

In applying implicit bias theory to jury perception and religious belief, it would therefore not be unlikely that, for example, a Muslim juror will identify or feel some connection to a witness or defendant that has apparently sworn on the Quran. He or she may therefore be more likely to find them credible or reliable. Similarly, a juror with no religious belief could find a witness or defendant whom affirms to be more rational in their non-belief, and this may affect how his or her evidence is evaluated. On the flipside, those with negative associations towards, for example, Muslims, Jews, or Catholics, may find themselves – unconsciously – less likely to believe the relevant person’s evidence.

It is definitely not my submission that this impact is significant, nor that general members of the public are seething to the teeth with religious hatred and prejudice, or favouritism and favour. Rather, assuming implicit bias theory has legs to stand on, then by logical extension, the effect of disclosing a person’s religious belief or non-belief to the jury will always have the possibility of some marginal impact. This is unfair in the context of criminal proceedings, and indeed both unnecessary and easily resolved. A person’s credibility and reliability in the box should only be decided based on the evidence they give, and no other background feature should deliberately be placed before the jury which can influence this.

As stated, the solution I propose is to simply require the defendant or witness to be sworn in without the presence of the jury. Once seated, the jury can then be told that the relevant witness has already been sworn in, and the jury would not be able to draw any inferences – as should be the case – about their faith or lack of faith. Indeed, this is not uncommon. Juries are often asked to leave when discussions are being taken by the court or legal arguments heard which could prejudice the defendant. It is submitted the same principle should apply to oaths.

Counter-Arguments

The major counter-argument this proposal is confronted with is that swearing an oath in the jury’s presence engenders a solemnity of the occasion to all concerned, and it is important in its own right that juries are able to see the person giving evidence swear to tell the truth. To this, three points can be made. First, a Judge is able to inform – with necessary emphasis – the jury that the witness has sworn an oath to tell the truth. Judges frequently give directions or impart information to juries, and this is treated with immense importance and respect by every juror. Secondly, and in any case, avoiding the potential prejudice of implicit bias outweighs any “solemnity of the occasion” resulting from a jury seeing a witness swear their oath. And thirdly, if this solemnity is nevertheless considered far too

significant an aspect of jury trials, then as pointed out in the introduction, the oath can be administered in the presence of the jury but in a standardised way which avoids any inferences of religious belief.

A second counter-argument is that the same point of implicit bias can be made about a witness’s race or ethnicity. These may also affect the jury’s perception of evidence. However, and unlike religious belief, seeing a person’s face has some evidential utility. For example, judging body language can be crucial to evaluating credibility. Thus, the implicit impact of also recognising racial and ethnic features can be justified. Moreover, the risk of implicit bias based on religious belief can be nullified with ease compared to its racial and/or ethnic counterpart.

The third counter-argument I envisage is it may be suggested that witnesses could simply affirm if they do not wish to disclose their religious belief. Indeed, under human rights law, no one can be forced to expose their faith, even on oath, and for good reason. However, defendants should not be put in a position to hide their faith for fear of jury prejudice, and in any case, affirming would not remove the risk of implicit bias. In the current system, affirming simply gives the impression that the person on the stand has no faith, and implicit bias can exist for or against this notion, even if misconceived.

The obvious and workable solution is to prevent the jury from unnecessarily inferring a witness’s religious belief during their oath. If religious belief is relevant to the offence in issue, then this can be produced in evidence more explicitly.

Conclusion

In conclusion, I simply point out that the risks in a criminal trial are far too great. Often the defendant’s liberty is at stake for years, if not decades. Jury trials by definition deal with the more serious criminal offences in our society. Thus, even if the impact of implicit bias is ultimately minimal once all the evidence has been heard and the Judge’s directions given, the risk to the defendant in a criminal trial is so significant as to justify any and every measure to be taken to prevent potential prejudice in the proceedings. The ease of the solution also supports this course of action.

Author details

Rabah Kherbane (BCL)
Pupil Barrister, 25 Bedford Row
Teaching Fellow, SOAS University of London.