

Attachment B

About Implicit Bias

As “a team of legal academics, scientists, researchers, and a sitting federal judge” explain,

[m]ost of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we -- all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity -- have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

[Jerry Kang et. al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1126, 1186 (2012).]

The authors explain that bias comes in a number of forms, which can operate in concert:

[C]onsider a vegetarian’s biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are explicit biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of concealed bias (explicit bias that is hidden to manage impressions).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an implicit bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for \$10 or a cheeseburger for \$3. Unfortunately, she has only \$5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of structural bias in favor of meat.

We disentangle these various mechanisms -- explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces -- because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward

Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms -- explicit bias, implicit bias, and structural forces -- are not mutually exclusive. To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.

[Id. at 133-35 (footnote omitted).]

The authors explore ways in which biases may enter the judicial process in both criminal and civil cases, id. at 1135-68, and consider possible ways to reduce the impact of implicit biases -- and thus to promote greater fairness -- in the judicial process, id. at 1169-86.

Other scholarly works that have identified implicit bias and the negative impact it may have on the justice system include:

- Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 Cal. L. Rev. 969 (2006);
- Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489 (2005);
- Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 Duke L.J. 435 (2007);
- Antony Page, Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 Boston U.L. Rev. 155 (2005);
- Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 Notre Dame L. Rev. 1195 (2009).

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