

Achieving an Impartial Jury (AIJ) Toolbox

INTRODUCTION to the AIJ Project & Toolbox

The ideal of a fair and impartial jury is enshrined in the American ethos.¹ But achieving this ideal has remained elusive.² Many years of research focusing on the judicial system demonstrates that, at nearly every point, from school discipline³ to death sentences,⁴ results are unduly skewed along lines of race, ethnicity, or other group identity.⁵ These results persist despite the deep and

¹See, e.g., U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”); see also U.S. CONST. amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved”); *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (“The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.”); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) (“And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?”); AM. BAR ASS’N, *PRINCIPLES FOR JURIES AND JURY TRIALS* (2005), Principle 11, at 13–17.

² See generally, e.g., Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361 (2012); Equal Justice Initiative, *Illegal Discrimination in Jury Selection: A Continuing Legacy* 6, 38–40 (2010), available at <http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf>. See also Dennis J. Devine & Laura D. Clayton, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH. PUB. POL’Y & L. 622 (2001) (offering literature review and concluding, “To summarize, the pattern is overwhelmingly clear: Defendant race and victim race are related to the decisions of juries in the sentencing phase of capital trials.”); Leslie Ellis & Shari Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1033, 1038–39 (2003) (discussing perceptions of fairness and the legitimizing value of diversity of juries).

³ See, e.g., U.S. Dep’t of Educ. Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot: School Discipline* (Mar. 21, 2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

⁴ *Race and the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/race-and-death-penalty> (last visited Mar. 24, 2015) (cumulating data and research and summarizing, “Racial bias has always been a significant issue in death penalty debates. There have been many careful statistical studies indicating that race plays a significant role in determining who lives and who dies.”).

⁵ See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* ch. 3 (2010); Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON 1017 (2012), available at <http://qje.oxfordjournals.org/content/127/2/1017.full.pdf+html>; Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157 (2013) (cumulating research in criminal justice); Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin,

long-standing commitment of the bench and bar to eliminate bias in our legal institutions.⁶

Emerging social and neuroscience research offers a new and promising approach to achieve greater impartiality by focusing more on *implicit* bias than on *explicit* bias.⁷ The American Bar Association (ABA) has been a leader in applying aspects of this research in various practice settings to reduce bias.⁸

Continuing this leadership, the *Achieving an Impartial Jury (AIJ)* project focuses on implicit bias in the context of the jury system and offers tools to address its impact.⁹ Funded by an ABA Enterprise Grant, implementation of the *AIJ Project* was led by the Criminal Justice Section, the Section of Litigation, several ABA diversity entities, and a strong Advisory Group of leaders from the social sciences, the legal academy, the ABA, and the practicing bench and bar.¹⁰

This *Toolbox* is the core of the *AIJ Project*. Determining the contents of the *Toolbox* was an evolutionary process that began with a review of the

Implicit Bias in the Courtroom, 59 UCLA L. REV. 1124, 1135–49 (2012) (reviewing points from first encounter with police to sentencing and also reviewing civil litigation); Sarah E. Redfield, Salma Safiedine & Sarina Cox, *Voir Dire*, in THE STATE OF CRIMINAL JUSTICE (2013) (cumulating discussion re: jury selection and voir dire); As these few references suggest, the literature is extensive.

⁶ See, e.g., AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT, Cannons 1–2, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html (last visited Mar. 24, 2015); *Id.* R. 2.2; (“A judge shall . . . perform all duties of judicial office fairly and impartially.”); *Id.* R. 2.3. (A) (“A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”); AM. BAR ASS'N JUDICIAL DIVISION, PERCEPTIONS OF JUSTICE SUMMIT REPORT (Mar. 14–15 2013); Pamela Casey, Roger K. Warren, Fred L. Cheesman & Jennifer K. Elek, *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64 (2013), available at <http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1Casey.pdf>. See generally, e.g., Kevin Burke & Steven Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007); Tom R. Tyler, *Procedural Justice and the Court*, 44 CT. REV. 26 (2007). See also *infra* note 12 and accompanying text.

⁷ See, e.g., R. Richard Banks, Jennifer L. Eberhardt & Leet Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); Kang et al., *supra* note 5, at 1124, 1149.

⁸ E.g., Am. Bar Ass'n Criminal Justice Section, *Building Community Trust Model Curriculum*, A.B.A., http://www.americanbar.org/groups/criminal_justice/pages/buildingcommunity.html (last visited Mar. 24 2015); AM. BAR ASS'N NAT'L TASK FORCE ON STAND YOUR GROUND LAWS, PRELIMINARY REPORT AND RECOMMENDATIONS (Aug. 29, 2014), available at http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_justice/aba_natl_task_force_on_syg_laws_preliminary_report_program_book.authcheckdam.pdf; Am. Bar Ass'n Section of Litigation Task Force on Implicit Bias, *Implicit Bias Toolbox & Training Manual*, A.B.A. <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox.html> (last visited Mar. 24 2015).

⁹ See generally Sarah E. Redfield & Salma Safiedine, *Achieving an Impartial Jury*, in THE STATE OF CRIMINAL JUSTICE 2012 (summarizing issues).

¹⁰ See Appendix A.

literature,¹¹ and engaged large numbers of experts in the academy and among the practicing bench and bar in both formal and informal interviews, discussions, and peer review. These early conversations led to a focus on judges, based, in part, on their commitment to an unbiased judicial process and, in part, on their role as the permanent and sustaining figure in the courtroom.¹² Versions of the *Toolbox* were piloted and presented in courts and other legal forums across the country, and feedback informed the version presented here.¹³ The feedback across this wide range of practices and locations was diverse, and helped us to coalesce around a rich set of tools that offer courts options for best practices.

The *AJ Tool* includes:¹⁴

- **RECOMMENDED ORIENTATION MATERIALS:** This preliminary section offers a short set of materials that provide background on the concept of implicit bias generally and in court settings. Additional extensive

¹¹ See generally, e.g., Justin D. Levinson, Danielle M. Young, & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 19–24 (Justin D. Levinson & Robert J. Smith eds. 2012); KIRWAN INSTITUTE & CHERYL STAATS, *STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW* (2014), available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf>; KIRWAN INSTITUTE & CHERYL STAATS, *STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW* (2013), available at http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf.

¹² See, e.g., AM. BAR ASS'N, *MODEL CODE OF JUDICIAL CONDUCT*, R. 2.3 (“(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.; (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.”), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_3biasprejudiceandharassment.html.

¹³ Formal pilots were held in North Carolina, California, and Washington. Additional informational sessions and interviews were held over a year and a half in conjunction with ABA midyear and annual meetings, with ABA committee meetings, and with meetings of other groups such as the Federal Judicial Center. In addition, several members of the Advisory Group reviewed the drafts of this material as they developed, and, throughout, Professor Redfield received feedback from the Advisory Group and from a significant number of judges and bar leaders by phone and email.

¹⁴ There are, of course, many areas that were beyond the scope of this effort. One needs particular mention, *Batson*. The issues raised by and surrounding *Batson* are many and longstanding, but a decision was made in the review process for this project that they were regrettably beyond its scope. While *Batson* is mentioned at some points here, it is the hope that other projects can focus on these concerns with particularity. *Batson v. Kentucky*, 476 U.S. 79 (1986).

research and articles in the field are further reflected in the Additional Materials Section as well as by the Bibliography at Appendix B.

- **INTRODUCTION TO THE CONCEPT OF IMPLICIT BIAS:** This section offers a brief overview of the social science and its applications.
- **THE MINDFUL COURTROOM CHECKLIST:** Checklists are often identified as a known de-biasing technique, and this checklist offers one illustrative list focused on courtroom dynamics.
- **SUGGESTED JURY INSTRUCTIONS:** While developing a jury instruction related to implicit bias proved both difficult and somewhat controversial, this section offers suggested instructions based on the expertise of the Advisory Group and feedback received from pilot sites and other venues throughout the project. We encourage those who choose to use any of these jury instructions or some other version to stay in touch with the project through Professor Redfield at sarah.redfield@gmail.com.
- **SUGGESTED VOIR DIRE:** Like the suggested jury instructions, *voir dire* to reveal implicit bias proved difficult to develop and reviewers were again varied in their views. We settled on a new approach, one where the focus is on questions to determine where the potential juror might have been in de-biasing situations and therefore more likely to bring an open-minded approach to the proceedings. Because this is a new approach, we particularly encourage those who choose to use any of these *voir dire* suggestions or some other version to stay in touch with the project through Professor Redfield at sarah.redfield@gmail.com.
- **DIVERSITY RECOGNITION POSTER—HOW TO:** Another de-biasing technique is exposure to others different from oneself. This includes exposure to images of those different from oneself. To help make this kind of image readily available to courts, a diversity poster was produced as part of this project and it will be offered to selected courts and also on the ABA Criminal Justice Section website.
- **SELECTED ADDITIONAL RESOURCES:** This section offers additional materials in a bit more depth than the orientation section.
- **APPENDICES AND OTHER MATERIALS**
 - **Appendix A. Advisory Group for the Achieving an Impartial Jury Project**
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- **Appendix B. BIBLIOGRAPHY (by category and alphabetical)**
- **Appendix C. Quick Tips for De-biasing**

A note on metrics—Request for Reporting: This project launches a *Toolbox* based on review of the extant literature, development of draft iterations, pilot testing, presentations, and a significant number of interviews with judges and colleagues working in law and social science across the country and in Canada.¹⁵ Additional feedback will be critical so we may continually revise our information to be most helpful to the justice system. Although the grant period has concluded, ideas and recommendations on this critical issue necessarily remain a work in progress as relevant social science develops further and as use and testing of the *AIJ Toolbox* in more real-world settings proceeds.¹⁶ To help measure this, we invite anyone who uses (or considers and rejects using) all or part of these materials to continue to be in touch through Professor Redfield, sarah.redfield@gmail.com, and to report their experiences, good or bad. This continued dialogue can inform any future additions or revisions.

RECOMMENDED ORIENTATION MATERIALS

Introductory Note on Orientation Materials:

Research and writing on implicit bias continues to emerge at an explosive rate. Listed below are a few selected resources that may serve as an orientation to the questions and emerging research. Other useful basic materials are provided in the Selected Additional Resources Section, *infra*, and in the Bibliography at Appendix B.

- Project Implicit, *Implicit Association Test*. This website offers the opportunity to test one’s own implicit associations in a variety of comparisons including, by way of examples, race, age, ability, and gender. (<https://implicit.harvard.edu/implicit/>)
- Mahzarin R. Banaji & Anthony G. Greenwald, *Blind Spot: Hidden Biases of Good People* (2013). This book is a very readable overview of the topic of implicit bias by two of the fields’ leading experts.
- Jerry Kang, *Implicit Bias, A Primer*, Nat’l Center for State Courts (2009). As its title suggests, this primer continues to offer a helpful starting point. (wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf)

¹⁵ Researchers should note that research on this version was largely concluded by the fall of 2014, although additional articles continued to appear.

¹⁶ Professor Sarah E. Redfield, sarah.redfield@gmail.com, mailing address: 20 Prilay Rd. Newport, ME 04953; cell 207-752-1721.

- Pamela M. Casey et al., Nat'l Center for State Courts, *Helping Courts Address Implicit Bias: Resources for Education*. This excellent work provides a basic overview of implicit bias from a judicial perspective and offers important potential strategies courts and individuals might use to address bias concerns; it was an invaluable resource for this project. (www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx)
- ABA Section of Litigation, *The Science and Implications of Implicit Bias*. This brief video provides a useful introduction to the subject. (<http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-videos.html>)

INTRODUCTION TO THE CONCEPT OF IMPLICIT BIAS

As the Introduction to the *AIJ Project* and *Toolbox* observes the way we perceive our system of justice and the way we are perceived and treated by that system differs based on gender, race, ethnicity, and other group identities.¹⁷ At the same time, the legal community stands strongly committed to a fair and unbiased judicial process. We know that most of the participants in our justice system make decisions in good faith, believing their decisions are unbiased.¹⁸ How is it, then, that the data continues to show results unduly differentiated by race or other group-identity?¹⁹ Why is progress in eliminating such disproportionalities so slow?²⁰

Emerging social science offers a partial answer as it turns from a focus on *explicit* bias, which is deliberately generated and consciously experienced, expressed, and self-reported as one's own, to a focus on *implicit* bias, which is unconsciously generated and often at odds with what we express or self-

¹⁷ See generally, e.g., Jody Armor, *Stereotypes and Prejudice Helping Legal Decisionmakers*, in CRITICAL RACE REALISM INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW (Gregory S. Parks, Shayne Jones & W. Jonathan Cardi eds. 2008) (looking at the role racial bias plays at many junctures in the legal system including witness identification and jury selection); Tara L. Mitchell, Ryann M. Haw, Jeffrey E. Pfeifer & Christian A. Meissner, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 625, 627 (2005) (meta-analysis finding a small but significant racial bias when focusing on group dynamics and observing that “research has repeatedly shown that jurors treat members of “outgroups,” such as those of a different race, more harshly than those jurors perceive to be substantially like them”).

¹⁸ See Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Racial Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 1 (2009); Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61 (John F. Dovidio & Samuel L. Gaertner eds. 1986).

¹⁹ Full review of various disparities and disproportionalities is beyond the scope of this Project, but sentencing offers one obvious and enduring example. See The Sentencing Project, *Racial Disparity*, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Mar. 24, 2105). Compare David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285 (2001), with Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 190–91 (1992). See also Order Granting Motion for Appropriate Relief, North Carolina v. Robinson, 91 CRS 23143, at 30 (N.C. Super. Ct. Apr. 20, 2012), available at http://www.wral.com/asset/news/local/2012/04/20/11008391/262217-M_Robinson_RJA_Order.pdf; Order Granting Motions for Appropriate Relief, North Carolina v. Golphin, at 92, 97 CRS 47314-15 (Golphin), 98 CRS 34832, 35044 (Walters), 01 CRS 65079 (Augustine) (N.C. Super. Ct. Dec. 13, 2012), available at http://www.aclu.org/files/assets/rja_order_12-13-12.pdf (both construing and applying the North Carolina Racial Justice Act); *supra* note 4 (discussing the death penalty).

²⁰ This question is one asked repeatedly in many contexts. See, e.g., VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN (1999) (asking this very question and discussing women in academia but equally applicable to other settings).

report.²¹ Critically, research demonstrates that self-reports are often unreliable because we may not know our implicit biases and associations or we may not choose to reveal them.²² This is apt to be particularly likely where self-reports are proffered on socially-sensitive topics or in stressful or ambiguous situations,²³ situations that are apt to arise during jury selection and deliberation. Individuals being questioned in a court room by a judge²⁴ are unlikely to lightly report matters or to answer questions in a way that could

²¹ See Adam Hahn, Charles M. Judd, Holen K. Hirsh & Irene V. Blair, *Awareness of Implicit Attitudes*, 143 J. EXPERIMENTAL PSYCHOL. 1369 (2014) (cumulating research); Jerry Kang, *Implicit Bias, A Primer*, NAT'L CENTER FOR STATE CTS. (Aug. 2009), available at <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf>; Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY 17–19 (Summer 2009), http://www.ncsconline.org/D_Research/ref/IMPLICIT%20BIAS%20Marsh%20Summer%202009.pdf; Brian A. Nosek, Carlee Beth Hawkins & Rebecca S. Frazier, *Implicit Social Cognition: From Measures to Mechanisms*, 15 TRENDS COGNITIVE SCI. 152, 152 (2011) (“This is not to say that self-report is never accurate, but that its accuracy is uncertain and can be based on information distinct from the actual causes of behavior.”).

²² See, e.g., Nosek et al., *supra* note 21, at 153 (“A variety of factors limit the value of introspectively derived explicit measurement. People may have limits in their motivation to report mental content of which they are aware; limits in their opportunity to report the mental content, as, for instance, the circumstances of measurement might constrain what is reported; limits in their ability to translate mental contents into a report; as well as limits in their awareness, the mental content may simply be inaccessible to introspection.” (internal citation and emphasis omitted)).

²³ See Pamela M. Casey, Roger K. Warren, Fred L. Cheesman II & Jennifer K. Elek, *Helping Courts Address Implicit Bias: Resources for Education*, NAT'L CENTER FOR STATE CTS. 2 (2012), http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx (cumulating research references); see also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974).

²⁴ See, e.g., The Honorable Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008) (further summarizing research and including Judge Arterton's own observations); Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1182–86, 1201 (2003) (favorably comparing attorney voir dire to judge's questioning); Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection*, 63 AM. PSYCHOLOGIST 528, 532 (2008).

make them appear biased.²⁵ The data shows us that biases very often remain undetected in this setting.²⁶

Social and neuroscientists have now developed methods to measure such unconscious bias indirectly so a “response is used to *infer* the mental content rather than itself indicating the mental content.”²⁷ The leading approach is the Implicit Association Test (IAT),²⁸ which measures unconscious preferences by comparing the speed with which we make certain associations.²⁹

The workings and results of the IAT are widely documented.³⁰ Using IAT data, researchers have found pervasive implicit biases in associations³¹ in favor of Whites as compared to Blacks, women in families as compared to women in careers, and the abled as compared to the disabled.³² For example, in a large

²⁵ See, e.g., Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 161 (2010) (“As a district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can “be fair.”). For attorneys operating with knowledge of a potential Batson challenge, this limitation on the reliability of self-reporting is of even greater significance. *Id.* at 158.

²⁶ Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 1, 27 (2009); see also Rachel A. Ream, *z*, CRIM. JUST., Winter 2009, at 22.

²⁷ Nosek et al., *supra* note 21, at 153.

²⁸ PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Mar. 24, 2015).

²⁹ 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, 1465–68 (1998).

³⁰ See, e.g., Mahzarin Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265 (John A. Bargh ed. 2013); Anthony G. Greenwald, T. Andrew Poehlman, Eric Uhlmann & Mahzarin Banaji, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009), available at <http://faculty.washington.edu/agg/pdf/GPU&B.meta-analysis.JPSP.2009.pdf>; Wilhelm Hofmann, Bertram Gawronski, Tobias Gschwendner, Huy Le & Manfred Schmitt, *A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures*, 31 PERSONALITY & SOC. PSYCHOL. BULLETIN 1369 (2005); Jerry Kang & Kristine Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476–81 (2010) (providing summary regarding reliability and validity). *But see*, e.g., Philip E. Tetlock & Gregory Mitchell, *Calibrating Prejudice in Milliseconds*, 71 SOC. PSYCHOL. Q. 12 (2008).

³¹ In addition to the categories noted in the text, tests involving additional groups are available at the IAT site, *IAT Demo*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/demo> (last visited Mar. 24, 2015).

³² See, e.g., Kang & Lane, *supra* note 30, at 474–75 (“Most participants demonstrated implicit attitudes in favor of one social group over another, away from the neutral position of no bias. Notwithstanding protestations to the contrary, people are generally not “color” blind to race, gender, religion, social class, or other demographic characteristics. More important,

research study involving some 700,000 participants, the most frequent (modal) answer in response to the question, “Who do you prefer, black people or white people?” was “I have no preference”. In that same study, 70% of participants showed a preference for Whites over Blacks on the IAT.³³

While these implicit associations are made without our express knowledge, and often contrary to our honestly held beliefs,³⁴ they nevertheless influence our responses and decisions.³⁵ From simple acts of courtesy to more consequential acts, such as the evaluation of work quality or of guilt or innocence, those who test higher in implicit bias measures have been shown to display greater discrimination.³⁶ That we may be cognitively sophisticated does not change this³⁷—and judges,³⁸ lawyers,³⁹ and jurors⁴⁰ are not immune.

participants systematically preferred socially privileged groups: Young over Old, White over Black, Light Skinned over Dark Skinned, Other Peoples over Arab-Muslim, Abled over Disabled, Thin over Obese, and Straight over Gay.”); 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, 37 (2007).

³³ See, e.g., Nosek et al., *supra* note 21, at 154.

³⁴ See, e.g., Nosek et al., *supra* note 32, at 53–54; Patricia G. Devine, Margo J. Monteith, Julia R. Zuwerink & Andrew J. Elliot, *Prejudice With and Without Compunction*, 60 J. PERSONALITY & SOC. PSYCHOL. 817 (1991).

³⁵ See, e.g., Nosek et al., *supra* note 21, at 15 (“The accumulated evidence shows that implicit measures can provide information that is distinct from self-report and uniquely predicts social behavior.”) *But see, e.g.*, Ben R. Newell & David R. Shanks, *Unconscious Influences on Decision Making: A Critical Review*, 37 BEHAV. & BRAIN SCIENCES 1(2014) (calling into question emphasis on unconscious); Philip E. Tetlock & Gregory Mitchell, *Calibrating Prejudice in Milliseconds*, 71 SOC. PSYCHOL. Q. 12, 12 (2008) (reviewing psychological research on unconscious prejudice and finding it fundamentally flawed in psychometric terms and inapplicable in real world settings).

³⁶ *IAT Demo*, *supra* note 33, *Project Implicit*, *supra* note 28.

³⁷ Emily Pronin, *How We See Ourselves and How We See Others*, 320 SCI.1177 (2008); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225–26 (2009) (discussing judges’ bias blindspot where most think themselves less biased than others); Richard F. West, *Cognitive Sophistication Does Not Attenuate the Bias Blind Spot*, 103 J. PERSONALITY & SOC. PSYCHOL. 506 (2012).

³⁸ See, e.g., Pat K. Chew & Robert F. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Chris Guthrie, Jeffrey J. Rachlinski & Andrew Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); John F. Irwin & Daniel Real, *Judicial Ethics and Accountability: At Home and Abroad: Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1 (2010); Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Blinking on a Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Jeffrey J. Rachlinski, Chris Guthrie & Andrew Wistrich, *Inside the Bankruptcy Judges Mind*, 88 B.U. L. REV. 1227 (2006); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195 (2009); Maya Sen, *Is Justice Really Blind? Race and Appellate Review in U.S. Courts*, 44 J. LEGAL STUD. (forthcoming 2015),

The relevance of the concepts of implicit bias to jury selection and function is supported by research on ingroup and outgroup dynamics. The standard understanding of discrimination has been that discrimination stems from prejudice, generally defined as outgroup hostility. A revised view articulated by leading implicit-bias researcher Professor Anthony Greenwald is: “Our strong conclusion is that, in present-day America, discrimination results more from helping ingroup members than from harming outgroup members.”⁴¹

available at <http://scholar.harvard.edu/msen/publications/justice-really-blind-race-and-appellate-review-us-courts>; Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005). See generally Jeffrey J. Rachlinski, Andrew J. Wistrich, Chris Guthrie, *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium In Honor of Stephen Yeazell: Altering Attention in Adjudication*, 60 UCLA L. REV. 1586 (2013) (considering other cognitive constraints).

³⁹ Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran & Gary Blasi, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010); see also Evan P. Apfelbaum, Kristin Pauker, Samuel R. Sommers & Nalini Ambady, *In Blind Pursuit of Racial Equality?*, 21 PSYCHOL. SCI. 1587 (2010) (discussing impact of messages re: colorblind t elementary school level).

⁴⁰ Justin D. Levinson, *Media, Race and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009) (discussing role of implicit bias particularly in death penalty cases); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345, 347 (2007) (describing empirical study showing that “[j]udges and jurors may unintentionally and automatically ‘misremember’ facts in racially biased ways during all facets of the legal decisionmaking process”); Justin D. Levinson & Danielle Young, *Different Shades of Bias*, 112 W. VA. L. REV. 307 (2010) (offering empirical evidence that participants in mock juries were more likely to find a person guilty when primed with the information that the perpetrator was dark skinned as compared to a lighter skinned perpetrator); Barbara O’Brien, Samuel R. Sommers & Phoebe C. Ellsworth, *Ask and What Shall Ye Receive? A Guide for Using and Interpreting What Jurors Tell Us*, 14 U. PA. J.L. & SOC. CHANGE 201 (2011); Andrew E. Taslitz, *‘Curing’ Own Race Bias: What Cognitive Science and the Henderson Case Teach About Improving Jurors’ Ability to Identify Race-Tainted Eyewitness Error*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1049 (2013).

⁴¹ Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669 (2014); see also, e.g., Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004); Kristin Davies, Linda R. Tropp, Arthur Aron, Thomas F. Pettigrew & Stephen C. Wright, *Cross-Group Friendships and Intergroup Attitudes: A Meta-Analytic Review*, 15 PERSONALITY & SOC. PSYCHOL. REV. 332 (2011) (analyzing cross-group friendships in relation to effects on group attitudes); Devine & Clayton, *supra* note 2 (“The notable finding in this area is that jury demographic factors interact with defendant characteristics to produce a bias in favor of defendants who are similar to the jury in some salient respect.”); Bertram Gawronski, Galen V. Bodenhausen & Andrew P. Becker, *I Like It, Because I Like Myself: Associative Self-Anchoring and Post-Decisional Change of Implicit Evaluations*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 221 (2007); JAMES M. JONES, JOHN F. DOVIDIO & DEBORAH L. VIETZE, *PSYCHOLOGY OF DIVERSITY: BEYOND PREJUDICE AND RACISM* 134 (2013) (suggesting an approach of “me’ and ‘you’ instead of ‘us’ and ‘them’”); Charles W. Perdue, John F. Dovidio, Michael B. Gurtman & Richard B. Tyler, *“Us” and “Them”: Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 478–79, 482–84 (1990);

Our automatic group identification is substantial.⁴² Research demonstrates that being a member of a group typically creates a preference for that group, the ingroup, and against others, the outgroup.⁴³ When we categorize people into groups, ingroups or outgroups, we tend to regard members of the same group as “more similar than they actually are, and more similar than they were before they were categorized together.”⁴⁴ We tend to think more individually and with more detail about ingroup members,⁴⁵ and to perceive outgroup members as lesser.⁴⁶

It is important to include in the consideration of implicit bias and group sensitivity an understanding of how our communications may reflect these responses particularly our perhaps-small, also unconscious, messages known as micromessages. One example of micromessaging is calling some participants by first name (or no name) and others by title, or allowing others to do so. Like implicit bias and ingroup preference, these micromessages are often unrecognized by the sender, but felt deeply by the recipient. They are cumulative, and they influence perceptions of fairness.⁴⁷

When read together, unconscious biases, group dynamics, and micromessaging confirm the need to be more attentive in our approach to how our brain makes critical decisions. To the extent that we are motivated to become more aware of these biases and de-categorize and *de-bias* our approach at key points, we can

Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006). See generally Scott E. Culhane, Harmon M. Hosch & Howard C. Daudistel, *Ethnicity and Court Processes: An Archival Review of Adjudicated Jury Trials*, 12 J. ETHNICITY & CRIM. JUST. 116 (2014) (reviewing literature and discussing jury selection and foreperson).

⁴² See *supra* note 41 and accompanying text.

⁴³ In a now-classic experiment, researchers showed that this group loyalty occurred even if factors that put you in a group were random and arbitrary, that is, the very act of categorization may be enough to create an ingroup preference. See Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 SCI. AM. 96 (1970).

⁴⁴ John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in HANDBOOK OF SOCIAL PSYCHOLOGY 1089 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds. 5th ed. 2010).

⁴⁵ JONES ET AL., *supra* note 41, at 132.

⁴⁶ See Adam Benforado & John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 325–26 (2007); see also Perdue et al., *supra* note 41, at, 478–79, 482–84.

⁴⁷ See, e.g., STEPHEN YOUNG, MICROMESSAGING: WHY GREAT LEADERSHIP IS BEYOND WORDS (2007); Mary P. Rowe, *Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity*, 3 EMP. RESP. & RTS. J. 153 (1990); Mary P. Rowe, *The Saturn’s Rings Phenomenon Also Referred to as Saturn’s Rings II, with Racist and Sexist Incidents from 1974–1975*, 50 HARV. MED. ALUMNI BULL. 14 (1975); Caroline E. Simpson, Assoc. Professor Fla. Int’l Univ., Presentation, Accumulation of Advantage and Disadvantage or Nibbled to Death by Ducks (June 1, 2010), www.aas.org/cswa/MAY10/Simpson_UncBias.pdf.

expect more individual, less stereotyped outcomes.⁴⁸ The materials in the *AIJ Toolbox* provide support for this work.

MINDFUL COURTROOM CHECKLIST

Introductory Note on the AIJ Checklist:

The value of checklists to maintain focus is well-documented.⁴⁹ Such an approach can combat quick unconscious responses by calling on more conscious, deliberative, reflective thinking and responses.⁵⁰ The checklist points in this section of the *Toolbox* consider the environment of the courtroom,⁵¹ the messaging and micromessaging in terms of how participants are treated in the courtroom,⁵² the importance of training on these and other

⁴⁸ Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 255 (2002) (reviewing research and finding “the results of these tests show that automatic stereotypes and prejudice can be moderated by a wide variety of events, including, (a) perceivers’ motivation to maintain a positive self-image or have positive relationships with others, (b) perceivers’ strategic efforts to reduce stereotypes or promote counterstereotypes, (c) perceivers’ focus of attention, and (d) contextual cues. In addition, the research shows that group members’ individual characteristics can influence the extent to which (global) stereotypes and prejudice are automatically activated”).

⁴⁹ See, e.g., ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009); Casey et al., *supra* note 6; Geoffrey Beattie, Doron Cohen & Laura McGuire, *An Exploration of Possible Unconscious Ethnic Biases in Higher Education: The Role of Implicit Attitudes on Selection for University Posts*, 197 SEMIOTICA 171 (2013).

⁵⁰ See generally, Casey et al., *supra* note 23 (summarizing strategies for courts to reduce bias); DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011) (explaining System 1 and System 2 thinking).

⁵¹ See, e.g., Casey et al., *supra* note 23, at 2; Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. RACIAL & ETHNIC JUST. 125, 144, 149 (2011) (discussing impact of Confederate flag at courthouse); Joyce Ehrlinger, E. Ashby Plant, Richard P. Eibach, Corey J. Columb, Joanna L. Goplen, Jonathan W. Kunstman & David A. Butz, *How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama*, 32 POL. PSYCHOL. 131 (2011).

⁵² See, e.g., Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361 (2012) (citing Jeffrey Gettleman, *Prosecutors’ Morbid Neckties Stir Criticism*, N.Y. TIMES, Jan. 5, 2003, at A14 (reporting father’s response to prosecutors wearing neckties with nooses in a death penalty trial)); Kerry Kawakami, Curtis E. Phillips, Jennifer R. Steele & John F. Dovidio, *(Close) Distance Makes the Heart Grow Fonder: Improving Implicit Racial Attitudes and Interracial Interactions Through Approach Behaviors*, 92 J. PERSONALITY & SOC. PSYCHOL. 957 (2007); Mary P. Rowe, *Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity*, 3 EMP. RESP. & RTS J. 153 (1990); John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20 (1983).

indicators of implicit bias,⁵³ and, more broadly, self-reflection and accountability.⁵⁴

The following checklist is meant to be illustrative; developing more specific checklists for particular decision-points is recommended to fit particular courts and issues.

- The visual images in my courtroom and courthouse are representative of the community members served by this courthouse. (For example, they are not all pictures of former judges who are mostly White.)
- Everyone in my courtroom is immediately called Mr./Ms. or another appropriate title such as Dr. if known (That is, not some by first name and others more formally).
- Everyone in my courtroom is greeted politely without assumption as to his or her role or guilt or innocence. (For example, Judge Bennett reports using a strategy of shaking hands with all jurors and the defendant in his courtroom before the case).
- To avoid implicit cues regarding status, everyone in my courtroom is given similar time for responding and shown similar levels of attention.
- I and my staff have participated in training regarding implicit bias and the significance of ingroup preferences.
- I have encouraged others involved with my courtroom to participate in training regarding implicit bias and the significance of ingroup preferences as well.
- My staff has been instructed to report any bias seen (implicit or explicit), and I have in place a consistent process for this reporting to happen confidentially.
- I remind myself that I might not be as objective as I'd like or as I think I am.⁵⁵
- I have a system where, at key decision points, I ask myself if my opinion or decision would be different if the people participating looked different, or if they belonged to a different group.⁵⁶

⁵³ See, e.g., Marsh, *supra* note 21, at 17–19; AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT, Cannons 1–2.

⁵⁴ Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 267–70 (1999).

⁵⁵ See Kang et al., *supra* note 5, at 1173–74 (suggesting that being thus reminded can improve objectivity).

⁵⁶ See Professor Lee's suggested instruction, *infra* at AIJ Suggested Jury Instructions.

- I have considered, and as appropriate incorporated, additional more specific checklists at key decision points.
- I have self-monitoring in place on training and checklist initiatives.

AIJ SUGGESTED JURY INSTRUCTIONS

Introductory Note on the Suggested AIJ Instruction:

As initially conceived, a jury instruction on implicit bias was thought to be a centerpiece of the *AIJ Toolbox*.⁵⁷ Such an instruction was already in place, for example, in the U.S. District Court for the Northern District of Iowa and in the California Model Instruction (provided below). As the Advisory Group discussed, and as others consulted formally and informally acknowledged, this approach was easier in concept than reality.

To the extent that research on de-biasing suggests that awareness of implicit bias is a critical step in de-biasing,⁵⁸ such an instruction making jurors aware of the possible influence of implicit, unconscious associations does seem valuable. However, as efforts got underway to draft an instruction on implicit bias, it became obvious that the drafting of such language was challenging. In addition to questions about form, length, wording, or how much time would be involved,⁵⁹ fundamental questions were raised as to whether a judge's highlighting of the notion of implicit bias would do more harm than good.⁶⁰

⁵⁷ Jury training using the Implicit Association Test was also considered by some to be an option. See Anna Roberts, *(Re) Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012). See generally Kang & Lane, *supra* note 30, at 465 n.163–64; Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 1, 27 (2009); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (discussing potential for jury training).

⁵⁸ Training to bring awareness of implicit biases is commonly described as a de-biasing technique. See, e.g., Casey et al., *supra* note 23, at 5–6, 9. Recent research suggests that we may be more aware of our implicit biases than previously assumed. Hahn et al., *supra* note 21 (“The current set of studies showed that contrary to this widespread presentation, it is possible to accurately predict the pattern of one’s implicit attitudes, without information from a test, even when the implicit attitudes are quite different from explicit feelings toward the same targets, and even when these attitudes might shed a possibly uncomfortable light on a person.”). Additional research will likely clarify this information further.

⁵⁹ Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190, 195, 198 (2013), available at <http://aja.ncsc.dni.us/publications/courtrv/cr49-4/CR49-4Elek.pdf>.

⁶⁰ See, e.g., Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (cumulating research on value of instruction to suppress stereotype and finding it mixed); Elek & Hannaford-Agor, *supra* note 59, at 193 (cumulating the research on such intervention); Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT

Research on this is obviously still young, and the question lingers. It should be noted that the National Center for State Courts' study on this point did not find such an effect.⁶¹

In this context, the group working on the *AIJ Project* did craft a model instruction,⁶² which started from Judge Bennett's instruction and incorporated the advice of the Advisory Group's social scientists and later reviewers. Earlier drafts of the *AIJ Project* version were utilized at pilot sites and other presentations across the country. Responses to the draft were mixed, ranging from excitement, to concerns about length, and even to the underlying efficacy. Some reviewers raised concerns about the uniqueness of a courtroom, questioning whether something that works for one judge and his or her style might not work elsewhere.

If there is a common conclusion heard repeatedly throughout the pilots, presentations, and various interviews, and also supported by the research, it is that being mindful of one's own implicit associations and choosing more individualized consideration are important, both in deliberation and in *voir dire*.⁶³ The ability of the decision maker to de-categorize and steer clear of group stereotypes and associations, however it is achieved, will likely make for a more fair decision. In this context, a variety of approaches are offered here in the *Toolbox* as possibilities for judges desiring to use this kind of instruction. It is also worth noting that some research suggests priming or forewarning jurors may be more effective than waiting until the end of the evidence.⁶⁴

DIRECTIONS PSYCHOL. SCI. 316 (2007); Jacquie D. Vorauer, *Completing the Implicit Association Test Reduces Positive Intergroup Interaction Behavior*, 23 PSYCHOL. SCI. 1168 (2012) (finding that White participants' taking race-based IAT led to their non-White (Aboriginal) partners feeling less well regarded than after interactions after a non-race-based IAT).

⁶¹ The researchers found "no significant effects of the instruction on judgments of guilt, confidence, strength of prosecution's evidence, or sentence length"; but the study's authors also reported that they were unable to identify the more traditionally-expected baseline bias, "which prevented a complete test of the value of the instructional intervention." Jennifer K. Elek & Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias?: New Questions Following a Test of a Specialized Jury Instruction*, NAT'L CENTER FOR STATE CTS. (Apr. 2014), available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/juries/id/273>. See generally Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW.U. L. REV. 1537, 1543-45 (2012); Alison C. Smith & Edith Greene, *Conduct and Its Consequences: Attempts at Debiasing Jury Judgments*, 29 L. & HUM. BEHAV. 505 (2005).

⁶² See *infra* at n. 65 and accompanying text.

⁶³ See *AIJ SUGGESTED VOIR DIRE infra*; see Benforado *supra* note 46; John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 335 (2008).

⁶⁴ See, e.g., Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 232 (2013); Kurt Hugenberg, Jennifer Miller & Heather M. Claypool, *Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem*, 43 J. EXPERIMENTAL

The following is the model instruction crafted by the AIJ Project as well as select model instructions used or suggested elsewhere. These latter versions are included to give courts other suggested approaches for consideration.

AIJ PROJECT PROPOSED INSTRUCTION⁶⁵

The references included as footnotes with this section provide background on why certain points/words were included.

Our system of justice depends on judges like me and jurors like you⁶⁶ being able and willing to make careful and fair decisions.⁶⁷ Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes.⁶⁸ Just like our knee reflexes, our mental

SOC. PSYCH. 334 (2007) (finding that warnings given ahead of time about likely misperceptions of other race faces may be effective).

⁶⁵ See Elek & Hannaford-Agor, *supra* note 59, at nn. 8–19 (making many of the same points and adding additional citation).

⁶⁶ *This part of the instruction focuses on using common purpose to create the attributes of an ingroup with the judge and to offer a less authoritarian approach, one more likely to be effective in reducing prejudice. See generally* Lisa Legault, Jennifer N. Gutsell & Michael Inzlicht, *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (But Also Increase) Prejudice*, 22 PSYCHOL. SCI. 1472 (2011) (discussing possible backfire for pressure for less biased approach); Marsh, *supra* note 21, at 17–19 (reviewing possible de-biasing approaches); Duane T. Wegener, Norbert L. Kerr, Monique A. Fleming & Richard E. Petty, *Flexible Corrections of Juror Judgments: Implications for Jury Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 629 (2000).

⁶⁷ *This part of the instruction continues to focus on creating a joint enterprise and also invites a collective intention and motivation to be fair. This intention has been shown to help de-bias one's approach. See, e.g.,* Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity and Cognitive Control*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION (T. Nelson ed. 2009); Maja Djikic, Ellen Langer & Sarah Fulton Stapleton, *Reducing Stereotyping Through Mindfulness: Effects on Automatic Stereotype-Activated Behaviors*, 15 J. ADULT DEV. 106 (2008); Kang & Lane, *supra* note 30, at 986; Marsh, *supra* note 21, at 17–19; Saaid A. Mendoza, Peter M. Gollwitzer & David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY SOC. PSYCHOL. BULL. 512 (2010); Brandon Stewart & B. Keith Payne, *Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1332 (2008).

⁶⁸ *This part of the instruction focuses on there being both social and neuroscience support for the idea that implicit bias is significant in decision-making. Both physical and social science support the view that we may all respond quickly without intent, it is just how all of our brains work. Virtually all of the trainers working on issues of implicit bias told us this was an important point. See, e.g.,* Jennifer T. Kubota, Mahzarin R. Banaji & Elizabeth A. Phelps, *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940 (2012); David Amodio & Patricia Devine, *On the Interpersonal Functions of Implicit Stereotyping and Evaluative Race Bias: Insights from Social Neuroscience*, in ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES (Richard E. Petty, Russell H. Fazio & Pablo Brinol eds. 2009); Elizabeth A. Phelps, Kevin J. O'Connor, William A. Cunningham, E. Sumie Funayama, J. Christopher Gatenby, John C. Gore & Mahzarin R.

responses are quick and automatic.⁶⁹ Even though these quick responses may not be what we consciously think,⁷⁰ they could influence how we judge people or even how we remember or evaluate the evidence.⁷¹

Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case.⁷²

Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.⁷³

Banaji, *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000).

⁶⁹ This part of the instruction continues to focus on the idea that our quick responses may not be indicative of our intent by using reflex terminology and the knee reflex reference as commonly recognized vocabulary helpful for distinguishing between intuitive and reflexive responses as compared to deliberative and reflective thinking. See, e.g., Casey et al., *supra* note 6; Matthew Lieberman, *Reflective and Reflexive Judgment Processes: A Social Cognitive Neuroscience Approach*, in SOCIAL JUDGMENTS: IMPLICIT AND EXPLICIT PROCESSES (Joseph P. Forgas, Kipling D. Williams & William Von Hippel eds. 2003).

⁷⁰ This part of the instruction seeks to reduce stress that some jurors may feel around the idea of bias by re-emphasizing that our brains work sometimes consciously, sometimes unconsciously, and that this is true for all of us: again, we are all subject to unconscious associations, which may differ from our consciously expressed views and attitudes. See, e.g., DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); Merlin Donald, *How Culture and Brain Mechanisms Interact in Decision Making*, in BETTER THAN CONSCIOUS? DECISION MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS 191 (Christoph Engel & Wolf Singer eds. 2008); Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Racial Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 1 (2009).

⁷¹ This part of the instruction encapsulates and reflects the research. For references on this point, see, e.g., Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010); Mally Schecory, Israel Nachson & Joseph Glicksohn, *Effects of Stereotypes and Suggestion on Memory*, 15 J. INT'L J. OFFENDER THERAPY & COMPARATIVE CRIM. L. 1113, 1113 (2010) ("Data analyses show that (a) when a suggestion matched the participant's stereotypical perception, the suggestion was incorporated into memory but (b) when the suggestion contradicted the stereotype, it did not influence memory. The conclusion was that recall is influenced by stereotypes but can be enhanced by compatible suggestions."); Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. RACIAL & ETHNIC JUST. 125 (2011) (reviewing possible implications of priming and implicit bias).

⁷² This part of the instruction introduces and reflects the current research on possible de-biasing techniques and offers specific approaches that can help replace implicit associations at key decision points. See, e.g., Nilanjana Dasgupta, *Color Lines in the Mind: Unconscious Prejudice, Discriminatory Behavior, and the Potential for Change*, in 21ST CENTURY COLOR LINES: EXPLORING THE FRONTIERS OF AMERICA'S MULTICULTURAL FUTURE (A. Grant-Thomas & G. Orfield eds. 2008); Nilanjana Dasgupta, Professor of Psychol. Univ. of Mass., Amherst, Presentation, *Debiasing Implicit Attitudes*, Mind Science Conference (Apr. 26, 2013); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

- Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.⁷⁴
- Try taking another perspective.⁷⁵ Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?⁷⁶
- You must each reach your own conclusions about this case individually,⁷⁷ but you should do so only after listening to and

⁷³ This part of the instruction reflects another part of the current research showing that reducing cognitive loads and taking the time to be reflective are helpful for de-biasing. See, e.g., Beattie et al., *supra* note 49; Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (cumulating research); Casey et al., *supra* note 6; Marsh, *supra* note 21, at 17–19; Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316 (2007); Jeffrey W. Sherman, Angela Y. Lee, Gayle R. Bessenoff & Leigh A. Frost, *Stereotype Efficiency Reconsidered: Encoding Flexibility Under Cognitive Load*, 75 J. PERSONALITY & SOC. PSYCHOL. 589 (1998); Alison C. Smith & Edith Greene, *Conduct and Its Consequences: Attempts at Debiasing Jury Judgments*, 29 L. & HUM. BEHAV. 505 (2005); Jennifer A. Richeson & Sophie Trawalter, *African Americans' Racial Attitudes and the Depletion of Executive Function After Interracial Interactions*, 23 SOC. COGNITION 336 (2005); Sommers & Norton, *supra* note 24, at 530.

⁷⁴ This part of the instruction offers another reminder of mindfulness as a de-biasing strategy. One way to counter a quick response or assumption that might not reflect one's conscious intent is to focus on individuation of facts and participants. See, e.g., David M. Amodio & Saaid A. Mendoza, *Implicit Intergroup Bias: Cognitive, Affective, and Motivational Underpinnings*, in HANDBOOK OF IMPLICIT SOCIAL COGNITION 353 (Bertram Gawronski & B. K. Payne eds. 2010); Casey et al., *supra* note 23; Djikic et al., *supra* note 67; JONES ET AL., *supra* note 41, at 134; SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 256, 293 (1993).

⁷⁵ This part of the instruction incorporates the research on another de-biasing technique, taking another perspective. See, e.g., Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, *Long-Term Reduction in Implicit Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2013); Lee, *supra* note 54, at 1600; Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, Part IV (2014); Jacquie D. Vorauer & Stacey J. Sasaki, *Distinct Effects of Imagine-Other Versus Imagine-Self Perspective-Taking on Prejudice Reduction*, 32 SOC. COGNITION 130, 145 (2014).

⁷⁶ This part of the instruction repeats the call for juror attention to the individual and makes the instruction relevant to the juror himself/herself to encourage this attention. See, e.g., JONES ET AL., *supra* note 41, at 134; see also generally Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Payer, *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 16–17 (2007) (discussing conversational memory and offering example of tendency to relate to self).

⁷⁷ This part of the instruction invokes another known approach to de-biasing, by suggesting that individuals be able to know/articulate their reasoning and feel accountable. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693 (2014); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999) (“Self-critical and

considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.⁷⁸

Working together will help achieve a fair result.⁷⁹

1-1 CALIFORNIA FORMS OF JURY INSTRUCTION 113 (2012)

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [insert any other impermissible form of bias]].

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

JUDGE BENNETT'S INSTRUCTION

Introduction

Congratulations on your selection as a juror!...You must decide during your deliberations whether or not the prosecution has proved the

effortful thinking is most likely to be activated when decision makers learn prior to forming any opinions that they will be accountable to an audience (a) whose views are unknown, (b) who is interested in accuracy, (c) who is interested in processes rather than specific outcomes, (d) who is reasonably well-informed, and (e) who has a legitimate reason for inquiring into the reasons behind participants' judgments.”).

⁷⁸ *This part of the instruction uses the research on implicit bias in a slightly different direction by suggesting that jurors be mindful not to let implicit bias interfere with their ability to listen to and benefit from other jurors who may not look like them. The call is for the jurors to take care to listen to a diversity of perspectives. See, e.g., Evan P. Apfelbaum & Samuel R. Sommers, Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction, 95 J. PERSONALITY & SOC. PSYCHOL. 918 (2008).*

⁷⁹ *See, e.g., Samuel R. Sommers, On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006); Samuel R. Sommers & Phoebe C. Ellsworth, How Much Do We Really Know About Race and Juries: A Review of Social Science Theory and Research, 78 CHI.-KENT L. REV. 997, 1026–29 (2003).*

defendant's guilt on the offense charged beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case 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.

Additional Instruction

Do not decide the case based on "implicit biases." As we discussed during 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 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.

PROFESSOR CYNTHIA LEE'S RACE-SWITCHING INSTRUCTION⁸⁰

This instruction is part of Professor Lee's longstanding work in this area and offers a nuanced approach to some of the social science that suggests perspective taking (imagining how you would feel in the other's place) as a debiasing tool.⁸¹

It is natural to make assumptions about the parties and witnesses based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group. If you are

⁸⁰ Lee, *supra* note 54, at 1600 (reporting that this instruction was used in a criminal case and "may have helped defense attorneys secure a not guilty verdict for their client, a Black teenager charged with aggravated assault upon a White classmate." (citing James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, CHAMPION, 1999, at 22-23)).

⁸¹ See, e.g., John F. Dovidio, Marleen ten Vergert, Tracie L. Stewart, Samuel L. Gaertner, James D. Johnson, Victoria M. Esses, Blake M. Riek & Adam R. Pearson, *Perspective and Prejudice: Antecedents and Mediating Mechanisms*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1537 (2004).

unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you would imagine a Latino defendant and a White victim. If your evaluation of the case before you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.

AIJ SUGGESTED VOIR DIRE

Introductory Note on AIJ Voir dire:

Who asks the voir dire questions varies among jurisdictions. Because this is a new approach, it seems preferable that the judge ask at least these particular questions as a set or as follow on; working from these materials the judge will be more likely to have the background to consider the responses in context.

As discussed in the Introducing Implicit Bias Section, the research on implicit bias suggests that by definition a person may not be aware of his or her own implicit or unconscious associations and biases. Accordingly, in addition to the traditional methods of voir dire focused on identifying and addressing explicit bias, a goal of the jury selection process should be to discover, with the prospective juror, what life experiences and attitudes, if any, may implicitly affect how that juror might view the evidence and the law in the case.⁸²

This is a two-sided inquiry. On one side, the effort is to determine which issues might impair a juror's ability to impartially view and listen to the evidence and the law; and on the other, to reveal where such experiences might have been de-biasing opportunities for the juror and improve his/her ability to approach the problem with more de-categorization and individuation.⁸³ Recognizing that traditional voir dire can be less than perfect even in revealing explicit bias,⁸⁴

⁸² See generally Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process*, JUDGES J., Winter 2008, at 1(2008); O'Brien et al., *supra* note 40, at 201.

⁸³ Adapted from email communication from Richard Gabriel, President of the American Society of Trial Consultants Foundation to Sarah Redfield and Sarina Cox (June 18, 2013). See also JONES ET AL., *supra* note 41, at 134 (discussing de-categorization); Adam M. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37 (2015) available at <http://scholar.harvard.edu/files/msen/files/daughters.pdf>.

⁸⁴ See, e.g., Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 179–80 (2011) (citing examples of explicit bias reported from jury deliberations often despite voir dire questions on point).

this approach nevertheless shares its goal to see the truth by increasing the quality of information about the juror that the judge and attorneys can use to determine cause and peremptory challenges.⁸⁵

As was the case with the jury instruction on implicit bias, the sample *voir dire* questions met with mixed reviews and similar questions were raised about their value.⁸⁶ For those who may wish to implement some or all of these *voir dire* questions, the specific questions and answers may well turn out to be less important than the overall result of making race or other group status salient.⁸⁷

SAMPLE QUESTIONS

The questions that follow are based on these assumptions:

- The usual questions will be asked regarding explicit bias.
- Each case and each courtroom will be different.

⁸⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986); see James J. Tomkovicz, *An Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 IOWA L. REV. 1393 (2012) (providing a primer on *Batson*); see also, e.g., *State v. Saintcalle*, 309 P.3d 326 (2013); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092–93 (2011) (“*Batson* is a response to the ‘fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Our study suggests that the *Batson* response is as ineffective as a lone chopstick.”(internal quotation marks omitted)); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias, in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POLICY REV. 149 (2010) (“Although *Batson* and its progeny purportedly prohibit striking members of a protected class on account of class membership alone, this limitation is easily circumvented if the prosecutor proffers a facially class-neutral justification and the defendant cannot establish purposeful discrimination to the court’s satisfaction. Moreover, the *Batson* challenge process may allow the implicit biases of the judges and attorneys to go unchecked during jury selection.”).

⁸⁶ Widely studied for at least forty years, *voir dire* and its general strengths and weaknesses as well as the issues surrounding peremptory challenge are beyond the scope of this project. See generally, e.g., Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505 (1965) (“*Voir dire* was grossly ineffective not only in weeding out “unfavorable” jurors but even in eliciting the data which would have shown particular jurors as very likely to prove “unfavorable.”); Rachel A. Ream, *Limited Voir Dire: What It Fails to Detect Juror Bias*, CRIM. JUST., Winter 2009, at 22, 27–28; *Symposium: Batson at Twenty-Five: Perspectives on the Landmark, Reflections On Its Legacy: Twenty-Five Years of Batson: An Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 IOWA L. REV. 1393 (2012); see also Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 1, 27 (2009); Gregory E. Mize & Paula Hannaford-Agor, *Jury Trial Innovations Across America: How We Are Teaching and Learning from Each Other*, 1 J. CT. INNOVATION 189, 208 (2008), available at http://www.courtinnovation.org/sites/default/files/documents/JournalCCI_Fall08.pdf.

⁸⁷ See, e.g., Sommers, *supra* note 79, at 601; Sommers & Ellsworth, *supra* note 79 at 1026–29; Lee, *supra* note 54.

- We are all implicitly biased (and that most of us share the predominant associations, for example, those that favor White people, and link women to family activities rather than to careers).
- Still, in trying to select an unbiased jury, too much focus on how we are all biased seems counterintuitive.
- The court has already created a non-intimidating atmosphere where potential jurors are sufficiently comfortable to answer openly or to ask to discuss separately.
- There is a basic use of open-ended questions.
- There is attentiveness to answers that might reveal de-biasing opportunities and experiences.

Possible Introduction:

To achieve salience of race or other identity in *voir dire*, the attorney or judge may wish to illustrate with a story from his/her own experience. One judge described a defense attorney (for an African-American defendant) beginning with the question, “How many of you know what a drug dealer looks like?”—and watching all hands go up, and then, on reflection, slowly come back down.⁸⁸ If the judge or attorney does not have a personal experience, he/she might well use the now well-known story of the iconic civil rights leader Jesse Jackson who says of himself: “There is nothing more painful for me at this stage of my life, than to walk down the street and hear footsteps and start to think about robbery, and then look around and see somebody white, and feel relieved. How humiliating.”⁸⁹

Suggested lines of questioning and a few possible considerations around potential answers follow. (Remember this is an evolving approach.)

⁸⁸ A similar illustration might be drawn from the prosecutor remarks criticized by Justice Sotomayor in a drug trial where the core issue was whether the defendant knew his associates were planning a drug deal or whether he was just along for the ride home: “You’ve got African Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, This is a drug deal?” Later the prosecutor added “I got accused by [defense counsel] of, I guess, racially, ethnically profiling people when I asked the question of Mr. Calhoun, Okay, you got African-American[s] and Hispanics, do you think it’s a drug deal? But there’s one element that’s missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash? None of these people are Bill Gates or computer [magnates]? None of them are real estate investors.” *Calhoun v. United States*, 133 S. Ct. 1136, 1136–37 (2013) (Statement of Sotomayor, J.).

⁸⁹ RACE CRIME AND JUSTICE: A READER 84 (Shaun L. Gabbidon & Helen Taylor Greene eds. 2003). This book is also cited in Lee, *supra* note 54, at 1593.

- “What is your work environment/neighborhood like?”⁹⁰ (For example, “I live and work in Millinocket, Maine; it’s a mill town; I pretty much know everyone in town.” Think about this answer likely reflecting a predominantly, if not all, white working class rural environment, as compared to “I live in Houston, Texas and work at a hotel downtown.” Perhaps follow on with more questions about who works there, the kind of work, and the kind of clientele. This may reveal that the work environment includes working, positive exposure to other groups or races, though it may not. Consider these answers again in later questions.
- “Where did you grow up? What was it like growing up there?”⁹¹
- “What experiences have you had with people who are different from you (e.g., from a culture other than your own)?” (Again, for example, the answer “served in the military” likely evokes different de-biasing experiences and attitudes than an answer “those families’ took over my neighborhood.”)
- “What (other) experience have you had with persons of different races/ethnicities, with disabilities (mental or physical) or other groups (as may be appropriate to the case)?”⁹²

⁹⁰ *In the context of implicit associations, this kind of question seeks information on whether the juror has had opportunity for meaningful contact with persons of other races, etc. See, e.g., Shaki Asgari, Nilanjana Dasgupta & Nicole Gilbert Cote, When Does Contact with Successful Ingroup Members Change Self-Stereotypes? A Longitudinal Study Comparing the Effect of Quantity vs. Quality of Contact with Successful Individuals, 41 SOC. PSYCHOL. 203 (2010); Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001); Casey et al., supra note 23, at 2; Kang et al., supra note 5, at 1170; Rhiannon N. Turner & Richard J. Crisp, Imagining Intergroup Contact Reduces Implicit Prejudice, 49 BRIT. J. PSYCHOL. 120 (2010), available at http://www.leeds.ac.uk/lihs/psychiatry/courses/dclin/cpd/past_events/positive_psychology/intergroup.pdf.*

⁹¹ *In the context of implicit associations, this question and the next two seek more background on possible experience with groups other than one’s own, starting with early life experience and going on to a specific ask on the point. See RACE CRIME AND JUSTICE: A READER 84 (Shaun L. Gabbidon & Helen Taylor Greene eds. 2003); see also, e.g., Am. Bar Ass’n Criminal Justice Section, Building Community Trust Model Curriculum, A.B.A., http://www.americanbar.org/groups/criminal_justice/pages/buildingcommunity.html (last visited Mar. 24, 2015); Nilanjana Dasgupta & Shaki Asgari, Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotypes, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004); Nilanjana Dasgupta & Anthony G. Greenwald, On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001); Lauri A. Rudman, Richard D. Ashmore & Melvin L. Gary, “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001).*

⁹² *See, e.g., Greenwald & Pettigrew, supra note 41.*

- “Do you have children in school here in _____, and, if so, what kind of school do they attend? What is this experience like?”⁹³
- “What, if anything, do you know about implicit or unconscious bias?”⁹⁴

**In each case, be mindful of nonverbal as well as verbal responses.⁹⁵

DIVERSITY RECOGNITION POSTER—HOW TO

Introductory Note on the Poster Possibilities.

A diverse environment and positive exemplars⁹⁶ can be valuable de-biasing tools. The basic idea is to trigger a different perspective than the viewer might intuitively or implicitly have and to offer a chance to consider other perspectives. There are several approaches that reflect this, ranging from the use of a screensaver that circulates positive diverse counter-stereotypical images—to longer-term exposure of students to certain faculty as showing a reduction in implicit bias among women at all-women’s colleges as compared to

⁹³ *In the context of implicit associations, this question provides further potential for information on a person’s experience with others, in what might (or might not) be an emotional subject area. See, e.g., Hana Shepherd, The Cultural Context of Cognition: What the Implicit Association Test Tells Us About How Culture Works, 26 Soc. F., 121–143 (2011) (“Individuals who differ in their chronic exposure to certain culture elements may have different associative structures, and thus respond to situational primes differently.”); Max Weisbuch & Nalini Ambady, Unspoken Cultural Influence: Exposure to and Influence of Nonverbal Bias, J. PERSONALITY & SOC. PSYCHOL., 96 AM. PSYCHOL. ASS’N 1104 (2009), available at <http://ase.tufts.edu/psychology/ambady/pubs/2009WeisbuchJPSP.pdf>.*

⁹⁴ *In the context of implicit associations, this is obviously a direct inquiry, which may provide insight into a person’s own awareness and de-biasing experiences.*

⁹⁵ Comments from some of the social science experts in the Advisory Group might provide further direction: e.g., 1) “Personal contact with outgroup members may not always reflect a person’s degree of implicit bias. But, if these questions can get a person’s view about bias—i.e., do they think it is acceptable? Do they support the idea that all Americans have equal rights and are entitled to equal treatment—this could be informative”; 2) “I like the idea of asking these types of open-ended questions assessing the individual’s everyday local environment and exposure to heterogeneous people who are different from oneself (based on research showing that positive intergroup contact reduces implicit bias; positive media exposure also reduces implicit bias). But the specifics of these questions should depend on the fact pattern of the given case. E.g., if the case is about gender and employment discrimination, then the “culture” question is less important than a question about positive contact with women in professional roles (as boss, leader). If the case is about race/ethnicity then these existing questions are likely to fit better. If the case is about sexual orientation or gender identity, these questions will have to be tweaked again.”

⁹⁶ See, e.g., Dasgupta & Asgari, *supra* note 91, at 649–54; Kang & Lane, *supra* note 30, 501–02 (summarizing research).

those at co-ed institution.⁹⁷ For this project a poster designed by E3 Photography will be made available to designated courts via grant funding and for others for purchase. Details will be available at the American Bar Association Criminal Justice Section website.

SELECTED ADDITIONAL RESOURCES

Introductory Note on these Resources:

This section offers suggestions for the next level of reading and viewing beyond the Recommended Orientation Materials Section above. Additional references are available at Appendix B.

POWERPOINT/TRAINING

- ABA Criminal Justice Section, Building Community Trust Model Curriculum and Instruction Manual at Unit 2, (http://www.americanbar.org/groups/criminal_justice/pages/buildingcommunity.html)
- ABA Section of Litigation, Implicit Bias Taskforce, Implicit Bias Toolbox, (<http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox.html>)

READINGS

- Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012). This lengthy article co-authored by many leading thinkers and researchers in the implicit bias arena attempts to answer the question, “what, if anything, should we do about implicit bias in the courtroom?” As the authors note, the article provides a “succinct scientific introduction” to implicit bias and then discusses bias and possible interventions in criminal and civil (employment) settings. (<http://www.uclalawreview.org/?p=3576>)
- Victoria Plaut, *3 Myths Plus a Few Best Practices for Achieving Diversity*, SCI. AM., Sept. 16, 2014. This is a very readable overview of the issues and possible approaches to de-biasing. (<http://www.scientificamerican.com/article/3-myths-plus-a-few-best-practices-for-achieving-diversity/>)

⁹⁷ Sally Lehrman, *The Implicit Prejudice*, SCI. AM. (May 2006), <http://www.scientificamerican.com/article/the-implicit-prejudice>; see also Dasgupta & Asgari, *supra* note 91.

- MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007). This book in Gladwell's much appreciated style captures the issues in engaging and thought-provoking terms.
- Samuel R. Sommers, *What We Do (and Don't) Know About Race and Jurors*, AM. SOC. OF TRIAL CONSULTANTS (July 1, 2010), Professor Sommers offers a short update on his extensive work on jury issues
- Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013). In this article Professor Lee uses the Trayvon Martin shooting as a vehicle to review implicit bias in the context of self-defense. The article offers extensive background and context with particular reference to social science expertise.
- AMERICAN BAR ASSOCIATION JUDICIAL DIVISION, *PERCEPTIONS OF JUSTICE SUMMIT REPORT* (Mar. 14–15 2013). This report summarizes the Judicial Division's work to address perceptions of bias and fairness in the judicial system. The report addresses assessment, community engagement and outreach, specifically speaking to the importance of training around implicit bias.

VIDEO

- California Courts, Continuing the Dialogue video series (all descriptions excerpted from the California web site, (<http://www2.courtinfo.ca.gov/cjer/838.htm>)).
 - [Neuroscience and Psychology of Decisionmaking, Part 1: A New Way of Learning \(#6433\)](#)
In this broadcast experts will discuss both emerging and well-settled research in neuroscience and social psychology, describing how unconscious processes may affect our decisions.
 - [Neuroscience and Psychology of Decisionmaking, Part 2: The Media, the Brain, and the Courtroom \(#6508\)](#)
A group of nationally recognized experts will discuss exciting emerging research on how the brain reacts when different images are presented to us.
 - [Neuroscience and Psychology of Decisionmaking, Part 3: Dismantling and Overriding Bias \(#6537\)](#)
This show highlights neuroscientific and psychological evidence that we can dismantle and override bias using specific techniques
 - [From Oscar Grant to Trayvon Martin—A Dialogue about Race, Public Trust, and Confidence in the Justice System \(#6942\)](#)
This broadcast focuses on the role that courts may play in

reducing racial bias, disparity, and disproportionality in the criminal justice system.

- *The Lunch Date*. This is a very entertaining and engaging 10-minute film that illustrates perception and assumption, (<http://www.youtube.com/watch?v=eputZigxUY8>)
- Rosabeth Moss Kanter, *A Tale of O Video on Diversity*. This is a very effective video clip on what it is like to be different, a minority, an outgroup, (<https://www.youtube.com/watch?v=p56b6nzslaU>)

Appendix A. Advisory Group for the AIJ Project

Achieving an Impartial Jury: Expert Advisory Group

Benny Agosto, Jr., Abraham, Watkins, Nichols, Sorrels, Agosto & Friend,
Houston, TX

Dr. David Amodio, Professor of Psychology and Neural Science, New York
University, New York, NY

Nicole M. Austin-Hillery, Director and Counsel, Washington Office Brennan
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Hon. Mark W. Bennett, Judge, U.S. District Court, Northern District of Iowa
Sarina Cox, Staff Attorney, ABA Criminal Justice Section

Dr. Nilanjana Dasgupta, Professor of Psychology, University of Massachusetts,
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Sharon Davies, Professor of Law and Director of the Kirwan Institute for the
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Michael Dean, Attorney, Wayne County Public Defender, IN

Dr. Patricia Devine, Professor of Psychology, University of Wisconsin-Madison,
Madison, WI

Dr. Shari Seidman Diamond, Howard J. Trienens Professor of Law and
Professor of Psychology, Northwestern School of Law, Chicago, IL

Hon. Bernice B. Donald, Judge, United States Court of Appeals for the Sixth
Circuit, Memphis, TN

Hon. William Dressel, President, The National Judicial College, Reno, NV

Allison Elgart, Legal Director, Equal Justice Society, San Francisco, CA

Fred Friedman, Chief Public Defender; Associate Professor University of
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Kim Greely, Attorney, Honolulu, HI

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Peter Koelling, Director, ABA Justice Center

Justin Levinson, Director, Culture and Jury Project; Deputy Director, Institute
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Kelly Mitchell, Executive Director, Robina Institute of Criminal Law and Criminal Justice, Minneapolis, MN

Rachel Patrick, Director, ABA Coalition on Racial and Ethnic Justice; Center for Racial and Ethnic Diversity

Hon. Costa Pleicones, Justice, South Carolina Supreme Court, Columbia, SC

Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law, York, ME

Robin Rone, Director, ABA Council for Racial and Ethnic Diversity in the Educational Pipeline; Commission on Sexual Orientation and Gender Identity

Daniel Serrano, Director, ABA Commission on Racial and Ethnic Diversity in the Profession

Lauren Stiller Rikleen, President of Rikleen Institute for Strategic Leadership and Executive-in-Residence, Boston College Center for Work & Family, Boston, MA

Sarah Turberville, Director, ABA Death Penalty Moratorium Implementation Project

Artika Tyner, Director of Diversity, Clinical Faculty, University of St. Thomas School of Law, Minneapolis, MN

Appendix B. BIBLIOGRAPHY

Bibliography, sorted

This part of the bibliography is roughly sorted by topic. Obviously many topics overlap, but this listing offers a first cut at categorization for readers' convenience. The divisions are: Film, General reading and background; General background, mostly legal; General background, mostly social science; Implicit Bias; Implicit Bias / courts; Implicit bias / neuroscience; Implicit bias/ groups; De-biasing; Training Materials.

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APPENDIX C. TEN QUICK TIPS FOR DE-BIASING

BE MINDFUL.

De-biasing (1), remember it's all about you, you can be motivated to make more reflective decisions.

De-biasing (2), become aware, understand your own implicit associations and group loyalties.

De-biasing (3), individuate, be careful not to unintentionally rely on stereotypes.

De-biasing (4), notice your environment, be aware of what small and large messages you are sending/are being sent.

De-biasing (5), add different context and relationships to your environment; when you have the opportunity to work with others who are diverse from you, take it.

De-biasing (6), be open to different perspectives, think about the decision with roles reversed.

De-biasing (7), modify your approach to fit the decision, use checklists and other reminders to keep yourself reflective not reflexive at significant points in decisions.

De-biasing (8), modify your approach to fit the situation, take time when you need it, write when you need to clarify your thinking.

De-biasing (9), modify organizational approaches, remove unnecessary clues that trigger implicit associations, impose accountability standards and methods when useful.

De-biasing (10), be an active player or bystander, engage when you see examples of implicit bias or group association or negative micromessaging; engage in positive messaging.