



44th Annual Bench-Bar & Boardroom Conference

Thursday, May 18, 2017

9:15 – 10:55 AM

**Hiding in Plain Sight: Confronting
Implicit Bias in Ourselves and in Our
Justice System**

*10.0 CLE Hours, Including 2.5 Ethics Hours in Missouri
10.0 CLE Hours, including 2.5 Ethics in Kansas*

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KCMBA
Kansas City Metropolitan Bar Association



Hon. Bernice B. Donald, *United States Court of Appeals for the Sixth Circuit*

Judge Bernice Bouie Donald, a judge on the United States Court of Appeals for the Sixth Circuit, is the first African American woman to serve in that position. She was the first African American woman in Tennessee to serve on the United States District Court for the Western District of Tennessee, the first African American woman in the United States to serve as a bankruptcy judge, and the first African American female judge in Tennessee. Judge Donald received her law degree from the University of Memphis Cecil C. Humphreys School of Law, where she has served as an adjunct faculty member. She frequently serves as faculty for the Federal Judicial Center and the National Judicial College.

An internationally recognized legal scholar, Judge Donald has lectured and trained judges around the world. She has served as faculty for numerous international programs, including in Romania, Mexico, Turkey, Brazil, Bosnia, Ukraine, Botswana, Namibia, Senegal, Rwanda, Tanzania, Russia, Egypt, Morocco, Thailand, Cambodia, Armenia, Jamaica, Uganda, and the Philippines. In 2003, Judge Donald led a People to People delegation to Johannesburg and Capetown, South Africa. She also traveled to Zimbabwe in 2005 to monitor the trial of a judge accused of judicial misconduct.

Judge Donald has served as President of the American Bar Foundation, the National Association of Women Judges, and the Association of Women Attorneys. She co-founded 4-Life, a skills training and enrichment program for students ages 6 to 15 designed to teach children to become positive productive citizens. In addition, she has served on the Board of Directors of the Stax Museum of American Soul and the Stax Academy Charter School.

Currently, Judge Donald serves as Chair of the American Bar Association (“ABA”) Center for Human Rights and is working to publish an implicit bias resource book for judges. Prior to this, Judge Donald served as Chair of the ABA Criminal Justice Section, the first African American woman to have served in that position. Her focus was on issues of children of incarcerated parents, mass incarceration, and the collateral consequences of incarceration.

Judge Donald has received over 100 awards for professional, civic, and community activities, including the Distinguished Alumni Award from the University of Memphis, the Martin Luther King Community Service Award, and the Benjamin Hooks Award from the Memphis Bar Foundation. In 2011, she received the Spirit of Excellence Award from the ABA Commission on Diversity. Two years later, she was elected to the Board of Directors for the American Judicature Society. During the 2013 Annual Meeting of the National Bar Association, Judge Donald received the William H. Hastie Award, the Judicial Council's highest award recognizing excellence in legal and judicial scholarship and commitment to justice under the law. Judge Donald also received the Difference Makers Award from the Solo, Small Firm & General Practice Division of the ABA, and the Pioneer Award from her fellow classmates at East Side High School. She has also received the Justice William Brennan Award from the University of Virginia and the Pickering Award from the Senior Lawyers Division of the ABA. Most recently, Judge Donald received the Be the Dream Legacy Award from the City of Memphis and the Women of Excellence Award from the Tri-State Defender.

Hiding In Plain Sight: Confronting Implicit Bias in Ourselves and in Our Justice System

Kansas City Metropolitan Bar
Bench-Bar Boardroom
Branson, MO
May 18, 2017

Honorable Bernice B. Donald
United States Court of Appeals for the Sixth Circuit

New York Times Faces of Power

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What is "Implicit Bias" or Social Cognition?

- Implicit social cognition is the process by which the brain uses "mental associations that are so well-established as to operate without awareness, or without intention, or without control."

Source: Project Implicit, Harvard University
<https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq2>



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An Explosion of Research...

...about implicit bias and its impact on the decision-making process has been published in the past decade.

This research offers us new avenues and opportunities to intervene and reduce the effects of bias in our institutions and interactions.



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Implicit Association Test (IAT)

Black
or
Good



White
or
Bad



Nasty
Wonderful
Failure

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Negative Implicit Attitudes

- Researchers who employ the IAT have found that the majority of tested Americans harbor negative implicit attitudes and stereotypes toward blacks, dark-skinned people...they consistently implicitly associate black with negative attitudes such as *bad* and *unpleasant*, and with negative stereotypes such as *aggressive* and *lazy*.

- *Smith & Levinson: The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion, 2011*

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Implicit Bias: A Summary

Evidence from hundreds of thousands of individuals shows that:

- (1) the magnitude of implicit bias toward members of outgroups is large;
- (2) implicit bias often conflicts with conscious attitudes and intentional behavior;
- (3) implicit bias influences behavior toward those who are the subject of the bias.

■ *Fair Measures, California Law Review, Kang and Banaji*

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An Inconvenient Truth

- “As disturbing as this evidence is, there is too much of it to be ignored.”

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Three Things About Implicit Bias

1. We all have biases—this is a way for us to process & organize information. “Bias doesn’t make you prejudiced, it makes you human.”
2. Our unconscious biases are often in conflict with our egalitarian value system and beliefs
3. Implicit biases predict & determine our actions and decisions more than our explicit values.

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Stereotypes



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Some Thought-Provoking Research

The Impact of Height



In the U.S., one inch of height is worth \$789 per year in salary.

Source: Malcolm Gladwell: *Blink*

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The Impact of Skin Tone

Scale of Skin Color Darkness



Immigrants with...lightest complexions earned...about 8 to 15 percent more than those with the darkest skin tone
"Being one shade lighter has about the same effect as having an additional year of education,"

Source: Joni Hersch, Vanderbilt University

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Racialized Perspective on Writing Skills



- 60 Lawyers received the exact same research memo written by a theoretical third year law student.
- Half of the lawyers were told that the law student was white, the other half that the student was African American.

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How was the memo rated?

- The exact same memo, averaged a 3.2/5.0 rating under our hypothetical African American and a 4.1/5.0 rating under hypothetical white student. The qualitative comments on memos, consistently, were also more positive for the “Caucasian” student.

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Misremembering the Facts

Prospective jurors were given a fictional incident. Some read about “William,” and the others about “Tyrone.” The facts of the incident were exactly the same. Participants more frequently remembered aggressive details when Tyrone rather than William was the defendant.

Levinson concluded “that the race of a civil plaintiff or a criminal defendant can act implicitly to cause people to misremember a case’s facts in racially biased ways.”

Source: See Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making, and Misremembering*, 57 Duke L.J. 345 (2007).

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“Prejudice proceeds from
whom we choose to help”



The Bus Study

It's less likely these days to find people in positions of authority, even at lower levels of decision making, consciously denying minorities rights. But it is easier to imagine decision makers, like the bus drivers, granting extra privileges and accommodations to nonminorities. **Discriminatory gifts are more likely than discriminatory denials.**

New York Times, Feb. 24, 2015



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Can We Use This Research to Identify New Interventions to Reduce Consequences of Implicit Bias?



- Implicit bias research helps us to understand how unconscious prejudice or stereotypes may affect decision-making process

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Microaggressions Defined

- The casual degradation of any marginalized group. The term was coined by psychiatrist and Harvard University professor Chester M. Pierce in 1970 to describe insults and dismissals he regularly witnessed non-black Americans inflict on African Americans.

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Chronic Egalitarian



- Persons who are made aware of the fact that their reactions are biased, and then allowed to “practice” neutral judgments are more likely to make them on a day-to-day basis. This is especially true if they are personally committed to racial equality norms, as opposed to socially pressured to conform to norms of formal equality.
- “The best candidates for non-prejudiced reactions are a group who are called ‘chronic egalitarians’—people who monitor their own reactions and behavior in an effort to root out stereotypes and feelings of which they don’t approve”

Sheri Lynn Johnson, “[Litigating for Racial Fairness After McCleskey v. Kemp](#),” (2008)

The Good News

- Self, situational, or broader cultural interventions can correct systematic and consensually shared implicit bias.
- Moreover, recent discoveries regarding malleability of bias provide the basis to imagine both individual and institutional change.

(*Fair Measures, California Law Review, Jerry Kang and Banaji*)

Devine Intervention



“Our data provide evidence demonstrating the power of the conscious mind to intentionally deploy strategies to overcome implicit bias”

Patricia Devine, “Long-term Reduction in Implicit Race Bias: A Prejudice Habit-breaking Intervention”

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How Do We De-Bias?

- Do Not Suppress, Rather Openly Acknowledge and Confront One's Biases
- Intention: Motivation to Change
- Attention: To When Stereotypical Responses or Assumptions are Activated
- Time To Practice New Strategies

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What Are These Strategies?

- Individuation
- Stereotype Replacement
- Counter-Stereotypic Imaging
- Perspective Taking
- Increasing Opportunities for Contact

Patricia Devine, “Long-term Reduction in Implicit Race Bias: A Prejudice Habit-breaking Intervention”

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Individuation? (vs. Generalization)

- Moving beyond racial categories by gathering specific information about an individual. This allows you make judgments on the basis of his or her personal, rather than group, characteristics.
- Individuating involves recognizing that race is just one facet of other people that makes each person unique.

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Stereotype Replacement

This strategy can be used when you detect stereotypic portrayals of racial minorities in your environment and when you detect a stereotypic response within yourself. Steps:

1. Label the response or portrayal as stereotypical
2. Evaluate the situation to determine how the response or portrayal occurred and how it might be prevented in the future, and
3. Replace the stereotypical response or portrayal with one that is non-stereotypical.

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Counter-Stereotypic Imaging

After you detect a stereotyped response:

- Think of examples of either famous or personally known people that show the stereotype to be inaccurate. For example, while watching a movie that portrays Black people as unintelligent, you could think of Dr. Martin Luther King, Jr., Barack Obama, Condoleezza Rice, Frederick Douglass, or intelligent, personally known Black friends or acquaintances.
- Thinking of counter-stereotypic people provides concrete examples that demonstrate the inaccuracy of stereotypes.

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Perspective Taking

- Imagining in the first person what it feels like to be in another person's situation. Think about how you would feel to have your abilities questioned, or to be viewed as lazy and potentially violent on the basis of your appearance.
- This strategy can be used either proactively, without any prompting from outside sources, or reactively, after a stereotypic response or portrayal has been detected.
- Perspective taking, especially after the detection of a stereotypic response or portrayal, is very useful in assessing the emotional damage caused by stereotyping others.

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Increasing Opportunities for Contact

- Actively seek out situations where you are likely to have positive interactions with stereotyped groups. You can do this by joining particular clubs, participating in particular events, and so on. This allows you to meet people who disconfirm stereotypes.
- In addition to seeking personal contact, you can modify your visual environment by watching movies, TV, and news that portray stereotyped groups in non-stereotypical ways.

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