

Implicit Bias: Me, You and Our Judges too...

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What this is not, What this is.

- Not negative, nor accusatory.
- A positive exploration of the issues that sit beneath implicit bias—our unconscious associations between events/data that lead to schemas/categorizations—and the required CLE standards, without charges or negativity.
- A look at implicit bias in the law through the prism of cases lawyers have litigated, judges have decided, and how we trigger implicit bias with word choices as lawyers in our legal writing and case development.
- Look at judicial opinions and patent examples of implicit bias at play in advocacy in the courts for the constituents we must address: judges, lawyers, witnesses/jurors, and systemic.
- Be better advocates! Actionable steps to recognize implicit bias and make better decisions as lawyers for our clients - one form of implicit bias is confirmation bias which we all know to be careful of.

Confirmation Bias - One Form of Implicit Bias

- Confirmation bias is where decision makers actively seek out and assign more weight to evidence that confirms their hypothesis and ignore or underweight evidence that could disconfirm their hypothesis. This creates a tendency to seek out information or to view things in a way that confirms what you already believe. Confirmation bias contributes to overconfidence in personal beliefs, even when faced with contrary evidence.
- As lawyers we are hyper aware of it because it can be our Achilles' Heel: it can affect our perspectives on things such as which route might be the best for a client, the strength of arguments they're making, discounting strength of the other side which leads to negative client results.
- And we offensively look to see if it exists in the other side's experts.

Implicit Bias Regulatory Overview

- In 2020, the California Legislature enacted Cal. Bus. & Prof. Code section 6070.5, which directed the California State Bar to update the Minimum Continuing Legal Education (MCLE) requirements for lawyers to include “training on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system.”
- In 2021, the Bar increased its MCLE hours requirement for implicit bias from one hour to two hours.

Why these changes, where does this come from?

- <https://youtu.be/1JVN2qWSJF4>
(0-2:26)

Definitions

- Implicit bias: Thought processes that occur without us knowing it that create associations that can lead to biases. Attitudes or stereotypes that impact our interpretation of events and people, decision-making, and behavior, without our express awareness of it. Some associations lead to negative, unfounded biases; some are just biases in our schemes of thinking that don't carry charged weight. But they are there and all matter for us to know to be better advocates.
- Explicit bias: Overt racism, sexism and other biases have played a major role in the legal space for decades in terms of anti-discrimination laws and equal protection challenges. This we are familiar with most as lawyers.

Explicit: From *Batson v. Kentucky*, 476 U.S. 479 (1986) to *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017)

- *Batson*: The Supreme Court addressed the question of whether the prosecutor's use of peremptory challenges to exclude four black jurors violated the right to a fair jury trial and his Fourteenth Amendment rights to equal protection of the laws.
 - *Held*: racial discrimination in the selection of jurors not only deprives the accused of important rights during a trial, but also is devastating to the community at large because it "undermines public confidence in the fairness of our system of justice."
- *Pena-Rodriguez*: "For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."
- All require explicit bias.
- Not yet extended to implicit bias.

Unpackaging Implicit Bias

- From the ABA (2:29-8:30)

https://players.brightcove.net/1866680404001/default_default/index.html?videoId=6195630261001

Professor Schema

9

Students re: Professors

- Know their subjects
- Prepare for and attend class
- Have office hours
- Give and grade assignments and exams

So Students

- Rely on schema to
 - predict and explain prof's actions
 - fill in gaps if prof's actions are ambiguous
- But may eventually change based on individual performance

Implicit Bias peeled back: Lens through which we view the world

- SCHEMA/IMPLICIT BIAS
 - a preference for a group (positive or negative)
 - often operating outside our awareness
 - based on stereotypes and attitudes we hold
 - that tend to develop early in life
 - and tend to strengthen over time

Attitudes

Evaluative feelings that are positive or negative

Stereotypes

Traits we associate with a category

Implicit Association Test

- Computerized test, 2 keys
 - Typically 2 social and 2 evaluative categories, e.g., Biden/Reagan and good/bad, etc.
 - Closely associated categories, easier & quicker to sort together...
 - So faster reaction times show implicit connections.
- Take the test privately here (among many places):
<https://implicit.harvard.edu/implicit/takeatest.html>



Cal Bus & Prof Code § 6070 Constituents

- Third Party Witnesses/Jurors: Studies have shown eyewitness testimony on racial identification issues have reliability issues.
- Judges: Some studies show judges rely more on intuition than deliberative judging on issues being decided.
 - Justice Michael B. Hyman, *Implicit Bias in the Courts*, 102 Ill. B.J. 40, 44 (2014)
 - Sarah Q. Simmons, *Litigators Beware: Implicit Bias*, 59 Advocate 35, (2016)
- Lawyers: Decision on who to prosecute or plea out. Decisions on who to keep on juries or try to exclude. Decisions on who is a credible witness for your case or other side's case.

Implicit Bias impact on people accessing the legal system - § 6070.5(a)(2) Witness Example

Witness
/ Juror

- Witness example: When cross-racial identification is made, it is up to the judge to decide whether experts should be allowed to delve into the issues or whether jury instructions should be given addressing these issues of implicit bias.
 - Cross-racial identification is when the witness and the defendant being identified are of different racial backgrounds.
- In 2008, the ABA approved a resolution urging courts "to recognize that in particular cases cross-racial identification may increase the risk of erroneous conviction" and that expert testimony should be admitted -- to discuss empirical studies in the area -- and jury instructions given when appropriate.

Witness Example Continued: New Jersey Supreme Court and Cross-Racial Bias

Witness
/ Juror

- *State v. Cromedy*, 158 NJ 112 (1999)
- The New Jersey Supreme Court requested that the Criminal Practice and Model Jury Committees develop a cross-racial jury instruction in accordance with the Court's opinion, and held that a cross-racial instruction "should be given only when . . . identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability."

Implicit Bias - Juror Questioning Example

- *United States v. Young*, 6 F.4th 804 (8th Cir. 2021).
- Near the end of voir dire, Young's attorney objected: "I just wanted to note for the record that I'd like to voir dire on race [and] if there's some kind of implicit bias that the jurors might have about [the defendant's race]."
- Judge asked about express bias. No mention of implicit bias. Convicted. On appeal Young argued failure to inquire was reversible error.
- Majority: Race not inextricably intertwined with case so need to delve into implicit bias.
- Dissent/Concurrence: "I nevertheless suggest that more can be done to diminish any influence implicit bias may have on a jury's deliberations. For example, a district court might take meaningful steps to educate the venire and the empaneled jury about implicit bias. See Kang et al., supra, at 1181 (recommending that jurors "must be educated and instructed" to "become skeptical of their own objectivity and . . . become motivated to check against implicit bias"). Indeed, some courts show videos to juries and use special jury instructions in every case to "highlight[] and combat[] the problems presented by unconscious bias." Unconscious Bias Juror Video, U.S. Dist. Ct. for the W. Dist. of Wash., <https://www.wawd.uscourts.gov/jury/unconscious-bias> (last accessed July 12, 2021)."

Implicit Bias impact on people accessing the legal system (6070.5(a)(2) - Judge Example

Judge

Rusk v. State of Maryland, 43 Md. App. 476 (1979) - Majority and Dissent

"The prosecutrix was a twenty-one year old mother of a two-year old son. She was separated from her husband but not yet divorced. Leaving her son with her mother, she attended a high school reunion after which she and a female friend, Terry, went bar hopping in the Fells Point area of Baltimore. They drove in separate cars. At the third bar the prosecutrix met appellant. Appellant requested a ride home and she agreed."

The victim -- I'll call her Pat -- attended a high school reunion. She had arranged to meet her girlfriend Terry there. The reunion was over at 9:00, and Terry asked Pat to accompany her to Fell's Point. Pat had gone to Fell's Point with Terry on a few prior occasions, explaining in court: "I've never met anybody [there] I've gone out with. I met people in general, talking in conversation, most of the time people that Terry knew, not that I have gone down there, and met people as dates." She agreed to go, but first called her mother, who was babysitting with Pat's two-year old son, to tell her that she was going with Terry to Fell's Point, and that she would not be home late. As Pat was preparing to go, appellant asked if she would drop him off on her way home. She agreed because she thought he was a friend of Terry's. She told him, however, as there walked to her car, "I'm just giving a ride home, you know, as a friend, not anything to be, you now, thought of other than a ride." He agreed to that condition.

Implicit (and express) Biases appear in Majority

Judge

- Word choice can be a signal and is something we need to be attuned to
 - Prosecutrix vs Doe/real name
 - “leaving her son” vs. babysitting help

Implicit Bias impact on people accessing the legal system (6070.5(a)(2) - Judges Example

Simmons v. Romo, No. 20-55043 (9th Cir 2022)

Judge

“Murillo walked past Simmons, then suddenly turned around and struck him in the head, right above his left ear. Murillo continued to hit Simmons, who says he did not fight back...Arnett chose to use the 40mm launcher. Because Simmons was between Arnett and Murillo, Arnett could not shoot Murillo. Arnett fired a round at Simmons from about 10 yards away, aiming for Simmons’s legs and avoiding his groin, consistent with protocol for use of the launcher. The round hit and broke Simmons’s left leg. Arnett says that he kept ordering the two inmates to stop fighting, without any success. Arnett fired two more rounds at Simmons, hitting him in his butt and thigh. After Arnett fired the third round— about thirty to forty-five seconds after he had sounded the alarm—other prison staff arrived and Murillo and Simmons immediately laid prone and stopped fighting.”

Majority

“At this point, one prisoner, face bloody from the exchange, approached Simmons, and began punching him. Dazed from the attack, Simmons made no attempt to punch back.

Even though Simmons did not swing back at his assailant, Officer Arnett shot Simmons in the back of his left shin.

Simmons never heard any orders from Officer Arnett before he was shot.

Simmons started to collapse from the combination of Officer Arnett’s shooting and the other prisoner’s punches, and he grabbed hold of the other prisoner’s waist for support. Even as the circumstances evolved, Officer Arnett’s response remained the same. As Simmons fell to the other prisoner’s waistline, Officer Arnett shot him again, this time striking his right thigh. Simmons slipped further down, grabbing for the other prisoner’s ankles, when Officer Arnett shot him a third time.”

Dissent

Implicit: Judicial DQ for even appearance of impropriety

Judge

- Although we don't speak in "implicit bias" terms as legal requirement in the *Batson* context (yet), we have been litigating what are often root implicit bias issues for a long time in judicial disqualification questions.
- 28 U.S.C. §§ 144 & 455; Cal. Rule Prof. Conduct 3-200, 5-120, 5-200 & Code of Conduct for U.S. Judges.
- Rule is built around this question: When would a reasonable person challenge the judge's impartiality?
- Major rule that distills: **DQ for the appearance of partiality as viewed from the perspective of a reasonable (non-judge), thoughtful person.**
 - Public perception policy & outward facts that could be construed as bias avoid need to do subjective heart and mind inquiry
 - We strain to assess whether anyone looking in could harbor concern due to others' perceptions of what is fair and proper.
 - Here we in the law have long looked to assess if implicit bias could be triggered by connection between a judge's behavior and others' perceptions of extreme fairness

Example: Judge's commentary on public issues

Judge

- *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993)
- Judge appeared on TV to address abortion protests and publicly said the protests were illegal. Judge then had the case. Refused to disqualify upon motion.
- Tenth Circuit *Held*:
“Together, these messages unmistakably conveyed an uncommon interest and degree of personal involvement in the subject matter. It was an unusual thing for a judge to do, and it unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator.”

No finding of express bias, but ruling hinges on Implicit Bias

Judicial Work to Address Systemic Implicit Bias For Jurors

Judge/
Systemic

- <https://youtu.be/hdjBbfdRLkA> (0-1:21, 3:20-5:05, 8:07-8:48)
- Comes from the Western District of Washington: “The video and jury instructions on this page were created by a committee of judges and attorneys and will be presented to jurors in every case with the intent of highlighting and combating the problems presented by unconscious bias.”

Implicit Bias - Lawyer Examples

Lawyer

- We (and others) judge credibility on eyesight, but some cultures find it disrespectful to look at people in the eyes. These judgments can impact our ability to properly defend or prosecute a case.
- Our judgments about religion and religious people.
- Our judgments about potential clients and even taking the case can turn on implicit biases.
- Our implicit judgments about witnesses demeanor tied to truth/credibility, jurors based on race, religion, socio-economic status, etc.

Lawyer Example: Witness Interviews

Goswami v. DePaul U, 8 F.Supp.3d 1004 (N.D. Ill 2014)

Lawyer

- Pltf denied tenure. Sued for race discrimination. Pltf lawyers interviewed one of Deft faculty voters (Witness) who favored Pltf to get tenure and saw denial as race-based.
- During ex parte interview, lawyers showed witness emails from others at the University disparaging the Witness.
- Deft sought sanctions: "an obvious ploy to stoke Dr. Larrabee's animosity towards the [Philosophy] Department majority on the eve of her deposition."
- Deft contended that the showing of full negative emails from Deft about her personally was designed to trigger confirmation bias in mind of witness on eve of deposition.
- Denied terminating sanctions but permitted cross-x on bias issue because Witness' perceptions may have been her own confirmation bias: "Dr. Larrabee, made her views about those who voted against tenure luminously clear: those who disagreed with her assessment of things were racially motivated. The notion that there could be a reasonable difference of opinion over plaintiff's qualifications, was for Dr. Larrabee, unthinkable." *Id.* at 1018.
- But also noted lawyer's behavior stoking implicit, extant confirmation biases was dangerous and sanctioned them costs: "While the insults did not approach those of the Earl of Kent in King Lear, under a realistic appraisal of psychological tendencies and human weakness, it is idle to say that plaintiff's experienced and skillful counsel did not know the derisive emails contained the kind of personal insults that are not easily laughed off and brushed aside."

Lawyer Example: Patent Law

Systemic

- In 2016, 21% of patents had a female inventor and 12% of all patent inventors were women.
- Patent examiners have wide discretion.
- Female inventor patent allowance rates are 5% less than male inventor allowance rates and female inventors receive more office actions than male inventors.
 - Office of the Chief Economist, USPTO, Progress and Potential: A profile of women INVENTORS U.S. 3 (No. 2, 2019), <https://www.uspto.gov/sites/default/files/documents/Progress-and-Potential.pdf>
 - Jessica Milli et al.. Equity in Innovation: Women Inventors and Patents 8 (Institute for Women's Policy Research 2016).
- In a 500K implicit bias survey pool, 70% associate men with science and women with arts. Similar results repeated in Natl Academy Sciences experiment.
 - Catherine Hill, et al., Why So Few? Women in Science, Technology, Engineering, and Mathematics 76.

6070.5 CLE Mandate: Actionable steps to take to recognize and address implicit bias.

- Be aware of it. Think about your implicit, unconscious biases.
- Question yourself, question snap judgments.
- Take the IAT to delve deeper and learn your implicit biases/schemas to then be aware of them and not let them hurry your lawyering.
- Areas of law where discretion is vested to others are ripe for it and so are the areas to discuss, address and combat it: judges, juries, patent examiners, prosecutorial discretion, legal hiring--anywhere that vests lots of discretion.
- Write, hold programs, seek jury instructions in your trials, send letters to PTO to train Examiners on it.
- Pay attention to word choice in legal writing and whether you are using implicit biases and then if they are ok to advance or not.