

Uncovering Unconscious Motives: Recognizing “Implicit Bias” to Ensure a Fair Trial

by Jeffrey L. Goodman, Max Maharry, and Richard Wiener, Ph.D.

In a highly-publicized legal battle in 2012, Ellen Pao and her lawyer worked diligently to prove that Kleiner Perkins, a Silicon Valley venture capital firm, discriminated against Pao based on her gender when they fired her.

Pao, a Chinese-American woman from New Jersey with a BA in electrical engineering from Princeton University, a JD from Harvard Law School, and an MBA from Harvard

Business School, argued that men were promoted ahead of women, that ideas offered by women were quickly dismissed, and that Kleiner Perkins provided inadequate support to women who complained about sexual harassment. Despite the merits of Pao’s case, the jury concluded that Pao’s job performance was the sole cause of her termination by ruling in favor of Kleiner Perkins on all counts.

If asked, the jury would likely respond that they came to their decision based solely on the facts of the case. And perhaps they did. However, discrimination cases like *Pao v. Kleiner Perkins* can often raise questions of juror bias(es). Trial consultant psychologists have identified two types of predetermined prejudices (e.g., *explicit bias and implicit bias*) that can offset even the best of arguments that trial attorneys can make to support their clients’ cases.

Explicit bias entails attitudes or beliefs that are available to the conscious mind – considerations that people are aware of and which they actively consider when reaching a decision.

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If a juror in the Pao case relied upon an explicit bias to decide which way to rule, the juror's decision-making process would sound something like: "women do not belong in tech jobs and tend to perform worse than men in the tech industry. Pao was therefore not discriminated against nor wrongfully terminated." Explicit biases are conscious, *known* prejudices that one may hold towards any given thing, person, or group. People consciously choose to make decisions based upon these biases. An attorney's arguments *can* persuade a juror to abandon these conscious prejudices. That is, proper education and information can eliminate, or at least lessen, one's explicit bias.

Implicit bias, on the other hand, is not so easy to pin down. Implicit biases are attitudes or beliefs that are *unavailable* to the conscious mind. People do not know that they have these biases and yet these prejudices can have a major impact on their judgments and decisions. Implicit biases result from leftovers of past experience which guided prior behavior but are no longer accessible to people in their conscious awareness. They are habits that activate without the decision maker's deliberate choice to activate them. In fact, it is difficult for people to either know or control their implicit biases. Thus, if a juror fell victim to his or her own implicit bias in deciding which way to rule in the *Pao* case, he or she would have *no* idea that they were making a biased decision. Rather, they would listen to the trial, review the facts, deliberate with the other jurors, and tell

themselves that the conclusion they reached was based entirely on the objective facts of the case. However, this juror's decision could have been tainted by an implicit bias, resulting from years of cultural and societal habitual responding. Such a bias would say to the juror that women are less suited for the technical jobs and are more suited to work with children and adults as schoolteachers or nurses. Unlike explicit bias, implicit bias is *not* impacted by persuasion — for it lurks under the surface and remains entirely unknown to its possessor.

Some are dismissive of the concept of implicit bias. Is it real? Does it truly have an impact on the way people think and make decisions? Psychologists have published hundreds of scientific papers in peer reviewed journals that measure implicit bias using computer programs that record people's response times as they react to "hot" topics. Luckily, anyone can see for themselves how these processes work. "Project Implicit," a program generated by Harvard University, provides a series of online tests called Implicit Association tests, or, IAT tests, to determine which implicit biases one may unknowingly hold. For more information, and to take an implicit bias test yourself, visit www.implicit.harvard.edu.

Studies analyzing the effects of implicit bias have become ample in size and scope, permeating a wide range of human interactions. For example, one study on the National Hockey League (NHL) found that "differences in ethnicity may result

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in implicit biases on the ice,” creating strategy implications for coaches and players hoping to win professional hockey games (Waltemyer, 2006). Another study concluded that in the medical field, physicians’ implicit biases may lead to racial/ethnic disparities between black and white patients in use of medical procedures (Green, et al., 2007). Overall, the examples of conclusions that have been drawn from implicit bias findings are abundant.

Implicit bias tends to only affect small, subtle judgements, but those are sometimes the most important judgments that people make in the legal arena. These subtle biases can have a major impact on jurors’ decision-making processes during trials. Thus, the administration of justice in the American judicial system can often be affected by unconscious biases that are entirely unknown to the jurors themselves. Because of this, studies of implicit bias have become prominent in the legal world as well.

There are a number of law review articles that describe how implicit bias infiltrates the processes of criminal and civil trials, and what strategies are available to counter implicit biases in judges and juries (Kang, et al., 2012). Some authors go further to make the argument that the “theoretical underpinnings of the entire [judicial] system ... are culturally and cognitively inseparable from implicit bias” (Levinson and Smith, 2017), that “implicit racial bias contributes to increases in the length of sentences based on offenders’ darker skin tone” (Bennett, 2017), and that “implicit bias drives decision-making” in immigration law (Marouf, 2011).

As attorneys and judges have become more and more aware of the invidious impact of implicit bias, many have come to understand the intricacies and implications of these unavoidable cognitive processes and have increasingly concluded that this understanding is important for success in trial. Trial consultants can play a key role in assessing implicit biases to help layers navigate the pitfalls of bias.

Being well-versed in implicit bias, trial consultants can assist in identifying the kinds of implicit biases that jurors harbor. No trial consultant can find jurors without implicit biases because such jurors do not exist. A good trial consultant will combine this expertise with the insight of a practicing trial lawyer to indemnify implicit biases with the goal of not activating or exploiting them. This unique combination will allow for arguments to be designed that ensure biases are neutralized rather than activated.

The literature on implicit bias is only growing more thorough and reliable. As psychologists continue to uncover the significance of this concept, attorneys and legal professionals will be forced to incorporate techniques to account for and neutralize implicit bias into their practices. The question then becomes: what must you do to account for implicit bias and

ensure a just outcome in the court room? One answer is to rely on the expertise of trial consultants who bring both the legal and psychological knowledge necessary to navigate the treacherous waters of implicit biases that may very well sabotage even the best legal arguments you can make as you try to navigate your case to a successful outcome. 

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