IMPLICIT BIAS II

A DEEPER DIVE INTO RACIAL BIAS & SYSTEMIC RACISM IN THE LEGAL PROFESION
conscious/explicit behavior

unconscious/implicit behavior
WHERE DOES IMPLICIT BIAS COME FROM?

MEDIA, BOOKS, EDUCATION, HISTORY:
- Slavery
- Taking land from Native Americans by force and extermination
- U.S. Immigration laws
- Denial of the right to vote (blacks and women)
- Jim Crow/Segregation in Housing, Places of Public Accommodations & Education
- Separate But Equal
SLAVERY: More than 12 million Africans of all ages, shackled in the bottom of ships, were sold into a lifetime of forced labor.


1930s Social Security Act left out 2/3s of Black Americans.
Federal mortgage lending programs helped white Americans buy homes after World War II, but Federal policy said that the very presence of a black resident in a neighborhood reduced the value of the homes there, effectively prohibiting African-American residents from borrowing money to buy a home.

Average black household worth $17,000 in 2016 while the average white household was worth 10 times that.

Sentencing laws of the past several decades meant that poor black Americans were thrown in prison for decades-long terms for consuming one type of cocaine while their wealthier white counterparts got a slap on the wrist for consuming another.
Black children are more likely to attend under-resourced schools, thanks to a reliance on local property taxes for funding;

Black voters are four times as likely as white voters to report difficulties voting.

Black women are three to four times as likely as white women to die in childbirth, in part because of a lack of access to quality health care.
SYSTEMIC RACISM

INDIVIDUAL RACISM

IMPLICIT BIAS
"What adults believe about a young person’s capacity, often determines what will be achieved."
TEACHERS...

- Ask more complex questions of higher achieving students than lower achieving students.
- Give less wait time to lower achieving students than to higher achieving students.
- Call on higher achieving students more often than lower achieving students.
- Seemingly provide help to lower achieving students, but in actuality provide help to higher achieving students more often because they seek it.
- Spend 25% less time listening to lower achieving students than higher achieving students.
Discipline in VT

- The Use of Exclusionary discipline, restraint, seclusion, referral to law enforcement and school-related arrest varies widely.

- Black/African-American and Native American Students Were 2x-3x more likely than white Students to be suspended.
A Johns Hopkins study showed that students suspended just one time in grade 9 had double the risk of dropping out.

Other studies have shown that disciplinary removal increases the likelihood of contact with the juvenile justice system by threefold.

Other studies connect drop-out rates to a greater likelihood of incarceration as an adult and higher poverty rates.
Lifetime Likelihood of Imprisonment

- All Men: 1 in 9
- White Men: 1 in 17
- Black Men: 1 in 3
- Latino Men: 1 in 6
- All Women: 1 in 56
- White Women: 1 in 111
- Black Women: 1 in 18
- Latina Women: 1 in 45
What Does This Look Like Where We Work?

- Police
- Attorneys
- Judges
- Jurors
• When participants are subliminally primed with a Black male face (as opposed to a White male face, or no prime at all), they are quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static.

• The phenomenon also happens in reverse. When subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces.

• The idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness.
• Researchers found that participants were quicker to shoot when the target was Black as compared to White.
• Also, under time pressure, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets, and failed to shoot more armed White targets (misses) than armed Black targets.
• L.A. Study – Prosecutors more likely to press charges against Black than White Defendants that could not be attributed to race-neutral factors such as prior record, seriousness of charge or use of weapon (Florida and Indiana too).

• U.S. Sentencing Commission – Prosecutors more apt to offer White defendants generous plea bargains with sentences below the prescribed guidelines than to offer them to Black or Latino defendants.

• Even Capital Punishment defense attorneys show negative implicit bias towards African Americans - mirrored population at large.
A JURY OF ONE’S PEERS?

In Louisiana, prosecutors struck Black jurors 3x more often;

In North Carolina, Black jurors were struck 2x more often (2012);

In Houston County, Alabama, between 2005 and 2009, prosecutors struck 80% of Black jurors.
Racial diversity in the jury alters deliberations. Racially diverse juries (compared to all white jury) had…

- longer deliberations
- greater focus on the actual evidence
- greater discussion of missing evidence
- fewer inaccurate statements
- fewer uncorrected statements
- greater discussion of race-related topics.
Evaluation of Evidence

Mock Jury Study: Five photographs of a crime scene including surveillance camera photo that featured a masked gunman whose hand and forearm were visible. The arm was dark or light.

Jurors evaluated the evidence presented and answered “how guilty is the defendant?”

More likely to evaluate the evidence as more credible and find the defendant guilty if the skin was darker.
SENTENCING

• Federal Black defendants were sentenced to 12 percent longer sentences under the Sentencing Reform Act of 1984.

• Black defendants are subject disproportionally to the death penalty.

• Probation officers. In one study, researchers subliminally primed police officers and juvenile probation officers with words such as “Harlem” or “dreadlocks.” This subliminal priming led the officers to recommend harsher sentencing decisions.
Bias in Civil Cases - Employment Discrimination

- **Pre-trial Motions**: Prevailed 4.23% of the time vs. 22.23% in other types of civil cases;

- **At trial**: 20% of the time vs. 46% of the time.

- **On appeal**: courts reversed 54% of the pre-trial victories of plaintiffs vs. 11% of defendant victories; courts reversed 42% of plaintiff trial victories vs. 8% of defendant victories.
QUESTIONS WE SHOULD BE ASKING

1. Are you selecting a jury that is fair or biased in your favor?
2. Should the Judge instruct the jury on implicit bias?
3. What if the law you’re using to charge a defendant punishes the poor or discriminates against a group of people?
4. Is there anyone collecting, reviewing, analyzing race data from your office, the bench? If so, what are you doing with it?
5. When is it appropriate for you to challenge the law instead of following it?
6. What is your role in addressing bias?
PLEDGE: I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.

JURY INSTRUCTIONS: Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.
What is Your Role in Addressing Bias?

START WHERE YOU ARE:

1. Read more, learn more, practice mindfulness.
2. Make internal changes in hiring, promoting, discussing issues of race and racism and bias in the workplace.
3. Evaluate what you do or don’t do as an attorney/judge that perpetuates systemic racism and bias.
4. Address those things specifically and strategically.