

Implicit Bias

People will be prejudiced so long as they continue to think.
-Michael Billig

<https://music.apple.com/us/album/stereotypes/1440840656>

Ground Rules

Respect

Open mind

No judgment

Uncomfortable

Necessary

No one is
immune/automatic

Vulnerability

What implicit bias is NOT

Racism. Even Nelson Mandela reported having negative implicit associations with Black Africans because of Apartheid.

Bigotry, racial animus, invidious beliefs about women and others are not the same as implicit associations.

According to Professor Jerry Kang, implicit bias is “the one strain of bias that cannot be easily relegated to a few “bad apples,” or extremists, or the history books. Implicit bias is here, right now, in your own courtroom, in your own mind, and in mine.”

This is not critical race theory. Longstanding Social Cognition Theory/Research re Heuristics or Cognitive Shortcuts



WE ALL HAVE UNCONSCIOUS
BIASES AND STEREOTYPE
OTHERS BASED ON THOSE
BIASES



OUR BRAINS LEARN OVER
TIME HOW TO DISTINGUISH
DIFFERENT OBJECTS BASED
ON FEATURES OF THE
OBJECTS THAT COALESCE
INTO PATTERNS



THESE PATTERNS OR
SCHEMAS HELP THE BRAIN
EFFICIENTLY RECOGNIZE
OBJECTS ENCOUNTERED IN
THE ENVIRONMENT



IMPLICIT BIASES ARE
ATTITUDES OR
STEREOTYPES THAT AFFECT
OUR UNDERSTANDING,
COMPREHENSION,
DECISIONS AND ACTIONS

They are activated involuntarily, without awareness, intention or control

They are especially dangerous because they are often in conflict with our stated and explicit beliefs

We are most vulnerable to implicit bias in areas where we have the greatest discretion

Problematic because the brain automatically associates certain characteristics with specific groups that are not accurate for all individuals in the group

In numerous studies participants systematically preferred socially privileged groups: men over women, young over old, white over black, other people over Arab/Muslim, able over disabled, and straight over gay

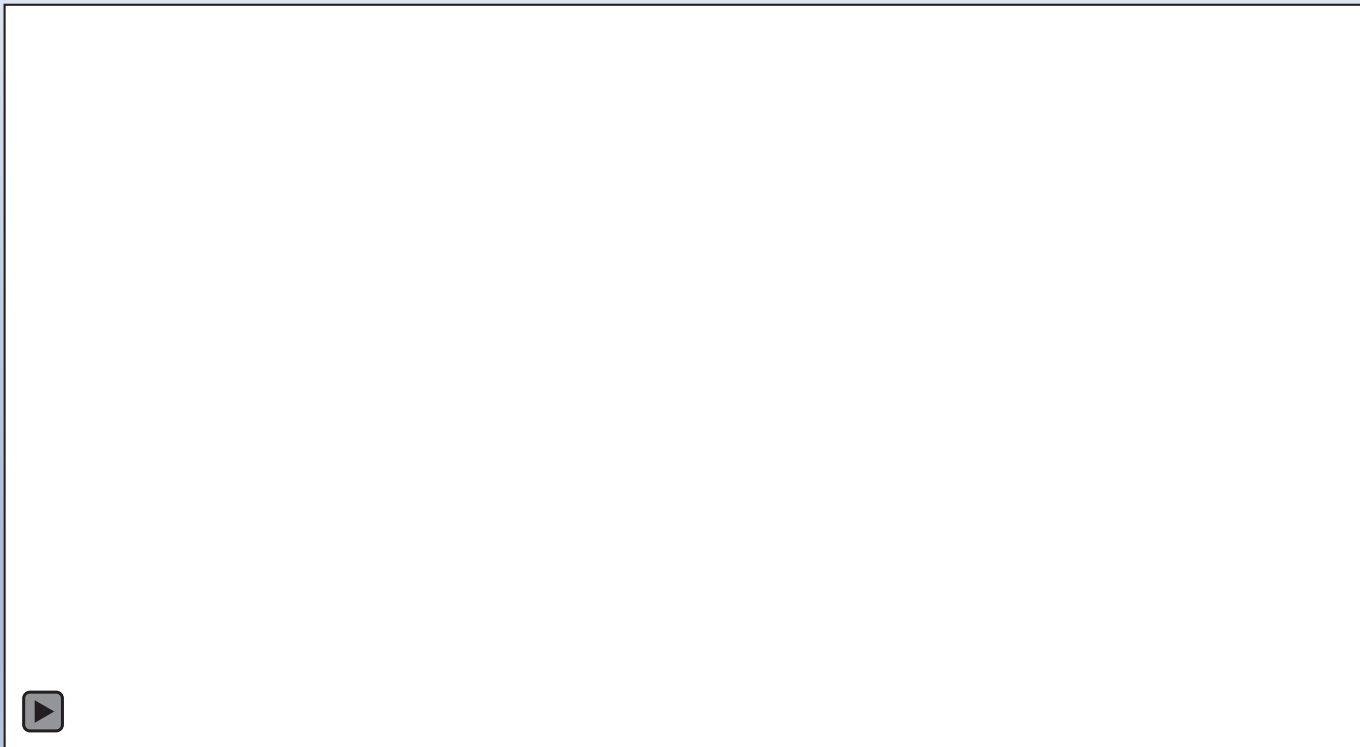
The Stroop effect

John Ridley Stroop, Studies of Inference in serial verbal reactions,
18 J. Exper. Psychol. 643

- Stroop effect refers to the delay in recognition created by the pairing of congruent and incongruent stimuli
- **RED**
- **RED**
- The result does not depend upon overt animosity towards various colors
- Associations impacted to a lifetime of exposure to stereotypic associations in the media

Juror Orientation Video Regarding Implicit Bias

<https://newsroom.courts.ca.gov/news/jury-service-and-fairness-understanding-challenges-implicit-bias>



There are formidable obstacles

Confirmation and
Expectation Bias

Cognitive Dissonance

Narrative Fallacy

Associative
Reasoning

Categorization

Ingroup
Favoritism/Outgroup
Derogation

Stereotypes as
Heuristics

Rationalization

Confirmation and Expectation Bias



Cognitive Dissonance

Narrative Fallacy

Associative Reasoning

Categorization

Ingroup Favoritism/Outgroup Derogation

Stereotypes as Heuristics

Rationalization

Research Studies

Implicit Association Test (IAT) which measures reaction time:

- Measures the strength of associations between concepts and evaluations or stereotypes to reveal an individual's hidden or subconscious biases

Shooter Bias Study (Joshua Correll, 2002):

- Measured whether it is easier to shoot Blacks compared to Whites in a game simulation
- Participants asked to make one response if the person holds a weapon and another if holding a harmless object such as a cell phone
- Responses differed as a function of race. Both Blacks and Whites were quicker to “shoot” an armed Black target than armed White target, but slower to “not shoot” an unarmed Black target than an unarmed White target

Death Penalty Defense Lawyer Study:

- Defense counsel, who are charged with undivided loyalty to their clients, and presumed to serve as a shield against racial bias on the part of other criminal justice system actors, may experience both compromised loyalty and judgment when they serve African-American or Latino clients.

Nevada Judicial Evaluation Study:

- Nevada lawyers responding to a judicial evaluation survey rated female judges lower than male judges, even after controlling for objective measures of their qualifications and performance on the bench

Hospital Study (Green et al. 2007)

- Based on the color of a patient's skin, doctors treated patients differently for heart problems
- Doctors less likely to prescribe the African-American patient with the more aggressive clot-busting drugs
- Doctors were not acting in ways driven by animosity

Gender Study (Steinpreis et al., 1999)

- CVs were sent to numerous academics
- CVs came from a real-life scientist and were identical, but names were changed to reflect traditional male/female names
- BOTH male and female academics significantly more likely to hire a male than an equally qualified potential female
- Both sexes reported the male applicant had superior teaching, research, and service experience compared to the female job applicant with an identical record

1952 Orchestra Studies (Goldin & Rouse, 2000, Orchestrating Impartiality):

- Boston Symphony Orchestra introduced “Blind auditions”
- Used a screen to conceal the identities to the jury
- Click-clack of heels permitted judges to identify women, so hiring committee asked musicians to take off shoes
- “Blind” auditions increased the likelihood of female musicians being selected by 30%
- New study: Using blind auditions increases by 50% chances a woman will advance from preliminary round and nearly triples chances of selection from among finalists

- **Resume Study**

- Researchers sent 5000 resumes in response to over 1300 want ads for sales, clerical, and admin support jobs in Chicago and Boston newspapers
- Half the resumes were randomly assigned stereotypically Black sounding names like Lakisha Washington or Jamal Jones, and half assigned White sounding names like Emily Walsh or Greg Baker
- Also crafted 2 resumes, one higher quality and one lower
- Resumes with White sounding names produced 50% greater callback rate than resumes with Black sounding names
- The difference in callback rate for high versus low quality resumes was much smaller for Black names than for White names. The premium to having a better quality resume was so much less for Black sounding names than for White sounding names
- Low quality resumes with White names got more callbacks than higher quality resumes with Black names

Performance Reviews (Reeves, 2014)

- Law firm partners agreed to participate in “writing analysis study”
- Legal memo had 22 errors. Half told memo written by a Black 3rd year associate named Thomas Meyer; other half told White 3rd year Thomas Meyer
- Memo of White Thomas Meyer was rated better, generally a good writer, less errors

Redefining Merit/Commitment to Criteria (Uhlmann and Cohen, 2005)

- Subjects shown resumes for a candidate for police chief, Michael or Michelle
- Candidates given one of two sets of credentials, either experience “on the street” or formal education
- When Michael was “streetwise” and Michelle “formally educated,” participants favored Michael
- When told Michael “formally educated” and Michelle was “streetwise” they picked Michael
- Why? They adjusted requirements to favor Michael
- BUT, when asked ahead to indicate what criteria was more important, and then asked, they chose the individual consistent with the value indicated

Judge Ana de Alba from the Ninth Circuit Court of Appeals



Disparate Impact of Subjective Decision-making on African Americans in CJS



Professor Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity



Research paper regarding the disparate impact of implicit bias on African Americans in 5 discrete subjective decision-making points in the criminal justice system

Decision to arrest
Decision to charge
Decision to strike potential jurors
Decision to convict
Sentencing



Other forms of implicit bias, pertaining to age, skin tone, height, weight, citizenship, etc. that influence judges

Why This Matters

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

Jerry Kang, *Implicit Bias: A Primer for Courts 2* (National Center for State Courts, 2009)

Jurisprudence

- *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79
- Code of Civil Procedure section 231.7 (A.B. No. 3070) regarding use of peremptory challenges
- *People v. McWilliams* (2023) 14 Cal.5th 429
- Racial Justice Act, Penal Code Section 745 (A.B. No. 2542)

People v. Wheeler (1978) 22 Cal.3d 258
Batson v. Kentucky (1986) 476 U.S. 79

California and U.S. Supreme Courts provided framework for combating explicit bias in jury selection

Low bar because it is easy to craft race neutral reasons for striking a juror

Justice Marshall wrote a concurring opinion and proposed that peremptory strikes be eliminated entirely because of implicit bias, stating, “Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.”

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is “sullen,” or “distant,” a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported...seat-of-the-pants instincts may often be just another term for racial prejudice.”

Code of Civil
Procedure §231.7
Effective January 1,
2022, and applies to
criminal trials; will
apply to civil trials
effective January 1,
2026

“A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.”

Code Civ. Proc. §231.7(d)(1)



Trial court now limited to considering “only the reasons actually given” for the peremptory challenge




Trial court may not “speculate on, or assume the existence of, other possible justifications”



Trial court need not “find purposeful discrimination to sustain the objection”



Trial court “shall” sustain the objection if it “determines there is a substantial likelihood that an objectively reasonable person would view” race, ethnicity, gender, etc., “as a factor in the use of the peremptory challenge”



“Objectively reasonable person” defined as someone who “is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California” (CCP §231.7, subd. (d)(2)(A))

Unconscious bias expressly “includes implicit bias and institutional biases” (CCP §231.7, subd. (d)(2)(C))

Certain reasons for exercising a peremptory strike are presumptively invalid unless the party exercising the peremptory challenge can show “by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated” to a prospective juror’s race and the articulated rationale bears on the juror’s ability to be fair and impartial (CCP §231.7, subd. (e))

Clear and convincing means “it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.” (CCP §231.7, subd. (f))

People v. McWilliams (2023) 14 Cal.5th 429

Unlawfully seized evidence is nonetheless admissible when the causal connection between the lawless conduct of the police and the discovery of the challenged evidence becomes “so attenuated as to dissipate the taint”

Because a parole search is not a ministerial act dictated by judicial mandate, like an arrest warrant, it is a matter of discretion

Discretionary decision to conduct parole search did not “sufficiently attenuate the connection” between the initial unlawful detention and discovery of contraband

Justice Kruger noted that the officer’s “basis to suspect McWilliams of violating the law was not merely insufficient – it was essentially nonexistent”

Supremes reversed court of appeal’s affirmance of denial of suppression motion in a 7-0 opinion

Justice Liu concurrence: “[A]n officer’s decision-making may be vulnerable to implicit biases that result in a heightened risk of exploitation of the unlawful detention.”

“The issue is not racism in the sense of intentional discrimination. It is the operation of ‘attitudes and stereotypes’ and can ‘function automatically.’”

Penal Code Section 745 (Racial Justice Act)

- “The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.” (Penal Code §745(a).)
- Legislative history:
“Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant’s case and to the integrity of the judicial system. It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing. It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them.” (Assem. Bill No. 2542, § 2, subd. (i).)
- *People v. Simmons* (2023) 96 Cal.App.5th 323, 326 (“The Racial Justice Act seeks to eliminate racism from criminal trials in California.”)

**California Rule
of Court
10.20(b)(3):
Court is duty
bound to prevent
bias**

Ensure unbiased decisions:

Each judicial officer should ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases.

New Criminal and Civil Jury Instructions and Juror Video Regarding Implicit Bias

Cal Crim 209

CACI 5030


Juror Orientation
Video

CAL CRIM 209/CACI 5030

Our brains help us navigate and respond quickly to events by grouping and categorizing people, places, and things. We all do this. These mental shortcuts are helpful in some situations, but in the courtroom they may lead to biased decision-making.

Bias can affect what we notice and pay attention to, what we see and hear, what we remember, how we perceive people, and how we make decisions. We may favor or be more likely to believe people whom we see as similar to us or with whom we identify. Conversely, we may disfavor or be less likely to believe people whom we see as different.

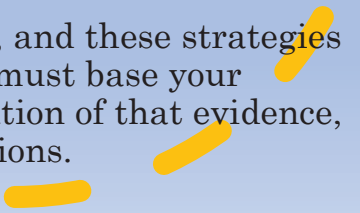
Although we are aware of some of our biases, we may not be aware of all of them. We refer to those biases as “implicit” or “unconscious.” They may be based on stereotypes we would reject if they were brought to our attention. Implicit or unconscious biases can affect how we perceive others and how we make decisions, without our being aware of their effect.



To ensure that bias does not affect your decisions in this case, consider the following steps:

1. Reflect carefully and thoughtfully about the evidence. Think about why you are making each decision and examine it for bias. Resist the urge to jump to conclusions or to make judgments based on personal likes or dislikes, generalizations, prejudices, stereotypes, or biases.
2. Consider your initial impressions of the people and the evidence in this case. Would your impressions be different if any of the people were, for example, of a different age, gender, race, religion, sexual orientation, ethnicity, or national origin? Was your opinion affected because a person has a disability or speaks in a language other than English or with an accent? Think about the people involved in this case as individuals. Focusing on individuals can help reduce the effect of stereotypes on decision-making.
3. Listen to the other jurors. Their backgrounds, experiences, and insights may be different from yours. Hearing and sharing different perspectives may help identify and eliminate biased conclusions.

The law demands that jurors make unbiased decisions, and these strategies can help you fulfill this important responsibility. You must base your decisions solely on the evidence presented, your evaluation of that evidence, your common sense and experience, and these instructions.



So, what can we do?



Awareness of implicit bias

Only by assuming that we will be biased will we have any chance of being truly fair

We must cultivate an internal motivation to be fair



Cultivate greater awareness of and sensitivity to group and individual differences



Routinely check though processes and decisions for possible bias



Identify distractions and sources of stress in the decision-making environment and remove or reduce them

What can we do?



**ALLOW MORE TIME FOR
DECISION-MAKING/AVOID
HURRIED RULINGS**



**WRITE OPINIONS -SEE IF
YOUR REASONS WILL WRITE**



**COMMIT TO OBJECTIVE
DECISION-MAKING CRITERIA
BEFORE REVIEWING CASE-
SPECIFIC INFORMATION/USE
CHECKLISTS**



**INTERGROUP
CONTACT/PROMOTE
DIVERSITY**

In her 2003 concurring opinion in *Grutter v. Bollinger*, Justice Ginsburg wrote, “It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”

How we see people is how we treat people. And how we see people is how we serve people.

https://youtu.be/H_KipNvujKo

California
Supreme
Court
Statement on
Equality and
Inclusion,
June 11, 2020

We state clearly and without equivocation that we condemn racism in all its forms: conscious, unconscious, institutional, structural, historic, and continuing. We say this as persons who believe all members of humanity deserve equal respect and dignity; as citizens committed to building a more perfect Union; and as leaders of an institution whose fundamental mission is to ensure equal justice under the law for every single person.

In our profession and in our daily lives, we must confront the injustices that have led millions to call for a justice system that works fairly for everyone. Each member of this court, along with the court as a whole, embraces this obligation. As members of the legal profession sworn to uphold our fundamental constitutional values, we will not and must not rest until the promise of equal justice under law is, for all our people, a living truth.

Thank You