Exploring the Connections Between Implicit Bias, Incivility and Toxicity in the Legal Profession

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Why Does this Matter?

- Ethics
- Stigma
- Bias
- Public Service
- Lawyer Well Being
Juror bias training falls short, lawyers say

Defense attorneys are pushing for more detail in state court video on implicit bias.

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An 11-minute video on the impact of implicit bias in everyday decisionmaking is a common part of juror orientation in federal court in Minnesota, but state courts have lagged in adopting the practice as defense attorneys push for its inclusion.

Implicit bias includes attitudes or stereotypes that unconsciously affect decision-making. The topic arose earlier this year when attorneys representing former Minneapolis police officer Mohamed Noor, who is Somali-American, unsuccessfully asked a judge to allow it at his trial in the fatal shooting of Justine Ruszczyk Damond.

The issue has resurfaced as Chief Hennepin County Public Defender Mary Moriarty fired back at a new state-produced juror orientation video that she said glosses over the topic. “We know from research that implicit bias does impact jurors’ thinking,” she said. “The best thing we can do is make them aware of it and check that, and it’s just embarrassing that this is the best thing our courts could come up with.”

Of the more than 46,000 people who reported for jury duty across Minnesota in fiscal year 2018, whites were over-represented at 88% of the pool, according to the State Court Administrator’s Office. Every other racial group aside from American Indians was under-represented.

Some metro prosecutors, including Hennepin County Attorney Mike Freeman, "The number of Hispanic inmates is included in the count of other races. **Makeup of more than 46,000 jurors who served in Minnesota in FY 2018.**
Defining Implicit Bias

- Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.
- These biases encompass both favorable and unfavorable assessments.
What do you think of?
How about now?
Origins of Implicit Bias

- They 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.
- Implicit biases are not accessible through introspection.
Development of Implicit Bias

- 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.

- They develop over our lifetime through exposure to direct and indirect messages.

- The media and news programming are often-cited origins of implicit associations.
Characteristics

- Implicit biases are **pervasive**. Everyone possesses them, even those, such as judges, who are committed to impartiality.

- Implicit and explicit biases are **related but distinct**. They are not mutually exclusive and may even reinforce each other.
Characteristics

- 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.
Characteristics

- 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 techniques.
Law Office Implications

- Informal assignment processes lack standardization or systematic checks to ensure that all similarly situated attorneys receive the same or similar levels of assignments and opportunities.

- Do supervisors tend to distribute work – or the best work - to those most like themselves?

- Article: *Written in Black and White*:
Harvard Implicit Association Test

- Project Implicit - non-profit created to educate the public about hidden biases and to provide a “virtual laboratory” for collecting data on the Internet.
- The IAT measures attitudes and beliefs that people may be unwilling or unable to report and that are outside of conscious awareness and control.
IAT Topics

- Race
- Gender
- Age
- Sexual Orientation
- Disability
- Additional variations such as career, skin-tone and weight.
How does implicit bias play a role in toxicity in the legal profession?

- Implicit bias plays a large role in workplace discrimination and harassment.
- Implicit bias is intrinsically connected to incivility and bullying as evidenced in behavior toward judges, opposing counsel and adverse parties and witnesses.
Legal professionals report “startling” rates of bullying and sexual harassment in IBA Survey.

- In 2018 the International Bar Association (IBA) launched a survey investigating how sexual harassment and bullying affect legal workplaces.
- “Us Too? Bullying & Sexual Harassment in the Legal Profession.”
- Survey results released in the spring of 2019.
- Results confirm that bullying and sexual harassment is common in legal workplaces and no region of the globe is immune.
Statistics: the largest-ever survey on bullying and sexual harassment in the legal profession

6,980 respondents from 135 countries

Conducted in 6 languages: English, French, Italian, Portuguese, Russian, Spanish

Respondents were:

67% female  32% male  0.2% non-binary/self-defined

From across the spectrum of the legal profession: law firms, in-house, barristers’ chambers, judiciary, government.

*Graphics from "Us Too? Bullying and Sexual Harassment in the Legal Profession.*
Bullying is rife in legal workplaces, affecting:
1 in 2 female respondents and
1 in 3 male respondents.

Sexual harassment is also common, with:
1 in 3 female respondents and
1 in 14 male respondents
having been sexually harassed in a work context.

More needs to be done. Of respondents’ workplaces,
53% had policies and 22% undertook training
to address bullying and sexual harassment.

Targets do not report. In:
57% of bullying cases and
75% of sexual harassment cases,
the incident is never reported.

Targets don’t report due to:
the status of the perpetrator,
fear of repercussions and the incident
being endemic to the workplace.

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Graphics from “Us Too? Bullying and Sexual Harassment in the Legal Profession.”
Policies and training do not appear to be having the desired impact. Respondents at workplaces with policies and training are just as likely to be bullied or sexually harassed as those at workplaces without.

Targets are leaving unsupportive workplaces. 65% of respondents who have been bullied and 37% of respondents who have been sexually harassed left or are considering leaving their workplaces.

Bullying and sexual harassment by country*

Bullying

- 52-74
- 45-51
- 37-44
- 29-36
- 15-28
- insufficient data

% of respondents bullied
Can you regulate civility?

- Civility is a code of decency that characterizes a civilized society?
- But how is that code reflected in the practice of law, and to what extent can regulate mandate civility?
- Aspirations versus enforceable rules of professional conduct.
MRPC applicable to incivility, bullying and harassment...

- Rule 4.4(a) “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person.”
- 8.4(d) “conduct prejudicial to the administration of justice.”
- 8.4(g) prohibits harassment on the basis of sex, race, age, religion, sexual orientation, ethnicity, etc...
- 8.4(k) prohibits discriminatory acts that reflect adversely on a lawyer.
Impact of stress on behavior

- When stress hormones fog a person’s brain, the person acts rashly and in his or her own self interest.
- If stress, anxiety, or other mental health or substance use issues are at play, a person may not be functioning at an optimal level and resort to rash, physical expressions rather than engaging in an argument about the merit of the objection or following proper procedures for disputes.
Mental Health and the Legal Profession
Why Does this Matter?

- Ethics
- Stigma
- Bias
- Public Service
- Lawyer Well Being
Paulette Brown

- Implicit bias can be and is manifested toward those who suffer from mental health issues, depression, anxiety and substance problems in our profession.
Alcohol Use in Our Profession - 2016 data

- ABA and Hazelden Betty Ford surveyed over 15,000 lawyers in multiple states
- 21% met criteria for alcohol use disorder
- Younger/newer lawyers in law firms have higher rates
- Those from underrepresented groups get help later, if at all
- Other drugs, compulsive behaviors
When is Work Affected?

- The impaired lawyer may cover very well at work.
  - I never missed court
  - No client complaints - yet
- Are you bringing your “A” game?
  - If not, are you overcompensating
Depression

- Lack of interest in normally pleasurable activities.
- Lawyers notice changes in ability to concentrate, remember and decide.
- Those who are subjected to greater degrees of implicit bias have higher rates of depression.
- Depression is a predictor for suicide.
Other Mental Health Issues

- Anxiety Disorder – 18%
- Bipolar Disorder
- Obsessive Compulsive Disorder
- ADHD
- Post Traumatic Stress Disorder
- Alzheimer's Disease
What Stigma Means

- ABA Hazelden Study - Barriers to seeking help included
  - "not wanting others to find out they needed help"
  - "concerns regarding privacy or confidentiality"
- Fear of negative repercussions
- Stigma refers to a feeling of disgrace or fear
Double Stigma

- Those subject to implicit or explicit bias, anticipated or actual, experience greater stress
- Stress increases our risk of experiencing mental health issues.
- Legal profession expectations of majority and other attorneys differ. No second chances.
Impact of Double Stigma

- Social stigma coupled with attitude about weakness
- Pressure to overperform
- Cultural stigma = more unmet mental health needs
- Self-reliance, trust in healthcare system
Mindfulness

- Increase awareness
- Factors that can increase implicit bias
The Path to Lawyer Well-Being:

Practical Recommendations for Positive Change

THE REPORT OF THE NATIONAL TASK FORCE ON LAWYER WELL-BEING
What is lawyer “well-being”? A continuous process in which lawyers strive for thriving in each dimension of their lives:

- **Emotional**: Recognizing the importance of emotions. Developing the ability to identify and manage our own emotions to support mental health, achieve goals, and inform decision-making. Seeking help for mental health when needed.
- **Social**: Developing a sense of connection, belonging, and a well-developed support network while also contributing to our groups and communities.
- **Occupational**: Cultivating personal satisfaction, growth, and enrichment in work. Financial stability.
- **Intellectual**: Engaging in continuous learning and the pursuit of creative or intellectually challenging activities that foster ongoing development. Monitoring cognitive well-being.
- **Spiritual**: Developing a sense of meaningfulness and purpose in all aspects of life.
- **Physical**: Striving for regular physical activity, proper diet and nutrition, sufficient sleep, and rejuvenation. Minimizing the use of addictive substances. Seeking help for physical health when needed.
It works both ways

- If the legal profession supports well-being, it must also support a diverse and fully inclusive workplace.

- If the legal profession supports diversity and inclusion, it must also be willing to foster an environment where well-being is a priority.
Challenges

- Serious examination of “forced” cultural norms – from golf to alcohol
  - Recovery
  - Interaction with medications

- Hallmarks of success
  - Competition vs. collaboration
  - Impact of incivility and harassment
Collegiality and Respect

- Building resilience
- Mentoring, fostering and sponsorship
- Reduced isolation
- Autonomy
- Having what we need to do our best work.
Resources

- ABA 360 Commission
- Harvard Implicit Association Test
- Harvard Mind Trails Project
- Kirwan Institute for the Study of Race and Ethnicity
- www.lawyerwellbeing.net
Lawyers Concerned for Lawyers Minnesota LAP

- History
- Confidentiality
- Lawyers, judges law students and families
- Education
  - CLEs
  - Website www.mnlcl.org
- Consultation
  - Advice and support to concerned persons
  - Assistance to legal organizations with policies and procedures
Lawyers Concerned for Lawyers
Minnesota LAP

- Clinical Services
  - 24 hour hotline
  - Assessment
  - Intervention Coaching
  - Short term counseling
  - Referral to Community Services
  - Group Therapy
  - Support Group

- Mentoring

- Social Support
Partnership with EAP

- Up to 4 free counseling sessions
- Resource website
  - www.sandcreekeap.com
  - Click on WORKLIFEWELLNESS LOGIN
  - Enter password LCL1
- Contact Sand Creek directly at 651-430-3383 or toll-free: 1-888-243-5744
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&

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