



## Get out of my head!

### OVERCOMING (IMPLICIT) BIAS

As members of the legal profession, we are committed to a dispute-resolution framework built upon principles of objectivity. There is the right to trial by an *impartial* jury, which the California Constitution describes as “inviolable.” (Cal. Const., Art. I, § 16; see also U.S. Const., Sixth Amendment.) The purpose of the *voir dire* process is “[t]o select a fair and impartial jury.” (Code Civ. Proc. § 222.5.) The Supreme Court of the United States boasts its motto on its western façade: “Equal justice under law.” Lady Justice is blindfolded, symbolic in modern times of justice being delivered objectively, fairly, and impartially. (See Kee, Rebecca K., *Justice for All?*, 65 Vand. L. Rev. En Banc 217, 221.)

Yet, we all must recognize that we are far from these ideals of impartiality, fair justice, and a lack of bias in the courtroom. Implicit bias rears its ugly head in the judicial process on nearly every level. For example, studies have found that judges hold racial implicit biases that influence their judgment, including setting longer sentences and higher bail for black defendants than for white defendants. (See, e.g., Rachlinski, Jeffrey J., et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1196-1197.)

According to available data, white and black individuals have different case-related motivations when serving as jurors. (Larson, Dale, *Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DePaul J. For Soc. Just. 139, 155.) Although there is much less reported on implicit bias for witnesses and attorneys, a basic understanding of the way implicit bias operates generally suggests that implicit bias is prevalent in relation to the credibility of witnesses and attorneys. Is a juror or judge more likely to believe a witness or attorney who is the same race? What about the same gender, age, socioeconomic class, political affiliation, or level of hygiene?

There is a discrepancy between ideals of impartial justice and the realities of implicit bias in society. Resolving this discrepancy requires understanding how implicit bias operates, the dangers it poses, and how it can be addressed. Do we admit to engaging in prejudicial or discriminatory thoughts or behavior? Should we? If not, why not? What keeps us from recognizing our own biases? How thin is the line between implicit bias (allegedly carried out in an unconscious manner) and explicit bias? How do we improve?

These are all questions this article seeks to explore. In doing so, we find that bias primarily stems from a lack of acceptance of differences among people in society. We must recognize that we cannot use the excuse of implicit bias, or the notion that some biases may be “implicit,” to perpetuate prejudicial attitudes or discriminatory practices. A more nuanced understanding of bias coupled with awareness of our own biases and the motivation to deal with differences in a socially healthy manner should lead to greater objectivity and impartiality in our profession and in our lives.



#### What is implicit bias?

“Implicit bias” can be defined as attitudes, beliefs, or stereotypes that affect one’s actions, decisions, or behavior in an unconscious manner. Breaking this down, there are two key components that make implicit bias what it is. First, there must be an attitude, belief, or stereotype that actually has an effect on the person. Secondly, the effect on the person must be done in an unconscious manner. If the actor is actually acting consciously on his or her attitudes, beliefs, or stereotypes, that is not implicit bias, but rather, explicit or conscious bias.

#### Is bias bad?

Theoretically, there are attitudes, beliefs, or stereotypes that may affect one’s actions or decisions in an unconscious and *favorable* manner. That notion raises a host of questions, such as: Is there such a thing as favorable unconscious bias? Is favorable unconscious bias bad (to the extent it exists)? Are we biased against bias?

Call me biased, but the purpose of this article is to highlight how implicit bias arises and how it may be overcome, starting with the premise that it is probably better to avoid implicit biases, or at least to recognize them in decision-making processes. Because implicit bias results in an unconscious effect on one’s actions or decisions, by definition it undermines ideal objectivity. Objectivity is typically seen as a good thing in society, especially in the law, so logically the elimination of implicit or unconscious bias should be a goal for each of us if we strive to

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be objective thinkers and actors in society.

The definitions of “bias” and “stereotype” highlight the notion that bias undermines objectivity. Black’s Law Dictionary defines “bias” as “[a] mental inclination or tendency; prejudice; predilection.” (Black’s Law Dictionary (10th ed. 2014).) To be biased is to exhibit prejudice, and the synonymy between bias and prejudice in society should not be disregarded. A “stereotype” can be defined as “[a] conventional, formulaic, and often oversimplified or exaggerated conception, opinion, or image of (a person).” (Wiktionary, <https://en.wiktionary.org/wiki/stereotype>.) To allow stereotypes to affect one’s actions, decisions, or behavior through the operation of implicit bias is to make judgments that oversimplify and distort who others actually are.

Moreover, the attitudes, beliefs, and stereotypes that form the foundation of implicit bias generally stem from negative associations society has placed on individuals that fall within minority classes such as racial minorities, women, and members of the LGBTQ community. They also stem from societal perceptions of the various other groups in which people belong, such as religious affiliations, political leanings, geographical associations, socioeconomic status, and so forth.

For example, if you are interacting with two people and one is an African-American, Catholic lesbian and the other is a straight, white, Buddhist male, your interactions may be colored not only by your experiences with those various groups of people (i.e., African Americans, white people, Catholics, Buddhists, lesbians, straight people, women, and men), but also by societal perceptions of those groups of people. If being a lesbian or being Catholic were illegal, for example, implicit bias may lead you to treat these two individuals with greater disdain or distrust. By the same token, if society views being straight or being Buddhist as socially preferable, implicit bias may lead you to treat these individuals with great respect and trust.

Because of these correlations, unconscious bias is inherently linked

with societal norms and frameworks such as sexism, racism, heterosexism, and other forms of discriminatory attitudes and structures. Let’s consider gender stereotypes, and the larger issues of patriarchic societal structure and sexism, as an example:

Enduring gender stereotypes, intertwined with racial stereotypes, shape automatic associations about women and have led to distinct norms of femininity. These phenomena culminate in different expectations of the temperament, behavior, and career choices of women and men. Gender stereotypes grow out of our historical and cultural understanding of the roles of men and women in society – many, or even most, of which are outmoded but continue to be powerful. Automatic associations about a gender group are established early in life and are consistently reinforced by cultural experiences, further entrenching gender-based stereotypes.

....

The science of implicit bias shows us how gender stereotypes affect our responses and assumptions even when we consciously disagree with them.

....

Implicit biases are powerful predictors of our behavior; among other things, research has shown that they can affect how we judge women’s competence for particular jobs, what salaries are offered in a negotiation, the level of respect given to women in workplace interactions, and whether girls are selected for an honors math class.

(Godsil, Rachael A., et al., *The Science of Equality, Volume 2, The Effects of Gender Roles, Implicit Bias, and Stereotype Threat on the Lives of Women and Girls* (2016), 11-12 (bullet formatting removed).)

Theoretically, there may be types of favorable or benign bias. However, the links between bias, stereotypes, socially created power structures, systemic forms of oppression of groups historically not in power, and ideals of impartial justice lead to a resolute answer: bias is *dangerous*.

## What are the sources of bias?

Perhaps the best way to understand the source of “implicit bias” is to examine the various types and/or categories of biases that exist that relate to unintended biased results. These are sometimes referred to as forms of cognitive bias, and they mainly include the following:

**Affinity bias:** The tendency to favor people like ourselves;

**Attribution bias:** The tendency to assess people in our “in groups” more favorably and to assess people in our “out groups” by less favorable group stereotypes;

**Confirmation bias:** The tendency for people to pay more attention to information that confirms their pre-existing beliefs or assumptions;

**Halo effect:** The tendency to shape beliefs about someone based on your overall impression of that person (i.e., letting one trait or a few traits govern your entire impression);

**Mere exposure effect:** The tendency to like something more because you are exposed to it or familiar with it; and

**Status quo bias:** The tendency to favor things that are familiar and to like things to stay the same.

(See, e.g., Micah Berman, *Manipulative Marketing and the First Amendment* (March 2015) 103 Geo. L.J. 497, 521; Nalty, Cathleen, *Strategies for Confronting Unconscious Bias* (May 2016) 45 The Colorado Lawyer 45, 45-46; Kendra Cherry, Very Well Mind, *The Halo Effect*, <https://www.verywellmind.com/-what-is-the-halo-effect-2795906> (last visited July 27, 2018); Rob Henderson, Psychology Today, *How Powerful Is Status Quo Bias*, <https://www.psychologytoday.com/us/blog/after-service/201609/how-powerful-is-status-quo-bias> (last visited July 28, 2018).)

Considering these different categories of biases and the way they appear in society is extremely useful to the larger understanding of the source of implicit bias overall. The common thread linking nearly any type or category of bias is that the biased reaction is based on some type of association with

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traits that separate us as human beings. The tendency is to gravitate toward people and traits who/that are either like ourselves or who maintain and reinforce societal norms, or both. (See generally, John T. Jost and Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness* (1994) 33 *British Journal of Social Psychology* 1.)

If one looks at the various *differences* in people, one may find that those differences affect the way we think about others, both consciously and unconsciously. This may seem obvious, but the hard part is recognizing when unconscious bias actually happens (versus it happening without notice), which is much easier to do if we realize that it stems from judgments of how people are different than ourselves.

Think for a moment about all the things that makes each one of us who we are. These include attributes such as:

- Race
- Ethnicity
- Gender
- Age
- Sexual orientation
- Skin tone
- Accent
- Physical disability status
- Socioeconomic status
- Height
- Weight
- Hairstyle
- Clothing style
- Cleanliness
- Education level
- Marital status
- Geographic location
- Occupation
- Politics
- Religion
- Sports affiliations

Now think of someone else, perhaps someone you are interviewing for a job, a witness who is testifying in court, or someone who is trying to give you advice. In doing so, consider the attributes of that person, such as the ones listed above. Then, consider three things in relation to each attribute: 1) whether the attribute is one that you share or is

different from you; 2) your life experiences related to that attribute; and 3) how society has treated, and is treating, that attribute.

If implicit or unconscious bias is in operation and goes unchecked, most of us will probably have tendencies to favor people who are either like ourselves or who are within socially common groups and closer to the status quo. For example, we may be reluctant to trust a witness who has multiple piercings and blue hair and a thick accent and is bisexual unless we have an extreme style, related to their culture or accent, or identify as a member of the LGBTQ community. That is the operation of affinity bias (the tendency to favor people like ourselves), attribution bias (the tendency to favor people in the “in groups” and reject those in the “out groups”), a form of reverse exposure bias (the tendency to distrust someone because they have attributes to which you have not been exposed), and status quo bias (the tendency to favor familiar things and perpetuate the status quo). If 85 percent of the population in our culture had multiple piercings and blue hair and were bisexual, those inherent biases may not exist.

### How honest is self-evaluation of bias, honestly?

As a final step, consider how much bias you may feel against the person you envision – meaning a reluctance to trust or believe the person – is actually, swear-on-your-life unconscious. Sure, we probably all would like to see ourselves as objective people, and to the extent we are not objective, we probably all would like to blame the lack of objectivity on forces beyond our control. If we were asked in a study, or by social scientist or psychologist, or even by the media, whether we intentionally favor certain groups of people over another (men over women, white over minority, straight over gay, upper middle class over poor, etc.), we would probably say no. No one likes to admit to being biased, particularly where that admission would mean that the bias is conscious and explicit, undermining the excuse of

“implicit” bias behind which we can all hide. But the reality is that we know ourselves, our life experiences, and what society accepts and rejects, and we all discriminate in some form. It is not simply a reflex, but a decision. This is true, even though our self-completed surveys indicate that we self-identify as completely objective.

### Is “implicit” bias an excuse to perpetuate discrimination?

Perhaps the answer to this question hinges on another question: Is “implicit” bias really *implicit*? Yes and no. The yes part is simple enough. We do not intend to be biased, but bias just happens. It comes from some part of us that we (may or may not, depending on our state of depravity) would like to think does not exist. It surfaces like the flexing of an involuntary muscle, or like a reflex that arises from the deep, and just happens. In this sense, the term “implicit” is a way to distinguish it from “explicit” bias.

The no part is more complicated. The term “implicit bias” may be a misnomer. The word “implicit” implies that something is within our nature, as though we are hardwired to react and behave in the ways we do. As such, to use the phrase “implicit bias” in some respects suggests that our actions, decisions, or behavior that are affected by our attitudes, beliefs, or stereotypes through the operation of bias is natural or unchangeable. In this sense, the term “implicit bias” connotes that the biased actor engages in actions, decisions, or behavior that he or she cannot control, diffusing that actor’s responsibility for biased, prejudicial, and discriminatory behavior.

We, as human beings, are not so hardwired to avoid taking actions and making decisions that recognize systems of oppression and discrimination in society. Discriminatory actions are not all reflexive. Being given the excuse of implicit bias – where we understand unconscious or unintentional bias as merely a product of things beyond our control and engrained within ourselves – perpetuates a sense of unaccountability

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for the true harm that bias creates. As such, we must make an effort to understand the sources of bias and learn ways of addressing bias so that its harmful effects can be mitigated. (See Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative* (2018) 50 Ariz. St. L. J. 193, 245 (“Discrimination remains a vibrant force in society and some of it is no doubt the result of unconscious or implicit bias. At the same, implicit bias does not explain all contemporary discrimination. ... [I]t is now time to return to holding individuals responsible for the choices they make and can control.”))

Bias may be described as “implicit” in the sense that any impartiality that is truly unintended stems from how society has taught us to view others and the power dynamics that underlie our interactions with others. However, the paradox, and the danger, is that the more the bias may be described as implicit, the more any one of us can raise our hands and say, “I didn’t mean to discriminate.” This is dangerous.

### How do we avoid unintended bias?

Avoiding, and perhaps overcoming, unintended bias begins with understanding ourselves. But it doesn’t end there. We can also make behavioral changes as well as systematic and structural changes in our lives and practices that challenge discriminatory practices and prejudicial thinking.

#### *Awareness*

It is imperative that we, as members of society and especially as members of the legal profession, do our best to remain *conscious* in our thoughts, words, and behaviors to avoid unintended bias. Increased awareness of our own biases, coupled with the motivation to avoid those biases, should lead to us being less biased in the long run. Greater awareness of our own biases and prejudicial tendencies can promote greater behavioral and systemic changes in our lives and practices to avoid bias, especially unintended bias.

It may seem tautological, but perhaps the first step in increasing awareness of one’s bias is to simply take the time to consider it. Actually take time to

do so. Ask lots of questions about what bias is, how it plays out in society, how it is harmful to society, and how it plays out in your own consciousness, life, and profession. Consider the unintended aspects of bias and question what your unconscious may be thinking.

Because unconscious bias is unconscious, there are clear challenges in attempting to understand our biases completely on our own. Fortunately, there are many resources to help us investigate.

Perhaps the most famous is the Implicit-Association Test (“IAT”), which is an assessment created in 1995 by a team of scientists from the University of Washington, Harvard University, and the University of Virginia that assesses bias in various fields including gender, race, weapons, career, weight, sexuality, and disability. (*Understanding Prejudice*, <http://www.understandingprejudice.org/iat/faq.htm> (last visited July 30, 2018).) It is counterproductive to expose the elements of the test, but know that the various IAT tests are available free online (<https://implicit.harvard.edu/implicit/takeatest.html>) with the caveat that the team of scientists who run the test, known as “Project Implicit,” use the online exams as a virtual laboratory to collect data. (Project Implicit, *About Us*, <https://implicit.harvard.edu/-implicit/aboutus.html> (last visited July 30, 2018).) The IAT has been both widely praised and criticized across the board by numerous fields (the details of which well exceed the scope of this paper), but it is a resource for exploring personal and unconscious biases. Other bias-inquiry tests include the Go/No-Go Association Test (“GNAT”) and a host of other semantic priming and lexicon/sentence-based exams that are neither as well known nor readily available as the IAT but still used in various fields to study unconscious bias.

Other resources for developing self-awareness of implicit or unconscious bias include various publications and other informative materials from organizations and institutes that incorporate bias study as a key component of their research and policy in an effort to improve society.

These include, by way of example, the Perception Institute, Ohio State University’s Kirwan Institute for the Study of Race and Ethnicity, and the Williams Institute (for LGBTQ studies) at UCLA School of Law.

#### *Behavioral changes*

While awareness of bias is a first step, awareness alone is insufficient to avoid and overcome unintended bias. Fortunately, research has shown that motivation is key: people who are motivated to challenge their biases and make an effort to do so are more likely to be successful in being less biased. (Rachlinski, *supra*, 84 Notre Dame L. Rev. at 1195, 1202; Jack Glaser and Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. Experimental Soc. Psychol. 164, 164-65, 170-71 (2008).)

There are a number of ways to change behaviors and thinking patterns to better control our bias impulses. Questioning one’s objectivity and actively doubting it, as well as finding ways to increase one’s motivation to become less biased, are two of the first ways to combat unconscious bias. Be introspective. Actively question yourself and your motivations. Dissect your interactions with others in various parts of life (at the office, in court, at the grocery store, etc.) Try to discover what you need to change about yourself to become a less prejudicial person. These steps are inherently linked to the process of increasing awareness of bias, but go a step further to secure the motivation necessary to affirmatively address and counteract unintended biases once they are discovered.

Secondly, find ways to actively recognize and counteract biases that you discover. This includes actions that involve both recognizing and conceptualizing differences in people in society. Recognize that blindness to differences is not the goal. All of us are different, and our differences can have value. Yet, there is a distinction in recognizing apparent differences and allowing harmful, socially constructed divisions between people of different races, gender, classes, ages, and sexual orientations to dictate one’s thinking.

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It is useful to be mindful of stereotypes and watch for snap judgments. Slow down your thinking and engage in mindful processing to avoid making rapid decisions that may include biased judgment. Expose yourself to people who are different from you. Learn about them and what makes them different, whether it be their culture, their lifestyle, or their motivations. Try to walk in the shoes of others and find commonalities that form points of connection between you and others in spite of your differences.

### Avoiding LGBTQ bias

Another key aspect to combatting bias involves the use of appropriate language and terminology. While some traits are obvious, others are not, and unintended bias can manifest in situations involving mutable characteristics. For example, consider LGBTQ status. Because heterosexuality is considered the norm, assumptions are made that someone is straight, or any notice of deviations from normal gender structures faces scrutiny, even if inadvertent.

If you are unaware of another person's sexual orientation, do not assume in conversation that they are straight. Avoid using pronouns (e.g., he/him, she/her) that make that assumption. Be sure to use correct terms when interact-

ing with transgender persons, transsexuals, or encounters with LGB couples and individuals, including terms that identify with the gender of their choosing. Do so in all aspects of conversation and oral and written argument. Avoid offensive slurs and other language that makes the LGBTQ community feel more marginalized. For example, use "gay" or "lesbian" instead of "homosexual" to be more specific and to avoid the historic clinical/disease association that the word "homosexual" carries. Avoid phrases where terms are qualified with "gay" or "homosexual" such as "gay relationship" (just say "relationship") or "lesbian couple" (just say "couple"). Use the phrase "sexual orientation" instead of "sexual preference" to avoid suggesting that LGBTQ status is a choice or something to be cured.

Apply this same level of cognizance and appropriate language sensitivity to other differences, especially mutable or non-apparent differences such as socioeconomic status, marital status, or specific ethnicity.

### Systematic and structural changes

There are numerous tactics for combating implicit bias on a structural level. If you hold any type of leadership position, be sure to set the right example and foster an environment of inclusion and embrace and celebrate diversity.

Ensure that there is protection for sexual orientation, gender identity, and gender expression in HR policies as well as for any other type of inclusion you want to foster.

In the workplace, avoid any practices that threaten an inclusive environment. Guarantee that all employees will not be denied any benefits or pay or face any other discrimination on the basis of falling within any protected class. Fully act on those guarantees, and avoid "glass ceilings" and other historical forms of subversive discrimination.

Consider having a Diversity and Inclusion Committee in your firm or organization to develop, evaluate, and achieve the goals and to foster progressive ideals and innovation. (For further breakdown and discussion on methods of combatting bias see, e.g., Nalty, *supra*, 45 *The Colorado Lawyer* at 47-50; *Godsil, supra*, *The Science of Equality* at 14.)

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