

# DIVERSITY EQUALITY INCLUSION

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## Implicit Bias In Litigation

BY JANICE PARKER

When we think about bias and discrimination, we often think about the most obvious examples. We can all visualize the signs saying "white only" or "reserved for colored" that were prevalent in 1950s America. During the Black Lives Matter protests in 2020, there were counterprotest signs displaying Nazi symbols and using anti-Semitic language. Even the Covid-19 medical pandemic led to racism against Asian Americans through terms such as "Kung-Flu" and via physical attacks. These more recent events have shown that express bias still exists and is publicly recognizable. But there is another form of bias that is much quieter and harder to deal with: implicit bias. This article seeks to summarize some key studies regarding implicit bias. More importantly, it will highlight how such biases can affect our legal practice. It is present in how we interact with our clients, how we evaluate cases and how we assess jurors.

### Explicit Bias vs. Implicit Bias



Explicit bias is the traditional type of bias that most of us are familiar with. It refers to the attitudes or beliefs that we have about a person or group on a conscious level. In other words, it is the biases that we are fully aware of. This is often what leads to hate speech and active discrimination. For example, a landlord with a sign saying

"whites only" would be based on explicit bias. But there is also implicit bias, which refers to the stereotypes or attitudes that operate without an individual's conscious awareness. As it operates subconsciously, the person is often unaware of it. For example, a landlord conducting more criminal background checks on potential non-white tenants versus white tenants would be based on implicit bias. This is not objectively bad. We all use schemas, groupings of information, because it helps us organize and interpret information.<sup>1</sup> Schemas help us process information with little or no conscious thought. For example, a child develops a schema for a horse (tall, four legs, tail) which gets modified over time to help her differentiate it from other animals (cows shaped differently, dogs are shorter).

Implicit bias, however, is an example of a negative schema that prevents people from seeing the world as it is. It can inhibit a person from taking in new information because their schema already has a strong set of existing beliefs. This starts cognitively with *stereotypes*, which are generalizations about the perceived typical characteristics of a group. For example, Bob might believe a stereotype that all Asians eat strange animals that Westerners wouldn't usually eat. This then turns into emotions or feelings that are triggered by the group stereotypes, which is how we develop our *prejudicial attitudes*. Bob might feel disgusted when seeing an Asian restaurant and starts disliking Asians generally. Finally that leads to *discrimination*, the behavioral aspect which dictates how a person acts towards the group. Bob might refuse to have dinner at the home of a Chinese coworker based simply on the fact that he is



Chinese. The problem is that these implicit biases can be the starting point for expressive discrimination.

## Implicit bias can be seen within brain activity

Implicit bias affects the way our brains operate because it filters our views of the world. There are scientific studies that observed people's brain activity to determine whether an implicit bias existed. A Princeton University study published in 2006 studied the prefrontal cortex (mPFC), which is the part of the brain that activates when we see someone as "human" and deactivates whenever we dehumanize people.<sup>2</sup> Participants were asked to make a judgment about diametrically opposed groups of people: homeless versus middle class, IV drug users vs non-drug users, disabled people versus athletes. For the groups that are traditionally stigmatized (i.e., homeless, IV drug users, disabled), the mPFC was not activated, indicating that the participants tended to dehumanize them. The most interesting part of this study is that the measured responses were not intentional, and there was no indication that the participants had any conscious reaction to the groups.

A similar brain study was published in the *Journal of Cognitive Neuroscience* in 2000.<sup>3</sup> The focus of this study was the amygdalae, which is the part of the brain that activates when a person experiences emotions such as fear, anxiety and mistrust. Test subjects were shown pictures of African American male faces and Caucasian male faces while an MRI was measuring their amygdalae. Most of the subjects exhibited higher activation in the amygdalae when looking at African American male faces, indicating a subconscious anxiety or mistrust. Like the previous study, there was no indication that the participants were consciously aware of this change. What both these types of tests show is that there are subconscious biases that all of us have.

## Implicit bias can be tested

While subconscious, implicit bias can still be tested based on the speed at which we consciously process information. This is that "gut reaction" we experience when we receive new information. Based on this principle, the University of Chicago conducted a "Shoot/No Shoot" test.<sup>4</sup> The researchers devised an experiment requiring split-second judgments on whether to shoot a person with a gun or leave them alone. The potential targets were in different poses and in different locations, holding either a neutral object (e.g., cell phone, wallet) or a handgun, and they were either African American or Caucasian. The mistakes made in shooting armed persons showed a clear pattern: participants shot more unarmed African Americans than Caucasians, and they failed to shoot more Caucasians that were holding weapons. Because split-second judgments were involved, this experiment showed that there are biases based not on what people believed, but based on long-standing associations that became a part of our mental schema. This experiment has been performed informally in various ways with the same results. Like the scientific studies above, most people were unaware of this bias, and some participants were upset when they were advised of their results.<sup>5</sup>

Using speed and "gut reaction" to test for implicit bias has been around since the mid-1990s; although, it has become more known in recent years. Developed in 1998, the Implicit Association Test (IAT) was developed to help people discover their implicit biases. The test asks participants to categorize words or images as being positive or negative. For the Sexual Orientation IAT, the participant is given negative ("terrible") and positive words ("glorious") along with pictures of different types of couples in wedding clothes. They are asked to then associate pictures and words, and the speed of these response was calculated. If there is a marked delay in matching positive words with LGBTQ couples, or an

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increase in mistakes when asked to make this pairing, it indicates a bias against the LGBTQ community. The results were explained to the participants to make them aware of these unconscious biases. Many people have started taking various versions of the IAT to help self-identify biases. (You can do the same with this online version at <https://www.projectimplicit.net/>.)

## Our implicit biases as attorneys

Like most people, attorneys may not be aware of their own implicit biases. That means it may be revealed in the way we deal with our diverse clients, even without our knowledge. Becoming self-aware will allow us to better serve and understand those whom we represent. Some examples of when this can arise in legal practice include:

**Communications with clients:** One of the hardest things we do as attorneys is explain complex legal concepts in a way that a layperson can understand. In doing this, we may have implicit biases about what a particular type of client may or may not understand, or may make assumptions about why there is a misunderstanding. For example, we may assume that a client without a high school education misunderstood our instructions because of their educational background, but it may be because we did not simplify language and used "legalese." This is especially true when communicating with clients via an interpreter. It can also arise in the context of cultural attitudes when speaking to persons in authority (yes, that means attorneys). Many Asian cultures promote the idea of respect and obedience to authority, which means some clients may feel

uncomfortable correcting you if you make a mistake.<sup>6</sup> When the mistake is revealed later, attorneys may have an implicit bias that the failure to correct immediately signals a lack of credibility, when there could be alternative reasons for the delay.

### **Credibility**

**assessments:** As attorneys, we are required to make important assessments of our potential clients at a time when we have very little information about them. Implicit bias can arise based on numerous factors, such as a similar case

we had previously or because they remind us of a past client. We need to be mindful and not make decisions based on past associations due to a "gut reaction." We also need to be careful of biases against clients that do not do a good job of telling their story consistently. For example, some cultures tend to focus on the type of social interactions and persons involved when recounting a story instead of the details about time, location, or topic that are important to litigation.<sup>7</sup> We may have biases about their credibility based on the manner in which a person recounts their story.

**Case valuation:** One well known implicit bias is related to the pain assessment of minorities by healthcare providers.<sup>8</sup> One recent study shows that healthcare providers have a tendency to discount, disbelieve or misdiagnose the pain and symptoms of African Americans. This is based on inaccurate biases about differences in biology or the false belief that some groups are simply seeking access to medications. The unfortunate result is that there may be incomplete treatment or a lack of prescription medications for some clients that does not accurately reflect their condition. We should be aware of the "gut reaction" of assuming a client is not that injured because they haven't accessed the usual treatment. If there is a large discrepancy between the reported symptoms and the actual treatment, we should take a moment to determine if a client simply needs a referral to better medical professionals within our network.



## Implicit biases in the courtroom

Implicit bias is something that can affect our case presentation in the courtroom. This is especially true during jury selection, as the voir dire process is our method for rooting out both explicit and implicit biases of jurors. This topic was examined in great detail by a team consisting of a federal judge, law professors, and researchers.<sup>9</sup> The following are some examples of implicit biases that all persons in the courtroom, especially individual jurors, might have regarding certain types of plaintiffs:

- Plaintiffs who are visible minorities. This implicit bias is outlined in the numerous studies previously explained. There is a general sense of anxiety, mistrust or dehumanization of people in this group. The average juror may have those biases against our client and as attorneys, we need to be proactive about how to humanize our client to combat this.
- Plaintiffs whose first language is not English or who require the use of an interpreter. There are prejudicial attitudes that many jurors may have regarding who is "American" (i.e., Americans speak English) and who is deserving of justice.
- Poor Plaintiffs, especially those in receipt of social benefits. There are a lot of explicit biases regarding

these plaintiffs, but there is also the unspoken disapproval or lack of empathy for such persons in general (i.e., Princeton Study) that may be quietly present in the jury.

- Plaintiffs who use non-Western medicine or refuse prescription pain medications. There are some cultural based biases when plaintiffs choose to access alternative treatments (i.e., Chinese herbs, acupuncture, etc.), which are not considered by some to be "real" medicine. There are also people who have conquered addictions, or are attempting to, that will avoid narcotic pain relievers. This can trigger some implicit biases about addictive behaviors or addictions in general.

As attorneys, we have to be prepared to challenge these implicit biases. The simplest way to do this is something we do already: humanize our clients. We can prepare our client to open up and express their physical, mental and emotional injuries using their own personal voice. We can support them by using other evidence such as family photos, documents about the client's accomplishments, having friends and family testify about damages, testimony from supportive coworkers and day in the life videos. There should be a concerted effort to break through whatever schema a juror might have and present our client as a unique person, not a stereotype.

## Exposure is the solution

That is exactly what we need to do for ourselves as well. We need to break down our own schemas. Knowledge and education is the first step, so simply reading this article and others like it puts us on notice of its existence. After that, psychologists suggest that the goal is to change the schema that caused the bias in the first place.<sup>10</sup> This can be done through formal implicit bias training and taking the IAT. It can also be informally accomplished by gaining exposure to counter-typical situations. expanding one's network beyond the usual places or meeting diverse people so that some of those stereotypes are broken down. On a personal note, we can become better at self-checking those initial reactions and snap judgments by pausing to consider our thoughts. The good news is that it is never too late for any of us to start, and doing so will make us both better attorneys and better human beings.

*Janice Parker is originally from Ontario, Canada, where she obtained her Juris Doctorate degree from York University – Osgoode Hall Law School in 2001. Janice moved to Las Vegas in 2015, where she worked in medical malpractice defense, but she is now using her insider knowledge to assist plaintiffs only. Janice initially worked at Adam Smith Law and has now joined the Las Vegas office of Panish | Shea | Boyle | Ravipudi LLP. She is a member of the NJA's Diversity, Equality and Inclusion (DEI) Committee.*

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8. Hoffman KM, Trawalter S, Axt JR, Oliver MN. *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*. *Proc. Nat'l Acad. Sci. USA* (2016); 113(16): 4296-301.
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