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Implicit Bias: Racism Without Racist

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Implicit Bias: Racism Without Racist

Judge Genesis Draper

Transcription:

I'm going to get us even closer to getting back on track. A couple of things I'll say. It's an honor to speak here at this conference. It is really difficult to come behind the Congresswoman¹ and my colleague Judge Cornelio², both of whom are women I deeply respect. So I'll be talking to you a little bit about implicit bias. But a couple of things I wanted to say before we get into that discussion is one, I'm not a scientist. I'm not a neuroscientist. I'm not a social scientist. I wasn't even that good at science to be quite honest. But I am a judge, deeply committed and concerned about equality in our court. So, because of that, I have become a student of the study of implicit bias. I look forward to chatting with you about that.

This is meant to be a discussion to get us started about, just to think about, implicit bias and the role that it plays in our courts. And so, we'll start it and we'll start with figuring out kind of where people are in understanding implicit bias. At this point, most of you have probably heard of implicit bias or about implicit bias. But I do want to kind of make some distinctions, right? We live and if we've learned nothing else in the last few months or years, is that we have more than enough explicit bias to keep us busy, to be quite frank. But with that then you also have implicit bias, and there's been a lot more study on that as of late. But it's important to note the difference, because in preparing for this presentation, I was looking at examples of implicit bias in our courts, and one that came up was, for example, that was given, was the case of Duane Buck³. Duane Buck was convicted right here in Harris County and sentenced to death by a jury after his defense counsel put on a psychologist at sentencing who said that African-Americans are more likely to commit violent crimes, therefore making him more likely to commit a violent crime in the future. And after that testimony, the jury did convict him and sentence him to death. Later, it was overturned⁴, but this was given as an example of implicit bias, and it just goes to show how misunderstood implicit bias really is. Because that is not implicit bias. Right, implicit bias is unconscious attitudes that lie below the surface but may influence our behavior. So, it's like a knee jerk reaction. You go to the doctor and they -- I don't know if they really do this anymore, but they hit your knee, and then it makes your knee jump. It's that kind of sensation. And so, a doctor who prepares this testimony, and studies, and goes to school, and takes the stand, and says that black people are more dangerous -- that's just explicit bias.

And I think what is happening is that when people profess not to be racist, we put that in the implicit bias category. And that's not what really implicit bias is, so I want us to really think more

¹ Representative Sheila Jackson Lee, Texas 18th Congressional District (1995 – present).

² Judge Natalia Cornelio, Harris County 351st Judicial District Court (January 1, 2021 – present).

³ *Buck v. Davis*, 137 S. Ct. 759 (2017).

⁴ *Buck v. Davis*, 865 F.3d 215 (5th Cir. 2017).

about those reactions that are underneath the surface, that are automatic, they are quick, they are a knee jerk reaction that is much more difficult to detect and much more difficult to control.

All right. So implicit biases come out of the knee jerk reaction, our mind, our brain taking shortcuts right, all day. That's how your brain, that's how you navigate this world. Your brain takes all these short cuts to get you from point A to point B.

If you take a look at the paragraph here, you can just read with no problem, right? According to our research, Cambridge University, it doesn't matter what in what order the letters or the words are. The only important thing is that the first and last letter should be in the right place. The rest can be a total mess. You can still read without problem. This is because the human mind does not read every letter by itself, but the word as a whole. No problem. Because that's how our mind works. You look at the first last letter and we make a quick judgment on what that word is and proceed. I have a third grader right now. He's reading more phonetically. He's following each letter. But as you go, as your mind develops these habits, you take all kind of shortcuts. That's what implicit bias is about, it's the decisions that you make based on your experience, your life experience, and what you've been taught, and it's so ingrained that your mind is programmed to take shortcuts to get you from point A to point B.

All right. So how is implicit bias identified if it's unconscious? There's a lot of people say, OK, well, if it's unconscious, well, what can I do about it? Why even think about it? How can you even identify it? So, there were individuals whose names escape me. You know, one last name is Greenwald⁵, who came up with implicit association test. And it is an assessment that you can take to try and identify your biases or if you have biases, which we all do. It's a really quick test to find it on Implicit Harvard.⁶ I have it later in the presentation, I would encourage everyone to take it. It's much debated whether or not it's a valid test, whether or not it's an accurate test. But I still think it's worth taking. To just see for yourself how your mind thinks when you are having to make quick snap judgment decision. And so this kind of gives you a visual of what the test looks like. It's a lot of quick words associated with pictures and you're asked to pick different things and it will then give you output on your level of implicit bias.

All right, so, some of the characteristics of implicit bias. One, it's important to note that it's pervasive, right? Everybody has this. That's one of the ways in which it is easier to talk about this because we all have, so nobody has to admit to being a racist. Everybody has implicit bias. So that's one way to approach it.

The interesting thing about implicit bias is that it often does not align with your declared belief. So you might say, you know, I don't hold any biases against this particular race. But your implicit bias reactions and associations may be directly contrary to that. So the difference in implicit bias is that it's something that's so underneath the surface that you don't know it's there. And so you might profess to be one thing, but your implicit bias says something totally different. You generally hold implicit biases that tend to favor your in-groups. So my in-groups: woman, black woman,

⁵ *Project Implicit* was founded in 1998 by three scientists – Dr. Tony Greenwald (University of Washington), Dr. Mahzarin Banaji (Harvard University), and Dr. Brian Nosek (University of Virginia).

⁶ See <https://implicit.harvard.edu/implicit/takeatest.html>.

heterosexual woman, mother. Those are my in-groups, you tend to have implicit biases that favor your group, although that's not absolute. Particularly in a lot of the studies it's found that black people sometimes have the same kind of negative associations about their own race. Right? And so, it doesn't always track that way.

Several studies have shown that there are some groups that will identify some negative racial implicit biases based on their own race, so that you've got to show how deeply these things are ingrained in us. That even if that's your in-group that the indoctrination is so powerful, that it can overcome, you know, the fact that that is your own race, your tendency to favor your in-group. But there is hope. There is credible research out there, credible studies out there that show that implicit bias that the mind is malleable, right? You cannot remove all bias, can't remove implicit bias. That's not happening, but you can become more aware. You can change the way you react so quickly. You develop more information to try and minimize or reduce the effect of implicit bias, particularly in our courts.

So how do they show up in the administration of justice? I'm sure you've heard a lot today about police misconduct, and policing, and police brutality. Implicit bias has been talked about a lot in that circle, in that space. And there have been several studies done about it, and why we have is killing black brown people. And when black or brown people pull out a cell phone, how officers may deem it to be a weapon more readily in a person who's black or brown than white, right? Snap decision, it is something that's happening in the moment because of possibly implicit bias and can deem that to be a weapon because of that bias. That person might profess, well I don't treat white or black differently. I'm not a racist. Okay, we can debate that for sure. But it could also be an effect of implicit bias, which is why it is important to study these things and not just dismiss it. Because if you can save just one life it's worth it.

Another area it creeps in is charging decisions. We know that black and brown people face more stringent charging when they are indicted. Right. So we have mandatory minimums more frequently with the black and brown. Same for bail decisions. It was mentioned by my colleague today, all the discussion about bail reforms and a lot of it boils down to this, right? People think that having money makes you less dangerous. This is an implicit bias. They wouldn't say that. They would say, well no, that's not what I mean. But you need to be able to pay to get out. Right? If I could pay, I'm not as dangerous, which is why you are going to let me out. Yeah. And so, we see that present itself in our bail decision.

Media coverage. Now I'm a little asterisk on this, because I'm not ready to put this in that implicit bias category just yet. I think the, it's arguable that it's explicit bias with the media. But there are examples, you know, when there is a shooting or a charge of any kind... quick to put the picture of a black or brown person up. But if the perpetrator is white, maybe we will, maybe we won't. So that too could be attributed to implicit bias.

Trial strategy. Lawyers make snap decisions all the time based on what they perceive to be the client's wishes. I represented—so did Judge Cornelio—indigent people accused for over a decade. And lawyers are so dismissive of individuals who don't have resources. They are so used to those

people's voices being snuffed out, and they just go roll right over and make the decision for them. So, it even can affect the way they advocate for the affected person-makes decisions.

Lastly sentencing. I was in federal court for, I don't know, six or seven years. Judge Cornelio and I were there together, working together. And I can remember sitting in a courtroom, watching a federal judge sentence a white defendant. And him agonizing about his sentencing and deciding ultimately not to send him to jail, because it would be too detrimental. It would be too much for him. I mean, it was just like a long thesis on why, ultimately, after much berating, he was not going to send him to prison. And all I could think was about all these black and brown people that I have waiting on their sentencing, they feel like it will be equally as stressful and harmful to them and their family as this person here. But he just did not conceive of this person being able to now go into the penitentiary. And so, longer sentences -- there's so much documentation out there about the fact that black, brown, poor people receive much longer sentencing than their nonblack or brown counterparts, whites.⁷

All right. What can we do about it? So, you know, some of these things are very controversial, divisive, very controversial, whether or not it's effective, whether or not doing things like that implicit association test or whether that implicit bias training is effective, whether or not these talks are effective, right? I do think that quantifying its effect is difficult, but I refuse to believe that having these conversations, trying to make ourselves aware of slowing down when we make decisions is not helpful. So I do mention that for that reason. Diversifying our court rooms, Judge Cornelio talked about that, right? Giving out implicit bias jury instructions. We have several.

I'll go quickly for time. But here's an example, right, right? These are, this picture here is exactly a lot like what Harris County Court looked like. Not very long ago, right? And just think of what that does when you have a jury trying to make a decision and you're trying to minimize implicit bias, but present it to them and the white judge, white defense attorney, or white prosecutor, white jury, white court reporter. All of these people are presumed to be kind of law abiding. Right? And so present all of that, and in the middle of that sea of whiteness, you have a black or brown person in an orange jumpsuit. That type of othering only bolsters people's implicit bias. So we, those are the types of things that we can try to do to minimize your people from diverse perspective. Let them see diverse perspectives. That goes a long way to reduce implicit bias.

This is an example. You can look it up for yourself when you leave here. But in the Derek Chauvin trial, the judge there gave implicit bias instruction. For the George Floyd and the trial for the killing of George Floyd they gave implicit bias instruction.⁸ Likewise, I think they did a lot of talk about implicit bias on the front end. So, in voir dire, in jury selection, they did a lot of talk about implicit bias. But I'm not sure how effective it would be to go through a whole trial and then throw in this implicit bias and hope that the jury absorbs it. So you would want to have dealt with race on the front end, which quite frankly, is very rare. Both of us practice in criminal court. And it's

⁷ See generally, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, United States Sentencing Commission (November 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

⁸ Duties of Judge and Jury, page 12-13, *State v. Chauvin*, No. 27-CR-20-12646 (Dist. Ct. 4th Dist. Hennepin, Minn. (April 19, 2021).

extremely rare that a lawyer would even touch race, even though that is an obvious thing that you need to deal with. It is very rare that they bring it up. And to that, I would also put a plug in for Batson, right? Batson challenges. I think we're all familiar with Batson v. Kentucky⁹ or vice versa, where the Supreme Court ruled that prosecutors cannot kick off a person for race without having a race neutral reason, right? So that is still law, and yet we never get Batson challenges. And Batson challenges are one way to try and reduce these types of biases. Right? So, a lawyer is making choices about who's going to be on this jury. We all know that a lot of cases are won or lost at jury selection, and so we're making decisions based on implicit biases, then that's affecting the outcome of cases.

And so all we're saying, and I've had this come up in my court, I mean, lawyers are totally offended when you launch a Batson challenge, you might as well have called them a racist. And I had to explain it is not calling you a racist. It is just saying you don't have a race neutral reason for why you struck this person. So it could be explicit or implicit, but it's important that we call it out. I don't know why lawyers don't do Batson challenges. One, I think is misunderstood. For example, I think people think that you have to have struck all the black people for me to make a Batson challenge. You can one and not have a race neutral reason and have that sustained. So, it's important for us to know more about it, and it's important for us to expand it. Right now Batson applies to race, ethnicity, and gender. That's not enough, there's not enough. We need age, we need sexual orientation. There are so many things that Batson should apply to so that we can try and -- because you won't recognize implicit bias in yourself. That's the whole reason. But we need to be educated about it so other people can identify it in you.

I tell the story of when I was in federal court and I started working in the public defender. I was pretty much the only black person that practiced in federal court consistently. Right. So, you know, if you're working in a civil law firm, you're not there every day. But if you are working in the federal defender's office, you're there four or five days a week. So I'm the only black person, black lawyer, that they're seeing basically every day. When I first started there, you know, I was 28 years old. So I wasn't like I am now, I wore black and blue mostly. Wore my hair in locks that were pulled back, to give a conservative appearance and my nails were not like they are today. I mean, I'm the Judge now so I can do whatever I want to do.

But, back then, I really tried my best to fit in. And I can remember going to the probation department. The lawyer has to go to the probation department, meet with probation officers while conducting interviews with their clients. So I come there normal, I had my blue suit on, had my little briefcase, and hair pulled back. It's my first time there and I'm like, "I'm here to meet with probation officer." And the receptionist says, "give me your birthday." But I don't have my birthday. She said, "I have your birthday." She said it so confidently she convinced me. So I was like, Oh, OK, I'm going to have my birthday programmed. And she's like, "Who's your probation officer?" and I'm like "Ma'am I don't have a probation officer, I'm here to meet with probation." And she was like, "well why didn't you say so?" Well, you didn't give me a chance. Those are the type, I mean, those are the type of quick snap decisions that you make. Ignore that I'm here with a briefcase and a navy suit. Maybe I'm here for something else. Right, but your mind takes those

⁹ Batson v. Kentucky, 476 U.S. 79 (1986).

type of shortcuts, and that happens all the time. When I was in federal court where at least the first six months, right? Ma'am, are you looking for bankruptcy? Ma'am, you can't sit there, that's for lawyers only. Ma'am, where are you going?

It was tough, right? And so, if that is in our staff, you know, they have what they call the security that works there. If that's there, just imagine, it's anywhere, it's on the bench, it is in our jury. And so we have got to do more as lawyers and judges to minimize that. And so I'm calling on you guys to be the ones to launch these Batson challenges, to expand that, and to push for implicit bias in the judiciary among lawyers. Push, push your colleagues to explore those biases so that we can have a more fair and just judicial system. That concludes my talk, I hope it's been helpful at a minimum, I hope it starts a conversation. I am Judge Genesis Draper, Judge Harris County Criminal Court Number Twelve. My contact information in there and I'm an open book. You can always find you on Instagram, Twitter, everywhere at Judge Genesis. I've enjoyed talking with you all. Thanks again for having me.