

Minimizing Implicit Bias

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What is unconscious, or implicit, bias?

“The unconscious mind... always reaches a result, regardless of whether there is ‘enough’ or contradicting information. It is built to resolve ambiguity, and so it frequently jumps to conclusions.” [Karnow, Deciding.](#)

50 types of bias

Affinity Bias: Preferring people who are similar to oneself in background, interests, and experiences.

Anchoring Bias: Relying too heavily on the first piece of information encountered.

Attribution Bias: Attributing successes to one's own abilities and failures to external factors.

Beauty Bias: Preferring attractive people.

Blind Spot Bias: Seeing oneself as less biased than others.

Confirmation Bias: Favoring information that confirms one's preexisting beliefs.

Contrast Effect: Judging something to be better or worse based on a comparison with something else.

Conformity Bias: Aligning with the opinions of a group, even if it goes against personal beliefs.

Cultural Bias: Judging someone based on cultural norms and standards.

Egocentric Bias: Overestimating the degree to which one's opinions and beliefs are shared by others.

Endowment Effect: Overvaluing something simply because one owns it.

Fading Affect Bias: The tendency for negative emotions to fade more quickly than positive ones.

Fundamental Attribution Error: Overemphasizing personality traits over situational factors in explaining other people's behavior.

Gender Bias: Preferring one gender over another.

Groupthink: Valuing harmony and coherence over accurate analysis and critical evaluation.

Halo Effect: Letting one positive trait influence the perception of other unrelated traits.

Horn Effect: Letting one negative trait influence the perception of other unrelated traits.

In-group Bias: Preferring members of one's own group.

Just-World Hypothesis: Believing that the world is inherently fair, leading to rationalizing injustice.

Negativity Bias: Focusing more on negative experiences than positive ones.

Out-group Homogeneity Bias: Seeing members of an out-group as more similar to each other than members of one's own group.

Overconfidence Bias: Having excessive confidence in one's own answers to questions.

Planning Fallacy: Underestimating the time needed to complete tasks.

Pro-innovation Bias: Overvaluing an innovation's usefulness while undervaluing its limitations.

Projection Bias: Assuming others share the same beliefs, values, or preferences.

Recency Bias: Giving undue importance to recent events.

Self-serving Bias: Crediting oneself for successes but blaming failures on external factors.

Stereotyping: Generalizing traits about a group based on the actions of a few members.

Status Quo Bias: Preferring things to stay the same rather than change.

Sunk Cost Fallacy: Continuing a behavior or endeavor because of previously invested resources.

Survivorship Bias: Focusing on successful examples while ignoring unsuccessful ones.

System Justification Bias: Defending and justifying the status quo.

Temporal Bias: Valuing present or near-term events more than future events.

Third-person Effect: Believing others are more affected by biases than oneself.

Similarity Bias: Being drawn to people who are like oneself.

Pessimism Bias: Overestimating the likelihood of negative outcomes.

Optimism Bias: Overestimating the likelihood of positive outcomes.

Authority Bias: Valuing opinions from authority figures over others.

Illusory Correlation: Seeing a relationship between variables even when none exists.

Hindsight Bias: Believing, after an event has occurred, that one would have predicted or expected the event.

Unconscious Bias: Holding attitudes that affect understanding, actions, and decisions in an unconscious manner.

Barnum Effect: Accepting vague or general statements as personally meaningful.

Framing Effect: Being influenced by the way information is presented.

Reactive Devaluation: Devaluing proposals only because they come from an adversary.

Placebo Effect: Experiencing a real change because of an expectation of change.

Gambler's Fallacy: Believing that future probabilities are influenced by past events.

Availability Heuristic: Overestimating the importance of information that is readily available.

Clustering Illusion: Seeing patterns in random events.

Dunning-Kruger Effect: Overestimating one's own competence.

Mere Exposure Effect: Developing a preference for things merely because they are familiar.

Now review the scenarios below, and determine the type of bias being highlighted in the scenario:

1. Alexa is a vegan. She's a juror on a case where the defendant is accused of animal cruelty. During the jury discussion, Alexa adamantly argues for a guilty verdict, and ignores any contrary evidence that may prove the defendant not-guilty.
2. Dwight is an expert in employment law and has many years of litigation experience. He's won awards and been featured in the news for his accomplishments. A new lawyer working on a cybersecurity case asks Dwight to mentor him on his case.
3. Jordan has a strict Catholic background and is currently defending a client who identifies as LGBTQ. Jordan finds herself disagreeing with the client regularly, and questions her client's side of the story. She tells herself that she's the expert and she should be questioning her client every step of the way. This is a normal type of lawyer-client relationship.

Reducing bias

Training. Participate in training that acknowledges and promotes an appreciation for group differences and multi-cultural viewpoints.

Remove or reduce distractions. Identify distractions and sources of distress in the decision making environment, and remove or reduce them.

- Effective law office management
- Effective meeting and conferring and other stress/work reduction techniques
- Civility
- Embrace effective caseflow management efforts by the court



Reduce ambiguity. Identify sources of ambiguity in decision making and establish more concrete standards before engaging in the decision-making process.

Avoid subconsciously allowing shortcuts to affect decisions, e.g. stereotypes.

Institute feedback mechanisms

- a. Objective
- b. Transparent
- c. Easily perceived as fair measures

Seek familiarity. Increase exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes.

- a. Seek group members who contradict the social stereotype.
- b. Inclusive recruitment efforts

Use, and maintain quality control of, a process.

- c. Start with a clean state
- d. Challenge the status quo
- e. Seek multiple perspectives
- f. Search for more information and data
- g. Play Devil’s Advocate
- h. Reflect on your own views and values

Practice being mindful

Practice Exercise. Find someone in the room to introduce yourself to. Even if you’ve met before, hold a conversation as if you are just meeting for the first time. Now find another person in the room and act talk to them as if they are a childhood friend that you have known for years.

Reducing Risk Factors. We discussed risk factors during the presentation. Now brainstorm your own risk factors and how you might minimize them.

Risk Factor	Countering Strategy
<i>Ex. Certain emotional states</i>	<i>Ex. Before responding, count backwards from 5 and take one deep breath.</i>

Bias and the Law



Bias as an Element of Crime

CALCRIM 523 (First Degree Murder: Hate Crime (Pen. Code, § 190.03))

- ❖ “1. The defendant was **biased** against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);
- ❖ AND
- ❖ 2. The **bias** motivation caused the defendant to commit the alleged murder.”
- ❖ (Defines or clarifies *disability, gender, nationality, race or ethnicity, religion, sexual orientation, and association with a person or group with (this/one or more of these) actual or perceived characteristic[s]*, but **not bias**.)

CALCRIM 761 (Death Penalty, Duty of Jury [in Penalty Phase])

- ❖ “Do not allow bias, prejudice, or public opinion to influence your opinion in anyway.”

CALCRIM 902 (Assault on Military Personnel (PC § 240,241.8))

- ❖ “...bias caused the alleged assault.”

Case Law Defining Bias.

People v. Hughes (1961)

- ❖ “... the existence of a *state of mind* on the part of the juror in reference to the case, or to either of the parties, *which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party*,... [Emphasis added].” 57 Cal 2d 89, 95 (*former* PC § 1073; definition not replaced in CCP 228 – 230).

Ensher, Alexander & Barsoom, Inc. v. Ensher (1964)

- ❖ “Bias or prejudice consists of a mental attitude or disposition of the judge towards a party to the litigation. In order for a judge to be disqualified, the prejudice must be against a party and sufficient to impair the judge's impartiality so that it appears probable that a fair trial cannot be held.” 225 Cal. App. 2d 318, 322.

Marriage of Fenton (1982)

- ❖ “... fixed, anticipatory prejudgment...” 134 Cal.App.3d 451, 457

People v. Hernandez (1984)

- ❖ “... bias or prejudgment...” 160 Cal. App. 3d 725, 747
- ❖ “Lacks and/or appears to lack “fairness”.” *Id.*, at 747-748

Federal Civil Rights Violations

- 42 U.S.C. § 1983
- Applies to government entities and employees.
- CACI Instructions 3000 – 3051.

UNRUH Civil Rights Act, and Related Statutes

- Civil Code §§ 51 – 53.7
- “... all business establishments of every kind whatsoever” (§ 51(b).)
- CACI Instructions 3060 – 3069.
- Query: Is this liability insurable?

Reading List

1. Casey, Warren, Cheesman, and Elek, *Helping Courts Address Implicit Bias: Resources for Education* (2012), Williamsburg, VA: National Center for State Courts (NCSC). (Full report of NCSC’s project on implicit bias and judicial education. For a summary, see “NCSC, Strategies [etc.], below on this list.) www.ncsc.org/ibreport
2. Harvard, *Implicit Attitudes Test [IAT]*, (Undated), Cambridge, MA: Harvard University. (Self-test from Harvard’s “Project Implicit.” Self-description: “The IAT measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)”.) <https://implicit.harvard.edu/implicit/takeatest.html>.
3. Karnow, Curtis E.A., *Cognitive Fallacies Reading List* (2015); *Deciding* (2015); and *The Adversarial System, Three Lemons, and Cocaine: The Role of Confirmation Bias* (2014), San Francisco, CA. All available at https://works.bepress.com/curtis_karnow/, find sub- title “Decision making,” select article of choice.
4. LexisNexis, Maggiore-Anet, David, *Elimination of Bias in the Legal Profession* (2013). (Presentation for educational purposes by LexisNexis.) <http://www.acc.com/chapters/sandiego/upload/elimination-of-bias-3.pdf>
5. NCSC, *Strategies to Reduce the Influence of Implicit Bias* (2012), Williamsburg, VA: NCSC. (Summarizes the’ (NCSC’s) project on implicit bias and judicial education.) http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx
6. USC Marshall School of Business, *How to Reduce Bias in Decision-Making* (2014), Los Angeles, CA: University of Southern California. (One element of USC Marshall’s “Critical Thinking Initiative” training.) <http://info.marshall.usc.edu/faculty/critthink/Supplemental%20Material/Reducing%20Bias.pdf>

Viewing List

If you have access to LinkedIn Learning via your firm or a Premium Account, they have a variety of courses on bias, inclusivity, and more. Here are a few to get you started.

1. Uncovering Unconscious Bias in the Recruiting and Interviewing Process, Dr. Tana Session
<https://www.linkedin.com/learning/uncovering-unconscious-bias-in-recruiting-and-interviewing?u=0>
2. Unconscious Bias, Stacey Gordon
<https://www.linkedin.com/learning/unconscious-bias?u=0>
3. Fighting Gender Bias at Work, LeanIn.org
<https://www.linkedin.com/learning/fighting-gender-bias-at-work?u=0>
4. Becoming a Male Ally at Work, Emilie Aries
<https://www.linkedin.com/learning/becoming-a-male-ally-at-work?u=0>
5. Confronting Bias: Thriving Across Our Differences, Verna Meyers & Arianna Huffington
<https://www.linkedin.com/learning/confronting-bias-thriving-across-our-differences/introduction-by-arianna-huffington?autoplay=true&resume=false&u=0>
6. From Bystander to Upstander, Catherine Mattice
<https://www.linkedin.com/learning/bystander-training-from-bystander-to-upstander?u=0>