

To What Extent do Florida Criminal Defense Attorneys Previous Biases Affect Them in the Court Room?

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ABSTRACT

Crime rates in America have been increasing over recent years and, in turn, so has the number of criminal cases that pass through the court system. If a criminal defendant cannot afford one for themselves, a public defender will be provided for them. However, the public defender does not get to dictate which cases or clients they take on. This paper explores the level in which implicit bias may affect these attorneys in the court room. This is conducted through a series of surveys and correlational research which is then analyzed to determine the true extent to which one can suppress their implicit bias. Participants are deemed to be successful at suppressing their biases if they score a zero on the implicit bias test, which indicates little to no automatic preference for one subject matter over the other. It is proven that no matter how hard one tries, implicit bias is difficult and almost impossible to fully suppress, even for the trained attorney participants. Looking in future directions, this knowledge can be used to spark conversation and new research regarding biases in the judicial system.

Introduction

Guilty or innocent, no one accused of a crime should have to question whether their lawyer is one hundred percent on their side. However, everyone, including criminal defense attorneys, has bias. This research focuses on whether there is an existing bias that affects criminal defense attorneys and to what extent. A criminal defense attorney is a lawyer who represents a defendant in a lawsuit or criminal prosecution. Public defenders are provided to a defendant if they cannot afford to hire one themselves. Attorneys who work in the public defender's office do not get to choose who their client is or which case they take on. These attorneys are faced with difficult cases and tough subjects on a daily basis. These cases can include defending those accused of rape, murder, assault and battery, thefts, and all types of violent crimes. Yet, under our constitution, even those accused of such heinous crimes are to be afforded due process. Lawyers are held to a high standard of ethics and professional responsibility to not cross the line where emotion interferes with the practice of law.

In order to become a lawyer, one must study through three years of post-graduate law school, pass the federal and state portions of the bar exam, and pass an ethics portion. The American Bar Association has clearly set rules and standards for lawyers to abide by that should eliminate any bias they may have when they are in the court room. However, implicit bias plays a major role in everyday life. No matter what, everyone is impacted by their subconscious preferences, personal beliefs, and emotions correlating with a subject or event. It is up for debate, however, as to the extent to which this subconscious bias may affect a practicing criminal defense attorney. Further investigating the relationship between implicit biases and criminal defense attorneys will ultimately lead to results pertaining to productivity, mentality, and performance.

Literature Review

Many have hailed our legal system as the world's greatest while others have criticized it for being either too harsh, too lenient, or too slow. No matter which views you may have, one thing is clear – no matter what crime has been committed, the accused is entitled to and will be given a fair and just trial by jury and the right to an attorney. This is known as due process, and while the best, or most just, verdict is not always delivered according to each of our own beliefs, it comes after the accused is supposed to be afforded a fair trial. The belief that an accused has not been given a fair trial is always going to be challenged, and it is no surprise that many researchers investigate the legitimacy of our judicial system and what fairness is. The National Institutes of Health has defined bias as “attitudes, behaviors, and actions that are prejudiced in favor of or against one person or group compared to another” (2022). However, the form of bias that is most important to study is known as “implicit bias”. An implicit bias is a bias that exists automatically and subconsciously. Most of the time, one does not even recognize that their actions are being influenced by implicit biases. While implicit bias may be hard to mitigate, it is important to recognize its impact in the courtroom.

Every student who goes to law school must take and pass a bar exam in their jurisdiction before being allowed to call themselves an attorney and practice law. Law school teaches a lot of theory and philosophy behind legal concepts which is geared towards helping every student get ready to take the bar exam. Our future attorneys are not expected to understand the rule of law applicable to a given set of facts and why a judge made a particular decision unless they understand the theory and practical application of that law. According to *The Practice*, a high rated law journal, “Just as character and fitness is a specific component of becoming a licensed lawyer, ethics and professional responsibility courses are a component of graduating from law school” (2020). Thus, it is clearly established that practicing attorneys must not have bias and should uphold a standard of professionalism as set and regulated throughout law school. It is to be further examined as to whether a bias can even be brought to the surface, fully contained and mitigated, or if there is some part of one's personal belief that manages to slip its way through the cracks unconsciously. The hypothesis is as stated: Criminal defense attorneys in the state of Florida are impacted in the court room due to implicit biases. The impact is measured on a different extent in every situation but may include changes in what one says, thinks, or their actions.

To fully comprehend the extent to which biases could possibly affect a lawyer's actions, past research must be considered. It is common to conclude that attorneys do not have bias and are one hundred percent committed to the cases that they take on based on sheer belief in our constitution and the rights it affords every citizen. However, it is becoming more and more clear that this is not the case. Joseph J. Avery and his team of researchers conducted an empirical study across forty-three states in which they tested biases in criminal defense. To do this, they took implicit measures, racial bias test, as well as an empirical study. Other than Joseph Avery's research, no other source has clearly set out to look at criminal defense attorneys in Florida and any biases they may have that directly affects them. The results of this study concluded that there is in fact bias embedded within criminal defense. However, this study was conducted on a much broader scope, taking into account attorneys from almost every state in the U.S. It can be argued that this study is flawed, because every state has different procedures, rules of law, sentencing guidelines, and evidentiary burdens. This study, therefore, is designed to solely focus on practicing attorneys in Florida. This is a suitable gap for this research.

The *Stanford Law Review* wrote on the toll of being a criminal defense attorney. They stated that there are three questions an attorney must ask themselves: “1) Why should attorneys in our legal system defend people they know are guilty? 2) Assuming that our system requires that there must be some attorneys who will do the “dirty business” of representing the guilty, why should anyone choose to be one of those attorneys? 3) How can a defense attorney represent those defendants known by the attorney to be not simply guilty but dangerous to society?” (1952, p.1). The questions hit the heart of the matter in total. The ethical obligations of attorneys to defend someone deemed to be a criminal is heroic, but how much of a toll does it take on their mental or emotional wellbeing? Why defend a criminal when knowing if they win the case, the criminal may be put back into society and cause damage to persons or property? It is known that previous and implicit biases influence the way that one makes decisions, acts, or holds

themselves. This is similar to the definition of an implicit bias given previously by the National Institute of Health. Chaves Nobre, Machado, and Nepomuceno Nobre conducted a study in which they considered the role of behavioral biases present in decision making. Their results were dramatic:

“the individual’s subjectivity influences investment decision-making. The literature emphasizes that such factors influence the decision-makers and the results of the investments they plan. Consequently, this research tried to enlighten the relation between behavioral bias and decision making” (2022,p.2). Nobre essentially confirms that one’s biases and opinions do in fact affect their abilities to perform neutrally. It is apparent that biases affect decision-making skills.

Though this is established regarding the general public, when dealing with professionals, everything is elevated onto a different scale. Professionals, such as attorneys, are meant to uphold their neutrality and keep their biases hidden when on the clock. This is both for the good of their job and the people they need to help. For lawyers, maintaining neutrality is part of their civic duty. This study progressed into the decision-making skills of those in marketing and entrepreneurship fields. In those professions, similar to attorneys, they need to make unbiased decisions pertaining to their work and the good of their companies and finances. Nobre continued to prove that though these investors try to maintain their neutrality, they fail to do so. The same logic can be applied to attorneys. Though they do not mean to, bias seeps into the soul of decision making. The Stanford Law Review as well as the article written by Nobre focus on the consequences of having bias in the workplace and how heavily it can weigh on one’s shoulders. If it is not acknowledged that there is room for improvement within these fields, there will be no change or action to prevent it from happening in the future.

Nobre has proven that in professional fields, it is nearly impossible to reduce and fully eliminate implicit biases, but it is important to reduce implicit biases as much as possible and recognize its influence. The National Speech and Debate Association (NSDA) agrees with Nobre in the sense that implicit biases, in fact, cannot be diminished. The NSDA released a statement regarding biases for all judges of Speech or Debate events. The statement read, “We are all influenced by implicit bias, or the stereotypes that unconsciously affect our decisions. When judging, our implicit biases negatively impact traditionally marginalized and disenfranchised students. Before writing comments or making a decision, please take a moment to reflect on any biases that may impact your decision making.” (NSDA 2020). Clearly, if the National Speech and Debate Association felt it necessary to give a disclaimer on implicit bias, it must affect their judges to a fairly high extent. It can thus be assumed that implicit biases have effects on professionals in most circumstances, yet they are taught how not to let it affect their work. All in all, the answer to this study is of great importance to the world of criminal defense. The understanding of subconscious biases affecting an attorney could unleash new potential for further and more extensive research in the future. This eventually is what brought upon the formulation of the final research question, to what extent do Florida criminal defense attorneys previous biases affect them in the court room?

Methods

In order to begin evaluating the hypothesis that criminal defense attorneys are, in some way, shape, or form, affected by their biases in the court room, a multitude of research methods were used to fully examine the outcomes. The first step in this research was to determine the best way to collect data. The survey method was determined to be the best course of action with respect to gathering opinions and statistics. The survey method is also easy to administer and inexpensive.

The first group of surveys sent out is called the control group survey. This survey was sent to high school students at High School A. Participants were collected through word of mouth as well as social media sites such as Snapchat. The data collected from the thirty high school student participants will act as a representation of those in the state of Florida who have not enrolled in higher education (further education other than high school). The purpose of adding this group was to compare their ability to perceive and block out biases as compared with those who underwent years of higher education and experience in the field (criminal defense attorneys). The students were first asked

a series of questions to determine their level of understanding of bias, implicit bias, and if they think they can perform without any signs of bias. See appendix for questions asked in survey.

After these questions were asked, the students had the choice of participating in an implicit bias test supplied by Harvard Law called Project Implicit. Project Implicit takes into account reaction time when shown pictures and certain words that we automatically associate with images.

The participants were given the choice to choose either the race, age, or gender implicit bias test. However, the students were instructed to take the implicit bias test of their choice as if they aimed for total neutrality. Essentially, the students were asked to suppress all biases to the best of their ability while taking this test. They then take their chosen test and submit their results on the same survey used for the previous question. A single follow up question was asked at the end of the survey for after the implicit bias test was taken. The question asked if the student was surprised by their results and why. This allows the research to connect their initial opinion on how well they thought they would do with how well they actually did.

The next portion of the research involves interviewing criminal defense attorneys. Twenty-five criminal defense attorneys were utilized for this study and sent a similar survey as the control group was given. Their survey asked questions specific to their job and their chosen field of practicing law. See appendix for questions asked in survey.

Following these questions, the attorney group next encountered the implicit bias section of the survey. The implicit bias test was the same one given in the control group. The attorneys were given the same choices of which test to take: race, age, or gender. When the lawyers took the test, they were told to pretend like they were in a court room setting and eliminate all bias from their answer choices. After the attorneys completed this implicit bias test, they submitted their results on the same survey they answered the questions on. A single follow-up question was asked at the end of the survey. The question asked if the attorney was surprised by their results and why.

The main data collected is from the implicit bias test. Again, the implicit bias test is a way to track one's subconscious biases by something as simple as the difference in milliseconds between choosing answers. Even if one believes that they have no bias at all and that it does not affect them, this test will truly see if that is accurate. If the test results show that there are signs of bias in the majority of the high schoolers and the attorneys, the hypothesis will be proven to be false. However, if the implicit bias test can prove that even when trying to stay unbiased the participants were unable, the hypothesis will be proven to be true.

This leads to the research method to be used in this research and data analysis project. Correlational research will be a vital tool in analyzing all the collected data and looking at the correlation between the data sources. Correlational research helps to figure out how the results of each data collecting technique interact with one another. In this instance, the correlation between survey answers by participants and their implicit bias test will be measured. By using this technique, we can analyze how the answers of the survey correlate with the answers of the implicit bias test and vice versa.

Results and Analysis

Implicit Bias Score Analysis

The data in Figure 1-1 shows the distribution of the implicit bias test for Gender-Sciences taken since December of 2015. To begin analyzing the results, each score received a number. The closer the number is to zero, the more neutral and unbiased the result was. Every respondent who took an implicit bias test was proven to favor one side over the other by a significant difference. Any test scores that had the majority in the purple category tended to favor a more conservative point of view, any results in white favored a neutral point of view, and any score in the blue category favored the opposite view of that in the purple. From the scores of the implicit bis test, it is analyzed with the responses of the survey regarding their initial opinion on the topic.

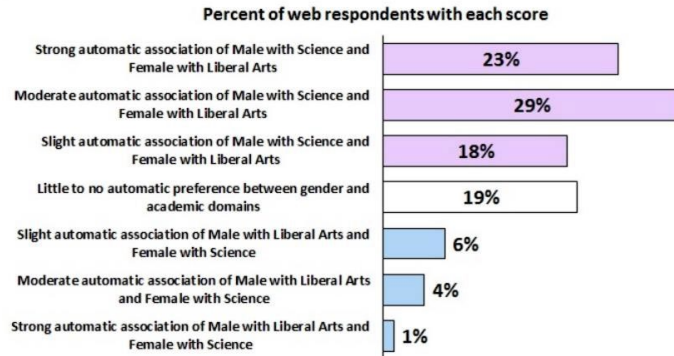


Figure 1-1: Project Implicit 2023

The “Strong Automatic Preference” category in purple represents positive three points, while the “Strong Automatic Preference” category in blue represents negative three points. The “Moderate Automatic Preference” category in the purple represents positive two points and, in the blue, it represents negative two points. Lastly, the category “Slight Automatic Preference” in purple represents positive one point while in blue it represents negative one point.

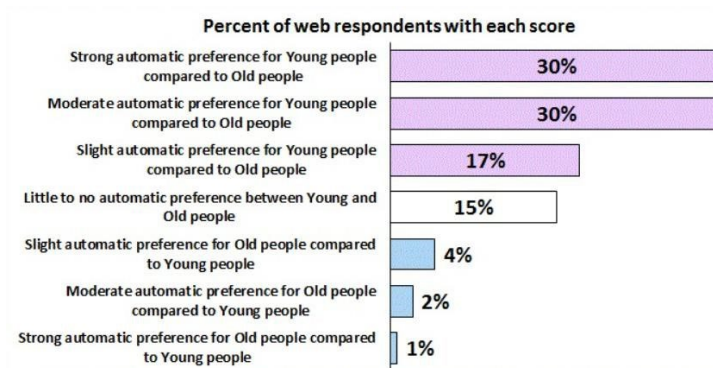


Figure 1-2: Project Implicit 2023

The data in Figure 1-2 states that 85 percent of all people who take this specific bias test does not pass with total neutrality. Using the point system, most people taking this implicit bias test scored a positive three or positive two. This means the majority of the people have a strong or moderate preference for one age over the other, preferring the purple category which, in this instance, means that most people prefer young people to old people. For the race implicit bias test in figure 1-3, 82 percent of all respondents could not score neutrally.

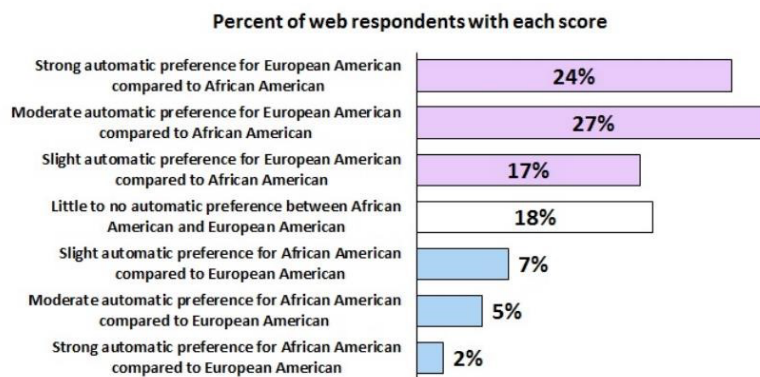


Figure 1-3: Project Implicit 2023

Part 1: Students

Thirty students, age ranging 16-18 years old, completed one of the three implicit bias tests: gender, race, or age. They were told to take the test and try to ignore all biases while doing so. The results, however, were very similar to baselines provided by Project Implicit as seen in figures 11, 1-2, and 1-3. As seen in figure 2-1, 73 percent of the high school student respondents scored a positive three and twenty-seven percent of students scored a positive two. To reiterate, the results were a summation of the three categories the students were able to choose from. The score of a positive two or three leans heavily on the biased side of this test. It goes to show that though they tried to eliminate their biases, they were unable to stop their subconscious biases from affecting them.

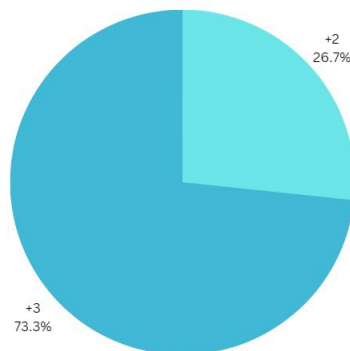


Figure 2-1: Self- Created 2023

When initially asked in the survey what they thought they would score, the majority of the students thought they would either score positive one or negative one. It was common to see responses that stated that just because they tried neutrality when taking the tests, their score would reflect that. However, after the student took the implicit bias test and submitted their results, the ending questions were dramatically different. 93 percent of students stated that they did not expect to show much bias. These students could not tamper their biases when faced with the Implicit Bias Test. This statement is in agreement with the theory that no one can become completely neutral regarding a subject.

Part 2: Attorneys

The results from the defense attorneys were highly anticipated as they determined the overall result of the study. It was established and proven that the initial group that took the survey and test could not suppress their biases no matter how hard they tried to.

The study concluded with responses from twenty-five defense attorneys that practice in the state of Florida. It is vital to discuss and interpret the answers to the preliminary questions given to the attorneys before looking at the implicit bias test scores. To preface, every attorney who responded did pass the Bar Exam and is a practicing attorney in the state of Florida. In addition, every lawyer who responded is a currently practicing defense attorney. It was stated by 22 of the attorneys who took the survey that they believe they will show up on the scale as having no bias at all. Only three attorneys stated that they would show some bias in the implicit bias test. This data is shown in figure 3-1.

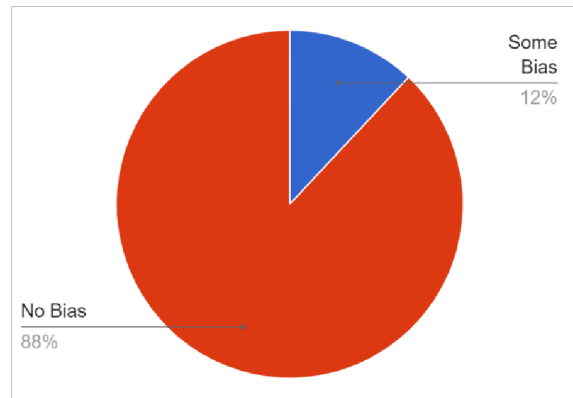


Figure 3-1: Self-Created 2023

The legal factors that are considered in evaluating a client’s case were extensive. These factors included injury, extent of loss, prior claims similar to the current one, and liability. These are all very reasonable factors that will be taken into account before a case is chosen. Every lawyer needs to protect themselves as well so if the case is not plausible enough in court, there is a high chance many attorneys will deny the case. However, the attorneys were then asked about non-legal factors that play a role in evaluating a case. These answers ranged from client attitude to the lawyer’s own ethics. There were multiple answers regarding the state of the client themselves. This initial answer can stand to prove that the lawyer’s own opinion on the client or the way the client looks or acts will affect whether or not they take the case. This is the attorneys bias at work even before a case is taken on.

The implicit bias test scores showed that 13 lawyers scored positive 2, 10 lawyers scored a positive 1, and the remaining 2 scored a negative 2. This data is represented in figure 3-2. This data proves to further show that even criminal defense attorneys cannot resist implicit bias. The attorneys were asked to remain neutral and most dramatically failed. Using correlational research, it is possible to connect the results of the implicit bias test with how each attorney and participant believed they would do.

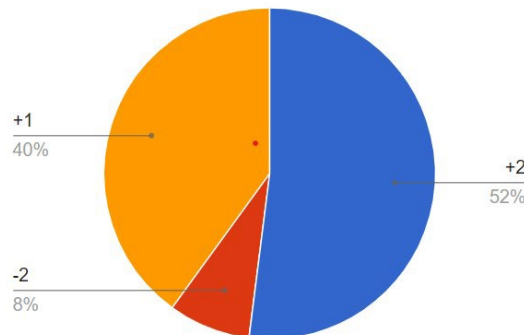


Figure 3-2: Self- Created 2023

Conclusions, Limitations, and Implications

Though the study at hand aimed to reveal the extent to which criminal defense attorneys let their implicit biases affect them, a greater understanding of implicit bias was uncovered. The way that the study was set up, utilizing both attorneys, professionals, and students, the majority of the country was represented. The results of this study can be applicable to much of the uneducated and untrained population of Florida. Numerous factors are taken into account to garner this result. For example, bias is part of human nature, and one would have to have the ability to not feel basic

human emotion in order to completely get rid of it. Therefore, no matter student or professional, bias would undoubtedly show up on the test. The results of the research study have proven to support the presented hypothesis that implicit bias does affect attorneys in the court room. When asked to take the implicit bias test as if they were in court with a client, the majority were not able to maintain neutrality in the heat of the situation.

Though each of the participants were asked to present their opinions and beliefs truly, there is a margin of human error which must be accounted for. Humans lie and do not always remember the truth to the full extent. Either of these situations could lead to skewed results. In addition, there was a limited number of attorney participants who took the implicit bias test. The initial goal was to gain about 50 attorney participants; however, such a large group of attorneys were unattainable. In addition, the implicit bias tests were not taken in a court room setting and therefore may have different results based on the setting in which it is taken. In the courtroom, there is an added level of professionalism that may not be present when one is in a more relaxed setting.

There is and always will be implicit and subconscious biases that play a role in everyone's actions and beliefs, even in the court room. It is important to remember, however, that with human action comes human error. As the job of attorney has not yet been able to be completed by AI or other forms of technology, there will always be this bias in most every case. Whether that bias is simply not understanding one's culture or behaviors or detrimental, open prejudices. In law school, there are ethics and philosophy classes that are required to take. However, not many classes teach lawyers how to set aside their biases and teach them to remain neutral. This is a task that is, for the most part, up to the attorney to figure it out for themselves. More classes should be available. In addition, this topic deserves more education. Not enough people are aware of the injustices of the legal system. Lastly, future studies are encouraged to continue research on this topic to determine the results on a larger scale of participants. While it is not commonly known, there is bias all around us. In every action, word, and thought the people around the world have; why would it be different in the court room?

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