

DIVERSITY IN THE PROFESSION

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Implicit Bias Reference List

What is Implicit Bias?

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“Also known as implicit social cognition, implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages. In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.

A Few Key Characteristics of Implicit Biases

- Implicit biases are **pervasive**. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
- Implicit and explicit biases are **related but distinct mental constructs**. They are not mutually exclusive and may even reinforce each other.
- The implicit associations we hold **do not necessarily align with our declared beliefs** or even reflect stances we would explicitly endorse.
- We generally tend to hold implicit biases that **favor our own ingroup**, though research has shown that we can still hold implicit biases against our ingroup.
- Implicit biases are **malleable**. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques.”

<http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>

Reeves, A., *Diversity in Practice: What Does Your Brain See?*, Nov. 2012, available at http://www.nextions.com/wpcontent/files_mf/1352727388_magicfields_attach_1_1.pdf (“The research effectively disproves that any of us are ‘color-blind’ or ‘gender-blind.’ We ‘see’ race and gender even when those characteristics are undefined.”).

Implicit Bias in the Legal Profession

Jackson, Liane, *Minority women are disappearing from BigLaw – and here’s why*, March 1, 2016, available at http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why (“Studies and surveys by groups such as the ABA and the National Association of Women Lawyers show that law firms have made limited progress in promoting female lawyers over the course of decades, and women of color are at the bottom.”)

Greene, Michael, *Minorities, Women Still Underrepresented in Law*, April 16, 2015, available at <https://bol.bna.com/minorities-women-still-underrepresented-in-law/> (“Based on Department of Labor Statistics, the IILP [Institute for Inclusion in the Legal Profession] found that ‘aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs.’”)

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Rhode, Deborah L, *Law is the Least Diverse Profession in the Nation and Lawyers Aren’t Doing Enough to Change That*, May 27, 2015, (“Women constitute more than a third of the profession, but only about a fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans. . . . Although blacks, Latinos, Asian Americans and Native Americans now constitute about a third of the population and a fifth of law school graduates, they make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. In major law firms, only 3 percent of associates and less than 2 percent of partners are African Americans.”)

National Association for Law Placement Press Release, *Women, Black/African-American Associates Lose Ground at Major U.S. Law Firms*, Nov. 19, 2015, available at <http://www.nalp.org/uploads/PressReleases/2015NALPWomenandMinorityPressRelease.pdf> (noting in particular that the percentage of African-American firm associates has declined each year since 2009)

American Bar Association, *Summary Report and Recommendations From 2009 ABA Study of the State of Diversity in the Legal Profession, examining Race and Ethnicity Gender Sexual Orientation Disabilities*, April 2010, (citing as a top disappointment that “[t]he legal profession is less racially diverse than most other professions, and racial diversity has slowed considerably since 1995.”)

Lam, Bourree, *The Least Diverse Jobs in America*, June 29, 2015, available at <http://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/> (citing data from the U.S. Census showing that 81% of lawyers are white, topping the list)

New York State Bar Association, *Judicial Diversity: A Work in Progress*, Sept. 17, 2014, available at http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html (“People of color and women remain significantly under-represented on the bench. This under-representation most starkly manifests in our upstate judicial districts, but can also be observed in certain downstate districts with large minority populations”), at p. 8.

Strickler, Andrew, *How Minority Attorneys Encounter BigLaw Bias*, available at <http://www.law360.com/articles/795806/how-minority-attys-encounter-biglaw-bias> (“Minorities still lack a presumption of competence granted to white male counterparts, as illustrated in a recent study by a consulting firm. It gave a legal memo to law firm partners for “writing analysis” and told half the partners that the author was African American. The other half were told that the writer was white. The partners gave the white man’s memo a rating of 4.1 on a scale of 5, while the African American’s memo got a 3.2.”)

Negowetti, Nicole E., *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, University of Nevada Law Journal, Spring 2015, available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1600&context=nlj> (examining, at pp. 945-949, the relationship between implicit bias and lawyering and the impact on associate experience and retention: “[t]he nature of lawyering predisposes lawyers to evaluate each other using a subjective system of evaluation. Legal work contains discretionary judgment, a product of external factors and ‘the lawyer’s own character, insight, and experience.’ . . . Without specific metrics to objectively evaluate the quality of an associate’s work, stereotypes and implicit biases will influence one’s judgment.”)

http://www.abajournal.com/news/article/male_partners_make_44_percent_more_on_average_than_female_partners_survey_f/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email “Male partners make 44% more on average than female partners, survey finds,” ABA Journal, October 13, 2016.)

<http://abovethelaw.com/2016/03/high-minority-attrition-rates-continue-to-plague-large-law-firms/> (“A recent report in the *ABA Journal* showed that 85% of female attorneys of color in the United States will quit large firms within seven years of starting their practice, with a number surveyed stating that they “feel they have no choice.”) See also http://www.abajournal.com/mobile/mag_article/minority_women_are_disappearing_from_biglaw_and_heres_why

http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases (Partners “saw” more errors in memo attributed to black sounding name in study, even when memo was exactly the same.”)

http://www.abajournal.com/news/article/women_underrepresented_in_lead_trial_lawyer_positions_aba_study_reports

Implicit Bias in Employment

“Actions Speak Too: Uncovering Possible Implicit and Explicit Discrimination in the Employment Interview Process,” Therese Macan and Stephanie Merritt, *International Review of Industrial and Organizational Psychology* 2011, Volume 26 (2011).

http://www.huffingtonpost.com/2014/09/02/jose-joe-job-discrimination_n_5753880.html

https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html?_r=0

<https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html>

<http://www.usnews.com/news/articles/2015/07/06/its-official-the-us-is-becoming-a-minority-majority-nation>. See also <https://www.census.gov/quickfacts/table/PST045215/00> (showing declining numbers of “white alone” individuals in the United States).

Ian Ayres, When Whites Get a Free Pass, THE NEW YORK TIMES (Feb. 24, 2015), at A23, available at <https://www.nytimes.com/2015/02/24/opinion/research-shows-white-privilege-is-real.html>

<http://time.com/3666135/sheryl-sandberg-talking-while-female-maninterruptions/>

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Jessica Bennett, How Not to Be ‘Maninterrupted’ in Meetings, TIME.COM (Jan. 14, 2015)

Tonja Jacobi & Dylan Schweers, Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates, HARV. BUS. REV. (Apr. 11, 2017), <https://hbr.org/2017/04/femalesupreme-court-justices-are-interrupted-more-by-male-justices-and-advocates>.

<http://gap.hks.harvard.edu/orchestrating-impartiality-impact-%E2%80%9Cbld%20%E2%80%9Dauditions-female-musicians> (Implementation of blind auditions caused a surge in hires of female and diverse musicians in symphony orchestras.)

<http://www.nber.org/papers/w9873> (In an audit study of employer hiring behavior, researchers Bertrand and Mullainathan (2003) sent out identical resumes to real employers, varying only the perceived race of the applicants by using names typically associated with African Americans or whites. The study found that the “white” applicants were called back approximately 50 percent more often than the identically qualified “black” applicants. The researchers found that employers who identified as “Equal Opportunity Employer” discriminated just as much as other employers.)

<http://neatoday.org/2015/09/09/when-implicit-bias-shapes-teacher-expectations/> (“Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination by the National Bureau of Economic Research.”)

Implicit Bias in Criminal Justice

Incarceration rates for men and women of color continue to be significantly higher than those of white prisoners. A 2013 U.S. Department of Justice report cited that non-Hispanic blacks (37%) comprised the largest portion of male inmates under state or federal jurisdiction as compared to non-Hispanic whites, while the imprisonment rate for black females was twice the rate of white females. <http://www.bjs.gov/content/pub/pdf/p13.pdf>

Blind injustice: the Supreme Court, implicit racial bias, and the racial disparity in the criminal justice system, *American Criminal Law Review*, Summer 2014: http://ic.galegroup.com/ic/ovic/AcademicJournalsDetailsPage/AcademicJournalsDetailsWindow?failOverType=&query=&prodId=&windowstate=normal&contentModules=&display-query=&mode=view&displayGroupName=Journals&dviSelectedPage=&limiter=&currPage=&isableHighlighting=&displayGroups=&sortBy=&zid=&search_within_results=&p=OVIC&action=e&catId=&activityType=&scanId=&documentId=GALE%7CA375696910&source=Bookmark&u=mnamsumank&jsid=cce6cbf0363435a6bf3d6170d4b781a0

<http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> (Discussing colorism: “Other research explored the connection between criminal sentencing and Afrocentric features bias, which refers to the generally negative judgments and beliefs that many people hold regarding individuals who possess Afrocentric features such as dark skin, a wide nose, and full lips. Researchers found that when controlling for numerous factors (e.g., seriousness of the primary offense, number of prior offenses, etc.), individuals with the most prominent Afrocentric features received longer sentences than their less Afrocentrically featured counterparts. ... This phenomenon was observed intraracially in both their Black and White male inmate samples.”)

<https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> (The Department of Justice found reasonable cause to believe that the Baltimore Police Department engages in, among other things, a pattern or practice of conducting stops, searches and arrests without meeting the requirements of the Fourth Amendment and focusing enforcement strategies on African Americans, leading to severe and unjustified racial disparities in violation of Title VI of the Civil Rights Act and the Safe Streets Act.)

Implicit Bias in Education

<http://www.npr.org/sections/ed/2016/09/28/495488716/bias-isnt-just-a-police-problem-its-a-preschool-problem> (Study of pre-school teachers showed that 42% “saw” challenging/disruptive behavior by black children when there was none.)

<https://www.aft.org/ae/winter2015-2016/staats> (Understanding implicit Bias: What educators should know)

<http://kirwaninstitute.osu.edu/racial-disproportionality-in-school-discipline-implicit-bias-is-heavily-implicated/>
(Research shows that African American students, and especially African American boys, are disciplined more often and receive more out-of-school suspensions and expulsions than White students. Perhaps more alarming is the 2010 finding that over 70% of the students involved in school-related arrests or referred to law enforcement were Hispanic or Black. Citing to Education Week, 2013.)

<http://www.shankerinstitute.org/blog/what-implicit-bias-and-how-might-it-affect-teachers-and-students-part-i> (Research suggests that Black students as young as age five are routinely suspended and expelled from schools for minor infractions like talking back to teachers or writing on their desks. In a simple analysis of this phenomenon, the over-zealous application of “zero tolerance” policies gets all the blame, but a deeper dig will show a far more complex scenario.)

https://youthlaw.org/wp-content/uploads/2015/07/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-Literature-Review_061915.pdf (“The consequences for Black communities policed by biased officers has been tragic, but it can be equally consequential in schools, points out Becki Cohn-Vargas, the co-author of *Identity Safe Classrooms: Places to Belong and Learn*. “This is not about blaming or pointing fingers,” she said, but it clear that the decisions made by teachers also do affect children’s life trajectories. Unequal discipline, for example, may fuel the school-to-prison pipeline that has disproportionately affected students of

color. ...Whether or not a teacher “believes in” her students and expects them to succeed has been shown to affect how well that student does in school, particularly among disadvantaged students. But educators should be aware that those expectations can be influenced by their own implicit racial biases.”)

Page | 6 <http://www.shankerinstitute.org/blog/what-implicit-bias-and-how-might-it-affect-teachers-and-students-part-ii-solutions>

(Youth of color are overrepresented at every stage of the juvenile justice process. Much of the literature that discusses this overrepresentation focuses on racial disparities in the juvenile justice process itself. However, a comprehensive understanding of this racial disproportionality is not possible without examining racial bias in the “feeder systems” that funnel our children into the juvenile justice system.)

<https://www.npr.org/sections/ed/2016/06/20/482472535/why-preschool-suspensions-still-happen-and-how-to-stop-them> (black students — from kindergarten through high school — are 3.8 times more likely to be suspended than white students.)

Implicit Bias and the LGBTQ Community (Legal or Otherwise)

<https://www.sciencedaily.com/releases/2015/07/150723083718.htm> (U.S. Supreme Court’s positive ruling on same sex marriage caused a decrease in conscious and unconscious bias against gay people.)

<http://apps.americanbar.org/litigation/committees/lgbt/articles/fall2012-1212-reality-check-combating-implicit-bias.html>

(“Over the course of a career, the effects of implicit decision-making can lead to significant, detrimental consequences for the careers of LGBT lawyers. For example, in a law-firm setting, straight partners handing out choice assignments may subconsciously feel more comfortable working with straight associates and thus seek their assistance first, leading to fewer billable hours and less challenging work for LGBT lawyers. Because LGBT attorneys are less likely to choose traditional, opposite-sex family arrangements, LGBT lawyers and their straight counterparts can have social differences that might reinforce implicit biases in some settings. Or a referral source may have a subconscious concern that an LGBT colleague might be perceived negatively by the client or in a courtroom, and choose to pass the case along to a straight colleague.”)

http://lambdalegal.org/sites/default/files/jury-selection-dec2015_final.pdf (“Bias against people who are lesbian, gay, bisexual or transgender (LGBT) can influence jurors’ decisions.¹ Such prejudice can play out in any matter involving LGBT people, including sexual assault, hate crime, intimate partner violence or other criminal cases, as well as discrimination, tort or even contract disputes. But lawyers can conduct effective voir dire to uncover possible bias among prospective jurors.”)

https://www.huffingtonpost.com/cody-cain/religious-freedom-vs-gay-b_7718830.html (When people use “religious freedom” as a means to discriminate.)

<https://www.advocate.com/politics/2018/1/24/homophobe-sam-brownback-confirmed-religious-freedom-ambassador>

https://www.huffingtonpost.com/entry/opinion-signorile-gay-bi-men-murders_us_5a730f74e4b06fa61b4df141 (Hate crimes against LGBTQ individuals increased exponentially in 2017.)

Strategies for Interrupting Implicit Bias

<http://thehill.com/homenews/house/306480-115th-congress-will-be-most-racially-diverse-in-history>

<https://ncwba.org/wp-content/uploads/2016/11/Strategies-for-Confronting-Unconscious-Bias-The-Colorado-Lawyer-May-2016.pdf>

<http://nypost.com/2017/10/25/kelloggs-called-out-for-racist-cartoon-on-cereal-box/>

http://lambdalegal.org/sites/default/files/jury-selection-dec2015_final.pdf (“Studies show that people who have close friends who are LGBT tend demonstrate less anti-LGBT bias.”)

<https://www.usatoday.com/story/money/2017/04/27/whats-your-salary-becomes-no-no-job-interviews/100933948/>