
North Carolina Criminal Law Blog: Implicit Bias: Why Race is Hard Even when People are Good*

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Scholar [John Powell](#) succinctly defines implicit bias as “a habit of the mind.” He explains that our brains have a natural tendency to form associations (for example, we might see a tall person and think “basketball player”) in order to make sense of the 5,000 or so images with which we are bombarded each day. This process happens rapidly at an unconscious level and helps us to navigate the world. However, concerns arise when our brains form associations between race and negative traits. For example, in one [recent study](#), researchers concluded that participants held implicit associations between “Black” and “guilty,” and that such associations predicted how they would evaluate ambiguous evidence. A growing body of scholarship, discussed in the School of Government manual [Raising Issues of Race in North Carolina Criminal Cases](#) (see [Section 1.3D](#) in particular), suggests that such unconscious associations affect the perceptions and decisions of court actors, and may contribute to disparate treatment and outcomes in the criminal justice system.

Implicit bias is a topic that has been receiving increasing interest in the criminal justice field. For example, the National Center for State Courts has developed training programs and resources, available [here](#), to help courts address it. The American Bar Association has developed standards that direct defense attorneys and prosecutors to “strive to eliminate implicit biases” and to “be proactive in efforts to detect, investigate, and eliminate improper biases.” See ABA Criminal Justice [Standard 4-1.6](#) and [Standard 3-1.6](#) (fourth edition). The North Carolina Commission on Racial and Ethnic Disparities, a body of stakeholders that includes judges, police chiefs, public defenders, and prosecutors, is examining how implicit bias may be contributing to racial disparities in our courts, and provides an overview of the issue [here](#).

Court actors in North Carolina are increasingly seeking out opportunities to examine how implicit bias may affect their decision-making. Last year, a number of groups served by the School of Government, including magistrates, district court judges, superior court judges, court of appeals judges, indigent defense attorneys, prosecutors, Department of Social Services attorneys, assistant and deputy clerks of court, and municipal clerks requested and received training on implicit bias. According to [this report](#) by the National Center for State Courts, educational programs that discuss how our brains categorize and use information and the implications of “unconscious stereotype activation” may help participants correct for bias.

Recently I was fortunate enough to be included in a training program for prosecutors in Mecklenburg County on the topic of implicit bias.** (Mecklenburg court actors have been thinking about these issues for some time, as demonstrated by the [Race Matters for Juvenile Justice](#) initiative, started in 2000.) It was there that I heard John Powell speak, in addition to scholars [Song Richardson](#) and [Rachel Godsil](#). They conducted exercises to demonstrate how our minds “fill in gaps” in information to conform to our expectations (I won’t give anything away in case you have the chance to take part), and described studies from different fields on the impact of implicit bias, such as [this one](#) in which White participants with high levels of implicit bias were more likely to perceive Black people’s facial expressions as angry or threatening.

One relatively new Assistant District Attorney asked a particularly insightful question: “Has the law lagged behind the science in acknowledging the impact of implicit bias?” The presenters said that indeed it has. Generally speaking, a defendant who is seeking relief on the basis that he was discriminated against in violation of his rights under the Equal Protection Clause must show that the challenged action was intentional or deliberate. See *Washington v. Davis*, 426 U.S. 229 (1976); *In re Register*, 84 N.C. App. 336 (1987). If bias operates for the most part at an unconscious level, as social science studies have indicated, it may be difficult to make a showing of discriminatory intent. This issue may arise at various stages of a case, such as when a defendant is seeking to show that race played an unlawful role in a traffic stop, a charging decision, or sentencing.

In the context of jury selection, some jurists have concluded that the *Batson* framework is unworkable because an attorney may exercise a peremptory strike based on race without even realizing it. See, e.g., *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (observing that “sometimes, no one, not even the lawyer herself, can be certain whether a



decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype,” and questioning, “[h]ow can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?”); *State v. Saintcalle*, 309 P.3d 326, 339 (Wash. 2013) (“we should abandon and replace *Batson*’s ‘purposeful discrimination’ requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion”). Some scholars argue that a peremptory strike violates the Equal Protection Clause under the current framework when it is motivated by implicit bias. See Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L. J. 1053, 1099 (2009) (“[t]here is no exemption for strikes that are discriminatory, but not intentionally so”).

The manual on race (available for free online) offers guidance on recognizing when implicit bias may be playing a role in a particular stage of a case and making a showing. Also, it points to research suggesting that when issues of race are brought to our attention, we tend to correct for our implicit biases. This is hopeful news and suggests that the numerous court actors in North Carolina who are learning and talking about implicit bias are positioning themselves to mitigate its effects in our courtrooms.

*I borrowed this expression from John Powell.

**I am grateful to Mecklenburg District Attorney Andrew Murray for inviting me to attend this excellent program and to Clerk of Superior Court Elisa Chinn-Gary for making the connection on my behalf.