

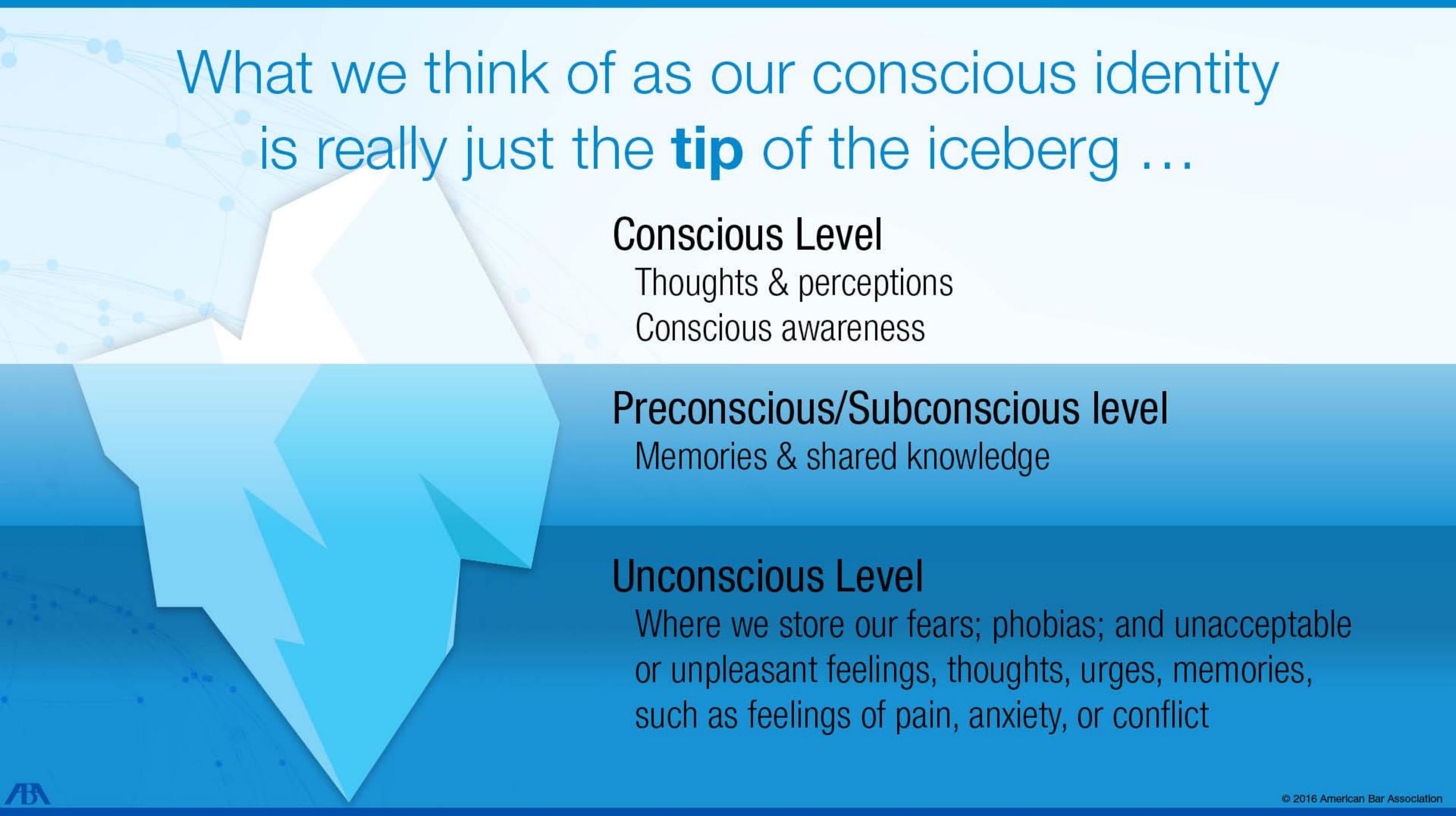
Implicit Bias & Judges

How innate attitudes shape behavior, even on the bench



INTRODUCTION

- Objective
 - Learn what Implicit Bias is and how it might affect outcomes in the courtroom.
 - Learn how to identify and combat the effects of Implicit Bias in the courtroom.

The image features a large iceberg graphic. The tip of the iceberg is above a white horizontal line, while the much larger body of the iceberg is below it. The background is a light blue gradient with a network of white dots and lines. The text is in shades of blue and black.

What we think of as our conscious identity
is really just the **tip** of the iceberg ...

Conscious Level

Thoughts & perceptions
Conscious awareness

Preconscious/Subconscious level

Memories & shared knowledge

Unconscious Level

Where we store our fears; phobias; and unacceptable or unpleasant feelings, thoughts, urges, memories, such as feelings of pain, anxiety, or conflict

System 1 & System 2

Social scientists says that we have two systems used in thinking: **System 1** and **System 2**.

System 1 is *always running* without our knowledge—unknowingly, involuntarily. It is automatic and *fast*. System 1 is where our unconscious associations and snap judgments are made, where breathing and regulating body temperatures occurs, and more. System 1 is where our schemas live.

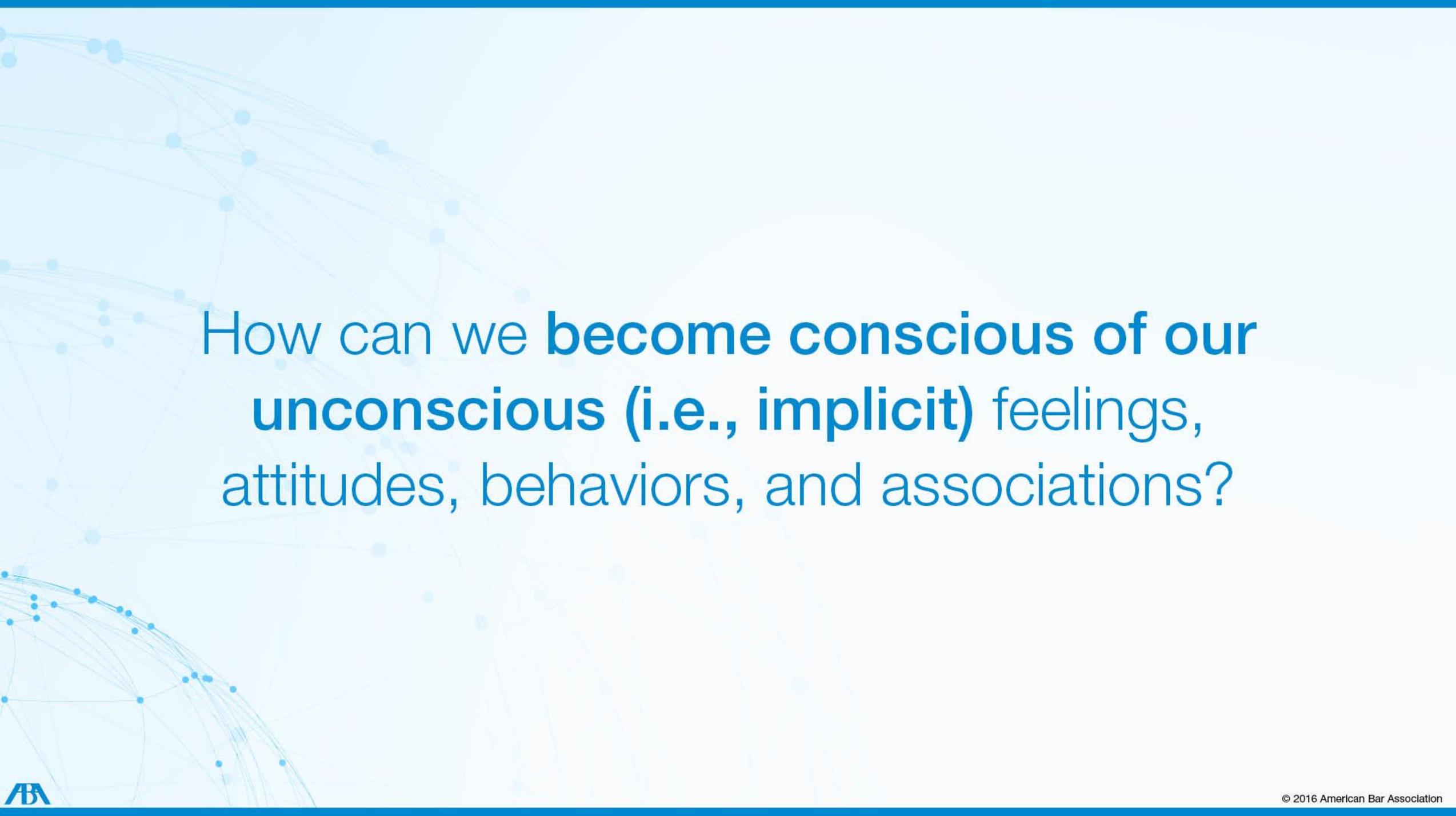
System 2, by contrast, is our conscious, deliberative mind. This is where we assess conflicting information and make complex judgments. We use this part of our brain consciously—and guess what? It is only 10 percent of our brain power, capability, and functioning. **TEN PERCENT!** This is also where our aspirations for acceptance and tolerance live.

This Work Is Focused on System 1: The Unconscious and Specifically, Our Implicit Biases

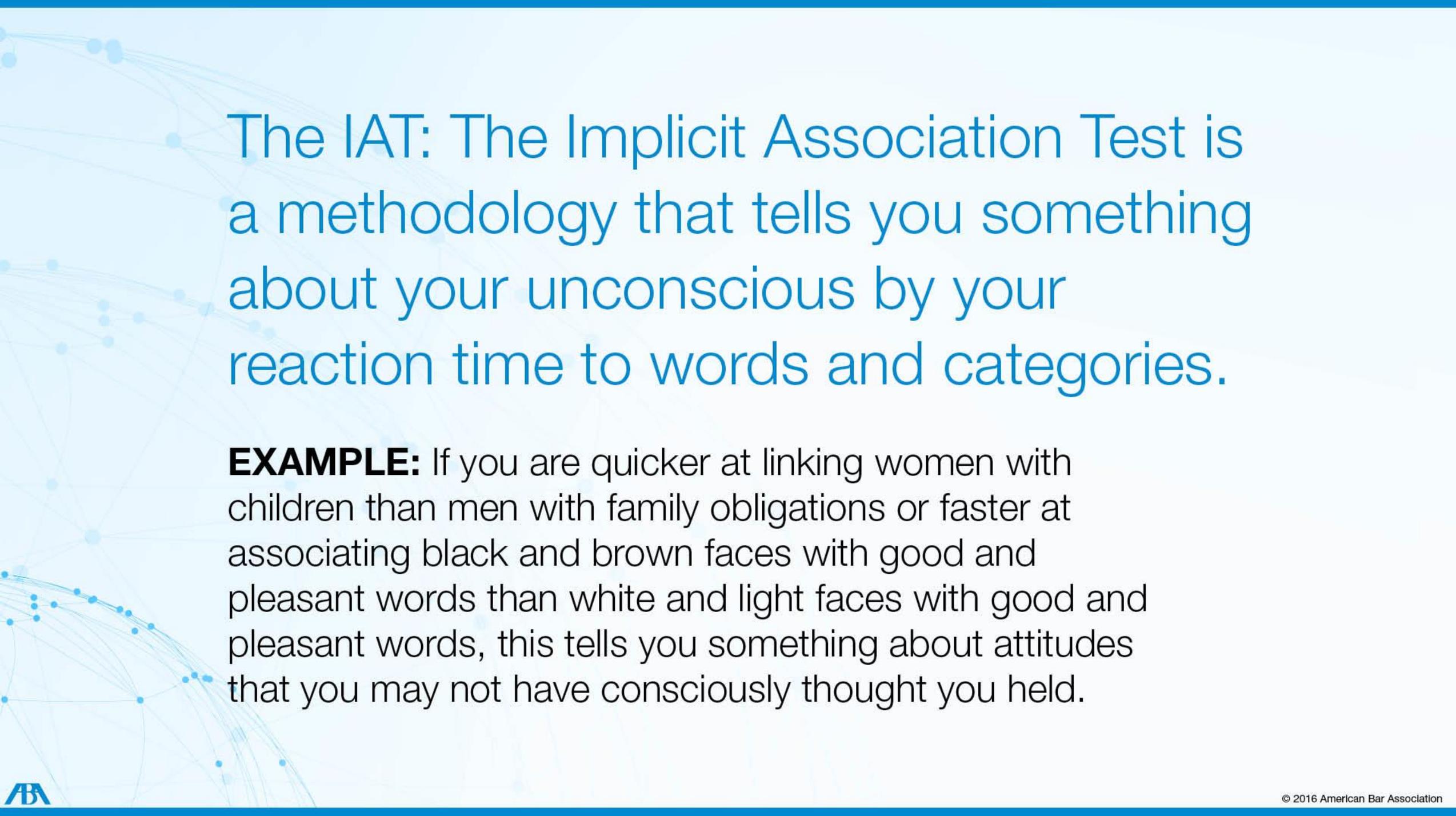
According to the Kirwan Institute,

“implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness.”

KIRWAN INSTIT. FOR THE STUDY OF RACE & ETHNICITY, UNDERSTANDING IMPLICIT BIAS 1, 1 (2015), available at <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

A background graphic consisting of a network of light blue dots connected by thin, curved lines, resembling a globe or a complex web. The dots are scattered across the left and top-left portions of the slide, with lines connecting them in a non-linear fashion.

How can we **become conscious of our unconscious (i.e., implicit)** feelings, attitudes, behaviors, and associations?



The IAT: The Implicit Association Test is a methodology that tells you something about your unconscious by your reaction time to words and categories.

EXAMPLE: If you are quicker at linking women with children than men with family obligations or faster at associating black and brown faces with good and pleasant words than white and light faces with good and pleasant words, this tells you something about attitudes that you may not have consciously thought you held.

There are many different kinds of tests you can take:

SKIN-TONE IAT

This IAT requires the ability to recognize light and dark-skinned faces. It often reveals an automatic preference for light-skin relative to dark-skin.

WEIGHT IAT

This IAT requires the ability to distinguish faces of people who are obese and people who are thin. It often reveals an automatic preference for thin people relative to fat people.

ASIAN IAT

This IAT requires the ability to recognize White and Asian-American faces, and images of places that are either American or Foreign in origin.

ARAB-MUSLIM IAT

This IAT requires the ability to distinguish names that are likely to belong to Arab-Muslims versus people of other nationalities or religions.

NATIVE IAT

This IAT requires the ability to recognize White and Native American faces in either classic or modern dress, and the names of places that are either American or Foreign in origin.

WEAPONS IAT

This IAT requires the ability to recognize White and Black faces, and images of weapons or harmless objects.

There are many different kinds of tests you can take:

GENDER-SCIENCE IAT

This IAT often reveals a relative link between liberal arts and females and between science and males.

AGE IAT

This IAT requires the ability to distinguish old from young faces. This test often indicates that Americans have automatic preference for young over old.

GENDER-CAREER IAT

This IAT often reveals a relative link between family and females and between career and males.

RELIGION IAT

This IAT requires some familiarity with religious terms from various world religions.

DISABILITY IAT

This IAT requires the ability to recognize symbols representing abled and disabled individuals.

RACE IAT

This IAT requires the ability to distinguish faces of European and African origin. It indicates that most Americans have an automatic preference for white over black.

SEXUALITY IAT

This IAT requires the ability to distinguish words and symbols representing gay and straight people. It often reveals an automatic preference for straight relative to gay people.

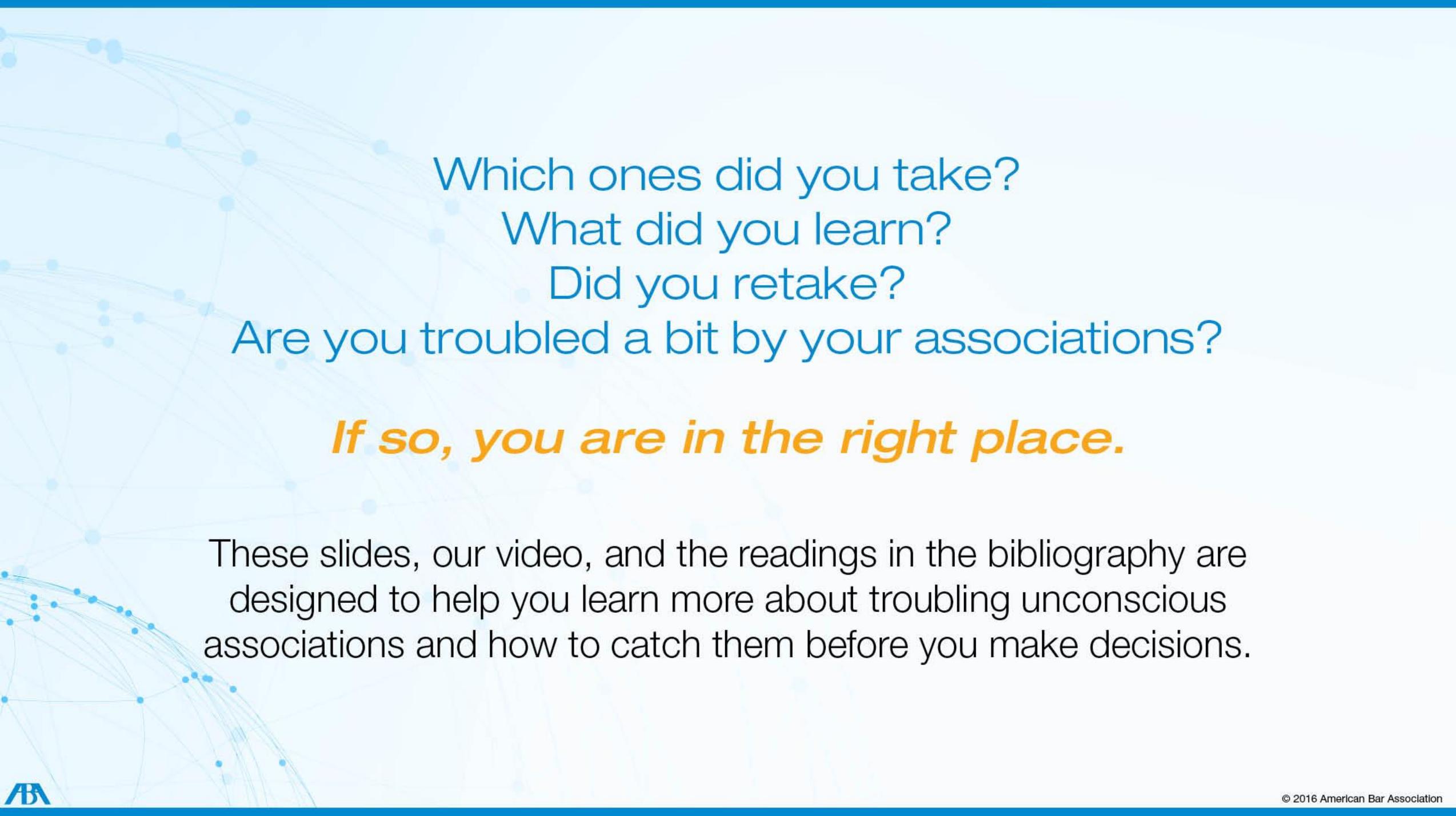
PRESIDENTS IAT

This IAT requires the ability to recognize photos of Barack Obama, and one or more previous Presidents.

Go ahead! TAKE A TEST.

<https://implicit.harvard.edu/implicit/takeatest.html>

Each test takes about six minutes. If you are interested in learning more about unconscious associations that you have, you have to start somewhere. The IAT is the best place to begin. (You could also take an MRI in a controlled lab, but that's a lot more work....)



Which ones did you take?
What did you learn?
Did you retake?
Are you troubled a bit by your associations?

If so, you are in the right place.

These slides, our video, and the readings in the bibliography are designed to help you learn more about troubling unconscious associations and how to catch them before you make decisions.

Schemas: How We Understand The World

Schemas are “mental concept[s] that inform[]” us “about what to expect from a variety of experiences and situations. Schemas are developed based on information provided by what one is exposed to and “then stored in memory.”

Schemas in Psychology: Definition, Types & Examples, STUDY.COM, <http://study.com/academy/lesson/schemas-in-psychology-definition-types-examples.html> (last updated 2016).

Broadly speaking, “a schema ...describes a pattern of thought or behavior that organizes categories of information and the relationships among them.”

Schema (Psychology), WIKIPEDIA, [https://en.wikipedia.org/wiki/Schema_\(psychology\)](https://en.wikipedia.org/wiki/Schema_(psychology)) (last updated 2016) (citing Paul DiMaggio, Culture and Cognition, 23 ANN. REV. SOC. 263 (Aug. 1997)).

Our Schemas Consist of: **Attitudes & Stereotypes**

ATTITUDE: An association between some concept (here, a cultural marker) and an evaluative valence, either positive or negative.

Examples: A woman wearing a hijab must be hiding something, or a woman wearing a hijab is respectful of her religion.

STEREOTYPE: An association between a concept and a trait.

Examples: Black people are criminals, girls are not good at math, etc.

Implicit Social Cognitions

“We naturally assign people into various social categories divided by salient and ...accessible traits such as age, gender, race,” skin color, disability, etc. (And science has proven that we begin to do some of this as early as six months old!)

And, so, “just as we ... have implicit cognitions that help us ... drive” and eat, we have implicit social cognitions that help us group and evaluate people based on our schemas.

JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS 1 (Aug. 2009), available at <http://jerrykang.net/research/2009-implicit-bias-primer-for-courts/>.

A background graphic consisting of a network of light blue nodes connected by thin lines, forming a complex web-like structure. The nodes are scattered across the left and top portions of the slide, with some clusters. The overall aesthetic is clean and modern, typical of a professional presentation.

a **few** examples

of biases...

Racial Bias

- Complex and socially constructed
 - Stereotyping
 - Consequence of changing demographics and isolation
- Systemic
 - Often not overtly discriminatory individual acts
- Lived experience with racism and repeated perceptions of disparity
 - Affects sense of justice

JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE (1994).

Gender Bias

- Persistent, socially prescribed, “gendered” roles such as “natural” roles for women, i.e., caretakers
- Assumptions about nature and behavior
 - Often a consequence of archaic stereotypes, i.e., women are the weaker sex and thus must be looked after
- Policies and practices that continue to treat women differently, such as the persistent wage gap and a lack of paid family leave

Gender Bias Example

One experiment asks participants to evaluate two finalists for chief of police—one male and one female.

One finalist's profile “signaled book smart,” while the other “signaled streetwise.” The profiles were randomly switched between the two finalists during the experiment.

The man was chosen more often by all groups, regardless of which profile he had.

All attributes were considered more important when ascribed to the man.

Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1156–57 (2009).

Gender Bias: Another Example

In *Blink*, Malcolm Gladwell relates the story of classical musicians and gender bias. There, orchestras were largely male with almost no female participation. As an experiment, one orchestra changed the audition structure to make them blind. This drastically increased the number of female players in classical ensembles, showing that there may have been an implicit gender bias at work.

The same has been shown to be true in service-sector employment, and there is a move toward trying to make law firm hiring “blind.”

MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 273 (2005).

Disability Bias

IAT: The test presents positive and negative words coupled with pictures of a wheelchair, crutches, a man with a cane, and a seeing-eye dog, as well as drawings of a man running, a man skiing, and a crossing guard with a mother and child.

- The results showed **more** implicit bias than against race, gender, or sexual orientation. **Even among test takers with disabilities, there was a preference for able-bodied people.**
- Men showed a much stronger preference for the able-bodied than women. Older test takers also showed a stronger preference than younger folks for able-bodied people.

Dale Larson, Unconsciously Regarded As Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act, 56 UCLA L. REV. 451, 476 (2008).

Sexual Orientation Bias

IAT: A preference for heterosexuals relative to homosexuals is observed in both heterosexual and bisexual respondents. Homosexual respondents display a preference for homosexuals.

Punishment: One recent study found that LGBT youths are likely to be punished more harshly than heterosexual youths in sexual activity cases. For example, a combination of two gay boys results in a more punitive response than any other gender combination when juveniles are engaged in a prosecutable sexual activity.

Jessica M. Salerno et al., Give the Kid a Break—But Only if He's Straight: Retributive Motives Drive Biases Against Gay Youth in Ambiguous Punishment Contexts, 20 PSYCHOL. PUB. POL'Y & L. 398, 405 (Nov. 2014).

Implicit Sexual Orientation Bias in Other Contexts

HEALTHCARE:

Research shows moderate to strong implicit preferences for heterosexual people over lesbian and gay people among heterosexual health-care providers.

Health-Care Providers Hold Biases Based on Sexual Orientation, Study Says, SCI. DAILY (July 16, 2015), <https://www.sciencedaily.com/releases/2015/07/150716180910.htm>.

EMPLOYMENT:

Only 1.9 percent of law firm lawyers are openly LGBT. Implicit bias may explain some of this low percentage.

J. Dalton Courson, Reality Check: Combating Implicit Bias, A.B.A.: LGBT LITIGATOR (Dec. 21, 2012), <http://apps.americanbar.org/litigation/committees/lgbt/articles/fall2012-1212-reality-check-combating-implicit-bias.html>.

The media plays into what gets sent & stored in our unconscious as well. Consider...



“Two residents wade through chest-deep water after **finding** bread and soda from a local grocery store after Hurricane Katrina came through the area in New Orleans, Louisiana.”

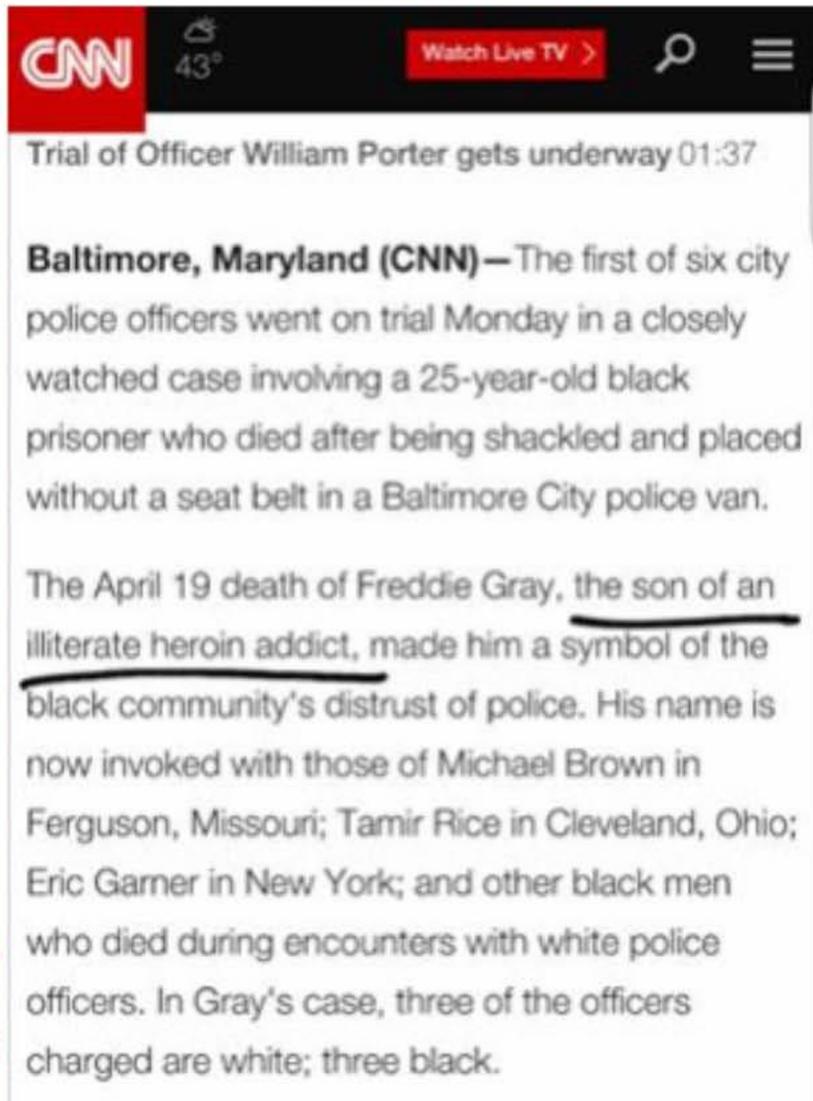
(AFP/Getty Images/
Chris Graythen)



“A young man walks through chest deep flood water after **looting** a grocery store in New Orleans on Tuesday.”

(AP/Dave Martin)

Compare:



The screenshot shows a mobile news article from CNN. At the top, there is a red bar with the CNN logo, a weather icon showing 43 degrees, a "Watch Live TV" button, and search and menu icons. Below the bar, the article title is "Trial of Officer William Porter gets underway 01:37". The main text begins with "Baltimore, Maryland (CNN)—The first of six city police officers went on trial Monday in a closely watched case involving a 25-year-old black prisoner who died after being shackled and placed without a seat belt in a Baltimore City police van." The second paragraph starts with "The April 19 death of Freddie Gray, the son of an illiterate heroin addict, made him a symbol of the black community's distrust of police. His name is now invoked with those of Michael Brown in Ferguson, Missouri; Tamir Rice in Cleveland, Ohio; Eric Garner in New York; and other black men who died during encounters with white police officers. In Gray's case, three of the officers charged are white; three black."

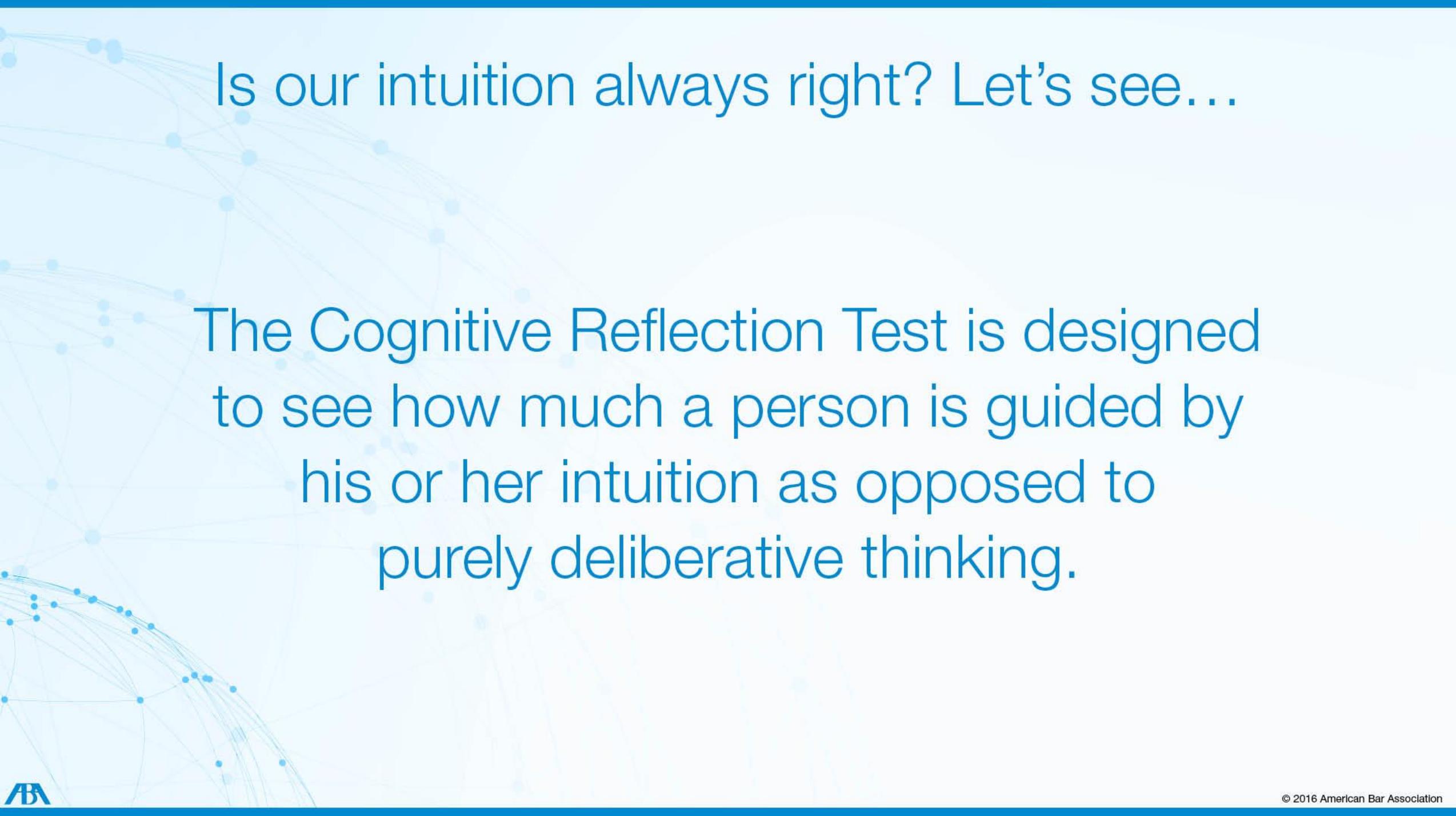
December 1, 2015 by [Libby Anne](#) [Leave a Comment](#)

Have a look at how the New York Times [described Robert Dear](#), the Planned Parenthood shooter, in an article published over the weekend:

Suspect Lived Off the Grid but Left Trail of Disputes

By JULIE TURKEWITZ, RICHARD FAUSSET, ALAN BLINDER and BENJAMIN MUELLER

Acquaintances described Robert L. Dear Jr., who was arrested in a fatal rampage at a Planned Parenthood center in Colorado, as a **gentle loner** who occasionally unleashed violent acts toward neighbors and women he knew.



Is our intuition always right? Let's see...

The Cognitive Reflection Test is designed to see how much a person is guided by his or her intuition as opposed to purely deliberative thinking.

Cognitive Reflection Test (CRT)

The CRT is designed to distinguish between intuitive and deliberative processing:

1. A bat and ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?
2. If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?
3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake?

Shane Frederick, Cognitive Reflection and Decision Making, 19 J. ECON. PERSP. 25, 27 (2005).

Scoring the Slide Answers

1. The answer here is 5 cents. The intuitive answer is 10 cents, which would make the bat and ball combination cost \$1.20, not \$1.10.
2. The answer here is 5 minutes. The intuitive answer is 100 minutes—it is what most people answer just before reporting the question to be “easy.”
3. The answer here is 47 days. The intuitive answer is 24 days, which is what most people tend to answer. However, if the patch doubles in size every day and the lake is covered on day 48, then on day 47 the lake would have to be half-covered.

Shane Frederick, Cognitive Reflection and Decision Making, 19 J. ECON. PERSP. 25, 26–27 (2005).

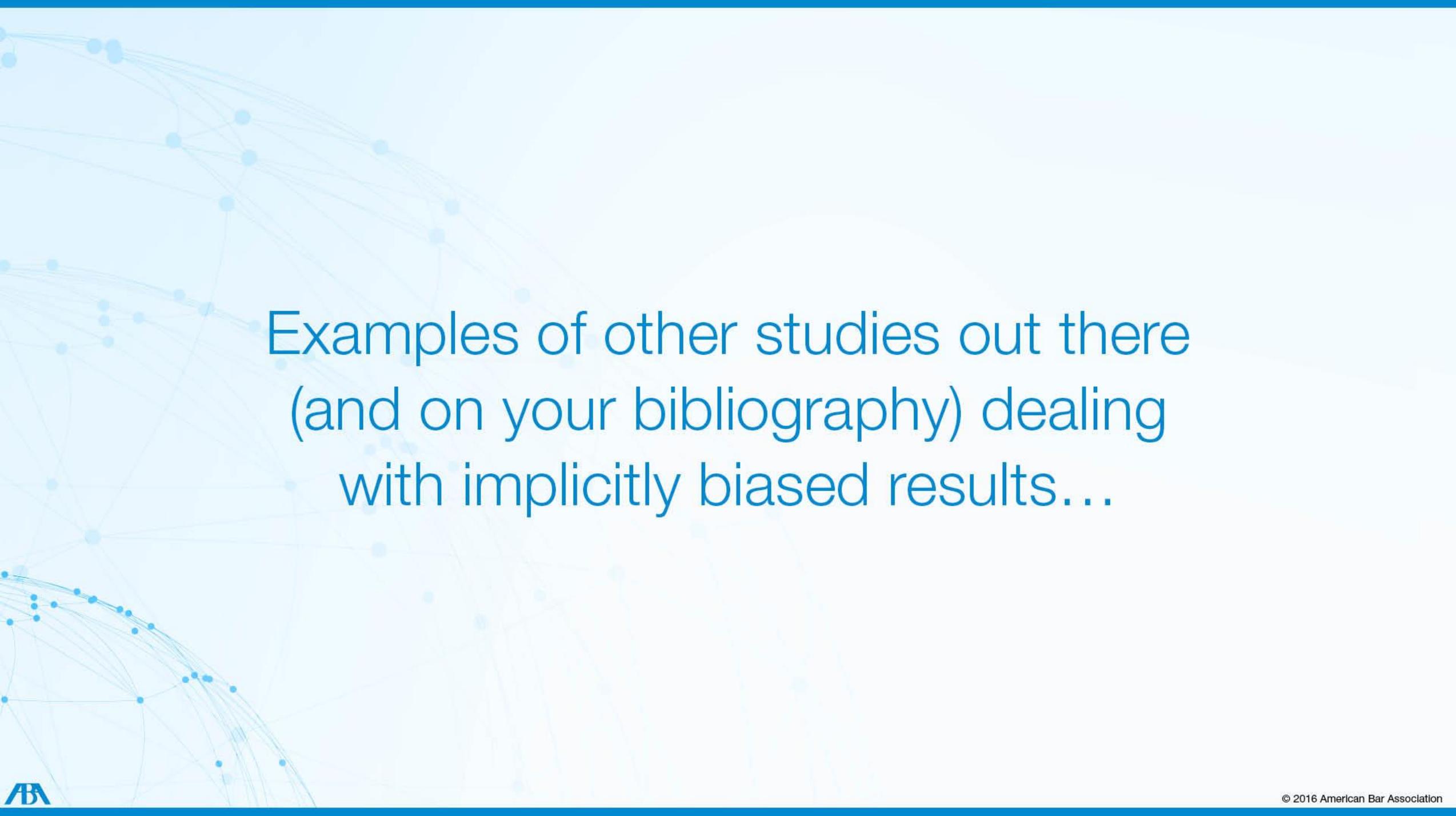
How'd you do!?

- Most people average only one correct answer, instead going “with their gut,” meaning impulse, and getting the answers wrong.
- Adults tend to perform particularly poorly on this test.
- Subjects who selected the “intuitive” responses were much more likely than those who answered correctly to report that the problems were **easy**.

The Judge Study

- After administering the CRT to 252 trial judges, one study found that judges obtained an average score of 1.23 out of 3.00, which is slightly higher than students at the University of Michigan (1.13) and slightly lower than the students at Harvard (1.43). (Students at MIT scored the highest at 2.18.)
- Judges who selected the intuitive, though incorrect, answers were just as likely to describe the questions as easy as the general population.
- The fact that about 1/3 of the judges suppressed their intuitions to deliberate, i.e., moved from System 1 to System 2 in real time, is a good place to start.

Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 14–16 (2007–08).

A background graphic consisting of a network of light blue nodes and connecting lines, resembling a globe or a complex web, positioned on the left side of the slide.

Examples of other studies out there
(and on your bibliography) dealing
with implicitly biased results...

Ideal Litigators Study

Found test takers associate ***ideal litigators (competence, skill, likeability)*** as being white and male DESPITE EXPLICIT (conscious), strong beliefs that they held no such associations!

Jerry Kang et al., Are Ideal Litigators White?: Measuring the Myth of Colorblindness, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

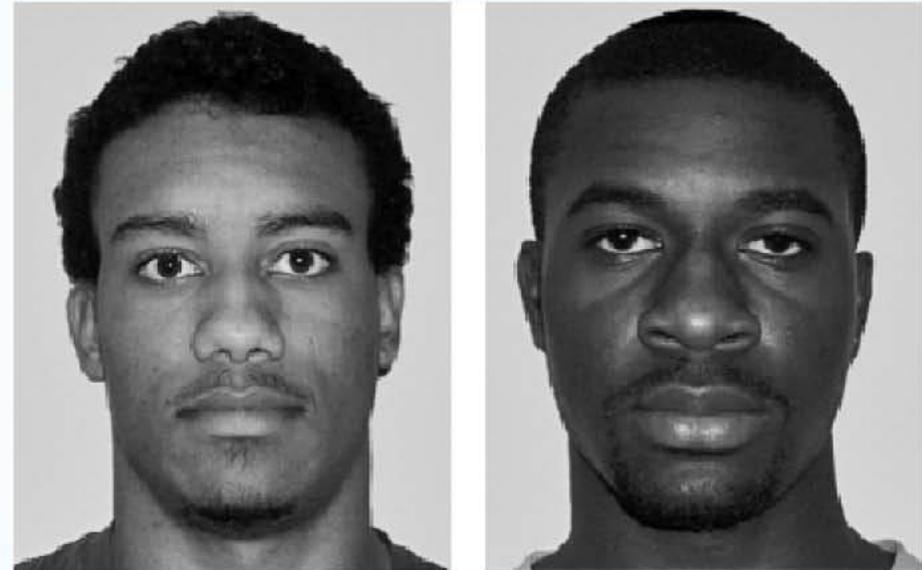
Blacks and Sentencing Outcomes: Two Studies

- Dark skin, broad nose, big lips, and even hair (afro, dreadlocks) = harsher sentencing.

Jennifer L. Eberhardt et al., Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, 17 PSYCHOL. SCI. 383, 383–84 (2006) (photos to the right are examples from the article).

- Consider another study out of Georgia concluding that blacks receive sentences that are 4.25 percent harsher than whites after controlling for types of crime. Dark-skinned black men received sentences 4.8 percent harsher than whites; light-skinned blacks received sentences that were not statistically significant.

Traci Burch, Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing, 12 J. EMPIRICAL LEGAL STUD. 395, 395 (SEPT. 2015).



The Presumption Of Innocence

Every defendant is innocent
until proven guilty.

Federal District Judge Mark Bennett asks: Do you really believe that?
Would you shake the defendant's hand and tell the jury that s/he is innocent?
Why not?

Mark W. Bennett, The Presumption of Innocence and Trial Court Judges:
Our Greatest Failing, 39 CHAMPION (Apr. 2015).

A background graphic featuring a network of blue dots connected by thin lines, forming a complex web. The dots are scattered across the left side of the image, with lines extending towards the right. The overall color scheme is light blue and white.

We All Misremember Facts, Too...

Implicit Racial Bias and Forgotten Memory

Implicit Racial Bias Automatically Causes Most Fact Finders to **Misremember Case Facts** in **Racially Biased Ways**:

Participants read two unrelated stories: one about a fistfight and the second about an employee who was terminated. The independent variable was the race of the story protagonist.

Fight Story: William, a Caucasian; Tyronne, an African-American

Employment Termination Story: Brenda, a Caucasian; Keisha, an African-American

Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 DUKE L.J. 345, 391–94 (2007).

Implicit Racial Bias and Forgotten Memory: Study Results

Participants misremembered certain legally relevant and important facts in a racially biased manner:

- Participants who read about Tyronne recalled 80.2% of aggression facts.
- Participants who read about William recalled only 68.8% of aggression facts.
- Participants falsely remembered Brenda being Employee of the Month 17% of the time; but Keisha, only 10%

Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 DUKE L.J. 345, 399, 404 (2007).

We Also Interpret *Ambiguous Evidence* Differently, Depending on Skin Color



Implicit Racial Bias and Skin Tone

Subjects viewed a crime scene photo of a masked armed robber at a Mini Mart. The photo shows the forearm of the robber; half saw light skin, and half saw dark skin (see previous slide).

Subjects were then told 20 pieces of ambiguous evidence, e.g., the suspect was a Golden Gloves boxing champ, the suspect was left-handed, etc.

Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 332–33 (2010).

Implicit Racial Bias and Skin Tone

RESULTS:

1. Memory bias and explicit racial preference (Modern Racism Scale) were not correlated.
2. Those who saw dark skin saw ambiguous evidence significantly more probative of guilt (if the black suspect was right-handed, people assumed the suspect purposely changed hands to throw law enforcement off; but a white right-handed suspect was excluded as the likely robber since the person in the picture held the gun in the left hand).
3. Subjects found the dark-skinned defendant “more” guilty on a scale of 1 to 100.

Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 337–38 (2010).

Other examples we should look out for...

EYEWITNESS TESTIMONY: Studies have shown that eyewitness testimony can become victim to implicit racial biases. For example, it is well-settled that people are much more accurate when identifying another member of their own race as opposed to someone of a different race. Additionally, in one study, when participants were subliminally primed with a black male face, they were quicker to distinguish a weapon out of static. When primed with a weapon, they were also quicker to see a black male face. This was true for both students and police officers.

Other examples we should look out for...

DEATH ROW: Seventy-seven percent of all death row inmates in the United States are minorities, whereas 75 percent of all federal judges are white and 68 percent are male. A whopping 30 percent of all executions stem from 15 individual counties, all in former Confederate states (i.e., LA, GA, SC, AL, MS, TX). Maybe even more importantly, a staggering 95 percent of elected prosecutors are white.

Amita Kelly, Does It Matter That 95 Percent of Elected Prosecutors Are White?, NPR (July 8, 2015), <http://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white>.

Consider, too...

DEHUMANIZATION BIAS: One study tested 176 mostly white, mostly male police officers for a “dehumanization bias” against black people by having them match photos of people with photos of big cats or apes. The study found a “statistically significant” occurrence of the dehumanization bias among white police officers in urban areas. Also, the officers with higher scores on the Dehumanization IAT were much more likely to have a record of excessive force complaints from black suspects.

Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 4 J. PERSONALITY & SOC. PSYCHOL. 526, 534–36 (2014).

Consider, too...

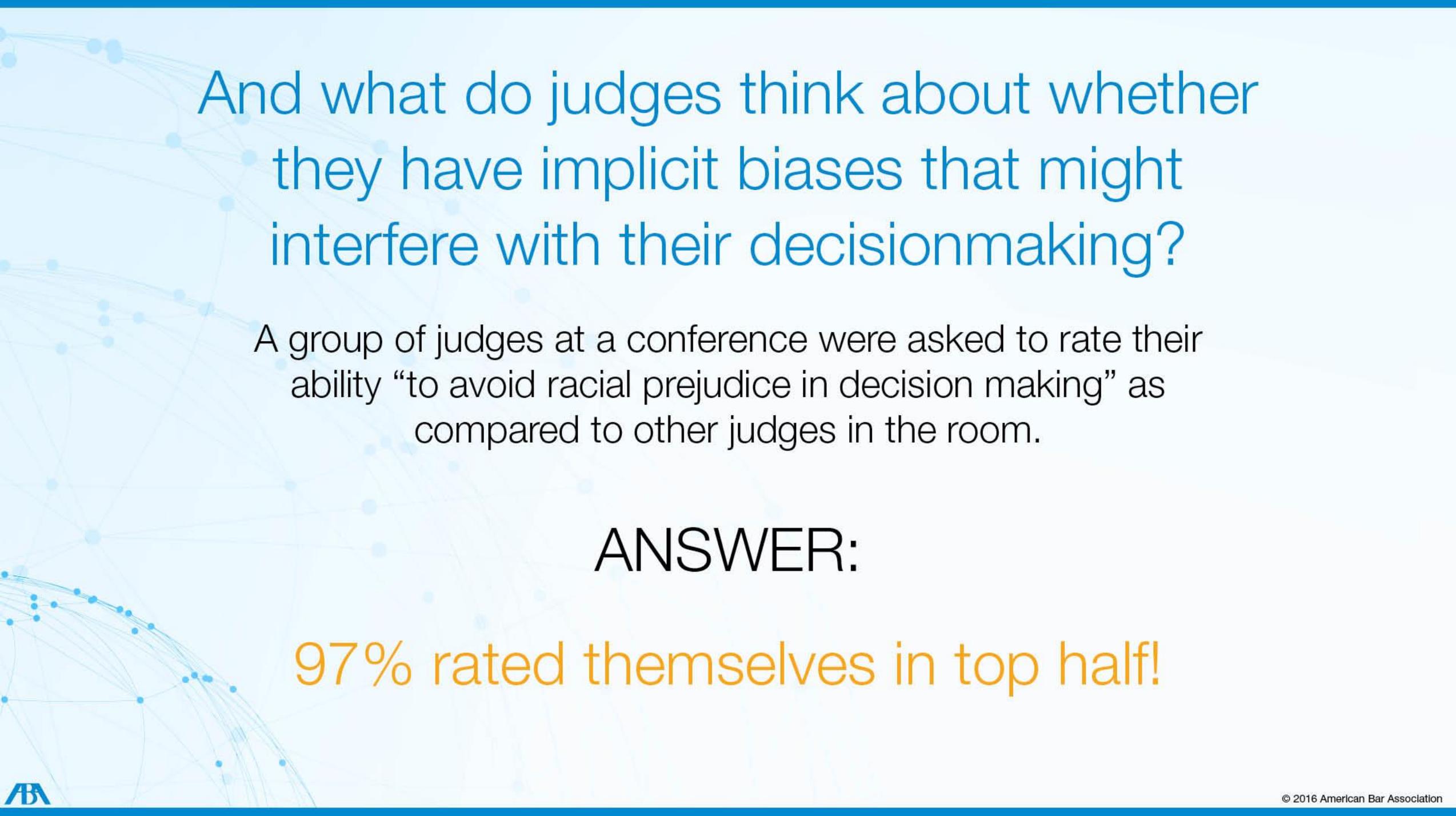
SHOOTER BIAS: Civilians, students, and police officers all respond much more quickly to a black figure with a gun than a white figure with a gun—and also tend to mistake harmless objects for guns in black hands more often than in white hands.

So, Back to the IAT: Judges, Implicit Bias, and Effect on Judgement

In a study, judges took the Race IAT as well as tests to determine whether implicit bias affected judgment. Some of the findings:

1. White judges showed strong implicit attitudes favoring white defendants over African-American defendants. The study showed a mixed preference among black judges.
2. White judges' IAT scores showed a statistically stronger white preference than did the scores of whites in the general population. Black judges' IAT scores were comparable to scores of blacks in the general population.
3. White judges who had a greater degree of implicit bias against African-Americans, as measured by the IAT, were harsher on defendants (who were never racially identified) when they had been primed with racially charged words.

Jeffrey Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?,
84 NOTRE DAME L. REV 1195, 1210, 1216 (2009).

A decorative background graphic consisting of a network of light blue dots connected by thin, curved lines, resembling a globe or a complex web. The dots are of varying sizes and are scattered across the slide, with a higher concentration on the left side.

And what do judges think about whether they have implicit biases that might interfere with their decisionmaking?

A group of judges at a conference were asked to rate their ability “to avoid racial prejudice in decision making” as compared to other judges in the room.

ANSWER:

97% rated themselves in top half!

How can or should a judge address bias?

- Decisions about whether to address bias are affected by the following:
 - Whether inequality or disparity is recognized
 - Whether addressing it is seen as relevant to the court's work
- Does intentionality of bias matter?
 - Is it enough to be color blind or gender blind in practice? In the courts?

Combating Implicit Bias

- Awareness
 - Harvard Implicit Association Test (IAT)
- Insulating subjects of bias from its effects
 - Induce deliberation
- “Debiasing”
 - Increase diversity
 - Eliminate hostile environments and create positive environments
 - Focus on exposure and education

How is implicit bias operating in you, in others?

- Start considering every person of relevance to the matter before you in the courtroom:
 1. Yourself
 2. Prosecutor
 3. Defense Attorney
 4. Defendant
 5. Jurors
 6. Court Personnel

As a judge, you are *already looking out for bias*:

ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.3: Bias, Prejudice, and Harassment

- (A) **A judge shall perform** the duties of judicial office, including administrative duties, *without bias or prejudice*.
- (B) **A judge shall not, *in the performance of judicial duties***, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and *shall not permit court staff, court officials, or others subject to the judge's direction and control to do so*.
- (C) *A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice*, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

Inducing Deliberation

Studies show that inducing deliberation is a key component to combating bias. How do we go about inducing deliberation?

- A “Kind” Environment

This means that “immediate, high-quality feedback” is available on the causes and consequences of errors from peers and trusted colleagues.

- Time

Time pressures present an enormous challenge, and the amount of time a judge has to make a decision can directly influence a reliance on intuition. Allotting more time for decision-making is likely to help induce deliberation.

Inducing Deliberation, cont.

- Opinion Writing

Writing more opinions could induce more deliberation by affording the chance to assess a decision carefully as well as justifying it in writing.

If writing the opinion is not feasible, maybe announce your reasoning out loud before having a clerk draft the opinion.

- Training and Feedback

Statistical training could be massively useful for judges as studies show that statistical training increases the likelihood that individuals will make rational, deliberative decisions.

Adopting a kind of interdistrict peer-review process could also, in theory, be largely beneficial for participating jurists

What Deliberation Might Look Like

“Entering the cultural
imagination of the other”

–Raymond Carroll

“Down the rabbit hole”

–Lewis Carroll

GOALS:

Suspending conclusions & judgments

Enlarging & refracting understandings of how the world works

Suggesting inquiries for future understanding

Sue Bryant & Jean Koh Peters, Five Habits for Cross-Cultural Lawyering, in RACE, CULTURE, PSYCHOLOGY, AND LAW 47 (Kimberly Holt Barrett & William H. George eds., 2005).

Exposure

- Exposure to varied groups and types also can help reduce bias. Following are some examples of exposure:
- Using countertypicals
 - ◆ MLK, Jr., and Charles Manson are countertypicals
 - ◆ Even this kind of tangential exposure has been shown to reduce implicit bias
 - ◆ Additionally, brief visualization exercises can change IAT scores.
 - ◆ Similarly, juxtaposing ordinary people with countertypical settings has also been shown to have an effect.
- Reducing homogeneity
- Identifying your own personal risk factors based on your own experiences, upbringing, age, religion, etc.
 - ◆ Tracking your performance and independent education have also been shown to reduce implicit bias.

Sexual Orientation and Gender Identity Discrimination

Would candor, i.e., making one's orientation known, reduce biases toward the LGBT community?

VIEW ONE: The candor literature suggests that rather than move away from negative views, courts and others will become increasingly committed to their initial intuitions and will rely explicitly on them.

Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 *UCLA L. REV.* 1375, 1413–14 (June 2010).

VIEW TWO: Making sexual orientation salient can help jurors cognitively process and reject stereotypic assumptions about LGBT litigants.

Cynthia Lee, *The Gay Panic Defense*, 42 *U.C. DAVIS L. REV.* 471, 531 (Dec. 2008).

Making Sexual Orientation Salient

Making sexual orientation salient, i.e., known, could possibly help and be done through pretrial publicity, questions asked during voir dire, opening and closing statements, trial testimony, and jury instructions.

In the Matthew Shepard case, gay and lesbian groups made sexual orientation salient when they decried the killing as a hate crime based on the victim's sexual orientation. The result was a felony murder conviction, more severe than the manslaughter conviction that the defense team wanted.

Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 531 (Dec. 2008).

Why Not Just Be “Color Blind”?

Definition: Color blindness is a way of thinking that attempts to be “nonracial.” This means that a white person would actively attempt to treat everyone equally without regard to racial identities.

Attempting to be color blind puts us at intensified risk of adopting implicit biases because we are refusing to see and acknowledge things that are in front of us.

EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 3 (4th ed. 2014).

The Problem With Being “Color Blind”

Color blindness is an attempt to act purely on intuition, i.e., to remove the onus of deliberation. The ultimate behavioral representation of revisionist thinking, color blindness allows the status quo to prevail. If one does not “see color,” it may become difficult to see real differences in treatment.

Example: Studies show that black Americans are killed at twelve times the rate of any other group in the developed world. African-Americans, generally, have the highest death rate and shortest survival time for most cancers of any racial or ethnic group in America.

Nate Silver, Black Americans Are Killed at 12 Times the Rate of People in Other Developed Countries, FIVETHIRTYEIGHT (June 18, 2015), <http://fivethirtyeight.com/datalab/black-americans-are-killed-at-12-times-the-rate-of-people-in-other-developed-countries/>.

The Big Picture

The ***most important tool*** in your toolbox is ***your own awareness*** of implicit bias as a reality — and your own motivation to make the unconscious, conscious.