

PRESENTED AT

Advanced Texas Administrative Law Seminar

September 7-8, 2023

Austin, TX

UNCONSCIOUS BIAS – WHAT YOUR BRAIN IS UP TO WHEN YOU AREN'T PAYING ATTENTION

Jonathan Smaby

Judge Audrey Moorehead

Jonathan Smaby
Texas Center for Legal Ethics
Austin, TX

info@legalethictexas.com
512.427-1477

UNCONSCIOUS BIAS – WHAT YOUR BRAIN IS UP TO WHEN YOU AREN'T PAYING ATTENTION

Do you remember the first time you ever got behind the wheel of a car? Did it feel strange? Did you find it a little scary because of all the things you had to think about at once?

If you did, you're pretty normal. Getting the feel for maneuvering an automobile while operating the accelerator and brakes with just the right touch – while being mindful of road conditions and other vehicles on the road, all at the same time – takes experience. While you were learning, you probably devoted considerable brain power to mastering the various tasks involved in safely operating a motor vehicle.

Contrast that feeling with how you approach driving now – you likely drive a car without ever thinking about the myriad of different skills you need to operate a two-ton hunk of steel at relatively high rates of speed. Not only do you drive on autopilot, but you are so confident about driving that you probably perform numerous other tasks while driving – talking to passengers, keeping kids in line, singing along with the radio, speaking on the phone (on speaker only, we hope), and who knows what else? You can do those things because your brain knows how to perform most of the complicated tasks to operate a car without you being conscious of it. This frees your brain up for other, more conscious activities. How does that work?

Your Brain's Role. Your brain *consciously* processes about [40 bits of information per second](#), which sounds like a lot. And it is. But your brain also *unconsciously* processes [11 million bits of information](#) per second. Most of what your brain allows you to do just to get through the day operates outside your awareness. Which is a good thing. If it didn't, you'd have to consciously think about how to walk, how to operate a doorknob, or how to tie your shoes. Imagine how many tasks you perform each day that you don't even think about, and how taxing it would be if these were all conscious decisions.

The reason your brain does this is to preserve energy. The brain wants to be as efficient as possible, and it does this by processing large amounts of information unconsciously, because that uses less energy. This is particularly true when the brain senses danger. The brain of early humans quickly evolved to develop an instinct to retreat from danger, like an angry lion or bear. People who didn't or couldn't do that didn't live very long. Your instant decision to slam on the brakes to avoid a collision with another vehicle or pedestrian – without even consciously thinking about it in advance – helps keep you alive.

While these unconscious thoughts are useful – and, in fact, critical – to our ability to stay safe and get through our daily routines, they also can have unintended negative consequences. When you meet a new person, your brain is unconsciously assessing that person on many levels. You may assume that someone is educated or uneducated by their appearance, attire, speech, or mannerisms. You may be drawn to or repelled by some people based on these same factors. You may think that you are making these decisions consciously, but the evidence shows otherwise.

System One/System Two. In Daniel Kahneman's book, *Thinking, Fast and Slow*, he describes decision-making processes as System One or System Two. System One decisions are emotional judgments made intuitively and nearly instantaneously. These judgments are fast, automatic, and effortless. System Two decisions are slower, conscious, and deliberate. It is also where skeptical thought takes place. But in the time that it takes to complete a System Two decision, the subconscious emotional conclusion already reached by System One has taken hold. Too often, the slower and more deliberate brain is subconsciously influenced by System One to the point that the initial subconscious, emotional assessment becomes an unconscious belief. As Kahneman says:

System Two is more of an apologist for the emotions of System One than a critic of those emotions – an endorser rather than an enforcer. Its search for information and arguments is mostly constrained to information that is consistent with existing beliefs, not with an intention to examine them.

System Two is not as rational as you might assume. And it interferes with your ability to use your slower, more deliberative brain.

Unconscious Bias. One consequence of this phenomena is unconscious bias, also known as implicit bias. Unconscious bias refers to the attitudes or stereotypes that affect our thoughts, actions, and decisions in an unconscious manner. They can be favorable or unfavorable and are activated without a person's awareness or control.

As a result, we all have unconscious feelings and attitudes about other people based on characteristics such as race, ethnicity, age, gender and appearance that may not necessarily align with our conscious beliefs, such as believing that we are not biased against other groups of people. Other subconscious bias triggers may include accent, language, culture, socioeconomic status, height, weight, appearance, disability, political views, and occupation (such as bias against the legal profession). Inevitably, implicit bias affects our day-to-day interactions with others as well as our assessments of others' behavior. We all engage in it, and we all are affected by others exhibiting these biases against us.

So, what does implicit bias look like? Consider this riddle that was popular many years ago:

A man is driving with his son next to him in the front seat. They are suddenly involved in a severe car accident, and the man is killed instantly. The son is unconscious but alive and is rushed to a hospital, where it is determined that he needs immediate surgery. The surgeon walks into the operating room and – after looking at the boy – says “I cannot operate on this boy. He is my son.” How is this possible?

If you came up with the correct answer, good for you. If you didn't, you're not alone. Many people have been puzzled by this riddle over the years. But when you know the answer, you may better understand unconscious bias. The answer, of course, is that the surgeon is the boy's mother.

Also available as part of the eCourse

[2023 Advanced Texas Administrative Law eConference](#)

First appeared as part of the conference materials for the

18th Annual Advanced Texas Administrative Law Seminar session

"Implicit Bias: What Your Brain is Up to When You're Not Paying Attention"