



Implicit Bias: Should the Legal Community Be Bothered?
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Implicit Bias: Should the Legal Community Be Bothered?

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Introductory note: *While much of the research on implicit bias has focused on Black/White, implicit bias is relevant to all groups, and where groups intersect, bias is likely even more present. As you review this article, we urge consideration of other groups, including those defined by socioeconomics, religion, LGBTQ, gender, disability, age, and other social groupings.*²

The term “implicit bias” has increasingly become part of our common vocabulary.³ If this wasn’t the case before Starbucks garnered national media attention for the arrest of two Black men at its Philadelphia store and its subsequent closing of all of its stores to “train” its employees about implicit bias,⁴ it certainly is now. But what is the fuss about? Should the legal community be bothered to learn about implicit bias and its manifestations? Can it be that we are implicitly biased and making decisions that we might not really endorse? Are there strategies to interrupt and minimize its impact? *Yes, yes, and yes.*

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Yes, We Should Bother to Become Bias-Literate⁵

Being Able to Measure Implicit Bias Is Significant

The Implicit Association Test

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Research Shows That Implicit Bias Can Be Interrupted with Evidence-Based Training and Strategies

Successful Training Has Certain Attributes¹²⁶

A Personal Closing Note

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Yes, We Should Bother to Become Bias-Literate⁵

“There is a mountain of evidence—independent of any single test—that implicit bias is real . . .and it matters.”⁶ For the legal community, the significance of the scientific research measuring implicit bias is that it allows us to conceptually understand the intransigent manifestations of inequality and inequity that previously defied explanation—that is, defied explanation if we don’t assume (as we do not) that we are all sexists, racists, etc. What’s more, we should be encouraged to bother about implicit bias by the emerging research: “As disturbing as this evidence is, there is too much of it to be ignored. Moreover, recent discoveries regarding malleability of bias provide the basis to imagine both individual and institutional change.”⁷

But really, why bother? We answer that the manifestations of its impact are too great to ignore. In our training on implicit bias, we sometimes answer, “It could save your mother’s life,” and it could.⁸ This is an impact hard to ignore, as are, for our purposes here, the many manifestations of implicit bias in our legal system discussed in later sections.

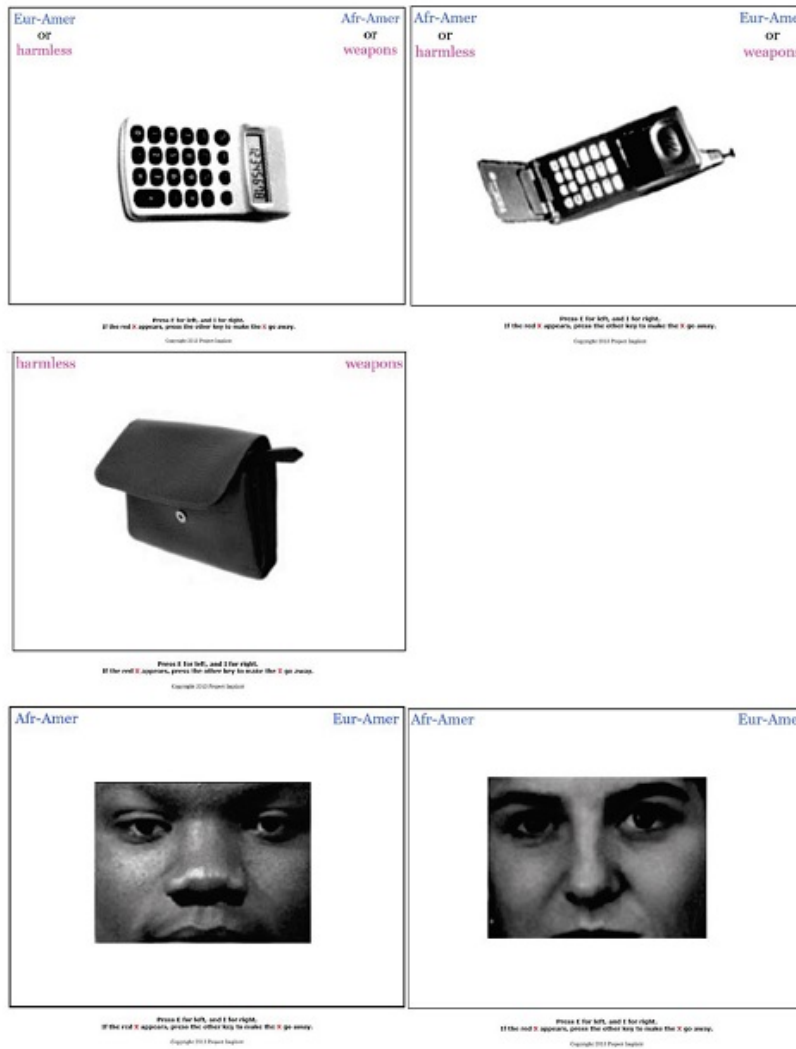
Being Able to Measure Implicit Bias Is Significant

Twenty-five years ago, if we wanted to know if someone was biased, we asked.⁹ While this yielded some information, it was likely to be shaded by the responders’ not wanting to admit bias or perhaps not even recognizing their own biases.¹⁰ In the 1990s, University of Washington Professor Dr. Tony Greenwald and his colleagues put forward a way to look for bias that *measured* rather than asked, a way that could “reveal attitudes and other automatic associations even for subjects who prefer not to express those attitudes”: the Implicit Association Test (IAT).¹¹

The Implicit Association Test

The IAT is typically taken online, where takers are presented with prompting words or pictures and match them with specified categories. Readers can find and take this test in a variety of categories at the Project Implicit website.¹² To illustrate, the prompts and categories in the IAT for weapons/race look like this:¹³

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The IAT identifies bias based on the comparative speed with which we respond to prompts to pair a prompt with an attribute.¹⁴ One thing flows from another without conscious thought. For example, we are quicker to associate the name “Greg” with “male” and the name “Emily” with “female” than the reverse, or in the illustration, “European Americans” with “Harmless Objects.”¹⁵

Millions of people taking the IAT have shown that implicit biases are pervasive.¹⁶ Aggregated results indicate that a majority demonstrate an automatic preference for European-American over African-American,¹⁷ for women and families over women and careers,¹⁸ for women and liberal arts over women in science,¹⁹ for abled over disabled.²⁰ As these results suggest, there is a preference for the dominant group. At the same time, IAT results show that “members of stigmatized groups (e.g., Black people, gay people, older people) tend to have more positive implicit attitudes toward their own groups than do people who are not in the group, but that there is still a moderate preference for the more socially valued group.”²¹ Project Implicit explains, “We think that this is because stigmatized group members develop negative associations about their group from their cultural environments, but also have some positive associations because of their own group membership and that of close others.”²²

Measuring Implicit Bias Has Focused Our Attention on Its Many Manifestations in Our Legal System

While Starbucks is recent news, the work of the legal community, including several among us who are both psychologists and lawyers, is of longer-standing.²³ Indeed, lawyers and judges had much to consider as the science on implicit bias emerged and grew more robust. Disproportionality—where a group is out of proportion to its representation in the population²⁴—is and has long

been present in negative ways in many aspects of society including education, employment, housing, and certainly law. We know that justice is not equally perceived among all groups in our society.²⁵ Not surprisingly, our criminal justice system²⁶ offers a deep and disturbing illustration, where decisions at each juncture show indication of being influenced by implicit bias: arrest,²⁷ prosecution,²⁸ defense²⁹ juries,³⁰ convictions,³¹ pre-sentence reports,³² sentencing,³³ including death penalties,³⁴ and prison populations.³⁵ We know that the school-to-prison pipeline approaching these junctures is also disproportionately populated with LGBTQ children, children of color, and children with disabilities, who are typically disproportionately

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arrested, referred, detained (longer), charged, found delinquent, and confined.³⁶ As Judge Bennett summarizes, “What aspects of today’s civil and criminal justice systems might be implicated and affected by participants’ implicit biases? Everything and everybody.”³⁷

Measuring Implicit Bias Provides Insight into Its Negative Manifestations in Our Legal System and to Opportunities for Change

There has (at least until very recently)³⁸ been a societal trend against the explicit expression of racism and other forms of bias.³⁹ Despite this trend, the manifestations of differences and inequities among groups remain long-standing and seemingly intransigent. Nor can these disproportionalities be dismissed as arising because of the different (bad) behavior of certain groups.⁴⁰ Some researchers have called this a riddle:⁴¹ If the lessening of explicit bias is real, and if our decisions are being made in good faith, why does inequity endure, why is change taking so long?⁴² One answer: As psychology research in recent decades suggests, *one reason for this divide is that much discrimination may be driven by implicit bias rather than explicit prejudice.*⁴³

This answer—that the disparities in equity and justice might arise from implicit unintended bias, rather than explicit, even if unstated, bias—offered an important explanation. We were making decisions that were part of systems that showed bias even though those decisions were not necessarily consistent with our values and may not even have been known to us.⁴⁴ Later work from Drs. Greenwald and Pettigrew offered a further important insight when they suggested that differences and inequities might come *less from bias against* someone in our out-groups than from the results of *biases helping* someone in our in-group.⁴⁵

What Does Implicit Bias really Mean?

Implicit bias and its correlates in group dynamics and communication are all about our quick, unconscious responses, sometimes referred to as “System 1 thinking,” distinguished from more deliberate and conscious “System 2 thinking.”⁴⁶

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Implicit and Explicit Bias defined

Explicit bias is a preference deliberately generated and consciously experienced as one’s own.⁴⁷ For example, when the Miami police circulated a game of “Black Monopoly,” where every square was marked “Go to Jail,” that was explicit bias.⁴⁸ *Implicit bias* is an association or preference that is not consciously generated and is experienced without awareness.⁴⁹ It reflects our life experience and social context, from our culture, from the media, from all around us all the time,⁵⁰ what Drs. Greenwald and Banaji have described as “unsought cultural expertise, condensed into stereotypes and attitudes.”⁵¹ For example, when employers who consciously and sincerely express their intent to hire as equal opportunity employers turn out to call White applicants back 50% more often than African-Americans, this evinces implicit bias.⁵² Or when chatting with a person in a wheelchair, people talk louder, this too is likely implicit bias—they probably don’t consciously believe that all folks in a wheelchair also have hearing disabilities. In some cases, both implicit and explicit biases may be at play. For example, Professor Nicole

Gonzalez Van Cleve's *Crook County: Racism and Injustice in America's Largest Criminal Court*⁵³ is a tour de force of explicit bias, but reviewing the book, Professor L. Song Richardson offers the additional observation that together with obvious racism, "under conditions of systemic triage, implicit racial biases are likely to thrive."⁵⁴

Implicit bias may well be disassociated from our consciously held attitudes and beliefs.⁵⁵ As Dr. Mahzarin Banaji and her colleague Dr. Calvin Lai describe this discovery:

[u]sing a variety of methods to get at these associations has led to a striking set of discoveries. Among the most central of these discoveries is that within the same individual mind there exists multiple actors: a deliberative decision-maker who aspires to egalitarian ideals and a less conscious partisan who is attentive to the similarity, familiarity, and social standing of those who are judged.⁵⁶

Describing this new science, MIT Professor of Biology Dr. Nancy Hopkins observed:

If you asked me to name the greatest discoveries of the past 50 years, alongside things like the internet and the Higgs particle, I would include the

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discovery of unconscious biases and the extent to which stereotypes about gender, race, sexual orientation, socioeconomic status, and age deprive people of equal opportunity in the workplace and equal justice in society.⁵⁷

While there is lively debate about the extent,⁵⁸ implicit biases have been found to correlate to some degree with explicit biases and behavior.⁵⁹ In any case, it is clear that implicit biases can and do have real-world consequences in school,⁶⁰ in hiring,⁶¹ in evaluation,⁶² in productivity,⁶³ in court,⁶⁴ or on the street.⁶⁵ For just one illustration, consider Dr. Arin Reeves' study of confirmation bias in partner reviews of two identical legal memos. The memos were labeled "Thomas Meyer, third-year association NYU," with one described as African-American, the other, Caucasian. Reviewing partners, who had agreed to participate in a "writing analysis study," scored the memo 3.2 out of 5 for the African-American version and 4.1 for the White.⁶⁶ The comments were equally telling: for the African-American "Needs lots of work; can't believe went to NYU"; for the Caucasian, "Good analytic skills; generally good writer with potential."⁶⁷

Group Dynamics Are Part of the Implicit Picture⁶⁸

As Dr. Reeves' work suggests, implicit biases relate to our affiliations as members of an in-group and also to our cultural values and social standing. Looking at our implicit responses to in- and out-groups again shows real-life consequences.⁶⁹ Experimental work substituting names on otherwise identical documents or qualifications shows how pervasive these implicit associations can be.⁷⁰ For just a few of many examples: scientific abstracts are judged as "poorer quality" when attributed to a female rather than a male;⁷¹ professors in online courses are evaluated lower when thought to be female,⁷² women and people of color are evaluated lower as leaders than White males.⁷³

What does all this reflect? That we are all part of cultural groups and that we tend to prefer our own. We tend to recognize members of our in-group more quickly and more accurately.⁷⁴ We respond to them more favorably and think it fair that we do so.⁷⁵ We readily connect (or not) when someone appears a certain way—for example, based on age, sex, and race⁷⁶—or is labeled a certain way—for example, American or poor.⁷⁷ In one often-cited experiment, researchers showed participants a video of nine-year old Hannah taking a test, giving different information about her socioeconomic group: those told she "came from a high SES [socioeconomic status] rated her abilities well above grade level, whereas those for

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whom the child was identified as coming from a lower-class background rated her abilities as below grade level."⁷⁸ Our group-related tendencies also implicitly influence memory, so that, for example, we inhibit memory of stereotype-inconsistent aggression

for in-group members⁷⁹ and remember out-group members as more aggressive.⁸⁰ These errors are related not to consciously racist attitudes or preferences, but to participants “systematically and implicitly mak[ing] stereotype-driven memory errors.”⁸¹

We also tend to exaggerate differences between our in-group and others.⁸² For members of our in-groups, we tend to attribute poor behavior to something in the external situation—for example, just bad luck.⁸³ For those who are members of our out-groups, we tend to assign blame dispositionally, genetically (they are all lazy); and even where an out-group member does well, we assign praise based on this being an exceptional case, perhaps due to luck or special advantage.⁸⁴ In this mindset, we are really unlikely to give an out-group member the benefit of the doubt.⁸⁵ Categorizing in this way ignores individuation and leads to what some have described as the ultimate attribution error.⁸⁶ Consider the tendency to believe that women in leadership positions have succeeded against expectations, are lucky, work hard (instead of being competent).⁸⁷ In one of our training sessions, a professor asked the group, “How often have you heard a woman described as a genius?”; the answers: rarely, if ever.⁸⁸ It is easy to see how a profession dominated by more White men than any other group will continue to be a profession dominated by more White men than any other group.⁸⁹

Micromessages Are Part of the Implicit Picture

The effects of implicit biases and group dynamics are reinforced by micromessaging, which itself is often implicit.⁹⁰ Micromessages are small messages—not the kind of thing that would be actionable, but a message nonetheless. Mary Rowe, defining these messages based on her work at MIT in the early 1970s, described them as Saturn’s rings: Each dust particle is small, but cumulatively they obscure the planet.⁹¹

Micromessages can be verbal or nonverbal—what you say or do not say, who you sit next to, what messages or pictures are displayed in your office or courthouse. What is a young woman of color experiencing when she walks into her law school atrium day after day seeing that all of the pictures displayed are White men? Well, no (explicit) bias here; they are all former deans, and they were in

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fact all White men.⁹² Another common example is addressing individuals in some groups by their title (Judge Smith, Dr. Smith) and others by their first name (Julie or Jimmy)⁹³ or traits,⁹⁴ or worse, simply not learning or using their real names at all.⁹⁵ Consider a teacher who decides that a student’s name is too hard to learn and so calls that student “Frank,” all to the amusement of the rest of the class—a microinvalidation to the student, a microaffirmation to the rest who are correctly called by name. In a different context, consider criminal court, as Professor Van Cleve describes defendants: “Defendants are dressed in homogeneous beige jumpers—their “D-O-Cs” (for “Department of Corrections”). Some jumpers are color-coded—yellow, orange, or beige—which denotes the jail or penitentiary location. Sometimes these colors allow professionals to identify a defendant without using a name.”⁹⁶ Another powerful and well-documented example of micromessaging is the tendency to interrupt women more often than men⁹⁷ or to credit men more often than women—again, microinvalidation and insult to the women, microaffirmation to the men.⁹⁸

As these examples suggest, micromessages can be both affirmative, conveying inclusion and respect to some, and negative, conveying exclusion and diminishment to others. What’s more, they are contagious.⁹⁹ If a person in authority or power does not acknowledge someone, others are likely to also ignore that person.¹⁰⁰ And they accumulate to influence engagement, behaviors, and out-comes.¹⁰¹

When Motivated, It Is Possible to Interrupt Implicit Bias and Alter Its Manifestations

A few provisos: This is not what we’re used to; it doesn’t matter how smart we are.

Before addressing bias interruption in earnest, we recognize a few points for context. We know that much of what we are discussing is the antithesis of the “thinking like a lawyer,” System 2 thinking approach we learned in law school. Implicit bias by its very definition is *not* the careful analytical reasoning these watchwords represent. Implicit bias is, well, implicit; it’s human. Not everything is as it seems. If you’ve never done it, try the “monkey business illusion.”¹⁰² Not wanting to be spoilers, we’ll let it speak for itself. Or look at Adelson’s checker-shadow illusion.¹⁰³ For something a little more extended and involving what we might call a social illusion,¹⁰⁴ watch “The Lunch Date” (about ten minutes).¹⁰⁵

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We also note that how smart we are does *not* control how implicitly biased we are and should not lead us to be overconfident in our ability to be fair; believing ourselves objective seems to make us prone to decide otherwise.¹⁰⁶ When Professor Jeff Rachlinski and his colleagues queried judges at a judicial education conference, 97% rated themselves in the top 50% of other judges there with respect to their ability “to avoid racial prejudice in decisionmaking.”¹⁰⁷ Reminiscent of the mathematical impossibility of Garrison Keillor’s Lake Wobegon, where all the children are above average,¹⁰⁸ this was not the reality of the testing.¹⁰⁹ Enough said.

A few (more) provisos: Some situations are particularly susceptible to implicit bias.

When decisions are discretionary or based on ambiguous inputs, “biased judgements are to be expected.”¹¹⁰ That is, the very things that lawyers and judges do all the time are the things most susceptible to implicit bias and to our falling back on our stereotypes.¹¹¹ We are almost always needing to resolve or decide where some information is ambiguous. One classic study that gives a good picture of this is the 1976 “shove,” where participants saw a video of an ambiguous shove. When done by the Black actor, the shove was found hostile or violent; by the White actor, in jest or playing around.¹¹² It’s certainly easy to extrapolate this example to our everyday lives. Think too about our tendency to choose (exercise our discretion) to hire and pay more to those who look like us,¹¹³ or—we couldn’t resist putting in this example—marry those who share our first initials (which Sarah did!).¹¹⁴

Research Shows That Implicit Bias Can Be Interrupted with Evidence-Based Training and Strategies

Although research on techniques to interrupt bias is comparatively recent and conclusions vary,¹¹⁵ change is possible. As psychologist Nilanjana Dasgupta observes, “[T]he path from implicit bias to discriminatory action is not inevitable. People’s awareness of potential bias, their motivation and opportunity to control it, and sometimes their consciously held beliefs can determine whether biases in the mind will manifest in action.”¹¹⁶ Whether or not such efforts can actually change results on the IAT,¹¹⁷ there is “compelling evidence” that recipients of knowledge-based training¹¹⁸ are able “to recognize bias and its consequences for minorities, then address it in the world around them.”¹¹⁹ For example, training on implicit bias and use of bench cards produced a measurable change in judges’

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juvenile detention decisions to meet the stated goal of keeping children with their families.¹²⁰ Consistent with this, training on implicit bias has produced significant results increasing women in STEM fields, not only in changing awareness,¹²¹ but also in actually increasing hiring numbers.¹²²

There is also some indication that interventions that increase awareness (without all of training attributes mentioned above) have some impact. For example, doctors who were aware of the purpose of the IAT study compensated for their implicit biases in delivering appropriate thrombolysis treatment.¹²³ In a different context and scope, researchers recorded a change in implicit bias as a result of the prominence of Black Lives Matter.¹²⁴ Similarly, though not focused specifically on implicit bias, some remarkable work by Dr. Jason Okonofua and his colleagues shows that relatively brief training interventions to induce an empathetic mindset can change school discipline results.¹²⁵

Successful Training Has Certain Attributes¹²⁶

So what are the aspects of successful training? What should we be looking for?¹²⁷ Let's start with what it's not: It's *not* a one-time one-hour presentation.¹²⁸ New York City, for example, mandates eight hours for its police officers and recruits.¹²⁹ It's not, to paraphrase Dr. Lori Fridell, the leading trainer for Fair and Impartial Policing, your grandparents' diversity training,¹³⁰ which has often been found unsuccessful.¹³¹ And perhaps most important to keep in mind, it's not something that is necessarily going to change your implicit biases as measured on an IAT. Then, what is successful training? From our experience to date, we'd say:



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- It starts from a point of no blame; implicit bias is human, we are all human.¹³²
- It considers the audience and its relationship to the trainer(s).¹³³
- It is engaging, interactive, and encourages reflection.
- It is an evidence-based approach.¹³⁴
- It couples awareness with specifically identified strategies to interrupt bias appropriately matched to participants' situations.¹³⁵

More specifically, we have found success where training is structured so participants:

- become aware of implicit bias, group preferences, and micromessages and their manifestations;
- learn to define implicit bias and anticipate triggering situations;
- learn to identify critical decision-making points relevant to their needs (it doesn't matter whether you like blueberry or squash pie, but it does matter when you are deciding between discipline choices),¹³⁶
- learn to evaluate the potential harm/benefit of bias interrupting interventions;¹³⁷
- recognize the critical role of ambiguity so as to avoid the likelihood of falling back on stereotypes;
- recognize the critical significance of discretion and provide strategies for blinding or limiting discretion where possible,¹³⁸
- identify metrics to assure accountability;
- provide resources and offer opportunity to practice and revisit the training/strategies.

These strategies are both individual- and system-oriented, including those from implicit bias-based research and other research on changing habits. By way of specific examples, we suggest training on a combination of strategies, including individuating,¹³⁹ using checklists or pre-commitment to criteria to limit discretion,¹⁴⁰ using implementation intentions,¹⁴¹

encouraging diverse contact and counter-stereotyping,¹⁴² flipping or otherwise taking different perspectives,¹⁴³ slowing down decision making,¹⁴⁴ structuring opportunities for seeking more evidence/information to clarify ambiguity,¹⁴⁵ and even eating lunch.¹⁴⁶ Again, this

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list offers some illustration of skills developed in training, but is not inclusive and is, of course, subject to new knowledge and particular settings. As Drs. Lai and Banaji have recently concluded:

Evidence of implicit bias has raised the bar on the challenges faced by modern democracies. . . . Understanding that discrimination is possible without an intention to harm is difficult to grasp and even harder to solve given the presence of legal systems founded on the idea of intent as pivotal in determining justice. However, recent discoveries on the possibility of addressing the pernicious consequences of implicit bias show that what may seem to be inevitable effects of implicit bias need not be so. The research we have reviewed show individual minds to be sensitive to change given the right inputs.¹⁴⁷

A Personal Closing Note

In our own work on this, we always give people “homework.” Here we suggest two assignments: First, take the IAT if you haven’t already tried it.¹⁴⁸ Second, watch the media to grow your understanding of how we acquire “unsought cultural expertise, condensed into stereotypes and attitudes.”¹⁴⁹ The following iconic pictures from Hurricane Katrina are an illustration to get you started:¹⁵⁰

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“A young man walks through chest deep flood water after looting a grocery store in New Orleans on Tuesday, Aug. 30, 2005. Flood waters continue to rise in New Orleans after Hurricane Katrina did extensive damage when it made landfall on Monday. (AP Photo/Dave Martin)”



“Two residents waded through chest-deep water after finding bread and soda from a local grocery store after Hurricane Katrina came through the area in New Orleans, Louisiana. (AFP/Getty Images/Chris Graythen)”

For those of you already involved in this area, we urge you to continue your work; for those of you relatively new to this area, we especially encourage you to get some training, try some of the homework. We invite all of you to stay in touch with us on ideas expressed here or initiatives you have taken.

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Judge **Bernice B. Donald** was appointed to the U.S. Court of Appeals for the Sixth Circuit in 2011. Prior to service on the U.S. Court of Appeals, she served on the U.S. District

Court for more than fifteen years. She received her law degree from the University of Memphis, Cecil C. Humphreys School of Law. She has been active in the American Bar Association, the National Association of Women Lawyers, and her state and local community, and has received over 100 awards for professional, civic, and community service. Professor Emerita **Sarah E. Redfield** is a professor emerita at the University of New Hampshire School of Law. Her primary teaching areas are education and administrative law, and her continuing scholarship focuses on diversity and inclusion, with a particular focus on implicit bias. She has also served on the faculty of PLI's California MCLE Marathon 2018: Current Developments in Legal Ethics-Competence Issues-Elimination of Bias. Both authors are leaders in the American Bar Association Criminal Justice Section's Implicit Bias Initiative.

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Notes

A note on notes: One aspect of implicit bias is invisibility of the stigmatized individual. We make a small step toward addressing this by trying to include all authors in footnotes rather than reverting to *The Bluebook's* suggested "et al."

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1. Bernice Donald, U.S. Court of Appeals for the Sixth Circuit, and Sarah Redfield, Professor of Law, University of New Hampshire, worked together on the ABA's book on implicit bias, which work underlies this piece. We once again thank all of our co-authors from whom we continue to learn. *ENHANCING JUSTICE: REDUCING BIAS* (Sarah E. Redfield ed., 2017).
 2. See generally Michelle Benedetto Neitz, *When Myths Become Beliefs: Implicit Socioeconomic Bias in American Courtrooms*, in *ENHANCING JUSTICE*, *supra* note 1, at ch. 5. Court opinions discussing bias, including implicit bias, are beyond the scope of this article.
 3. See, e.g., KIRWAN INST., *STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW* (2013). This annual review is available for years 2013 through 2017 on the Kiriwan Institute website. See *Implicit Bias Review*, KIRWAN INST., <http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/implicit-bias-review/> (last visited Oct. 16, 2018).
 4. See, e.g., *Starbucks Closes More Than 8,000 Cafes for Racial Bias Training*, *GUARDIAN* (May 29, 2018), www.theguardian.com/business/2018/may/29/starbucks-coffee-shops-racial-bias-training; Diana Stancy Correll, *Manhattan Lawyer Who Threatened to Call ICE on Spanish Speakers in Viral Video Faces Formal Complaint*, *WASH. EXAMINER* (May 17, 2018), www.washingtonexaminer.com/news/manhattan-lawyer-who-threatened-to-call-ice-on-spanish-speakers-in-viral-video-faces-formal-complaint.
 5. This term is attributed to Ruta Sevo & Daryl E. Chubin, *Bias Literacy: A Review of Concepts in Research on Discrimination* (Feb. 2008) (describing bias literacy as first step to change bias).
 6. Keith Payne, Laura Niemi & John M. Doris, *How to Think About "Implicit Bias"*, *SCI. AM.*, Mar. 27, 2018 (quotations merged); see also, e.g., Mahzarin R. Banaji & Anthony G. Greenwald, *The Implicit Revolution: Reconceiving the Relation Between Conscious and Unconscious*, 72 *AM. PSYCHOL.* 861 (2017); Calvin K. Lai & Mahzarin R. Banaji, *The Psychology of Implicit Intergroup Bias and the Prospect of Change* 1, 4 (2017) (penultimate draft, on file with Harvard University) (both reviewing and summarizing research), www.people.fas.harvard.edu/~banaji/research/publications/articles/2017_Lai.pdf.
 7. Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 *CALIF. L. REV.* 1063, 1064 (2006).
 8. Jessica Nordell, *A Fix for Gender Bias in Health Care?*, *N.Y. TIMES*, Jan. 11, 2017.

9.

See, e.g., John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in PREJUDICE, DISCRIMINATION, AND RACISM 91 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

10.

See, e.g., David M. Amodio & Saaid A. Mendoza, *Implicit Intergroup Bias: Cognitive, Affective, and Motivational Underpinnings*, in HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS 356 (B. Gawronski & B.K. Payne eds., 2010).

11.

Anthony G. Greenwald, Debbie E. McGhee & Jordan L.K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465 (1998); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

12.

PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Oct. 17, 2018).

13.

See *Take a Test*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Oct. 16, 2018) (agreeing to site terms on this web page directs users to a menu page of test options, including the “Weapons IAT” test); see also Lai & Banaji, *supra* note 6, at 1, 5 (indicating that the data “show associations of Black American with danger and White American with safety”).

14.

See, e.g., *About the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html> (last visited Oct. 16, 2018) (“The IAT measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key.”).

15.

See, e.g., Greenwald, *supra* note 11, at 1464–65.

16.

See, e.g., Brian A. Nosek, Frederick L. Smyth, Jeffrey J. Hansen, Thierry Devos, Nicole M. Lindner, Kate A. Ranganath, Colin Tucker Smith, Kristina R. Olson, Dolly Chugh, Anthony G. Greenwald & Mahzarin R. Banaji, *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 36 (2007) [hereinafter *Pervasiveness*].

17.

How Do People Score on the Race IAT?, EXPLORE THE DATA: IMPLICIT ASSOCIATION TEST, <https://pi-liz.shinyapps.io/explore-iat/> (last visited Oct. 16, 2018) [hereinafter *Race IAT*].

18.

General compiled results for all takers are available to individual test-takers who complete the test; results cited here were from report to authors.

19.

Race IAT, *supra* note 17.

20.

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Id.; see also *Race IAT*, *supra* note 17 (selected for race of test takers); cf. Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 169 (Theodore M. Newcomb & Eugene Hartley eds., 1947).

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Erin J. McCaluey, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, 107 AM. J. PUB. HEALTH 1977, 1977 (2017) (people with disabilities have "higher cumulative probability of arrest" and Blacks with disabilities have "highest cumulative probability of arrest"); PHILLIP ATIBA GOFF, TRACEY LLOYD, AMANDA GELLER, STEVEN RAPHAEL & JACK GLASER, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE 4 (July 2016), http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf. See generally *Racial Disparity*, THE SENTENCING PROJECT, www.sentencingproject.org/issues/racial-disparity/ (last visited Oct. 16, 2018).

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See, e.g., Mark Bennett & Victoria Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745 (2018); Levinson Cai & Young, *supra* note 20, at 190, 207 (finding participants "held implicit associations between Black and Guilty" [and] "these implicit associations were meaningful-they predicted judgments of the probative value of evidence").

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Lindsay M. Perez, Monica K. Miller, Alicia Summers & Shawn C. Marsh, *Assessing Interventions to Reduce Judicial Bias*, in ENHANCING JUSTICE, *supra* note 1, ch. 13; Jesse Russell & Alicia Summers, *Reflective Decision-Making and Foster Care Placements*, 19 PSYCHOL., PUB. POL'Y & L. 2 (2013).

121.

See, e.g., Carnes, *supra* note 44, at 1, 9, 11 (finding 75% of the faculty described planned or actual change as a result of the training); Molly Carnes, Patricia G. Devine, Linda Baier Manwell, Angela Byars-Winston, Eve Fine, Cecilia E. Ford, Patrick Forscher, Carol Isaac, Anna Kaatz, Wairimu Magua, Mari Palta & Jennifer Sheridan, *The Effect of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial*, 90 ACAD. MED. 221 (2015) (demonstrating "significantly greater changes post intervention for faculty in experimental versus control departments on several survey outcome measures, including self-efficacy to engage in gender-equity-promoting behaviors").

122.

See, e.g., Patricia G. Devine, Patrick S. Forscher, William T.L. Cox, Anna Kaatz, Jennifer Sheridan & Molly Carnes, *A Gender Bias-Breaking Intervention Led to Increased Hiring of Female Faculty in STEM Departments*, 73 J. EXPERIMENTAL SOC. PSYCHOL. 211, 213–14 (2017) (reporting an 18% increase in hiring women post intervention); Jessi L. Smith, Ian M. Handley, Alexander V. Zale, Sara Rushing & Martha A. Potvin, *Now Hiring! Empirically Testing a Three-Step Intervention to Increase Faculty Gender Diversity in STEM*, 65 BIOSCIENCE 1084 (2015) (showing successful increase in STEM faculty using a three-part intervention).

123.

Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I. Iezzoni & Mahzarin R. Banaji, *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007).

124.

Jeremy Sawyer & Anup Gampa, *Implicit and Explicit Racial Attitudes Changed During Black Lives Matter*, 44 PERSONALITY & SOC. PSYCHOL. BULL. 1039, 1039 (2018) (“After controlling for changes in participant demographics, overall implicit attitudes were less pro-White during BLM than pre-BLM, became increasingly less pro-White across BLM, and were less pro-White during most periods of high BLM struggle.”).

125.

Jason A. Okonofua, David Paunesku & Gregory M. Walton, *Brief Intervention to Encourage Empathic Discipline Cuts Suspension Rates in Half Among Adolescents*, 113 PNAS 5221, 5223–24 (2016); see also Jillian Katri Whatley, *Implicit Bias As a Contributing Factor to Disproportionality of African Americans in Special Education: The Promise of a Bias Literacy Intervention* (2017) (PhD thesis, Mercer University) (finding use of IAT and “Bias Literacy Intervention” increased personal objectivity and teacher expectations).

126.

Illustration and discussion from Bernice B. Donald, Judge, U.S. Court of Appeals for Sixth Circuit, Jason Nance, Prof. of Law, Univ. of Fla., & Sarah E. Redfield, Prof. of Law, Univ. of N.H.), *Enhancing Justice, Reducing Bias: Implicit Bias Concepts and Strategies* (Apr. 5, 2018) (presentation at Federal Bar Association, Tampa Bay, on file with author); Sarah E. Redfield, Prof. of Law, Univ. of N.H., *Implicit Bias Law Student Orientation* (Aug. 23, 2018) (presentation at Vermont Law School, on file with author).

127.

See Victoria C. Plaut & Christina S. Carbone, *Considering Audience Psychology in the Design of Implicit Bias Education Making*, in ENHANCING JUSTICE, *supra* note 1, ch. 10.

128.

See, e.g., Dovidio *supra* note 68, at 47; TEDx Talks, *TEDxHampshireCollege - Jay Smooth - How I Learned to Stop Worrying and Love Discussing Race*, YouTube (Nov. 15, 2011), www.youtube.com/watch?v=MbdxeFcQtaU (entertaining view of this point).

129.

A Rare Look Inside NYPD's Implicit Bias Training, CBS NEWS (Aug. 17, 2018) (“We can’t train enough . . .”), www.cbsnews.com/news/nypd-rare-look-inside-police-implicit-bias-training/.

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Lorie Fridell, *This Is Not Your Grandparents' Prejudice: The Implications of the Modern Science of Bias for Police Training*, TRANSLATIONAL CRIMINOLOGY 10, 11 (Fall 2013), <https://cebcp.org/wp-content/TCmagazine/TC5-Fall2013>.

131.

See, e.g., Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (2016). But see Katerina Bezrukova, Chester S. Spell, Jamie L. Perry & Karen A. Jehn, *A Meta-Analytical Integration of over 40 Years of Research on Diversity Training Evaluation*, 142 PSYCHOL. BULL. 1227, 1227 (2016) (“our analysis does reveal that successful diversity training occurs”).

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Corinne A. Moss-Racusin, Christina Sanzari, Nava Caluori & Helena Rabasco, *Gender Bias Produces Gender Gaps in STEM Engagement*, SEX ROLES 1 (2018).

133.

See, e.g., Plaut & Carbone, *supra* note 127, at 259.

134.

We particularly reference bias literacy as developed in the ADVANCE initiative to increase women in STEM, which work has shown demonstrable results. We are grateful for and respectful of their work. See, e.g., Isaac, *supra* note 87, at 311, 314, 316 (describing education model).

135.

See, e.g., Bezrukova, *supra* note 131, at 1227 (finding that “positive effects of diversity training were greater when training was complemented by other diversity initiatives, targeted to both awareness and skills development, and conducted over a significant period of time”).

136.

See, e.g., Frances Vavrus & Kim Marie Cole, *“I Didn’t Do Nothin’”: The Discursive Construction of School Suspension*, 34 URB. REV. 87 (2002) (illustrating emphasis of key decision points).

137.

See, e.g., Dr. Stephanie A. Goodwin, Dir. Faculty Dev. & Leadership, Wright State Univ., *Speaking Up to Bias: What’s a Bystander to Do?* (May 5, 2018) (presentation at Univ. of N.H.).

138.

Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000) (describing the impact of having musicians audition for behind a visual screen as significantly increasing number of women).

139.

See, e.g., Galen V. Bodenhausen, Sonia K. Kang & Destiny Peery, *Social Categorization and the Perception of Social Groups*, in SAGE HANDBOOK OF SOCIAL COGNITION CH. 16, at 6–7 (Susan T. Fiske & C. Neil Macrae eds., 2012) (describing significance of heterogenous attributes and salient context).

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Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474 (2005) (discussing how criteria for a sheriff's position address Michael, Michelle applications).

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E.g., Marieke A. Adriaanse, Peter M. Gollwitzer, Denise T. D. De Ridder, John B. F. de Wit & Floor M. Kroeseet, *Breaking Habits with Implementation Intentions: A Test of Underlying Processes*, 37 J. PERSONALITY & SOC. PSYCHOL. BULL. 502, 510 (2011) (explaining that implementation intention can overcome habits when goal motivated).

142.

See, e.g., Shaki Asgari, Nilanjana Dasgupta & Nicole Gilbert Cote, *When Does Contact with Successful In-group Members Change Self-Stereotypes? A Longitudinal Study Comparing the Effect of Quantity vs. Quality of Contact with Successful Individuals*, 41 SOC. PSYCHOL. 203, 203 (2010).

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David Broockman & Joshua Kalla, *Durably Reducing Transphobia: A Field Experiment on Door-to-door Canvassing*, 352 Sci. 220 (Apr. 8, 2016).

144.

E.g., ATUL GAWANDE, THE CHECKLIST MANIFESTO (2009).

145.

E.g., Thomas C. Mann & Melissa J. Ferguson, *Reversing Implicit First Impressions Through Reinterpretation After a Two-day Delay*, 68 J. EXPERIMENTAL SOC. PSYCHOL. 122 (2017).

146.

Shai Danziger, Jonathan Levav, Liora Avnaim-Pesso & Daniel Kahneman, *Extraneous Factors in Judicial Decisions*, 108 PNAS 6889 Fig. 1 (2011) (discussing that outcomes vary depending on breaks).

147.

Lai & Banaji, *supra* note 6, at 19.

148.

PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Oct. 17, 2018); see also text at note 12, *supra*.

149.

Banaji & Greenwald, *supra* note 6, at 867.

150.

Both of these photos were published in 2005 on Yahoo.com's news page in its coverage directly following Hurricane Katrina. The Associated Press photo caption used "looting," and the Agence France-Presse photo caption used "finding." See, e.g., Van Jones, *Black People "Loot" Food . . . White People "Find" Food*, HUFFPOST (Sept. 1, 2005), www.huffngtonpost.com/van-jones/black-people-loot-food-wh_b_6614.html.