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Judges' experiences with mitigating jurors' implicit biases

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Implicit bias can influence jury decision-making. Training judges about implicit bias is a fairly new endeavor, and not all judges are necessarily aware of these biases. Even when judges are aware that biases exist, they might not know whether or not they should alert jurors to such biases or how to appropriately do so. It is currently unknown how many judges alert jurors to implicit bias (e.g. via instructions or juror orientation). The purpose of this study is to discuss judges' beliefs and practices regarding implicit bias in the courtroom. The findings indicate that the majority of judges (72%) do not alert jurors to implicit bias. Many judges were found to have a lack of awareness or understanding about implicit bias, but many now feel that alerting jurors about bias is important and would like to do so in the future.

Keywords: implicit bias; juror bias; judges; courtroom procedure; content analysis.

Recently, a Lancaster County judge in Nebraska denied a defense attorney's request to show jurors a video about implicit bias (Innocence Project, 2018). The judge reasoned that instead of the video, issues of implicit bias should be addressed during *voir dire*. This demonstrates two of the various approaches that judges might use to alert jurors about potential implicit bias. Implicit biases are unconscious attitudes, associations or stereotypes about a group (Greenwald & Banaji, 1995). For example, some White people might associate Black people with danger and violence but be unaware that they hold this association. Because implicit biases can threaten a defendant's right to a fair trial it is important to reduce bias in jurors whenever possible.

However, training judges about implicit bias is a fairly new endeavor, and not all judges are necessarily aware of these biases (Redfield, 2017). Even the judges who are aware might not know whether or not they should alert jurors to such biases or how to appropriately do so. It is currently unknown how many judges alert jurors of implicit bias or the methods by which they do so; the current study will address this gap. The purpose of this article is to discuss judges' beliefs and practices regarding implicit bias in the courtroom.

Implicit bias in the courtroom

Several types of implicit bias, including racial bias (Sommers & Ellsworth, 2001), weight bias (Schvey et al., 2013; White et al., 2014), physical attractiveness bias (Patry, 2008) and gender bias (for a review, see Livingston et al., 2019) can influence various aspects of the legal system. Arguably, of these biases, racial bias is the most widely known and studied. Even though racial prejudice has declined over the years (e.g. Schuman et al., 1997), racial bias still exists in the legal system today.

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Some research shows that racial minorities experience worse outcomes compared to White people in police interactions (e.g. Spencer et al., 2016) and prosecutors' charging decisions (Kang et al., 2011). There is also evidence that, compared to White defendants, minority defendants receive harsher verdicts (ForsterLee et al., 2006; Wuensch et al., 2002) and sentences (Baldus et al., 2002; O. Mitchell, 2005; Sorensen & Wallace, 1995).

Both explicit and implicit racial attitudes of legal actors (e.g. jurors, judges) can account for these disproportionate outcomes (Cohn et al., 2009). Specifically, jurors tend to show bias in verdicts and sentencing against defendants of another race (T. L. Mitchell et al., 2005; Sweeney & Haney, 1992). For example, people's attitudes toward Black people are associated with ratings of guilt and death penalty recommendations for Black defendants (Dovidio et al., 1997). Furthermore, there is an interaction between defendant and victim race such that Black defendants receive even longer sentences when the victim is White (Baldus et al., 1983, 2002). Although explicit racial attitudes can account for some verdict and sentencing decisions, implicit attitudes can further explain these disproportionate outcomes. People tend to hold an implicit stereotype between Black and guilty (Levinson et al., 2010). Even a subtle manipulation of a defendant's skin color can affect how jurors evaluate evidence and the degree to which they believed the defendant was guilty (Kang et al., 2011). However, it should be noted that some studies have found no effect of defendant race on sentencing (Pfeifer & Ogloff, 1991; Williams & Holcomb, 2001).

Verdict and sentencing disparities are not just the result of juror bias – judges are also not immune to implicit bias. Mustard (2001) found that Black and Hispanic defendants received longer judicial sentences than White defendants (after controlling for crime seriousness) and that most of this effect occurred when judges deviated from the federal guidelines. When judges followed the guidelines, there was less of a discrepancy between minority and White defendant sentences (Mustard, 2001). Similarly, one study found that judges who held more implicit bias against Black people – as measured by the Implicit Association Test (IAT), a tool that measures implicit bias – were harsher on defendants when they were primed with Black words (Kang et al., 2011). Judges who held implicit biases in *favor* of Black people were less harsh on defendants when they were primed with Black words (Kang et al., 2011).

Reducing bias

Although legal decision-makers are not immune to implicit racial biases, there are ways to reduce their effects. One of the most studied mechanisms of reducing racial bias in jurors is making race salient in trial (e.g. via description and emphasis of minority status; Cohn et al., 2009; Sommers & Ellsworth, 2000, 2001). Racially charged cases or cases in which race is highlighted tend to mitigate potential juror biases (e.g. Kang et al., 2011). Specifically, when race is made salient (e.g. via witness testimony) jurors are significantly less likely to find a Black defendant guilty than when race is not made salient (Cohn et al., 2009). When race is made salient, White juror verdicts do not differ as a function of defendant race (Cohn et al., 2009). Aversive racism (Dovidio & Gaertner, 1986, 2000; Dovidio et al., 1998) can explain these findings in that emphasizing race makes jurors more aware that their verdicts can seem racist (Sommers & Ellsworth, 2000, 2001, 2003). In order to not appear racist, they act in a 'socially appropriate manner' and are less likely to find the Black defendant guilty. It is unclear whether or not race salience reduces the biases of those who score highly on explicit racism scales or who hold particularly strong implicit biases against racial minorities. For example, although Cohn et al. (2009) found that race salience reduced bias for even highly racist participants, Bucolo and Cohn

(2007) reported that race salience might have a backfire effect for people who hold stronger negative biases. Jurors who scored higher on a racial IAT were more likely to find a Black defendant guilty when race was made salient compared to when it was not. These latter findings are consistent with past research that White people's racial attitudes are associated with their White identity (Carter et al., 2004).

Research has shown mixed findings regarding other methods for reducing juror bias. For example, whereas some studies have found that jury deliberations reduce White juror bias (Foley & Pigott, 2002), other studies have found no effect (Bernard, 1979; Dovidio et al., 1997). Similarly, some research has found that judge instructions that include a charge to not rely on bias reduce juror bias in verdict decisions (Pfeifer & Ogloff, 1991). However, this method might not be entirely effective because understanding the nature and content of the instructions are important in reducing bias (Hill & Pfeifer, 1992), yet jurors' comprehension of judges' instructions tend to be low (Alvarez et al., 2016).

Other existing methods to reduce juror biases such as *voir dire* might also be ineffective. Although a judge-dominated *voir dire* might remove explicitly prejudiced or racist jurors, it likely does not remove jurors who hold implicit biases (Bennett, 2010). Judges commonly ask potential jurors whether or not they can be fair and impartial in relation to the case. Because jurors are unaware of their implicit biases, such a question is ineffective in removing implicitly biased jurors. In contrast, Bennett (2010) suggests that an attorney-led *voir dire* is more effective in reducing juror bias. Specifically, compared to judges, trial lawyers tend to know the case better and have access to more resources (e.g. jury consultants) to help develop strategies to address both explicit and implicit juror bias (Bennett, 2010). In addition, jurors tend to respond more candidly to a lawyer than to a judge (e.g. Jones, 1987).

Training on implicit biases is becoming more common, both in and out of the courtroom (Perez et al., 2017). Conference training sessions and educational tools are becoming more accessible. For example, the American Bar Association (ABA) recently released *Enhancing Justice: Reducing Bias* (Redfield, 2017), a book which educates judges about bias in both juror decisions and their own decisions. The book offers potential solutions such as 'bench cards' which help judges think through their decisions rationally and avoid bias. Due to this increase in the amount of training that judges receive, some judges might already be aware of what implicit bias is and the influence it can have in the courtroom.

Overview

Judges might vary on whether or not they alert jurors to potential biases. Even though some judges might alert jurors, others likely have reasons for not doing so. Firstly, because judge education and training on implicit biases is somewhat new, it is possible that some judges are not aware of juror implicit biases or do not even believe that they exist. Secondly, judges who are aware might refrain from alerting jurors due to a fear of exacerbating these biases or increasing the likelihood of overcompensation (i.e. alerted jurors now give more leniency to minorities than non-minorities; Bennett, 2010; Redfield, 2017). Thirdly, judges might not alert jurors because they feel that doing so would not be effective or appropriate coming from a judge. Lastly, judges might not alert jurors because they are unsure or uninformed about how to do so.

This study's main purpose is to conduct a content analysis on judges' responses to a survey question in order to understand (1) the prevalence of judges alerting jurors of implicit biases and (2) why judges might initiate or refrain from initiating such alerts. Thus, the following research questions guided the analyses:

RQ1: Do the majority of judges alert jurors to implicit biases?

RQ2: Why might judges refrain from alerting jurors of implicit biases?

RQ3: Why might judges alert jurors to implicit biases?

RQ4: How do judges alert jurors to implicit biases?

RQ5: Do judges have suggestions about how best to alert jurors to implicit biases?

Methods

Participants and procedure

As part of their recurring 'Question of the Month', The National Judicial College in Reno, Nevada administered an informal survey to their mailing list (i.e. alumni and judges who have taken classes through the college). Participation in the survey was optional and the number of judges who received it is unknown. A total of 357 judges completed the survey regarding their behavior in alerting jurors to the existence of biases. Specifically, judges responded 'Yes' or 'No' to the question 'Do you do anything to alert jurors to unconscious or implicit bias?' Judges could then choose to elaborate further (anonymously or providing their name and contact information) on their answer to the open question. Parts of these data are described in a general, non-scientific way in a brief article published in the *Judicial Edge* newsletter (National Judicial College, 2018).

Coding scheme

The authors developed a coding scheme based on the existing literature regarding beliefs about bias (e.g. skepticism about the existence of implicit bias; Redfield, 2017) for the frameworks and themes that were found throughout judges' responses. This led to the creation of 12 coding themes: (1) addressing bias exacerbates bias; (2) not sure how to address bias; (3) bias does not exist; (4) it is not appropriate for judges to address bias; (5) bias is/should be addressed elsewhere (e.g. *voir dire*); (6) shows a video to teach about bias; (7) reads an instruction that addresses bias; (8) presents a different strategy for addressing bias; (9) believes bias should be addressed; (10) addresses bias indirectly; (11) addresses bias sometimes; and (12) provides a reason for not addressing bias. The researchers coded responses on a '0' (theme absent from response) or '1' (theme present in response) dichotomy.

Results

Of the 357 judges who responded to the survey, two did not complete the yes/no portion of the question, leaving 355 yes/no responses. In regard to the open-ended nature of the question ('Do you do anything to alert jurors to unconscious or implicit bias?'), 130 judges elaborated on their answer. These more detailed responses were separated into 180 codable comments that consisted of any individual thought, and several responses included several codable comments. The researchers used a subsample of 33 codable comments to measure inter-rater reliability between the two coders (calculated using Cohen's κ). The two coders were found to have very good agreement of all coded comments in the subsample ($\kappa = .92$, range = .64–1.00; see Table 1). All discrepancies were discussed and resolved through discussion before the coders completed the remaining comments.

Prevalence of judges alerting jurors to implicit biases (RQ1)

The majority of judges (72%, $n = 254$) reported that they do not alert jurors to potential biases (answering RQ1 in the negative). However, the detailed responses of five of the judges who reported that 'yes' they do alert jurors to potential biases implied that these judges misunderstood what 'implicit bias'

Table 1. Inter-rater reliability for all 12 themes/coding categories.

Theme	Inter-rater reliability (Cohen's κ)
1. Addressing bias exacerbates bias	1.00
2. Not sure how to address bias	0.64
3. Bias does not exist	1.00
4. It is not appropriate for judges to address bias	1.00
5. Bias is/should be addressed elsewhere (e.g. *voir dire*)	1.00
6. Shows a video to teach about bias	1.00
7. Reads an instruction that addresses bias	0.92
8. Presents a different strategy for addressing bias	1.00
9. Believes bias should be addressed	1.00
10. Addresses bias indirectly	1.00
11. Addresses bias sometimes	1.00
12. Provides a reason for not addressing bias	0.69

refers to (e.g. 'I mention concepts of sympathy and prejudice. I don't lecture about implied bias […]') or actually only addressed bias sometimes (e.g. 'I do so as needed depending on the case').

Why judges refrain from alerting jurors of implicit biases (RQ2)

Several themes arose from the detailed responses as reasons for not alerting jurors of implicit biases (therefore answering RQ2). Some of these themes include beliefs that (1) bias does not exist ($n = 3$; e.g. 'Not convinced that implicit bias exists or is a problem […]'), (2) addressing bias only exacerbates bias or causes harm ($n = 15$; e.g. 'In my opinion, mentioning only emphasizes potential bias') and (3) it is not appropriate or it is unnecessary for judges to address bias ($n = 8$; e.g. '[…] I can't imagine how I would ever do this without stepping completely outside my role as judge'). Several judges reported unawareness of how to address bias ($n = 10$, e.g. 'I would like to but am not sure how to go about it').

Judges also mentioned various other reasons for not alerting jurors of bias ($n = 14$). These include reasons involving race ($n = 1$; e.g. 'I don't get the sense that as an African-American judge in a southern state, jurors are not as open to me addressing this with them'), beliefs about the ineffectiveness of alerting jurors ($n = 4$; e.g. 'I doubt that the jurors who harbor an otherwise disqualifying bias or prejudice would be influenced by such a suggestion'), worry about influencing the jurors ($n = 3$; e.g. 'If you do so, you are attempting to influence the outcome'), the need to use pre-approved instructions ($n = 3$; e.g. 'Missouri uses approved instructions. There is no such approved instruction in MO') and other potential drawbacks to alerting jurors ($n = 3$; e.g. 'Why put the idea of bias into someone's head? The entire *voir dire* process is made to weed out any bias in the jury panel. With this process we are able to select a fair and unbiased panel. To instill in the jurors that they are biased from the start would hinder this process greatly').

Why judges alert jurors to implicit biases (RQ3)

Of the 101 judges who indicated that they do address juror bias, some reported addressing it because it is imperative and the court's obligation to do so. Several judges reported that they believe bias should be addressed and/or want to address it more ($n = 21$; e.g. 'this is an important discussion to have with jurors'; 'I don't address it as thoroughly as I would like to').

A number of judges reported that they only alert jurors to implicit bias some of the time ($n = 12$). The reasons given for this include only alerting jurors to bias when it is deemed necessary or relevant ($n = 8$; e.g. 'Not unless it may be an issue'), only raising it if the instructions require it ($n = 2$; e.g. 'I follow the standard jury instructions. If it's in there […] I say it. If it's not […] I don't') and only addressing it if the need is deemed to have arisen during *voir dire* ($n = 2$; e.g. 'I would only do so when responses to questions are such that I feel that the discussion is necessary').

How judges alert jurors to implicit biases (RQ4)

The judges who indicated that they do alert jurors to implicit bias gave different strategies for doing so. A number of judges mentioned the use of a jury orientation video that discusses bias ($n = 18$; e.g. 'We have a video that addresses unconscious bias during jury orientation'). Many judges also mentioned addressing bias via instruction ($n = 42$) including the use of a standard instruction ($n = 19$; e.g. 'Our standard instructions address bias issues') or their own instruction ($n = 8$; e.g. 'I include a self-styled instruction about unconscious bias based upon my review of instructions other jurisdictions use').[1]

Some judges presented other methods of addressing bias ($n = 9$) such as considering defense motions on bias and directly talking to the jury pool about bias. Other judges reported addressing bias in indirect ways such as raising the issue of sympathy ($n = 5$; e.g. 'Not directly, but we often charge the jury that they should not be swayed by sympathy for a party'), using analogies ($n = 1$; e.g. 'I address the issue in *voir dire* and describe it using the unconscious or implicit bias and liken it to likes, dislikes and preferences') and alerting jurors to other types of prejudice ($n = 3$; e.g. 'I warn jurors that they must consider only the law and the evidence that is before them, and cannot make decisions based upon someone's court demeanor or physical appearance'; 'Our standard jury instructions address sympathy, bias, prejudice generally but not implicit bias specifically').

Several judges reported that bias is or should be addressed elsewhere ($n = 26$), such as during jury orientation ($n = 1$; e.g. 'I also talk about it when I do jury orientation'), during *voir dire* ($n = 19$; e.g. 'Jurors with unacceptable bias or prejudice can be weeded out during *voir dire*, where it should take place') or via attorneys ($n = 5$; e.g. 'Defense counsel seems to do this'; 'That is the job of the attorneys'). Lastly, one judge mentioned addressing bias throughout the entire process (e.g. 'I do it all through the process and give breaks so that they don't get too tired and go into default mode').

Judges' suggestions about how best to alert jurors to implicit biases (RQ5)

The survey did not ask the judges to make suggestions, but the authors thought that the judges might provide opinions on various ways to address bias. Although the judges did not make explicit recommendations, overall they tended to write favorably about the use of jury orientation videos, pre-written instructions and *voir dire*.

Discussion and future directions

Overall, the current study demonstrates that the majority of judges do not alert jurors to potential implicit biases. Several themes emerged from the detailed responses that explain why most judges do not alert jurors to such biases. These include an unawareness of how to address bias, the belief that it is inappropriate for judges to address bias and the misconception that addressing bias only exacerbates that bias. It is possible that the judges who indicated skepticism regarding

[1]It is unclear whether 15 of the judges are referring to the use of their own instruction or a standard instruction.

alerting jurors have not been educated or trained on implicit biases. In contrast, several judges reported addressing bias and their belief that it is important to do so. The judges who indicated that they do alert jurors presented different ways in which they do so (e.g. during jury orientation, via instruction, etc.). These results suggest a number of future directions for both psychology and the courts.

First, our results indicate that many judges are skeptical that implicit bias exists, skeptical that measures to reduce bias can work and/or fearful that such measures could backfire and actually make jurors *more* aware of the factor that the measure was intended to suppress (e.g. racial bias). These are legitimate concerns because there is a lack of research addressing these issues. There is research, some of which is presented above, suggesting that implicit biases exist (Greenwald & Banaji, 1995). There is limited research showing that increasing awareness of these biases is the first step to reducing them (Lee, 2017). Although some research has indicated a backfire effect in instances in which people need to make quick decisions, in complex situations in which people make intricate judgments – such as jury decision-making – salience has been found to reduce bias (Lee, 2017). There is also research which illustrates that having an awareness of potential factors can actually reduce them because people try to hide their biases (e.g. the race salience effect; Sommers & Ellsworth, 2009). Thus, researchers should continue to investigate implicit bias, both in general and specifically related to the courtroom.

Second, many of the judges indicated a lack of awareness of what implicit bias is and how it can affect the courtroom. Thus, researchers should make their findings accessible to judges by publishing them in legal outlets. There is also a need for more extensive and widespread education on implicit biases, as well as a need for training judges on the most effective ways to alert jurors to implicit bias.

Third, a number of judges mentioned a variety of ways to address implicit bias, some of which might not be as effective as they hope. For instance, several judges reported using *voir dire* to remove biased jurors – and although this method might effectively remove *explicitly* biased jurors, it likely does not remove *implicitly* biased jurors (Bennett, 2010). Furthermore, several judges reported using instructions to address juror bias. This method might also be ineffective in reducing juror bias because jury instructions in general are not always effective (for a review, see Alvarez et al., 2016). Judges who do not use instructions might be aware of the research which shows that they can be ineffective. Some judges stated that they rely on attorneys to ferret out bias, but here too there is little evidence that attorneys are able to do so effectively. Indeed, attorneys might be motivated to actually promote bias toward their own client.

Other judges have reported using fully untested methods. For instance, some judges use videos and instructions – even those they have created on their own. Some address bias in indirect ways by talking about sympathy or prejudice in general or through the use of analogies. The point of delivery of such methods might also matter: some judges reported addressing bias during jury selection and others during judicial instructions, with one mentioning addressing it multiple times throughout the trial. The question remains however as to the best time for jurors to receive, understand and act on information about implicit bias. Research has indicated that instructions are easier for jurors to understand when given multiple times (Alvarez et al., 2016), so maybe jurors need to hear about implicit bias more than once. All of these measures have the potential to affect juror implicit bias, but most remain largely untested.

Thus, there is a need for the real-world evaluation of such measures.

Finally, some of the judges expressed the view that it is not permissible for them to address implicit bias, whereas others held the belief that it is an important responsibility of the court and stated that there are jury instructions already in place to address it. This could vary by state and jurisdiction – thus, there is a need for the development of judicial instructions, videos or other measures that have legislative approval. Having a specific policy would likely ease the minds of judges who worry that implementing such measures would overstep the bounds of their remit.

It should be noted that there are some surprising findings. Specifically, the judges did not directly mention certain seemingly important and relevant topics. Only one judge mentioned race as a reason for not addressing bias (i.e. 'I don't get the sense that as an African-American judge in a southern state, jurors are not as open to me addressing this with them'). It is possible that judges in areas which possess more Black jurors do not feel the need to address implicit bias. Some possible reasons for not seeing this in the responses are that the judges in such areas did not find it relevant or necessary to explain this, or that the results of the survey are not representative of particular jurisdictions in which this reasoning would pertain. Future surveys or interviews could explicitly ask judges if they think there are jurisdictions where implicit bias is less of a problem. We were also surprised to find that more judges did not explicitly discuss the risk of reversible error. However, several judges did indicate hesitation in deviating from standard and preapproved instructions, and some mentioned their opinion that alerting jurors to implicit bias would be classed as an attempt to influence the outcome. Future research could examine whether or not the risk of reversible error is a specific reason why judges do not alert jurors to implicit bias.

Limitations

The current content analysis is not without limitations. First, because completion of the survey was voluntary, there might be response bias. Specifically, we are unaware of the response rate of the judges who received the survey and completed it, and it is plausible that the majority of judges who responded to the survey held strong opinions about implicit bias in the courtroom. If it was indeed the case that the judges who held stronger opinions were more motivated to respond, the responses will not necessarily be representative of moderate views on the subject. Second, due to the completely open-ended nature of the question, we were unable to ask the judges about specific aspects of implicit bias. For example, although presumably a large issue, very few responses discussed how addressing bias might result in reversible error. Thus, the results are constrained to whichever topics the judges chose to discuss in their detailed responses. Lastly, the judges were not provided with a specific definition of 'implicit bias' – thus, it is possible that they responded to the 'yes/no' and open-ended aspects of the survey question with varying definitions of implicit bias in mind. This would especially be true for judges who are less familiar with the concept.

Conclusions

This study has found that many judges have a lack of awareness and/or understanding about implicit bias. For instance, some judges do not believe that implicit bias exists, while others believe that addressing it could exacerbate it. Despite these misconceptions about implicit bias in the courtroom, it is promising that a good proportion of the judges who responded to the survey question believe that addressing bias is important and wanted to know about more effective ways of doing so.

The findings suggest a need for better education regarding implicit bias. Judges would likely benefit from education on what implicit bias is, its influence in the courtroom and when and how it is best addressed. Many judges want to address bias in the courtroom and would benefit from training and workshops on how to effectively do so. Future research should examine which methods are most effective in addressing and subsequently reducing juror implicit bias. For example, future research could investigate whether or not jury instructions and jury orientation videos are actually effective in addressing implicit biases. Such research could help to reduce implicit biases in the courtroom and thus protect both the constitutional rights of defendants and the integrity of the court itself.

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Ethical standards

Declaration of conflicts of interest

Jacqueline M. Kirshenbaum has declared no conflict of interest.

Monica K. Miller has declared no conflict of interest.

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.

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