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Who, Me? Am I Guilty of Implicit Bias?

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Judge Dana Leigh Marks

Judge Dana Leigh Marks is the president of the National Association of Immigration Judges (NAIJ) and a member of the ABA. She has presided as an immigration judge in San Francisco since 1987. The views expressed here do not necessarily represent the official position of the U.S. Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ.

As I observe his testimony, I notice the witness is not looking me in the eye, making me begin to suspect that I am not being told the truth. I note my concern while the testimony continues. As his story comes out in a confusing jumble, with bits and pieces that are not firmly grounded in a chronological timeline, I am again plagued by doubts about his veracity.

Sitting in front of me is an extremely muscular, heavily tattooed man whose mere physical presence seems to presage danger. I am horrified by the life he has led and the violent stories he recounts. I struggle to remain focused on the present evidence and its relevance, but I am aware that I feel something is just "off." After a few more minutes, I catch myself and remember that it is not culturally appropriate in many cultures to look an authority figure in the eye. Okay, discount that factor. Then I remember that rigid timelines and linear storytelling are not necessarily common or expected in all cultures. Okay, another factor must be discounted or minimized.

I am continuing to listen as I recall the devastating impact stress from trauma has on memory. During a traumatic incident, the brain functions differently, often causing a shocking memory to be inaccessible or an event to be stored in the brain in a random, illogical manner making it incapable of orderly retrieval. Yet another factor which troubled me now must be thrown out or re-examined.

Or maybe today's witness is a shy young woman, one who tells her stories of religious observance or political activism in an effort to persuade me that her activities would cause her harm if she were to return to her homeland. But I find it hard to believe that someone who supposedly found those principles to be so central to her life as to run the risk of persecution would have such difficulty discussing doctrine—until I remember that I am viewing her stories through a completely different lens of circumstance and experience, that is, from the vantage point of my own privileged status as an American accustomed to freedom of religious and political expression. Now how do I assess credibility? How would a different judge have reacted if his or her personal history included being raised

Sources and Resources

The following sources relied upon for this article merit in-depth exploration:

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Cheryl Staats, Kirwan Institute for the Study of Race and Ethnicity, State of the Science: Implicit Bias Review 2014, <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf>.

The Implicit Association Test (IAT) is available at <http://implicit.harvard.edu>.

About The Judges' Journal

outside the United States? Does it matter that my personal values include a rather laissez faire interpretation of the religious doctrine of my childhood, but that I find issues of political theory and social justice sacrosanct?

Counteracting Implicit Bias: A Matter of Life and Death

So, as I adjudicate what in effect can be death penalty cases (when I may have to deport someone to a country so violent and/or poverty stricken that they may die) in a setting that most closely resembles traffic court in volume of cases and lack of resources, my thoughts turn to prejudice—implicit and explicit—fairly often. I hope to offer some practical ideas about how we can recognize our own implicit biases and expose them so we can all improve our decision making rather than allowing our unconscious to undermine our hard work. These are the kinds of dilemmas that judges face daily.

Understanding the influences of my assumptions (implicit biases) makes me be constantly on guard to bring my unconscious attitudes to a conscious level. Equally important, these daily challenges have made me be actively on the lookout for advice and solutions to prevent myself from being influenced by my own implicit bias.

My decisions are based on a mosaic of factors, and I must ensure that all are visible and none are distorted. Is there something I am taking so much for granted, something so embedded in my beliefs, that I don't even realize it is influencing my perceptions? Take the word *bias* for example. I am tempted to dismiss it from my personal reality; it is just plain hateful and wrong, but certainly not something that I am guilty of being influenced by.

Then I remember what I have learned about implicit bias, and the proven fact that it is quite pervasive. Studies have shown it to be so rampant that it has been found to exist in virtually every profession. Perhaps more surprising, it does not necessarily align with a person's declared beliefs. Indeed, by definition, implicit bias is bias that individuals are not even aware they have. Rather than be defensive and deny its existence, or delude myself by thinking that because I am not explicitly prejudiced, I don't have any implicit bias, I have discovered that I must "check my privilege" and take it into account. In essence, we must accept that we are all the product of environmental factors that imbue some degree of implicit bias and do our best to counteract its destructive effects

I Thought I Knew

I remember thinking that, as a victim of bias myself, I would be particularly sensitive and skilled at detecting my own implicit bias and knowing how to neutralize it. You see, when I think about bias, explicit and implicit, I have found it ironic that I have spent my entire career in a legal field that is often the brunt of explicit prejudice—immigration law. When I began in the mid-70s, the field was widely assumed to be filled with second-rate lawyers and unethical cheats. I moved "up" to the bench in Immigration Court only to find that this negative prejudice persisted because we are "mere" administrative judges, not "real" judges, not to mention the fact that my legal preparation for the job was as a lowly immigration attorney.

Then I am struck by the fact that my current work environment does not project an image which inspires faith in our court's freedom from bias. This is because the immigration court system is housed in a law enforcement agency, the U.S. Department of Justice, which is closely aligned with those who are the prosecutors in our courts (Department of Homeland Security (DHS) trial counsel). This

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Contact Us

Lisa Comforty, Editor

American Bar Association
321 N. Clark St.
Chicago, IL 60654
Phone: 312.988.6121

structural arrangement has caused many members of the public we serve, and the attorneys who represent them, to doubt our decisional independence.

Indeed, when we are physically co-located, as is frequently the case, and dependent for our security needs upon the Federal Protective Service, a component of DHS, their presence is strongly evident in our courthouses and potentially can make us susceptible to unconscious overidentification with law enforcement. Due to our history and current position within an agency whose top priority is law enforcement, the perfect breeding ground for implicit bias exists.

We are constantly being sent messages from the DOJ framed in law enforcement terminology and are closely aligned with sibling law enforcement agencies. In fact, our own agency has failed to promulgate regulations implementing the contempt authority that was legislatively provided to our courts more than 15 years ago because of resistance by DHS. It is not hard to see why being in this law enforcement family can't help but to foster some bias, whether we always realize it or not.

The Antidote

Implicit biases are those automatic attitudes or stereotypes that affect our understanding, actions, or decisions in an unconscious manner. They are attributed to acquired associations, favorable and unfavorable, learned from an early age after continued exposure to direct and indirect messages—the essence of socialization in our modern communities. They reflect a national consciousness created by our media, history, news, and political policy. We are bombarded by images, attitudes, and assumptions daily, and we are bound to internalize some of them. Because implicit biases are activated involuntarily, they generally occur without our awareness or intentional control. Some are even so deeply embedded that they are not accessible through introspection alone. In fact, surprising to many people, it has been found that an egalitarian or “color-blind” approach can actually produce greater implicit bias. Because implicit bias has been learned, these beliefs can also be unlearned, and it is our responsibility to do that. If we don't discuss it, implicit bias operates unabated; it continues to influence us and affect our decisions. Rather than declaring ourselves immune, we must continually learn about group differences and multi-cultural viewpoints so as to foster true understanding, which is the antidote to reverting to stereotypes, particularly unconscious ones.

As a judge, I also feel a responsibility to recognize that by virtue of my visible place in the social structure, the attitudes that I project and the ramifications of the decisions I make can easily become threads in the fabric of the implicit biases of tomorrow. Our courts play an important role in shaping the national dialogue about many sensitive issues, such as the legality of same-sex marriages, the extent of abortion rights, the propriety of detention in civil immigration cases, or whether certain methods of executing a death sentence are allowable. All are examples of highly charged social policy questions in which the decisions rendered by courts are central. How we make our decisions as judges undeniably plays an important part in establishing the framework that will shape the implicit biases of tomorrow, and we as judges must always ensure that we are conscious of the influences which are at work, rather than allowing our opinions to be governed by unconscious attitudes or bias.

The Good News

While the task at times seems insurmountable, the good news is that implicit biases are considered by psychologists to be malleable and can be gradually

unlearned. Thus I am reminded that we must endeavor to identify and understand our implicit biases, rather than simply denouncing them or denying they exist

Explicit prejudice is obvious, easily identified, and hopefully rare in judicial settings. Because it is so direct and clear, the safety mechanisms of appeal should be adequate to cure any errors in judgment that may occasionally arise. In contrast, because implicit bias is automatic and functions below our conscious awareness, it is far more pernicious and dangerous. Complicating matters further, experts recognize that now, in the era of political correctness, unconscious negative feelings often get expressed in more subtle, indirect, and even seemingly logically rational ways—making them much more akin to avoidant reactions like discomfort, anxiety, or fear.

Implicit bias is a master of disguise, invoking unconscious reactions that may not align with our declared, conscious beliefs. The common judicial predicament of second guessing one's assumptions becomes all the more challenging in my courtroom.

Our nation's immigration courts are fast-moving dockets governed by intricate and sometimes almost incomprehensible statutes, teeming with diverse foreign languages and cultures, set in the context of a law whose very origins were explicitly discriminatory and prejudiced.

NCSC Studies

It is important that judges address the dilemma of implicit bias vigorously, and the National Center for State Courts (NCSC) has extensively studied the issue. The NCSC has recommended strategies to help combat implicit bias, and has set forth several concrete steps that can be undertaken by individuals and organizations. These strategies include raising awareness among judges, training judges to identify and consciously acknowledge implicit bias, making routine checks of one's thought processes and decisions, reducing or removing distractions and sources of stress, reducing sources of ambiguity in decision making, instituting feedback mechanisms, and increasing exposure to stigmatized groups. Clearly it would be impossible to delve into all of these recommendations in this brief article, however they provide a helpful basis for my suggestions.

Personal Effort and Structural Support Needed

Successful efforts to reduce implicit bias require both personal efforts and structural support. The common thread I find in all these suggestions is that they require time, education, and persistence. We cannot hide our heads or shirk our personal responsibilities just because we are good people, seriously committed to doing the best job we can, which can lead us to feel immune from these unconscious influences. Nor can individual efforts alone suffice; the structural adjustments necessary to support judges' personal efforts must also be undertaken or the best of personal intentions are unlikely to be sustainable.

What You Can Do

On the personal front, the good news is that by reading this issue of *The Judges' Journal*, you have already taken the first step—to educate yourself about implicit bias. But, because of the unconscious nature of implicit bias, the most productive results come from augmenting our individual efforts with the support of the organizations in which we work. Training sessions employing focus groups with knowledgeable facilitators, educators, scientists, and judicial colleagues can help all of us broaden the scope of our understanding through examples drawn from the daily experiences we share. Hearing about the issues confronted by colleagues and listening to their insights, suggestions, and solutions are invaluable learning tools.

Personally, I found that taking the implicit association test (IAT) was a truly revealing assessment of my subconscious attitudes and provided concrete evidence that despite my best efforts and personal perception that I was bias-free; I am, after all, very typical and influenced by my upbringing and cultural norms. I frequently remind myself to honestly scour my own background for assumptions I might make and to ask myself: Would I rule differently if this person were from a different country, would I be more or less tolerant of past misbehavior, or would I find their story more plausible?

Avoidance of implicit bias requires that one routinely check one's thought processes and decisions for the influence of these unconscious biases. I have found it particularly difficult to devote the time this requires in light of my fast-paced docket. Yet it is clear to me that it is only through thoughtful, deliberative processing of the testimony and documentary evidence in the record that is before me that I can escape the seductive lure of stereotypes. In order to counteract those situations where I feel pressured by time or adrift due to ambiguity in the law, I must spend more time developing concrete criteria that will help me make more consistent decisions, free from stereotypes and implicit bias. That means I must find more analogous jurisprudence on similar facts and issues, and ensure I am knowledgeable about current events and politics in general.

For immigration judges, there has been some modest progress of late. Due in part to issues such as the ones discussed here, there have been increased numbers of judicial law clerks hired in recognition that the complexity of many of our cases require written decisions. As this improvement provides help in addressing our burgeoning dockets, some of the pressures faced in the immigration courts will be eased gradually. The benefits are enormous, as allowing the opportunity to review one's reasoning processes before publicly committing to a decision, and having the chance to critically assess a decision for implicit bias, help ensure that our reasoning will withstand scrutiny.

Receiving feedback has also been recommended as a helpful tool to aid judges avoid implicit bias. The most effective feedback is that which comes from a respected authority who addresses the decision-making process rather than any approach designed to achieve a particular outcome. With that in mind, I believe that judges should be encouraged to actively seek feedback from colleagues and be provided the time and opportunity to discuss cases among themselves for all issues, not just matters of legal interpretation. I have found that weaknesses in my own reasoning or leaps in logic can become quickly apparent merely through the process of explaining the issue I am grappling with to a trusted colleague.

Having a dialogue can highlight implicit assumptions and hidden prejudices and allows for a sharing of viewpoints and experiences that reduce implicit bias. An opportunity for input from those who appear in court, including parties and the interpreters who serve regularly, can provide useful perspective and be helpful to ensure reasoning is transparent and decisions are perceived by all to be fair. Questions about possible implicit bias should be addressed routinely in judicial evaluation questionnaires, as they provided a necessary (albeit sometimes harsh) reality check as to whether our personal efforts to avert implicit bias are succeeding.

To help reduce the impact of implicit bias, it has also been suggested that we identify the sources of ambiguity in the decision-making context and endeavor to establish more concrete, tangible standards. Having only practiced in the field of immigration, I realize my views may be naive, but I have often found myself wishing that I had two witnesses to an incident when called upon to make a

credibility determination so that my assessment would be more fact based rather than dependent upon my assessment of just one person's veracity.

It has always seemed to me exceedingly difficult to determine credibility when the proceedings are taking place through a foreign language interpreter across cultures and the testimony is about unfamiliar events and social or political practices in a country that I know little about. It seems that deciding if the young woman with 20/20 vision saw the accident more clearly than the elderly gentleman with cataracts would be a much easier task because despite the known unreliability of eye witnesses, at least I would have additional views on the issue. Finding ways to draw conclusions in the kinds of cases I routinely see, those with only one percipient witness to the contested events, has required me to guard against implicit bias by scouring legal precedent for similar fact patterns and pushing litigants to provide materials for the record that educate me and help provide more objective evidence upon which to base the essential rulings in cases where the factual contexts are inherently more difficult to document.

Studies support the personal anecdotal perception of many judges that commonly present stressors can adversely affect judicial performance. Time pressures caused by heavy caseloads filled with complex matters, fatigue from long hours and/or lack of sufficient support staff, distractions from multitasking or even threats to physical safety or security can all tend to provide fertile soil for reliance on intuitive or spur-of-the-moment decisions, which are far more prone to the inappropriate influence of implicit bias. Immigration judges in particular have been found to suffer from intense stress and burnout, higher than the rates experienced by prison wardens and busy hospital doctors, because of the heavy caseloads they carry with inadequate resources and staff support.

The antidote to this is to give judges the opportunity to reorganize their calendars so that they can reconvene if additional deliberation is needed and to provide sufficient resources to minimize the effects of fatigue and burdensome multitasking, while continually and realistically reassessing the amount of resources needed to handle continually rising dockets. Taking the time to assess whether or not our personal experiences, with crime, discrimination, vicarious trauma, or a perceived lack of proper respect from parties (either directly or through lack of preparation), are unduly coloring our perceptions is crucial to avoiding implicit bias.

Structural Support Needed

However, this personal scrutiny cannot take place without structural support, which means more time off the bench through adjustment of dockets and reduced distractions. Judges need the structural support, which only their court managers and administrators can provide, to ensure that they have sufficient time on their dockets to address the constant fight against implicit bias. It has been found that an important way to reduce implicit bias is to create a clear and specific strategy to ferret it out, which takes time and advance preparation. Sharing tips and insights gained from experience by other judges in our own court systems and learning from varied judicial settings about how they address these issues are invaluable tools.

The positive effect of time off the bench to reflect and diffuse the pressures of a huge docket cannot be overstated. It is often the only antidote to unfounded assumptions creeping into decisions. Immigration judges in particular have to struggle to carve out this space since our courts have long been based on a model requiring oral decisions to be rendered immediately at the end of a hearing, leaving little time to step back and gain perspective. Because we make our decisions without any written transcript of testimony (our proceedings are only

transcribed if appealed), we must rely on our contemporaneous notes and impressions of witnesses gleaned while we also serve as our own bailiffs, court clerks, and unofficial stenographers.

In this setting, the suggestion that distractions be avoided and that objective deliberation be enhanced to reduce stereotyping is a solution which seems constantly out of reach in times of fiscal austerity. Yet taking time upfront, before firmly committing to a decision, is judicially economic, as it reduces the likelihood of committing an error or facing reversal on appeal, which is far more time consuming (not to mention demoralizing) in the long run.

For immigration judges, one suggestion that would help to alleviate the implicit biases we may be acquiring because of our close alignment with law enforcement is the creation of an independent immigration court structured under Article I of the Constitution. Many organizations, including the National Association of Immigration Judges, the ABA, and the Federal Bar Association, among others, advocate this restructuring for a variety of reasons, including this one.

Conclusion

As I walk into court after all these years, I am very glad that there are still new challenges that face me. The variety of the people and their stories that come before me present an opportunity for learning and growth on my part. But I also risk falling prey to the burnout caused by the similarities their cases inevitably demonstrate.

Combatting implicit bias is one task in my work that starts anew each day and never remains the same. It is a struggle that I must wage alone in my private thoughts, as must each of my colleagues, yet it is one that we cannot fully resolve without relying on each other for reality checks. It is a personal struggle which we all face, and one we cannot ignore.

The fact that a judge's job will always retain this quintessentially human aspect is both the good news and the bad news in my view. While it is frustrating to think my work on an issue will never be complete, I think that is the very reason why I love my job.