

# THE DISCOVERY AND USE OF IMPLICIT BIASES

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**W**e have all been asked to explore our implicit biases and to also recognize our explicit biases and consider how such biases affect our representation of clients before and during trial. A personal bias, known or implicit, can sometimes unknowingly affect the selection of witnesses, jury selection, and our attitude and approach in the preparation of all aspects of trial, including the cross-examination of adverse witnesses, and perhaps our relationship with the judge.

We have touched upon these bias issues in the past at the Trial Lawyers College when asked to explore and answer the question: **Who am I?** But I was never focused on the discovery of my biases as an important element in the struggle to fully answer that question. I know that I am the totality of all of my life experiences, and I have spent many hours in psychodrama sessions and in self-exploration slowly discovering the answer to that question. But in the process, until recently, I did not fully recognize my implicit biases and their contribution to who I have become. I now finally realize that my biases gave birth to the passion necessary to achieve justice for certain clients, and that without that passion, success was unlikely.

I have been assisted in that endeavor by the authors of the bestselling book, *What Happened To You?*<sup>1</sup> I will later refer to this book, and I highly recommend it to assist in discovering who you are and how life experiences—both good and bad—shape us and can be preserved in the development of the brain starting before birth and thereafter, and how certain memories that are preserved by the brain can become subconscious biases that can remain undiscovered for a lifetime.

## The Poor and the Working Class

So, let me start with a few of my own later-recognized and understood implicit biases, and how those biases have affected my life and practice of law.

For as long as I have memories, I have felt comfortable and warm in the presence of the working class. I have only recently recognized that I had a longstanding subconscious bias directed toward those that I have sensed were taking advantage of this class of citizens—the working class. Where did this bias originate, and how has it affected my life, the practice of law, and who I became?

As a child spending summers and a winter with aunts and

uncles in a small isolated coal mining town in the Colorado mountains, I became very fond of my hardworking extended families that had to purchase their groceries on credit from the store owned by the mining company. Some lived in housing owned by the company. The small town was isolated and snowed in during the winter months, when the narrow-gauge coal train delivered groceries to the company store and transported injured miners out of town to a distant hospital.

While the families did not live in poverty, their standard of living was totally controlled by the company. The miners' income was based on the tonnage of coals that each miner produced by pick and shovel each day. I often overheard miners' angry statements directed toward the company, including my favorite uncle's statement that the company was cheating him out of wages at the weight station when the coal he produced was weighed. Why and how the memory of this statement remains in my subconscious for more than 80 years can be explained by recent scientific studies on the retention of certain memories during the development of the brain and how that can then result in implicit bias.<sup>2</sup>

*What other memories remained in my subconscious over the years that contributed to my implicit biases, and what were those biases?* My father grew up in poverty following his own father's death at a young age. My grandfather's death left my grandmother and the children struggling for survival in the years that followed. My father's later description of those events of his childhood had a lasting impression on me as I visualized his stories of the 'haves' and the 'have nots'—the working class and those in control of the working class.

His childhood home was next to the railroad tracks where the narrow-gauge coal trains often parked overnight, their cars loaded with coal. As a young child, my father would wait until dark, then climb up the side of a fully loaded coal car and throw chunks of coal to the ground and retrieve them for his mother's use in the coal stove at home. Once, a railroad cop caught him, gave him hell and angrily threatened him if he ever caught my father again. I was left with the picture of Dad, helpless, reduced to tears of fear and humiliation. Dad's stories and this particular memory caused my heart to go out to the poor and disadvantaged.

Are there other memories that contributed to my unconscious

biases that favored the poor and working classes and made those that harmed them the enemy? There are many, both from my childhood and in the years that followed. I will describe a few that I now recognize had a longstanding effect on how I eventually practiced law, and the type of cases that created a passion in my representation of certain clientele.

### The Catholic Church

My best friend in grade school, Lynn Griffith, was the youngest in an impoverished family of 16 children who lived across the railroad tracks from me in Grand Junction, Colorado. His struggling father used his children to help him deliver coal to residences in town using an old broken-down truck. Lynn and I did everything together—hunted rabbits with slingshots, climbed buildings looking for pigeon nests, sold the local newspaper after school each day in bars and restaurants and to troops on the troop trains carrying soldiers destined for World War II.

Lynn questioned why my mother made me and my sister, Adrienne, go to the Catholic Church each Sunday without her, and I explained that Catholics went to church to confess their sins and take Holy Communion which allowed them to go to Heaven, and otherwise they would go to Hell. One day he asked if I would take him to church with me the following Sunday, so that he would also go to Heaven. When he met me in the alley behind my home that Sunday, he was clean with combed hair, wearing clean hand-me-down clothes, and wearing shoes. I then remembered that because he had not gone through the rituals of becoming a Catholic, he could not go with me to take Communion, and when I explained this, he looked devastated, and fighting tears, he headed home. As I walked to church without him, I remember feeling a deep sadness and some confusion over the harm this had created to my best friend, who I now realize I loved as a brother.

At that time, none of the Catholic Church ceremony was in English except the short sermons, and I was always bored and anxious to leave. My only memory of a Sunday service occurred at age six or seven, when the grey-haired priest went to the podium to deliver his sermon, and in a loud and angry voice, he told the Mexican families seated in the back pews of the church, that they were not welcome and should leave because they never contributed money to the church. I remember having a sad feeling for the Mexican families, and some anger toward the priest and church. The priest later came to our home wanting my mother to enroll me and my younger siblings in the Catholic school. She explained that she had no money for the tuition and could not do so. The priest unsuccessfully persisted and embarrassed her in the process.

When I became old enough to say “no,” I stopped attending church. In later years I recognized that my bias was against the Church and its policies, and not the parishioners. My maternal and paternal extended families, whom I loved, were all Catholic. This was an important distinction in considering how my bias may have later affected my representation of some clients.

In later years other events occurred that contributed to my bias against any person, group, or organization that seemed to

take advantage of the poor and those in the working class. At age 16, I found summer employment working on an assembly line, and joined the Teamsters Union. My job consisted of removing heavy lead trays filled with frozen food products from a long tank, dip the tray into a tank of steaming hot water to separate the items of food, and shove the tray down the assembly line where several women worked separating and sacking the food products. We worked as a team and I became very fond of these older hardworking women who would discuss their problems and hardships during coffee breaks. I still remember their names and low income status despite their hard, sweating work, and Union representation.

Another memory ingrained in the lower part of my brain occurred in later years when, as a young adult, I was hunting deer in the mountains outside the coal mining town that I earlier described. I heard the noise of what I thought was an elk coming through the timber. I aimed my rifle in that direction and a very large Native American man emerged riding a horse and holding a gun across his saddle. I lowered my rifle and apologized. I learned that he was the only Native American coal miner in the small mining town. When I explained that I was the nephew of coal mining uncles that I named, his face broadened into a wide friendly smile and he described his friendship for my uncle, Tony Byouk, who, he explained, came to his rescue one night in a local bar when some of the drunken White miners were trying to physically remove him from the bar. My uncle later explained that he did in fact stand side-by-side with his Indian friend and fight off the other miners.

I became a friend of the Native American and his family and learned that he and his wife were Apache Indian descendants, and I was invited to their home on several occasions. I was with him in his pickup truck one day on a muddy road when he spotted a car stopped in the roadway with a flat tire. I noted a total change come over him as he quickly stopped and became very deferential to the other driver and insisted that he change the tire so that the other driver would not get muddy and dirty. Afterwards, I asked him why he treated the other driver with such deference, and why the other driver seemed to expect it. He shrugged and said that the other driver was his boss in the coal mine.

This memory registered in my subconscious as another example of how the working class can be taken advantage of by the corporations and people who control them, and how the poor and the working class are expected to show deference to this treatment.

### My Mother

Perhaps the suppressed memory that I eventually recognized to be a major influence on my later life actions, occurred when I told my mother, at age 18, that I had changed my mind about joining the Marines with two of my friends because they had changed their minds and had decided to go to college. I didn't want to join the Marines without them. I told her that I had decided to join my friends in enrolling at Colorado A&M College that fall. I thought that she would be delighted because no

one in our extended working-class families had attended college. Thus I was bewildered when she burst into tears and said something about losing me and my becoming too important. I didn't understand—I thought she was just worried about the expense. I assured her that I could work my way through college.

In retrospect, her emotional reaction was not the money, but the fear I would become one of those people that looked down on the poorest in the working class. In the years that followed, I subconsciously wanted Mom to know that I remained a member of the family and the working class, and acted accordingly. It wasn't until after her death that I recognized how the suppressed memory of her tearful reaction had turned me against anyone I felt to be anti-working class.

I now know those memories are the foundation of some of my unconscious biases. *Why and how did I suppress those memories for so long, and how have they impacted me in the practice of law?* First, let me address the scientific evidence which explains why and how certain memories are suppressed, but are retained in the development of the brain.

### Why Some Memories Are Suppressed

Dr. Perry describes in elaborate scientific detail how each section of the brain has the capacity to restore memory; but as the brain develops in children, it is the brainstem and lower portion of the brain that reacts to the body senses of smell, sound, sight, and touch. In young children, the cortex of the brain has not yet fully developed to enable a child to interpret the early memory traces resulting from any stressful events created by the body senses. Yet those memories remain in the subconscious and can unknowingly surface in the form of biases throughout life.<sup>3</sup> Dr. Perry writes:

The most powerful categories to our brain come from our first experiences, usually in early life. This contributes to our tendencies for bias<sup>4</sup> ... One of the hardest things to grasp about implicit bias and racism is that your beliefs and values do not always drive your behavior. These beliefs and values are stored in the highest, most complex part of your brain—the cortex. But other parts of your brain can make associations—distorted, inaccurate, racist associations. The same person can have very sincere anti-racist beliefs but still have implicit biases that result in racist comments and actions. Understanding sequential processing in the brain is essential to grasping this, as is appreciating the power of developmental experiences to load the lower parts of the brain with all kinds of associations that create our worldview.<sup>5</sup>

Subconscious memories created by stressful events can continue to be stored in the lower portion of the brain throughout life, as demonstrated by numerous stories and examples throughout this excellent book. Dr. Perry also explains the difference between implicit bias and racism:

Implicit bias suggests that the bias is present but not 'plainly expressed'—sometimes even unintentionally expressed. Racism, on the other hand, is an actual overt set

of beliefs about the superiority of one race over others.

In the United States, racism is the marginalization and oppression of people of color by systems created by White men to privilege White people. You could say that racism is embedded in the top, 'rational' part of your brain, whereas implicit bias involves the distorting 'filters' created in the lower parts of the brain. When a child or youth is exposed to overt racial beliefs, possibly in their home or peer groups, those beliefs can become 'embedded' in the filters. The result can be a deeply ingrained set of feelings and beliefs that cut across multiple regions of the brain.<sup>6</sup>

So, how do we correct or overcome the destructive biases that we are able to identify, or make better use of those that we feel are beneficial. I am now satisfied that my biases against people or organizations that harm or take advantage of the poor and the working class have had the beneficial effect of providing me with the needed passion necessary to put my heart and soul into the representation of many of those people without thinking about or even realizing what was creating that passion. I also eventually overcame some of my biases to some extent, by spending time with individuals belonging to the organizations that I disliked because of my feelings that they were the enemy of the poor and the working class. But my passion, arising out of my biases, was more important to me, than attempting to control or change those biases. But according to the experts, biases can be changed over time.

Dr. Perry explains how those changes can be made or can occur. For example:

Even the most hateful racist belief system can be changed. Remember that the cortex is the most malleable; the most changeable part of the brain. Beliefs and values can change. But implicit bias is much more difficult. You may truly believe that racism is bad, that all people are equal. But those beliefs are in the intellectual part of your brain, and your implicit biases, which are in the lower part of your brain, will still play out every day—in the way you interact with others, the jokes you laugh at, the things you say.

It is interesting to watch how this relates to the Black Lives Matter movement. In the wake of the murder of George Floyd, so many conversations have been sparked about structural racism, implicit bias, and white privilege. This has illuminated so much misunderstanding and resulted in so much expressed pain. And, of course, so much defensiveness. 'I've never been racist.' 'I don't have a racist bone in my body.' 'Well, the issue isn't your bones. It's your brain. All of us have ingrained biases, and lurking among these are racist associations.'<sup>7</sup>

*So, how have my recently acknowledged implicit biases impacted my life and the practice of law?* One of my earliest cases in the 1960's was a lawsuit I filed to seek removal of a Boulder County

Commissioner who forced a Mexican employee to work without pay on the Commissioner's personal properties on weekends. When the employee finally asked for payment, he was fired. I remember the feelings of outrage upon hearing my client's story, and the passion I felt in pursuing the litigation that resulted in my client receiving damages and in the County Commissioners resignation from the Board.

This was the first of many cases that I filed in subsequent years and throughout my career, involving conduct harmful to the poor and the working class. Cases that created a passion in me, with no understanding at the time that an implicit bias was creating the passion. I filed lawsuits to assist the working people poisoned by the asbestos industry; lawsuits involving defective products that harmed workers at their places of employment; lawsuits that involved the creation of new appellate law that would offer protection to generations of future workers.<sup>8</sup> And, lawsuits against the operators of private prisons that exploit prison laborers for profit.<sup>9</sup>

In retrospect, my implicit biases were instrumental in my enthusiasm to become one of the co-founders of Trial Lawyers for Public Justice (now 'Public Justice'), a Board Director of The Human Rights Defense Center, and perhaps, more importantly, my activities in the Trial Lawyers College. It was as members of the Board of Directors of TLC, that J.R. Clary, Cyndy Short and I revised the by-laws to insure that the college would only educate and train lawyers who are committed to represent and obtain justice "for individuals: the poor, the injured, the forgotten, the voiceless, the defenseless and the damned, and to protecting the rights of such people from corporate and governmental oppression.—We do not offer training for those lawyers who represent government, corporations or large business interests."<sup>10</sup> My passion in helping to draft this Mission Statement, as Chair of the committee, was obviously the result of my implicit and explicit biases. The grades that I gave to applicants to the college for over 20 years were obviously influenced by my implicit biases. Since April of 2020, my passionate objections to the conduct of the minority Directors who could have destroyed the College or substantially altered its course, has also been the result of my implicit biases that favor the poor and the working class.

I now realize that my subconscious memories and biases also played a major role in my written opposition to the University of Wyoming's dismissal of fourteen black football players in 1969 who were protesting racial prejudice. My letter to the University president, a former acquaintance, asking that the black players be re-instated, was ignored. But in my subconscious bias, this again represented a powerful institution that was not only harming members of a working class, but also promoting racism.

So the discovery of our implicit biases can be critically important in our life's decisions, and for me, in creating the passion necessary to constantly fight for the poor, the working class, and those who are often victims of the rich and powerful.

But many implicit biases that are helpful, can also be harmful in life changing ways. I finally recognized this following my mother's death. When I married and began practicing law, I re-

sisted purchasing items for family or myself that might make it appear that I was now a member of a higher class that I subconsciously felt looked down on the working class. I didn't want a fancy home or car that might make my mother uncomfortable when visiting. I was subconsciously torn between a lifestyle that I felt would satisfy my mother, and a new life that was inclusive of the professional class that I was now a member of. In addition, I was uncomfortable asking jurors for money damages and therefore reluctant to recommend a large sum. I identified with lawyers representing the 'working class'.

Then my mother passed away, and I couldn't understand why I no longer felt guilty when associating with lawyers who were financially successful, and I began feeling more friendly and comfortable around those lawyers who were wealthy, many of whom became very close friends over time. I questioned why I felt somewhat relieved and free after my mother's death, a mother I deeply loved. I was confused.

It was then that I discovered, with the help of a psychologist, that I had an implicit bias toward those that I had assumed took advantage of my extended family, the working class and the poor. I was in the process of understanding and overcoming that bias to some extent. I was then able to overcome my reluctance to ask jurors to assess large monetary damages when justice demanded.

Before discovering this unconscious bias, did it at times result in my rejecting a juror who would have been favorable and fair? Did I sometimes unnecessarily attack an adverse witness because of this bias, and offend the jury? Did I sometimes treat certain defense council with undeserved disrespect? Perhaps, but that's water over the dam and I'll never know. I do know that I have overcome this particular implicit bias to some extent. I now wonder if I have other unconscious biases that I haven't yet discovered, and was pleased to learn, through Dr. Perry's book, that there are ways of overcoming such biases.

## Overcoming Implicit Biases

Dr. Perry explains that

the challenge of addressing implicit bias is first recognizing that you have it. Reflect on when your biases have been expressed. Anticipate when and where you may likely express your bias. Be courageous enough to spend time with people who are different from you and who may challenge your biases. It can be uncomfortable. But remember: Moderate, predictable, controllable stress can build resilience. Create new associations; have new experiences. Ideally, you go out into the community and spend time with people who are different than you are. You need to create real, meaningful relationships so that you get to know individuals based on their unique qualities, not based on categories.

This is what really changes implicit bias and racism:

And this is why you can't be a corporation and address these issues by simply having everyone go to an anti-racism course of cultural-sensitivity training. You don't get

trained in cultural sensitivity—you go spend time immersed in the culture, spend time with other people. \*\*\* You can't become culturally sensitive from a three-hour seminar.<sup>11</sup>

The long-term solution is to minimize the development of implicit bias. We have to think about ways to raise our children with more opportunities to be exposed to the magnificence of human diversity earlier in their lives. And we have to change the inherently biased elements of so many of our systems.<sup>12</sup>

So, changing subconscious bias can be far more difficult than what it may seem. This is particularly true if implicit biases can be passed on from one generation to the next in the DNA of the developing brain, as new scientific research has disclosed.<sup>13</sup>

So, based on all of the current medical and neuroscience evidence, TLC can work to help its students, faculty and staff in beginning to discover their implicit biases, which must be discovered to fully answer the question, 'who am I'. The College can attribute its unique success to several important factors: (1) a team of the best and most experienced and dedicated psychodramatists available; (2) the careful selection of students representing racial, sexual and ethnic diversity; (3) hours then spent in psychodrama sessions using re-enactments of life events and reversing roles with one another, which develops mutual compassion, understanding, and lasting friendships; and (4) living together in the kind of environment that Dr. Perry recommends to "create real, meaningful relationships" necessary to discover and change implicit biases that are harmful, and discover those that may be advantageous and helpful. With this training, and in this college environment, harmful implicit biases can change.

Student graduates then continue to use this knowledge and experience in joining or forming small working groups throughout the nation, and the environment that dispels harmful biases thereby continues to grow. I have been fortunate to participate in this environment for more than 20 years, discovering and using the passions created by my implicit biases, both in my everyday life, and in the practice of law.

Thanks to our dedicated Board of Directors, faculty, alumni, staff and psychodramatists, the Trial Lawyers College has survived and continues to grow despite the pandemic and challenges presented, and will assist thousands of trial lawyers in future years in answering the question, **Who Am I**. In the process, many will discover and address their implicit as well as explicit biases. No other program is presently adequately prepared to render this assistance. <sup>14</sup>

### Endnotes

1 This is a *New York Times* bestseller published in 2021. Authors include Bruce D. Perry, M.D., Ph.D., a child psychiatrist and neuroscientist who is a senior fellow of the Child Trauma Academy, and an Adjunct professor of psychiatry at the Northwestern University School of Medicine in Chicago. I am forever indebted to my son, Jeff Trine, for introducing me to this book, which contributed to my discovery of my biases.

2 See *What Happened to You?* for a discussion of the scientific studies of the brain as it relates to the subconscious retention of certain early memories that can then result in implicit biases.

3 See, 'What Happened To You', pgs. 29-34; 76-78; and 223-4.

4 Id at 234.

5 Id at 236.

6 Id at 239.

7 Id at 240-241.

8 Some of these cases are described in 'Ways in Which Trial Lawyers Can Make a Difference', by Bill Trine, *The Warrior*, Summer 2016, at page 26.

9 See, 'A Broken Criminal Justice System and Prisons for Profit', by Bill Trine, *The Warrior*, Fall 2021, at page 7.

10 See Bylaws of the Trial Lawyers College adopted by the Board of Directors and signed by Gerry Spence as Chairman of the Board, and Jude Basile as President on February 1, 2011. (*Ed. note:* The Bylaws were thereafter revised on May 6, 2020.)

11 See footnote 1, 'What Happened to You?' at page 241.

12 Id at 242.

13 See, Mark Wolynn, "It Didn't Start With You", published in 2017 by Penguin Books, describes some of the latest neuroscience research showing that the memories of traumatic experiences residing in the DNA of brain cells can be passed on to the next generation and the next.

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