BOOK CHAPTER – Manifestations Of Implicit Bias in the Courts

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Chapter Highlights

- We all have implicit, subconscious biases, even though we think we don't.
- Our blind spot bias allows us to see bias in others, but makes it difficult to see our own explicit and implicit biases.
- Implicit biases have the potential to affect discretionary and very significant decisions by litigants, lawyers, prosecutors, juries, judges, and court personnel.

> "If you asked me to name the greatest discoveries of the past 50 years, alongside things like the internet and the Higgs particle, I would include the discovery of unconscious biases and the extent to which stereotypes about gender, race, sexual orientation, socioeconomic status, and age deprive people of equal opportunity in the workplace and equal justice in society."[2]
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> "And we knew . . . that even the good cops with the best of intentions – including, by the way, African American olice officers – might have unconscious biases, as we all do."[3]

[2] Dr. Nancy Hopkins, Amgen, Inc. Professor of Biology, MIT, Boston University's 141st Commencement Baccalaureate Address: Invisible Barriers and Social Change (May 18, 2014).
[3] President Barack H. Obama, Remarks by the President at Howard University Commencement Ceremony (May 7, 2016).

I. Introduction

This Chapter addresses several ways in which implicit bias affects lawyers, jurors, and to a lesser extent, judges in the civil and criminal justice systems. Implicit bias and judges' decision making has its own chapter, Chapter 9, and is ably addressed there by two of the leading scholars in the country on the subject, Professor Jeffery J. Rachlinski and Judge Andrew J. Wistrich.

Social scientists, academics, lawyers, judges, and court administrators have recently demonstrated an increased and heightened interest in and knowledge of implicit bias. Despite Professor Nancy Hopkins's claim in the opening quote of this chapter, the concept that unconscious bias affects decision making in the civil and criminal justice system is not new. One of my personal heroes, Lena Olive Smith, the first black female member of the Minnesota bar and a renowned civil rights lawyer of her time in Minnesota, wrote in a 1928 Motion for New Trial in a state court prosecution of a black man for raping a white woman, before an all-white jury:

> The court fully realizes I am sure, that the very fact that the defendant was a colored boy and the prosecutrix a white woman, and the entire panel composed of white men – there was a delicate situation to begin with, and counsel for the State took advantage of this delicate situation . . [P]erhaps [the jurors] were, with a few exceptions, conscientious in their expressions [of no race prejudice]; yet it is common knowledge a feeling can be so dormant and subjected to one's sub-consciousness, that one is wholly ignorant of its existence. But if the proper stimulus is applied, it comes to the front, and more often than not one is deceived in believing that it is justice speaking to

him; when in fact it is prejudice, blinding him to all justice and fairness.[4]

What aspects of today's civil and criminal justice systems might be implicated and affected by participants' implicit biases?

Everything and everybody.

Lena Olive Smith understood more than eight decades ago what the mind scientists through implicit social cognition (ISC) now understand, that is, implicit biases "can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness."[5] While Lena Olive Smith intuitively understood this from her own personal history, Professor Nancy Hopkins is correct that the discovery of the extent to which implicit biases infect so many discretionary decisions and impact human behavior is truly an astounding revelation. What aspects of today's civil and criminal justice systems might be implicated and affected by participants' implicit biases? Everything and everybody. Before turning to the next section of this Chapter, I share a personal narrative of how I became involved with the study of and concerned with the implications of implicit bias both in my courtroom and in my life.

[4] Def's Mot. for New Trial, *State of Minn. v. Haywood*, (4th Dist. Ct. 1928) (No. 26241) (filed June 18, 1928).

[5] Jerry Kang, Mark Bennett, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012) [hereinafter *Implicit Bias in the Courtroom*]. ISC "is a field of psychology that examines the mental processes that affect social judgment but operate without conscious awareness or conscious control." *See generally*, Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007)." *Id.* at 1129, n.10.

A little more than a decade ago, my unexpected and sudden introduction to my own implicit biases was unnerving. Before I was a federal trial judge, I was a civil rights lawyer in one of the first racially integrated law firms at the partner level in Iowa. For many years I had been teaching Advanced Employment Discrimination at the Drake University Law School along with then Associate Dean Russ Lovell (also, a former civil rights lawyer). He explained and suggested I take the race IAT, which I had never heard of. I was eager to take my first IAT and confident, as a former civil rights lawyer and sitting federal judge, with a life-long commitment to egalitarian values, I would "pass" with flying colors. I didn't. I retook the test. Same results. I then did what any self-respecting trial lawyer or trial judge would do – I assumed the IAT test was invalid and proceeded to read everything I could about the IAT to prove it. After weeks of intense research, I came to the conclusion, by at least clear and convincing evidence, if not beyond a reasonable doubt, that the IAT was a valid measure of my own racial implicit biases and those of the millions of others who had taken the test. My epiphany was reflected in the cartoon character Pogo's statement: "We have met the enemy and he is us."[6] Once judges, lawyers, and court staff members learn about their own implicit biases and those of others,

I was eager to take my first IAT and confident as a former civil rights lawyer and sitting federal judge with a life-long commitment to egalitarian values that I would "pass" with flying colors. I didn't. I retook the test.

[6] The Pogo quote, originally appearing on an Earth Day poster in 1970, has been attributed to American Navy Commodore Oliver Hazard Perry, who uttered the words on September 10, 1813, after defeating a British naval squadron on Lake Erie during the War of 1812. *See* http://www.thisdayinquotes.com/2011/04/we-have-met-enemy-and-he-is-us.html.

there should be a call to action to attempt to reduce the negative and serious effects of implicit bias in the court system.

Section II Highlights

- Implicit biases affect client's choice of lawyers.
- Unique caseload pressures, combined with implicit biases, may result in initial evaluations by lawyers, such as public defenders, which impact future case decisions in significant and potentially undesirable ways.
- Implicit biases unknown to prosecutors may dramatically affect prosecutorial discretion in undesirable ways.
- Implicit biases affect lawyers' evaluations of judges.
- Implicit bias affects jurors' memories, their interpretation of ambiguous evidence, and the presumption of innocence in ways often averse to minorities.
- Learn about one judges' unique approach to implicit bias and the presumption of innocence.

II. The Participants

A. Overview

First Principles Of Implicit Bias. Lawyers, judges, litigants, jurors, and court personnel interact with each other in various ways and often in complex combinations. Very few of these relationships have been studied in the context of implicit biases. However, there are some first principles of implicit bias that are uncontroversial and worthy of repeating. First, no one is likely free of implicit biases. While some of us may not have implicit biases in some areas like race, for example, if we look at sex, disabilities, sexual orientation, age, national origin, skin tone, obesity, slenderness, political affiliation, religion, large firm and small firm lawyers, bowtie wearers, etc., there is a virtual certainty that all of us would have some implicit biases. Second, there is no reason to

believe that lawyers, judges, and court personnel have any fewer or less potent implicit biases than members of the general public. Indeed, in the only two empirical studies to date on implicit bias and judges, both found judges are either equal to members of the general public or have greater implicit biases.[7] Third, researchers have repeatedly found and determined that people are not only unaware of their specific implicit biases, but that these biases often conflict with self-reported egalitarian values.[8] Fourth, all vertebrates have a *scomata* (the Greek word for darkness) in each eye.[9] It is where the optic nerve exits the retina. It's our blind spot "where light arriving at that spot has no path to the visual areas of the brain."[10] Here, we are not concerned with this visual blind spot except as a metaphor for the cognitive blind spot of recognizing biases in others, while not being able to see or recognize them in ourselves.[11]

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[7] Jeffery J. Rachlinsky, et al., *Does Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195, 1210-11 (2009) (On race implicit bias the authors "found that the black judges produced IAT scores comparable to those observed in the sample of black subjects obtained on the Internet. The white judges, on the other hand, demonstrated a statistically significantly stronger white preference than that observed among a sample of white subjects obtained on the Internet.") (footnotes omitted); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes Beyond Black and White*, 69 FLA. L. REV. (forthcoming 2017) (authors found that federal and state trial judges demonstrated moderate to strong implicit bias against Asians and Jews on IAT tests).

[8] Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 798 (2012).

[9] MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT XI (2013).

[10] *See Id.* at viiii-xii (for a discussion how this blind spot works).

[11] Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 491 (2014) ("This psychological blind spot prevents us from seeing our own cognitive biases, yet allows us to see them in others.") (footnote omitted); *See also,* Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others,* 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 681–82 (2005); Emily Pronin &

B. Lawyers

1) Choice of a lawyer

The implicit biases held by lawyers has not been the subject of any actual empirical analysis. However, there exist some limited scholarly articles discussing how implicit biases may effect lawyers' judgments and decision making.

Before addressing these studies, I note that the only empirical study of explicit and implicit biases in the selection of a lawyer for a civil matter reveals that both explicit and implicit biases of potential clients affect the choice of a lawyer.[12] In this study, the authors created a customized IAT to measure the degree to which White Americans versus Asian Americans are associated with traits that embody the ideal litigator."[13] A second IAT was also administered to measure the degree to which the participants favored White Americans over Asian Americans – a measure of the participants' implicit racial attitudes.[14] Concerning explicit biases, the authors measured "the degree to which participants personally endorsed" personality and societal stereotypes linking an ideal litigator to Asian Americans or White Americans.[15] The participants watched two video depositions involving an auto accident and a slip-and-fall accident, selected because they are typical civil cases.[16] Before each deposition was viewed, the participants were "primed" by showing the deposing litigator's picture and name for five seconds.[17] The race and name of the litigator was manipulated by

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Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565 (2007).

[12] Jerry Kang, Nilanjana Dasgupta, Kumar Yogesswarn & Gary Blasi, *Are Ideal Litigators White? Measuring the Myth Of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

[13] *Id.* at 892-93.

[14] *Id.* at 895.

[15] *Id.* at 899.

[16] *Id.* at 896.

[17] *Id.* at 897, 912.

varying the name and photograph "to be prototypically White (William Cole) or Asian (Sung Chang)."[18] After viewing the depositions, the participants rated the litigator's competence on six items, warmth on six items, and whether they would retain the litigator or recommend him to family and friends.[19]

No *Explicit* Bias In Selecting Asian Or White Litigator. On the measure of explicit bias, the authors found no statistically significant difference on the self-reported measure of whether the participants "viewed Whites as more the ideal litigator as compared to Asian Americans."[20] However, statistically significant differences were found on the cultural stereotype measure.[21] While the participants did not self-report any explicit biases of their own regarding the ideal litigator, "they thought 'most Americans,'" think Asian American litigators "possess fewer characteristics necessary to be a successful litigator."[22]

***Implicit* Bias Favored White Litigators Over Asian Litigators.** Now for the "dissociation" between explicit and implicit bias. As in many of the implicit bias empirical studies, there is often no correlation between explicit and implicit bias. Here, the authors found that the participants' implicit bias in favor of White litigators was correlated with how much they liked the litigator, how competent they thought the litigator was, and their willingness to hire the litigator and recommend the litigator to friends and family.[23] In contrast to the evaluations of the White litigator, the Asian litigator evaluations were significantly correlated to the participants' explicit cultural stereotypes.[24] Thus, the authors found that explicit stereotypes that an ideal litigator was White predicted "out group derogation" while implicit stereotypes predicted preferential

[18] *Id.* at 897.
[19] *Id.* at 898.
[20] *Id.* at 899.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 901.
[24] *Id.*

evaluation of the White litigator demonstrating "in group favoritism."[25] At bottom, the authors concluded; "Our study demonstrates that explicit and implicit stereotypes about litigators and Whiteness alter how we evaluate identical lawyering, simply because of the race of the litigator."[26]

2) Public defenders

Public Defenders Engage In Triage Much Like An ER. Turning the tables from potential implicit bias of clients toward lawyers, is an examination of the ways in which implicit biases affect attorney interaction with clients. A prime example, drawn from the criminal

[25] *Id.* at 886. For detailed discussions of the role of both in group favoritism and out group derogation, *see* Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Towards None and Charity for Some – Ingroup Favoritism Enables Discrimination*, AM. PSYCHOLOGIST 669, 680 (2014) ("Our strong conclusion is that, in present-day America, discrimination results more from helping ingroup members than from harming outgroup members."); Robert J. Smith, Justin D. Levinson & Zoe Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 923 (2015) ("Yet, the picture created by the implicit racial bias as out-group derogation model is necessarily an incomplete one. To provide a more behaviorally rich portrait, as well as to contribute to understanding of racial disparities to which the out-group derogation model cannot speak, this Article provided the first systemic account of implicit favoritism and its role in perpetuating disparities in the criminal justice system. We explained the multiple ways in which implicit favoritism operates (e.g., through priming, through bias in explaining why an event occurred, through enhanced in-group empathy) to give the reader a sense that implicit favoritism is an umbrella term that applies to a variety of mechanisms--all of which operate without conscious intention. We then illustrated how implicit favoritism can operate in the criminal justice system by focusing on how it can impact the discretionary decisions of legislators, police officers, jurors, and legal professionals. This importation of implicit favoritism into the legal literature on racial disparities in criminal justice means that we now have a more behaviorally accurate understanding of how racial disparities are perpetuated, a better sense of the magnitude of the problem, and an understanding that scholars will need to address how we might curb favoritism--as well as derogation--if we hope to achieve a racially fair criminal justice system.")

[26] *Implicit Bias in the Courtroom*, *supra* note 5, at 912.

context, is the way public defenders perform triage because of overwhelmingly large caseloads. Professors L. Song Richardson and Phillip A. Goff explore this phenomenon in their article *Implicit Racial Bias in Public Defender Triage*.[27] They start by noting the recent fiftieth anniversary of the Supreme Court's landmark decision in *Gideon v. Wainright* promising those accused of felonies "the guiding hand of counsel."[28] Burgeoning caseloads and a crisis in lack of resources "make it virtually impossible to provide zealous and effective representation to every client."[29] Thus, like many hospital ERs, public defenders are forced to engage in triage.[30] Richardson and Goff describe public defender triage this way:

> In an ideal world, defenders would have unlimited opportunities to interview and investigate all of the state's witnesses, canvass the neighborhood where the crime occurred, and otherwise thoroughly investigate the case. Furthermore, defenders could conduct legal research, file motions, request funds for expert assistance, and engage in extensive plea negotiations. They also would have the time to develop relationships with clients, which is critical because clients have important information that can aid attorneys in their trial preparation and their arguments for pretrial release, better plea offers, and reduced sentences. However, most PDs do not work in an ideal environment. They cannot realistically provide each client with zealous and effective advocacy. PDs are forced by circumstances

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[27] L. Song Richardson & Phillip A. Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626 (2013).
[28] *Id.* at 345.
[29] *Id.* at 105-06. *See also*, Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1007 (2013) ("Having a lawyer without the time and resources to adequately prepare only exacerbates this disparity."); Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact on Racial Minorities*, 22 HASTINGS CONST. L. Q. 219 (1994).
[30] *Id.* at 106.

> to engage in triage, i.e., determining which clients merit attention and which do not. As one defender put it, "The present M.A.S.H. style operating procedure requires public defenders to divvy effective legal assistance to a narrowing group of clients, [forcing them] to choose among clients as to who will receive effective legal assistance."[31]

Professors Richardson and Goff identify three areas where implicit racial bias may adversely influence public defenders' judgments: A) biased evaluation of evidence; B) biased interactions with clients; and C) biased acceptance of punishments.[32] First, like all lawyers, public defenders begin evaluating cases upon the initial assignment. However, because of their unique caseload pressures, their initial evaluations likely impact their future case decisions in more significant and potentially undesirable ways than in other practices. Professors Richardson and Goff described this as follows:

> Their initial evaluations will affect a variety of subsequent decisions important to the ultimate resolution of the case. For instance, after reviewing the discovery, they may decide that expending resources to conduct a fact investigation would be a waste of time because the state's evidence is strong. On the other hand, if attorneys determine that the state's case has weaknesses they can exploit, they may expend more resources to defend the client, including investigating the case and engaging in vigorous plea bargaining. Thus, early appraisals of cases can become self-fulfilling prophecies. While attorneys must evaluate a case's merits, the problem is that IB's [implicit biases] may influence these judgments."[33]

Second, implicit biases may have a dramatic impact on crucial interactions with clients. This is especially true with clients associated

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[31] *Id.* (footnote omitted).
[32] *Id.* at 2634-40.
[33] *Id.* at 2635.

with negative stereotypes.[34] Studies demonstrate that this can involve "interpreting clients' ambiguous behaviors and facial expressions," including viewing behavior as more aggressive; ending contact with the client earlier; believing their clients to be less truthful; developing earlier perception of guilt; and "the attorney's unconscious negative expectations may produce perceptions and attributions consistent with them."[35]

Third, implicit racial biases "may result in defenders unconsciously being more accepting of harsher sentences for some clients than others."[36] Professors Richardson and Goff cite to studies that raise serious concerns that public defenders may accept harsher punishment for black versus white offenders.[37] This may lead to less aggressive negotiations for lower sentences or failing to conduct more thorough mitigation investigations that could lead to lower sentences.[38]

Professors Richardson and Goff have five recommendations for curtailing the "pernicious effects" of implicit biases on public defender decision making: 1) transforming office culture; 2) developing objective triage standards; 3) implementing accountability mechanisms; 4) increasing awareness of implicit biases and they affect attorney behavior; and 5) developing intentional goals for situations where implicit biases are likely activated.[39] A fuller discussion of strategies for reducing the effects of implicit bias ia contained in later chapters.

There is a study of implicit bias of habeas lawyers and death penalty defense trials.[40] It notes that criminal defense lawyers are notoriously skeptical of prosecutors' decisions to seek the death penalty based on the

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[34] *Id.* at 2636-37.
[35] *Id.* at 2637-38.
[36] *Id.* at 2641.
[37] *Id.* at 2640.
[38] *Id.*
[39] *Id.* at 2641-48.
[40] Theodore Eisenberg & Sherri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers,* 53 DEPAUL L. REV. 1539 (2004).

race of the defendant (black) and the race of the victim (white).[41] There is skepticism as to jurors' racial attitudes when the death penalty is imposed on black defendants.[42] Yet, the study found, based on IAT scores, that capital defense lawyers demonstrate essentially the same types and degrees of racial implicit biases as law students, trial lawyers, and the general public.[43] The study concludes by suggesting that "introspection" about racial stereotypes by capital defense lawyers and "vigilance concerning those effects on others is necessary."[44]

While this subsection focused on criminal defense lawyers, specifically public defenders and death penalty defense lawyers, the importance of the principles discussed, here, obviously has much wider applications.

3) Prosecutors

With the possible exception of police officers, it is unassailable that prosecutors in state and federal courts possess greater and broader unreviewable discretion than any other actor in the criminal justice system.[45] Award winning author, Michelle Alexander, although not the first, recognized that numerous studies established prosecutors interpret and respond to identical criminal activity differently based on the offenders' race.[46] In their breakthrough article, *The Impact Of Implicit Racial Bias On The Exercise of Prosecutorial Discretion*, Professors Robert Smith and Justin Levinson explore how implicit racial biases may unknowingly affect prosecutors and the myriad of discretionary

[41] *Id.* at 1539.
[42] *Id.*
[43] *Id.* at 1542, 1553, 1556.
[44] *Id.* at 1556.
[45] Smith, *supra* note 8, at 805. *See also,* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability,* 157 U. PA. L. REV. 959, 960 (2009).
[46] MICHELLE ALEXANDER, THE NEW JIM CROW 115 (2010).

decisions they daily encounter.[47] The authors focus on three primary areas: 1) charging decisions; 2) pretrial strategy; and 3) trial strategy.[48]

a) Charging decisions

The most important decision prosecutors make is the fundamental decision of whether or not to charge a suspect with a crime, if their jurisdiction allows them to do that or, alternatively, to seek a grand jury indictment if that is required. Professors Smith and Levinson's discussion of this "charge or release" dilemma used several examples, including a hypothetical, but realistic forcible rape case.[49] Here are the facts:

> According to the suspect, after a romantic dinner and a movie, the complaining witness invited him back to her house. They entered her bedroom. The complaining witness grabbed his crotch area and started kissing him. He directed her onto the bed and began taking off her (and then his) clothes and began having intercourse. After roughly one minute, she slapped his face. Taking this as a sign of sexual play, he slapped her back. After roughly another minute, he saw tears rolling down her face, immediately stopped having intercourse and asked her, "What's wrong?"
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> The witness tells a different story. She contends that the suspect closed the door after they entered the bedroom. He approached her quickly as though he was going to shove her against the door. She put up her hand in a defensive posture and struck him in the crotch area. He began kissing her. At first she tried to pull away, but then she "just sort of stopped resisting." He shoved her onto the bed and began taking off her (and then his) clothes. She said it "all happened so quickly" that she didn't know what was

[47] Smith, *supra* note 8, at 805-822.
[48] *Id.* at 805.
[49] *Id.* at 808-10.

> happening and felt like she was in "shock." She slapped his face as hard as she could muster. He then slapped her across the face with such force that she thought "my jaw had shattered." She began to sob. After a pause, he asked her, "What is wrong?" and then rolled off from on top of her. She began to sob very loudly.[50]

A prosecutor who reads these conflicting witness and suspect reports, and sees the mug shot photo of the suspect, a black male might implicitly and subconsciously associate aggressiveness, insatiability, and even rape with the suspect.[51] Indeed, as Professors Smith and Levinson discuss, research indicates people associate black perpetrators with the crime of rape.[52] It's important to note that Professors Smith and Levinson are not suggesting that a prosecutor intentionally makes these associations. Rather, due to the insidious nature of how implicit biases work, these associations are automatic and not "consciously linked to race."[53] Of course, this is just one example of how unconscious implicit bias may affect the prosecutorial charging decision.

b) Pretrial strategy

Once the charging decision is made, there are numerous pretrial decisions that prosecutors routinely make: to agree to or oppose pre-trial release; the amount of bail or personal bond, if any, to request; what conditions of pre-trial release to ask for; to engage in formal or informal discovery with the other side; what potential evidence is exculpatory or inculpatory and what should be turned over to the defense; what types of scientific evidence should be obtained; what motions to file; whether to allow the defendant to cooperate, and if so, what benefits to provide the defendant at sentencing; the numerous factors that go into plea

[50] *Id.* at 808-09.
[51] *Id.* at 809.
[52] *Id.*
[53] *Id.* at 809-10.

bargaining decisions, including the seriousness of the crime, the accused's remorse; the race and views of the victim; and the value of cooperation, if any, just to mention just a few.

At each of the pretrial stages, it is likely that implicit biases to some degree will affect these important discretionary prosecutorial decisions. With regard to minority defendants, Professors Smith and Levinson argue that a plethora of social science research suggests "that a majority of Americans …harbor negative implicit attitudes toward blacks and other disadvantaged groups…"[54] Social science studies "repeatedly demonstrate black Americans are stereotyped as being less intelligent, lazier, and less trustworthy than white Americans."[55] Thus, it is likely that "stereotypes that black citizens are violent, hostile and prone to criminality" adversely impact pretrial prosecutorial decisions.

c) Trial strategy

With respect to trial strategy, two areas are discussed: jury selection and closing arguments. As all lawyers and judges in the criminal justice system know, the "prohibition against race-based strikes is clear, but policing the rule is far murkier."[56] The prohibition is clear because of the thirty-year precedent established in *Batson v. Kentucky*, 476 U.S. 79 (1986) which held the Equal Protection Clause of the Fourteenth Amendment precludes removing potential jurors based on their race. It did not take long for *Batson* to be criticized. Indeed, Justice Powell wrote in his majority opinion in *Batson*, that "[P]eremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[57] Even more compelling and prophetic was Justice Marshall's concurring opinion in *Batson*:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black

[54] Smith, *supra* note 8, at 797.
[55] *Id.* at 814.
[56] *Id.* at 818.
[57] *Id.* at 818 citing Batson v. Kentucky, 476 U.S. 79, 96 (1986) (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

> 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. . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.[58]

I have previously observed that one of the many problems with *Batson* is that a judge must essentially call a prosecutor a liar when disbelieving their alleged proffered non-discriminatory reason to sustain a challenge.[59] The problem of implicit bias in jury selection is even more insidious considering the exceptionally lame excuses that trial and appellate courts have accepted as non-discriminatory.[60] This includes, for example, potential jurors excluded because "Hindus tend…to have feelings a good bit different from us and the prosecutor preferred an American juror," or where a black juror was struck "for dying her hair blond."[61] Examples like this led one court to conclude: "Any neutral reason, no matter how implausible or fantastic, even if it is silly or superstitious, is sufficient to rebut a prima facie case of discrimination."[62] In sum, implicit bias helps explain why even egalitarian prosecutors strike minority jurors disproportionately.[63]

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[58] Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).
[59] 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 HARVARD L. & POL'Y REV. 149, 162 (2010).
[60] *Id.* at 162-65.
[61] *Id.*
[62] *Id.* at 163 citing Pruitt v. McAdory, 337 F.3d 921, 928 (7th Cir. 2003) (internal quotation marks and citations omitted).
[63] Anthony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

Professors Smith and Levinson also discuss the potential effects on jurors of closing arguments infused with implicit biases.[64] They focus on closing arguments that cast defendants as animals using language laced with animal imagery.[65] They cite to a case where the prosecution referred to the defendant in closing argument as an "animal" and that the jurors needed to "send a message to the jungle" by convicting the defendant.[66] Their article then discusses a social science study that people, even those who claim to have never heard of the stereotype, link blacks with apes.[67] In a related study, the researchers found animalistic references in the press referring to black defendants, but not white defendants, correlated with receiving the harshest punishments available.[68]

4) Lawyers, implicit bias, and judicial evaluations

Does implicit bias affect lawyers' evaluations of judges – especially concerning judges of color, other minority judges, and women judges? In many states, judicial performance evaluations (JPE's) "are a critical part of selecting judges, especially in states using merit-based selection systems."[69] It also applies in states with retention voting by the public where the constituents are simply voting a sitting judge up or down. Do female judges get penalized in their JPE's based on unconscious perceptions and implicit biases? This has been referred to as a "double bind" for women in the legal profession, because they may be penalized in their performance evaluations both in legal jobs and as judges "for being too masculine and for not fitting the masculine stereotype of the position."[70]

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[64] Smith, *supra* note 8, at 819-20.
[65] *Id.*
[66] *Id.* at 820.
[67] *Id.*
[68] *Id.*
[69] Rebecca D. Gill, *Implicit Bias in Judicial Performance Evaluations: We Must Do Better Than This,* JUSTICE SYS. J. 1 (2014).
[70] *Id.* at 6-7.

Professor Gill's article raises probing questions about how and the likelihood that implicit bias disadvantages minority and women judges in JPE's.[71] She states:

> Unfortunately, the results presented here suggest that there is significant cause for concern about JPE attorney surveys. The sex and race disparities in the Judging the Judges survey act as a thumb on the scales, systematically disadvantaging groups that have been traditionally underrepresented on the bench. There is not a single category of questions that escapes this problem; the effects of judge sex and race are significant, large, and consistent across all of the dimensions of judicial performance evaluated by the Judging the Judges survey.[72]

It appears the evidence is not yet fully developed to reach any firm conclusions. However, the issues raised by Professor Gill should be of great concern to the legal profession. Further, critical study is imperative to ensure that implicit biases are not affecting judgments about the merits of selecting or retaining judges.

5) Summary and expanding what we have learned

Implicit biases affect how a client chooses a lawyer. Important decisions public defenders and prosecutors make on a daily basis are also impacted by implicit biases, often in ways that are socially and legally undesirable. Implicit biases can also adversely affect the selection and retention of judges, negatively impacting women and minorities.

Implicit bias can affect lawyers in so many other ways, limited perhaps only by the imagination. Does a plaintiff's lawyer evaluate potential damages in a case for a black client differently than a white client? Will defense lawyers do the same thing? Do jurors? Are associates work

[71] *Id.* at 19-20.
[72] *Id.* at 19.

evaluated differently in law firms and legal departments based on skin color or other protected class attributes?[73]

C. Jurors

1) Implicit bias and jurors' memories

There has been little empirical study or analysis about the role of implicit bias in jury decision making. In fact, one is hard pressed to find any study involving actual trial jurors. However, there are a few studies involving mock jurors that reveal important insights into how implicit bias likely affects jurors in very significant ways. In this section, I examine the role of implicit bias in jurors misremembering important facts in racially biased ways; in evaluating ambiguous evidence in racially biased ways; and in devaluing the presumption of innocence in racially biased ways. It also shows how implicit bias likely impacts the administration of the death penalty in America.

The first study of mock jurors and implicit bias was done by Professor Justin D. Levinson in 2007, and involved the relationship between implicit bias and mock jurors misremembering case facts in racially

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[73] A research study examining racial confirmation bias found that when partners assessed the writing abilities of fictional third year litigation associates in an identical memo, there was a negative bias toward the memos perceived to be written by African Americans compared to Caucasians. The "African American" associate received an overall rating of 3.2/5.0 and generally received more negative feedback, whereas the "Caucasian" associate received more positive feedback and an overall rating of 4.1/5.0. The widest statistical disparity showed partners found only 2.9/7.0 of the spelling/grammar errors for the "Caucasian" associate, while 5.8/7.0 of the spelling/grammar errors were found for the "African American" associate. ARIN N. REEVES, YELLOW PAPER SERIES: WRITTEN IN BLACK AND WHITE – EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS, (Nextions Original Research, 2014), http://www.nextions.com/wpcontent/files_mf/1446822647201404011 4WritteninBlackandWhiteYPS.pdf.

biased ways.[74] Before turning to this study, it is important to realize that "the arc of thinking and writing about human memory reaches back at least 2000 years to Aristotle's treatise on the nature of living things, *On the Soul*."[75] For many centuries, Aristotle's memory theory compared memory to wax impressions.[76] Other memory metaphors developed comparing memory to retrieving information from a file cabinet or a video recording.[77] We now know that neither wax impressions, file cabinets, nor video cameras accurately describe how memory works.[78] The memories of witnesses and jurors are not as accurate as most people think they are. The accuracy of memories is affected by a host of external and internal factors. Thus, our brains "recreate or reconstruct our experiences rather than retrieve copies of them."[79] As long as we think of human memory as a video recording, we greatly overvalue its reliability.

In Professor Levinson's study, 153 participants from wide-ranging ethnic backgrounds read two unrelated stories. Seventy-two percent of the respondents indicated they were from mixed racial backgrounds[80] One involved a fistfight after two males accidentally bumped elbows in a crowded bar. The other involved the termination from employment of a marketing clerk.[81] The race of the protagonist in the stories provided the "independent variable." For the fight story, participants read about either William, a white, Tyronne, a black, or Kawika, a Hawaiian – all males. In the employment termination story, participants read about

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[74] Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007).
[75] Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility,* 64 AM. U. L. REV. 1331, 1340 (2015) (footnote omitted).
[76] *Id.*
[77] *Id.* at 1335-36.
[78] *Id.*
[79] *Id.* at 1336, citing DANIEL L. SCHACTER, THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS 9 (2001).
[80] Levinson, *supra* note 74, at 390.
[81] *Id.* at 392, 423.

Brenda, a white, Keisha, a black, or Ka'olu, a Hawaiian – all females. Participants were randomly assigned the race and names of the protagonist. Other than that, the stories were identical.[82]

After a ten-minute distraction exercise, participants were tested on their memory of the salient facts in the stories by responding to 16 questions.[83] The details of this study are fascinating, but only the general results are recounted, here. As to the fight story, aggressive facts were recalled in racially biased ways. Aggressive facts were much more likely to be recalled when Tyronne was the protagonist. For example when asked: "[William/Kawika/Tyronne punched James (white) from behind]," 59% correctly remembered this fact when it was Tyronne; 43% when it was William, and 35% when it was Kawika .[84] Participants also misremembered important facts in racially biased ways that favored William (white).[85]

As to the employment termination story, the rate of false memories was lower. There was only a 15.2 % false memory rate for the employment story, yet it was 34% for the fight story. Participants who read about Brenda (white) falsely remembered she was the employee of the month 17% of the time, for Keisha (black) it was 10%, and for Ka'olu only 2%.

This study and others establish "compelling evidence linking false memory generation to stereotypes…"[86] Professor Levinson, in part based on the research of other scholars, suggests that allowing jurors to take notes and ask questions of witnesses *may* reduce the effects of juror implicit memory bias and increase overall juror accuracy.[87] This is

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[82] *Id.* at 394-95.
[83] *Id.* at 393-94.
[84] *Id.* at 400-01.
[85] *Id.*
[86] *Id.* at 408.
[87] *Id.* at 400-11. For a comprehensive empirical study of lawyers and judges' perceptions of allowing jurors to ask questions of witnesses *see* Thomas D. Waterman, Mark W. Bennett & David C. Waterman, *A Fresh Look at Jurors*

because if helps jurors focus on actual evidence and "active juror" reforms improve the ways jurors process information.

2) Implicit bias and ambiguous evidence

In another Professor Levinson empirical study, along with Professor Danielle Young, the effect of implicit bias on mock jurors' evaluations of ambiguous evidence in a robbery scenario is examined.[88] This study examined the effect of altering skin tone on the arm of a perpetrator in a security camera photo of a robbery of a Quick Stop Mini Mart.[89] After participants read a paragraph about the robbery, they were shown a series of five photographs each for four seconds. The third photo was the subject of the experimental manipulation. It contained an image of the robber wearing a ski mask and holding a gun. Only the skin on the forearm was visible. Participants received a photo of either light or dark skinned forearms – everything else in the photos was identical.[90] After viewing the photos, participants were informed a suspect had been arrested. They were then asked to evaluate individually twenty items of ambiguous evidence. A few examples were:

> The defendant used to be addicted to drugs.
>
> The defendant has been served with a notice of eviction from his apartment.
>
> The defendant is left-handed.
>
> The defendant was a youth Golden Gloves boxing champ in 2006.

Questioning Witnesses: A Review of Eighth Circuit and Iowa Appellate Precedents and an Empirical Analysis of Federal and State Trial Judges and Trial Lawyers, 64 DRAKE L. REV. 485 (2016).

[88] Justin D. Levinson & Danielle Young, *Different Shades Of Bias: Skin Tone, Implicit Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010).

[89] *Id.* at 331-32.

[90] *Id.* at 332. The skin tone manipulation in this study was what social scientists call a between-subjects independent variable.

The defendant is a member of an anti-violence organization.

The defendant does not have a driver's license or car.[91]

The ambiguous evidence was designed so that some items tended to suggest guilt, some were neutral, and some tended to indicate innocence. After reading each piece of evidence, participants evaluated on the following 1-7 Likert Scale:

1 = very strongly tending to indicate Not Guilty

2 = strongly tending to indicate Not Guilty

3 = somewhat indicating Not Guilty

4 = neutral evidence

5 = somewhat tending to indicate Guilty

6 = strongly tending to indicate Guilty

7 = very strongly tending to indicate Guilty[92]

After completing the evidence evaluation task, participants completed several other tasks measuring explicit racial bias (the Modern Racism Scale); a task to measure how guilty or not guilty the defendant was ("On a scale of 0 (definitely not guilty) to 100 (definitely guilty), how guilty is the defendant?"; and two IAT's.[93]

Here are the key results:

Skin Tone Affects Judgments Of Ambiguous Evidence. The perpetrator's forearm skin tone in the photo meaningfully affected mock jurors' judgments of the evidence. Participants who saw the photo of the darker skinned forearm judged ambiguous evidence

[91] *Id.* at 333.
[92] *Id.*
[93] *Id.* at 334.

significantly more probative of guilt than those who viewed the lighter skinned forearm.[94]

Skin Tone Affects Judgments Of "How Guilty Is The Defendant?" The perpetrator's forearm skin tone in the photo meaningfully affected how guilty the defendant was perceived to be. Participants who viewed the photo with the darker skinned forearm judged the defendant guiltier than those who viewed the lighter skinned forearm. Thus, simply being primed with darker skin tone not only affected judgments about ambiguous evidence, but also led participants to view the defendant as more guilty.[95]

Evidence Judgments Unrelated To Explicit Biases. Scores on the two measures of explicit bias had no predictable effect on the participant's view of ambiguous evidence or on their guilty/not guilty decisions.[96]

The Judgments And Implicit Bias. At the end of the study, participants were asked if they could remember the race of the perpetrator in the security camera photo. Many participants, regardless of the skin tone they viewed, could simply not recall. This result suggests that skin tone of the perpetrator was not consciously considered by participants in the judgments they made. This was reinforced by the IAT results. Thus, the judgments made in the study were implicit in nature.[97]

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[94] *Id.* at 337. This result was obtained using a MANCOVA (a multivariate analysis of a variance test) statistical model. *Id.* at 336.

[95] *Id.* at 337. A MANCOVA statistical model was also used to determine how guilty the suspect was perceived to be with the addition of a logical regression analysis to determine these two variables on the decision of guilty or not guilty. *Id.* at 336-337.

[96] *Id.* at 338. This was also true when adding the explicit bias results to the regression analysis. *Id.*

[97] *Id.*

3) Implicit bias and the presumption of innocence

Over a century ago, the U.S. Supreme Court declared that the enforcement of the presumption of innocence is the foundation of our nation's criminal law."[98] But is it? Again, drawing insights from another Professor Levinson study, the question of whether implicit racial bias calls into question the fair administration of the bedrock principle of the presumption of innocence is examined.[99]

Racial Implict Bias Reduced The Benefit Of The Presumption Of Innocence. Participants in the study were jury eligible students. The study further refined the data from the Quick Stop Mini Mart robbery study and results showed that "when it comes to racial equality and the presumption of innocence, there is reason for concern."[100] The study established that there is implicit racial bias in being able to give black defendants the same benefit of the presumption of innocence that white defendants receive. Study participants held implicit associations between black and guilty.[101]

Warm Feeling Towards Blacks Correlated With Guilty Implicit Bias. There was one very interesting twist that reinforces the pernicious effects of implicit bias in the courtroom. Participants who reported warmer feelings toward blacks on an *explicit* bias test were *more* likely to show implicit guilty bias toward blacks.[102] Thus, they were less likely to be able to give black defendants the full benefit of the presumption of innocence.

The bottom line is that if judges, defense lawyers, and prosecutors want to ensure that jurors give minority defendants the full benefit of the

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[98] Coffin v. United States, 156 U.S. 432, 453 (1895) ("The presumption of innocence in favor of the accused is undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").
[99] Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty By Implicit Bias: The Guilty/Not Guilty Implicit Association Test,* 8 OHIO ST. J. CRIM. L. 187 (2010).
[100] *Id.* at 207.
[101] *Id.* at 204.
[102] *Id.* at 205.

presumption of innocence available to white defendants, more has to be done in the jury selection and trial process.

Allowing broader questioning into potential biases and more time in jury selection to explore such biases is one potential modification to current practice.[103] As one defense lawyer put it:

> It is not that I believe that racial or demographic stereotypes are an accurate proxy for the attitudes and life experience of all prospective jurors. I do not. It is that, absent a meaningful exploration of the latter, I am stuck with the former, and it would be foolhardy or worse not to at least consider the generalizations on which the stereotypes are based.[104]

While this helps with explicit biases, it does not help with implicit biases. Also, judges could be more open to allowing questioning about bias because "it is precisely when race is not an obvious issue that white juror bias is particularly likely."[105]

One Judges Approach To Implicit Bias And The Presumption Of Innocence. In an attempt to increase the likelihood that jurors give defendants the full benefit of the presumption of innocence, I have taken some unusual and unconventional measures in jury selection.[106] This is important, because the research discussed above clearly indicates that jurors have a more difficult time giving minorities the full benefit of the presumption of innocence due to stereotypes of those minorities engaging in greater criminality.

I have nothing but a wellspring of admiration for my federal and state court colleagues on the trial bench. They are the bedrock of the best

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[103] *See* Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias,* 44 CONN. L. REV. 827, 843-844 (2012).
[104] Abbe Smith, *"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense,* 67 FORDHAM L. REV. 523, 530-31 (1998).
[105] Roberts, *supra* note 103, at 846.
[106] Mark W. Bennett, *The Presumption of Innocence and Trial Court Judges: Our Greatest Failing,* THE CHAMPION, May, 2015, at 18-20.

system for delivering justice known to humankind. As a group, however, we, along with defense counsel and prosecutors, have woefully failed to assist potential jurors in internalizing the meaning of the presumption of innocence. The hope of all judges, defense lawyers, and prosecutors should be that each juror selected will be committed to giving the accused the full benefit of the presumption of innocence. Unless we collectively, dramatically improve our efforts to explain the presumption – that hope will not be realized.

As a new trial court judge in 1994, I quickly realized that jurors lacked the information necessary to give the accused the "full benefit" of the presumption of innocence. In one of my first criminal jury trials, after giving what I thought was an outstanding explanation of the presumption, I discovered how little the potential jurors actually understood. I decided to ask a question I had asked in my first criminal trial, in July 1975, when I was a newly minted member of the bar. I picked a prospective juror at random and stated: "Please take a very good look at defendant Tyronne Williams." I paused and then asked: "Does he look guilty or not guilty?" The juror responded, as thousands have since: "I have no idea, I haven't heard any of the evidence yet." I proceeded to ask six or so prospective jurors the same question. Their responses were all eerily similar. I instantly knew I had been completely wrong in assuming that the potential jurors actually understood the presumption.

Experience teaches that simply defining the presumption of innocence or sprinkling a few platitudes about its importance is nowhere near enough.

So what do I do? I start, like most of my colleagues, by explaining some important elements of the presumption of innocence. I explain that the presumption is so important that it applies in every criminal case from Maine to California and Hawaii to Florida. It applies in all 94 federal district courts and all state courts. The presumption, and "reasonable doubt" (which I also explain in great detail), are, for my money, the two most important concepts in the American judicial system. It is because

of these two bedrock principles that our system of justice is envied around the world.

In visual terms, I explain that the presumption is like a steel curtain that surrounds the accused – except it is transparent, so we cannot actually see it. I tell potential jurors that the presumption surrounds the accused throughout the entire trial. I explain that the only way the presumption can be overcome is if the prosecution can produce enough evidence, beyond all jurors' reasonable doubts, to completely chip away the steel curtain.

I explain that the presumption may, all by itself, be sufficient to find the accused not guilty. Using my hands as the scales of justice, I explain that in civil cases the parties start even and the party filing the suit has to prove its case by just a slight movement of the scales — as if a feather has been placed on one. I then move my hands very far apart to demonstrate that the presumption requires that the scales start very far apart. So far, so good — but I assume (and hope) that most judges do this and more.

The potential jurors are wide-eyed and several mouths are gaping. I then state as confidently as I can: "I just shook hands with an accused that is absolutely not guilty. I believe this to my core and each of you must believe it, too, or you cannot sit on this jury."

Here comes the innovative part. It happens immediately after my "trick" question when I tell potential jurors to take a good look at the accused and ask several prospective jurors if the accused looks guilty. I stand up, leave the bench, make my way into the well of the courtroom, walk directly over to the defendant, shake the accused's hand, instantly spin around, and walk up within a few feet of the front row of the prospective jurors. I assure you, there is shock and awe in the courtroom. The potential jurors are wide-eyed and several mouths are gaping. I then state as confidently as I can: "I just shook hands with

an accused that is absolutely not guilty. I believe this to my core and each of you must believe it, too, or you cannot sit on this jury." I remind them that the accused is absolutely not guilty "unless and until" the prosecution can establish guilt beyond a reasonable doubt. As my words sink in, I walk slowly back to the bench.

After taking my seat, I say: "Here is your free pass off jury duty. If any of you cannot give the accused, the full benefit of the presumption of innocence, you can stand up and walk out the courtroom doors because you are free to leave. You serve your country just as well as those that are selected because you are being honest about your inability to give the accused the full benefit of the presumption of innocence."

Then I go into scenarios about the defense lawyer not doing anything and the accused not testifying. I ask the potential jurors if this would affect their ability to give the accused the full benefit of the presumption of innocence. Next, I ask this question: "If you were charged with a crime and believed you were not guilty; would you want to testify?" There are many reasons a particular defendant would not want to testify. I explore these reasons. I ask the prospective jurors, especially if they said they would want to testify, if, in the event the accused does not testify, they can promise not to hold it against the accused and not to discuss it with their fellow jurors during deliberations. Then, to re-emphasize how serious I am about the presumption, I repeat: "As I said, any of you are free to leave if, for whatever reason, you are unable to give the accused the full benefit of the presumption."

Potential jurors hear about my father, a World War II veteran who fought in the Pacific for our enduring freedoms. I tell them that, shortly after I was confirmed as a judge, my father came and watched an early criminal trial. After the trial, my father told me that he was proud of me for going out of my way to make sure the parties got a fair trial because that was one of the precious freedoms for which he and others had fought. I ask the potential jurors if they have loved ones who have served in the military or alternative service.

I close this portion of the voir dire by asking if they agree that, by giving the accused the full benefit of the presumption of innocence, they honor all who have served and are serving our country. I then move on to "reasonable doubt" and a colorful reasonable doubt chart that I display in my PowerPoint voir dire.

4) Summary and expanding what we have learned

Memories are not like a video recorder or file cabinet, but are affected by many internal and external factors. Jurors' memories of actual case facts and the creation of false memories are significantly affected by implicit biases. The darkness or lightness of the skin tone of a suspect can dramatically influence how jurors view ambiguous evidence and how convinced they are of a defendant's guilt. Jurors are less likely to give defendants with a darker skin tone the benefit of the presumption of innocence. However, these things can be overcome. One judges' effort, to inculcate in potential jurors a belief in the importance of, and what it means, to give every defendant the full benefit of the presumption of innocence can be replicated across the country.

It is my belief that judges and lawyers will be more interested in, and pro-active in learning and experimenting with, strategies to reduce implicit bias in their courtrooms by understanding and comprehending the pernicious effects of implicit bias discussed in this chapter. Because most implicit bias research is in areas unrelated to the legal system, much needs to be explored.[107] Here are just a few areas of potential future inquiry – does implicit bias result in jurors: giving minority witnesses' testimony less weight?; giving minority jurors' opinions less weight?; or finding minority lawyers' arguments less credible? The answers to these and other probing questions await further empirical research.

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[107] Mike Morrison, et.al., *Stacking The Jury: Legal Professionals' Preemptory Challenges Reflect Jurors' Levels Of Implicit Bias,* 42 PERSONALITY & SOC. PSYCHOL. BULL. 1129, 1130 (2016) ("[C]ompared to the exponentially growing body of research in the area of implicit social cognition empirical data …in legal decision-making it is still scarce.").

Later Chapters discuss many of the de-biasing strategies and interventions to reduce the impact of implicit bias. Thankfully, cognitive social scientists are rapidly expanding research on de-biasing techniques.[108]

III. Conclusion

This Chapter examined ways in which implicit bias manifests in the players in the criminal and civil justice systems. Implicit bias impacts a plethora of discretionary decision makers in virtually unlimited ways.

Near the end of their book, Blind Spot, the authors, (two of the three social scientists who invented the IAT) Dr, Banaji and Dr. Greenwald, indicated we need to be concerned, not only about large consequential outcomes, but repeated small effects. They give as one example of a consequential outcome sending an innocent person to prison.[109] However, they observe that repeated small effects, even those so small they cannot be accurately measured, can still have enormous consequences. As an example, they use an athlete who improves 1/100th of 1 percent a day. Too small an effect to be measured in a few day or even a few weeks. The improvement in a world class 100-meter sprinter would be 1/1,000th of a second – the time to run one centimeter.[110] But, over 200 days, that is enough impact to improve .2ths of a second which is "enough to be the difference between holding a world record and being an unnoticed also-ran."[111]

Small impacts of implicit bias have huge consequences in the larger scheme of our civil and criminal justice systems. As Martin Luther King, Jr., so often reminded us: "The arc of the moral universe is long, but it

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[108] See e.g. Calvin K. Lai, et.al., *Reducing Implicit Racial Preferences: A Comparative Investigation Of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOL. 1765 (2014).
[109] MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT 202 (2013).
[110] *Id.* at 205.
[111] *Id.*

bends towards justice."[112] As history has taught us, it does not bend on its own. Each of us most do more to overcome the insidious effects of implicit bias.

[112] *See* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63, 197 (1988) ("[O]ne of King's favorite lines, from the abolitionist preacher Theodore Parker, [was] 'The arc of the moral universe is long, but it bends toward justice.'").

So You'd Like to Know More

Jerry Kang, Mark W. Bennett, et al., *Implicit Bias in the Courtroom*, 59 U.C.L.A L. REV. 1124, (2012).

L. Song Richardson & Phillip A. Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626 (2013).

Robert J. Smith & Justin D. Levinson, *The Impact Of Implicit Racial Bias On The Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012).

Justin D. Levinson & Danielle Young, *Different Shades Of Bias: Skin Tone, Implicit Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010).

Jeffery J. Rachlinsky, et al., *Does Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195 (2009).