

Judging the Book by More Than Its Cover: A Symposium on Juries, Implicit Bias, and the Justice System's Response

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TABLE OF CONTENTS

What is Implicit Bias?	2
The Science Behind Implicit Bias	2
Mitigating Implicit Bias	2
Where We See Implicit Bias in Jury Trials, According to Research	3
Civil Jury Trials	3
Criminal Jury Trials	3
Methodologies Courts Have Used to Mitigate Implicit Bias Among Jurors	4
Educating the Jury about Implicit Bias	4
Voir Dire to Draw Out Biases	4
Jury Instructions Related to Implicit Bias	5
What Judges Can Do about Implicit Bias in Jury Trials	5
Judging the Book by More Than Its Cover: A Symposium on Juries, Implicit Bias, and the Justice System's Response: Discussion Points, Outcomes & Recommendations	6
Overview of the Course and Symposium	6
Outcomes from the Symposium	6
Conclusion	7
Notes	8

What is Implicit Bias?

Implicit bias refers to the subconscious attitudes, associations, or stereotypes held about a person based on the group to which that person belongs.¹ Implicit biases can affect the outcome of a trial, especially when those biases are held by jurors about a defendant, a plaintiff, or a witness.² They can affect a juror's understanding of the facts, decision-making, and behavior without them even realizing it, and can lead to unfair or unjust results.³ Judges are not immune to, and are also influenced by, implicit bias.⁴ As such, it is important to reduce bias in the justice system whenever and wherever possible.

The Science Behind Implicit Bias

Implicit bias refers to the brain's automatic associations and attitudes toward, particular persons or things without our conscious awareness. Unlike explicit biases, which are overt and noticeable, unconscious implicit biases can occur without conscious awareness. Implicit bias can be as innocuous as a preference for one beverage brand over another. Implicit bias can also lead to prejudicial and discriminatory behaviors, such as a preference for one racial group over another. In trial, implicit bias can manifest in disparate sentencing of groups against which people may hold implicit biases, or money damages in favor of groups that people may be more sympathetic toward (or, conversely, punishing groups that people may be less sympathetic toward).⁵

All individuals have implicit biases.⁶ They are the mental shortcuts that allowed our ancestors to survive by making split-second decisions with incomplete information. It provides a much faster manner of assessing a situation or object, allowing for a faster reaction, which could have meant life or death. Helpful or harmful, implicit biases exist in all persons.

Psychology and other social science fields have developed manners of examining and measuring implicit bias. One popular measure is the Implicit Association Test (IAT; Greenwald, McGhee, & Schwartz, 1998).⁷ The IAT measures differential association speeds of two targets with an attribute. The two targets appear in a two-choice task (e.g., Cake versus Moldy Bread), and the attribute in a second task (e.g., Pleasant versus Unpleasant words). When a response key is shared with highly associative categories (e.g., Cake and Pleasant), response times are faster than when less-associative categories share a response key (e.g., Moldy Bread and Pleasant). The IAT has been extended to examine Black versus White faces with Pleasant versus Unpleasant words, which is interpreted as a measure of implicit bias around Black/White. The IAT has been extended to numerous other forms of bias, such as other racial groups beyond Black/White, gender, age, and sexual orientation to name a few. The IAT can be extended to examine any number of categorical pairings. It is worth noting, though, that the IAT is not a panacea; indeed, researchers still debate many issues regarding the tool.⁸

Mitigating Implicit Bias

The first step to mitigate implicit bias is to recognize its existence in everyone. Critically, judges and those involved in the administration of justice are included in "everyone." Consequently, failure to recognize the ubiquity of implicit bias could contaminate the entire legal system because when individuals think they are not subject to implicit bias, they are, ironically, more susceptible to biases.⁹ While it is not known what percentage of judges consider themselves subject to implicit bias, limited studies suggest that a large percentage of the judges surveyed actually consider themselves unbiased.¹⁰

Figure 1: Illustration of potential sources of bias



The implications from judges who do not properly address implicit bias can be significant. As illustrated in Figure 1, judges are often positioned in the center of the legal system from law enforcement to parole, including juries. This figure helps depict how the failure of judges to monitor their own implicit bias throughout legal processes can have an adverse impact on the administration of justice. For purposes of this paper, we will focus on the role judges play with jurors.

Identifying the existence of implicit bias is one thing; figuring out how to reduce or eliminate these biases is quite another. Some researchers would suggest that we expose ourselves to "counter typical associations," which is to say that if we have an identified bias against a particular group, that we surround ourselves with members of that group who refute those stereotypical attributes either through direct or vicarious contact.¹¹ More simply, and more appropriately for jurors, is bringing awareness to our biases and giving time to process the information they need to make decisions, or giving them the right tools so that biases are less likely to translate into behavior.¹²

Where We See Implicit Bias in Jury Trials, According to Research

The U.S. constitution guarantees citizens a fair and impartial trial. But are jurors, or judges for that matter, as impartial and free of implicit biases as we'd like to believe when they are rendering their decisions? Unfortunately, research on the topic implies that is not the case. As researchers dive into the issue within the legal system, they have uncovered bias involving race, weight, physical attractiveness, and gender, among others.¹³ Researchers focusing on this topic such as Levinson, Bennett, and Hioki examined sitting federal and state judges using the IAT and found that judges harbored strong to moderate negative implicit stereotypes toward certain racial and ethnic groups while harboring favorable implicit stereotypes toward others.¹⁴ Moreover, this implicit bias was related to different justice outcomes, too – judges gave longer sentences to defendants against whom they were biased and, conversely, shorter sentences to groups they implicitly favored.¹⁵

Other research has found implications for implicit bias in the voir dire process. There is evidence that legal professionals' preemptory challenges are related to the jurors' levels of implicit bias.¹⁶ Moreover, lawyers assigned to the role of defense lawyer for a Black defendant were more likely to exclude jurors with high levels of implicit race bias, whereas lawyers assigned to the prosecuting lawyer role for a Black defendant did the opposite. Legal advocates are skilled at identifying jurors with levels of implicit racial bias that are congruent with their interests. To what degree such findings have permeated the legal system, and to what degree it has biased trial outcomes, is unknown.

However, most of the researchers on jurors and implicit bias would agree that jurors are not immune from implicit bias and that these biases can lead to less-than-fair outcomes in the trial.

Jurors then run the risk of improperly evaluating these individuals based on stereotypes rather than taking in the whole picture of how they presented themselves at the stand. This becomes a critical issue because jurors evaluate the credibility of witnesses. While it is true that the jury, in evaluating the witness, may consider the whole picture, the whole picture should not include any implicit biases that they are bringing into the courtroom. These are their own beliefs that are separate from what they have learned about the witness on the stand. If they offhandedly dismiss a witness simply because of some implicit bias they did not realize they were employing—or even the opposite, overly trust a witness that needs to be evaluated just like any other—the trial process becomes less fair. While it is true that a trial will not be perfect, it should at least be reasonable to ask for a trial that is free from biases and prejudice. Being able to take the extra time and steps necessary to understand the

implicit biases jurors possess could be, at the very least, a simple check on the jurors to ensure they properly evaluate the evidence presented to them.¹⁷

There are several critical junctures where implicit bias may play a role in a criminal case.

Civil Jury Trials

There are other types of bias that may affect a civil jury trial. Humans tend to exhibit other types of decision-making shortcuts that have been well studied and documented, such as anchoring bias, which causes the decision maker to give too much importance to an initial number even if it is irrelevant to the decision.¹⁸ That said, to date there are few research articles describing in detail implicit bias in the civil context, including that of jurors in civil cases. Other types of research suggest that jurors would likely succumb to ingroup/outgroup biases; for example, that a juror might be reluctant to find fault in members of their own ingroup where it might reflect on that group's ethical behavior or status.¹⁹

Interestingly, it has been suggested that jurors may hold implicit biases about the competency of the attorney based on their race.²⁰ While not studied, the findings of these researchers could have implications for a juror's perception of performance among expert witnesses or the plaintiff or defendant.

Criminal Jury Trials

Implicit bias has been studied primarily in the criminal trial context, and several researchers have discovered that implicit bias may lead to a disproportionate outcome. There are several critical junctures where implicit bias may play a role in a criminal case, from the police investigation, to arrest, to bail or pretrial decisions, plea bargains, jury decisions about guilt, or sentencing.²¹ However, specific to jury trials:

Both explicit and implicit racial attitudes of legal actors (e.g., jurors, judges) can account for these disproportionate outcomes. Specifically, jurors tend to show bias in verdicts and sentencing against defendants of another race. For example, people's attitudes toward Black people are associated with ratings of guilt and death penalty recommendations for Black defendants. Furthermore, there is an interaction between defendant and victim race such that Black defendants receive even longer sentences when the victim is

White. Although explicit racial attitudes can account for some verdict and sentencing decisions, implicit attitudes can further explain these disproportionate outcomes. People tend to hold an implicit stereotype between Black and guilty. Even a subtle manipulation of a defendant's skin color can affect how jurors evaluate evidence and the degree to which they believed the defendant was guilty. However, it should be noted that some studies have found no effect of defendant race on sentencing. Verdict and sentencing disparities are not just the result of juror bias—judges are also not immune to implicit bias. Mustard found that Black and Hispanic defendants received longer judicial sentences than White defendants (after controlling

for crime seriousness) and that most of this effect occurred when judges deviated from the federal guidelines. When judges followed the guidelines, there was less of a discrepancy between minority and White defendant sentences. Similarly, one study found that judges who held more implicit bias against Black people—as measured by the Implicit Association Test (IAT), a tool that measures implicit bias—were harsher on defendants when they were primed with Black words. Judges who held implicit biases in favor of Black people were less harsh on defendants when they were primed with Black words.²²



Research supports the idea that being persuaded that a problem exists can create the motivation to fix it.

Methodologies Courts Have Used to Mitigate Implicit Bias Among Jurors

While much has been studied on the existence of implicit bias, the jury is still out, so to speak, on how to mitigate these biases. Research has shown mixed findings related to the efficacy of the various ways in which courts have tried to identify and reduce, if not eliminate, implicit bias.

Educating the Jury about Implicit Bias

Research supports the idea that being persuaded that a problem exists can create the motivation to fix it.²³ Educating jurors that implicit bias exists and that it's a problem can help them adopt the countermeasures that could mitigate the bias.²⁴ Courts should bear in mind, however, that jurors who have never before been told that they hold biases, even implicit ones, may feel some hostility to the idea due to lack of exposure to the topic and the very

short amount of time they have to digest the idea.²⁵ Education about implicit bias could come on the front end, such as educational material during jury orientation and before selection. One court has developed an educational video that is available online and is part of jury orientation.²⁶

Voir Dire to Draw Out Biases

Voir dire provides attorneys an opportunity to “dive deeper into the minds of the jury and ensure that they are fair and impartial; and when challenges arise, for-cause and peremptory challenges may be used.”²⁷ Voir dire may work well for explicit bias, but to date no magic test has been developed to draw out biases that a juror may not even know they hold. Judge Mark Bennett argues that attorneys should be as aware of implicit bias as judges, and

that attorneys have an important role to play in striking jurors who have demonstrated explicit or implicit bias.²⁸ When judges dominate the process, it allows jurors with undetected and undeterred implicit biases to decide cases by preventing attorneys from using preemptory or for-cause strikes to eliminate such jurors. Because lawyers almost always know the case better than the trial judge, lawyers are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome.²⁹

Jury Instructions Related to Implicit Bias

Some courts are adopting specific jury instructions related to implicit bias, even though for many years courts have provided

instructions to jurors to make their decisions fairly and free from bias.³⁰ It bears mentioning that jury instructions are given after all of the evidence has been presented, requiring a juror to rethink their initial impressions of the parties and the witnesses.³¹ In her proposal to properly address implicit bias, Anona Su states that “implicit bias jury instructions alone are not enough to combat the full effect of these biases” because the instructions provide very little context for what the biases are and how they pertain to their decision-making.³² The Western District Court of Washington tries a dual method of an educational video shown to potential jurors during jury selection and again reminding jurors of implicit bias in the jury instructions.

What Judges Can Do about Implicit Bias in Jury Trials

The National Judicial College supports educating judges about the existence of implicit bias and the ways in which awareness of individual biases can affect trial outcomes. We also support educating jurors about implicit bias and engaging in strategies to mitigate the effects of implicit bias on juror decisions.

While not an exhaustive list, judges can:

- Educate themselves on implicit bias (and recommend that attorneys receive education as well)
- Take the IAT to become aware of their own implicit bias
- Ensure that their courts educate potential jurors
- Allow attorneys to meaningfully participate in voir dire
- Incorporate implicit bias in jury instructions
- Encourage the adoption of standing committees to audit or study implicit bias in decisions
- Ensure they are collecting the data that would show disproportionate impact

Many of the courses offered by the NJC contain education about implicit bias, and numerous resources exist online for judges to further educate themselves and entertain changes to their rules and procedures in furtherance of eliminating the effects of bias on trial outcomes. Indeed, recent research even recommends educating the judiciary on implicit bias and engaging them in the construction and delivery of the educational materials.³³ Furthermore, many of the recommendations are activities in which the NJC is already actively engaged: Continue to educate the judiciary on implicit bias as well as social cognition in general; Engage judicial voice in assessing how bias education is designed and delivered; Review and revise bias education for judges to address common misconceptions; Redouble efforts to include guidance on how to incorporate what we know about implicit bias in day-to-day court practice; Continue to engage judicial leadership to advance the discussion on race (and gender, sexual preference,

etc.); Expand the discussion of implicit bias beyond race; Engage businesses and other stakeholders in this effort; Engage academia in this effort; Expand both basic and applied research regarding implicit bias and the judiciary; Develop a roadmap for not only research (basic, applied, pedagogical) but centralizing information on promising practices, myths, experts to contact, effective interventions, etc.³⁴

The NJC recommends using evidence-based methods of education. The pedagogical preferences of judges regarding effective bias training align well with delivery methods utilized for the course and symposium. Marsh and Marsh reported that most of their respondents found self-study (63.4%) and webinars (60.2%) to be *not effective at all* or *slightly effective*, whereas 63.3% felt small-group discussions were *very effective* or *extremely effective*. Also, a substantial minority reported that 1+ day institutes (46.5%), 50-90-minute small-group lectures (48.8%), or half-day seminars (46.3%) are *very effective* or *extremely effective*.³⁵ It was also noted that the majority of respondents in the study preferred educational models in which a judge and a technical subject-matter expert are teamed.³⁶ This educational approach is frequently used in NJC courses.

Many of the courses offered by the NJC contain education about implicit bias, and numerous resources exist online for judges to further educate themselves.

Judging the Book by More Than Its Cover: A Symposium on Juries, Implicit Bias, and the Justice System's Response: Discussion Points, Outcomes & Recommendations

Overview of the Course and Symposium

To help educate and inspire the judiciary on the topic of implicit bias in the courts, The National Judicial College, in partnership with the American Association for Justice Robert L. Habush Endowment, held a three-day course and a one-day symposium in March 2020 in Washington, D.C. The course explored how to elucidate and eliminate implicit bias from decision making with an emphasis on juror bias, and provided the judge-participants with tools for conducting a jury trial. The symposium that followed was composed of two keynote speakers, two roundtable events, and a small-group workshop. More than 150 experts, members of the bar and the bench, and stakeholders were invited to participate in the symposium. This section of the report explores a number of the outcomes of the symposium and provides a brief outline of the issue.

THE SYMPOSIUM TAKEAWAYS

- Judge-participants gained a broader understanding of what implicit bias is
- How it can impact jury decision-making
- How it can impact judges and the courts more broadly

Several of the approaches that were discussed included jury instructions that highlight and address implicit bias specifically, and jury instructional videos that discuss and explain implicit bias and its effects on decision-making. Examples currently being used, such as juror's written instructions and an instructional/educational video being utilized in some states, were also presented and discussed and are summarized in this paper.

More than 150 experts, members of the bar and the bench, and stakeholders were invited to participate in the symposium.

Outcomes from the Symposium

Expert roundtable discussed latest findings. Addressed during the expert panel roundtable were latest findings on juror decision-making and implicit bias. For example, Morrison (2020) discussed important findings from research in the field of psychology and law and presented his research findings on implicit racial bias in jury trials, and how legal professionals appear adept

at selecting out or keeping in jurors who are implicitly biased, depending on the role of the legal professionals. Runge (2020) as part of the presentation provided an exercise revealing implicit biases surrounding rape cases in particular.

Justice system roundtable discussed judicial action. During the justice system roundtable, topics such as effective jury management were discussed. Judges shared their perspectives on the changing nature of the jury trial and how judges can mitigate the effects of juror bias. Bennett (2020) discussed what implicit bias is, research examples from psychology involving priming and stereotypes, showed videos highlighting implicit bias, and discussed potential jury instructions and current approaches. Also discussed were the findings of the Levinson et al. 2017 study cited in this white paper.

Participants worked at their tables in small groups on three questions:

You have just watched a jury orientation video³⁷ that explains implicit bias. What are your thoughts on the video (efficacy, ease of administration, other)? How would this go over in your jurisdiction? By and large, most participants believed this would be welcome in their jurisdiction. Criticisms were the length of the video and the lack of diversity among the video's presenters as well as possible administrative or logistical hurdles in finding the time and space to show such a video.

Actionable item: Provide jurors with an instructional video that is mindful of the jurors' attention spans and includes the right concentrations of ethnic groups consistent with the populations they represent.

In some jurisdictions, attorneys are describing or discussing implicit bias during jury selection. What are the pros and cons of doing so from your perspective? Do you have any other ideas of how to tackle bias during jury selection? Conducting meaningful voir dire was a topic of discussion in both the course and the symposium. One group mentioned that what could work is for the clerk's office and the judges to devise a potential juror questionnaire that would include some of the kinds of questions from the Harvard IAT. The test has been widely used in social psychology research and has been extensively validated. Specific questions could be crafted that would seek to ascertain juror biases. Potential jurors would fill out the written questionnaires prior to the in-court juror selection process. The judge would then be able to excuse those jurors who exhibited strong implied bias

toward the parties. Having an extensive written questionnaire has a downside: It would take time to develop. It would also take time for jurors to fill out. It would not be perfect, and it would lengthen the jury selection process.

Actionable item: Convene a research group to determine how an assessment test similar to the IAT could be conducted with jurors in a more efficient manner; for instance, a mobile app that screens persons being considered as a juror.

In some jurisdictions, jury instructions include information related to implicit bias. What are the pros and cons of doing so from your perspective? Who would be the best person to ensure that jury instructions did not unintentionally bias the jury? Having the bench working in concert with the bar was thought to be a critical component to the success of jury instructions that include an instruction on implicit bias. One

of the presenters, Judge Mark Bennett, provided the group with a model jury instruction that includes implicit bias. The group highlighted the importance of ensuring that the instructions were clear and did not further confuse the jury. One weakness identified was the implication that one short jury instruction was adequate for explaining the notion of implicit bias and the ways that it might manifest in deliberations or decisions.

Others commented that critically examining word choice and its effect on those before the court will be a component of designing jury instructions that incorporate implicit bias. Several judges noted that they will be reviewing the jury instructions they use to make sure they conform to best practices or the models that we saw at the conference.

Actionable item: Convene a group of lawyers and judges to prepare a template of what jury instructions should include.



Conclusion

The jury is intended to represent a cross section of the community, bound by legal principles and rules that must be followed in weighing facts. As researchers delve into implicit bias among jurors and the ways in which these biases might be mitigated, judges will continue to play an important role in ensuring the fairness of the jury trial. Judges can and should educate themselves about implicit bias. Judges should educate jurors about implicit bias, use voir dire effectively, and adapt jury instructions to ensure fairness. Institutions like The National Judicial College can play a role in educating the judiciary about the existence of these biases and promising practices for reducing or eliminating

them. The 2020 course and symposium were an important step in a journey toward the court's understanding of how to identify and educate jurors who have biases that are potentially harmful to a just case outcome. The College pledges to continue the dialogue and further the work of actionable items identified during the symposium, the findings emerging through ongoing racial justice efforts, and the evolving research on jurors and implicit bias.

NOTES

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- ²²Kirshenbaum & Miller, supra Note 2, at 2. Internal citations removed.
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