

# Recognizing and Addressing Implicit Bias in Bankruptcy Proceedings

by

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***Implicit bias*** [ im-plis-it bahy-uhs ]: bias that results from the tendency to process information based on unconscious associations and feelings, even when these are contrary to one’s conscious or declared beliefs.<sup>2</sup>

“[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 attitude 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>3</sup>

## ***Everyone Has Bias***

To understand implicit bias, one must first understand schemas. Schemas are sets of propositions or mental constructs for relationships; they create generalizations and expectations about categories of objects, places, events,

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<sup>2</sup> *Dictionary.com* (2021).

<sup>3</sup> Malcolm Gladwell, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

activities, and people.<sup>4</sup> We use schemas to make sense of and navigate the incredible volume of data and input encountered every day. We have schemas for many objects—think about driving a car, riding a bicycle, picking a flower, or tying shoes. Once learned, these are tasks we do quickly without conscious thought or effort. The unconscious brain deals with the “mundane and routine,” while the conscious brain is the “mediator of novelty and learning.”<sup>5</sup>

We also have schemas for ourselves and other people, and these schemas also carry certain expectations. We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. Expectancies flow from our schema and social cognitions.<sup>6</sup> From this implicit schema, we tend to find explanations for contradicting behavior that go with our schemas. Such schema can predispose us to certain expectancies and to evaluate others in a way that confirms pre-existing biases.<sup>7</sup>

Using schemas, the brain takes in information and processes it in connection with its pre-existing patterns. Some researchers call the way the brain operates with schemas “unconscious cognition” or, in regard to people or groups, unconscious or “implicit social cognition.”<sup>8</sup> Social categories and stereotypes are kinds of schemas. We develop our generalized social categories and characteristics from many sources, such as parents, friends, media.<sup>9</sup> Our social categories can be either positive or negative, e.g., some think lawyers are smart, some think lawyers are motivated solely by money. They can also be accurate or inaccurate, helpful or unhelpful. And if one is not careful, schema can lead to discriminatory behaviors.

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<sup>4</sup> Douglas A. Bernstein et al., *PSYCHOLOGY 290* (8th ed. 2007).

<sup>5</sup> Merlin Donald, *How Culture and Brain Mechanisms Interact in Decision Making*, in Christoph Engel & Wolf Singer, eds., *BETTER THAN CONSCIOUS? DECISION MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS* 191 (2008).

<sup>6</sup> Willhem Hoffman et. al., *A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures*, 31 *PERSONALITY & SOC. PSYCHOL. BULLETIN* 1369 (2005).

<sup>7</sup> Susan T. Fiske, Daniel T. Gilbert, & Gardner Lindzey, eds., *HANDBOOK OF SOCIAL PSYCHOLOGY* 1090 (5th ed. 2010)

<sup>8</sup> Anthony Greenwald, *The Psychology of Blink - Part 1 of 2: Understanding How Our Minds Work Unconsciously*, Presentation, available at <http://www.youtube.com/watch?v=xRUs9Ni3Bv8&feature=related>

<sup>9</sup> Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotypes*, 40 *J. EXPERIMENTAL SOC. PSYCHOL.* 642 (2004).

In short, implicit bias is a lens through which we view the world—a lens which automatically filters how we take in and act on information, a lens that is always present.<sup>10</sup> The bias reflects a preference for a group (positive or negative), often operating outside our awareness, based on stereotypes (traits we associate with a category) and attitudes (evaluative feelings that are positive or negative) we hold that tend to develop early in life and tend to strengthen over time. While implicit biases do not necessarily lead to explicitly biased decisions or behaviors, they may well predict discriminatory nonverbal, subtle behaviors such as sitting further away or cutting interviews short, which behaviors are then interpreted as biased.<sup>11</sup>

### ***The Role of Implicit Bias in Bankruptcy Proceedings***

The potential influence of implicit bias on the bankruptcy profession and access to and delivery of justice is wide-ranging. Consider the following:

1. A 2012 study found that, after controlling for financial, demographic, and legal factors that might favor a chapter 13 filing, African Americans are much more likely to file chapter 13, as compared to debtors of other races. The same authors reported on a second study of a random sample of consumer bankruptcy attorneys who represented debtors. The study showed attorneys were more likely to recommend chapter 13 when the hypothetical debtors were a couple named “Reggie & Latisha,” who attended an African Methodist Episcopal Church, as compared to a couple named “Todd & Allison,” who attended a United Methodist Church. Also, attorneys viewed “Reggie & Latisha” as having better values and being more competent when they expressed a preference for chapter 13 as compared to “Todd & Allison,” who were seen as having better values and being more competent when they wanted to file chapter 7, giving them a “fresh start.” The authors suggest consumer bankruptcy attorneys may be playing a very important, although likely unintentional, role in creating the racial disparity in chapter choice.<sup>12</sup>

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<sup>10</sup> Jerry Kang, Nat'l Center for State Courts, NCSC, *Implicit Bias, A Primer* (2009), available at <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf> (“Kang primer”).

<sup>11</sup> Fiske, et al., *supra*.

<sup>12</sup> Jean Braucher, Dov J. Cohen, and Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, JOURNAL OF EMPIRICAL LEGAL STUDIES 9 (3):393–429 (2012).

2. Bankruptcy judges are the least diverse bench in the entire federal court system, even though Americans are more likely to go to bankruptcy court than any other federal court. Data supplied to the Brennan Center indicates that as of 2015, approximately 7 percent of active bankruptcy judges were people of color and 31 percent of bankruptcy judges were women. By contrast, nationally, people of color make up nearly 40 percent of the population and women make up half the population.<sup>13</sup>

How might implicit bias play a role in these situations? How does implicit bias affect other aspects of the bankruptcy process and proceedings?

### ***How Do We “Debias” in the Bankruptcy Practice?***

There are several techniques that lawyers and judges may use to reduce the impact of implicit bias. Intentional approaches include recognizing one’s implicit biases and responses<sup>14</sup> and investing in efforts to practice specific strategies to avoid stereotypic or prejudicial responses.<sup>15</sup> In addition to these intentional approaches, implicit biases can be changed by altering the “social context people inhabit rather than by directly manipulating their goals, motivation, or effort,” with the longer the period of exposure to counterstereotypes, the greater the decrease in stereotypes.<sup>16</sup> These techniques may be grouped in the following three categories:

#### Education

Be aware and remain mindful. Intuition and implicit responses are valuable, but some decisions require a more explicit kind of thinking. Everyone should take an Implicit Association Test<sup>17</sup> or watch a video on implicit bias.<sup>18</sup> We must recognize how perceptions can be deceiving or incorrect in the justice system.

#### Exposure

Making contact with positive, diverse colleagues and exemplars and practicing taking the “other” perspective all contribute to decreasing implicitly

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<sup>13</sup> Brennan Center for Justice, *Resources for Aspiring Bankruptcy Judges* (September 26, 2019).

<sup>14</sup> Kang primer, *supra*.

<sup>15</sup> Dasgupta, et al., *supra*, at 642.

<sup>16</sup> *Id.* at 643-44.

<sup>17</sup> Readers are encouraged to take a test at <https://implicit.harvard.edu/implicit/takeatest.html>

<sup>18</sup> Two examples: Adam Davison, *The Lunch Date*, available at <http://www.youtube.com/watch?v=eputZigxUY8>, and *Unconscious Bias Juror Video*, <https://www.wawd.uscourts.gov/jury/unconscious-bias>, developed by the U.S. District Court, Western District of Washington.

biased response. The idea of perspective taking, where a person takes the viewpoint of a member of the outgroup, is also useful in changing implicit bias.<sup>19</sup> There is also great value in volunteering at legal clinics; not only do attorneys provide much needed pro bono services, but they meet with individuals from different groups with different backgrounds.

### Approach

Implicit bias can be limited by allowing more time to consider decisions. Additional time allows the attorney an opportunity to engage in “high-effort processing” of information vs. low-effort/peripheral processing, that is time to “stare” or consciously consider, for example through more writing of discussion points and decisions, rather than to “blink” with off-the-cuff decisions.<sup>20</sup> For example, when a bankruptcy lawyer meets with a new debtor client, she or he needs to allow time to think about whether any bias has crept into the recommendation whether to file a case and, if so, under which chapter.

Using checklists at key decision points can encourage less biased decisions by providing an objective framework to assess your thinking.<sup>21</sup> This helps assure decreased attention to biased characteristics that may be influencing decision-making.<sup>22</sup> This approach also can limit the tendency to re-make the criteria fit the ingroup favoritism and “preferred” candidate.<sup>23</sup> For example, when law firms hiring new bankruptcy lawyers, creating a checklist in advance of interviews can help debias the process.

Another approach to debiasing is for organizations to add a level of accountability. If we think we are being monitored or may have to explain our decisions, we are more motivated to act in an unbiased or debiased way.<sup>24</sup>

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<sup>19</sup> Christopher L. Aberson, *Implicit Bias and Contact: The Role of Interethnic Friendships*, THE JOURNAL OF SOCIAL PSYCHOLOGY 144, 335-347 (2004).

<sup>20</sup> Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U.L. REV. 107, 109 (2010).

<sup>21</sup> Hal R. Arkes and Victoria A. Shaffer, *Should We Use Decision Aids or Gut Feelings?* In G. Gigerenzer & C. Engel, eds., HEURISTICS AND THE LAW (2004).

<sup>22</sup> Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 79 (2004).

<sup>23</sup> Anthony G. Greenwald, *Implicit Association Test (IAT) in Legal Settings*, Presentation, Ass’n American Law Schools. AALS Annual Meeting, (San Francisco Jan. 6, 2011).

<sup>24</sup> Adam Benforado and John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 325-26 (2007-2008); Jonathan

We should also be aware of “micro-messaging,” where small messages are sent, typically without conscious thought or intent.<sup>25</sup> For example, lawyers should consider how the pictures or artifacts that hang in their offices might be viewed by some as unwelcoming or even hostile to certain groups.

### ***Conclusions***

It is human nature to categorize objects and people in ways that may be implicitly biased. To increase the fairness of our explicit behavior, it is imperative that that we educate ourselves and become aware of these implicit biases and then take concrete steps to address them in our practice.

*“Motivation to be fair makes a difference.”<sup>26</sup>*

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C. Ziegert and Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553, 556 (2005).

<sup>25</sup> Virginia Valian, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 104-06 (1999)

<sup>26</sup> Kang primer, *supra*.