

Implicit Bias
in the Law,
the Court System,
and
the Legal Community

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The Concept of Implicit Bias

- Traditional thought
- Current research shows that we all make choices that discriminate against one group and in favor of another:
 - **without even realizing that we are doing it**
 - against our own conscious belief that we are being unbiased in our decision-making
 - even though we do not possess any explicit prejudice or ill will

The Concept of Implicit Bias

- Although recent research shows the unconscious bias is **normal and unintentional** it does not mean we should use it as an excuse for prejudice or discrimination.
- The research gives us awareness that implicit bias exists which is a step in the right direction to reduce its influence on our decisions.



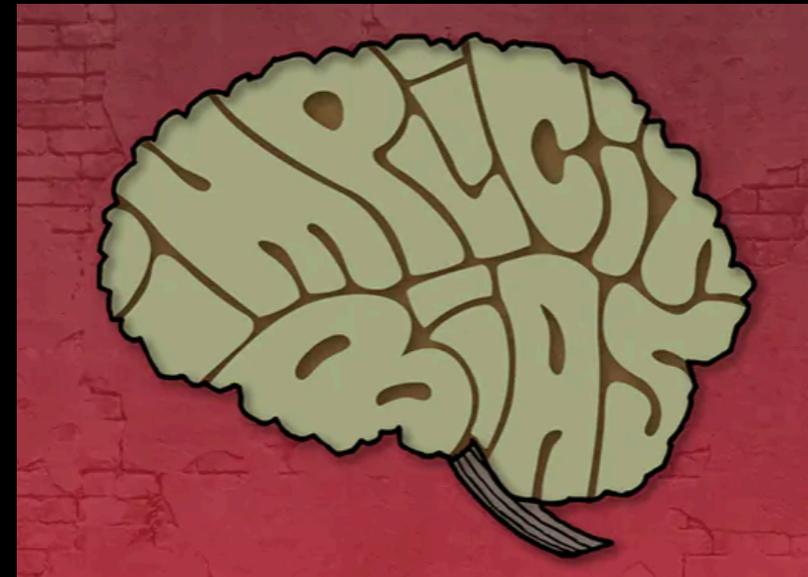
Why Should We Try To Understand Implicit Bias?

- The fundamentals of fairness and impartiality are at the core of our judicial system.
- All players have a special duty to ensure fairness – **Lawyers have a special duty**
 - Criminal Justice System
 - Operations of the Court
- Awareness of our implicit biases and how they influence our decision making is necessary if we want to ensure fairness and impartiality.



Why Should We Try To Understand Implicit Bias?

- Questions to Think About
 - How often do we think about **our biases**?
 - Does the Court operate in a way that is efficient for some users but not for others?



ABA Model Rules of Professional Responsibility

- Rule 8.4 Misconduct

A lawyer shall not:

- (d) engage in conduct that is prejudicial to the administration of justice;
- **[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice.** Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
- (Comment 3 to Rule)



From the Preamble To Virginia Rules of Professional Conduct

- A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. ***A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.*** A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.



From Virginia Principles of Professionalism

- ***Endorsed by the Virginia Supreme Court:***
- **Principles**
 - In my conduct toward everyone with whom I deal, I should:
 - Remember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession.
 - Act at all times with professional integrity, so that others will know that my word is my bond.
 - ***Avoid all bigotry, discrimination, or prejudice.***
 - ***Treat everyone as I want to be treated — with respect and courtesy.***
 - ***Act as a mentor for less experienced lawyers and as a role model for future generations of lawyers.***
 - Contribute my skills, knowledge and influence in the service of my community.
 - Encourage those I supervise to act with the same professionalism to which I aspire.

Key Definitions

- ***Explicit Bias*** is a **conscious** preference (positive or negative) for a social category.
- ***Implicit Bias is a preference (positive or negative) for a social category that operates outside of awareness.***
- *The components of bias include:*
 - ***Stereotype***
 - ***Prejudice***
 - ***Discrimination***



Bias & Information Processing

- Research shows a nexus between **bias and information** processing.
- In order to understand implicit bias we have to understand how our **brains process** information.



Processing Information

- Scientists estimate that we are exposed to as many as **11 million** pieces of information at any one time, but our brains can only functionally deal with about 40.
- Our brains have developed ways to quickly sort through and categorize information and stimulus depending on perceptions, interpretations, and biases that we have adapted throughout our life.



Automatic Information Processing

- In order for us to function it is necessary that our brain process much of the information automatically. Instant reactions without thinking about what we have to do:
 - Driving
 - Directions
 - Reading
 - Other Examples?

Automatic Information Processing

Read this:

- I cannot believe I actually understood what I am reading. According to research at Cambridge University, it doesn't matter in what order the letters in a word are, the only important thing is that the first and last letter be in the right place. The rest can be a total mess and you can still read it without a problem. This is because the human mind does not read every letter by itself, but the word as a whole.



Interference Effect

- What happens to our ability to process information when there is conflicting evidence or stimuli?



Interference Effect

- Say the **COLOR** of the **WORD**:

- **Black**
- **Green**
- **Red**
- **Blue**
- **Yellow**
- **Green**
- **Lion!**
- **Black**



Interference Effect

- When there is interference or competing mental processes we are unable to process information perfectly.
- We are **less accurate** and our response times are slower.
- We are required to use more concentration.
- We revert back to our experiences in making a decision.
- This is important to consider when examining how implicit bias works.

What Are the Sources of Implicit Bias?

- This area of science is evolving, however, the current theory and evidence indicate that it may arise from several interrelated sources.



What are the Sources of Implicit Bias?

- Our life experiences inform how we process and categorize information
 - **Examples**
 - May be positive or negative
- As we mature, categories develop around observable characteristics:
 - Color
 - Gender
 - Age
 - Body type
 - And non-observable characteristics such as professions

Implicit Bias

- Implicit Bias is a preference – positive or negative – for a group based on stereotypes or attitudes we hold and that tend to develop early in life.
 - It operates outside our awareness – we don't know it is there
 - It acts as a filter as we take in and act on information
 - It is always present
 - It can operate even for individuals who express low explicit bias



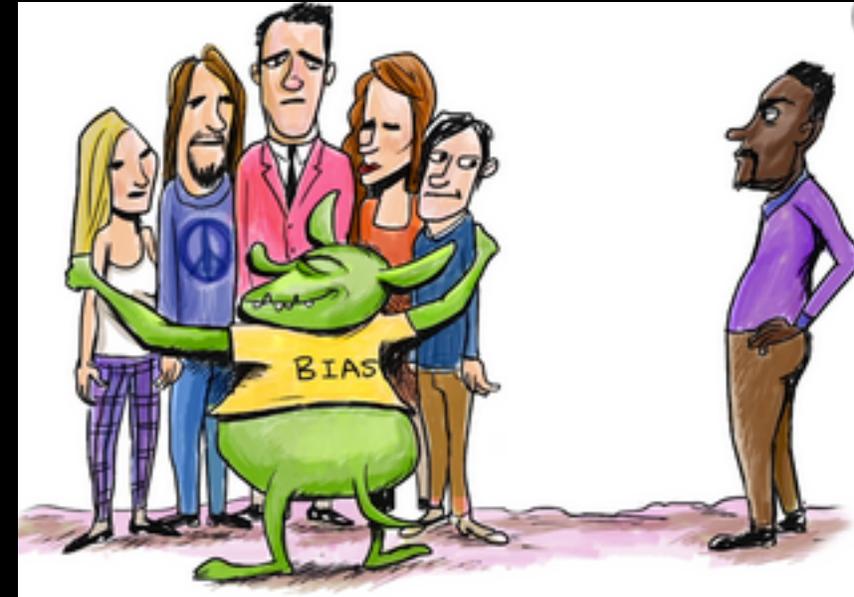
How Is Implicit Bias Measured

- Researchers use different methods in measuring implicit bias, however, the most commonly used methods are computerized and measure reaction time.
- The most popular is the Implicit Association Test (“IAT”). See Project Implicit. <http://implicit.harvard.edu>.
- Developed in 1998 and tests for implicit bias in the areas of age, gender, race as well as religion, politics and more.
- Over 4.5 million participants have taken the web-based test providing a great deal of data.

Take the Test!

Other Measurements

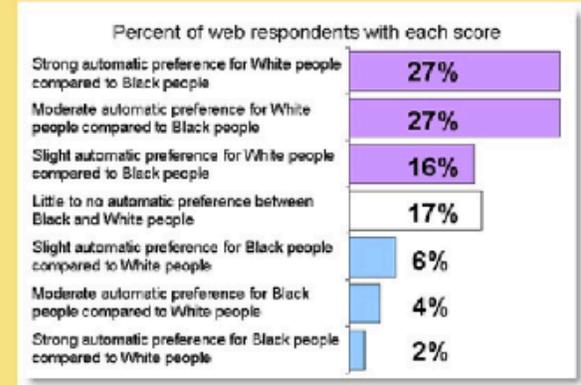
- Paper & Pencil Measures
- Physiological Measures
 - Look at nervous system responses
 - Amount of sweat produced
 - Facial Movements
 - Cardiovascular responses
 - Blood pressure changes
 - fMRI (functional magnetic resonance imagery)



Some IAT Results

- Age
- Gender
- Race
- ***Younger people are just as likely to display an implicit race bias as older adults, women are as likely to display an implicit race bias as men and education attainment appears to make no difference with respect to implicit race bias.***

Harvard Implicit Association Test



<http://implicit.harvard.edu>



Critics of Implicit Bias

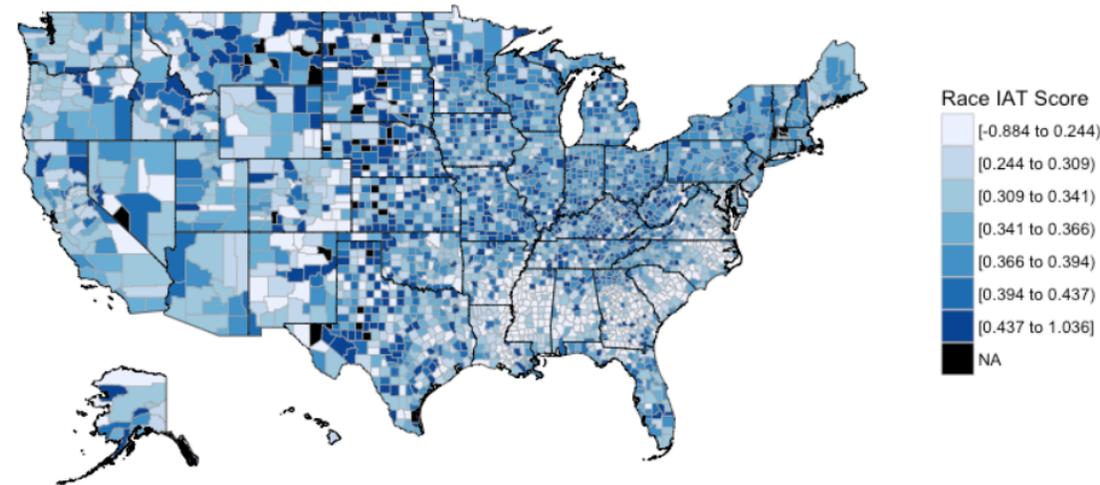
- Critics argue that the IAT and similar tests are not diagnostic or reliable.
- Research and new methods for measuring implicit bias continues.



Research Based Conclusions

- The research evidence leads to two conclusions:
 - People know less about their own mental processes than common sense would suggest, and
 - **Overt discrimination** may be diminishing, but subtler forms of discrimination persist.

Average Race IAT Score by County



Implicit Bias in the Real World

- White felons are more likely to receive jobs than blacks with no criminal records. (Princeton Professors Pager and Wester).
- Judges and Jurors – Studies show there is a tendency to implicitly associate African Americans with crime unfairly impacting verdicts and sentencing.

Implicit Bias in Our Courts?!

- Examples from the presenter:
 - Who is the **Attorney** and who is the **Client**?
 - Who is the **Attorney** and who is the **Court Reporter**?
 - Who may sit in the assigned attorney seating in the courtroom?



Educating Stakeholders in the Justice System

- Examples from Minnesota
 - Committee for Equality and Justice
 - Juror Pledge
 - Juror Training



Jury Selection

- ***Batson v. Kentucky*, 476 U.S. 79 (1986).**
- The Court held that race based use of peremptory challenges by prosecutors violated the Equal Protection Clause. The Court adopted a burden-shifting rule:
 - Defendants are required to establish a prima facie case of discrimination
 - Prosecutors may then offer a race-neutral explanation for their use of the peremptory challenge
 - The burden then shifts to Defendants to prove that the neutral reason offered is pretextual.



Jury Selection Process

- How do we reconcile a professional effort to fulfill the lawyer's obligation to help his or her client with a peremptory jury selection process that permits and often encourages the use of stereotypes about race, gender, religion, or national origin which is at odds with antidiscrimination laws.
- Is it time to reconsider the peremptory challenge system?
- Would it be helpful to include implicit bias questions in juror voir dire?



Solutions / Discussion

- Suggestions to reduce implicit bias in our decision making when it is automatic:
 - Acknowledge It
 - Education
 - Self Awareness
 - Identify sources of stress in decision making
 - Expose yourself to different people

IMPLICIT BIAS

I KNOW IT EXISTS. NOW WHAT?



Summary

- We all live and work in diverse populations and the world is growing more diverse.
- With awareness and continued research in this area we may begin to reduce the impact of implicit bias on our decisions.

“Not everything that is faced can be changed, but nothing can be changed until it is faced.”

- James Baldwin

THE COLOR OF LAW:

A VIRTUAL EVENING WITH
RICHARD ROTHSTEIN

MODERATED BY ATTORNEY JAMILAH LECRUISE

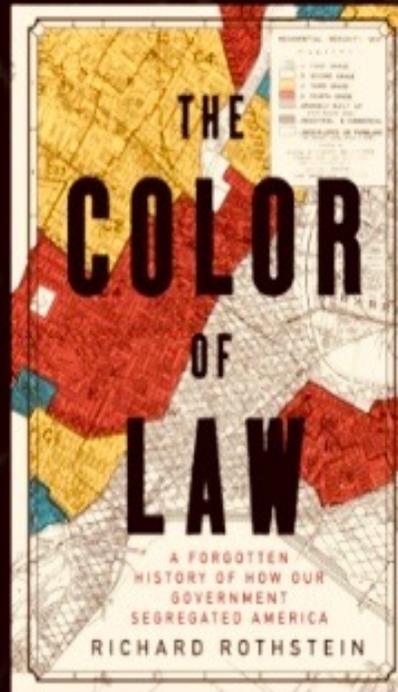
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