



2019 Annual Conference

March 13 -15 2019

Orlando, FL

## **Implicit Bias: Solutions Not Guilt**

### **I. Awareness Matters**

Implicit bias refers to unconscious attitudes and stereotypes that affect our viewpoints, actions, and behaviors in an unconscious manner. Implicit biases are often the product of learned associations and social conditioning. They often begin at a young age. Many people are unaware that they hold them. Implicit bias may be favorable or unfavorable and often conflicts with our conscious values and beliefs.

As claims professionals, attorneys, and experts we pride ourselves on being fair, fact based decision makers. However, studies show that unbeknownst to us, implicit biases may be distorting how we perceive and evaluate the facts we are presented. Being aware of our implicit biases allows us to control their impact on our decision making and prevent unconscious bias from clouding our decision-making. It also allows us to recognize and hire the best talent for handling claims, defending claims, and evaluating liability.

### **II. What is Implicit Bias**

A widely held belief is that discrimination arises from prejudice or an outgroup hostility. Implicit bias research suggests that most societally significant discrimination may be the effect of in-group favoritism. *Greenwald, (2001) Journal of Personality and Social Psychology, Vol. 81. No. 5. 800-814.*

Implicit bias is based on schemas or mental constructs for relationships, which create generalizations and expectations about places, events, activities, and people. We use schemas to navigate the incredible volume of data and input encountered in our everyday lives. The unconscious brain deals with the mundane and routine.

Schemas can be helpful in some situations but may lead to discrimination, inequity or unfairness in others. For example, shorthand schemas are helpful when tying shoes or driving. Often we perform these tasks as if on auto-pilot. Schemas may not be helpful in connection with race, general or cultural groups.

Cultural Groups may be defined as “... groups of people who consciously or unconsciously share identifiable values, norms, symbols, and some ways of living that are repeated and transmitted from one generation to another.” *ABA Building Trust: Improving Cross-Cultural Communication In The Criminal Justice System, Unit 2*. Examples of traits that define cultural groups include race, ethnicity, religion, gender, sexual orientation, national origin, family or professional status, etc.

Implicit bias filters how we process and act on information in our daily lives – often without any awareness. Generalized schemas may be developed from parents, friends, relatives, media, or life experiences and may or may not be accurate. For example, generalizations that professors are either smart or absent-minded may be deeply ingrained without much conscious recognition. Understanding the inherent nature of social categorization or schemas helps us understand implicit bias and its potential affects.

### **III. How Implicit Bias is Measured**

When researchers first began studying racism, they used study participants’ responses to surveys soliciting their conscious attitudes about race and gender. Researchers noticed that even as conscious attitudes towards racism shifted as evidenced by survey responses, there was little change in the representation of women and minorities in management and leadership positions. Researchers began looking for other factors that could explain the disconnect between our conscious attitudes toward race and gender and the apparent lack of change in hiring and promoting practices.

Mahzarin Banaji, a researcher at Harvard University, first noticed that the time it takes our brains to respond is tied to how concepts are aligned in our brains and in conjunction with Tony Greenwald at the University of Washington developed a series of associational exercises to study how quickly we associate commonly held stereotypes of race and gender with corresponding images. The test they developed is called an Implicit Association Test or “IAT.”

IAT measures and compares response times to evaluate unstated biases. The underlying theory is that we respond quickly to associations that fit with our schemas and implicit social cognitions (i.e. our unconscious social beliefs). They explain why policy officers who consciously abhor prejudice are still more likely to shoot a black suspect than a white suspect engaged in the same activities.

For example, it is easier and quicker to read the word red when it is written in red than when it is written in green.



Take the test: <https://implicit.harvard.edu/implicit/> Some researchers contend IATs are a better predictor of behavior than our expressed or explicit belief system. Implicit and explicit bias are interrelated but neither completely predicts bias or behavior.

### III. Implicit Bias' Influence on Decision Making

The impact of implicit bias on our decision making is well documented. Examples include:

- Researchers sent identical resumes to employers and found a 50% drop in interview callback rates for the applicants when they changed the names of the

resumes from Emily and Greg (signaling European ancestry) to Lakisha and Jamal (signaling African ancestry). Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON.REV. 991 (2004).

- Study participants shown photos of Black and White American men with neutral facial expressions perceived the black face to be more hostile than the white face, and the participant's implicit bias as measured by the IAT correlated to the degree of hostility the participant perceived. Jerry Kang, Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA Law Review 465, 481 (2010).
- Partners reviewing the identical third year associate memorandum, rated the memorandum higher and found fewer errors when the associate was identified as white than black. Reeves, A. N., *Written in Black & White" Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, file:///C:/Users/dawna/OneDrive/WritteninBlackandWhite%20mem%20study.pdf (2014-0404).
- Brain scans show the area of the brain that reacts to fear and "out-group" identification, the amygdala, activated more when participants viewed black than white male faces, and again the level of activation correlate to the participants' implicit bias as measured by the IAT. Phelps, E.A., O'Connor, K.J., Cunningham, W.A., Funayama, E.S., Gatenby, J.C., Gore, J.C. & Banaji, M.R., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activity*, 12 J. COGNITIVE NEUROSCIENCE 1-10 (2000).
- Study participants, including police officers, asked to indicate "shoot" or "no shoot" when shown images of white and black suspects holding lethal (e.g. a gun or knife) and nonlethal (e.g. a cell phone or wallet) objects reacted faster to shoot armed black than white suspects and faster to not shoot unarmed white than black suspects. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399, 400–01 (2003); Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010–13, 1015–17 (2007).

#### **IV. Implicit Bias in Legal Arguments**

Implicit bias cannot be ignored in legal arguments. One person's bias may be viewed as harmless behavior or a joke by someone else. What may be insignificant to lawyers or

their client may be very significant and perhaps even offensive to jurors or judges with different life experiences. Sensitivity to these differences is important to both lawyers and claims professionals. Take for example the case, *Marin v. Quinn, Emanuel, Urquhart & Sullivan LLP*, SDNY Index No. 17 CV 5488 (VEC).

The *Marin* case made national news when defense counsel argued a supervisor's use of a racial slur was simply a poor attempt at humor or a bad pun and was not evidence of discrimination. In declining to dismiss Marin's Complaint, the federal court judge opined that racial slurs cannot be characterized as a joke and especially not in an employment setting. In the same case, defense counsel argued there was no harm in a supervisor asking a black employee if they have ever been arrested because that might just be a sign of "solidarity" in "this time of Black Lives Matter." For litigators and claims professionals it is important to analyze the perspective of your opponent as clearly as your own.

## V. Debiasing - Solutions Not Guilt

The good news is the motivation and desire to be fair matters. An awareness and motivation significantly affects expressions of bias. Implicit biases can be changed when people are influenced when we "invest the effort to practice specific strategies to avoid stereotypic or prejudicial responses." *Dasgupta & Asgari, (2004). Seeing is believing: Exposure to counterstereotypic women leaders and its effect on the malleability of automatic gender stereotyping. Journal of Experimental Social Psychology, 40(5), 643.* Even steps as simple as visualizing counter stereotypic images such as strong female leaders and positive black role models has been shown to create a short term reduction (approximately 24 hours) in the impact of unconscious bias in decision making. Irene V. Blair, Jennifer E. Ma, and Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 831-32 (2001)

In addition to these intentional approaches, implicit biases can be changed by changing the "social context people inhabit rather than by directly manipulating their goals, motivation, or effort," with the longer the period of exposure to counter stereotypes, the greater the decrease in stereotypes. *Id.* 643-644.

Education and awareness are key. Challenging implicit bias through environmental exposures and social contact with diverse cultural groups is important. Arguing a case from both sides often provides critical insights.

The effects of implicit bias may also be reduced by allowing more time to evaluate key decisions points. The theory is that decreasing the amount and complexity of information processed in a short time period will lead to better outcomes. Said

differently, allowing time for conscious consideration, as opposed to quick decisions based on our bias or schema, may lead to better decision-making.