

# Subconscious bias and the battle for justice

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The second-year law school students watched in amazement.

A woman gave testimony in a domestic violence hearing in Cobb County Superior Court. Instead of the subdued, tearful, intimidated stereotype of a domestic abuse victim, the woman seethed with fury, crying out.

She blew [student](#) preconceptions apart like a bomb.

After the hearing, Tiffany Roberts (J.D. '08), adjunct professor and deputy director of the National Institute for Teaching Ethics and Professionalism (NIFTEP), debriefed the Fundamentals of Law class, which she co-teaches with Clark D. Cunningham, W. Lee Burge Chair in Law and Ethics and director of NIFTEP.

Roberts asked a pointed question to the students, who had been watching the court proceedings as part of the class.

"This woman wasn't the meek stereotype most people expect to find in a case of domestic abuse. Did her defiance and anger make you think — even for an instant — that she may have caused, or even deserved, her domestic abuse?"

Roberts then asked an even tougher question.

"Could there possibly be internal [bias](#) at work in your judgment about her?"

In that moment, Roberts forced her class to stare into a deep, truthful mirror and confront an important and too often unexamined issue of the legal system: subconscious bias.

Professor Andrea Curcio, Roberts' colleague, makes the sensitive subject of personal bias a focus of her academic work.

"Understanding subconscious biases, their pervasiveness and their impact on perceptions, interactions and analyses, helps prepare lawyers to represent people from cultural and racial backgrounds different from their own and to address both individual and institutional injustice," Curcio said.

## **The bias blind spot**

On close examination, a widespread and fundamental assumption of American life — that our justice system is truly just — threatens to fall apart. Bias runs like a jagged scar through the legal decision-making of the United States, from the nation's beginnings to present day.

For census-taking purposes, authors of the foundational document of our legal system, the U.S. Constitution, deemed slaves to be merely three-fifths of a human being. And 228 years later, in August 2016, a Department of Justice investigation in the aftermath of the Freddie Gray police shooting in Baltimore revealed official policies allowing unconstitutional stops, searches, arrests and other activity by that city's police department.

These examples of overt bias, institutionalized and unjust, are conspicuous — and notorious. Roberts and Curcio, however, choose to work at a personal level to raise awareness of how subconscious bias can affect client relationships, influence courtroom decisions and shape laws.

Why does it matter? By logic, when the legal system can address bias at its base, at the personal level, justice will more often prevail. Lawyers will become better advocates for their clients. Judges will uniquely consider each and every courtroom decision on its own merit. Prejudicial laws will appear less often on the books.

An utterly honest examination of personal bias or prejudice like the one Roberts' students conducted after their Cobb County court observation is key. But self-awareness means facing the truthful mirror, and what it reveals can be painful.

"The predominant discourse in law school and among lawyers is that lawyers are the ultimate rational thinkers. We train law students to 'think like lawyers,'" Curcio said. "Students often assume that thinking rationally, logically and analytically means they are able to set aside their

existing biases."

Unfortunately, this faith in the supremacy of rational thinking can result in what researchers call a "bias blind spot," in which individuals see biases in others but believe that they are bias free.

Curcio and fellow researchers have conducted two surveys to examine subconscious bias among law students. One canvassed 125 incoming law students and 13 upper-level clinic students. A second was administered to 591 incoming and upper-level students at two separate schools. Curcio's paper discussing the survey results ("[Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory](#)") appeared in the Nevada Law Journal in 2015.

"The survey results suggest many students believe lawyers are less susceptible than clients to having, or acting upon, stereotypes or biases," Curcio said.

Curcio's work powerfully suggests that some [law students](#) do not understand the pervasiveness of bias, in themselves or in other well-meaning people.

"Some students don't recognize that legal analytical training is unlikely to trump a lifetime of subconscious cognitive processes," Curcio said.

"And because they believe that they already understand and can recognize their biases, students may resist education aimed at helping them recognize how personal biases affect their interactions with clients and the legal system."

## **Stereotypes start early**

Stereotypes form in the human consciousness at a very young age.

Infants and toddlers begin to categorize people based on easily observable characteristics like skin color, gender, age, etc. Racial stereotypes can be embedded before children enter kindergarten. The social experiences that create those stereotypes "influence how people perceive and assess facts, attitudes, legal problems and legal processes," Curcio said.

Both Roberts and Curcio contend that no one — lawyer, tinker, tailor, spy, whoever — breezes through the world free of [personal bias](#). Even well-meaning people can be shockingly biased in the ways subconscious prejudices color their perceptions and decisions.

Curcio's Nevada Law Journal paper gives a telling example.

It cites an experiment in which five partners from different law firms deliberately inserted grammatical, factual and analytical errors into a legal research memo about trade secrets in Internet start-ups. Then, 53 different law firm partners were asked to participate in a study on writing competencies of young attorneys and asked to edit the memo for errors and rate its overall quality. The partners received exactly the same memo. A cover page instructed that the memo was drafted by a male third-year associate who graduated from New York University School of Law. Half the partners editing the memo were told the associate was Caucasian; the other half were told the associate was African-American.

The identical memo averaged statistically significant lower overall ratings for the fictional African-American associate than the Caucasian. Partners found more errors and made more negative qualitative comments in the purportedly African-American memo —for exactly the same work.

Social cognition theory to the rescue?

"I think everyone has biases," said Roberts, "but I don't think one's biases must translate into being oppressive or racist. If we are willing to examine our behavior, we can make sure our biases aren't causing harm to other people's lives."

Harm can show up with little fanfare. When a lawmaker allows bias to shape opinions, lasting injustice can appear in the legal code. When a judge sees an endless stream of faces from the same socio-economic background crowding a courtroom, it becomes easy to assume the next person on the docket is just like all the others. When a public defender stressed by caseloads impatiently waits a half hour for a late client, it might be easy to assume the client simply doesn't care. (But, Roberts pointed out, what if scraping together enough money for bus fare caused the delay?)

"The relationship of counsel to client is the foundational element of a successful legal relationship," Roberts said. "Bias can break down the relationship if we can't identify and manage it. If we don't trust a client, we won't be able to optimize our representation."

Subconscious bias sometimes doesn't even involve people.

Student Greg Mullin (J.D. '17) sees examples of what he calls "confirmation bias" in his studies of technology law.

"Many people have formed beliefs that data is private, devices are secure and technology is trustworthy," Mullin said. "Those beliefs may or may not be true."

He describes what happens when a user receives an anonymous email request to click a link and change a password.

"Confirmation bias means there is a risk you will immediately click the

link because you interpret that email, which could be a 'phishing' scam, as conforming to your belief that emails are trustworthy," Mullin says. "In situations like this, confirmation bias can cause people to act outside of their best interests."

Mullin said the discussions about bias in Roberts' and several other of his classes will help him be more self-aware as a lawyer.

"I learned about types of biases and how unconscious bias can produce unwanted results within the legal system," he said. "That knowledge helped me to more easily identify and overcome biases and gave me another tool to use when advocating for a client."

That's progress. But Curcio thinks that law school training in rational thinking may provide students a false sense of competency when it comes to working in the real world.

"To focus on rational thinking as if there's an objective reality," she said, "does not serve us or our clients well."

Curcio favors teaching students the psychology and science that underlie biases in the hope that this will make students "more receptive to learning about, and confronting, their own stereotypes and [biases](#)."

## **When bias becomes personal**

Roberts, a black woman, knows firsthand what happens when subconscious bias, or worse, enters the legal system.

Roberts' background commands respect. She has been teaching Fundamentals of Law, which integrates a clinical component letting students represent victims of domestic violence in protective order proceedings, at Georgia State since fall 2011. She started her



professional career as a public defender in the Atlanta Judicial Circuit.

As a private attorney, Roberts handles tough felony and civil rights cases. Atlanta Mayor Kasim Reed appointed her to represent a community organization on a panel that screened applicants for the 23rd chief of police for the city. She does community organizing on policing issues, and she represents many clients from poor neighborhoods and bad situations.

So what sometimes happens when this accomplished attorney shows up to represent a client?

"I've been to courtrooms in jurisdictions just outside of Atlanta where it's not assumed that I'm an attorney," Roberts said. "They assume I'm the defendant's girlfriend, and I'm told to 'go sit over there.'"

"I've never seen that happen to a white person with a briefcase. It takes a different level of patience to deal with that on a consistent basis."

Roberts and Curcio share an understanding that so long as humans are imperfect, the legal system will be imperfect too.

But they also strongly believe that the one acceptable bias in law should be a bias toward better justice.

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