CLE 101 | America’s Diversifying Population: Addressing Implicit Bias in Jury Selection

Session Description:
This panel will discuss the “nuts and bolts” of voir dire and strategies for addressing implicit bias during jury selection, particularly given the results of the 2020 Census and the changing demographics of APAs and the overall US population. Our panel of seasoned APA trial attorneys and jury consultants will share their down-in-the-trenches experiences and strategies to identify and mitigate implicit bias in the face of increasingly diverse jury pools. The panel will address the following:

- What the results of the 2020 Census show (increased racial, ethnic, geographic, economic, and political diversity);
- Implicit bias in the courtroom that may arise due to changing demographics identified in the 2020 Census;
- How demographic shifts could and should inform your jury selection strategies;
- Ways to identify bias and how to use juror questionnaire responses to your advantage during jury selection; and
- Recent jury trial war stories as courts reopen after the pandemic and jury trials resume either in person or virtually.

Moderator:
Diana Chang, Senior Counsel, Shook, Hardy & Bacon L.L.P.

Speakers:
Joan Haratani, Partner, Morgan Lewis
Johanna Hillard, JD, President, JuryScope
Bonnie Lau, Partner, Morrison Foerster
America's Diversifying Population: Strategies for Addressing Implicit Bias in Jury Selection
Over more than three decades, Joan Haratani has honed practical, goal oriented, strategic thinking and courtroom skills in high-exposure cases. A co-lead counsel on some of the largest mass tort litigations, Joan defends her clients in class actions, from product liability litigation, to complex licensing agreements, to trade secret indemnity issues. While her litigation experience spans industries, including retail and finance, she focuses much of her current practice on the banking and finance industries. She is co-lead national counsel for one of the world’s largest financial institutions. Joan's preferred pronouns are she/her/hers.
Johanna Hillard, JD
President, JuryScope

Johanna Hillard, President of JuryScope, has extensive trial consulting experience with an expertise in complex litigation. Her experience covers both state and federal court in venues across the country. Having been retained on hundreds of cases, her consulting experience includes using juror and judge mock trials and focus groups to delve into the key issues in a case. Ms. Hillard has also assisted developing juror questionnaires, preparing judge and attorney jury voir dire questions and, of course, providing in-court assistance in jury selection. She also has extensive experience developing the protocol for and conducting post-trial juror interviews where permitted.
Bonnie Lau is the co-head of Morrison Foerster’s San Francisco litigation department. A dynamic trial lawyer, Bonnie has significant experience defending class actions, multidistrict litigations, and enforcement actions, and deftly handles international competition investigations and enforcement issues. Clients commend Bonnie as “absolutely outstanding; a practical, responsive and adept adviser” and “a fantastic lawyer, detail-oriented and able to handle complex matters with ease and good humor.” (Chambers USA 2022.)
Diana Chang concentrates her practice in environmental, and toxic tort litigation. She has substantial experience in litigation involving polychlorinated biphenyls (PCBs), including those related to their use, fate and transport, and regulation under the Toxic Substances Control Act.

In addition, Diana has experience representing clients in a range of industries, including automotive transportation, construction, amusement parks, and pharmaceuticals.
Agenda

Background: 2020 Census Results

Addressing Implicit Bias

• Implicit Bias During Trials
• Jury Questionnaire
• Successfully Using Voir Dire to Address Implicit Bias
• Other Strategies to Address Implicit Bias

Questions and Answers
2020 Census Results
Growth of Minority Populations, 2010-2020

Figure 2. Change in US population for race and ethnic groups, 2010-2020

- Latino or Hispanic: 11,602,450
- 2+ Races*: 7,582,502
- Asian American*: 5,153,595
- Black*: 2,254,490
- Other races*: 1,085,568
- Hawaiians/ Other Pacific Islanders*: 140,442
- American Indian/Alaska Native*: 4,601
- White: -5,119,905

* non-Latino or Hispanic members of racial group

## Diversification of States

<table>
<thead>
<tr>
<th>Majority “Minority” Population</th>
<th>40% or more People of Color</th>
<th>30% or more People of Color</th>
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<tbody>
<tr>
<td>Hawaii — 79%</td>
<td>Alaska — 42%</td>
<td>Alabama — 37%</td>
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<tr>
<td>California — 65%</td>
<td>Arizona — 47%</td>
<td>Arkansas — 31%</td>
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<tr>
<td>New Mexico — 63%</td>
<td>Delaware — 41%</td>
<td>Colorado — 35%</td>
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<tr>
<td>District of Columbia — 62%</td>
<td>Florida — 49%</td>
<td>Connecticut — 37%</td>
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<tr>
<td>Texas — 60%</td>
<td>Georgia — 49%</td>
<td>Massachusetts — 35%</td>
</tr>
<tr>
<td>Nevada – 54%</td>
<td>Illinois — 42%</td>
<td>Oklahoma — 39%</td>
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<tr>
<td>Maryland — 53%</td>
<td>Louisiana — 44%</td>
<td>South Carolina — 38%</td>
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<td></td>
<td>Mississippi — 45%</td>
<td>Washington — 36%</td>
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<tr>
<td></td>
<td>New Jersey — 48%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>New York — 47%</td>
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<tr>
<td></td>
<td>North Carolina — 40%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Virginia — 41%</td>
<td></td>
</tr>
</tbody>
</table>
Asian population in U.S. nearly doubled between 2000 and 2019 and is projected to surpass 46 million by 2060.

Note: In 2000 and later, Asians include the mixed-race and mixed-group populations, regardless of Hispanic origin. Prior to 2000, decennial census forms only allowed one race category to be selected. Asians include Pacific Islanders in 1980 and earlier years. Population figures for 1870-1980 are rounded to the nearest 1,000, and for 2000-2060, they are rounded to the nearest 100,000.


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Asians Projected to Become Largest U.S. Immigrant Group

Asians projected to become the largest immigrant group in the U.S., surpassing Hispanics

<table>
<thead>
<tr>
<th>Year</th>
<th>Actual</th>
<th>Projected</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1965</td>
<td>80</td>
<td>29</td>
</tr>
<tr>
<td>1975</td>
<td>59</td>
<td>32</td>
</tr>
<tr>
<td>1985</td>
<td>36</td>
<td>34</td>
</tr>
<tr>
<td>1995</td>
<td>44</td>
<td>36</td>
</tr>
<tr>
<td>2005</td>
<td>48</td>
<td>38</td>
</tr>
<tr>
<td>2015</td>
<td>47</td>
<td>38</td>
</tr>
</tbody>
</table>

Note: White, Black and Asian populations include those who report being only one race and are not Hispanic. Asians include Pacific Islanders. Hispanics are of any race. Other races shown but not labeled.


Six origin groups make up 85% of all Asian Americans

<table>
<thead>
<tr>
<th>Origin</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chinese</td>
<td>24%</td>
</tr>
<tr>
<td>Indian</td>
<td>21%</td>
</tr>
<tr>
<td>Filipino</td>
<td>19%</td>
</tr>
<tr>
<td>Korean</td>
<td>10%</td>
</tr>
<tr>
<td>Vietnamese</td>
<td>9%</td>
</tr>
<tr>
<td>Japanese</td>
<td>7%</td>
</tr>
<tr>
<td>All others</td>
<td>15%</td>
</tr>
</tbody>
</table>

Note: “All others” includes the 3% of U.S. Asians in the category “Other Asian, not specified.” “Chinese” includes those identifying as Taiwanese. For more about measuring the Taiwanese population in the U.S., read “How many Taiwanese live in the U.S.? It’s not an easy question to answer.” Figures do not add to 100% because individuals identifying with more than one Asian group are included in all groups. Figure for all origin groups includes mixed-race and mixed-group populations, regardless of Hispanic origin.

Source: Pew Research Center analysis of 2019 American Community Survey 1-year estimates (Census data).

Pew Research Center
Nearly half of all Asian Americans live in the West

% of the Asian population in the U.S., 2019

Note: Figures for all Asians include mixed-race and mixed-group populations, regardless of Hispanic origin.

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How Does This Affect Us?

- Dramatic changes in racial/ethnic diversity
  - The percentage of the White non-Hispanic population decreased from 63.7% of the population in 2010 to 57.8% in 2020.
- Clients more diverse: In-house legal counsel more diverse
- Trials more diverse
  - Judges more diverse
  - Employees (witnesses) more diverse
  - Better juries
Juror Opinion Poll: Confidence in the Legal System

- **Great Confidence**
- **Some Confidence**
- **Very Little Confidence**
- **No Confidence**

<table>
<thead>
<tr>
<th>Race</th>
<th>Great Confidence</th>
<th>Some Confidence</th>
<th>Very Little Confidence</th>
<th>No Confidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>19%</td>
<td>69%</td>
<td>11%</td>
<td>17%</td>
</tr>
<tr>
<td>Black or African-American</td>
<td>13%</td>
<td>64%</td>
<td>13%</td>
<td>19%</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
<td>15%</td>
<td>69%</td>
<td>15%</td>
<td>33%</td>
</tr>
<tr>
<td>Asian</td>
<td>14%</td>
<td>70%</td>
<td>13%</td>
<td>22%</td>
</tr>
<tr>
<td>Other</td>
<td>15%</td>
<td>63%</td>
<td>15%</td>
<td>19%21%</td>
</tr>
</tbody>
</table>
Soliciting More Diverse Juries

"Jurors from a cross-section of the community bring different life experiences and perspectives to jury deliberations, leading to more informed discussions and greater public confidence in the judicial process."

– Chief Judge Juan R. Sanchez of the Eastern District of Pennsylvania
The Power of Diverse Juries

• Diversity forces challenges to one’s own opinion
  • This forces a more detailed understanding of the evidence
  • Requires stronger arguments to support opinions
  • Avoids “GroupThink” (harmony for the sake of harmony)
  • Dispersed knowledge
• When White jurors are in a diverse group, they become more careful and systematic in the way they evaluate evidence that could trigger their own racial biases
• White jurors in the diverse group condition exchanged more information and considered a broader range of facts before coming to a decision than did White jurors in the all-White condition
The Benefit of Diverse Juries

• Diverse juries have been shown to process information more thoroughly
  • On average, diverse mock trial juries deliberated 11 minutes longer
  • They discuss more facts about the case
  • They make fewer factual errors than all-White juries
  • Diverse juries were more open to talking about the role of race in the case

• Diverse juries with egalitarian discussions boost jurors’ confidence in the legal system and promotes other civic engagement, including voting

• Unrepresentative juries weaken the perception of fairness and legitimacy of the legal system, particularly among members of minority racial and ethnic group
Addressing Implicit Bias
Implicit Bias: What Is It and Why Should We Care?

• Definition: Bias that exists outside of conscious awareness
  • Attitudes, mental shortcuts, and stereotypes
  • Both positive and negative
  • May differ from explicit biases

• Implicit bias predicts behavior better than explicit bias
  • Predicts interpretations of ambiguous actions

• Why raise awareness of implicit bias?
Questionnaires

• Given to prospective jurors beforehand

• Value of questionnaires and ability to self-report

• Look for trigger words
Do you find people who do not speak English to be more or less credible than someone who does speak English?

- Yes, a person who speaks English is more credible: 81%
- Yes, a person who speaks English is less credible: 17%
- No, a person’s ability or inability to speak English does not change their credibility: 2%
Do you find people who speak with a foreign accent to be more or less credible than someone speaking with an American accent?

- Yes, a person with a foreign accent is more credible: 2%
- Yes, a person with a foreign accent is less credible: 6%
- No, a person’s accent does not change their credibility: 92%
Do you have strong feelings, positive or negative, about people who do not speak English?

- Yes, positive: 16%
- Yes, negative: 4%
- No: 80%
In general, would you trust the testimony of someone from China as much as the testimony of someone from the United States?
Have you ever had a negative experience with the countries or people from:

- **Outside North America**
  - Yes: 7%
  - No: 93%

- **Asia**
  - Yes: 9%
  - No: 91%

- **China**
  - Yes: 7%
  - No: 93%

Confidential and privileged work product. The contents of this report constitute proprietary information.
Questionnaires: Examples

Chinese people are dishonest.

- Strongly Agree: 2%
- Agree: 6%
- Neither: 45%
- Disagree: 16%
- Strongly Disagree: 31%
Chinese people unfairly face discrimination in the United States today.

Questionnaires: Examples
Successfully Using Voir Dire to Address Implicit Bias

• A trial is won or lost when the jury is selected

• Useful to follow up with jurors individually based on questionnaires

• Voir dire is difficult!
  • Importance of building trust
  • Ask open ended questions
  • Understanding local rules and your judge

• Preservations for appeal
Other Strategies to Address Implicit Bias

- Sample jury instructions
- Proposed jury instructions

Joan to provide examples of sample jury instructions
Instructing Away Bias: Proposed Jury Instruction

Growing scientific research indicates each one of us has "implicit biases," or hidden feelings, perceptions, fears, and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.

– Retired Judge Mark Bennett, Northern District of Iowa
Toolkit on Implicit Bias

- Questionnaire
- Introduction to concept of implicit bias
- Lawyer-led individual voir dire
- Preserving appellate issues during voir dire
- Jury instructions

Speakers to provide input
Questions?
Thank You
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ABOUT THE PRIMER

This Primer was produced as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts. The Campaign seeks to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness across the nation’s state courts. The Campaign is funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. Points of view or opinions expressed in the Primer are those of the author and do not represent the official position of the funding agencies. To learn more about the Campaign, visit www.ncsconline.org/ref.

ABOUT THE AUTHOR & REVIEWERS

Jerry Kang is Professor of Law at UCLA School of Law. He has written and lectured extensively on the role of implicit bias in the law. For more information on Professor Kang, please visit jerrykang.net. The Primer benefited from the review and comments of several individuals working with the National Campaign, including Dr. Pamela Casey, Dr. Fred Cheesman, Hon. Ken M. Kawaichi, Hon. Robert Lowenbach, Dr. Shawn Marsh, Hon. Patricia M. Martin, Ms. Kimberly Papillon, Hon. Louis Trosch, and Hon. Roger K. Warren.
Implicit Bias: A Primer

Schemas and Implicit Cognitions (or “mental shortcuts”)

Stop for a moment and consider what bombards your senses every day. Think about everything you see, both still and moving, with all their color, detail, and depth. Think about what you hear in the background, perhaps a song on the radio, as you decode lyrics and musical notes. Think about touch, smell, and even taste. And while all that’s happening, you might be walking or driving down the street, avoiding pedestrians and cars, chewing gum, digesting your breakfast, flipping through email on your smartphone. How does your brain do all this simultaneously?

It does so by processing through schemas, which are templates of knowledge that help us organize specific examples into broader categories. When we see, for example, something with a flat seat, a back, and some legs, we recognize it as a “chair.” Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category “chair.” Without spending a lot of mental energy, we simply sit. Of course, if for some reason we have to study the chair carefully—because we like the style or think it might collapse—we can and will do so. But typically, we just sit down.

We have schemas not only for objects, but also processes, such as how to order food at a restaurant. Without much explanation, we know what it means when a smiling person hands us laminated paper with detailed descriptions of food and prices. Even when we land in a foreign airport, we know how to follow the crazy mess of arrows and baggage icons toward ground transportation.

These schemas are helpful because they allow us to operate without expending valuable mental resources. In fact, unless something goes wrong, these thoughts take place automatically without our awareness or conscious direction. In this way, most cognitions are implicit.

 Implicit Social Cognitions (or “thoughts about people you didn’t know you had”)

What is interesting is that schemas apply not only to objects (e.g., “chairs”) or behaviors (e.g., “ordering food”) but also to human beings (e.g., “the elderly”). We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail—such as the elderly—we will not raise our guard. If we think that another category is foreign—such as Asians—we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term “implicit bias”
includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense? Or have we already internalized the lessons of Martin Luther King, Jr. and navigate life in a perfectly “colorblind” (or gender-blind, ethnicity-blind, class-blind, etc.) way?

Asking About Bias (or “it’s murky in here”)

One way to find out about implicit bias is simply to ask people. However, in a post-civil rights environment, it has become much less useful to ask explicit questions on sensitive topics. We run into a “willing and able” problem.

First, people may not be willing to tell pollsters and researchers what they really feel. They may be chilled by an air of political correctness.

Second, and more important, people may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection. For example, slight environmental changes alter our judgments and behavior without our realizing. If the room smells of Lysol, people eat more neatly. People holding a warm cup of coffee (versus a cold cup) ascribe warmer (versus cooler) personality traits to a stranger described in a vignette. The experiments go on and on. And recall that by definition, implicit biases are those that we carry without awareness or conscious direction. So how do we know whether we are being biased or fair-and-square?

Implicit measurement devices (or “don’t tell me how much you weigh, just get on the scale”)

In response, social and cognitive psychologists with neuroscientists have tried to develop instruments that measure stereotypes and attitudes, without having to rely on potentially untrustworthy self-reports. Some instruments have been linguistic, asking folks to write out sentences to describe a certain scene from a newspaper article. It turns out that if someone engages in stereotypical behavior, we just describe what happened. If it is counter-typical, we feel a need to explain what happened. (Von Hippel 1997; Sekaquaptewa 2003).

Others are physiological, measuring how much we sweat, how our blood pressure changes, or even which regions of our brain light up on an fMRI (functional magnetic resonance imaging) scan. (Phelps 2000).

Still other techniques borrow from marketers. For instance, conjoint analysis asks people to give an overall evaluation to slightly different product bundles (e.g., how do you compare a 17” screen laptop with 2GB memory and 3 USB ports, versus a 15” laptop with 3 GB of memory and 2 USB ports). By offering multiple rounds of choices, one can get a measure of how important each feature is to a person even if she had no clue to the question “How much would you pay for an extra USB port?” Recently, social cognitionists have adapted this methodology by creating “bundles” that include demographic attributes. For instance, how
would you rank a job with the title Assistant Manager that paid $160,000 in Miami working for Ms. Smith, as compared to another job with the title Vice President that paid $150,000 in Chicago for Mr. Jones? (Caruso 2009).

Scientists have been endlessly creative, but so far, the most widely accepted instruments have used reaction times--some variant of which has been used for over a century to study psychological phenomena. These instruments draw on the basic insight that any two concepts that are closely associated in our minds should be easier to sort together. If you hear the word “moon,” and I then ask you to think of a laundry detergent, then “Tide” might come more quickly to mind. If the word “RED” is painted in the color red, we will be faster in stating its color than the case when the word “GREEN” is painted in red.

Although there are various reaction time measures, the most thoroughly tested one is the Implicit Association Test (IAT). It is a sort of video game you play, typically on a computer, where you are asked to sort categories of pictures and words. For example, in the Black-White race attitude test, you sort pictures of European American faces and African American faces, Good words and Bad words in front of a computer. It turns out that most of us respond more quickly when the European American face and Good words are assigned to the same key (and African American face and Bad words are assigned to the other key), as compared to when the European American face and Bad words are assigned to the same key (and African American face and Good words are assigned to the other key). This average time differential is the measure of implicit bias. [If the description is hard to follow, try an IAT yourself at Project Implicit.]

**Pervasive implicit bias (or “it ain’t no accident”)**

It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the stereotype of “career” versus “family”), light-skinned over dark skin, youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of implicit bias, are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements.

These pervasive results do not mean that everyone has the exact same bias scores. Instead, there is wide variability among individuals. Further, the social category you belong to can influence what sorts of biases you are likely to have. For example, although most Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks, African Americans show no such preference on average. (This means, of course, that about half of African Americans do prefer Whites, but the other half prefer Blacks.)

Interestingly, implicit biases are dissociated from explicit biases. In other words, they are related to but differ sometimes substantially from explicit biases--those stereotypes and attitudes that we expressly self-report on surveys. The best understanding is that implicit and explicit biases are related but different mental constructs. Neither kind should be viewed as the solely “accurate” or “authentic” measure of bias. Both measures tell us something important.
Real-world consequences (or “why should we care?”)

All these scientific measures are intellectually interesting, but lawyers care most about real-world consequences. Do these measures of implicit bias predict an individual’s behaviors or decisions? Do milliseconds really matter? (Chugh 2004). If, for example, well-intentioned people committed to being “fair and square” are not influenced by these implicit biases, then who cares about silly video game results?

There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world—in ways that can have real effects on real lives. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- **implicit bias** predicts the rate of callback interviews (Rooth 2007, based on implicit stereotype in Sweden that Arabs are lazy);
- **implicit bias** predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- **implicit bias** predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- **implicit bias** predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decisionmaking in hard cases;
- **implicit bias** predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);
- **implicit bias** predicts the amount of shooter bias—how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);
- **implicit bias** predicts voting behavior in Italy (Arcari 2008);
- **implicit bias** predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).

With any new scientific field, there remain questions and criticisms—sometimes strident. (Arkes & Tetlock 2004; Mitchell & Tetlock 2006). And on-the-merits skepticism should be encouraged as the hallmark of good, rigorous science. But most scientists studying implicit bias find the accumulating evidence persuasive. For instance, a recent meta-analysis of 122 research reports, involving a total of 14,900 subjects, revealed that in the sensitive domains of stereotyping and prejudice, implicit bias IAT scores better predict behavior than explicit self-reports. (Greenwald et al. 2009).

And again, even though much of the recent research focus is on the IAT, other instruments and experimental methods have corroborated the existence of implicit biases with real world consequences. For example, a few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment (Banks et al. 2006; Blair 2004).

Malleability (or “is there any good news?”)

The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit. Fortunately, there is evidence
that implicit biases are malleable and can be changed.

- An individual’s motivation to be fair does matter. But we must first believe that there’s a potential problem before we try to fix it.
- The environment seems to matter. Social contact across social groups seems to have a positive effect not only on explicit attitudes but also implicit ones.
- Third, environmental exposure to countertypical exemplars who function as “debiasing agents” seems to decrease our bias.
  - In one study, a mental imagery exercise of imagining a professional business woman (versus a Caribbean vacation) decreased implicit stereotypes of women. (Blair et al. 2001).
  - Exposure to “positive” exemplars, such as Tiger Woods and Martin Luther King in a history questionnaire, decreased implicit bias against Blacks. (Dasgupta & Greenwald 2001).
  - Contact with female professors and deans decreased implicit bias against women for college-aged women. (Dasgupta & Asgari 2004).
- Fourth, various procedural changes can disrupt the link between implicit bias and discriminatory behavior.
  - In a simple example, orchestras started using a blind screen in auditioning new musicians; afterwards women had much greater success. (Goldin & Rouse 2000).
  - In another example, by committing beforehand to merit criteria (is book smarts or street smarts more important?), there was less gender discrimination in hiring a police chief. (Uhlmann & Cohen 2005).
  - In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking. This recognition is the opposite of various forms of “blindness” (e.g., color-blindness).

In outlining these findings of malleability, we do not mean to be Pollyanish. For example, mere social contact is not a panacea since psychologists have emphasized that certain conditions are important to decreasing prejudice (e.g., interaction on equal terms; repeated, non-trivial cooperation). Also, fleeting exposure to countertypical exemplars may be drowned out by repeated exposure to more typical stereotypes from the media (Kang 2005).

Even if we are skeptical, the bottom line is that there’s no justification for throwing our hands up in resignation. Certainly the science doesn’t require us to. Although the task is challenging, we can make real improvements in our goal toward justice and fairness.

**The big picture (or “what it means to be a faithful steward of the judicial system”)**

It’s important to keep an eye on the big picture. The focus on implicit bias does not address the existence and impact of explicit bias—the stereotypes and attitudes that folks recognize and embrace. Also, the past has an inertia that has not dissipated. Even if all explicit and implicit biases were wiped away through some magical wand, life today would still bear the burdens of an unjust yesterday. That said, as careful stewards of the justice system, we
should still strive to take all forms of bias seriously, including implicit bias.

After all, Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done—and be seen to be done.
Glossary

Note: Many of these definitions draw from Jerry Kang & Kristin Lane, A Future History of Law and Implicit Social Cognition (unpublished manuscript 2009)

Attitude
An attitude is “an association between a given object and a given evaluative category.” R.H. Fazio, et al., Attitude accessibility, attitude-behavior consistency, and the strength of the object-evaluation association, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 339, 341 (1982). Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. See also stereotype.

Behavioral realism
A school of thought within legal scholarship that calls for more accurate and realistic models of human decision-making and behavior to be incorporated into law and policy. It involves a three step process:

First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of human behavior and decision-making embedded within the law. These latent theories typically reflect “common sense” based on naive psychological theories.

Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of “the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view.” Kristin Lane, Jerry Kang, & Mahzarin Banaji, Implicit Social Cognition and the Law, 3 ANNU. REV. LAW SOC. SCI. 19.1-19.25 (2007)

Dissociation
Dissociation is the gap between explicit and implicit biases. Typically, implicit biases are larger, as measured in standardized units, than explicit biases. Often, our explicit biases may be close to zero even though our implicit biases are larger.

There seems to be some moderate-strength relation between explicit and implicit biases. See Wilhelm Hofmann, A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures, 31 PERSONALITY & SOC. PSYCH. BULL. 1369 (2005) (reporting mean population correlation r=0.24 after analyzing 126 correlations). Most scientists reject the idea that implicit biases are the only “true” or “authentic” measure; both explicit and implicit biases contribute to a full understanding of bias.

Explicit
Explicit means that we are aware that we have a particular thought or feeling. The term sometimes also connotes that we have an accurate understanding of the source of that thought or feeling. Finally, the term often connotes conscious endorsement of the thought or feeling. For example, if one has an explicitly positive attitude toward chocolate, then one has a positive attitude, knows that one has a positive attitude, and consciously endorses and celebrates that preference. See also implicit.
Implicit
Implicit means that we are either unaware of or mistaken about the source of the thought or feeling. R. Zajonc, Feeling and thinking: Preferences need no inferences, 35 AMERICAN PSYCHOLOGIST 151 (1980). If we are unaware of a thought or feeling, then we cannot report it when asked. See also explicit.

Implicit Association Test
The IAT requires participants to classify rapidly individual stimuli into one of four distinct categories using only two responses (for example, in the traditional computerized IAT, participants might respond using only the “E” key on the left side of the keyboard, or “I” on the right side). For instance, in an age attitude IAT, there are two social categories, YOUNG and OLD, and two attitudinal categories, GOOD and BAD. YOUNG and OLD might be represented by black-and-white photographs of the faces of young and old people. GOOD and BAD could be represented by words that are easily identified as being linked to positive or negative affect, such as “joy” or “agony”. A person with a negative implicit attitude toward OLD would be expected to go more quickly when OLD and BAD share one key, and YOUNG and GOOD the other, than when the pairings of good and bad are switched.

The IAT was invented by Anthony Greenwald and colleagues in the mid 1990s. Project Implicit, which allows individuals to take these tests online, is maintained by Anthony Greenwald (Washington), Mahzarin Banaji (Harvard), and Brian Nosek (Virginia).

Implicit Attitudes
“Implicit” attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.” Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection. See also attitude; implicit.

Implicit Biases
A bias is a departure from some point that has been marked as “neutral.” Biases in implicit stereotypes and implicit attitudes are called “implicit biases.”

Implicit Stereotypes
“Implicit” stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category” Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection. See also stereotype; implicit.

Implicit Social Cognitions
Social cognitions are stereotypes and attitudes about social categories (e.g., Whites, youths, women). Implicit social cognitions are implicit stereotypes and implicit attitudes about social categories.

Stereotype
A stereotype is an association between a given object and a specific attribute. An example is “Norwegians are tall.” Stereotypes may support an overall attitude. For instance, if one likes tall people and Norwegians are tall, it is likely that this attribute will contribute toward a positive orientation toward Norwegians. See also attitude.
Validities
To decide whether some new instrument and findings are valid, scientists often look for various validities, such as statistical conclusion validity, internal validity, construct validity, and predictive validity.

- Statistical conclusion validity asks whether the correlation is found between independent and dependent variables have been correctly computed.
- Internal validity examines whether in addition to correlation, there has been a demonstration of causation. In particular, could there be potential confounds that produced the correlation?
- Construct validity examines whether the concrete observables (the scores registered by some instrument) actually represent the abstract mental construct that we are interested in. As applied to the IAT, one could ask whether the test actually measures the strength of mental associations held by an individual between the social category and an attitude or stereotype.
- Predictive validity examines whether some test predicts behavior, for example, in the form of evaluation, judgment, physical movement or response. If predictive validity is demonstrated in realistic settings, there is greater reason to take the measures seriously.
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Judges’ experiences with mitigating jurors’ implicit biases

Jacqueline M. Kirshenbaum and Monica K. Miller

Interdisciplinary Social Psychology, University of Nevada Reno, Reno, NV, USA

Implicit bias can influence jury decision-making. Training judges about implicit bias is a fairly new endeavor, and not all judges are necessarily aware of these biases. Even when judges are aware that biases exist, they might not know whether or not they should alert jurors to such biases or how to appropriately do so. It is currently unknown how many judges alert jurors to implicit bias (e.g. via instructions or juror orientation). The purpose of this study is to discuss judges’ beliefs and practices regarding implicit bias in the courtroom. The findings indicate that the majority of judges (72%) do not alert jurors to implicit bias. Many judges were found to have a lack of awareness or understanding about implicit bias, but many now feel that alerting jurors about bias is important and would like to do so in the future.

Keywords: implicit bias; juror bias; judges; courtroom procedure; content analysis.

Recently, a Lancaster County judge in Nebraska denied a defense attorney’s request to show jurors a video about implicit bias (Innocence Project, 2018). The judge reasoned that instead of the video, issues of implicit bias should be addressed during voir dire. This demonstrates two of the various approaches that judges might use to alert jurors about potential implicit bias. Implicit biases are unconscious attitudes, associations or stereotypes about a group (Greenwald & Banaji, 1995). For example, some White people might associate Black people with danger and violence but be unaware that they hold this association. Because implicit biases can threaten a defendant’s right to a fair trial it is important to reduce bias in jurors whenever possible.

However, training judges about implicit bias is a fairly new endeavor, and not all judges are necessarily aware of these biases (Redfield, 2017). Even the judges who are aware might not know whether or not they should alert jurors to such biases or how to appropriately do so. It is currently unknown how many judges alert jurors of implicit bias or the methods by which they do so; the current study will address this gap. The purpose of this article is to discuss judges’ beliefs and practices regarding implicit bias in the courtroom.

Implicit bias in the courtroom

Several types of implicit bias, including racial bias (Sommers & Ellsworth, 2001), weight bias (Schvey et al., 2013; White et al., 2014), physical attractiveness bias (Patry, 2008) and gender bias (for a review, see Livingston et al., 2019) can influence various aspects of the legal system. Arguably, of these biases, racial bias is the most widely known and studied. Even though racial prejudice has declined over the years (e.g. Schuman et al., 1997), racial bias still exists in the legal system today.
Some research shows that racial minorities experience worse outcomes compared to White people in police interactions (e.g. Spencer et al., 2016) and prosecutors’ charging decisions (Kang et al., 2011). There is also evidence that, compared to White defendants, minority defendants receive harsher verdicts (ForsterLee et al., 2006; Wuensch et al., 2002) and sentences (Baldus et al., 2002; O. Mitchell, 2005; Sorensen & Wallace, 1995).

Both explicit and implicit racial attitudes of legal actors (e.g. jurors, judges) can account for these disproportionate outcomes (Cohn et al., 2009). Specifically, jurors tend to show bias in verdicts and sentencing against defendants of another race (T. L. Mitchell et al., 2005; Sweeney & Haney, 1992). For example, people’s attitudes toward Black people are associated with ratings of guilt and death penalty recommendations for Black defendants (Dovidio et al., 1997). Furthermore, there is an interaction between defendant and victim race such that Black defendants receive even longer sentences when the victim is White (Baldus et al., 1983, 2002). Although explicit racial attitudes can account for some verdict and sentencing decisions, implicit attitudes can further explain these disproportionate outcomes. People tend to hold an implicit stereotype between Black and guilty (Levinson et al., 2010). Even a subtle manipulation of a defendant’s skin color can affect how jurors evaluate evidence and the degree to which they believed the defendant was guilty (Kang et al., 2011). However, it should be noted that some studies have found no effect of defendant race on sentencing (Pfeifer & Ogloff, 1991; Williams & Holcomb, 2001).

Verdict and sentencing disparities are not just the result of juror bias – judges are also not immune to implicit bias. Mustard (2001) found that Black and Hispanic defendants received longer judicial sentences than White defendants (after controlling for crime seriousness) and that most of this effect occurred when judges deviated from the federal guidelines. When judges followed the guidelines, there was less of a discrepancy between minority and White defendant sentences (Mustard, 2001). Similarly, one study found that judges who held more implicit bias against Black people – as measured by the Implicit Association Test (IAT), a tool that measures implicit bias – were harsher on defendants when they were primed with Black words (Kang et al., 2011). Judges who held implicit biases in favor of Black people were less harsh on defendants when they were primed with Black words (Kang et al., 2011).

Reducing bias

Although legal decision-makers are not immune to implicit racial biases, there are ways to reduce their effects. One of the most studied mechanisms of reducing racial bias in jurors is making race salient in trial (e.g. via description and emphasis of minority status; Cohn et al., 2009; Sommers & Ellsworth, 2000, 2001). Racially charged cases or cases in which race is highlighted tend to mitigate potential juror biases (e.g. Kang et al., 2011). Specifically, when race is made salient (e.g. via witness testimony) jurors are significantly less likely to find a Black defendant guilty than when race is not made salient (Cohn et al., 2009). When race is made salient, White juror verdicts do not differ as a function of defendant race (Cohn et al., 2009). Aversive racism (Dovidio & Gaertner, 1986, 2000; Dovidio et al., 1998) can explain these findings in that emphasizing race makes jurors more aware that their verdicts can seem racist (Sommers & Ellsworth, 2000, 2001, 2003). In order to not appear racist, they act in a ‘socially appropriate manner’ and are less likely to find the Black defendant guilty. It is unclear whether or not race salience reduces the biases of those who score highly on explicit racism scales or who hold particularly strong implicit biases against racial minorities. For example, although Cohn et al. (2009) found that race salience reduced bias for even highly racist participants, Bucolo and Cohn
(2007) reported that race salience might have a backfire effect for people who hold stronger negative biases. Jurors who scored higher on a racial IAT were more likely to find a Black defendant guilty when race was made salient compared to when it was not. These latter findings are consistent with past research that White people’s racial attitudes are associated with their White identity (Carter et al., 2004).

Research has shown mixed findings regarding other methods for reducing juror bias. For example, whereas some studies have found that jury deliberations reduce White juror bias (Foley & Pigott, 2002), other studies have found no effect (Bernard, 1979; Dovidio et al., 1997). Similarly, some research has found that judge instructions that include a charge to not rely on bias reduce juror bias in verdict decisions (Pfeifer & Ogloff, 1991). However, this method might not be entirely effective because understanding the nature and content of the instructions are important in reducing bias (Hill & Pfeifer, 1992), yet jurors’ comprehension of judges’ instructions tend to be low (Alvarez et al., 2016).

Other existing methods to reduce juror biases such as voir dire might also be ineffective. Although a judge-dominated voir dire might remove explicitly prejudiced or racist jurors, it likely does not remove jurors who hold implicit biases (Bennett, 2010). Judges commonly ask potential jurors whether or not they can be fair and impartial in relation to the case. Because jurors are unaware of their implicit biases, such a question is ineffective in removing implicitly biased jurors. In contrast, Bennett (2010) suggests that an attorney-led voir dire is more effective in reducing juror bias. Specifically, compared to judges, trial lawyers tend to know the case better and have access to more resources (e.g. jury consultants) to help develop strategies to address both explicit and implicit juror bias (Bennett, 2010). In addition, jurors tend to respond more candidly to a lawyer than to a judge (e.g. Jones, 1987).

Training on implicit biases is becoming more common, both in and out of the courtroom (Perez et al., 2017). Conference training sessions and educational tools are becoming more accessible. For example, the American Bar Association (ABA) recently released *Enhancing Justice: Reducing Bias* (Redfield, 2017), a book which educates judges about bias in both juror decisions and their own decisions. The book offers potential solutions such as ‘bench cards’ which help judges think through their decisions rationally and avoid bias. Due to this increase in the amount of training that judges receive, some judges might already be aware of what implicit bias is and the influence it can have in the courtroom.

**Overview**

Judges might vary on whether or not they alert jurors to potential biases. Even though some judges might alert jurors, others likely have reasons for not doing so. Firstly, because judge education and training on implicit biases is somewhat new, it is possible that some judges are not aware of juror implicit biases or do not even believe that they exist. Secondly, judges who are aware might refrain from alerting jurors due to a fear of exacerbating these biases or increasing the likelihood of overcompensation (i.e. alerted jurors now give more leniency to minorities than non-minorities; Bennett, 2010; Redfield, 2017). Thirdly, judges might not alert jurors because they feel that doing so would not be effective or appropriate coming from a judge. Lastly, judges might not alert jurors because they are unsure or uninformed about how to do so.

This study’s main purpose is to conduct a content analysis on judges’ responses to a survey question in order to understand (1) the prevalence of judges alerting jurors of implicit biases and (2) why judges might initiate or refrain from initiating such alerts. Thus, the following research questions guided the analyses:
RQ1: Do the majority of judges alert jurors to implicit biases?

RQ2: Why might judges refrain from alerting jurors of implicit biases?

RQ3: Why might judges alert jurors to implicit biases?

RQ4: How do judges alert jurors to implicit biases?

RQ5: Do judges have suggestions about how best to alert jurors to implicit biases?

Methods

Participants and procedure

As part of their recurring ‘Question of the Month’, The National Judicial College in Reno, Nevada administered an informal survey to their mailing list (i.e. alumni and judges who have taken classes through the college). Participation in the survey was optional and the number of judges who received it is unknown. A total of 357 judges completed the survey regarding their behavior in alerting jurors to the existence of biases. Specifically, judges responded ‘Yes’ or ‘No’ to the question ‘Do you do anything to alert jurors to unconscious or implicit bias?’ Judges could then choose to elaborate further (anonymously or providing their name and contact information) on their answer to the open question. Parts of these data are described in a general, non-scientific way in a brief article published in the Judicial Edge newsletter (National Judicial College, 2018).

Coding scheme

The authors developed a coding scheme based on the existing literature regarding beliefs about bias (e.g. skepticism about the existence of implicit bias; Redfield, 2017) for the frameworks and themes that were found throughout judges’ responses. This led to the creation of 12 coding themes: (1) addressing bias exacerbates bias; (2) not sure how to address bias; (3) bias does not exist; (4) it is not appropriate for judges to address bias; (5) bias is/should be addressed elsewhere (e.g. voir dire); (6) shows a video to teach about bias; (7) reads an instruction that addresses bias; (8) presents a different strategy for addressing bias; (9) believes bias should be addressed; (10) addresses bias indirectly; (11) addresses bias sometimes; and (12) provides a reason for not addressing bias. The researchers coded responses on a ‘0’ (theme absent from response) or ‘1’ (theme present in response) dichotomy.

Results

Of the 357 judges who responded to the survey, two did not complete the yes/no portion of the question, leaving 355 yes/no responses. In regard to the open-ended nature of the question (‘Do you do anything to alert jurors to unconscious or implicit bias?’), 130 judges elaborated on their answer. These more detailed responses were separated into 180 codable comments that consisted of any individual thought, and several responses included several codable comments. The researchers used a subsample of 33 codable comments to measure inter-rater reliability between the two coders (calculated using Cohen’s κ). The two coders were found to have very good agreement of all coded comments in the subsample (κ = .92, range = .64–1.00; see Table 1). All discrepancies were discussed and resolved through discussion before the coders completed the remaining comments.

Prevalence of judges alerting jurors to implicit biases (RQ1)

The majority of judges (72%, n = 254) reported that they do not alert jurors to potential biases (answering RQ1 in the negative). However, the detailed responses of five of the judges who reported that ‘yes’ they do alert jurors to potential biases implied that these judges misunderstood what ‘implicit bias’
refers to (e.g. ‘I mention concepts of sympathy and prejudice. I don’t lecture about implied bias [...]’) or actually only addressed bias sometimes (e.g. ‘I do so as needed depending on the case’).

Why judges refrain from alerting jurors of implicit biases (RQ2)

Several themes arose from the detailed responses as reasons for not alerting jurors of implicit biases (therefore answering RQ2). Some of these themes include beliefs that (1) bias does not exist (n = 3; e.g. ‘Not convinced that implicit bias exists or is a problem [...]’), (2) addressing bias only exacerbates bias or causes harm (n = 15; e.g. ‘In my opinion, mentioning only emphasizes potential bias’) and (3) it is not appropriate or it is unnecessary for judges to address bias (n = 8; e.g. ‘[...] I can’t imagine how I would ever do this without stepping completely outside my role as judge’). Several judges reported unawareness of how to address bias (n = 10, e.g. ‘I would like to but am not sure how to go about it’).

Judges also mentioned various other reasons for not alerting jurors of bias (n = 14). These include reasons involving race (n = 1; e.g. ‘I don’t get the sense that as an African-American judge in a southern state, jurors are not as open to me addressing this with them’), beliefs about the ineffectiveness of alerting jurors (n = 4; e.g. ‘I doubt that the jurors who harbor an otherwise disqualifying bias or prejudice would be influenced by such a suggestion’), worry about influencing the jurors (n = 3; e.g. ‘If you do so, you are attempting to influence the outcome’), the need to use pre-approved instructions (n = 4; e.g. ‘Missouri uses approved instructions. There is no such approved instruction in MO’) and other potential drawbacks to alerting jurors (n = 3; e.g. ‘Why put the idea of bias into someone’s head? The entire voir dire process is made to weed out any bias in the jury panel. With this process we are able to select a fair and unbiased panel. To instill in the jurors that they are biased from the start would hinder this process greatly’).

Why judges alert jurors to implicit biases (RQ3)

Of the 101 judges who indicated that they do address juror bias, some reported addressing it because it is imperative and the court’s obligation to do so. Several judges reported that they believe bias should be addressed and/or want to address it more (n = 21; e.g. ‘this is an important discussion to have with jurors’; ‘I don’t address it as thoroughly as I would like to’).

<table>
<thead>
<tr>
<th>Theme</th>
<th>Inter-rater reliability (Cohen’s κ)</th>
</tr>
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<tbody>
<tr>
<td>1. Addressing bias exacerbates bias</td>
<td>1.00</td>
</tr>
<tr>
<td>2. Not sure how to address bias</td>
<td>0.64</td>
</tr>
<tr>
<td>3. Bias does not exist</td>
<td>1.00</td>
</tr>
<tr>
<td>4. It is not appropriate for judges to address bias</td>
<td>1.00</td>
</tr>
<tr>
<td>5. Bias is/should be addressed elsewhere (e.g. voir dire)</td>
<td>1.00</td>
</tr>
<tr>
<td>6. Shows a video to teach about bias</td>
<td>1.00</td>
</tr>
<tr>
<td>7. Reads an instruction that addresses bias</td>
<td>0.92</td>
</tr>
<tr>
<td>8. Presents a different strategy for addressing bias</td>
<td>1.00</td>
</tr>
<tr>
<td>9. Believes bias should be addressed</td>
<td>1.00</td>
</tr>
<tr>
<td>10. Addresses bias indirectly</td>
<td>1.00</td>
</tr>
<tr>
<td>11. Addresses bias sometimes</td>
<td>1.00</td>
</tr>
<tr>
<td>12. Provides a reason for not addressing bias</td>
<td>0.69</td>
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</tbody>
</table>
A number of judges reported that they only alert jurors to implicit bias some of the time \((n=12)\). The reasons given for this include only alerting jurors to bias when it is deemed necessary or relevant \((n=8)\); e.g. ‘Not unless it may be an issue’), only raising it if the instructions require it \((n=2)\); e.g. ‘I follow the standard jury instructions. If it’s in there [...] I say it. If it’s not [...] I don’t’) and only addressing it if the need is deemed to have arisen during voir dire \((n=2)\); e.g. ‘I would only do so when responses to questions are such that I feel that the discussion is necessary’).

How judges alert jurors to implicit biases (RQ4)

The judges who indicated that they do alert jurors to implicit bias gave different strategies for doing so. A number of judges mentioned the use of a jury orientation video that discusses bias \((n=18)\); e.g. ‘We have a video that addresses unconscious bias during jury orientation’). Many judges also mentioned addressing bias via instruction \((n=42)\) including the use of a standard instruction \((n=19)\); e.g. ‘Our standard instructions address bias issues’) or their own instruction \((n=8)\); e.g. ‘I include a self-styled instruction about unconscious bias based upon my review of instructions other jurisdictions use’).\(^1\)

Some judges presented other methods of addressing bias \((n=9)\) such as considering defense motions on bias and directly talking to the jury pool about bias. Other judges reported addressing bias in indirect ways such as raising the issue of sympathy \((n=5)\); e.g. ‘Not directly, but we often charge the jury that they should not be swayed by sympathy for a party’), using analogies \((n=1)\); e.g. ‘I address the issue in voir dire and describe it using the unconscious or implicit bias and liken it to likes, dislikes and preferences’) and alerting jurors to other types of prejudice \((n=3)\); e.g. ‘I warn jurors that they must consider only the law and the evidence that is before them, and cannot make decisions based upon someone’s court demeanor or physical appearance’; ‘Our standard jury instructions address sympathy, bias, prejudice generally but not implicit bias specifically’).

Several judges reported that bias is or should be addressed elsewhere \((n=26)\), such as during jury orientation \((n=1)\); e.g. ‘I also talk about it when I do jury orientation’), during voir dire \((n=19)\); e.g. ‘Jurors with unacceptable bias or prejudice can be weeded out during voir dire, where it should take place’) or via attorneys \((n=5)\); e.g. ‘Defense counsel seems to do this’; ‘That is the job of the attorneys’). Lastly, one judge mentioned addressing bias throughout the entire process \(\text{e.g. ‘I do it all through the process and give breaks so that they don’t get too tired and go into default mode’.}

Judges’ suggestions about how best to alert jurors to implicit biases (RQ5)

The survey did not ask the judges to make suggestions, but the authors thought that the judges might provide opinions on various ways to address bias. Although the judges did not make explicit recommendations, overall they tended to write favorably about the use of jury orientation videos, pre-written instructions and voir dire.

Discussion and future directions

Overall, the current study demonstrates that the majority of judges do not alert jurors to potential implicit biases. Several themes emerged from the detailed responses that explain why most judges do not alert jurors to such biases. These include an unawareness of how to address bias, the belief that it is inappropriate for judges to address bias and the misconception that addressing bias only exacerbates that bias. It is possible that the judges who indicated skepticism regarding

\(^1\)It is unclear whether 15 of the judges are referring to the use of their own instruction or a standard instruction.
alerting jurors have not been educated or trained on implicit biases. In contrast, several judges reported addressing bias and their belief that it is important to do so. The judges who indicated that they do alert jurors presented different ways in which they do so (e.g. during jury orientation, via instruction, etc.). These results suggest a number of future directions for both psychology and the courts.

First, our results indicate that many judges are skeptical that implicit bias exists, skeptical that measures to reduce bias can work and/or fearful that such measures could backfire and actually make jurors more aware of the factor that the measure was intended to suppress (e.g. racial bias). These are legitimate concerns because there is a lack of research addressing these issues. There is research, some of which is presented above, suggesting that implicit biases exist (Greenwald & Banaji, 1995). There is limited research showing that increasing awareness of these biases is the first step to reducing them (Lee, 2017). Although some research has indicated a backfire effect in instances in which people need to make quick decisions, in complex situations in which people make intricate judgments – such as jury decision-making – salience has been found to reduce bias (Lee, 2017). There is also research which illustrates that having an awareness of potential factors can actually reduce them because people try to hide their biases (e.g. the race salience effect; Sommers & Ellsworth, 2009). Thus, researchers should continue to investigate implicit bias, both in general and specifically related to the courtroom.

Second, many of the judges indicated a lack of awareness of what implicit bias is and how it can affect the courtroom. Thus, researchers should make their findings accessible to judges by publishing them in legal outlets. There is also a need for more extensive and widespread education on implicit biases, as well as a need for training judges on the most effective ways to alert jurors to implicit bias.

Third, a number of judges mentioned a variety of ways to address implicit bias, some of which might not be as effective as they hope. For instance, several judges reported using voir dire to remove biased jurors – and although this method might effectively remove explicitly biased jurors, it likely does not remove implicitly biased jurors (Bennett, 2010). Furthermore, several judges reported using instructions to address juror bias. This method might also be ineffective in reducing juror bias because jury instructions in general are not always effective (for a review, see Alvarez et al., 2016). Judges who do not use instructions might be aware of the research which shows that they can be ineffective. Some judges stated that they rely on attorneys to ferret out bias, but here too there is little evidence that attorneys are able to do so effectively. Indeed, attorneys might be motivated to actually promote bias toward their own client.

Other judges have reported using fully untested methods. For instance, some judges use videos and instructions – even those they have created on their own. Some address bias in indirect ways by talking about sympathy or prejudice in general or through the use of analogies. The point of delivery of such methods might also matter: some judges reported addressing bias during jury selection and others during judicial instructions, with one mentioning addressing it multiple times throughout the trial. The question remains however as to the best time for jurors to receive, understand and act on information about implicit bias. Research has indicated that instructions are easier for jurors to understand when given multiple times (Alvarez et al., 2016), so maybe jurors need to hear about implicit bias more than once. All of these measures have the potential to affect juror implicit bias, but most remain largely untested.
Thus, there is a need for the real-world evaluation of such measures.

Finally, some of the judges expressed the view that it is not permissible for them to address implicit bias, whereas others held the belief that it is an important responsibility of the court and stated that there are jury instructions already in place to address it. This could vary by state and jurisdiction – thus, there is a need for the development of judicial instructions, videos or other measures that have legislative approval. Having a specific policy would likely ease the minds of judges who worry that implementing such measures would overstep the bounds of their remit.

It should be noted that there are some surprising findings. Specifically, the judges did not directly mention certain seemingly important and relevant topics. Only one judge mentioned race as a reason for not addressing bias (i.e. ‘I don’t get the sense that as an African-American judge in a southern state, jurors are not as open to me addressing this with them’). It is possible that judges in areas which possess more Black jurors do not feel the need to address implicit bias. Some possible reasons for not seeing this in the responses are that the judges in such areas did not find it relevant or necessary to explain this, or that the results of the survey are not representative of particular jurisdictions in which this reasoning would pertain. Future surveys or interviews could explicitly ask judges if they think there are jurisdictions where implicit bias is less of a problem. We were also surprised to find that more judges did not explicitly discuss the risk of reversible error. However, several judges did indicate hesitation in deviating from standard and preapproved instructions, and some mentioned their opinion that alerting jurors to implicit bias would be classed as an attempt to influence the outcome. Future research could examine whether or not the risk of reversible error is a specific reason why judges do not alert jurors to implicit bias.

Limitations

The current content analysis is not without limitations. First, because completion of the survey was voluntary, there might be response bias. Specifically, we are unaware of the response rate of the judges who received the survey and completed it, and it is plausible that the majority of judges who responded to the survey held strong opinions about implicit bias in the courtroom. If it was indeed the case that the judges who held stronger opinions were more motivated to respond, the responses will not necessarily be representative of moderate views on the subject. Second, due to the completely open-ended nature of the question, we were unable to ask the judges about specific aspects of implicit bias. For example, although presumably a large issue, very few responses discussed how addressing bias might result in reversible error. Thus, the results are constrained to whichever topics the judges chose to discuss in their detailed responses. Lastly, the judges were not provided with a specific definition of ‘implicit bias’ – thus, it is possible that they responded to the ‘yes/no’ and open-ended aspects of the survey question with varying definitions of implicit bias in mind. This would especially be true for judges who are less familiar with the concept.

Conclusions

This study has found that many judges have a lack of awareness and/or understanding about implicit bias. For instance, some judges do not believe that implicit bias exists, while others believe that addressing it could exacerbate it. Despite these misconceptions about implicit bias in the courtroom, it is promising that a good proportion of the judges who responded to the survey question believe that addressing bias is important and wanted to know about more effective ways of doing so.
The findings suggest a need for better education regarding implicit bias. Judges would likely benefit from education on what implicit bias is, its influence in the courtroom and when and how it is best addressed. Many judges want to address bias in the courtroom and would benefit from training and workshops on how to effectively do so. Future research should examine which methods are most effective in addressing and subsequently reducing juror implicit bias. For example, future research could investigate whether or not jury instructions and jury orientation videos are actually effective in addressing implicit biases. Such research could help to reduce implicit biases in the courtroom and thus protect both the constitutional rights of defendants and the integrity of the court itself.

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Ethical standards

Declaration of conflicts of interest
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ORCID
Jacqueline M. Kirshenbaum [p] http://orcid.org/0000-0002-4755-2107

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Cynthia Lee
George Washington University Law School, cylee@law.gwu.edu

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A New Approach to Voir Dire on Racial Bias

Cynthia Lee*

INTRODUCTION

The shooting of Michael Brown in Ferguson, Missouri on August 9, 2014 renewed debate over whether racial stereotypes about Black men as dangerous, violent criminals encourage police officers and armed civilians to shoot unarmed Black men in cases where they would not have used deadly force had the victim been White.1 Two diametrically opposed accounts of what happened emerged in

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* Cynthia Lee is the Charles Kennedy Poe Research Professor of Law at The George Washington University Law School. She is the author of Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom (2003) and coauthor (with Angela Harris) of Criminal Law: Cases and Materials (3d ed. 2014). She thanks Nancy Kim, Anna Roberts, and Tania Tetlow for helpful comments on this Article. She thanks Lesliehana Jones, Lam Nguyen, and Matthew Halldorson for excellent research assistance on this Article. She thanks Micah Morris of the UC Irvine Law Review for excellent editorial assistance on this Article. She also thanks Elizabeth Moulton for administrative assistance on this Article.

1. I purposely capitalize the letter “B” in “Black” and “W” in “White” to acknowledge the fact
the weeks following the shooting. Brown’s friend, Dorian Johnson, who was with Brown at the time Brown was shot, claimed Officer Darren Wilson shot Brown for no reason and continued shooting even after Brown turned around with his hands in the air, trying to show the officer that he was unarmed. In contrast, Officer Wilson said he shot Brown in self-defense after a scuffle in which Brown shoved him into his patrol car and attempted to grab his weapon.

Polls taken shortly after the shooting showed a racial divide in public opinion over whether the officer was justified in shooting Brown with fifty-seven percent of Blacks saying they believed the shooting was unjustified and only eighteen percent of Whites with the same opinion. When protests erupted in Ferguson, Missouri over the shooting, the police responded with an unusually heavy-handed display of force. Again, public opinion was split over whether the protesters or the police acted inappropriately.

One question that prosecutors face in highly charged cases with racial overtones like the Ferguson case is whether to attempt to conduct voir dire into

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that Black and White are socially constructed racial categories. See IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 9–10 (1996).


6. A YouGov poll found that forty-eight percent of Whites believed the protests were unreasonable compared to thirty-one percent of Blacks. Peter Moore, Ferguson, MO: Racial and Political Divide over Brown Shooting, YouGov (Aug. 18, 2014, 8:01 AM), http://today.yougov.com/news/2014/08/18/ferguson-mo [http://perma.cc/N2SZ-GFBF] (referring to poll results at http://cdn.yougov.com/cumulus_uploads/document/cu4yi1g0z8/tabs_HP_police_20140817-2.pdf). The same poll found thirty-four percent of Whites believed the police response to the Ferguson protests to be reasonable compared to only sixteen percent of Blacks with the same opinion. Id.
racial bias. Voir dire is the process of questioning prospective jurors to ensure that those chosen to sit on the jury will be impartial and unbiased. As Neil Vidmar and Valerie Hans explain, “[v]oir dire, a term with a French origin meaning roughly ‘to see them say,’ is used to denote the process whereby prospective jurors are questioned about their biases during the jury selection process . . . .” In federal court, voir dire is generally conducted by the trial judge. In state court, voir dire practice varies widely depending on the jurisdiction. In most states, voir dire is conducted by both the judge and the attorneys.


9. Tamara F. Lawson, Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials, 41 LOY. U. CHI. L.J. 119, 145 (2009) (noting that in the federal system, judges ask most of the questions during voir dire, whereas in the state system, judges allow attorneys to ask most questions).

10. Maureen A. Howard, Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges, 23 GEO. J. LEGAL ETHICS 369, 378–79 n.44 (2010) (citing Valerie P. Hans & Alayna Jehle, Avoiding Bald Men and People with Green Socks Other Ways to Improve the Voir Dire Process in Jury Selection, 78 CHI.-KENT L. REV. 1179, 1184 (2003)) (noting that in forty-three states, voir dire questioning is conducted by both the judge and attorneys); David B. Rotman et al., U.S. DEPT OF JUSTICE, State Court Organization 1998, at 273–77 tbl.41 (2000), http://www.bjs.gov/content/pub/pdf/sco98.pdf [http://perma.cc/2SMK-7ETA] (listing four states—Connecticut, North Carolina, Texas, and Wyoming—in which attorneys only conduct voir dire, listing seven states—Arizona, California, Delaware, Illinois, Massachusetts, New Hampshire, and New Jersey—in which judges only conduct voir dire, and noting that both attorneys and judges conduct voir dire in the remaining states). In Missouri, judges usually allow the attorneys to ask the questions during jury selection, but the judge may, at her discretion, conduct some or all of the voir dire herself. Your Missouri Courts, TRIAL JUDGES CRIMINAL BENCHBOOK §§ 7.8–9 (Kelly Bronice et al. eds., 2007), http://www.courts.mo.gov/hosted/resourcecenter/TJCB%20Published%20April%202008.2011/TJBB.htm%20files/CH_07_JurySelect_2d_files/CH_07_JurySelect_2d.htm (noting that voir dire is done first by the counsel for the state and then by the counsel for the defendant § 7.8), but also noting that in some instances—at the court's
It is important to note that racial bias is not unique to any particular group. While it is often assumed that racial bias means bias in favor of Whites and against Blacks, racial bias can cut in many different ways. In the Ferguson case, for example, those who believed Michael Brown was shot when he had his hands up before the Department of Justice’s investigation into the shooting was completed11 may have assumed Officer Wilson was lying when he claimed self-defense because of stereotypes about White police officers as racist individuals. At the same time, those who believed the officer’s account of what happened before knowing all of the facts relating to the shooting may have assumed Michael Brown was acting in a threatening way because of stereotypes about Black men.

The Supreme Court has addressed the question of voir dire into racial bias in only a handful of cases. All of these cases dealt with the issue of whether a criminal defendant has the right to have prospective jurors questioned on racial bias, and the last time the Court dealt with this issue was in 1986, more than twenty-five years ago.

Reasonable minds can disagree as to whether it is good trial strategy to voir dire prospective jurors on racial bias. Perhaps the most common view is that reflected by Albert Alschuler, who suggested over twenty-five years ago that voir dire into racial bias would be “minimally useful.”12 Alschuler argued that asking a prospective juror whether he would be prejudiced against the defendant because of the defendant’s race would be patronizing and offensive.13 He also argued that no prospective juror would admit to racial bias, even if he was in fact prejudiced against members of a particular racial group.14

In this Article, I rely on empirical research on implicit bias to challenge Alschuler’s view that voir dire into racial bias would be of minimal benefit to an attorney concerned about such bias. This research suggests that for an attorney concerned that racial stereotypes about the defendant, the victim, or a witness might affect how the jury interprets the evidence, voir dire into racial bias can be extremely helpful. Calling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make. While I agree with Alschuler that a simple, close-ended question like, “Are you going to be biased against the defendant because of his race?” is unlikely to be helpful, I believe that a series of open-ended questions
educating jurors about implicit bias and encouraging them to reflect upon whether and how implicit racial bias might affect their ability to even-handedly consider the evidence can be beneficial in helping to ensure a truly impartial jury.

My Article proceeds in four parts. In Part I, I provide an overview of the process of voir dire and review the Supreme Court’s jurisprudence on voir dire into racial bias. In Part II, I examine social science research that helps answer the question whether it is a good idea to conduct voir dire into racial bias. Some of this research relates to the Implicit Association Test (IAT), an online test that measures implicit bias by comparing response times to selected words and images. Additionally, however, a wealth of less familiar empirical research on race salience conducted over the past decade indicates that calling attention to race can motivate jurors to treat Black and White defendants equally, whereas not highlighting race may result in jurors tending to be more punitive and less empathetic towards Black defendants than they might otherwise be without such attention.

In Part III, I examine a few recent studies calling into question whether making race salient is a good idea. These studies indicate that when White individuals perceive extreme racial differences in the prison population (i.e., when they believe there are many more Blacks and Latinos than Whites in prison), they are more likely to support punitive criminal justice policies than when they perceive that the proportion of minorities in prison is not so large. I analyze these studies and conclude that, while they may appear at first glance to contradict the race salience research, they do not in fact undermine that research.

In Part IV, I turn to the question of what steps can be taken to combat implicit racial bias in the criminal courtroom. I argue that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection. Voir dire can be used to both educate prospective jurors about the concept of implicit bias and help them to become aware of their own implicit biases. It makes sense to address the possibility of implicit racial bias early on, rather than waiting until just before the jury deliberates, as it may be too late by then to undo its effects.

I. Voir Dire

It is often said that a trial is won or lost when the jury is selected. This is because “jurors bring to the courtroom biases and predispositions which largely determine the outcome of the case.” The process of voir dire presents an opportunity for the attorneys to influence who ends up sitting on the jury, at least in jurisdictions where attorney voir dire is permitted.

In this Part, I first discuss the process of voir dire and its role in jury selection.

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I also examine the benefits of attorney voir dire over judge-dominated voir dire. I then discuss the Supreme Court’s jurisprudence on voir dire into racial bias.

A. The Process of Voir Dire

“Voir dire is the process of questioning prospective jurors about their qualifications to serve on the jury panel to decide the case.”

In federal court, voir dire is usually conducted by the judge. In state court, jury selection procedures vary widely with judge-dominated voir dire the practice in seven states, attorney-dominated voir dire the practice in four states, and a mix of judge and attorney questions in the remaining state courts. Some courts allow the attorneys to propose questions that are then given to prospective jurors in the form of a written questionnaire.

According to one source, jury selection in felony cases takes an average of 3.6 to 3.8 hours. During the process of jury selection, the parties are given the opportunity to strike an unlimited number of prospective jurors for cause. A “for cause” challenge will be granted if the judge finds that the party has articulated a good reason that the juror should not serve, such as an inability to be impartial or a prior relationship with the defendant, the defense attorney, the prosecutor, the judge, or one of the witnesses. Each side is also given a set number of peremptory challenges, which can be used to strike a prospective juror for any reason or no reason at all, as long as the reason for striking the prospective juror is not based on the individual’s race or gender.

In order to guard against the possibility that attorneys may use their peremptory challenges to strike prospective jurors based on their race, the Court in 

Batson v. Kentucky

established a three-part framework much like the three-part framework used in the Title VII context to determine whether an individual has

18. Lawson, supra note 9, at 145.
22. Vidmar & Hans, supra note 8, at 87 (“A ‘challenge for cause’ is an assertion by one of the lawyers that a potential juror is not impartial.”).
23. For example, in federal court, a defendant charged with a felony is given ten peremptory challenges, and the prosecutor is given six peremptory challenges. FED. R. CRIM. P. 24(b)(2). If the defendant is in federal court and charged with a misdemeanor, both the defendant and the prosecutor are given three peremptory challenges. (b)(5). In a federal capital case, both sides get twenty peremptory challenges. (b)(1).
been denied a job on the basis of unlawful discrimination. Under the Batson framework, if one party believes the other party has used a peremptory strike to remove a juror because of the juror’s race, that party may assert a Batson challenge. The challenger must first set forth a prima facie case of intentional discrimination. Under the original Batson framework, a defendant who asserted a Batson challenge could establish a prima facie case of purposeful discrimination in the selection of the jury by showing “that he [was] a member of a cognizable racial group . . . , and that the prosecutor [had] exercised peremptory challenges to remove from the venire members of the defendant’s race.” Once the defendant showed that these facts and any other relevant circumstances raised an inference that the opposing party used its peremptory challenges to exclude individuals from the jury on account of their race, the burden shifted to the opposing party to proffer a race-neutral reason for the strike. After a race-neutral reason was proffered by the party opposing the Batson challenge, the trial court had to decide whether the challenger has met its burden of proving purposeful discrimination. In J.E.B. v. Alabama, the Court extended Batson to forbid peremptory challenges based on gender. At least one lower court has gone further, applying Batson to peremptory challenges based on sexual orientation.

26. Under the three-part framework established by the Court in McDonnell Douglas Corp. v. Green, the employee must first establish a prima facie case of unlawful discrimination by a preponderance of the evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The employee can establish a prima facie case by showing (1) he belongs to a racial minority; (2) he applied and was qualified for a job the employer was trying to fill; (3) though qualified, he was rejected; and (4) thereafter the employer continued to seek applicants with complainant’s qualifications. Id. Once the employee establishes a prima facie case, the burden shifts to the employer to rebut this prima facie case by articulating a legitimate, nondiscriminatory reason for the employee’s rejection. Id. The employee can prevail only if he can show that the employer’s response is merely a pretext for behavior actually motivated by discrimination. Id. at 798.

27. Because Batson involved a defendant’s challenge to a prosecutor’s peremptory challenge, its holding left open the question whether a prosecutor could assert a challenge against a defendant if he believed the defendant was exercising its peremptory challenges in a racially discriminatory manner. In 1992, the Court answered this question in the affirmative, applying Batson to criminal defendants. Georgia v. McCollum, 505 U.S. 42, 46–48 (1992); see also Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618–19 (1991) (extending Batson to civil litigants).


29. Id. Subsequently, the Court broadened the Batson framework to include challenges based on ethnicity, see Hernandez v. New York, 500 U.S. 352 (1991), and later gender, see J.E.B. v. Alabama, 511 U.S. 127 (1994).

30. Id.

31. Id. at 97. The Court, however, has made it fairly easy for the opposing party to rebut the challenge, finding it is not necessary that the opposing party’s race-neutral explanation be minimally persuasive or even plausible at stage two of the Batson inquiry. Purkett v. Elem, 514 U.S. 765, 768 (1995) (“The Court of Appeals erred by . . . requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e., a ‘plausible’ basis for believing that ‘the person’s ability to perform his or her duties as a juror’ will be affected.”).

32. Batson, 476 U.S. at 98.


34. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 476 (9th Cir. 2014).

While Batson was well intended, it has not proven to be very effective. Attorneys facing Batson challenges have been able to survive these challenges by proffering fairly implausible “race-neutral” reasons for their strikes. For example, in one case, a prosecutor who faced a Batson challenge from a Black defendant charged with importing heroin proffered two ostensibly race-neutral reasons for striking a Black woman from the jury.

First, the prosecutor noted that the prospective juror was a postal employee and said that it was the U.S. Attorney’s Office’s general policy not to have postal employees on the jury. When pressed by the defense attorney, the prosecutor backed down and admitted that the office did not have such a policy and proffered a second reason for the strike. The prosecutor then suggested that because the prospective juror was a single parent who rented an apartment in an urban area, she “may be involved in a drug situation where she lives.” The judge accepted this second explanation as a race-neutral reason for the strike and denied the defense’s Batson objection.

In another case, the government used five of its six peremptory challenges to strike Black jurors. When the defendant, a Black man, asserted a Batson challenge, one of the race-neutral reasons proffered by the government for striking a Black female from the jury was that her name, Granderson, closely resembled that of a defendant, Anthony Grandison, in a previous case tried by the same prosecutor. Even though that case was completely unrelated to the case at hand and therefore the fact that the prospective juror’s name was similar to the name of a defendant in a completely unrelated case would have had no bearing on the prospective juror’s ability to be fair and impartial, the Court of Appeals agreed with the trial court that this was a neutral and nonpretextual reason for the strike and affirmed the defendant’s conviction.

In United States v. Romero-Reyna, the defendant, a Hispanic man charged with possession of marijuana and heroin with intent to distribute, challenged the government’s use of its peremptory challenges against six prospective jurors of Hispanic origin. The prosecutor proffered as a race-neutral reason for striking one of the individuals who worked as a pipeline operator that he had a “P” rule in which

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35. Professor Jean Montoya surveyed prosecutors and criminal defense attorneys and found that most thought Batson was of limited effectiveness in eliminating racial discrimination in jury selection in large part because of the case with which an attorney can come up with a race-neutral reason for the strike. Jean Montoya, The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory, 29 U. Mich. J.L. Reform 981, 1006 (1996).
37. Id. at 390–91.
38. Id. at 391.
39. Id.
40. Id.
41. United States v. Tindle, 860 F.2d 125, 128 (4th Cir. 1988).
42. Id. at 129.
43. Id.
44. United States v. Romero-Reyna, 889 F.2d 559, 560 (5th Cir. 1989).
he never accepted jurors whose occupations began with a “P.” The trial court accepted this explanation as nonpretextual and rejected the defendant’s *Batson* challenge. On remand, the prosecutor repeated adherence to his “P” rule, but added that he had been informed that marijuana use by pipeline operators was prevalent. This time, the trial court rejected the prosecutor’s “P” rule as a legitimate basis for the strike, noting that several other members of the venire had occupations beginning with the letter “P” and had not been struck by the prosecutor. Nonetheless, the trial court found that the newly added explanation was race-neutral and not a pretextual reason for the strike and rejected the defendant’s *Batson* challenge again.

Another problem is that the attorney exercising the challenged strike may not even be aware that she would not have struck the prospective juror if that individual had been of another race. As Antony Page explains, an attorney may be unaware that she has relied on racial stereotypes in forming her opinions about the prospective juror. When asked to provide a race-neutral reason for the strike, the attorney may sincerely believe that she struck the prospective juror for reasons not related to the juror’s race, even though implicit racial bias may have in fact influenced the attorney’s perceptions of the individual. “By the time the lawyer exercises the peremptory challenge, stereotypes may have thoroughly affected her observation and interpretation of the information upon which she makes her decision.” In light of these and other problems with the *Batson* framework, critics of *Batson* have argued that it would be best to simply eliminate the peremptory challenge altogether and force attorneys to take the first twelve individuals in the jury box unless the attorneys can articulate reasons to challenge those individuals for cause.

Regardless of whether peremptory challenges continue to exist in our criminal justice system, a critical question remains: which legal actor—the judge or the attorney—should conduct voir dire? Empirical research suggests that judge-dominated voir dire is less effective at discovering juror bias than attorney voir dire because prospective jurors often give what they think is the socially desirable

45. *Id.*
46. *Id.*
47. *Id.* at 561.
48. *Id.*
49. *Id.*
51. *Id.*
52. *Id.*
response when the judge is asking the questions.54 There are other reasons why a
trial court should allow the attorneys to conduct voir dire, particularly when the case
involves the possibility of racial bias. As Judge Mark Bennett notes, attorneys usually
know the case better than the trial judge, and therefore “are in the best position to
determine how explicit and implicit biases among potential jurors might affect the
outcome.”55 Attorneys also have more of an incentive than the trial judge to use
jury consultants and other resources “to develop voir dire strategies to address both
explicit and implicit biases of prospective jurors.”56 This is because attorneys need
as much information as possible about the prospective jurors in order to know
which prospective jurors would have difficulty being impartial and should be
stricken from the jury.57

B. The Supreme Court’s Jurisprudence on Voir Dire into Racial Bias

The U.S. Supreme Court has addressed the question of whether a criminal
defendant has a right to question prospective jurors on the issue of racial bias in
only a handful of cases. Not surprisingly, the Court has gone back and forth on this
issue.

Initially, the Court was sympathetic to the idea that a criminal defendant has a
constitutional right to question prospective jurors about racial bias. In 1931, the
Court reversed a Black defendant’s murder conviction where the trial judge had
refused a defense request to interrogate the venire on racial prejudice.58 In Aldridge
v. United States, a Black man charged with the murder of a White police officer was
convicted of first-degree murder and sentenced to death.59 The trial judge had
refused a defense request to question prospective jurors on whether they had any
racial prejudice based on the fact that the defendant was Black and the deceased
was White.60 The Supreme Court reversed the conviction, stating that fairness
demands that inquiries into racial prejudice be allowed.61 In response to the lower
court’s suggestion that such inquiry was unnecessary since African Americans were
afforded the same rights and privileges as Whites, such as the right to practice law
and the right to serve on juries,62 the Court said, “Despite the privileges accorded
to the negro, we do not think that it can be said that the possibility of such prejudice

54. See Bennett, supra note 17, at 160; Susan E. Jones, Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, 11 LAW & HUM. BEHAV. 131, 143 (1987) (finding that prospective jurors respond more candidly and are less likely to give what they think is the socially desirable response when attorneys are asking the questions during voir dire than when the judge is asking questions).
55. Bennett, supra note 17, at 160.
56. Id.
57. J.E.B. v. Alabama, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) (“[P]reventing bias . . . lies at the very heart of the jury system.” (citations omitted)).
59. Id. at 309.
60. Id. at 310–11.
61. Id. at 313.
62. Id. at 316 (McReynolds, J., dissenting).
is so remote as to justify the risk in forbidding the inquiry. Noting “[t]he argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices,” the Aldridge Court concluded, “We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred.”

The Court did not revisit the question of whether a criminal defendant has a right to require the trial judge to question prospective jurors on racial bias until 1973, more than forty years later. In Ham v. South Carolina, a case involving a Black civil rights activist charged with possession of marijuana, the Court again sided with the defendant, holding that a trial judge’s refusal to question prospective jurors as to possible racial prejudice violated the defendant’s constitutional rights. This time, the Court went further than it had in Aldridge v. United States and expressly grounded its decision in due process, holding that “the Due Process Clause of the Fourteenth Amendment requires that . . . the [defendant] be permitted to have the jurors interrogated on the issue of racial bias.” The Ham Court reaffirmed the trial court’s discretion to conduct voir dire in the manner it thinks is best, noting that the trial judge is “not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by [the defendant].” It also limited the right in controversy to questioning regarding possible bias to racial bias, refusing to require the trial court to question prospective jurors regarding bias against persons with beards even though the defendant, who sported a beard, had requested such voir dire.

A mere three years later, the Court started backtracking from its support for voir dire into racial bias. In Ristaino v. Ross, the Court held that the mere fact that the defendant is Black and the victim is White is not enough to trigger the constitutional requirement that the trial court question prospective jurors about racial prejudice. The defendants in Ristaino v. Ross were three Black men on trial for armed robbery, assault and battery by means of a dangerous weapon, and assault with intent to murder two White security guards. Defendant Ross requested that the trial judge ask prospective jurors the following question: “Are there any of you who believe that a White person is more likely to be telling the truth than a Black person?” The trial court not only refused to ask this particular question, it failed

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63. Id. at 314.
64. Id. at 314–15.
65. Id. at 315.
67. Id. at 527.
68. Id.
69. Id. at 527–28.
71. Id. at 590.
72. Id. at 590 n.1.
make any reference to race when giving jurors an overview of the facts of the case and when questioning the jurors about possible bias or prejudice for or against either of the defendants or the victim. The jury convicted the defendants on all counts.

In holding that the trial court did not err in refusing to question the venire on racial bias, the Court attempted to distinguish the case before it from Ham v. South Carolina. Somewhat unconvincingly, the Court explained that racial issues were “inextricably bound up with the conduct of the trial” in Ham because Ham, who had a reputation as a civil rights activist, claimed that he had been framed because of his civil rights work. The Ristaino Court continued, “The mere fact that the victim of the crimes alleged was a White man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in Ham.” The Court then established what some have called a “special circumstances” rule: a defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a “significant likelihood” of prejudice by the jurors.

Even though the Ristaino Court refused to find a due process violation in the trial court’s failure to question jurors on racial bias, it did acknowledge the usefulness of asking questions on racial bias as a prudential matter. “Although we hold that voir dire questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant.” The Court indicated that had the case been tried in federal court, it would have used its supervisory power to require the trial court to ask prospective jurors questions on racial bias.

In 1981, the Court revisited the issue of voir dire into racial bias in a case involving a defendant of Mexican descent. The defendant in Rosales-Lopez v. United States was charged with smuggling undocumented Mexican immigrants into the United States. The defendant requested that prospective jurors be asked the following questions: “Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect

73. Id. at 592 nn.3–4.
74. Id. at 593.
75. Id. at 596–97.
76. Id. at 597.
77. Id. at 596–97; see also Laura A. Giantris, The Necessity of Inquiry into Racial Bias in Voir Dire, The Maryland Survey: 1994-1995, 55 MD. L. REV. 615, 629 (1996). Giantris discusses Hill v. State, a Maryland decision in which the Maryland Court of Appeals held that the trial court’s refusal to question the venire on racial or ethnic bias constituted constitutional error and concludes that “[a]s a result of Hill, Maryland criminal defendants no longer must meet the burdensome ‘special circumstances’ test as enunciated in Thornton and Rosales-Lopez.” Id.; see also Barry P. Goode, Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire, 92 KY. L.J. 601, 672 (2004) (“Ristaino established a ‘special circumstances’ rule: the Constitution only requires a court to allow defendants to ask questions designed to elicit racial prejudice when the special circumstances of a case indicate a significant likelihood of prejudice by the jurors.”).
78. Ristaino, 424 U.S. at 597 n.9.
79. Id.
you?"81 The trial judge did not pose either of these questions to the prospective jurors, nor did he pose any questions specifically addressed to possible prejudice against the defendant because of his race or ethnicity.82 The trial judge instead asked the following questions of prospective jurors: “Do any of you have any feelings about the alien problem at all?”, and “Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?”83

In considering defendant Rosales-Lopez’s appeal, the Supreme Court started by discussing the importance of voir dire, noting that “[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.”84 The Court observed that lack of adequate voir dire impairs the trial court’s ability to remove jurors who cannot act impartially.85 Next, the Court noted that “federal judges have been accorded ample discretion in determining how best to conduct the voir dire.”86 This is due to the fact that the responsibility to impanel an impartial jury lies with the trial judge.87 Additionally, the trial judge is able to see the prospective jurors and their responses, both verbal and nonverbal, to the questions posed to them during voir dire.88

The Court next distinguished between questions directed at the discovery of racial prejudice that are constitutionally mandated and questions directed at the discovery of racial prejudice that are required of federal courts as a matter of the Court’s supervisory authority over the federal courts.89 The Court then established a new nonconstitutional rule for federal courts, holding that federal courts must inquire into racial prejudice “when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups.”90 In all other cases, the Court explained, reversible error will occur only when the circumstances of the case “indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.”91 Because Rosales-Lopez was charged with smuggling, not a crime of interracial violence, the trial court was not required to ask questions directed at racial prejudice even though requested to do so by the defense unless there was a reasonable possibility that racial prejudice influenced the jury.

81. Id. at 185.
82. Id.
83. Id. at 186. It could be argued that the trial court’s use of the word “alien” to describe Rosales-Lopez encouraged the jurors to be biased against Rosales-Lopez. The word “alien,” which is used to refer to one who is an immigrant to the United States, conjures up images of aliens from outer space. Because of this, many progressives use the phrase “undocumented immigrant” rather than “illegal alien.”
84. Id. at 188.
85. Id.
86. Id. at 189.
87. Id.
88. Id.
89. Id. at 190.
90. Id. at 196.
91. Id. at 191. In other words, in all other cases, the special circumstances rule established in *Ristaino v. Ross* would control.
or ethnic prejudice influenced the jury.\(^{92}\) The Court did not believe such a possibility existed in this case.\(^{93}\)

While Rosales-Lopez may not have been happy with the Supreme Court’s decision since the Court affirmed his conviction, the decision was partially good news for future defendants, as it established a new defense-friendly rule—albeit one that leaves discretion in the trial court’s hands—for defendants seeking voir dire into racial bias in federal courts. In federal cases involving a defendant and a victim of different races or ethnicities and a crime of violence, the trial court should as a prudential matter conduct voir dire into racial prejudice if the defense requests that it do so.\(^ {94}\)

In 1986, the Court addressed the issue of a defendant’s right to have prospective jurors questioned on racial prejudice for the last time to date.\(^ {95}\) In Turner v. Murray, Willie Lloyd Turner, a Black man, was charged with capital murder and other crimes after fatally shooting a White jewelry store owner with a sawed off shotgun in front of a police officer and three witnesses.\(^ {96}\) Apparently, Turner became upset with the store owner after learning that he had triggered a silent alarm to summon the police to the store.\(^ {97}\)

Prior to jury selection, Turner’s attorney submitted to the trial judge a list of questions that he wished to ask the venire, including the following question: “The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a White Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?”\(^ {98}\) The trial court refused to ask this question, instead asking the venire the more generic question “whether any person was aware of any reason why he could not render a fair and impartial verdict.”\(^ {99}\) Everyone on the venire responded to this question in the negative.\(^ {100}\) At the time they were asked this question, the prospective jurors did not know that the victim was White.\(^ {101}\) Eight

\(^{92}\) Id. at 192.

\(^{93}\) Id. at 193.

\(^{94}\) Id. at 192.

\(^{95}\) The Court has mentioned voir dire on racial bias in other cases, but this was not the main issue in those cases. See, e.g., Warger v. Shauers, 135 S. Ct. 521, 529 n.3 (2014). The court held that a plaintiff in a personal injury suit may not use a juror affidavit detailing alleged juror dishonesty to get a new trial while noting in a footnote, “There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. . . . We need not consider the question, however, for those facts are not presented here.” Id.; see also, e.g., Mu’Min v. Virginia, 500 U.S. 415, 422–24 (1991) (finding no error in trial court’s refusal to further question prospective jurors about news reports to which they had been exposed while discussing cases involving voir dire into racial bias as examples of state cases on the extent of voir dire examination).


\(^{97}\) Id. at 30.

\(^{98}\) Id. at 30–31.

\(^{99}\) Id. at 31.

\(^{100}\) Id.

\(^{101}\) Id.
Whites and four Blacks were selected to serve on the jury. The jury found the defendant guilty of all charges, and after a separate sentencing hearing, recommended that Turner be sentenced to death.

Turner appealed his death sentence, which the Supreme Court reversed. The Court started by reaffirming what it stated in *Ristaino*: the mere fact that the defendant is Black and the victim is White is not a special circumstance of constitutional significance. The Court then distinguished this case from *Ristaino*, noting that in addition to the fact that Turner was Black and his victim was White, Turner was charged with a capital offense. The Court explained why this one fact mattered so much. The jury in a capital case, the Court explained, has an enormous amount of discretion. First, the capital jury must decide whether aggravating factors merit putting the defendant to death. The jury must decide, for example, whether the defendant is likely to commit future violent acts, or whether his crime was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.” Additionally, “the [capital] jury must consider any mitigating evidence offered by the defendant.”

Next, the Court exhibited an amazing amount of prescience in its recognition of the concept of implicit racial bias. Even though *Turner* was decided in 1986, almost thirty years ago, the Court at that time realized the “unique opportunity for racial prejudice to operate but remain undetected”:

>[A] juror who believes that Blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case. Fear of Blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.

The *Turner* Court noted that in cases like the one before it where the defendant was charged with a crime of violence and the defendant and victim were of different races, there was a real risk that racial prejudice might infect the proceeding and improperly lead to a death sentence. “The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality

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102. *Id.*
103. *Id.*
104. *Id.* at 31–33.
105. *Id.* at 33.
106. *Id.*
107. *Id.* at 33–34.
108. *Id.* at 34.
109. *Id.*
110. *Id.* at 35.
111. *Id.*
112. *Id.*
of the death sentence.”113 The Court found the risk that racial prejudice may have infected Turner’s capital sentencing “unacceptable in light of the ease with which that risk could have been minimized.”114 In the Court’s view, the trial judge could have minimized this risk by questioning prospective jurors on racial prejudice but refused to do so.115 The Court concluded by holding that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.”116 The Court made clear that “the trial judge retains discretion as to the form and number of questions on the subject.”117 Moreover, “a defendant cannot complain of a judge’s failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry.”118

Turner thus established a constitutional right to voir dire into racial bias in all capital cases in which the defendant is charged with an interracial crime of violence, as long as the defendant specifically requests such voir dire.119 Oddly, however, the Court limited its holding by reversing only the death sentence Turner received, not his guilty conviction.120 Even though the twelve jurors who voted to have Turner executed were the same jurors who found him guilty, the Court refused to vacate Turner’s conviction. The Court explained:

At the guilt phase of petitioner’s trial, the jury had no greater discretion than it would have had if the crime charged had been noncapital murder. Thus, with respect to the guilt phase of petitioner’s trial, we find this case to be indistinguishable from Ristaino, to which we continue to adhere.121 The problem with this reasoning is that Ristaino is distinguishable from Turner. Ristaino was never at risk of being put to death, but Turner was. If Turner’s jury had not convicted him in the first place, he would not have been at risk of being executed. Moreover, if a juror’s racial beliefs might influence her to see the defendant as more violent and dangerous, and lead that juror to more readily accept evidence of aggravating factors and discount evidence of mitigating factors, then those same beliefs are likely to color the juror’s weighing of the evidence presented at the guilt phase of the trial.122

The Supreme Court’s jurisprudence on voir dire into racial bias leaves us with the following general rules. A capital defendant charged with an interracial crime of

113. Id. at 36.
114. Id.
115. Id.
116. Id. at 36–37.
117. Id. at 37.
118. Id.
119. Id. at 36–37.
120. Id.
121. Id. at 37–38.
122. As noted by Justice Clark in Gideon v. Wainwright: “How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted . . . ?” Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Clark, J., concurring).
violence in either state or federal court has a due process right to have prospective jurors questioned on racial bias, but the defendant must specifically request such voir dire in order to trigger the constitutional right.123 A noncapital defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a significant likelihood of prejudice by the jurors.124 The mere fact that the defendant and victim are of different races is not considered a special circumstance triggering the due process right to voir dire into racial bias.125 A federal court overseeing a case involving a defendant charged with an interracial crime of violence should, as a prudential matter, allow the defense to question prospective jurors on racial bias as long as the defendant requests such voir dire.126 The States of course are free to go further than the constitutional minimums set forth by the Supreme Court.

All of the Supreme Court cases on voir dire into racial bias to date have focused on whether the defendant has a right to such voir dire. The Court has never addressed the question of whether the government has a corresponding right to have prospective jurors questioned on racial bias. In certain cases, particularly in interracial cases involving a White defendant and a Black victim, the prosecutor may be concerned that racial stereotypes may lead jurors to sympathize with the defendant and have less empathy for the victim. Racial stereotypes about Black men as dangerous, violent criminals may encourage jurors to see the victim’s actions as threatening and the defendant’s actions as reasonable.

In perhaps the only law review article to focus on this question, Tania Tetlow argues that the Supreme Court should establish that the prosecutor shares the defendant’s constitutional right to conduct voir dire into racial bias.127 Tetlow notes that prosecutors are charged with “doing justice,” and argues that “doing justice” includes ensuring equal protection of the law for defendants and victims alike.128 One way to ensure equal protection for victims of color, Tetlow argues, is to allow prosecutors to question prospective jurors on racial bias so they can better ascertain which individuals can serve as truly impartial jurors.129 Tetlow argues that the right to voir dire into racial bias should not be limited to capital cases in which the defendant is charged with an interracial crime of violence and cases involving a significant likelihood of prejudice in the jurors.130 Although it is difficult to make a case for a constitutional right to voir dire into racial bias for prosecutors, I agree that as a prudential matter, courts should permit prosecutors as well as defense

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125. Id.
128. Id. at 1125–26 (“Doing battle against discriminatory acquittal falls squarely within a prosecutor’s ethical duty to ‘do justice’ . . . .”).
129. Id. at 1148–51.
130. Id. at 1151–52.
attorneys to conduct voir dire into racial bias in any case in which racial stereotypes may influence the jury.

II. SOCIAL SCIENCE RESEARCH ON RACE SALIENCE

A. Implicit Bias

Over the past decade, social scientists have convincingly demonstrated that bias is largely unconscious and often at odds with conscious beliefs.131 Even though one may sincerely believe that all individuals should be treated equally regardless of race, one may nonetheless have an implicit preference for individuals of one race over individuals of another race. This type of bias that exists outside of conscious awareness is called “implicit bias.”

Social scientists have demonstrated that most Americans are affected by implicit bias through an online test known as the Implicit Association Test (IAT). The IAT measures the amount of time that an individual takes to associate different words and images viewed on a computer screen.132 When individuals are asked to pair words and images and those pairings are consistent with widely held beliefs and attitudes, their response times are fairly quick.133 When they are asked to pair words and images that do not correlate to widely held associations, response times are noticeably slower.134 For example, individuals asked to pair names like Katie and Meredith with words or images reflecting pleasant and nice things and names like Ebony and LaTonya, names associated with African Americans, with words or images reflecting unpleasant or negative things were able to do this task fairly quickly.135 When they were asked to pair White-sounding names with unpleasant or negative words and images and African American sounding names with pleasant or positive words and images, their response times were noticeably slower.136 Since I have written at length about implicit bias in previous works, I will not repeat that discussion here.137

Over fourteen million IATs, measuring bias based on age, gender, sexuality, among other types of biases, have been taken.138 IAT research has shown that both young and old individuals tend to favor the young and disfavor the elderly.139 Most

134. Id. at 1130.
136. Id. at 1469–70.
heterosexuals taking the sexual orientation IAT have demonstrated an implicit bias in favor of heterosexuals over gays and lesbians. Of those who have taken the race IAT, seventy-five percent have demonstrated implicit bias in favor of Whites over Blacks.

B. Race Salience

In light of the research on implicit bias, social scientists have studied whether race salience can encourage individuals to overcome their implicit racial biases. “Race salience” is a term of art used by some social scientists to refer to the process of making salient the potential for racial bias. “Race salience” does not simply refer to juror awareness of the races of the defendant and victim. It involves “‘making salient’ the potential racism of jurors’ attitudes.”

A wealth of fairly recent empirical research has shown that when race is made salient either through pretrial publicity, voir dire questioning of prospective jurors, opening and closing arguments, or witness testimony, White jurors are more likely to treat similarly situated Black and White defendants the same way. For example, in one study, Steven Fein and others examined the effects of pretrial publicity on mock jurors. The study found that most mock jurors were negatively influenced by newspaper articles that presented the facts in a way that disfavored the defendant, even when the mock jurors were told that the newspaper articles were inadmissible and should not be considered in deciding the defendant’s guilt. However, when mock jurors were given information suggesting that the media’s treatment of the defendant was racially biased, the negative bias against the defendant that the mock jurors had previously exhibited disappeared.

In another experiment conducted by Samuel Sommers and Phoebe Ellsworth, jury-eligible citizens and actual jury pool members from a county in Michigan were found that implicit ageism or implicit bias against the elderly is even more prevalent than implicit racial bias against Blacks.
shown a videotaped summary of an actual rape trial involving a Black defendant. 149 Participants completed a voir dire questionnaire, watched a trial video, received actual State of Michigan pattern jury instructions, and deliberated on the case as members of six-person juries. 150 Although all the mock jurors viewed the same trial video, some received questions about their racial attitudes and general perceptions of racial bias in the legal system on their voir dire questionnaire while other mock jurors did not. 151 For example, some mock jurors read the following race-relevant question: “The defendant in the case is African-American and the victims are White. How might this affect your perceptions of the trial?” 152 Another race-relevant question was: “In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?” 153

Sommers and Ellsworth found that regardless of their race, mock jurors who received the race-relevant voir dire questions were less likely to vote to convict the Black defendant than the mock jurors who did not receive race-relevant voir dire questions. 154 It is worth noting that the race relevant questions were not intended to identify jurors likely to exhibit racial bias in their judgments. 155 Rather, they were “designed to force mock jurors to think about their racial attitudes and, more generally, about social norms against racial prejudice and institutional bias in the legal system.” 156

Calling attention to the possibility of racial bias through witness testimony can also help minimize racial bias. In another study, Ellen Cohn and others found that White mock jurors were less likely to convict a Black defendant charged with attempted vehicular manslaughter after striking three White men with his car if presented with testimony from the defendant’s wife revealing that the White victims shouted racial slurs at the defendant and his wife before the defendant got into his vehicle and sped away. 157 Calling attention to the possibility that the victims may have been racially biased against the defendant may have encouraged the jurors to consider the facts with a bit more empathy for the defendant than they otherwise might have had.

Racial bias can also be reduced if race is made salient by attorneys in their opening and closing statements. Donald Bucolo and Ellen Cohn found that when a defense attorney called attention to the possibility of racial bias in his opening and closing statements, White mock jurors were less likely to find the Black male

150. Id.
151. Id.
152. Id. at 1027.
153. Id.
154. Id.
155. Id.
156. Id.
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defendant guilty of assault and battery than when the attorney did not call attention to the possibility of racial bias in his opening and closing statements. Statements making race salient included, “The defendant did what any (Black/White) man in this situation would do,” and “The only reason the defendant, and not the supposed victim, is being charged with this crime is because the defendant is (Black/White) and the victim is (White/Black).” Bucolo and Cohn concluded that highlighting race in an interracial trial was a beneficial defense strategy when the defendant was Black, “leading to decreased ratings of guilt.”

III. SOCIAL SCIENCE RESEARCH ON RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE CRIMINAL JUSTICE POLICIES

Some recent social science research on racial perceptions of crime and support for punitive polices calls into question whether making race salient is a good idea. In 2014, Rebecca Hetey and Jennifer Eberhardt published the results of experiments they conducted in San Francisco and New York City. In each experiment, they manipulated the racial composition of the prison population and then measured the subject’s support for or acceptance of a punitive criminal justice policy. They found that when the prison population was represented as more Black, participants were more supportive of punitive criminal justice policies.

In the first experiment, Hetey and Eberhardt tested support for California’s Three Strikes Law. This law, passed in 1994, mandated a twenty-five-years-to-life prison sentence for anyone convicted of a felony after having been convicted of two prior violent or serious felonies. Even a minor third felony such as “stealing a dollar in loose change from a parked car” could result in a life sentence under the Three Strikes Law as originally enacted. In 2012, critics of the Three Strikes Law sought to amend it by permitting a twenty-five-years-to-life sentence only if the defendant’s third felony was a serious or violent felony. The proposed amendment would appear on the November 2012 ballot only if enough signatures supporting the amendment were gathered.

In the experiment, a White female recruited registered California voters from

159. Id. at 297.
160. Id. at 299.
162. Id. at 1.
163. Id.
164. Id. at 2.
165. Id.
166. Id.
167. Id.
a San Francisco Bay Area commuter station to participate in the study, which was described to them as exploring Californians’ views on social issues.\textsuperscript{169} Participants, all of whom were Caucasian, were shown eighty color photographs of Black and White inmates on an iPad.\textsuperscript{170} Some participants were shown fewer Black faces than other participants.\textsuperscript{171} In the “less Black” condition, only twenty-five percent of the photographs were of Black inmates, which was about the same percentage of Blacks actually in California prisons.\textsuperscript{172} In the “more Black” condition, forty-five percent of the photographs were of Black inmates, reflecting the approximate percentage of Blacks incarcerated under California’s Three Strikes Law.\textsuperscript{173} Next, the subjects were informed of California’s Three Strikes Law and the initiative to amend it.\textsuperscript{174} Subjects were asked to rate how punitive they thought the Three Strikes Law was.\textsuperscript{175} The subjects were then told the study was over and that the experimenter had copies of the actual petition, which they could look at and sign if they wanted.\textsuperscript{176} Subjects were told that if they signed the petition, their signature would be forwarded to the State Attorney General’s office to be counted.\textsuperscript{177}

Hetey and Eberhardt found that regardless of the condition they were in (“more Black” or “less Black”), subjects across the board agreed that California’s Three Strikes Law was too punitive rather than not punitive enough.\textsuperscript{178} Subjects in the “less Black” condition, however, were much more willing to sign the petition to amend the law to require that the third felony conviction be a serious or violent felony than subjects in the “more Black” condition.\textsuperscript{179} Of the participants who saw fewer photos of Black inmates, 51.72% signed the petition, whereas only 27.27% of participants who saw more photos of Black inmates signed the petition.\textsuperscript{180} Hetey and Eberhardt concluded that the Blacker the participant believed the prison population to be, the less willing the participant was to amend a law they acknowledged was overly punitive.\textsuperscript{181}

Hetey and Eberhardt conducted a second study (Study 2) in New York City, this time testing support for New York City’s controversial stop-and-frisk policy.\textsuperscript{182} The researchers recruited White New York City residents to complete an online survey in October 2013.\textsuperscript{183} Instead of showing participants photos of inmates, they

\textsuperscript{169} Hetey & Eberhardt, supra note 161, at 2.

\textsuperscript{170} Id.

\textsuperscript{171} Id.

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} Id.

\textsuperscript{177} Id.

\textsuperscript{178} Id.

\textsuperscript{179} Id. at 2–3.

\textsuperscript{180} Id. at 3.

\textsuperscript{181} Id.

\textsuperscript{182} Id.

\textsuperscript{183} Id.
simply presented participants with statistics about the prison population. In the “less Black” condition, they told subjects that the prison population was 40.3% Black and 31.8% White, which was almost the actual percentage of Blacks in prisons across the nation. In the “more Black” condition, they told subjects that the prison population was 60.3% Black and 11.8% White, approximately the actual percentage of Black inmates in New York City Department of Corrections facilities. Next, participants were told that a federal judge had ruled that New York’s stop-and-frisk policy was unconstitutional (this was actually true) and that the city was appealing the judge’s ruling. Participants were then asked a series of questions designed to measure their support for keeping New York’s stop-and-frisk policy. Finally, participants were asked whether they would sign a petition to end New York City’s stop-and-frisk policy.

Hetey and Eberhardt found that regardless of what condition they were in, participants across the board felt that New York’s stop and frisk policy was “somewhat punitive.” Participants in the “more Black” condition, however, were “significantly less willing to sign a petition to end the stop-and-frisk policy than were participants in the less-Black condition.” Only 12.05% of participants in the “more Black” condition said they would sign the petition compared to 33.3% in the “less Black” condition.

Also in 2014, The Sentencing Project published a report entitled, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies. The Sentencing Project found that skewed racial perceptions of crime by White Americans bolster their support for harsh criminal justice policies. Synthesizing two decades of research, The Sentencing Project reported that White Americans consistently overestimate the proportion of crime committed by persons of color. The report theorized that attributing crime to racial minorities limits White Americans’ ability to empathize with offenders and encourages retribution as the primary response to crime. The result: increased support for punitive criminal justice policies.

One might conclude that this recent research on racial perceptions of crime

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184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id.
190. Id. at 4.
191. Id.
192. Id.
194. Id. at 5.
195. Id. at 3.
196. Id. at 5, 13.
197. Id. at 6, 18–19.
leading to increased support for punitive policies means that calling attention to race is a bad idea as it may simply remind jurors of the association between Black and crime and encourage White jurors to act more punitively towards Black defendants. The research, however, does not support such a conclusion. Recall that The Sentencing Project’s report identified skewed or inaccurate racial perceptions of crime as the problem.198 Similarly, Hetey and Eberhardt’s Three Strikes study suggested that when individuals believed there were more Blacks in prison than might actually be the case, they were more supportive of punitive criminal justice policies.199 Indeed, the Sentencing Project explicitly supports making race salient, noting that “[m]ock jury studies have shown that increasing the salience of race in cases reduces bias in outcomes by making jurors more conscious of and thoughtful about their biases.”200 Making race and the possibility of racial bias salient, as opposed to highlighting extreme racial disparities in the prison population, can help reduce bias in jurors by encouraging them to think about and counter their own biases.

Implicit racial bias—unconscious racial bias even among people who explicitly disavow racial prejudice—contributes to inaccurate perceptions of race and crime because it encourages individuals to associate all or most Blacks and Latinos with crime when only some Blacks and Latinos are engaging in criminal behavior.201 One way to overcome implicit racial bias is to recognize its existence. “Dispelling the illusion that we are colorblind in our decision making is a crucial first step to mitigating the impact of implicit racial bias.”202

IV. COMBATING IMPLICIT RACIAL BIAS IN THE CRIMINAL COURTROOM

In light of the social science research on implicit bias, what steps can be taken to combat implicit racial bias in the criminal courtroom? This Section discusses a few different ways to address the problem of implicit bias in the courtroom. While the focus of this Article is on combating racial bias, the proposals discussed within can be helpful to attorneys concerned about bias of any kind.203

A. Raising Awareness of Implicit Bias Through Jury Orientation Materials

As Carol Izumi notes, “Awareness of bias is critical for mental decontamination success.”204 If so, then making sure jurors know what implicit bias

198. Id. at 3, 5.
201. Id. at 14.
202. Id. at 39.
203. For an excellent discussion on the difficulties of conducting voir dire when the concern is bias against gays, lesbians, and other sexual minorities, see Giovanna Shay, In the Box: Voir Dire on LGBT Issues in Changing Times, 37 HARV. J.L. & GENDER 407 (2014).
is and that they are likely to be affected by it is critical. Anna Roberts suggests one way to make jurors aware of the concept of implicit bias: include discussion of implicit bias in juror orientation materials. Roberts argues that including information about implicit bias in jury orientation materials, particularly jury orientation videos, makes sense for several reasons. First, information on implicit bias dovetails nicely with appeals to neutrality and egalitarian norms that are usually imparted to jurors during jury orientation. Second, “impressions formed early on can shape the understanding of what follows.” If a juror is made aware of implicit bias early on, she can better guard against it influencing her own decision making. Third, addressing implicit bias during jury orientation insures that all prospective jurors are educated about it, not just those who serendipitously end up with a judge who believes it important to mention the topic. Roberts goes further, suggesting not only that prospective jurors be informed about implicit bias during jury orientation but also that they should also be encouraged to take the IAT so they can experience bias within themselves. Although there is some research that suggests being forced to take diversity training leads to backlash and resistance, this research does not undermine Roberts’ proposal because Roberts does not suggest that courts require all prospective jurors to take the IAT. She would merely have courts encourage prospective jurors to take the IAT on a voluntary basis.

B. Raising Awareness of Implicit Bias Through Voir Dire

Voir dire on the topic of racial bias offers another way to make jurors aware of the concept of implicit bias. As discussed above, a wealth of social science research suggests that making race salient or calling attention to the possibility of racial bias can encourage prospective jurors to reflect on their own possible biases and consciously counter what would otherwise be automatic stereotype-congruent responses. Voir dire offers an opportunity to make race salient to prospective jurors. Questions designed to explore the subject of racial bias through voir dire would have to be carefully formatted. Open-ended questions that encourage reflection and thought about the powerful influence of race would be better than close-ended questions that simply encourage the prospective juror to give the politically correct response. Open-ended questions in general offer prospective


206. Id. at 863.

207. Id. at 864.

208. Id.

209. Id. at 867–71.

210. See Rudman et al., supra note 204, at 857 (noting that involuntary diversity training has not been effective), 861 (noting that students who voluntarily enrolled in a diversity education seminar showed less implicit and explicit anti-Black bias at the end of the semester compared to students who did not take the class).

211. Roberts, supra note 205, at 874 (“The IAT would be optional . . . .”).

212. Regina A. Schuller et al., The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom, 33 LAW & HUM. BEHAV. 320, 326 (2009).
jurors the chance to reflect and comment. Open-ended questions on racial bias in particular can give the attorney much more valuable information about which prospective jurors are likely to try to overcome their implicit biases than close-ended questions in which the juror is prompted to give a short “yes” or “no” response.\textsuperscript{213}

Jonathan Rapping, President and founder of Gideon’s Promise,\textsuperscript{214} offers several examples of effective voir dire strategies for an attorney concerned about racial bias.\textsuperscript{215} Rapping suggests that an attorney could start with the following:

You have just learned about the concept of [implicit racial bias]. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I’d like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making. Let me start by asking for your reaction to learning about the idea of implicit, or subconscious, racial bias.\textsuperscript{216}

If a prospective juror expresses skepticism about implicit racial bias, Rapping recommends that the attorney respond as follows: “I appreciate your candor and thank you for sharing this view . . . it is certainly not an uncommon reaction to first learning about [implicit racial bias] . . . [D]o others share Juror Number X’s skepticism?\textsuperscript{217}

The attorney concerned about implicit racial bias will also want to find out which prospective jurors are motivated to act in egalitarian ways since social science research suggests that egalitarian-minded individuals are more likely than hierarchical individuals to try to counteract stereotypical thinking when made aware of the possibility of racial bias.\textsuperscript{218} To find out which individuals are motivated to act in egalitarian ways, Rapping cautions attorneys not to ask questions like “How do you feel about racism?” or “Do you believe it is ever appropriate to judge someone based on their skin color?” because prospective jurors may answer such questions by simply giving what they believe to be the socially desirable response.\textsuperscript{219} Rapping suggests that the attorney instead ask prospective jurors to “[d]escribe [their] most significant interaction(s) with a member of another race” or “[d]escribe a particularly impactful interaction that [they or someone close to them] had with a member of another race.”\textsuperscript{220} Such questions force the prospective jurors to think

\textsuperscript{213} \textit{Id.} at 326.
\textsuperscript{214} Founded by Jonathan Rapping, Gideon’s Promise is a nonprofit organization that provides comprehensive advocacy training and community building support for both entry-level and seasoned public defenders. See \textit{FAQs}, GIDEON’S PROMISE, \texttt{http://gideonspromise.org/faqs/} [http://perma.cc/K9Z5-7FP5] (last visited Sept. 16, 2015).
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.} at 1033.
\textsuperscript{219} Rapping, \textit{supra} note 215, at 1034.
\textsuperscript{220} \textit{Id.}
about how they felt or acted in an actual situation as opposed to discussing how they think they would act in a hypothetical situation.221 This is important because “people often aspire to act in ways that do not perfectly match how they have behaved in the past.”222 As Rapping notes, “The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.”223 An attorney might also ask a prospective juror to discuss “the best . . . experience the [prospective] juror has had with a member of another race” or ask the prospective juror to identify a member of another race whom the prospective juror admires.224 Such questions track the social science research on debiasing. This research indicates that encouraging people to think about admired African American figures, such as Barack Obama, Colin Powell, and Martin Luther King, and disfavored White individuals, such as Jeffrey Dahmer (the infamous serial killer also known as the Milwaukee Cannibal), Ted Kaczynski (the Unabomber), and Timothy McVeigh (the man responsible for the 1995 Oklahoma City bombing), can help jurors counter the impulse to associate Blacks with criminality.225

C. Possible Objections

My proposal that attorneys concerned about implicit racial bias use voir dire to counter the automatic stereotype-congruent associations that most individuals make based on race is likely to encounter resistance on a number of fronts. One possible objection echoes the concerns raised by Albert Alschuler several decades ago. Alschuler opined that voir dire into racial bias would be “minimally useful”226 because any prospective juror asked whether he would be prejudiced against the defendant because of the defendant’s race would find such a question patronizing.

221. Id. Such questions could also force prospective jurors to think about whether they have ever had a significant interaction with a member of another race, which could also have a positive effect.

222. Id.


224. Id. at 1035. Rapping suggests that the attorney should also ask the prospective juror to discuss negative experiences with members of another race and times that the juror relied on a stereotype that turned out to be wrong. Id. Reminding prospective jurors of negative experiences with members of another race, however, may trigger negative stereotypes, so I would focus on encouraging jurors to think about positive experiences with members of other racial groups and admired individuals belonging to the racial group in question.


226. Alschuler, supra note 12.
and offensive. Alschuler suggested such voir dire would be akin to saying, “Pardon me. Are you a bigot?”

Alschuler’s objection, however, is not responsive to my proposal since I do not encourage attorneys to ask prospective jurors whether they will be prejudiced against the defendant on account of his race. I agree with Alschuler that a question like, “Are you likely to be biased against the defendant because of his race?” is unlikely to provoke an admission of bias. Individuals in today’s society know that it is considered wrong to discriminate on the basis of race, so even an individual who might actually be biased against the defendant because of the defendant’s race would almost surely answer such a question in the negative in order not to appear bigoted. Even an individual who truly disavows racism and racial discrimination might answer such a question in the negative, sincerely believing that he or she will not be biased against the defendant on account of the defendant’s race, when social cognition research suggests that all individuals, even the most egalitarian-minded on explicit measures, are implicitly biased on the basis of race.

I disagree, however, with Alschuler’s claim that voir dire into racial bias would be “minimally useful” in cases involving racial issues. Voir dire into racial bias can and should take the form of encouraging prospective jurors to think about racial bias in general. As discussed above, making race salient, whether through witness testimony or questions asked during voir dire, can inhibit the automatic associations that otherwise are likely to come into play when the defendant, the victim, or a witness is a member of a racially stereotyped group.

A second possible objection is more troubling and involves a burgeoning field of research on stereotype threat. As Song Richardson and Philip Atiba Goff explain, “[s]tereotype threat refers to the concern with confirming or being evaluated in terms of a negative stereotype about one’s group.” Most of us are aware of the concept of stereotype threat from Claude Steele’s research in the 1990s on African American undergraduate students faring poorly on standardized tests. Steele’s research showed that anxiety about confirming the stereotype that links African Americans to lack of intelligence results in African Americans doing poorly on...
standardized tests. Subsequent research has confirmed that “[t]he concern with being negatively stereotyped often provokes anxiety, leading to physical and mental reactions that are difficult, if not impossible to volitionally control such as increased heart rate, fidgeting, sweating, averting eye gaze, and cognitive depletion—often leading to a reported inability to think clearly.”

Stereotype threat affects not only African Americans, but also anyone who belongs to a group that is negatively stereotyped. For example, women as a group suffer from the stereotype of not being good at math. When women are reminded of this stereotype, they tend to perform worse on math tests than when they are not reminded of the stereotype. Stereotype threat afflicts not just members of historically disadvantaged groups; it has also been shown to afflict White police officers concerned with being seen as racist. In *Interrogating Racial Violence*, Song Richardson and Phillip Atiba Goff document a study involving police officers with the San Jose, California Police Department. Surprisingly, the officers most concerned with not being or appearing to be racist were found to be quicker to use physical force to control situations involving Black suspects than officers who were not as concerned with how they were perceived by others. To explain these findings, Richardson and Goff theorize that an officer who fears that a suspect sees him as racist will believe that he cannot rely on moral authority to control the situation, and thus must resort to physical force.

If White police officers concerned about being seen as racist (i.e., officers concerned about the White-cop-as-racist stereotype) end up acting in more racially disparate ways than White police officers not so concerned about being seen as racist, should we worry that White jurors made aware of their own implicit biases

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234. Richardson & Goff, *supra* note 231.
236. *Id.* (finding that women who were told that the test they were going to take had been shown to produce gender differences did less well on math tests than women who were told that the test they were about to take had not shown to produce gender differences); see also Paul G. Davies et al., *Consuming Images: How Television Commercials That Elicit Stereotype Threat Can Restrain Women Academically and Professionally*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1615, 1624 (2002) (finding that women exposed to gender-stereotypic television commercials underperformed on the math portion of a nondiagnostic test); Steven J. Spencer et al., *Stereotype Threat and Women’s Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 13 (1999) (finding that women who were told that the math test they were about to take was one in which gender differences do not occur performed just as well as men taking the same test, but women told that the test they were about to take was one in which gender differences had occurred performed worse than men taking the same test).
237. Richardson & Goff, *supra* note 231, at 126 (describing study involving the use of force by police officers with the San Jose Police Department).
238. *Id.*
239. *Id.* (“[T]he more officers were concerned with appearing racist, the more likely they were to have used force against Black suspects, but not suspects of other races, throughout the course of their careers.”)
240. *Id.*
will become overly concerned with not appearing racist and end up acting in ways that disadvantage Black defendants and victims over White defendants and victims? While certainly possible, I do not think this is likely because there is no prevailing stereotype of the White racist juror whereas at least in some communities, there seems to be an existing stereotype of the White racist police officer. While certain communities may view White jurors with distrust, most Whites do not think of themselves as racist and, more importantly, do not think others generally view them as racist. Nonetheless, the research on stereotype threat suggests that attorneys attempting to raise awareness of implicit racial bias during voir dire must be careful not to trigger anxiety in prospective jurors that they might be seen as racist. 241 Making jurors aware of their own implicit biases while not triggering stereotype threat is likely to be a difficult balancing act, somewhat like walking on a very thin tight rope.

CONCLUSION

In cases in which racial stereotypes about either the defendant, the victim, or a witness may influence the fact finder’s assessment of who was at fault, it is important for attorneys concerned about minimizing the risk of racial bias to be aware of the social science research on race salience. This research suggests that calling attention to race can help reduce racial bias in legal decision making. Voir dire into racial bias offers one way an attorney can make race salient to the jury. Calling attention to race can help minimize racial bias by encouraging jurors to consciously think about the impropriety of racial stereotyping.

241. But see Phillip Atiba Goff et al., The Space Between Us: Stereotype Threat and Distance in Interracial Contexts, 94 J. PERSONALITY & SOC. PSYCHOL. 91 (2008) (finding that White, male undergrad students at Stanford University reminded of the stereotype that Whites are racist and told that they would be discussing the subject of racial profiling with two partners positioned their chairs further away from their partners when they thought their partners would be Black than when they thought their partners would be White).
Awareness as a First Step Toward Overcoming Implicit Bias

Cynthia Lee

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Chapter 11
Awareness as a First Step Toward Overcoming Implicit Bias

Cynthia Lee

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Chapter Highlights
• Awareness is a necessary first step toward reducing implicit bias.
• One way to raise awareness about racial bias in a criminal case is to make race salient.
• Making race salient means calling attention to the possibility that racial stereotypes or racial prejudice may have influenced the actions of the parties in the case.
• Becoming aware of the existence of implicit bias and the fact that everyone is influenced by implicit bias alone is not sufficient to break the prejudice habit.
• One must also be motivated to break the prejudice habit and be trained in ways to overcome bias.
Introduction

For more than half a century, research on bias has focused on the idea that interpersonal contact with diverse others is the best way to reduce prejudice. Perhaps the most well-known proponent of the intergroup contact thesis was Gordon Allport, who argued in his book, The Nature of Prejudice, that intergroup interactions involving individuals of equal status from different groups would lead to a reduction in prejudice.1 Since Allport’s book was first published in 1954, much of the empirical research on bias reduction has focused on Allport’s intergroup contact hypothesis.2 This research has confirmed that intergroup contact reduces self-reported measures of prejudice.3

Allport’s work relied on conscious action and self-reporting. Self-reporting, however, tells only half the story. One can honestly believe it is wrong to discriminate against others and thus have low self-reported measures of prejudice, yet still have biased thoughts and engage in discriminatory behavior. A wealth of research over the past decade has shown that even when individuals do not consciously embrace prejudicial attitudes, they still manifest implicit bias, reflected in the tendency to associate members of different social groups—African-Americans, Latinos, Asian-Americans, gays, elderly people, and women—with stereotypes of these groups. This kind of stereotyping often takes place without conscious thought or awareness.

The existence of implicit bias has been demonstrated by several different measures, including the Implicit Association Test (IAT), which compares response times when individuals are tasked with linking different sets of images and words.4 The IAT measures implicit bias by comparing the amount of time it takes to hit a specified computer key when one is shown images and words that one expects to go together, such as images of flowers and positive words like “pretty,” to response times when one observes images and words that one does not expect to go together, such as pictures of cockroaches and words like “lovely.”5 Time after time, individuals respond more quickly when they see images and words that are typically associated with one another and more slowly when they see images and words that are not commonly linked.6 For example, most people are quicker to link Black faces with negative words and White faces with positive words, suggesting implicit racial bias in favor of Whites and against Blacks.7 Most people, including the elderly themselves, are quicker to associate good words with young people and bad words with elderly people, suggesting implicit ageism.8 Over 14 million IATs measuring bias based on age, gender, ethnicity, and other kinds of biases have been recorded.9 Seventy-five percent of the individuals who have taken the race IAT have demonstrated implicit bias in favor of Whites over Blacks.10

Once social scientists began to recognize that bias can operate without conscious awareness, they began trying to find ways to reduce not simply outward expressions of prejudice but also implicit bias. Reducing implicit bias, however, has proven to be a more difficult task than reducing explicit expressions...
of prejudice. This is because all of us engage in what Patricia Devine calls the prejudice habit.\textsuperscript{11} Devine posits that in order to break the prejudice habit, there must be (1) awareness, (2) desire or motivation to break the prejudice habit,\textsuperscript{12} and (3) training in ways that one can overcome bias.\textsuperscript{13}

I. Raising Awareness

This chapter focuses on just the first step in breaking the prejudice habit: making people aware of implicit bias. While some social scientists have questioned whether making people aware of implicit bias can actually reduce bias,\textsuperscript{14} social psychologists and others who study racial bias generally agree that awareness of the existence of implicit bias is an important first step towards reducing bias.\textsuperscript{15}

A. Implicit Bias Trainings and Efforts to Educate Jurors about Implicit Bias

One way to raise awareness about implicit bias is to simply inform individuals about its existence. Lectures and workshops on implicit bias have become more commonplace in various institutional settings, including in workplaces,\textsuperscript{16} law schools,\textsuperscript{17} law enforcement agencies,\textsuperscript{18} and other enterprises. For example, “[m]ore than half of Google’s nearly 56,000 employees have attended a 90-minute seminar on unconscious bias,” and nearly 2,000 of Google’s employees have attended “bias busting” workshops that “give Google employees practical tips on addressing unconscious bias.”\textsuperscript{19} In response to accusations of racial bias by hosts renting their homes through Airbnb, Airbnb announced in September 2016 that it would offer implicit bias training to its hosts.\textsuperscript{20} In the government sector, on June 27, 2016, the Department of Justice announced that it would require its 23,000 law enforcement agents and 5,800 lawyers in U.S. Attorney’s offices across the nation to engage in implicit bias training aimed at getting them to recognize and address implicit bias in their workplace decisions.\textsuperscript{21} Attention to implicit bias training is also present in courtroom settings, where some judges have started informing jurors about the existence of implicit bias and the need to try to guard against such bias. For example, the Honorable Mark Bennett,\textsuperscript{22} a federal district court judge in Iowa, routinely tells his jurors,

\begin{quote}
Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we
\end{quote}
see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.23

Attorneys are also educating jurors about implicit bias.24 For example, in one criminal case out of Alaska, defense attorneys representing a Black teenager charged with assaulting a White classmate were worried that their all-White jury would assume their client was guilty because of racial stereotypes linking Blacks with violence and criminality.26 To combat this potential bias, the attorneys spoke about their own racial biases during voir dire to let potential jurors know that it is normal to have racial bias. They also successfully requested that the judge give the jurors a race-switching jury instruction based on a model jury instruction I first proposed in a law review article.28 Essentially, the race-switching jury instruction told jurors they should think about the case with the same facts except imagine that the defendant was a White teenage boy and the victim was his Black classmate before deciding whether to find the defendant guilty or not guilty.29 The jury found the defendant not guilty. Switching as a means of raising awareness about bias can work in other contexts besides race.30

Limited research has been done on the effectiveness of implicit bias trainings in general and efforts to educate jurors about implicit bias in particular. The available research, however, suggests that implicit bias training that simply informs or educates individuals about the existence of implicit bias is insufficient. To have any lasting impact, such trainings must give individuals strategies for reducing bias.31 Similarly, making jurors aware of the existence of implicit bias and the fact that it may affect their own decision making may not be sufficient to make a difference in outcomes.32 One study, for example, found that jury instructions informing jurors about the existence of implicit bias and instructing jurors to try to resist relying on generalizations and stereotypes had no significant effect on judgments of guilt, belief in the strength of the prosecution’s evidence, or length of sentence.33

B. Making Race (or Other Types of Bias) Salient

Another way to raise awareness about implicit racial bias in the context of a criminal case is to make the possibility of such bias salient. A wealth of recent research on race salience demonstrates that calling attention to the possibility of racial bias in others can encourage jurors to treat Black and White defendants the same way. Samuel Sommers and Phoebe Ellsworth have conducted
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numerous experiments studying the possibility that if racial prejudice is made salient to mock jurors in a criminal case, those jurors are more likely to treat similarly situated Black and White defendants the same way.

In one experiment, for example, 196 White individuals were approached by a White experimenter in waiting areas of a major international airport and asked if they would read a written trial summary and complete a questionnaire about legal attitudes while they waited. The trial summary described a case involving a high school basketball player who had an altercation with a fellow teammate in the locker room, resulting in a charge of battery with serious bodily injury. Half the mock jurors were given a trial summary with a White defendant and a Black victim, while half were given the same trial summary with a Black defendant and a White victim. In both the race-salient and non-race-salient conditions, participants were given a description of the defendant and victim, which included the height, weight, race, gender, and age of each. In some of the trial summaries, race was made salient through the testimony of a defense witness who “testified that the defendant was one of the only two Whites (or Blacks) on the team, and had been the ‘subject of racial remarks and unfair criticism throughout the season from many of his Black (or White) teammates.” In others, race was not made salient. In the non-race-salient version of the case, there was no mention of the defendant’s race nor any mention of racial remarks. Instead, the defense witness testified that “the defendant had only one other friend on the team and had been the ‘subject of obscene remarks and unfair criticism from many of his teammates.” Other than this testimony, the written trial summaries were the same.

Sommers and Ellsworth found that the White mock jurors were significantly more likely to convict the Black defendant in the non-race-salient condition (90 percent) than in the race-salient condition (70 percent). When race was made salient, conviction rates for the White defendant (69 percent) and the Black defendant (66 percent) were fairly comparable. When participants were asked to rate the strength of the prosecution’s case, they rated the prosecution’s case against the Black defendant as significantly stronger in the non-race-salient condition than the exact same prosecution case against the Black defendant in the race-salient condition. Participants were also asked to recommend a sentence for the defendant. In the non-race-salient condition, mock jurors recommended a more severe sentence for the Black defendant than the White defendant than in the race-salient condition. Sommers and Ellsworth concluded that when race was made salient, the participants did not demonstrate prejudice “because the racial content of the trial activated a motivation to appear non-prejudiced.” On the other hand, “when race was not a salient issue, a motivation to avoid prejudice was not expected among jurors, and White mock jurors did indeed demonstrate racial bias in their judgments.”

In another study, Sommers and Ellsworth had 211 individuals who were waiting to depart from gates at a large international airport read a trial
summary about a man charged with assault and battery against his girlfriend. The man was at a bar with his coworkers celebrating a recent promotion when his girlfriend stood up and started making fun of his physique and sexual performance. The defendant yelled at his girlfriend, forced her into a chair, and then slapped her. The slap knocked the girlfriend to the ground, injuring her ankle. In the race-salient version of the case, the girlfriend testifies that the defendant yelled, “You know better than to talk that way about a White (or Black) man in front of his friends.” In the non-race-salient version, she testifies that the defendant yelled, “You know better than to talk that way about a man in front of his friends.” The only difference between the race-salient and non-race-salient versions of the case was the defendant’s mention of his race in this exchange.

In this study, Sommers and Ellsworth found that when race was not made salient, both White and Black mock jurors demonstrated racial bias. White mock jurors gave the Black defendant a significantly higher guilt rating than the White defendant, while Black jurors gave the White defendant a significantly higher guilt rating than the Black defendant. Both White and Black mock jurors were also more punitive in their sentence recommendations toward the other-race defendant when race was not made salient. White mock jurors rated the Black defendant’s personality as significantly more aggressive and violent than the White defendant’s, and Black mock jurors rated the White defendant’s personality as significantly more aggressive and violent than the Black defendant’s. When race was made salient, White mock jurors were more likely to treat the Black defendant the same as the White defendant. Black mock jurors, on the other hand, were still more lenient toward the Black defendant than the White defendant. Sommers and Ellsworth theorized that Black jurors may view the criminal justice system as inherently biased, and this belief might motivate them to demonstrate same-race leniency toward Black defendants to compensate for that bias.

Sommers and Ellsworth’s research is widely cited, but it is important to note that Sommers himself recognizes significant limitations in the work:

It remains the case, however, that too little is known regarding the psychological processes underlying the influence of a defendant’s race. This gap in the literature prevents conclusions from being drawn regarding, for instance, whether prejudicial attitudes account for the influence of defendant race on White jurors, or whether simple awareness of societal stereotypes regarding race and crime is sufficient to impact judgments.

One concern that judges and others may have is that making race salient might lead jurors to overcompensate. In other words, if judges or attorneys make race salient, then jurors might let guilty Black defendants go free and convict innocent White defendants. The research on race salience, however,
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suggests that making race salient simply reduces racial bias and results in White jurors treating similarly situated White and Black defendants the same; White mock jurors did not treat White defendants more harshly than similarly situated Black defendants.

C. Awareness Alone Is Not Sufficient to Break the Prejudice Habit

Raising awareness of the possibility of racial bias is a critical first step, but the existing research suggests educating people about implicit bias is not sufficient in and of itself to get them to break the prejudice habit. For example, for years it was thought that merely educating people about the value of cultural diversity and making them aware of the existence of prejudice would help reduce prejudice. While there is some evidence that voluntary enrollment in a class that focuses on the value of diversity can lead to bias reduction, it appears that mandatory enrollment in a diversity training program is not effective at reducing bias. This might be because some people resent being forced to expend time and effort on something they might view as political correctness training.

Similarly, it appears that simply telling people that they should try to avoid relying on stereotypes is not an effective way of permanently reducing bias. While telling people to suppress their stereotype-congruent responses may work in the short term, such interventions may lead to greater reliance on the stereotype when the person stops consciously trying to suppress the stereotype. For example, in one study, participants were shown a photograph of a skinhead and asked to write for five minutes on a day in the life of the person in the photograph. Half of the participants were told to try not to rely on stereotypes about skinheads when writing their narrative. The other half were not given a stereotype-suppression instruction. As might be expected, the narratives by the individuals told not to rely on stereotypes were less stereotypical than the narratives by the individuals in the control group who were given no such instruction. Sometime after this initial exercise, participants were shown a color photograph of another skinhead and asked to write about a day in this skinhead’s life. This time, the narratives by the participants who were initially told to suppress stereotypes were more stereotypic than those by the control group.

In a second experiment, which replicated the first part of the experiment described above, each participant was told after writing their narrative that they would meet the person in the photograph, and then the participant was taken to an adjacent room with eight empty chairs. A jacket and a backpack were on the first chair. The participant was told that the person in the photograph,
the skinhead, must have gone to the restroom and would be right back. The participant was told to choose any seat. Interestingly, participants who had been given the stereotype-suppression instruction chose seats further away from the seat with the jacket and backpack, whereas participants in the control group who did not receive a stereotype-suppression instruction chose seats closer to the seat where the skinhead presumably had left his belongings. The researchers who conducted the study hypothesized that there is a rebound effect when individuals are told to suppress stereotypic thoughts. In other words, when people attempt to suppress unwanted thoughts, these thoughts will reappear later with even greater insistence than if they had never been suppressed. According to the authors of this study, this rebound effect happens “as a consequence of the ironic monitoring process that occurs during suppression” because “unwanted constructs are continually stimulated or primed.”

Other social science research also suggests that calling attention to race, either by asking people not to rely on race or asking them to rely on race, counterintuitively increases the tendency to rely on stereotypes. For example, B. Keith Payne tested whether actively highlighting race prior to the decision to shoot reduced or increased stereotype-congruent errors in the decision to shoot. Participants were told they would see pairs of pictures presented briefly—a face in the first picture and an object, either a gun or a hand tool, in the second picture—and they were to decide quickly whether the object in the second picture was a gun or a tool. Individuals in the control group were given no other instructions. Participants in the “Avoid Race” group were given the same instructions described above but were also told,

You have been randomly assigned to take the perspective of a completely unbiased person. Regardless of your personal views, we would like you to base your responses only on whether the second object looks more like a gun or tool. Try not to let the race of the face influence your decisions.

Participants in the “Use Race” group were given the same instructions as the control group, but were also told,

You have been randomly assigned to the “racial profiling” condition. Regardless of your personal views, we would like you to play the role of someone engaged in racial profiling. That is, try to make correct classifications, but we would like you to use the race of the faces to help you identify the gun or tool in question.

All participants misidentified tools as guns more often after seeing a Black face than after seeing a White face. They also misidentified guns as tools more often after seeing a White face than after seeing a Black face. Surprisingly, however, making race salient increased the tendency of individuals to stereotypically
misidentify objects regardless of whether participants were told to avoid relying on race or to use race. Participants in both the “Avoid Race” and the “Use Race” conditions were more likely to misidentify harmless objects as guns when held by Blacks and misidentify guns as harmless objects when held by Whites than participants not given any instruction calling attention to race.

What conclusions might we draw from these studies? A skeptic might conclude that making race salient helps reduce bias in some cases but exacerbates bias in other cases, so the best course of action is to do nothing. The research discussed above, however, suggests that salience reduces bias in complex settings where individuals have to make intricate judgments—like jurors deciding whether to find a defendant guilty or not guilty—but such salience may have the opposite effect when individuals have to make a quick decision, such as whether to shoot a suspect who appears to be armed or where to sit before a skinhead who has gone to the restroom returns to the room. In the courtroom setting, where the fact finder has time to consider different arguments and weigh the credibility of witnesses, making race salient is likely to be more beneficial than harmful. Indeed, research on implicit bias and judicial decision making by Jeffrey Rachlinski, one of the authors of Chapter 5, which addresses implicit bias in judicial decision making, lends support to this theory. In Rachlinski’s study, White judges who showed a strong preference for Whites were able to mediate their pro-White preference and treat Black defendants fairly when they suspected that their decisions were being evaluated for racial bias.

**Conclusion**

As discussed above, there are various ways to raise awareness about implicit bias. In the workplace setting, employers can give employees the opportunity to attend implicit bias workshops and lectures. In the courtroom, judges can educate jurors about implicit bias. Attorneys can also make bias salient during voir dire, in opening and closing statements, and through witness testimony.

Raising awareness about implicit bias is an important first step to reducing implicit bias, but it is only the first step. One must be motivated to break the prejudice habit and trained in ways to overcome implicit bias. The ensuing chapters will address various ways to motivate people to break the prejudice habit and overcome the implicit bias that affects us all.

**So You’d Like to Know More**

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ABOUT THE AUTHOR

Cynthia Lee is a law professor at The George Washington University Law School in Washington, D.C., where she teaches criminal law, criminal procedure, and professional responsibility. She is the author of *Murder and the Reasonable Man* (2003), a book that examines the ways that race, gender, and sexual orientation norms can influence verdicts in self-defense and provocation cases. She has also published several articles dealing with implicit racial bias, including "A New Approach to Voir Dire into Racial Bias," 5 *U.C. Irvine L. Rev.* 843 (2015) and "Making Race Salient: Trayvon Martin and Implicit Bias in a Not yet Post-Racial Society," 91 *N.C. L. Rev.* 1557 (2013).93

ENDNOTES

6. Id. at 1465–70.
7. Id. at 1467, 1474.
10. Id. at 47.
11. Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. Experimental Soc. Psychol. 1267, 1268 (2012) (finding that "breaking the habit" of prejudice or implicit bias "requires learning about the contexts that activate the bias and how to replace the biased responses with responses that reflect one’s non-prejudiced goals").
12. Motivation to break the prejudice habit can be either internal or external. One is considered internally motivated to break the prejudice habit if one sincerely believes that it is morally wrong to discriminate against others. Id. at 1269 (noting that internal motivation to respond without prejudice “is primarily driven by personal values and the belief that prejudice is wrong”). One is considered externally motivated if the primary reason for conforming one’s behavior to societal norms is so that one will not be seen as a bigot. Id. (noting that external motivation to respond without prejudice is “primarily driven by a desire to escape social sanctions”).
13. The most important part of breaking the prejudice habit is training in bias reduction. While many debiasing interventions have been proposed, only a few appear to be effective at reducing implicit bias. In 2014, Calvin Lai and others conducted a comparative investigation of 17 debiasing interventions. Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. Experimental Psychol. 1765 (2014). The most effective bias-reducing intervention was one in which participants were assigned to be on a dodge ball team in which all of their teammates were Black

Electronic copy available at: https://ssrn.com/abstract=3011381
and all of the individuals on the opposing team were White. \textit{Id.} at 1771. Members of the all-White team engaged in unfair play. \textit{Id.} At the end of the game, participants were asked to remember how their Black teammates helped them and their White opponents hurt them. \textit{Id.} This intervention resulted in a reduction in implicit racial bias in favor of Whites and against Blacks. \textit{Id.} The second most effective intervention was one in which participants read a story in the second-person narrative in which a White man assaults the participant and a Black man rescues the participant. \textit{Id.} Participants took the race IAT both before and after reading the story. After reading the story, participants were told that the race IAT they would take would affirm that White is bad and Black is good and to keep the story they had just read in mind when taking the IAT. \textit{Id.} This intervention successfully reduced participants’ implicit racial preferences. \textit{Id.} The third most successful intervention was one in which participants were shown six positive, well-known Black individual exemplars (one of whom was Bill Cosby, who was viewed positively at that time) and six negative, infamous White individual exemplars, such as Charles Manson. \textit{Id.} Participants practiced taking an IAT that only paired Black faces with good things and White faces with bad things. \textit{Id.} This intervention was also effective at reducing implicit preferences. \textit{Id.} A similar experiment by Nilanjana Dasgupta and Anthony Greenwald found that exposure to pictures of famous admired Black individuals and infamous disliked White individuals resulted in a reduction in automatic implicit racial bias in favor of Whites. Nilanjana Dasgupta & Anthony C. Greenwald, \textit{On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals}, 81 J. PERSONALITY & SOC. PSYCHOL. 800 (2001).

14. Masua Sagiv, \textit{Cultural Bias in Judicial Decision Making}, 35 B.C. J.L. & SOC. JUST. 229, 254 n.114 (2015) (“Research in the field of law and psychology is divided as to the significance that an individual’s awareness of her own bias has in reducing or diminishing it.”); Linda Babcock et al., \textit{Creating Convergence: Debiasing Biased Litigants}, 22 LAW & SOC. INQUIRY 913, 916 (1997) (arguing that merely making someone aware of a bias won’t make him or her less biased, but having people think about counterarguments or weaknesses in their position helps reduce self-serving biases).


ENHANCING JUSTICE: REDUCING BIAS

20. Emily Badger, Airbnb Details Plans to Enrich Nondiscrimination Policy, WASH. POST, Sept. 9, 2016, at A17.
22. Judge Bennett is the author of Chapter 4, Manifestations of Implicit Bias in the Courts, which examines several ways in which implicit bias affects lawyers, jurors, and judges.
23. Anna Roberts, (Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias, 44 CONN. L. REV. 827, 859 (2012), also available at http://wispd.org/attachments/article/101/ImplicitBiasJuryInstruction.pdf. Jury orientation videos can also inform prospective jurors about implicit bias. Id. (proposing that jury orientation videos educate prospective jurors about implicit bias). I was called for jury duty in May 2016 and was pleased to see that D.C. Superior Court had adopted a new jury orientation video, narrated by Andrew Ferguson, Professor of Law at the University of District of Columbia David A. Clarke School of Law and author of Why Jury Duty Matters: A Citizen’s Guide to CONSTITUTIONAL ACTION (2013). The new jury orientation video focuses on the role of the juror in upholding our democratic values, and while it does not address implicit bias per se, it does talk about bias in general and the need to guard against bias. See We the People: A Call to Duty (2014), available at http://www.dccourts.gov/juryvideo.
25. Like many others who write about race, I purposely capitalize the “B” in “Black” and the “W” in “White” to highlight the fact that Blacks and Whites are commonly perceived in the United States as members of clearly defined racial groups.
27. Id.
31. Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5–6, 15 (1989) (suggesting five strategies to reduce bias, including counter-stereotypic imaging, obtaining specific information about individuals in a group, taking the perspective of the person in the stereotyped group, and increased opportunities for contact with outgroup members). See also Molly Carnes et al., The Effect of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial, 90 ACADEMIC MED. 221 (2015) (finding that gender bias was reduced when individuals were given specific behavioral strategies to practice, such as replacing a gender stereotype with accurate information, positive counter-stereotype imaging, imagining in detail what it is like to be a person in a stereotyped group, and meeting with counter-stereotypic exemplars, such as senior women faculty).
32. Anna Roberts reports that the “National Center for State Courts attempted the first empirical testing of jury instructions like [Judge Bennett’s], and found no significant influence of the instructions on jurors’ verdict preferences.” Anna Roberts, Jury Failures and Reform Post-Ferguson (work-in-progress presented at the 2016 SEALS Annual Meeting, Amelia Island, Florida, on Aug. 4, 2016) (manuscript on file with author), citing Jennifer K. Elek & Paula Hannaford-Agor, Can Explicit Instructions Reduce Expressions

33. Elek & Hannaford-Agor, supra note 32 (finding "no significant effects . . . on judgments of guilt, confidence, strength of the prosecution’s evidence, or sentence length" when testing a specialized implicit-bias jury instruction “[b]ased loosely on [the] jury instruction developed and used by Judge Mark Bennett”).


35. Id.

36. Id.

37. Id. at 214–16.

38. Id.

39. Id.

40. Id.

41. Id.

42. Id. at 217.

43. Id.

44. Id. at 218.

45. Id. at 219.

46. Id.

47. Id. at 220.

48. Id.


50. Id.

51. Id. at 1373.

52. Id.

53. Id.

54. Id.

55. Id. Because the case raised issues of gender as well as race, Sommers and Ellsworth included gender of the mock juror as an independent variable in their analysis and found no significant main effects. Id. at 1377.

56. Id. at 1374.

57. Id.

58. Id.

59. Id. at 1375.

60. Id. Black mock jurors, on the other hand, were more lenient toward the Black defendant than the White defendant. Id. Sommers and Ellsworth theorized that Black jurors may view the criminal justice system as inherently biased, and this belief might motivate them to demonstrate same-race leniency toward Black defendants to compensate for that bias. Id. at 1376.

61. Id.

62. Id. At least one other research team has found results similar to Sommers. See, e.g., Ellen S. Cohn et al., Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes, 39 J. APPLIED SOC. PSYCHOL. 1953 (2009); Donald O. Bucolo & Ellen S. Cohn, Playing the Race Card: Making Race Salient in Defence Opening and Closing Statements, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 293 (2010).


64. Clark McCauley et al., Diversity Workshops on Campus: A Survey of Current Practice at US Colleges and Universities, 34 COLLEGE STUDENT J. 100 (2000) (finding that 81 percent of U.S. colleges and universities have held diversity workshops).
65. Lorie A. Rudman et al., "Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001) (finding that students who voluntarily enrolled in a prejudice and conflict seminar taught by a Black professor showed reduced implicit and explicit anti-Black bias at the end of the semester compared to students who were not enrolled in the seminar).


67. Linda Babcock et al., Creating Convergence: Debiasing Litigants, 22 LAW & SOC. INQUIRY 813, 916 (1997) ("many researchers have tried, albeit unsuccessfully, to mitigate various biases by informing subjects about them—for example, by telling subjects about the hindsight bias and its effects").


69. Id.

70. Id.

71. Id. at 811.

72. Id. at 810.

73. Id. at 811.

74. Id.

75. Id.

76. Id.

77. Id.

78. Id. at 812.

79. Id. at 813–14.

80. Id. at 814 (concluding that "[o]ut of sight . . . does not necessarily mean out of mind, at least where unwanted thoughts are concerned.").

81. Id. at 812.


83. Id. at 388.

84. Id.

85. Id.

86. Id.

87. Id. at 389.

88. Id.

89. Id. at 390–91.

90. Id.


92. Id.

93. Professor Lee thanks Christina Stevens Carbone, Phyllis Pickett, and Jeffrey Rachlinski for enormously helpful comments on this chapter. She also thanks Andrew Hyun, Christine Kulumani, and Madeline DiLascia-Azia for helpful research assistance support on this chapter and Prema Balasundaram for administrative assistance. Finally, she thanks Sarah Redfield for inviting her to be a contributing author for this book.

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Helping Courts Address Implicit Bias
Resources for Education
Helping Courts Address Implicit Bias

Resources for Education

Pamela M. Casey
Roger K. Warren
Fred L. Cheesman II
Jennifer K. Elek

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Preface and Acknowledgments

The National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts was launched in 2006 to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness in the nation's state courts. Phase I of the Campaign resulted in an interactive database of promising programs to achieve racial and ethnic fairness in five key areas: (1) diverse and representative state judicial workforces; (2) fair and unbiased behaviors on the part of judges, court staff, attorneys, and others subject to court authority in the courthouse; (3) comprehensive, system-wide improvements to reduce racial and ethnic disparities in criminal, domestic violence, juvenile, and abuse and neglect cases; (4) the availability of timely and high-quality services to improve access to the courts for limited-English-proficient persons; and (5) diverse and representative juries. Phase II of the Campaign focused on implicit bias, an issue relevant to each of the five key areas and central to “fair and unbiased behaviors” in the courthouse. Phase II developed educational resources and provided technical assistance to courts on implicit bias. The results of those efforts are presented in this report to guide others in planning discussions, focus groups, presentations and/or educational programs about the role implicit bias may play in everyday decisions and actions.

The authors wish to thank a number of individuals and organizations who supported and provided assistance during Phase II of the Campaign. Our thanks go first to the Open Society Institute (OSI) and the State Justice Institute (SJI) for their generous support of both Phases of the Campaign. In particular, Dr. Thomas Hilbink from OSI and Ms. Janice Munsterman from SJI were instrumental in crafting the Campaign’s Phase II design, and Mr. Jonathan Mattiello ensured SJI’s continued support when he became Executive Director.

Led by former Chief Justice Ronald T. Y. Moon of Hawaii, the Campaign’s Steering Committee continued to provide overall guidance and included representatives of the Conference of Chief Justices, the Conference of State Court Administrators, the National Consortium on Racial and Ethnic Fairness in the Courts, the National Association for Court Management, the National Association of State Judicial Educators, and the National Association of Women Judges. In addition, project staff also freely relied on the expertise and good will of the members of the National Training Team: the Honorable Ken M. Kawauchi, the Honorable J. Robert Lowenbach, the Honorable Patricia M. Martin, Ms. Kimberly Papillon, and the Honorable Louis Trosch, Jr.

The authors also are grateful to the many judges and court staff who participated in the project’s training efforts in California, Minnesota, and North Dakota. We are especially appreciative of the time and energy contributed by each of the site coordinators: Ms. Kimberly Papillon from California, Ms. Connie Gackstetter from Minnesota, and Ms. Lee Ann Barnhardt from North Dakota. They all exhibited a strong professional commitment to delivering a quality program as well as good humor under pressing deadlines.
Several judges and judicial educators also participated in a focus group on implicit bias in court settings. Thanks very much to Ms. Lee Ann Barnhardt, the Honorable Donovan J. Foughty, the Honorable John F. Irwin, the Honorable Ken M. Kawaichi, the Honorable J. Robert Lowenbach, Mr. Michael Roosevelt, Ms. Kathleen F. Sikora, and the Honorable Louis A. Trosch, Jr. for sharing their insights and expertise with project staff.

Finally, the authors also thank their colleagues on the project who worked so hard to ensure good products were developed and delivered to each site. Our thanks go first to our two expert advisors on the project: Mr. Jerry Kang, Professor of Law at the UCLA School of Law, and Dr. Shawn Marsh, Director of the Juvenile and Family Law Department of the National Council of Juvenile and Family Court Judges. They both contributed substantially to our scientific understanding of implicit bias as well as its likely reception among judges and court staff. Our colleague Mr. William Raftery provided technical expertise throughout the project, and our thanks to Ms. Theresa Jones for running numerous statistical analyses of the program evaluations and to Ms. Stephanie Montgomery and Ms. Alicia Walther for their administrative assistance.
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Introduction

State courts have worked diligently over the last 25 years to address issues of racial and ethnic fairness. In the late 1980s, state court commissions were formed in the states of Michigan, New Jersey, New York, and Washington to address racial and ethnic bias in their court systems. In January 1989, the four commissions formed the National Consortium of Commissions and Task Forces on Racial and Ethnic Bias in the Courts, later renamed the National Consortium on Racial and Ethnic Fairness in the Courts.1 Membership in the National Consortium today has grown to include representatives from 37 states and the District of Columbia. During the last 20 years the state commissions have issued voluminous reports and recommendations to improve racial and ethnic fairness in their respective states (see National Center for State Courts’ [hereafter, NCSC] State Links for Racial Fairness Task Forces and Reports) and have implemented numerous programs and projects to carry out those recommendations (see, for example, the NCSC’s Interactive Database of State Programs to address race and ethnic fairness in the courts).

Despite these substantial efforts, public skepticism that racial and ethnic minorities receive consistently fair and equal treatment in American courts remains widespread. A comprehensive national survey of public attitudes about the state courts commissioned by the NCSC and released at the National Conference on Public Trust and Confidence in the Justice System in May 1999 found that 47% of Americans did not believe that African Americans and Latinos receive equal treatment in America’s state courts and 55% did not believe that non-English speaking persons receive equal treatment (NCSC, 1999, p. 37). Moreover, more than two-thirds of African Americans thought that African Americans received worse treatment than others in court (p. 38). State surveys, such as the comprehensive public opinion survey commissioned by the California Administrative Office of the Courts (Rottman, 2005, p. 29), confirmed the earlier national survey results. A majority of all California respondents stated that African Americans and Latinos usually receive less favorable results in court than others. About two-thirds believed that non-English speakers also receive less favorable results. Once again, a much higher proportion of African Americans, 87%, thought that African Americans receive unequal treatment.

What explains the disconnect between the extensive work undertaken by state courts to ensure racial and ethnic fairness and lingering public perceptions of racial unfairness? At least one explanation may be found in an emerging body of research on implicit cognition. This research shows that individuals develop implicit attitudes and stereotypes as a routine process of sorting and categorizing the vast amounts of sensory information they encounter on an ongoing basis. Implicit, as opposed to explicit, attitudes and stereotypes operate automatically, without awareness, intent, or conscious control. Because they are automatic, working behind-the-scenes, they can influence or bias decisions and behaviors, both positively and negatively,

1 When available, the authors cite internet sources that can be accessed directly from the on-line version of this report.
without an individual’s awareness. This phenomenon leaves open the possibility that even those dedicated to the principles of a fair justice system may, at times, unknowingly make crucial decisions and act in ways that are unintentionally unfair. Thus although courts may have made great strides in eliminating explicit or consciously endorsed racial bias, they, like all social institutions, may still be challenged by implicit biases that are much more difficult to identify and change.

The problem is compounded by judges and other court professionals who, because they have worked hard to eliminate explicit bias in their own decisions and behaviors, assume that they do not allow racial prejudice to color their judgments. For example, most, if not all, judges believe that they are fair and objective and base their decisions only on the facts of a case (see, for example, Rachlinski, Johnson, Wistrich, & Guthrie, 2009, p. 126, reporting that 97% of judges in an educational program rated themselves in the top half of the judges attending the program in their ability to “avoid racial prejudice in decisionmaking”). This belief may actually undercut the effectiveness of traditional educational programs on diversity that focus on explicit bias. Judges and other court professionals may be less motivated to attend and fully participate in educational programs discussing racial and ethnic fairness if they do not view themselves as explicitly biased.

In addition, educational programs that do not discuss implicit biases may lead participants to conclude that they are better at understanding and controlling for bias in their decisions and actions than they really are. Stone and Moskowitz (2011, p. 772) note that “research on stereotyping finds that although teaching people how to avoid explicit bias may control it at certain points in an interaction, it may also ironically increase the likelihood that stereotypes are activated and unknowingly used early in the impression formation and interaction process.” Alternatively, educational programs that discuss the scientific research on how the human brain categorizes and uses information and the implications of unconscious stereotype activation may have the benefit both of engaging participants in a less threatening discussion of bias and providing a fuller picture of how biases may be triggered and come to influence decisions and actions. Promoting awareness about implicit sources of bias in this way may help motivate participants to do more to correct for bias in their own judgments and behaviors (Burgess, van Ryn, Dovidio, & Saha, 2007; also see Appendix G for more information about potential strategies to address implicit bias).

This report explores the content and delivery of educational programs on implicit bias for judges and court staff. It draws upon an extensive literature on implicit bias, the perspectives of expert practitioners and scholars in the area, the development and delivery of judicial education programs on implicit bias in three states, and a focus group of judges and judicial educators interested in strategies to address the influence of implicit bias in court settings. It begins with a brief overview of the concept of implicit bias, provides a summary of the educational strategy used to deliver information on implicit bias in each of the three states, and offers lessons learned based on the synthesis of information across the literature, state educational programs, and expert discussions.
Implicit Bias Overview

During the last two decades, new assessment methods and technologies in the fields of social science and neuroscience have advanced research on brain functions, providing a glimpse into what Vedantam (2010) refers to as the “hidden brain”. Although in its early stages, this research is helping scientists understand how the brain takes in, sorts, synthesizes, and responds to the enormous amount of information an individual faces on a daily basis. It also is providing intriguing insights into how and why individuals develop stereotypes and biases, often without even knowing they exist.

The research paints a picture of a brain that learns over time how to distinguish different objects (e.g., an apple and an orange) based on features of the objects that coalesce into patterns. These patterns or schemas help the brain process information efficiently—rather than figuring out what an apple is every time it encounters one, the brain automatically recognizes it and understands that it is red, edible, sweet, and juicy—characteristics associated with apples. These patterns also operate at the social level. Over time, the brain learns to sort people into certain groups (e.g., male or female, young or old) based on combinations of characteristics as well. The problem is when the brain automatically associates certain characteristics with specific groups that are not accurate for all the individuals in the group (e.g., “elderly individuals are frail’). In his implicit bias primer for courts (see Appendix A), Kang (2009) describes the problem this presents for the justice system:

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense? (p. 2)

What is interesting about implicit biases is that they can operate even in individuals who may not be considered explicitly biased (e.g., Devine, 1989). Scientists have developed a variety of methods to measure implicit bias, but the most common measure used is reaction time (e.g., the Implicit Association Test, or IAT; also see Appendix B, FAQ #3, for more about this and other implicit bias measures). The idea behind these types of measures is that individuals will react faster to two stimuli that are strongly associated (e.g., elderly and frail) than to two stimuli that are less strongly associated (e.g., elderly and robust). In the case of race, scientists have found that most European Americans are faster at pairing a White face with a good word (e.g., honest) and a Black face with a bad word (e.g., violent) than the other way around. Indeed, even many African Americans are faster at pairing good words with White faces than with Black faces. Research also shows that these implicit biases can influence decisions and behaviors in a variety of real-life settings without the individual’s knowledge (Greenwald, Poehlman, Uhlmann & Banaji, 2009; also see Appendix B, FAQ #4, for more information).
Despite conscious efforts to be fair and objective, research also shows that judges may be susceptible to implicit bias as well. Rachlinski, Johnson, Wistrich, and Guthrie (2009), for example, found a strong White preference on the IAT among White judges while Black judges showed no clear preference overall (44% showed a White preference but the preference was weaker overall). The authors also reported that implicit bias affected judges’ sentences, though this finding was less robust and should be replicated. Finally, and most importantly for this report, the authors concluded that “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so” (p. 1221).

While motivation to be fair is a good start, it is not enough. Research shows that individuals need to understand what implicit bias is, that it exists, and that concrete steps must be taken to reduce its influence (e.g., see Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003). These studies show that implicit racial bias is something that can be controlled, but only if individuals are equipped with the tools necessary to address it.

Educational programs on implicit bias offer judges and court staff those tools. Because they focus on science and how the brain works, they offer an opportunity to engage judges and court staff in a fuller dialog on race and ethnic fairness issues, as described by Marsh (2009):

Recognizing that implicit bias appears to be relatively universal provides an interesting foundation for broadening discussions on issues such as minority over-representation (MOR), disproportionate minority contact (DMC), and gender or age discrimination. In essence, when we look at research on social cognitive processes such as implicit bias we understand that these processes are normal rather than pathological. This does not mean we should use them as an excuse for prejudice or discrimination. Rather, they give us insight into how we might go about avoiding the pitfalls we face when some of our information processing functions outside of our awareness. (p. 18)

Social science research on implicit stereotypes, attitudes, and bias has accumulated across several decades into a compelling body of knowledge and continues to be a robust area of inquiry, but the research is not without its critics (see Appendix B, FAQ #5, for a discussion of key criticisms). There is much that scientists do not yet know. This report is offered as a starting point for courts interested in exploring implicit bias and potential remedies, with the understanding that advances in technology and neuroscience promise continued refinement of knowledge about implicit bias and its effects on decision making and behavior.

The report does not review the substantial body of research on implicit bias. Rather it offers two summary documents for readers interested in learning more. Appendix A includes Implicit Bias: A Primer for Courts by Professor Jerry Kang, and Appendix B includes a set of frequently asked questions on implicit bias:

- What is implicit bias?
- What do researchers think are the sources of implicit bias?
Helping Courts Address Implicit Bias: Resources for Education

- How is implicit bias measured?
- Does implicit bias matter much in the real world?
- What are the key criticisms of implicit bias research?
- What can people do to mitigate the effects of implicit bias on judgment and behavior?
- Can people eliminate or change implicit bias?

Both of these documents summarize the key research on implicit bias, offer references to source materials, and can be used as background readings or handouts in judicial education programs.
Judicial Education on Implicit Bias: Three Examples

This section describes the efforts of three states that participated in a national project to provide information on implicit bias to judges and court staff. Table 1 presents the template the project used for working with the three states: California, Minnesota, and North Dakota. The template walks planners through the process of articulating why and how the education program will be delivered. It also serves as a starting point for other jurisdictions interested in developing a program on implicit bias.

Achieving the long-term goal, described in Table 1, of reducing the influence of implicit bias on the decisions and behaviors of judges and other court staff requires a concerted effort across time. It involves a multi-step process of building awareness that implicit bias exists, helping participants understand their own implicit biases, exploring the potential influence of their implicit biases on their decisions and behaviors, and taking steps to mitigate the influence. Jurisdictions engaged in a long-term effort to reduce implicit bias should understand that the three programs described in this report are only one component of this multi-step process.

Because the national project was available to work with the selected states for only a finite period of time, the focus was on developing a specific program and identifying the short-term outcomes (see column four in Table 1) resulting from the program. The project examined how judges and court staff reacted to the information. It did not measure the long-term effects (see column five in Table 1) of education on implicit bias.

A description of each program’s specific objectives, target audience, inputs and resources, processes and activities, outputs, and outcomes follows. General observations across all sites are:

- **Program objectives.** In general, because the states had a limited amount of time to introduce new judicial education material, all of the programs focused primarily on the first objective in Table 1—demonstrating a basic understanding of implicit bias—and provided relatively less time to explore strategies (second objective) and develop action plans (third objective) to address implicit bias.

- **Target population** varied across states. One state focused primarily on judges, another on general members of the Judicial Branch, and another on the members of a Racial Fairness Committee, including representatives from the court as well as community organizations.

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2 See “Preface and Acknowledgments” for information on the national project.
3 The three states were selected through an application process.
• **Inputs and resources** specified in Table 1 refer to the unique aspects of a state’s program on implicit bias and do not include resources such as meeting rooms and notebooks that are part of most education programs. Appendices C, D, and E include copies of resources available to the national project from the California, Minnesota, and North Dakota programs, respectively. In addition, all three states provided information on the Implicit Association Test (IAT), an on-line reaction-time assessment of preferences (see [Project Implicit Web site](#); see also Appendix B, FAQ #3). Two of the states provided a link to a secure IAT site set up for the project, and the other chose to link to the general public site. Program inputs also included questionnaires to assess implicit bias knowledge before and after the delivery of a state’s program. The questionnaires were developed by the national project team in consultation with the state program coordinators. The national project team also developed an on-line questionnaire to obtain participant impressions and actions taken several months after the delivery of one state’s program.

### Table 1. Template for Implicit Bias Program Development

<table>
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<th>Long-term Goal</th>
<th>To reduce the influence of implicit bias on the decision making and other behaviors of judges and court staff</th>
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<tr>
<td>Objectives:</td>
<td>As a result of participation in the implicit bias program, participants will be able to:</td>
</tr>
<tr>
<td></td>
<td>• Demonstrate a basic understanding of implicit bias</td>
</tr>
<tr>
<td></td>
<td>• Identify possible strategies to mitigate the influence of implicit bias on behavior</td>
</tr>
<tr>
<td></td>
<td>• Develop an individualized action plan to address implicit bias</td>
</tr>
<tr>
<td>Target Population:</td>
<td>Judges and other court staff</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Inputs/Resources</th>
<th>Processes/Activities</th>
<th>Outputs</th>
<th>Outcomes</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Program Content</td>
<td>Provide pre-program work</td>
<td>Number of participants in program</td>
<td>Participants express satisfaction with the training</td>
<td>Judges/court staff engage in activities to address their implicit biases</td>
</tr>
<tr>
<td>Delivery methods/presentation strategies</td>
<td>Provide implicit bias information using specified curriculum delivery strategies (e.g., lecture, interactions with subject matter experts, small group discussions)</td>
<td>Number of completed pre- and post-tests of implicit bias knowledge</td>
<td>Participants demonstrate increase in implicit bias knowledge</td>
<td>There are observable changes in judicial &amp; staff decisions and behaviors</td>
</tr>
<tr>
<td>Onsite experts, trainers, facilitators</td>
<td>Administer a pre-and post-test of implicit bias knowledge</td>
<td></td>
<td>Participants develop individualized action plan to address the influence of implicit bias on their behaviors</td>
<td>Disparate case outcomes based on race and ethnicity are reduced</td>
</tr>
<tr>
<td></td>
<td>Administer follow-up questionnaire to determine post-program effects</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

• The *processes and activities* varied based on program content and delivery methods. Each state administered a pre- and post-program questionnaire.

• *Outputs* refer to the work accomplished during the training session. The number of participants in the training program and the number of completed pre- and post-program assessment questionnaires serve as two measures of program outputs.

• For purposes of the national project, the primary outcome measures were whether participants were satisfied with the program (e.g., how did they react to a program on this topic) and whether their knowledge of implicit bias increased pre- and post-program. The project also examined whether or not participants planned to take some follow-up actions (e.g., learn more about implicit bias and take some steps to attenuate its influence) as a result of the program. The questions on the pre- and post-program assessment questionnaires differed somewhat by state because of (a) variations in key concepts emphasized in the three programs and (b) learning about which questions worked better as the project progressed from one state to the next.

The remainder of this section describes the specific program elements for each state.

**California**

*Program Objectives.* California’s program focused on the science of implicit bias, e.g., what it is, how it develops, and how it is measured, and provided a brief overview of strategies to mitigate its influence. The program coordinator also created a Web site (see Figure 1) for participants to learn more about strategies to address implicit bias. Subsequent programs, not included in this report, addressed strategies and action planning (see objectives in Table 1) more directly and thoroughly.

*Target Population.* Because the program was offered through the court system’s closed circuit cable television station, any member of the Judicial Branch could participate in the program. Among those who watched the broadcast were judges and other judicial officers, court professionals, attorneys, clerks, and support staff. The program was shown three times and was advertised in newsletters, letters to educational coordinators in each courthouse, and emails.
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and phone calls to other individuals who might be interested in the program. The program also was posted on the California Web site for viewing by anyone interested in seeing the program after its initial broadcasts.

**Inputs/Resources.** Table 2 summarizes the inputs and resources used in the California program. Appendix C includes California program materials available to the national project. California chose video as the medium for providing information on implicit bias. The program coordinator videotaped interviews with national experts in the field and created an hour-long documentary. The program’s Web site, *The Neuroscience and Psychology of Decisionmaking* (see Figure 1), provided links to the documentary and additional resources to help address the influence of implicit bias. Among the resources was a link to the Implicit Association Test (IAT).

Although California relied on experts in developing the documentary, the state did not provide on-site experts during the actual broadcast of the program. The original plan for the program included post-broadcast conference calls with experts to discuss selected readings on various issues presented in the documentary. However, because of staff and other resource issues, the conference calls did not take place during the course of the national project.

**Processes/Activities.** California did not provide participants with any readings in advance of broadcasting the documentary. To administer the pre- and post-assessment of viewers’ knowledge of implicit bias, the site coordinator worked with several jurisdictions to set up a central screening room in which questionnaires could be distributed to and collected from viewers. The documentary was aired at three different times and posted on the Judicial Branch Web site. The documentary encouraged viewers to take advantage of the various resources located on the program’s Web site page.

**Outputs.** Because California’s program was broadcast on the Judicial Branch’s cable television station and posted on the internet, there is no way to know how many individuals across the state watched the video. Web site statistics show over 350 hits in the first two months after the documentary’s broadcast. In addition, sign-in sheets at the central screening sites indicate that at least 107 individuals watched the program at these locations. Of these, information is available on 71 individuals who completed at least a partial pre- and post-

<table>
<thead>
<tr>
<th>Table 2. California Inputs/Resources</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ Developed <em>The Neuroscience and Psychology of Decision-Making: A New Way of Learning</em>, a one-hour video documentary of scientists and judges discussing research in neuroscience and social and cognitive psychology that demonstrates how unconscious processes may affect decisions.</td>
</tr>
<tr>
<td>▪ Developed Web site with access to a secure IAT site and additional resources for viewers to explore after watching the documentary</td>
</tr>
<tr>
<td>▪ Developed pre- and post-program evaluation</td>
</tr>
</tbody>
</table>
program assessment questionnaire. These individuals represent a variety of positions in the court (e.g., judges, court staff, attorneys, clerks) with no one position identified by more than 22 percent of respondents (see Table C-1 in Appendix F). Almost 65 percent had at least five years of experience, and 66 percent indicated they had minimal knowledge of the topic (see Tables C-2 and C-3 in Appendix F).

**Outcomes.** As shown in Table 3, at least 90 percent of the 60 California viewers responding expressed satisfaction with the documentary, thought it was effective in delivering information on implicit bias, and planned to apply the information in their work. As indicated in Table 4, content knowledge generally was better after watching the documentary. The percentage of correct responses across all viewers increased from the pre-assessment to the post-assessment (see \( \chi \) columns in Table 4) for all items. However, not all viewers improved pre- and post-assessment. Tables C-4 and C-5 in Appendix F display the percentage of correct and incorrect responses for those who scored correctly and incorrectly, respectively, on the pre-program assessment.

**Table 3. California Participants’ Satisfaction and Likely Use of Program Content (n=60)**

<table>
<thead>
<tr>
<th>Question</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Neutral</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Overall, I am satisfied with this documentary program</td>
<td>48%</td>
<td>45%</td>
<td>7%</td>
<td>0%</td>
<td>0%</td>
<td>100%</td>
</tr>
<tr>
<td>2. The program documentary was effective in delivering content</td>
<td>47%</td>
<td>43%</td>
<td>10%</td>
<td>0%</td>
<td>0%</td>
<td>100%</td>
</tr>
<tr>
<td>3. I will apply the course content to my work</td>
<td>28%</td>
<td>62%</td>
<td>8%</td>
<td>2%</td>
<td>0%</td>
<td>100%</td>
</tr>
</tbody>
</table>

---

4 Questionnaires were included in the California analyses if at least one question (the same question) was completed on both the pre- and post-assessment questionnaire.

5 The California pre- and post-assessment questionnaires included eight questions. One question was eliminated from the analyses because it included two correct response options but did not allow respondents to select both. Two other items did not have specific correct answers; rather they gauged opinions about the extent of implicit bias. These items were analyzed separately and thus not included in Table 4.

6 Tables showing the percentages of correct and incorrect answers for the pre- and post-program assessment questions include percentages for those who did not answer each question. A case could be made that missing responses are an indication that individuals did not know the correct answer and thus should be included with the incorrect responses. However, individuals may not have responded for other reasons such as they were in a hurry, thought the item was poorly worded or did not understand it, or inadvertently skipped the item. By including the missing information, readers can draw their own conclusions. The missing data also provide an indication of which items were the most troublesome or frustrating for individuals and should be revisited before using again.
Table 4. California Program Assessment Results (n=71)

<table>
<thead>
<tr>
<th>Questionnaire Item (bolded answer is correct)</th>
<th>Pre-Program Responses*</th>
<th>Post-Program Responses*</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Implicit or unconscious bias:</strong> (a) Is produced by the unconscious processing of stereotypes, (b) Is not influenced by an individual’s belief that people should all be treated the same, (c) Is difficult to alter, (d) <strong>All of the above</strong></td>
<td>66% 32% 1%</td>
<td>73% 25% 1%</td>
</tr>
<tr>
<td><strong>2. Which of the following techniques have been shown to limit the influence of implicit or unconscious bias?</strong> (a) Judicial intuition, (b) Morality plays, (c) <strong>Exposure to positive, counter-stereotypical exemplars</strong>, (d) <strong>All of the above</strong></td>
<td>52% 42% 6%</td>
<td>66% 28% 6%</td>
</tr>
<tr>
<td><strong>3. The Implicit Association Test (IAT):</strong> (a) Measures reaction time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Is better suited for educational rather than diagnostic purposes, (d) <strong>All of the above</strong></td>
<td>37% 49% 14%</td>
<td>56% 42% 1%</td>
</tr>
<tr>
<td><strong>4. What is the best evidence that implicit bias exists?</strong> (a) Analysis of criminal justice statistics, (b) <strong>Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior</strong>, (c) Self-reports, (d) <strong>All of the above</strong></td>
<td>31% 58% 11%</td>
<td>62% 38% 0%</td>
</tr>
<tr>
<td><strong>5. Which of the following techniques have not been used to measure implicit bias?</strong> (a) Implicit Association Test (IAT), (b) <strong>Polygraph</strong>, (c) MRIs, (d) <strong>All of the above</strong></td>
<td>38% 45% 17%</td>
<td>94% 6% 0%</td>
</tr>
</tbody>
</table>

*✓ = correct response, ✗ = incorrect response, ? = no response

Two additional questions gauged viewers’ opinions regarding the frequency with which implicit biases might be activated. The assumption was that viewers would see implicit biases as influencing decisions and actions more often after they watched the documentary. Figures 2 and 3 demonstrate that the assumption was correct: More viewers rated the prevalence of implicit bias as higher after seeing the documentary.

The write-in comments from viewers who completed the pre- and post-program assessment questionnaires indicated that they found the documentary interesting and surprising (e.g., “raising my awareness of prevalence of implicit bias,” “enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same,” and “greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested”). Many viewers indicated they would take additional action such as explore the topic further, visit the Web site and review the resources, take an IAT, or generally try to be more aware of their own implicit biases.
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Figure 2. Pre and Post Documentary Ratings of Pervasiveness of Implicit Bias

Question: It has been suggested that a judge’s decisions and court staff’s interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups. To what extent do you think that this occurs?

Figure 3. Pre and Post Documentary Ratings of Influence of Implicit Bias if No Explicit Bias

Question: Can a person who is free of explicit racial bias nonetheless be unwittingly influenced by unconscious or implicit racial bias?
Minnesota

**Program Objectives.** Minnesota’s program sought to engage participants in exploring implicit bias and its potential effects on fairness in the courts. It also began a discussion about possible methods to address implicit bias. Presentation materials (see Appendix D) identified the following objectives for program participants:

- Experience and assess responses to the Implicit Association Test (IAT),
- Understand the research on implicit bias,
- Explore the implications for decision making due to implicit bias in the courts,
- Specify the most critical behaviors affecting fairness that may be subject for dedicated action, and
- Identify personal and professional methods that can reduce the impact of bias.

**Target Population.** The program planners developed a pilot program for the Judicial Branch Racial Fairness Committee. The intent was to deliver the information to Committee members who would then recommend whether it should be included in new judge or other training. The Racial Fairness Committee included representatives of a variety of criminal justice perspectives (e.g., judge, prosecutor, defender, court interpreter, service agency representative).

**Inputs/Resources.** Table 5 summarizes the inputs and resources developed and/or used by the program planners. Minnesota incorporated both the California documentary as well as PowerPoint lecture and small group and plenary discussions to deliver program content on the science of implicit bias, the potential effects of implicit bias on the fairness of courts, and possible methods to reduce its impact. (See Appendix D for program materials available to the national project.)

Minnesota chose to develop its own cadre of on-site experts by identifying local faculty and convening conference calls with national experts to gain a better understanding of the subject matter and typical questions raised by court audiences. Assuming the information was well-received by the Racial Fairness Committee, the plan was to have local experts available to provide information about the topic during regularly-scheduled training.

<table>
<thead>
<tr>
<th>Table 5. Minnesota Inputs/Resources</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Convened conference calls with experts to enhance facilitator subject knowledge</td>
</tr>
<tr>
<td>• Developed directions for participants to take IAT at Project Implicit Web site prior to training and drafted questions to assess reactions</td>
</tr>
<tr>
<td>• Developed 2.5-hour live pilot program on implicit bias and fairness in the courts, including the following elements:</td>
</tr>
<tr>
<td>• Debriefing reactions to IAT in a pairs dialogue</td>
</tr>
<tr>
<td>• Showing documentary produced by California followed by small group and plenary discussions on themes and reactions</td>
</tr>
<tr>
<td>• PowerPoint lecture introducing and reinforcing key implicit bias concepts</td>
</tr>
<tr>
<td>• Small group breakout session on professional and personal methods to manage implicit bias</td>
</tr>
<tr>
<td>• Developed pre- and post-program evaluation</td>
</tr>
</tbody>
</table>
sessions such as the new judge orientation program.

**Processes/Activities.** Minnesota provided program participants with a set of instructions for taking the IAT prior to attending the program. The instructions requested that participants take the Race IAT and a second IAT of their choosing. After taking the IAT, participants completed an on-line survey consisting of six questions about their thoughts and observations related to taking the IAT. Participants discussed their reactions to the experience of taking the IAT during one of the program’s small group sessions.

A Minnesota judge and judicial educator led the program that included a PowerPoint presentation punctuated with small group and plenary discussions. A primary component of the Minnesota program included watching and debriefing the California documentary. Participants also spent time discussing what they could do to manage implicit bias both personally and professionally. The program began and ended with participants completing an assessment of their implicit bias knowledge.

**Outputs.** Minnesota’s Racial Fairness Committee consists of 20-25 judges, attorneys, justice system partners, and community representatives. The implicit bias program was opened to all members of the Committee. Because the Committee was considering whether to recommend the program content for new judge orientation programs, the Committee also extended an invitation to a few new judges to gauge their reaction to the material. Twenty-five participants completed at least some portion of the program evaluation. To ensure the anonymity of responses, given the small number and diversity of the participants, Minnesota’s evaluation form did not ask questions about the participant’s position and length of time in the position.

**Outcomes.** As shown in Table 6, the majority of participants were satisfied with the program: 82 percent of the 16 participants responding rated the program content medium high to high, 69 percent rated program process medium high to high, and 81 percent rated the program’s applicability medium high to high.\(^7\)

<table>
<thead>
<tr>
<th>Question</th>
<th>Scale Rating: 5=High and 1=Low</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Overall Rating: Content</td>
<td>44% 38% 12% 0% 6% 100%</td>
</tr>
<tr>
<td>2. Overall Rating: Process</td>
<td>50% 19% 25% 6% 0% 100%</td>
</tr>
<tr>
<td>3. Overall Rating: Applicability</td>
<td>50% 31% 12% 6% 0% 100%</td>
</tr>
</tbody>
</table>

Of the seven pre- and post-program assessment questions displayed in Table 7 ((see \(\square\) columns), the number of correct responses increased for four questions, decreased for two, and

\(^7\) The percentages are based on the responses of 16 of the 25 participants who completed these items on the post-program assessment.
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stayed the same for one. (Tables M-1 and M-2 in Appendix F display the percentage of correct and incorrect responses for those who scored correctly and incorrectly, respectively, on the pre-program assessment.) Because the Minnesota results are based on a small number of respondents, they should be interpreted with caution.

Table 7. Minnesota Program Assessment Results (n=17)

<table>
<thead>
<tr>
<th>Questionnaire Item (bolded answer is correct)</th>
<th>Pre-Program Responses*</th>
<th>Post-Program Responses*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Implicit bias: (a) Is produced by the unconscious processing of schemas and stereotypes, (b) Is not influenced by an individual’s belief that people should all be treated the same, (c) Is difficult to alter, (d) All of the above</td>
<td>53% 47% 0%</td>
<td>65% 35% 0%</td>
</tr>
<tr>
<td>2. Which of the following thought processes are activated automatically, without conscious awareness? (a) Implicit bias, (b) Explicit bias, (c) Profiling, (d) All of the above</td>
<td>35% 65% 0%</td>
<td>53% 47% 0%</td>
</tr>
<tr>
<td>3. Research has shown that unconscious or implicit bias: (a) Exists in only a few jurisdictions in the US, (b) Does not occur in people who are free of explicit bias, (c) Is related to behavior in some situations, (d) All of the above</td>
<td>53% 47% 0%</td>
<td>65% 35% 0%</td>
</tr>
<tr>
<td>4. The Implicit Association Test (IAT): (a) Measures response time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Should not be used to diagnose a particular individual as being biased, (d) a and b, (e) All of the above</td>
<td>47% 53% 0%</td>
<td>29% 71% 0%</td>
</tr>
<tr>
<td>5. Which of the following techniques have been shown to limit the influence of implicit bias? (a) Check lists, (b) Paced, deliberative decision-making, (c) Exposure to positive, counter-stereotypical exemplars, (d) All of the above</td>
<td>77% 24% 0%</td>
<td>77% 24% 0%</td>
</tr>
<tr>
<td>6. What evidence do we have that implicit bias exists? (a) Analysis of criminal justice statistics, (b) Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior, (c) Magnetic Resonance Imaging (MRIs), (d) b and c, (e) All of the above</td>
<td>41% 53% 6%</td>
<td>18% 82% 0%</td>
</tr>
<tr>
<td>7. Justice professionals can fail to recognize the influence of implicit bias on their behavior because: (a) They are skilled at constructing arguments that rationalize their behavior, (b) The large volume of work they are required to do makes it difficult to be cognizant of implicit bias, (c) They do not believe they are biased, (d) All of the above</td>
<td>77% 18% 6%</td>
<td>82% 18% 0%</td>
</tr>
</tbody>
</table>

*✓ =correct response, ☐=incorrect response, ?=no response

8 The Minnesota pre- and post-assessment questionnaires included eight questions. One of the items was eliminated from the analyses because a typographical error resulted in a flawed question.

9 The pre- and post-assessment results are based on the responses of 17 participants who completed at least one question (the same question) on both the pre- and post-assessment questionnaires. Most of the 17 also completed the items in Table 6, but the respondents are not identical for both tables.
A closer look at the frequency of responses to Questions 4 and 6, the two questions that received more incorrect responses on the post-program assessment, reveals that several participants were confused about (a) whether the IAT should be used for individual diagnostic purposes, and (b) whether analysis of criminal justice statistics serves as evidence that implicit bias exists. In retrospect, the confusion about the IAT may stem from the fact that participants were asked to take the IAT prior to the program. The experience of taking an IAT is similar to taking other diagnostic tests, and thus participants may have viewed the IAT as a more authoritative source of feedback about their own implicit racial bias than is warranted. Although the IAT has been shown to be predictive of behaviors in the aggregate – across many people—the test is not currently deemed reliable enough for use as a diagnostic tool at the individual level:

[I]t is clearly premature to consider IATs as tools for individual diagnosis in selection settings or as a basis for decisions that have important personal consequences. The modest retest-reliability of IAT measures together with the unanswered questions concerning the explanation of IAT effects make evident that potential applications should be approached with care and scientific responsibility. Meanwhile, IATs are a fascinating research tool at the interface of social cognition and personality psychology that help to draw a more holistic picture of individual behavior and experience. (Schnabel, Asendorpf, & Greenwald, 2008, p. 524)

The Minnesota assessment results reinforce the importance of emphasizing this point. Indeed, one of the program facilitators noted that “we should emphasize that the IAT is not a diagnostic tool” in written comments assessing the program.

With regard to the confusion about using criminal justice statistics as evidence of implicit bias, this may have occurred because of discussions about the potential implications of implicit bias for the justice system. During one discussion, some individuals suggested that implicit bias might account partially for the disproportionate representation of ethnic and minority groups in the criminal justice system. Some participants may have heard this discussion of disproportionate minority representation as demonstrating the existence of implicit bias rather than possible implications of implicit bias.

Comments from participants who completed the pre- and post-program assessment questionnaires indicated that they thought the most useful information gained from the session regarded the development and operation of implicit biases (e.g., “causes/reasons for implicit bias; ways to counteract implicit bias both personal and professional” and “brain-neurological discussion”). Several listed actions they were likely to take as a result of the program: For example, “consider ways to increase positive stereotypes—photos in offices, etc.” and “try to deal with my biases and learn techniques to counteract.”
**North Dakota**

**Program Objectives.** North Dakota’s program was longer than the California and Minnesota programs and thus had more time to explore the three objectives in Table 1, though relatively more time was devoted to the first objective to ensure participants understood implicit bias concepts. At the start of the program, the presenters identified the following objectives (see presentation materials in Appendix E):

- Normalize the association between information processing and how we relate to others,
- Examine implicit bias and the “condition” of being human, and
- Challenge the notion of being “color-blind.”

In addition, the presenters explained that the program was focusing on race but that the concepts extended to many other characteristics or groups and that implicit bias should not be used as an excuse for prejudicial behavior.

**Target Population.** North Dakota’s program targeted participants of its winter judicial conference. The majority of the 44 participants were judges or other judicial officers (e.g., referees). In addition, a few attorneys and members of court administration attended the program.

**Inputs/Resources.** North Dakota developed resources that included PowerPoint slides, video clips, and small group exercises to deliver content on the automaticity of information processing, the development of stereotypes and implicit attitudes, and strategies to reduce the influence of implicit bias. The project team also developed an on-line questionnaire for North Dakota to obtain participant impressions and actions taken several months after the program was delivered.

With assistance from the national project team, North Dakota identified two national experts—a judge and social psychologist—to deliver its program. As part of its judicial conference, North Dakota also convened a law and literature session led by another national consultant. Although not

<table>
<thead>
<tr>
<th>Table 8. North Dakota Inputs/Resources</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Developed 4-hour live conference presentation on social cognition and decision making, including the following elements:</td>
</tr>
<tr>
<td>- PowerPoint lecture on social cognition research</td>
</tr>
<tr>
<td>- Video clips from <em>Race: The Power of an Illusion</em> followed by plenary discussion about race as a social construction and the impossibility of being “color blind”</td>
</tr>
<tr>
<td>- Short film <em>The Lunch Date</em> followed by plenary discussion of stereotypes</td>
</tr>
<tr>
<td>- Small group breakout session on stereotypes</td>
</tr>
<tr>
<td>- Small group breakout session on strategies to reduce implicit bias and personal planning</td>
</tr>
<tr>
<td>- Background readings</td>
</tr>
<tr>
<td>- Faculty included a social psychologist and judge from another state</td>
</tr>
<tr>
<td>- Developed pre- and post-program evaluation</td>
</tr>
<tr>
<td>- Provided link to secure IAT site</td>
</tr>
<tr>
<td>- Developed follow-up questionnaire</td>
</tr>
</tbody>
</table>
part of the national project on implicit bias, the session served to reinforce several of the
concepts discussed during the implicit bias program offered earlier in the day.

**Processes/Activities.** North Dakota provided participants with a copy of *Implicit Bias: A
Primer for Courts* (see Appendix A) prior to the start of the implicit bias program. The national
faculty, a judge and social psychologist, delivered the program during the afternoon session of
the winter judicial conference. After providing information on implicit bias and possible
strategies to attenuate its influence, participants worked on individualized action plans to
address the influence of implicit bias. Faculty suggested participants take the IAT as one of their
action steps. Participants also completed an assessment of their knowledge of implicit bias at
the beginning and the end of the program. Approximately four months after the program, the
site coordinator requested participants to complete a short on-line questionnaire about the
program and any efforts they have made to address their implicit bias.

**Outputs.** Of the 44 participants attending the program, 35 completed at least some
questions on the pre- and post-program assessment. Almost all of the participants responding
to demographic questions (n=34) were judges with at least five years of experience on the
bench (see Tables ND-1 and ND-2 in Appendix F). Only one of the 34 participants listed his or
her race as different than White, noting that it was White and Native American (see Table ND-3
in Appendix F). Roughly half of the participants rated their knowledge of the subject as
moderate; another 44 percent rated their knowledge as minimal (see Table ND-4 in Appendix
F).

**Outcomes.** As shown in Table 9, 84 percent of the 32 participants responding were
satisfied with the program, 97 percent indicated they would apply the course content to their
work, and 87 percent considered the presentation effective in delivering the content.\(^\text{10}\)

**Table 9. North Dakota Participants’ Satisfaction and Likely Use of Program Content (n=32)**

<table>
<thead>
<tr>
<th>Question</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Neutral</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
<th>Total*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Overall, I am satisfied with this presentation</td>
<td>25%</td>
<td>59%</td>
<td>12%</td>
<td>3%</td>
<td>0%</td>
<td>99%</td>
</tr>
<tr>
<td>2. I will apply the course content to my work</td>
<td>19%</td>
<td>78%</td>
<td>3%</td>
<td>0%</td>
<td>0%</td>
<td>100%</td>
</tr>
<tr>
<td>3. The presentation was effective in delivering content</td>
<td>28%</td>
<td>59%</td>
<td>12%</td>
<td>0%</td>
<td>0%</td>
<td>99%</td>
</tr>
</tbody>
</table>

*Total may be less than 100% because of rounding fractional numbers to whole numbers.

\(^\text{10}\) North Dakota’s analyses are based on the responses of 35 participants who completed at least one question (the
same question) on both the pre- and post-assessment questionnaires. Of the 35, 32 also completed the questions in Table 9.
Of the seven pre- and post-program assessment questions displayed in Table 10 (see □ columns), the number of correct responses increased for four questions, decreased for two (although one decreased only slightly), and stayed the same for one.\textsuperscript{11} (Tables ND-5 and ND-6 in Appendix F display the percentage of correct and incorrect responses for those who scored correctly and incorrectly, respectively, on the pre-program assessment.).

### Table 10. North Dakota Program Assessment Results (n=35)

<table>
<thead>
<tr>
<th>Questionnaire Item (bolded answer is correct)</th>
<th>Pre-Program Responses*</th>
<th>Post-Program Responses*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. In general, do you think that it is possible for judges’ decisions and court staffs’ interactions with the public to be unwittingly influenced by unconscious bias toward particular racial/ethnic groups? (a) Yes, (b) No</td>
<td>100% 0% 0%</td>
<td>100% 0% 0%</td>
</tr>
<tr>
<td>2. Research has shown that unconscious or implicit bias: (a) Exists in only a few jurisdictions in the US, (b) Does not occur in people who are free of explicit bias, (c) Is related to behavior in some situations, (d) All of the above</td>
<td>69% 29% 3%</td>
<td>83% 17% 0%</td>
</tr>
<tr>
<td>3. Implicit bias: (a) Is produced by the unconscious processing of schemas and stereotypes, (b) Is not influenced by an individual’s belief that people should all be treated the same, (c) Is difficult to alter, (d) All of the above</td>
<td>74% 26% 0%</td>
<td>72% 26% 3%</td>
</tr>
<tr>
<td>4. Which of the following techniques have been shown to limit the influence of implicit bias? (a) Judicial intuition, (b) Moral maturity enhancement, (c) Exposure to positive, counter-stereotypical exemplars, (d) All of the above</td>
<td>23% 77% 0%</td>
<td>40% 54% 6%</td>
</tr>
<tr>
<td>5. The Implicit Association Test (IAT): (a) Measures response time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Should not be used to diagnose individual bias, (d) All of the above</td>
<td>26% 69% 6%</td>
<td>34% 63% 3%</td>
</tr>
<tr>
<td>6. What evidence do we have that implicit bias exists? (a) Analysis of criminal justice statistics, (b) Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior, (c) Self-report, (d) All of the above</td>
<td>14% 86% 0%</td>
<td>9% 89% 3%</td>
</tr>
<tr>
<td>7. Which of the following techniques has not been used to measure implicit bias? (a) Implicit Association Test (IAT), (b) Polygraph, (c) Paper and pencil tests, (d) MRIs</td>
<td>26% 74% 0%</td>
<td>31% 66% 3%</td>
</tr>
</tbody>
</table>

*\(\checkmark\) = correct response, \(\xmark\) = incorrect response, ? = no response

Although the percentage of correct responses increased from pre-assessment to post-assessment for the majority of items, four of the items had correct responses of 40 percent or less on the post-program assessment. Of the items that were answered incorrectly by the

\textsuperscript{11} The North Dakota pre- and post-program assessment questionnaires included eight questions. One question was eliminated from the analyses because, in retrospect, it could have been confusing to respondents.
majority of participants, no one clear explanatory pattern emerges from this data. For Questions 4 and 6, a majority of participants answered “all of the above,” indicating they may have misread the questions, thought that at least two of the answers were correct, or guessed at the correct response. For Question 5, a majority of participants answered “pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone.” Although correct, the other responses also were correct; thus the program may not have covered all of the material equally or equally well, or there was a lack of congruence between evaluation items on the tests and the actual curriculum as delivered on-site. Participants may have also guessed when answering Question 7, for which there was no majority—the highest percentage was 40 percent answering “MRIs.” In written comments, a few participants expressed that there was a lot of material covered and they would have preferred less time in small groups and more time on lecture and discussion: “more time—feel we went through this rather quickly and I needed more [time] to have a more concrete grasp. But it is a good start—thank you;” “more real experiences – too many slides – too little time – speaker knows subject of slides better than we do;” “too much small group....” Although participants were engaged (other comments noted “keep up the good work!” and “this is a great program!”), they seemed to need more time to fully understand the information and its implications.

Approximately three months after the North Dakota program, the program coordinator sent an email to participants requesting they complete a short, Web-based survey. Only fourteen of the original participants responded to the survey, so the results should not be considered representative of all the participants.

The majority of those responding thought that it was at least somewhat important for judges to be aware of the potential influence of implicit bias on their behavior: On a scale of 1 (unimportant) to 7 (very important), the average rating was 4.7 and the most frequent rating was “6”. Most (nearly 70 percent) indicated that they had not made any specific efforts to increase their knowledge of implicit bias; however, most (nearly 77 percent) indicated that they had made efforts to reduce the potential influence of implicit bias on their behavior. Examples of the efforts participants said they had taken are:

- Concerted effort to be aware of bias,
- I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination,
- Simply trying to think things through more thoroughly,
- Reading and learning more about other cultures, and
- I have made mental notes to myself on the bench to be more aware of the implicit bias and I’ve re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part.
Helping Courts Address Implicit Bias: Resources for Education

Lessons Learned

The project worked with three states to see how information on implicit bias could be delivered to members of their respective court community. Each state chose a time, venue, and approach for delivering implicit bias content based on its judicial branch education goals, resources, needs, and opportunities. Consequently, the three programs the states developed and delivered differed on a variety of factors and their outcomes cannot be directly compared to one another.

Taken as a group, however, the results of the three programs provide insights about the court community’s interest in implicit bias and suggestions for future judicial branch education programs on the topic. This section describes six “lessons learned” or “takeaways” identified by examining the three programs in concert.

1. Court audiences are receptive to implicit bias information.

An initial challenge for educators presenting information on implicit bias is whether they can engage audience members in an honest, open, and constructive discussion about personal biases. This may be difficult for a number of reasons, such as participant unwillingness to explore one’s own possible biases, an inability to identify those biases, or a concern about acknowledging those biases publicly.

Cultivating audience receptivity and personal accountability may be especially challenging with members of the court community who have been taught to focus on the facts and disregard irrelevant information. Judges have attained an important decision making role in society—a role they acquired based on their past performance. Their ability to exercise impartial and objective judgment is central to their self-identity. Research shows, however, that they tend to overestimate their ability to avoid bias (Rachlinski, Johnson, Wistrich, & Guthrie, 2009). As a consequence, they may not see a need for further education on racial and ethnic fairness issues. Thus one question the project team had at the outset was whether judges and other court professionals would be interested in learning about implicit bias and consider the subject matter relevant to their work.

Table 1 indicates that at least 80% of participants who responded to assessment questions in each state expressed satisfaction with the implicit bias program and saw its applicability to their work. Their comments used adjectives such as excellent, valuable, important, relevant, informative, worthwhile, and eye-opening to describe their reactions to the programs. This does not mean that the programs worked for all participants, but they seemed to work for a large majority.

Given the variation in target audiences and program features across the states (see Table 12), the findings suggest that judges and court professionals in other states also would be receptive to information about implicit bias. Comments from participants indicated that the programs raised their awareness of the presence and prevalence of implicit bias and piqued their interest to explore the topic more. Thus the findings indicate that implicit bias programs
offer judicial educators a vehicle to motivate and engage members of the court community to explore issues of bias.

### Table 11. Overall Program Ratings by State

<table>
<thead>
<tr>
<th>California (n=60)</th>
<th>Minnesota (n=16)</th>
<th>North Dakota (n=32)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 93% satisfied with this documentary program</td>
<td>• 81% gave the program content a medium high to high rating</td>
<td>• 84% satisfied overall with this presentation</td>
</tr>
<tr>
<td>• 90% will apply the course content to their work</td>
<td>• 81% gave the program’s applicability a medium high to high rating</td>
<td>• 97% will apply the course content to their work</td>
</tr>
</tbody>
</table>

### Table 12. Summary of Implicit Bias Program in Each State

<table>
<thead>
<tr>
<th>Program Feature</th>
<th>California</th>
<th>Minnesota</th>
<th>North Dakota</th>
</tr>
</thead>
<tbody>
<tr>
<td>Target Audience</td>
<td>General court community</td>
<td>Mix of justice system professionals</td>
<td>Mostly judges</td>
</tr>
<tr>
<td>Type of Program</td>
<td>1-hour video program</td>
<td>2.5-hour in-person program</td>
<td>4-hour in-person program</td>
</tr>
<tr>
<td>Program Components</td>
<td>Aired program, Provided Web site for follow-up</td>
<td>Viewed CA video, Provided lecture, small group discussions and exercises</td>
<td>Provided lecture, small group discussions, and exercises</td>
</tr>
<tr>
<td>Faculty/Facilitators</td>
<td>No facilitators on site</td>
<td>Local judge &amp; judicial educator</td>
<td>Judge and psychologist from outside of ND</td>
</tr>
</tbody>
</table>

2. **Complexity of the implicit bias subject matter demands time and expertise.**

Table 13 shows that posttest scores improved on all or a majority of the assessment questions across all three programs. However, the results are more complicated to interpret because those who responded correctly to an item on the posttest were not always the same individuals who responded correctly to the item on the pretest, i.e., some participants’ knowledge decreased from pretest to posttest. An ideal program reinforces participants’ correct answers and changes participants’ incorrect answers on the posttest. Incorrect posttest responses may be the result of ineffective delivery of some program information, a poor fit between the evaluation item and program content, participant misunderstanding of the test questions.

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12 Interpretation of the data is limited by small samples in some jurisdictions (limiting the number of responses on some items) and the representativeness of participants who were willing to complete the pre and posttests.
question, and/or guessing correctly on the pretest question and incorrectly on the posttest question. Based on the number of responding participants who mentioned needing more time to digest the information, incorrect posttest responses likely are also due to the complexity of the subject matter.

Unlike some judicial branch education programs that involve the delivery of factual information on new laws, procedural requirements, or appellate court decisions, education on implicit bias involves social science research that is unfamiliar to most legally-trained individuals and ultimately has behavioral change as its goal. Implicit bias training seeks to improve not only deliberate behaviors like judicial decision-making but also more spontaneous verbal and non-verbal behaviors of judges and court staff. Devine (see Law, 2011, p. 42) reports that combating implicit bias is much like combating any habit and involves specific steps:

- Becoming aware of one’s implicit bias.
- Being concerned about the consequences of the bias.
- Learning to replace the biased response with non-prejudiced responses—ones that more closely match the values people consciously believe that they hold.

Table 13. Pre and Posttest Results by Program

<table>
<thead>
<tr>
<th>Pre and Posttest Results</th>
<th>California (n=71)</th>
<th>Minnesota (n=17)</th>
<th>North Dakota (n=35)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Range of correct posttest responses</td>
<td>56% to 100%</td>
<td>18% to 82%</td>
<td>9% to 100%</td>
</tr>
<tr>
<td>Correct responses from pre to posttest</td>
<td>Increased on 5 of 5 questions</td>
<td>Increased on 4 questions, same on 1, decreased on 2</td>
<td>Increased on 4 questions, same on 1, decreased on 2</td>
</tr>
<tr>
<td># of questions that had at least one participant answer incorrectly on posttest after answering correctly on pretest</td>
<td>4 questions</td>
<td>6 questions</td>
<td>6 questions</td>
</tr>
</tbody>
</table>

Judicial educators should understand the difficulty of comprehending the scientific material for many of their program participants and the need to walk participants through the behavioral change process. Spreading the material across several sessions likely will result in better comprehension and application than trying to accomplish all of Devine’s steps in one session. Any introductory session, however, should let participants know that there are strategies for addressing implicit bias and that the strategies will be discussed; otherwise, program participants may leave the first session feeling somewhat helpless about what to do. In addition, as with any behavioral change program, continued efforts to periodically revisit implicit bias concepts (e.g., by hosting follow-up or refresher sessions; by integrating the topic into seminars on other, related issues) will promote vigilance and encourage sustained habit formation.
The complexity of the information also requires faculty and facilitators who are experts in the science of implicit bias and who are vigilant about correcting misinformation (e.g., the use of the Implicit Association Test for diagnostic purposes as discussed in Lesson Learned #4) that may arise during discussions about the material. Research on implicit bias continues to expand, and thus those teaching the course need to remain current with new findings. While it is helpful to have judges and other practitioners serve as faculty to reinforce the subject matter’s applicability to court audiences, implicit bias program faculty should include at least one subject matter expert to ensure that the science is properly presented and understood.

3. **Tailor implicit bias programs to specific audiences.**

Any judicial branch education program should be based on considerations of the target audience’s composition; this is particularly true for programs on implicit bias. Key considerations for program planners are:

- **Prior experience discussing race and ethnic fairness issues.** To what extent has the target audience participated in other educational programs related to cultural competence and sensitivity? Participants’ expectations will vary based on their prior experience. Program planners may need to allow more time for audiences new to discussing these issues and/or for audiences frustrated with the content of prior programs (see, for example, Juhler, 2008).

- **Demographic diversity of the state.** To what extent have program participants witnessed biased behaviors? In one program, a participant noted that more examples (“anecdotal references”) would be helpful given the lack of racial diversity in the work environment. Whereas this type of real-world contextual information may help frame the concept of implicit bias for individuals who live in more homogeneous communities with fewer racial minorities, educators may not need to spend as much time listing or elaborating such examples when training audiences from culturally diverse areas, for whom the real-world applicability of implicit bias may be more readily perceived. Educators also may have more success initially discussing implicit biases in the context of groups with which the audience is more familiar, such as teenagers or the elderly, before discussing implicit biases related to race and ethnicity.

- **Audience characteristics.** The audiences of the project sites varied in professional orientation, i.e., one program focused on judges while the other two included a wide array of justice system professionals. The audiences also varied on demographic factors such as age, race and ethnicity, and gender, and, as noted above, on prior level of exposure to cultural competency, diversity, and other related educational programs. These differences are important to acknowledge in developing program content and delivery. They will affect the types of examples educators use to relate implicit bias concepts to audience members’ every-day work environments as well as examples of strategies for combating implicit bias.

- **Audience motivation.** How willing is the audience to discuss bias in the court system? One program participant noted that his or her training group seemed
“collectively uncomfortable about talking about their bias.” As noted under Lesson Learned #1, court system professionals may believe that they are not as susceptible to bias as those in other fields. They may need to be convinced of the reality of implicit bias and the benefits of the educational program before they become fully engaged in program participation. Educational approaches that incorporate information about the empirical evidence of unintended bias may help promote awareness and instill intrinsic motivation to change. However, educators should avoid relying on extrinsic motivators (e.g., mandatory compliance, punitive measures) as they can engender backlash that escalates and perpetuates prejudice in some individuals (e.g., Plant & Devine, 2001).

4. **Content delivery methods affect participant understanding and satisfaction**

Additional research is needed to identify the most effective combination of content delivery methods for a judicial education curriculum on implicit bias. Regarding the assortment of approaches used in this triad of pilot studies, some noteworthy considerations for judicial educators emerged from direct feedback from pilot participants as well as general knowledge of effective educational delivery methods. Information on the various delivery methods used in the programs follows.

- **Video documentary.** Overall, California’s video documentary was well-received by participants in the California and Minnesota pilot programs and seemed to be an effective mechanism for delivering content about implicit bias. In the feedback provided from participants at both sites, many identified the video documentary as the most beneficial or useful part of their program. Participants indicated that the video was informative, interesting, and enlightening, despite some comments suggesting that the video could benefit from a more rigorous editing process and other comments regarding various technical difficulties (e.g., scratches on the source DVD, insufficient volume for some participants).

  Several participants wanted the documentary to provide more information on strategies to address implicit bias. The greater focus on the science behind implicit bias likely led one participant to comment that “the science was daunting for some participants and made them feel somewhat powerless to change because how do you change how our brains work?” Although the video referenced some strategies, pointed participants to a Web site with additional resources, and indicated that upcoming programs would address solutions in more detail, participant comments indicated an interest in hearing about possible strategies during the initial broadcast.

  A few participants also suggested building exercises into the video and making the content more interactive. One such approach could present the video documentary to a live audience of participants, but parse the video into shorter viewing segments. The California documentary could be paused at three points to produce four

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13 California produced two additional videos: [The Neuroscience and Psychology of Decision making, Part 2 — The Media, the Brain, and the Courtroom](#) and [The Neuroscience and Psychology of Decision making, Part 3 — Dismantling and Overriding Implicit Bias](#) to further explore implicit bias and strategies to address it.
approximately 15-minute clips that (1) provide an introduction to the neurological and psychological science behind bias, (2) explain the IAT, (3) present research illustrating how implicit bias affects real world behaviors, and (4) describe some strategies for addressing implicit bias. Facilitators could then incorporate guided group discussion and/or illustrative experiential exercises into these breaks to reinforce learning as new topics are introduced. If this approach helps clarify and elaborate on difficult concepts and prompt further discussion of practical solutions, perhaps participants will be less likely to feel overwhelmed by the material.

- **PowerPoint presentation and lecture.** One pilot program presented the educational material on social cognition and implicit bias via a live PowerPoint lecture delivered by a content expert, and another program used PowerPoint lectures to augment information presented in the video documentary. Several participants indicated that, in general, they needed a much slower pace and more time to fully digest such complex information. Some participants mentioned that additional real-world or anecdotal examples that illustrated the phenomenon would have helped them develop a more concrete understanding of the material.

- **Small group discussion.** In general, skillfully facilitated small group discussions can help raise self-awareness and cultivate more active, engaged participation (e.g., Teal, Shada, Gill, Thompson, Fruge, Villarreal, & Haidet, 2010). Interestingly, however, pilot participants who only viewed an educational presentation about implicit bias showed more consistent improvement from pretest to posttest than those who also engaged in small group discussion following an educational video or lecture. For example, in the results of an assessment question on scientific evidence that implicit bias exists, 62% of participants who viewed only a video documentary provided the correct response (see Table 4), whereas only 18% (see Table 7) and 9% (see Table 10) of participants from each program that incorporated a discussion group component answered this question correctly. Obvious explanations, given the substantial variation among pilot programs and evaluation tests, are that this counterintuitive trend emerged not from differences in learning, but from variations in the evaluation questions and response options used across programs and/or other inherent program differences (e.g., audience composition, content emphasized).

Another possibility to consider is that these results reflect cognitive processing errors, with group discussion opening the door for some common memory errors to enter and influence participant learning processes. For example, participants may have confused the source of information delivery, attributing or generalizing content they gleaned from peers in group discussion to the knowledgeable expert facilitator in the educational component of the session. Source memory information (i.e., who said it) is more likely to be disrupted than content memory (i.e., what was said), and this is particularly likely to occur when attention and cognitive resources for processing new information are divided (see Mitchell & Johnson, 2000). Alternatively, discussion with and misinformation from others may alter participants’ memories of previously learned information; this is more likely to occur when cognitive processing is constrained by factors like time pressure (e.g., Roediger, Meade, & Bergman, 2001; Zaragosa & Lane, 1998).
As noted earlier, some participants thought they would have benefitted from a slower pace and more time to process the information presented on implicit bias. If participants do not have a clear understanding of the material from the educational lecture or video component of the session, it is possible that misinformation may circulate in subsequent group discussions. This misinformation may then either fill in the gaps of a participant’s memories about the original educational content or impair accurate recall of what was originally conveyed by the educator or expert (e.g., Zaragoza, Belli, & Payment, 2006; Gabbert, Memon, Allen & Wright, 2004; Gabbert, Memon, & Wright, 2006). The answer is not to eliminate small group discussions but to structure them to increase their effectiveness and avoid misinformation (see below). It is worth noting that several participants at both sites with small group discussion indicated that better structure was needed to more effectively guide conversations. As discussed in Lessons Learned #2, having a subject-matter expert on the science of implicit bias on hand during the educational program would help prevent misinformation and facilitate better participant comprehension of the material.

- **Experiential exercises and other illustrative activities.** In general, participants commented favorably on exercises such as the Stroop test\(^{14}\) to demonstrate automatic cognitive processing. Educators, however, should select and use exercises judiciously to reinforce a point and not consume precious time that could be allotted elsewhere. One participant, for example, noted that a story on gender stereotyping was not really necessary in the context of the specific information that was being presented.

All three programs included information on the Implicit Association Test (IAT). One pilot site asked participants to complete the IAT prior to the program and answer a brief questionnaire regarding their thoughts and reactions to taking the test. This exercise was used as the basis for some initial discussion in the program. Participants described the IAT experience as challenging and revealing. The other two sites encouraged participants to take the IAT as a follow-up to the program. Several participants from those two sites thought that it might have been helpful if they had taken the IAT prior to the program or had been given an opportunity to take it during the program.

Although incorporating the IAT into a program may help provide insight and motivation for participants, judicial educators should weigh the IAT’s overall value to the course. If the IAT is taken prior to the program, it may unsettle some participants and require a lengthy explanation at the beginning of the program to place participants’ results in the proper context. If unplanned, this discussion can use valuable program time. Participants may have fewer questions and concerns about taking the IAT after the

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\(^{14}\) The Stroop test (Stroop, 1935) may be used to illustrate the concept of reaction time as a measure of automaticity (i.e., that cognitively easy or routine tasks can be performed more quickly or “automatically” than more cognitively challenging tasks). Although several variations of the test exist, in one popular version of the test, participants are asked to read a list of several color words (e.g., “red,” “blue,” “green”) in black ink—which they do easily. They are then given a list of colors that are written in ink colors that are incongruent with the semantic meaning of the word (e.g., “blue” is written in red ink). Rather than read the words, participants are asked to name the ink color of each word. Participants find this task much more difficult. The test demonstrates that for most people, reading has become an automatic process; people must override the semantic meaning of the word in order to name the font color when performing the second task.
program content has been delivered. If the IAT is offered during the program, educators need to consider issues of cost for laptops to connect to the Project Implicit Web site to take the test as well as privacy issues—some participants may be uncomfortable taking the test in public and possibly having their results visible to others. Some presenters have overcome these concerns by conducting an IAT with program participants as a group. They ask the participants to clap or hit the table to respond to the paired associations. Participants can hear how the pace slows when stereotype-incongruent pairs are displayed on a screen. This approach, however, may not work as well in a program with a small number of participants.

Regardless of whether taking the IAT is incorporated as a program activity, presenters should emphasize that the instrument is educational and not diagnostic in nature (Stanley, Sokol-Hessner, Banaji, & Phelps, 2011). The program assessment question focusing on the IAT was one of the most incorrectly answered items on the posttest for all three programs. Based on the assessment results, many participants may have misunderstood or not fully understood that the IAT is malleable and “that its predictive validity is moderated by situational variables” (Nosek, Greenwald, & Banaji, 2007, p. 285).

- **Supplemental resources.** Well-advertised Web sites with additional resources (e.g., a link to Project Implicit where visitors can take an IAT online, recommended supplemental readings, support tools for implicit bias intervention strategies) can encourage participant follow-up by guiding them to an organized, centralized hub of the most relevant and useful resources on the topic.

  Intermittently throughout the piloted program in California, participants heard about additional resources available on the California Administrative Office of the Courts’ Education Division Web site. At the conclusion of the educational session, several California participants indicated that they planned to visit the program Web site or seek more information about the topic on their own. In addition, the North Dakota conference included a “law and literature” program in the evening following the implicit bias program. Although this session was not considered part of the implicit bias program, participants referred back to information from the implicit bias program as they discussed several short stories. Based on observation, participants seemed to enjoy the opportunity to further discuss the implicit bias concepts in this more informal setting.

  To take full advantage of and adapt the delivery methods from the pilot programs, judicial educators should consider, as noted in Lesson Learned #2, planning a series of targeted seminars as opposed to one 2- to 4-hour session. An expanded curriculum would allow more time to supplement primary educational instruction like the California video documentary with interactive and experiential exercises to illustrate concepts and heighten awareness, and would afford participants time to fully digest the complex and thought-provoking information.

  A multi-session approach also may improve participant comprehension. Instead of trying to cover all program information in a single session, faculty could present the material in more manageable portions to improve retention. This approach also has the advantage of
reinforcing the educational message over repeated exposures, and thus better facilitating actual behavioral change over time.

Breakout sessions may be more productive and misinformation minimized if trained facilitators who are content experts help guide the discussions of each small group. Some small group participants indicated that discussion segments ran too long and would have benefitted from a more structured approach. Knowledgeable small group facilitators can help guide participants through key discussion points while accurately resolving any subject-matter questions or errors that arise in conversation.

Given the range of responses to the array of illustrative exercises used in the pilot studies, program planners should select exercises strategically, limiting them in the curriculum to only the few most effective options for their target audience. In an expanded curriculum, instructors could also offer more anecdotal or real-world examples, as requested by some pilot participants, to make the content more accessible and applicable to the local audience.

Finally, faculty should reinforce the availability of strategies to address implicit bias and, if intervention strategies are not covered in detail in the session, provide specific information about upcoming programs, Webinars, or conference calls that will address them. Faculty should also consider providing participants with handouts of easily accessible resources on such strategies (see Lesson Learned #5). Knowing that education on viable interventions is available may attenuate feelings of helplessness regarding the inevitability of implicit bias and may encourage interested individuals to learn more while they are motivated to do so.

If a second session is not possible, planners should ensure that participants leave the program with at least a basic overview of strategies to address implicit bias, and, if possible, provide follow-up opportunities through, for example, conference calls, Web sites, and newsletter articles to learn more about and encourage the practice of various strategies.

5. **Dedicate time to discuss and practice strategies to address the influence of implicit bias.**

Because the pilot programs primarily were introductory in nature, program planners allotted the most time to explaining the concept of implicit bias and how it might influence a person’s decisions and actions. Extensive time was spent on the science because program planners were not sure how receptive the audience would be to the concept of implicit bias. As a consequence, faculty spent relatively less time discussing strategies to address implicit bias. The experience across all three programs, however, demonstrated that once participants learned about the potential of implicit bias to influence their decisions and actions, they were very interested in learning how to address it.

Compared to the science on the existence of implicit bias and its potential influence on behavior, the science on ways to mitigate implicit bias is relatively young and often does not address specific applied contexts such as judicial decision making. Yet, it is important for strategies to be concrete and applicable to an individual’s work to be effective; instructions to simply avoid biased outcomes or respond in an egalitarian manner are too vague to be helpful
Helping Courts Address Implicit Bias: Resources for Education

(Dasgupta, 2009). To address this gap in concrete strategies applicable to court audiences, the project team reviewed the science on strategies and identified their potential relevance for judges and court professionals. The team also conducted a small group discussion with judges and judicial educators (referred to as the Judicial Focus Group or JFG) to discuss potential strategies.

Appendix G includes four tables. The first, “Combating Implicit Bias in the Courts: Understanding Risk Factors” identifies and describes conditions that exacerbate the effects of implicit bias on decisions and actions. The risk factors include:

- the presence of certain emotional states,
- ambiguity in decision-making criteria,
- environmental cues that make the social categories associated with cultural stereotypes more salient,
- low-effort decision-making,
- distracted or pressured decision-making, and
- environments that lack appropriate feedback mechanisms and accountability.

The second table “Combating Implicit Bias in the Courts: Seeking Change” identifies and describes seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions. The strategies ask people to:

- raise awareness of implicit bias (this in and of itself is insufficient to mitigate the effects of implicit bias on judgment and behavior),
- seek to identify and consciously acknowledge real group and individual differences,
- routinely check thought processes and decisions for possible bias,
- identify sources of stress and remove them from or reduce them in the decision making environment,
- identify sources of ambiguity in the decision making context and establish a structure to follow before engaging in the decision making process,
- institute feedback mechanisms; and
- increase exposure to stigmatized group members and/or counter-stereotypes and reduce exposure to stereotypes.

The table briefly summarizes empirical findings that support the strategies and offers concrete suggestions, both research-based and extrapolated from existing research, to implement each strategy. Some of the suggestions in the table focus on individual actions to minimize the influence of implicit bias, and others focus on organizational efforts to (a) eliminate situational or systemic factors that may engender implicit bias and (b) promote a more egalitarian court culture.

15 In addition, some seemingly intuitive strategies such as directing individuals to suppress or ignore stereotypes can actually result in more stereotypic thoughts (Macrae, Bodenhausen, Milne, & Jetten, 1994).
The third and fourth tables provide summaries of the research findings cited in the preparation of the first two tables for those interested in better understanding the basis for the risk factors and suggested strategies. The project team offers the four tables as a resource for judicial educators developing programs on implicit bias with the understanding that the information should be reviewed and revised as new research and lessons from the field expand current knowledge.

The implicit bias intervention strategies provided in Appendix G rely on an individual’s self-awareness (the ability to see how one’s own decisions may be biased) and self-control (the ability to regulate one’s own thoughts and behavior). Some audience members may already possess these skills at a high level, whereas others may need to refine them. Judicial educators should consider whether exercises to enhance these two skills are necessary for participants to apply implicit bias intervention strategies.

6. **Develop evaluation assessment with faculty.**

Evaluating the effectiveness of the programs proved difficult for two main reasons. First, although each program covered roughly the same topics, the programs varied in the extent of time devoted to each topic. Thus some of the pre- and post-program assessment questions focused on topics that were covered in detail in a particular program, and others did not address those same topics or did so in a more cursory manner. Although the project team designed evaluation questions in consultation with program coordinators, this did not guarantee that program faculty sufficiently addressed the material that appeared on the pre- and post-tests. As a result, the project team could not determine whether poor performance on an assessment question was due to specific program content and/or delivery problems or a lack of congruence between the content of the educational program and the content of the evaluation questions. Program coordinators, faculty, and evaluators should agree on the key “takeaways” participants should have when the program is completed and develop assessment questions to address those topics. Faculty should cover the “takeaway” topics in sufficient detail such that participants could be reasonably expected to answer related assessment questions correctly.

The second evaluation issue was generating assessment items that were neither too easy nor too difficult for participants. For example, in retrospect, the correct answer to the following item was obvious: “In general, do you think that it is possible for judges’ decisions and court staffs’ interactions with the public to be unwittingly influenced by unconscious bias toward particular racial/ethnic groups?” Appendix H discusses the challenges of evaluating programs on implicit bias and offers examples of process, outcome, and impact measures. It also includes a discussion of why the IAT should not be used as a pre- and posttest measure of the effectiveness of a program.
Helping Courts Address Implicit Bias: Resources for Education

References


Web Resources Cited

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National Center for State Courts, Interactive Database of State Programs:  
http://www.ncsc.org/refprograms

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http://www.ncsc.org/SearchState

National Consortium on Racial and Ethnic Fairness in the Courts:  
http://www.consortiumonline.net/history.html

Project Implicit: https://implicit.harvard.edu/implicit/