

Don't Let Implicit Bias Scare You!

How to Overcome Your Biases to Advocate for Human Rights for All

by Alisha Caldwell Jimenez

Welcome back to our *Equity and the Law* column, a brainchild that started over sandwiches with sides of ranch when Shawntal Mallory, Nebraska Legal Diversity Council; Stefanie Pearlman, the University of Nebraska College of Law; and Yvonna Summers, Creighton University School of Law, all decided that we would

activate around NSBA Executive Director Liz Neeley's invitation to highlight equity and inclusion topics within our profession. Through this article in *The Nebraska Lawyer*, we will collaboratively address different aspects of diversity, equity, and inclusion throughout the legal field and provide an educational perspective on how to implement equity and inclusion to promote a more diverse Bar. The Nebraska State Bar Association has been actively including continuing legal education opportunities geared towards cross-cultural competency and branching that educational component into a publication seemed like a natural next step. It then only felt logical to enlist the assistance of the co-chairs of the NSBA Diversity Section, Yvonne Sosa from the Office of the Federal Public Defender and Alisha Jimenez from Lancaster County Attorney's Office. After emails and Zoom calls, ideas, and much excitement, we have created this column for the readers of *The Nebraska Lawyer*.

Alisha Caldwell Jimenez



Alisha Jimenez is a licensed attorney, trained program analyst, and social scientist who believes empirical research has the potential to inform many aspects of professionalism in the judicial system. She currently co-chairs the NSBA's Diversity Section and has found a passion in promoting diversity in communities across Nebraska. Alisha holds a Bachelor of Arts in Psychology and Spanish

from Saint Louis University, a Master of Arts in Social Psychology from the University of Nebraska-Lincoln, and a Juris Doctorate from the University of Nebraska College of Law. Over the course of her career, Alisha has taught courses in introductory psychology and the psychology of diversity, and has guest lectured on topics related to juvenile justice and legal decision-making. Alisha currently serves as a Deputy County Attorney in Lancaster County, focusing in juvenile court. When she is not in the courtroom, Alisha conducts diversity, equity, and inclusion assessments for organizations through her small, women-owned and minority owned business, Inclusion, Diversity, and Equity Assessments (IDEA), LLC. *Opinions shared in this article are her own and do not represent the Lancaster County Attorney's Office.*

The U.S. legal system is designed to actively preserve human rights on a global level, by promoting democracy, civil rights laws, and labor rights laws abroad. On an international level, the U.S. advances human rights through foreign diplomacy and assistance, public research and reporting, and the imposition of sanctions to hold other nations accountable. On a national level, the U.S. has established laws and policies to protect human rights (e.g., U.S. Constitution, Bill of Rights, Human Rights Act, anti-discrimination laws) and the legal structures to uphold those laws (e.g., federal courts, U.S. Commission on Civil Rights). On a state level, Nebraska has established state protections outlined in state laws and policies, which are upheld by agencies such as, Nebraska Equal Opportunity Commission (NEOC) and the Nebraska Commission on the Status of Women, etc. It is easy to examine the U.S.'s global efforts and think of human rights as a crisis only in the context



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of foreign nations. However, just as every human is entitled to human rights, every human has a responsibility to refrain from infringing on the human rights of another. In particular, we as members of the legal profession have the obligation, the opportunity, and the means to contribute to the advancement of human rights in our day-to-day practice. This can be achieved through continued policy improvements, better education, empirical research, etc.

In this issue of the *Equity and the Law* column, I am here to challenge how you think about rights entitled to your fellow human. More specifically, I want to shift your thinking of human rights as an “international crisis” that only impacts foreign countries to recognizing it as an issue that is already at your doorstep. By the end of this article, I hope that you feel empowered to be a leader in advancing equity and equality in the preservation of human rights by starting with reimagining how you represent clients, taking into account all aspects of what they bring to the table. In particular, I hope to encourage you to reflect on your own legal practice and redefine how you preserve the humanity of every client you encounter.

The U.N. defines *human rights* as “rights inherent to all human beings regardless of race, sex, nationality, ethnicity, language, religion, or any other status.”¹ Philosophy professor, Brian Orend, further asserts that human rights are not a claim, but “a reason to treat persons in certain ways.”² That is, human rights are the values that require us to treat other humans with respect, and in the way we think we all deserve. As legal professionals, we can preserve the “humanness” of our clients, by acknowledging the complex identities that they hold and meeting them where they are as we engage with them. In an essay authored by Professor of Psychology at Pepperdine University, Dr. Miguel E. Gallardo, he reflects on the cross-section of professionals in a client-based profession and advancement of justice stating,

“...[O]ur work must evolve to include the tenets of human rights beyond what we can see in our ‘offices.’ Each client and family bring with them the lived experiences in their lives that must be front and center if we are to truly create better outcomes for our clients. We must make synonymous the concept of social justice with human rights for all.”³

Although Dr. Gallardo’s 2021 essay was primarily directed at mental health professionals, I believe the challenge applies to members of the legal profession as well. For decades, the legal profession has been criticized for the lack of diversity, particularly in positions of power and influence. A deep dive into the many empirical studies demonstrating specific disparities of representation in the legal community can be addressed in another issue; however, we can assume an unrepresentative profession means lawyers regularly represent clients that come from backgrounds, cultures, and lived experiences that

differ from their own. Despite well intentions, we enter every attorney-client relationship with our own biases that have the potential to influence how we hear and understand our clients, how we determine whether decisions are in the client’s best interest, and how we communicate information to the client to ensure understanding. In failing to adequately acknowledge and address the role of culture and bias in our ability to represent clients, we may miss the opportunity to empower them in the justice process. As NSBA Executive Director, Liz Neeley warned, “attitudes toward the courts can affect the way individuals perceive their role in the justice system: their willingness to comply with laws, report crimes, file legal suits, serve as jurors, and so on. In short, a positive public perception of the courts is critical to the maintenance and operation of the judicial system.” Public perceptions are shaped by the experience of individuals when they encounter the judicial system, and the attorney-client relationship can govern the lens through which a client navigates the system.

You do not have to be a human rights lawyer to contribute to the preservation of human rights. As a lawyer, topics such as civil rights and social justice are likely familiar, and I imagine it would be safe to assume readers are familiar with notable Supreme Court Cases, such as *Brown v. Board of Education*,⁴ which struck down “separate but equal,” *Loving v. Virginia*,⁵ which held anti-miscegenation laws unconstitutional; *U.S. v. Virginia*,⁶ which held gender-biased admission policies unconstitutional; and *Obergefell v. Hodges*,⁷ which guaranteed right of same-sex marriage. Each of these notable cases evince a societal consensus in the preservation of human rights through civil law protections. Unfortunately, one cannot watch the news today without exposure to an increasingly divisive rhetoric that permeates communities throughout the U.S. As a profession, we have a responsibility to model the culture of learning how someone personally identifies across various contexts opens the door to understanding what it means to be human in the capitalist, individualist society to which we all belong. One of the barriers to achieving a society that embraces diversity—that is, diversity of thought, race, religion, culture, sexual identity, etc.—is the breakdown in communication across sociocultural lines. Research has demonstrated human nature to govern ourselves, our beliefs, and our interactions with others through the lens of our own understanding. However, when our personal understanding is flawed, or at a minimum skewed, due the limitations of our own ignorance, we have a responsibility to readjust our thinking.

One theoretical concept, called cultural humility, acknowledges how culture impacts human behavior and treats the client as the expert in their own culture.⁸ Chopp offers a distinct way to think about how to broaden our understanding and inform our representation of clients by their personal experiences. According to the theory, the professional does not

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expect to achieve cultural “competence,” in the sense of fully knowing and understanding all facets of the communities and cultures to which the client belongs, but instead engages in a continuous process of self-reflection and self-critique to check power imbalances and foster a mutually respectful professional-client relationship. Mosher, Hook, Farrell, Watkins, and Davis define cultural humility as “(a) a lifelong motivation to learn from others, (b) critical self-examination of cultural awareness, (c) interpersonal respect, (d) developing mutual partnerships that addresses power imbalances, and (e) an other-oriented stance open to new cultural information.”⁹ In the context of a lawyer’s work, operating in cultural humility opens the door for lawyers to respect each clients’ cultural background, communicate effectively with the client, and properly represent the client’s personal experience when telling their story to a decision-maker. When we can better understand a client’s culture and minimize bias, we can best represent clients.

Don’t let the concept of bias scare you. The unfortunate truth about humans is that we are all at risk of engaging in discriminatory practices or behaviors. People form attitudes to objectively organize the environment around them. Humans function by switching back between two forms of thinking, System 1 and System 2 thinking.¹⁰ As a lawyer, you are likely well accustomed to System 2 thinking—that is, deliberate, conscious, active reasoning that uses orderly steps to make

judgments and choices regarding the information presented. Conversely, System 1 thinking occurs quickly, automatically, and is sometimes referred to as a person’s gut response to situations. This type of thinking is governed by mental shortcuts that are often grounded in the associations we develop over our lifetime. The ability to engage in System 1 thinking is essential to human survival and allows people to use cognitive shortcuts to arrive at decisions. Unfortunately, these automatically activated, subconscious mental short-cuts have the potential to systematically influence behaviors in the form of bias. Implicit bias refers to the attitude formation that occurs outside of the awareness of the person. When you consider implicit bias, I would implore you to think beyond race and ethnicity. Implicit bias rears its head with all dimensions of diversity and has the potential to influence how one engages with clients or other actors in the judicial system. Implicit biases have the potential to color lawyers’ interaction with their client unbeknownst to the lawyer. In contrast, explicit bias refers to those attitudes that people consciously express while carefully adhering to social norms, monitoring their views so that they are socially acceptable. One’s explicit attitudes shape one’s behaviors after having well considered the costs and benefits of various courses of action.

No doubt, the explicit attitude expressed by many members in the legal community is that in favor of inclusivity and

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diversity. Discussions advancing various forms of justice (i.e., social justice, racial justice, civil justice, etc.) are often paired with an emphasis on diversity, equity, and inclusion (DEI). As a society, we have certainly observed an uptick in DEI jobs in the U.S. Indeed.com reports jobs in diversity, inclusion, and belonging (DIB) rose 56.3% from 140 jobs per million to 219. Further, job postings increased 123% between May and September of 2020.¹¹ Within the Nebraska legal community, we have seen the establishment of the Nebraska Legal Diversity Council (NLDC), increased support for diversity and inclusion by the Nebraska State Bar Association, Annual Diversity Summits, and even this *Equity and the Law* column. These efforts and many others are absolutely relevant to the promotion of justice and are necessary to meaningfully impact the legal profession. However, in a client-based profession such as the practice of law, one where we swear an oath to zealously advocate on behalf of our clients and to provide competent representation, I believe we have an ongoing duty to self-reflect and self-correct, in a constant pursuit for the ideal of bias-free representation.

In the previous issue of this column, NLDC Executive Director, Shawntal Mallory, offered concrete ways in which we can improve diversity in our respective work offices. In this issue, I would offer simple steps you can take in your day-to-day practice to reduce the potentially harmful impact of implicit bias. These are tokens I've gleaned from the literature, as recommended by other legal professionals, social scientists, and legal educators.

1. *Introspection, self-reflection, self-correction.* Before we can address implicit bias, we must first accept the reality that we all hold unconscious biases that have the potential to impact our representation of our clients. Once we accept this truth, we can engage in self-reflection to identify personal biases and

take active steps to “debias” oneself.¹² One tool for identifying implicit biases is to complete the Harvard Implicit Association Test (IAT).¹³ This test uses response latencies (i.e. response times) to measure attitudes towards numerous groups, including but not limited to gender, race, sex, physical ability, etc. Gaining an understanding of one’s own biases is the starting point to counteract them.

2. *Be a lifelong learner.* In order to address bias, one must recognize and understand it. There are many empirical studies, law review articles, peer-reviewed research, and books that examine how implicit bias impacts people in general, and more specifically how it impacts the legal profession. Members of Nebraska’s legal community can take ownership in addressing their own biases by familiarizing themselves with information that is freely available to them. Education can include an examination of research literature, and it can also include engagement in diversity events offered in the legal community. If you have not had an opportunity to previously, try attending a Diversity Summit or an event offered by several of the diversity-focused groups in Nebraska. If you are in a position of leadership, education could also mean periodically evaluating hiring practices, distribution of promotions, etc., to determine if the numbers suggest there may be bias influencing decision-making in your office. As you expand your understanding of the effects of bias and cultural incompetence on legal decision-making, you can better recognize bias and counteract it.

3. *Expose yourself to counter-typical associations.* Recall that implicit bias is a result of mental shortcuts developed by our brains based on the information and experiences to which we have been exposed. These cognitive shortcuts form subconscious attitudes or stereotypes that can influence our behaviors. Kang and colleagues suggest exposing oneself to information and experiences that are contrary to what we already know.¹⁴ If



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you are in a leadership position, this could mean hiring diverse candidates in counter stereotypical roles. For others, it could mean joining and/or attending events from a NSBA section that you are less familiar with. Or it could mean attending cross-cultural or inter-cultural events in your local community.

4. *Improve conditions for decision-making.* Implicit bias is a product of the System 2 thinking, that is, an automatic gut response. Research in decision-making suggests, engaging in the System 1, deliberative, effortful thinking may counter the effects of implicit bias. When you must make decisions, especially in a cross-cultural context, build in sufficient time for you to engage in thoughtful, critical thinking. When representing a client, allow sufficient time to gain an adequate understanding of the cultural complexities that you may need to consider in communicating with them in a way that they understand. Check yourself if you notice you are making assumptions about the client and his or her values without sufficiently considering the client as the expert in his or her own story.

I know the idea of dismantling bias in one's practice can sound daunting at times, especially when you consider implicit bias occurs at a subconscious level of cognition. However, taking incremental steps towards improving oneself as a member within the legal community contributes broader improvements as a profession. I want to bring your attention back the idea we started with, that we can contribute to the preservation of human rights through our engagement with clients every day. If human rights are the values that require us to treat other humans with respect, and in the way we think we all deserve, we must consider the humanness of the client throughout all aspects of representation. Begin by practicing cultural humility and striving to curb bias of thought with each day. 

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Because of the importance of this issue to the entire profession, the Nebraska State Bar Association is making this manual available electronically free-of-charge to all NSBA members, regardless of membership status.

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Endnotes

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