

## IMPLICIT AND EXPLICIT EFFECTS OF BIAS IN THE COURTROOM

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With the election and inauguration of our nation's first biracial President, some have questioned whether the United States has finally quashed its ubiquitous problems with racial bias. Though Americans have made tremendous progress in their acceptance of differences, social psychological research indicates we aren't there yet. The study of bias has gone "underground," examining how *implicit* attitudes – that is, those feelings and beliefs outside of our awareness – are still negative toward minority groups as reflected in our reactions and outward behaviors toward others. When it comes to race, religion or gender, most people think they can report what their opinions are – but what about their unconscious biases? While they consciously believe they do not have biases, many negative attitudes remain under the surface influencing their decisions, feelings and behaviors. While a juror's explicit attitudes are certainly a factor in the courtroom, his or her implicit biases may play a more subtle, yet equally weighty, role in voir dire, jury selection, jurors' attitudes and trust toward attorneys or witnesses and even judicial rulings.

### **Bias Can Be Automatic and Implicit**

In these times of diversity training and political correctness, people are under social scrutiny to appear unbiased, which has made bias far more complex to record and understand than a simple question that assesses a person's explicit attitudes toward a social group, such as "Can you, as a juror, be fair to my client, who is a Muslim American?" Moreover, in general people do not have introspective access to their implicit attitudes to determine where those attitudes came from or why they hold them. So when jurors are asked to "put their feelings aside," where exactly can the juror put them, particularly if he or she is not fully aware of what those biases are?

Categorizing the people, things and events around us is automatic, like reading. Once we learn how to read, we cannot unlearn it and we do it automatically without effort. Our attitudes can relate to any social category and function in much the same way. We are bombarded by so much information that categorization helps us to simplify the world around us. So, when a person thinks about President Obama, many categories come into play simultaneously and outside of his or her conscious awareness – race, religion, age and political affiliation. But, the cognitive savings from using social categories often come with a price. With the non-conscious employment of each social category, people activate many associations, both positive and negative, and these associations can predict many forms of behavior in ways that a person's explicit feelings cannot.

Although no empirical tests exist for this effect in a courtroom, we can extrapolate this phenomenon to a jury trial where one of the attorneys is non-white or speaks with a hint of an accent, or the plaintiff in a discrimination case is Muslim. Maybe the Muslim plaintiff receives a lower damage award than if he were Protestant, or maybe the jurors with stronger negative implicit attitudes toward a racial group distrust the minority expert witness more than they would have if he were white.

In order to better understand how strong existing attitudes are and how they affect decisions and behavior, social psychologists developed the Implicit Associations Test (IAT).<sup>1</sup> Using reaction times to attitudes or concepts related to social groups (e.g., “joy” or “awful” in response to photographs of Black and white faces), the test assesses how quickly one associates positive and negative concepts with that social group. The IAT, after researchers collected data from millions of people, shows that bias is pervasive: The Black-White race test revealed that 75 to 80 percent of white and Asian Americans implicitly prefer whites over blacks (Project Implicit, 2008).

### **Implications for the Courts**

An appreciation for implicit attitudes and their implications for courtroom behavior is very important in understanding the outcomes of the legal system. Throughout a trial, jurors view evidence and testimony through the lens of their attitudes and beliefs. Processes such as *voir dire*, for example, are critical for identifying and removing prejudiced jurors. Yet during *voir dire*, jurors are asked to report their attitudes explicitly, which can only reveal a subset of their feelings related to their behaviors and decisions. Further, at this early stage in the legal process, jurors are prohibited from making any decisions and often discouraged from expressing a bias, thus increasing the spontaneity and subtlety of their reactions to a particular case or party. The more spontaneous the response, the more implicit attitudes come into play.

Under ideal conditions, jury decisions should be quite effortful and thus less subject to the influences of non-conscious processes. For example, to the extent that a courtroom is a cognitively-demanding place that taxes jurors’ cognitive resources, their implicit attitudes are more likely to predict guilt-related judgments. Moreover, instructions to suppress thoughts (e.g., a judge’s instructions to ignore information or “put attitudes aside”) can, ironically, make those thoughts hyper-accessible because of rebound effects, thereby increasing the application of jurors’ stereotypes and prejudices. And more generally, jurors who are relatively unmotivated may just not engage in effortful judgment and decision-making in the first place, such as in a June 2008 mistrial in Sydney, Australia, where jurors hearing a case involving a possible life sentence played Sudoku instead of paying attention to the proceedings because they were bored.

These insights are especially important because decades after the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, sex, race, religion and other employment discrimination claims are still being filed and recent changes have shifted the burden for defendants in employment discrimination cases. Employment discrimination, when evidenced solely by objective behaviors, can be difficult to prove because many prejudiced actions are the result of implicit bias outside of the actor’s awareness. For example, employers may pay women less or lay off older workers, but they probably do not often explicitly rationalize these decisions as a belief that “it’s a man’s job,” “women will not put in the time and effort it takes” or “older employees are ineffective.” Implicit biases are beginning to play a larger role in employment cases. In fact, some federal courts have shown a willingness to accept implicit bias as evidence in employment cases to certify all the employees within a group (e.g., women) as a class. Although social psychologists would not contend that implicit attitudes and prejudices are the sole determinant of biased behaviors in the workplace and courtroom, they do

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<sup>1</sup> A number of different IAT tests are available to try online at: <https://implicit.harvard.edu/implicit/>

play a role, and in some circumstances a very consequential role, in determining critical outcomes.

In exercising peremptory challenges, bias can rear its head as well. Of course, the *Batson v. Kentucky* (1986) and *J.E.B. v. Alabama* (1994) rulings attempted to extinguish the use of racial and gender bias in jury selection, forcing attorneys to justify non-racial or non-gender related reasons for their peremptory challenges. But how does a judge determine how legitimate those justifications are? For instance, in South Carolina an African American juror with dreadlocks was excused from the jury by a defense attorney's peremptory challenge. When the decision was challenged, the defense attorney rationalized his decision by explaining his "uneasiness" about the juror because of his dreadlocks. The South Carolina Supreme Court ruled that this was not a race-neutral reason for excluding the juror because deadlocks are strongly associated with African Americans. People have very little introspective understanding of their reasons for attitudes or decisions, so asking an attorney to understand and explicitly explain his or her implicit biases in challenging a Black or female juror can be rife with (probably unintentional) misinformation.

As the IAT has demonstrated millions of times, most people have warmer feelings and attitudes toward some social groups over others. The effect is less overt than a conscious decision to be biased. Instead, an attorney in *voir dire* may ask more questions of a white juror than a black juror, or focus more on men while building rapport with the group. The subtle social interactions and cues that occur spontaneously, in *voir dire* and the assessment of jurors' fit for a case, reveal the ways in which implicit biases play a role. The relations between implicit prejudice and discriminatory behavior are nontrivial, and real implications exist for the legal system.

## **Conclusion**

By no means does the existence of implicit biases indicate that progress has not been made and cannot continue. Explicit attitudes are easier to change because they are consciously accessible and more easily modified, but implicit attitudes can and do change. Our attitudes are a reflection of the world around us, our experiences, the groups we connect with and our openness to differences. As Americans observe the United States' first, non-white President leading their country, perhaps they will develop a heightened awareness of the increasing diversity within their communities. Those with an interest in social psychology and its influence in the American legal system will therefore have a heightened interest in how this will affect key players in the courtroom.