

Opening Remarks to Fifth Circuit Professionalism Conference
The Value of Diversity in Society and the Courts and the Need for Bias Elimination
April 20, 2018
Ocala, Florida

Good morning. I am very excited to be here to share some thoughts about the important topic you have dedicated this year's Professionalism Conference to: The Need for Eliminating Bias in the Courts. I want to thank and acknowledge your Chief Judge Sue Robbins, who I have known for many years as a champion of Florida's model family court and now is doing a stellar job as leader of the Fifth Circuit. And my thanks to Jack Moring who helped ensure that I got here-Jack has been a longtime member of the Steering Committee on Children and Families in the Court.

A bias is a shortcut for making a decision-it is prejudging in favor or against a person or group.

Everyone take out a moment and mentally picture your image of a leader. Now, was your image a man or a woman—was he or she white or black? Studies show that people almost always picture men in leadership positions.¹ Not surprising but implicit bias can impede a woman's ability to serve in a leadership position.

After almost 45 years as a lawyer, with the last 25 as an appellate court judge and supreme court justice, I am, unfortunately, acutely aware of the implicit (and sometimes explicit) biases that both lawyers and judges hold that can interfere with ensuring equal justice for all. I won't recount the instances of what I know to have been the result of explicit bias but at the very least implicit bias but we all know it is alive and well.

Then I shared 2 recent non-legal examples:

the pilot who successfully landed the Southwest jet calmly and expertly-surprised she was a woman. I was thrilled

the Starbucks incident where a manager had 2 black males arrested for trespassing

I used to recount the story of how, when I was a practicing attorney, I was mistaken for my law partner's secretary and asked to bring coffee at a deposition. But then I heard Justice Quince relate how she, dressed in her conservative blue suit, had been mistaken for the defendant in a case.

So we all know what biases are and they are not all negative but some are: racism, sexism, are ugly terms that drive people's behaviors in our society. But most people will deny being a racist or sexist. Implicit bias doesn't make you a racist but here is the scary fact: Thoughts and feelings are "implicit" if we are unaware of them.

We have a bias when, rather than being neutral, we have a preference for (or aversion to) a person or group of people.

The term "implicit bias" describes our attitudes toward people without our conscious knowledge. A fairly commonplace example of this is seen in studies that show that white people associate criminality with black people without even realizing it. Multiple studies show for example white physicians associate black patients as being "less cooperative" and were less likely to refer black patients with acute coronary symptoms for specific medical treatment. Showed Peanut Butter and Jelly video

We as judges often refer to ourselves as being referees or umpires: But what about this: Baseball umpires call strikes more frequently for pitchers of their same race; when they were told the computer was analyzing the pitch the bias stopped but started again when they were told the computer was off.

Here's what we know: when viewing the justice system, racial minorities do not see our courts as the shining example of fair and impartial that our Founders intended. Instead, they see that the courts favor the white and the rich. And like it or not, the series of newspaper articles last year in the *Sarasota Times* showed that blacks were more likely to get harsher sentences for the exact same crime with the same factors accounted for as whites. In fact, a recent article from the *Sarasota Herald-Tribune* reports that Broward County alone “incarcerates black defendants for an average of” between three and “five times as long as whites” for drug offenses.²

And implicit bias in prosecutors' charging decisions have been well documented.

As a result of these disparities, there was a defensive outcry among some of our judges challenging the methodology used. Instead, in my view, there should have been a thoughtful examination as to whether implicit bias affected the sentencing decisions.³

Judge Gross, a former colleague of mine on the Fourth District Court of Appeal recently wrote: “[S]entences imposed without sufficient explanation can mask implicit biases, which are ‘activated involuntarily’ and which ‘generally occur without our awareness or intentional control.’ ”⁴

So I am very glad that Judge Estrada will be speaking to us about Racial Bias in Sentencing and how to avoid the Appearances and Effects of Racial Bias in Sentencing.

So awareness that our decisions may be influenced by both explicit and implicit biases is one way to ensure that we accept that reality and then work to examine the legal and factual reasoning behind our decisions.

But, what about jurors? When I was a trial lawyer, we used to talk about prejudices and biases and emphasize that prejudices and biases are not always bad but, either way, they needed to be acknowledged. Would you give a police officer (more or less) credibility than any other witness? Have you been a victim of a crime? Would being a victim of a crime impair your ability to be fair and impartial in this case?

Perhaps that does not go far enough, though, in determining or reducing the potential effect of implicit biases on a juror's decision in a case.⁵

As issues concerning one's sexual orientation become a potential issue in the case, the question is how to ensure that questions are asked that will reveal the jurors undiscovered biases or prejudices.

Most jurors still want to believe that they could be fair even when their experiences might contradict that. But, reality tells us that, as humans, we are affected by unconscious biases that affect our decisions, even when we are not always aware of them. So judges must reassure jurors that it is their obligation to be honest, and if they need to express concerns, they should do it in a non-confrontational approach—perhaps at side bar. At the end of the day, it is our responsibility to work towards reducing the effect of bias—implicit and explicit—in the judicial system to ensure justice for all. I applaud the federal district court for the U.S. District Court of the State of Washington for coming up with pattern instructions and a video shown to jurors: **SHOW VIDEO CLIP FROM WASHINGTON**

Where do I worry a lot about judges' implicit biases? In family case where that judge's past life experiences, or even a divorce himself or herself, may influence his or her views for or against either spouse or in a dependency case to fail to understand the forces that might have led to the parents' current situation-caught in a cycle of drugs, violence, and poverty with little or no support system.

In juvenile delinquency cases, making assumptions about a juvenile who is dressed a certain way or whose hair is in dreads. Or it may be word choice or a perceived tone of voice that seems disrespectful. Frankly speaking, are we seeing Hispanics or African-Americans through

the distorted lens of a white person's world? I have these discussions often with my colleague Justice Peggy Quince.

And disturbingly a recent law review article that surveyed state and federal judges nationwide showed that beyond the tested implicit biases against African Americans, the study revealed that judges harbored strong to moderate negative implicit stereotypes against Asian-Americans and Jews, while holding favorable implicit stereotypes towards Whites and Christians, which obviously influenced their decisions. If judges are susceptible to those biases, what about lawyers and jurors who are even less aware of the dangers biases pose?

For years, our Supreme Court has commissioned studies such as the Gender Bias Study Commission and the Racial Bias Study Commission, recognizing that bias against women and blacks had been a fact of life and for us to be proactive.

While we have worked hard to attempt to eliminate those biases, ensuring more women and minorities on the bench and in the courtroom and on court committees, the tougher problem we must confront is "implicit bias."

- At the basic level, our brains, "[b]ased upon visual and oral cues, . . . make automatic judgments about what category a particular person fits within and we often act on those judgments." [Transforming Perception, Perception.org, American Values Institute](#), at 6.
- A bias is when, "rather than being neutral, we have a preference for (or aversion to) a person or group of people." [Perception Institute](#) □
- Federal Judge Mark Bennett: "Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement." [Judge Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions 1207 \(ABA\)](#). "[W]e unconsciously act on such biases even though we may consciously abhor them." *Id.*

So although implicit biases are a product of automatic and unconscious prejudices,⁶ the good news is that studies show these biases can be "gradually unlearned."⁷ SHOW GOOGLE VIDEO

And it is our responsibility to do just that—help us all make the conscious unconscious. It is our responsibility to do that. And if we don't discuss it, implicit bias continues unabated and continues to influence our decisions. Rather than declaring ourselves immune, we must continually learn about group differences and multi-cultural viewpoints so as to foster true understanding. As one judge recently stated: "Implicit bias is a master of disguise, invoking unconscious reactions that may not align with our declared conscious beliefs." We all want to believe we are fair and impartial. That is our mantra, but what if ingrained stereotypes interfere with that ability.

I have always championed the need for diversity on the bench—racially, ethnically, and gender. In fact, studies have shown that diversity on appellate panels make a real difference—"adding a female judge to the panel more than doubled the probability that a male judge ruled for the plaintiff in sexual harassment cases and more than tripled the probability in sex discrimination cases."

The antidote is time, education, and persistence. Just because we are good people committed to do the very best job does not mean we are immune. We must have a dialogue, and that dialogue must be honest—if we indeed have hidden prejudices it is our obligation to acknowledge them and ensure it does not impact our decision making.

READ EXCERPT FROM IMPLICIT BIAS BOOK: As MLK, Jr. stated, “The arc of the moral universe is long, but it bends towards justice.” As history has taught us, it does not bend on its own. Each of us must do more to overcome the insidious effects of implicit bias.

I, therefore, congratulate the Fifth Circuit for dedicating its annual, excellent Professionalism Conference to this timely and important subject of Bias—we must all be willing to look inside ourselves, be willing to be open-minded, be willing not to be defensive.

You have great speakers and I look forward to hearing and learning from them. Thank you for having me here.

¹ Heather Murphy, *Picture a Leader. Is She a Woman?*, N.Y. Times (March 16, 2018), <https://www.nytimes.com/2018/03/16/health/women-leadership-workplace.html>.

² Josh Salman, *Stacked Against People of Color*, Sarasota Herald-Tribune Media Grp. (Jan. 28, 2018); see Kang, et al., *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. Rev. 1124, 1139 (2012) (“Journalistic investigations have uncovered some statistical evidence that racial minorities re treated worse than Whites in prosecutors’ charging decisions.”); *id.* at 1148.

³ Kang, *supra*, at 1128.

⁴ *Alfonso-Roche v. State*, 199 So. 3d 941, 952 (Fla. 4th DCA 2016) (Gross, J., concurring specially).

⁵ See Jennifer K. Elek & Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias?: New Questions Following a Test of a Specialized Jury Instruction* (April 2014) (discussing jury instructions to address implicit bias).

⁶ Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions* 1207 (ABA); *Transforming Perception*, Perception.org, American Values Inst., at 6; Stanford Encyclopedia of Philosophy.

⁷ Ohio State Univ. Kirwan Inst. for the Study of Race & Ethnicity.