

## YOUNG LAWYERS

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# THE IMPLICIT FOUR-LETTER WORD: RECOGNIZING OUR PERSONAL BIAS

**Bias** — “[o]ur attitudes towards things like race or gender operate on two levels. First of all, we have our conscious attitudes. This is what we choose to believe. These are our stated values, which we use to direct our behavior deliberately ... But the IAT [Implicit Association Test] measures something else. It measures our second level of attitude, our racial, [gender-specific, sexual orientation and socioeconomic] attitude[s] on an unconscious level — the immediate, automatic associations that tumble out before we’ve even had time to think. We don’t deliberately choose our unconscious attitudes. And ... we may not even be aware of them. The giant computer that is our unconscious silently crunches all the data it can from the experiences we’ve had, the people we’ve met, the lessons we’ve learned, the books we’ve read, the movies we’ve seen, and so on, and it forms an opinion.”<sup>1</sup>

It is my goal to give you a quick and dirty primer to shed light on a topic that I feel certain will cause some of our membership to flip past my article based on the topic alone. The goal of this article is to give some insight into what implicit bias is and how we can combat it in our daily practice.

During my time as an Assistant Attorney General, on multiple occasions I was asked prior to the commencement of hearings if I was the paralegal for an Assistant Attorney General who had yet to make a timely appearance. My response was always, “No sir, I am the Assistant Attorney General handling this case.” Despite having received a wonderful education,<sup>2</sup> I have also been assumed to have been an affirmative action acceptance or hire. While one may not feel they are overtly racist, sexist or otherwise biased, bias does exist. The idea that bias can be manifested against one’s conscious will in all one

does is a premise that does not sit well with most people of the majority. Whether comfortable or not, it is an ugly truth in our society and justice system. It is such a truth that The Bar and the judiciary are making concerted efforts to educate attorneys and judges on the issue with the hope that personal awareness will help to eradicate it from our judicial system and process.

I do not believe that I am revealing anything that most could not have or have not yet discerned, but I am a female, minority member of The West Virginia State Bar and an assistant prosecuting attorney. Something that may not be so obvious when you are looking at me is that I, too, have implicit biases. Implicit bias is a stark contrast from explicit bias (e.g., overt racism, sexism, bias to sexual preference, etc.). Therefore, I must also be guilty of making decisions with my biases subconsciously bleeding into

them. I share that fact to illustrate that one's status as a member of the minority or majority community does not make one immune from implicit bias — in fact, no one is immune from implicit bias. It is, however, our responsibility as members of The Bar and officers of the court to both acknowledge that we all have biases and make a conscious effort not to allow those biases, whether positive or negative, to affect the way we deal with clients, witnesses, defendants, opposing counsel and judges.

“The problem [of addressing implicit bias] is compounded by judges and other court professionals who, because they have worked hard to eliminate explicit bias in their own decisions and behaviors, assume they do not allow racial [or gender] prejudice to color their judgments.”<sup>3</sup> I have attended and hosted CLE events that have included training on the topic of implicit bias, and I can personally attest that it is a topic that often appears to rub people the wrong way. If I had to wager a guess as to why that is, and this is only a guess, I believe that it is because it feels like one is being called a racist or sexist, and no one wants to be or feel like they are being labeled in that way. There is a reason that implicit bias is a hot topic that earns ethics credits and is being addressed in all professions. Having implicit bias does not demonize you; in fact, it humanizes you. The most egregious offense dealing with implicit bias is denying it exists and failing to account for such biases in practice.

Let's talk about what implicit bias is for just a moment. Implicit bias is not only limited to issues of race and gender, although those are two of the subjects that most often first come to mind. Let's further simplify the issue for a moment using fruit. “The research paints a picture of a brain that learns over time how to distinguish different objects (e.g., an apple and an orange) based on features of the objects that coalesce into patterns. These patterns or schemas help the brain process information efficiently — rather than figuring out what an apple is every time it encounters one, the brain automatically recognizes it and understands that it is red, edible, sweet and juicy — characteristics associated with apples. These patterns also operate at the social level.”<sup>4</sup> Implicit bias in society is defined as “an unconscious association, belief or attitude toward any social group.”<sup>5</sup> The problem is when the brain automatically associates certain characteristics with specific groups that are not accurate for all individuals in the group (e.g., ‘elderly individuals are frail’).<sup>6</sup> This unconscious association often results in the stereotyping of certain groups of people.

With a better understanding of how implicit bias

manifests in the subconscious of ALL human beings, it makes it simpler to accept that “[c]ognitive schemas — thought structures — influence what we notice and how the things we notice get interpreted.”<sup>7</sup> With this understanding, it is important to recognize these inner biases and do our best to be sure that these biases do not bleed into how we evaluate cases, clients, witnesses, opposing counsel and judges. There are many resources available to learn more about both implicit bias and combating it in the legal arena. You can take the IAT offered through Harvard's “Project Implicit” at <https://implicit.harvard.edu/implicit/takeatest.html>. The American Bar Association created the Joint Committee on Fighting Implicit Bias in the Justice System and offers several research articles and other resources to lawyers and judges.<sup>8</sup> Additionally, the ABA Section on Litigation's Implicit Bias Taskforce has developed an “Implicit Bias Toolbox” that is public for the use of the bar to give a short presentation to your firm, agency or local bar to address this topic.<sup>9</sup>

Always remember, “[s]ystems do not maintain themselves; even our lack of intervention is an act of maintenance. Every structure in every society is upheld by the active and passive assistance of other human beings.”<sup>10</sup> It is our responsibility as community leaders and members of The Bar to seek out and address injustices where we see them, and we must do so with our eyes wide open for not only the biases and injustice of others, but for inner reflection so we can put our best selves forward to solve these problems. **WVL**

## Endnotes

1. Gladwell, Malcom. *Blink: The Power of Thinking Without Thinking*.
2. I received my Bachelor's degree from University of Pittsburgh and my JD, MBA and LLM from West Virginia University.
3. Casey, Pamela M., et al. *Helping Courts Address Implicit Bias: Resources for Education*. [www.national-consortium.org/-/media/Microsites/Files/National%20Consortium/Implicit%20Bias/Helping-Courts-Address-Implicit-Bias.ashx#pg30](http://www.national-consortium.org/-/media/Microsites/Files/National%20Consortium/Implicit%20Bias/Helping-Courts-Address-Implicit-Bias.ashx#pg30), (last visited 10/22/2019).
4. *Id.*
5. Cherry, Kindra. *How Does Implicit Bias Influence Behavior?* <https://www.verywellmind.com/implicit-bias-overview-4178401>, (last visited 10/27/2019).
6. Casey, Pamela M., et al. *Helping Courts Address Implicit Bias: Resources for Education*. [www.national-consortium.org/-/media/Microsites/Files/National%20Consortium/Implicit%20Bias/Helping-Courts-Address-Implicit-Bias.ashx#pg30](http://www.national-consortium.org/-/media/Microsites/Files/National%20Consortium/Implicit%20Bias/Helping-Courts-Address-Implicit-Bias.ashx#pg30), (last visited 10/22/2019).
7. Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.
8. [https://www.americanbar.org/groups/judicial/committees/fighting\\_implicit\\_bias/](https://www.americanbar.org/groups/judicial/committees/fighting_implicit_bias/), (last visited 10/28/2019).
9. [https://www.americanbar.org/groups/judicial/committees/fighting\\_implicit\\_bias/](https://www.americanbar.org/groups/judicial/committees/fighting_implicit_bias/), (last visited 10/22/2019).
10. Taylor, Sonya R. *The Body is Not an Apology: The Power of Radical Self-Love*.