

**A JUSTICE SYSTEM'S RESPONSE
TO IMPLICIT BIAS**
Iowa Defense Counsel Association Annual Convention

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I. OVERVIEW

A. Role of the judicial system.

- 1. The Supreme Court of Iowa is responsible for administering justice within the Judicial Branch. Iowa Const. art. V, § 4; Iowa Code § 602.1201. It is also responsible for protecting the values and principles established in the Constitution. See *State v. Lyle*, 854 N.W.2d 378, 385 (Iowa 2014) (discussing core values contained in constitutions); *Varnum v. Brien*, 763 N.W.2d 862, 866–67 (Iowa 2009) (discussing constitutional principles).**
- 2. Justice does not only result from court decisions. Justice is also administered and addressed by courts through procedures, court rules, and commissions and task forces.**
- 3. The Supreme Court is obligated to inform the public of injustice and to address and remove injustice when found in the system of justice.**
 - a. 1993—Established the Supreme Court's response to domestic abuse. See Supreme Court Task Force on Courts' and Communities' Response to Domestic Abuse, *Final Report* 1 (1994), <http://www.iowacourts.gov/Administration/Reports/>.**
 - b. 2014—A call for communities to find ways to address racial disproportionality in the criminal justice system. See Mark S. Cady, 2014 *State of the Judiciary* 8 (2014), <http://www.iowacourts.gov/Administration/Reports/>.**
 - c. 2016—A call to confront and eradicate human trafficking. See Mark S. Cady, 2016 *State of the***

4. Justice has a voice, and judges must be leaders in advancing justice in every way possible and to inform the public when factors within the court system threaten the core values of justice.
 5. Impartiality and the absence of bias lies at the core of the values of the judicial system and the duties of judges under the code of judicial conduct.
- B. Advancements in science have helped to reveal injustice to help improve justice over time.**
1. Social science has improved justice by giving greater understanding to the meaning of due process as applied to juvenile court procedures over time. *In re Gault*, 387 U.S. 1, 26 (1967).
 2. Brain science has improved justice by giving greater understanding to the meaning of the Cruel and Unusual Punishment Clause of the Constitution over time. *Miller v. Alabama*, 123 S.Ct. 2455, 2464–65 (2012); *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013).
 3. Social science has improved justice by giving greater understanding to the meaning of equal protection over time. *Varnum v. Brien*, 763 N.W.2d 862, 892–93 (Iowa 2009).
- C. Science of implicit bias.**
1. Brain science has now revealed the presence of implicit bias that affects the thinking and actions of people. See Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 9997, 1035 (2006) (describing research concerning implicit bias); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality and Soc. Psychol. 5, 6 (1989).
 2. The research in this area is still growing and the science is still in the process of discovering how implicit bias affects the actions and thinking of people. See Ginger Pinholster, *Journals and Funders Confront Implicit Bias in Peer Review*, *Science*, May 27, 2016, at 1067–68.

3. **Implicit bias grounded in race and gender, and other areas, reveals a problem that threatens the core values of justice. See Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 Wash. U. J.L. & Pol'y 71, 96 (2010); Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 Drake L. Rev. 591, 592–93 (2009).**

II. IMPLICIT BIAS

A. Understanding implicit bias

1. **Implicit bias involves unrecognized and unconscious thoughts. It allows the mind to quickly make automatic associations between two concepts. It is part of the human adaptation that comes from that portion of the brain responsible for identifying and responding to danger. This human process becomes a bias that threatens justice when it takes the form of making unconscious negative associations between certain groups of people and undesirable etiologies or attributes, such as associating a particular race with crime or violence. These unconscious associations can account for an unconscious bias in our decision-making, especially those decisions that must be made quickly.**
2. **Implicit bias is difficult to determine and measure. An online test called the Implicit Association Test (IAT) is available at www.implicit.harvard.edu.**

B. Understanding the effects of implicit bias

1. **If implicit bias exists in our thinking, it has infiltrated into our rules and laws. If implicit bias exists in our laws, it exists in our decisions. If implicit bias exists in our decisions, it will exist in the future of our justice system unless ways are found to control it and account for it.**
2. **The process of justice has been built over the years in ways that not only can permit implicit bias to exist, but also shielded from detection.**
 - a. **Existing legal standards to review judicial outcomes.**
 - i. **Judicial discretion.**

- ii. Deference given to the fact finder.
 - b. Legal standards have been created to detect explicit bias, but not implicit bias. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (employment discrimination); *Batson v. Kentucky*, 476 U.S. 79, 85 (1989) (jury selection).
3. Statistics showing racial disparity in our justice system
- a. African American youth make up 16% of all youth, 28% of all juvenile arrests, 35% of youths prosecuted as adults, and 58% of youths in state prisons. Christopher Hartney & Fabiana Silva, National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* 37 (2007).
 - b. Statistics in Iowa also show racial disparity. See Brian Stauffer, Human Rights Watch, *Every 25 Seconds* (2016), <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.
4. Relationship between racial disparities and implicit bias
- a. The racial disparity that exists in our justice system can be explained by the way implicit bias influences decision making in our justice system. Michelle Alexander, *The New Jim Crow* (2011).
 - b. A study of juvenile sentencing reports revealed how black and white offenders were described by prosecutors differently. Blacks were commonly described as having internal personality conditions such as disrespect, while whites were described as having external conditions such as family conflicts. Bias was particularly revealed in drug enforcement, in the distinctions made with kids viewed as dangerous drug dealers and those viewed as selling to friends. *Supra*.
5. The impact of a subculture of bias can be embedded in law by experiences of life. Oliver Wendell Holmes Jr., *The Common Law* 5 (Pereira & Beltran, eds., University of Toronto Law School 2011) (1881).

III. RESPONSE TO IMPLICIT BIAS

- A. Find a starting point to begin the conversation

1. **The most important step that must come first is to find a common point of understanding to address the issue of implicit bias.**
 - a. **Implicit bias is not racism or bigotry and must not be viewed as such. It involves a human condition and forces separate from racism and will perpetrate injustice and inequity until it can be meaningfully addressed.**
 - b. **A discussion of implicit bias must be tied to the science that has emerged and is now available to help advance justice in ways never possible. It is an opportunity. Our discussions must not be dismissive and must not attempt to minimize the problem or be viewed as an insult against any person or group under consideration. Our discussions must go forward with the purpose of bringing us closer to our collective values of justice.**
 - c. **Solutions will not come easy or fast and must be thoughtful and contemplative. The elimination of implicit bias may be hard, but people can compensate for its presence if acknowledged and understood.**

B. Action Steps

1. **Training**
2. **Review the decision-making points of the justice system.**
 - a. **Jury selection and jury instructions.**
 - i. **Consider remedies suggested by Judge Mark Bennett. See Mark Bennett, *Unraveling the Gordian Knot of Implicit Bias Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, *Voir Dire*, Summer 2010, at 13–15.**
3. **Create a task force or joint bench-bar committee to consider solutions.**
4. **Build courts in ways that can address implicit bias.**

- a. **Juvenile Diversion Courts are an example of a way the judicial system can modified its procedures to overcome and help eliminate implicit bias in the referral of youthful offenders into the juvenile justice system.**
5. **Change the legal culture so that lawyers and judges begin to consider how implicit bias can be an obstacle to obtaining justice in each case. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1223 (2009) (indicating that cognitive corrections may allow implicit bias to be overcome).**

IV. CONCLUSION.

A. Going forward.

1. **We are an egalitarian society. Just as a part of our brain is responsible for implicit bias, another part, the portion responsible for pleasure, gives us our sense of fairness and justice. This human trait can overcome the implicit bias that interferes with justice and equality.**
2. **Implicit bias is fundamentally opposed to what the justice system does, so finding solutions to remove implicit bias must be fundamental to what we do.**