

## ***ISMS AND SCHISMS: IMPLICIT BIAS***

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## INTRODUCTION

This work is intended to invite each of us to explore the factors that can affect our ability to effectively represent our clients. We meet clients during a time of need; someone once compared the contact to the circumstances in which members of the clergy provide assistance. When we meet clients, they are embarrassed, frightened and insecure. We are expected to guide them through the legal process while attending to their humanity.

Many of us take the position that the humanity of our clients should be left alone, I disagree. Connecting with our clients is crucial for criminal defense; it affects how our clients perceive us and therefore how well they believe they are being represented.<sup>1</sup> This paper is concerned with our side of the interpersonal relationship with our clients. It explores how our beliefs

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<sup>1</sup> Taking care of the inter-personal is also good for business. Studies have shown, (so you know it's true), that clients who perceive their professionals as interested in them are less likely to file lawsuits against them and are more likely to refer them to others.

and experiences can affect our ability to be zealous advocates without our being consciously aware of the effect.

## **UNCONSCIOUS BIAS**

Each of us makes a decision about who our client is within a few moments of meeting him or her. We make judgments with minimal information about our clients. We make quick decisions about his or her level of education, his or her background, and his or her credibility. We also make decisions about our client's version of the events that led to their prosecution. Next, based on our judgment of our clients, we make decisions about our clients' witnesses, their level of education, their background and their credibility. Of course, the decisions we make are informed on a conscious level, by our observations – what we see, hear and deduce. The decisions are also informed on a subconscious level by our beliefs and experiences.

The quick assessments we make are natural in our line of work. A little bit of knowledge is not always such a dangerous thing. Snap decisions made in the heat of battle in a courtroom are often made based on little more than intuition. If we take time to gather more information during a trial, we

take too long to object, causing us to waive important rights and issues for appeal. Like a military leader in the midst of a battlefield, there is not much time to stop and think because lives depend on the ability of the warrior to be decisive. In his book “*blink*”<sup>2</sup>, Malcolm Gladwell observes that basketball players need to make snap decisions on the basketball court. Those who do it well are said to have “court sense” which allows them to read deeply into the narrowest slivers of experience and make a decision. Our court sense serves our clients well in the heat of battle.

But what of the times outside the heat of battle when we make snap decisions? What are the slivers of experience upon which we rely when we are at ease? Our subconscious informs these decisions. Gladwell uses the election of Warren Harding as President as an example. Harding was tall, athletic and attractive. He was also graceful and courteous with a voice that is said to be noticeably resonant, masculine and warm. Yet, Harding, according to many historians, was the worst President in American History. He was not scholarly; his tenure in the United States Senate is punctuated by his absence during votes on women’s suffrage and prohibition, two of the most important issues of his day. Yet he was elected, Gladwell opines, based on a prejudice in favor of his good looks.

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<sup>2</sup> Malcolm Gladwell, Bay back/Little, Brown and Company © 2007.

Another example of the subconscious informing decisions is the hiring and promotion of Chief Executive Officers (CEO) in our country. Although men over six feet tall represent about three point nine percent (3.9%) of the United States population, they make up fifty eight percent (58%) of Fortune 500 CEOs. This fact is best explained by a prejudice in favor of men over six feet tall, according to Gladwell.

When race enters the equation, the excuse of there not being any minorities in the pipeline is legitimate when taken together with historical discrimination, i.e. it is possible to staff an entire company with white males based on their representation in the population, so there may in fact be fewer minorities in the “pipeline” for promotion to CEO. The absence of men under six feet tall cannot be explained in the same way. Since the majority of the population is under six feet, it would be impossible to staff a large company with only men over six feet tall, thus there must be men under six feet tall who are in the pipeline. Unconscious bias informs the decision.

When I speak about prejudice, I am speaking about pre-judging in its most simple terms. Evil intent is a completely different subject for discussion. I am speaking to those of us who exclaim, “But I am not prejudiced!” Harvard University has conducted a study on implicit bias

through a test that measures our responses to a series of questions in terms of bias.<sup>3</sup> The Implicit Association Test or IAT, can be found at <https://implicit.harvard.edu>. The results of the IAT are astounding.

Nearly eighty percent (80%) of test takers were found to have “pro-white” associations. That’s 80% of Blacks, Non-Blacks, Hispanics, and Asians – everyone who took the test! We all make decisions informed by the same prejudice. Jurors make decisions this way as well.

When was the last time a juror told you during voir dire that she had a bias against criminal defendants or men under six feet tall or young black men or whomever? Ok, well, maybe it happens sometimes, but if such prejudice is revealed upon asking, then we have only one question to ask during voir dire - Can you be fair? We all know how much information that gets us. Gladwell calls this the storytelling problem. He suggests that we all tell one story about ourselves that is different from the truth.

Think of the description that most of us give of the kind of mate we seek and then look at the kind of mate we actually chose. The truth is we **all** have subconscious bias. The prejudice doesn’t necessarily come from an evil source: We are often programmed without knowing it.

Advertisers spend millions of dollars for fifteen- and thirty-second slots of

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<sup>3</sup> Justin Levinson, of the University of Hawaii at Manoa, is also conducting insightful research on implicit bias.

your time during the Super Bowl. They don't do that because it has no effect on us. That small amount of time can influence our opinions and our decisions.

We also get messages about the word "black" which is associated with African-Americans. Blackmail, blacklist, blackball, black humor, black cats, black heart, and wearing black for a funeral, are all negative images associated with black. With all of these negative images, it's no surprise we have negative attitudes toward "blacks" or African-Americans. When we encounter African-Americans, our brains go on a kind of autopilot from the advertisements and other messages to which we have been exposed and what we think of as free will really isn't free at all.

We are a lot more susceptible to negative influences than we realize and there are more negative influences than we expect. In fact we can be primed to think a certain way, not necessarily negative, in less time that we know. Repeat the word "polk" ten times fast. Then, quickly answer the question - what do you call the white of an egg? Most people will say yolk! This priming happens all of the time without our being conscious of it. We don't consciously treat taller people differently from short people, but the result is more tall executives than short. I encourage you to take the implicit association test. I learned a lot about myself by taking this test – you will

too. The test shows that our subconscious beliefs may be different from the image we have of ourselves, and different from the story we tell.

So how does this affect our zealous advocacy? Does subconscious prejudice or unconscious bias translate into disbelieving our client's story, or not giving credibility to his or her witnesses – into pre-judging them? If so, do we broadcast these misgivings through the design of our investigation; to the prosecutor during plea negotiations; to the jury at trial; to the judge during sentencing or worse, to our clients during interaction with them? Do these decisions affect the decisions we make and advice we give about a reasonable plea offer, which witnesses to call or what plan of action to take? It is possible, and the stakes are too high to refuse to be open to the idea that we could better serve our clients if we took a look at ways to minimize the impact of our subconscious negative beliefs.

I don't know what the answers are. I believe it is worth exploring. I suggest taking an inventory of the beliefs we hold. Of course, if the bias is subconscious, then how do we take conscious note of the bias? Perhaps it is the same way we prove or try to disprove intent – by looking at our actions. How many of us can say we have close friend who are from a different background? Sure we have colleagues; some of us have friends who are from a different culture, but what of those whom we allow to get closest to

us? We cringe when we hear people say, “I am not prejudiced I have a friend who is \_\_\_\_\_ (fill in the blank)”. Maybe it’s time to stop cringing and explore the idea a little. I suggest finding ways to develop friendships, close friendships with people who are unlike us. We can learn from them and teach them at the same time. We can build bridges across these differences so that we are free to ask the tough questions that lead to more understanding.

Once while lying by the pool in Kentucky, I was asked by a southern, elderly white woman if “we” tan. I could have easily taken offense at the question, which I was tempted to do, but I stopped and thought for a moment. I decided perhaps she was just curious and my answer could impact her desire to reach out to others in the future. I told her we have the same skin, but mine is browner, so yes, it tans, too. Had she a close friend who was brown whom she could have asked and then shared a good laugh? I suspect not.

We make first impressions based on our experiences and environment. We are likely to have a different first impression of a young African-American male if we are related to one or have one as a friend, than if we only encounter him in the news or in our work. Brief encounters without background information about the way people really live can skew

our beliefs about people or situations. Jurors often have these skewed beliefs as they sit in judgment of our clients.

That's what happened with the New Coke. Taste tests showed Pepsi would gain market share over Coke, so Coke changed its formula. Of course there was a revolt by Classic Coke drinkers and Classic Coke returned to the market. The reason for the failure of New Coke, Gladwell suggests, is the taste tests did not accurately reflect how soft drink consumers use soft drinks, i.e. they don't merely sip, which, according to experts gives an entirely different taste than drinking an entire can. Because Coke only got a small snippet of knowledge about the consumers' preference, rather than personal knowledge of their drinking habits, the company's impression was completely wrong. The experience was artificial in the sense that it was not the way soft drink consumers actually use the product. It gave a false impression; much like brief, rather than meaningful, interaction with people from different cultures can give a false impression.

Another suggestion is to stop and take a moment before you react to those who are different. Gladwell talks about three fatal mistakes made by the plainclothes police officers in the Amadou Diallo case. These mistakes were made because of what he calls "rapid cognition". The officers made a decision about Diallo without knowing more about Diallo or similarly

situated people. The first mistake was to decide that Diallo looked suspicious. Diallo was actually standing on the stoop of his apartment building getting some air that night, but the police officers decided this was suspicious. Next, as the cops drove by Diallo he did not move, nor did he move when they backed the police car up to his stoop. Rather than assuming that Diallo was curious, they decided that he was brazen not to run. (Of course if he had run, that would have been suspicious behavior.). Third, one of the officers approached Diallo, who did not speak or understand English well and who, it was rumored, had been recently robbed, the officer asked if he could speak with Diallo. Diallo, who stutters, did not answer, so the officers decided he was dangerous. Thus these snap decision by the officer led to Diallo's death.

If we take a moment, we can connect to our clients in an effort to be better advocates. In his book Gladwell discusses an experienced police officer that encountered three gang members. While two fled when approached, one stood frozen, reaching into the waistband of his pants. The officer remembers stopping to actually look at the fourteen-year-old boy who stood frozen before the officer. Although the encounter was only one and one-half to two seconds long, the experienced officer knew that he could

take a moment to give the kid the benefit of the doubt. This moment saved the boy's life.

If we take a moment, we can actually engage in mind reading in these circumstances. Not the kind that Johnny Carson did in his late night skits as Carnac the Magnificent, but the kind we all do from birth. Gladwell suggests listening with your eyes. Even babies look into your eyes to find the answer to what you really mean. Gladwell points to tests conducted with people diagnosed with autism while watching the movie "Who's afraid of Virginia Wolf?" as an example of listening with your eyes. People diagnosed with severe autism tend not to look at the eyes because they see humans as objects in the same way they may see a clock. Others look into the eyes of the actors during emotional high points in the movie, indicating that they were reading the intent of the actors by looking into their eyes. They connected with the emotion of the person by looking into their eyes.

We can do this with our clients. How many of us size our clients up without ever sitting down with them and looking them in the eye? How many of us find out more about our client at sentencing than during representation? If we make decisions about our client without stopping and taking the time to listen with our eyes, then guess what is informing your decision - your subconscious mind and the negative influences it carries. I

suggest that during the initial visit with our clients we never discuss the case – unless, of course, our clients ask.<sup>4</sup> I call this “sitting and rocking”. Sitting and rocking allows us to get to know the humanity in our client. It allows us to connect on the basic human level where we all live; the kind of connecting we ask of jurors during trial.

Gladwell suggests that we stop and think of positive images of African-Americans when we are tempted to make a rash negative judgment of an African-American. He suggests Martin Luther King, Colin Powell or Oprah Winfrey. The authors of the Harvard study have found that IAT scores improved when the test takers were asked to do this just before taking the test. There is no definitive information about long-term effects, but the short-term result showed decrease in pro-white attitudes after thinking of positive African-Americans.

## **CONCLUSION**

My hope is that you are open to the idea that we may be influenced by subconscious prejudice despite having good intentions. If there is even a possibility that our clients suffer as a result, the idea is worth exploring. I

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<sup>4</sup> I understand that time is so crucial this may not be practical, but that time spent on the front end will save time later. If you absolutely cannot use an entire visit for this purpose, then at least start the visit this way before going into the case.

encourage you to take the IAT now and again to check in on your subconscious mind. In the meantime make a close friend of someone unlike you and your family. Talk about your differences and build a bridge to a world about which you know very little. You will find that you have positive images of someone different upon which you can rely when you are tempted to make a snap judgment about a client. Maybe it will make you a better lawyer. Certainly it will make your life rich with diversity.

Humbly submitted,

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