. Empirical Legal Stud.* 393–429 (Sept. 2012); Arizona Legal Studies Discussion Paper No. 12-02; Illinois Public Law Research Paper No. 11-17 (2012). The results of this study showed that lawyers pursued Chapter 13 bankruptcy for black clients at twice the rate for their white clients, identifying race as the only differentiating factor between these clients. *Id.*

The same study discovered that bankruptcy attorneys were more likely to recommend Chapter 13 to the hypothetical debtors named "Reggie and Latisha" (names more commonly associated with black Americans) than to "Todd and Allison" (names associated with white Americans). *Id.* In addition, the attorneys viewed "Todd and Allison" as having better values and more competence when the couple expressed a desire to file Chapter 7. In contrast, the attorneys credited "Reggie and Latisha" with these same values only when this hypothetical couple expressed a preference for Chapter 13. The authors concluded that these implicit biases may explain why African Americans have the highest rates of Chapter 13 filings. *Id.*

We may try to point to alternative explanations for why we would pursue Chapter 13 bankruptcy for "Reggie and Latisha" and Chapter 7 for "Todd and Allison." Such attempts at justification may be a case of motivated reasoning—"the process through which we assimilate information in a self-serving manner." Sung Hui Kim, "[The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper](#)," 74 *Fordham L. Rev.* 983, 1029–34 (2005) (discussing and defining motivated reasoning). Generally speaking, motivated reasoning research suggests that we first make the decision we like—"a decision that may well be influenced by implicit factors"—and then validate our choice by changing our merit criteria accordingly to fit that decision. See Jerry Kang, Judge Mark Bennett et al., "[Implicit Bias in the Courtroom](#)," 59 *UCLA L. Rev.* 1124, 1156–57 (2012). For example, studies have found motivated reasoning at play in justifying the hiring of men over women with equal credentials. In the study *Constructed Criteria: Redefining Merit to Justify Discrimination*, the authors discovered that the study's participants consistently hired a male candidate over the female candidate regardless of which of the two character profiles had been assigned to each candidate. Eric Luis Uhlmann & Geoffrey L. Cohen, "[Constructed Criteria: Redefining Merit to Justify Discrimination](#)," 16 *Psychol. Sci.* 474, 475 (2005). In another study, participants subsequently redefined the merits of their hiring criteria to justify the hiring of a male candidate over a female candidate with identical credentials. See Michael I. Norton et al., "[Casuistry and Social Category Bias](#)," 87 *Personality & Soc. Psychol.* 817 (2004).

Studies have used the implicit-association test (IAT) in criminal settings to confirm that our own unconscious biases can affect how successfully we represent our clients. See, e.g., A.D. Lyon, "[Race Bias and the Importance of Consciousness for Criminal Defense Attorneys](#)," 35 *Seattle U. L. Rev.* 755–68 (2012). Generally speaking, "the IAT pairs an 'attitude object' (such as a racial group) with an 'evaluative dimension' (such as 'good' or 'bad') and suggests that the speeds of responses to the association of the two shows automatic attitudes and stereotypes, that is, implicit biases." Judge Mark W. Bennett, "[Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions](#)," 4 *Harv. L. & Pol'y Rev.* 149, 153 (2010). One study used the IAT to conclude that even capital punishment defense attorneys exhibited implicit racial biases. See, e.g., T. Eisenberg & S.L. Johnson, "[Implicit Racial Attitudes of Death Penalty Lawyers](#)," 53 *DePaul L. Rev.* 1539–56 (Summer 2004).

The good news is that we can prevent our implicit biases from influencing our client interactions. Counteracting implicit biases requires us to deliberately address our thoughts, question our own objectivity, and acknowledge the various ways in which our unconscious attitudes may affect our clients. See generally Said A. Mendoza et al., "[Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions](#)," 36 *Personality & Soc. Psychol. Bull.* 512, 514–15, 520 (2010); see also Margo J. Monteith et al., "[Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice](#)," 3 *Soc. &*

Personality Psychol. Compass 211 (2009). Conscious intervention becomes particularly important when we are overworked. "Overwhelming caseloads, imperfect information, and the need for quick decisions" can create an environment where we unknowingly allow our implicit biases to affect our judgments regarding which clients merit the most time and resources. L.S. Richardson & P.A. Goff, "[Implicit Racial Bias in Public Defender Triage](#)," 122 *Yale L.J.* 2626–49 (2013) (examining how such stressors increased the tendency for public defenders to unconsciously rely on their implicit racial biases).

How the Implicit Biases of Judges, Juries, and Opposing Counsel May Affect Our Clients

It is troubling that our *own* implicit biases can affect how well we represent our clients. Yet, with deliberate and conscious thought, we can control these biases and eliminate their effects. What is more troubling, perhaps, is just how much the implicit biases of *others* can affect our clients. Opposing counsel, judges, and jurors all possess unconscious biases that, when applied to our clients, can potentially change case outcomes.

Unconscious biases can affect criminal defendants at multiple stages during the course of a case. Before the case even starts, implicit biases may make it more likely for a racial minority to be a criminal defendant in the first place. Researchers have presented empirical evidence of negative attitudes toward African Americans (*see, e.g.*, Patricia G. Devine & Andrew J. Elliot, "Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited," 21 *Personality & Soc. Psychol. Bull.* 1139 (1995)), as well as evidence that people possess bidirectional associations between blackness and criminality. *See* Jennifer L. Eberhardt et al., "[Seeing Black: Race, Crime, and Visual Processing](#)," 87 *J. Personality & Soc. Psychol.* 876 (2004). These negative associations may explain why African Americans are investigated and arrested for suspected criminal activity at disproportionate rates in comparison with white Americans. *See, e.g.*, Sam Vincent Meddis & Mike Snider, "Drug War 'Focused' on Blacks," *USA Today*, Dec. 20 1990, at 1A (examining a 1989 *USA Today* study that found that, despite being only 15 percent of the drug-using population, 41 percent of those arrested for drug charges were African American); U.S. Dep't of Justice, Civil Rights Div., [Investigation of the Ferguson Police Department](#) (Mar. 2015) (finding evidence of racial bias by the Ferguson Police Department and stating that, from 2012 to 2014, African Americans accounted for 85 percent of vehicle stops, 90 percent of citations, and 93 percent of arrests made by Ferguson officers, despite accounting for only 67 percent of Ferguson's population).

As criminal defendants, racial minorities may receive less leniency from prosecutors and court officials. Statistical evidence suggests that racial minorities receive poorer treatment than whites in prosecutors' charging decisions. *See, e.g.*, Ruth Marcus, "Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions," *Wash. Post*, May 1992, at A4 (finding that, in nearly 700,000 criminal cases that were reported, whites were more successful than non-whites at virtually every stage of pretrial negotiations). In addition,

prosecutors commonly offer more generous plea bargains to white defendants than to black or Latino defendants; one recent report from the New York County district attorney's office found black defendants were 19 percent more likely than white defendants to be offered plea deals that included jail or prison time, despite both groups having committed comparable crimes. Besiki Luka Kutateladze & Nancy R. Andilorio, [Prosecution and Racial Justice in New York County—Technical Report](#), Doc. No. 247227 (Jan. 31, 2014).

Even judges and jurors possess implicit biases that lead them to perceive minority defendants as guilty more frequently than similarly situated white defendants. Implicit biases cause judges and jurors to unknowingly misremember case facts in racially biased ways. Justin D. Levinson, "[Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering](#)," 57 *Duke L.J.* 345, 355–56 (2007). In "[Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence](#)," [login required] 112 *W. Va. L. Rev.* 307, 319–26 (2010), Justin D. Levinson and Danielle Young discovered that the study's participants consistently rated a hypothetical defendant as guilty when that defendant's skin color appeared darker. This implicit association linking darker skin hues to guilt may explain why black criminal defendants consistently face harsher sentences than similarly situated white defendants. One empirical study revealed that black defendants are at least 30 percent more likely to be imprisoned than white defendants for the same crime. David Abrams et al., [Do Judges Vary in Their Treatment of Race?](#) (Inst. for Law and Economics, Research Paper No. 11-07, 2013). Researcher David B. Mustard discovered that federal black defendants received 12 percent longer sentences than white defendants under the Sentencing Reform Act of 1984. "[Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts](#)," 44 *J. L. & Econ.* 285, 300 (2001). Others have found evidence for disparities between black defendants and white defendants in their likelihood of receiving the death penalty. David C. Baldus et al., "[Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia](#)," 83 *Cornell L. Rev.* 1638, 1710–24 (1998).

Though the majority of these studies have focused on drugs and violent crimes, it seems likely that these results would carry over to minority defendants facing white-collar criminal charges. Police officers, prosecutors, jury members, and judges all possess implicit biases that unconsciously shape how they perceive our clients. These biases don't just disappear when one becomes an officer of the court. See, e.g., Rachlinski et al., "[Does Unconscious Racial Bias Affect Trial Judges?](#)" 84 *Notre Dame L. Rev.* 1195–1246 (2009) (discovering that trial judges were not immune to the implicit group favoritism displayed by implicit bias testing of the general population).

This article only scratches the surface of the various ways that implicit biases affect our profession. So far, we've primarily discussed how implicit biases affect our clients. However, these biases touch every party involved in the judicial process. For example, studies show that

black federal district judges are consistently overturned on appeal more often than white district judges, with a gap in reversal rates of up to 10 percent. This finding persists even after accounting for alternative causative factors such as previous professional and judicial experience, educational background, ABA-assigned qualification ratings, and differences in appellate panel composition, Maya Sen, "[Is Justice Really Blind? Race and Reversal in US Courts](#)," 44 *U. Chi. J. Legal Stud.*, S187–S229 (Jan. 2015).

Implicit biases are prevalent in us all. It is crucial that those of us in the legal profession learn about how implicit biases threaten the objectivity of our justice system. For more information regarding the formation of implicit biases, see, I.V. Blair, "[The Malleability of Automatic Stereotypes and Prejudice](#)," 6 *Personality & Soc. Psychol. Rev.* 242–61 (2002); see also L.A. Rudman, "[Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias](#)," 17 *Soc. Just. Research* 129–42 (June 2004).

To learn more about implicit biases and what you can do to counteract their effects, visit the ABA's [Implicit Bias Initiative webpage](#).

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