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IMPLICIT BIAS: THE SCIENCE, INFLUENCE, AND IMPACT ON JUSTICE

*Hon. Bernice B. Donald**

Walking, answering the phone, drinking a hot beverage, driving a car, eating out—every day we do many of these things with little conscious effort. When we see steam coming from a hot beverage, it takes little time to process the information to determine its meaning; we know from past experiences that steam coming from a beverage means we should proceed with caution. Phones come in many forms, yet we know when the landline phone on our desk, or the almost-obsolete wall-mounted phone in our kitchen, or the computer-like, rectangular, handheld device rings, we should answer. When walking, we need not analyze each obstacle on the sidewalk to determine how to proceed. When driving, our brain has milliseconds to process information and tell our body to react to avoid collision. When we see something barreling toward us, we know instantly to avoid the object. There is no time to consciously think about what the object may be, how fast it is traveling, or where it came from; we act immediately. Whether at a fast-food restaurant or an elegant establishment with refined cuisine, we have a general idea how to act when we walk in. Does one go directly to the counter or wait to be seated? In each of these scenarios, we know how to respond each time—without thinking—based on our past experiences dating back as far as early childhood.

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The human body sends 11 million bits of information per second to the brain for processing, yet the conscious mind can process a mere 50 of those bits in the same amount of time.¹ What happens to the 10,999,950 bits of information that our conscious mind does not process? Researchers conclude that the vast majority of processing is accomplished outside of the conscious mind and the body's direct conscious control.²

According to the American Academy of Family Physicians, automatic cognitive processes shape human behavior, beliefs, and attitudes from a very young age.³ As we grow, the processes transform according to personal life experiences, family upbringing, and information absorbed through media. These cognitive processes help determine how humans filter perceptions, decision-making, and systematic errors in judgment.⁴ The cognitive process also results in a preferential ranking and grouping of our peers and others in our community.

Attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious way are defined as implicit or unconscious bias.⁵ Mahzarin Banaji and Anthony Greenwald coined the term "implicit bias" in 1995. They argued that social behavior is largely influenced by these unconscious associations and judgments—those other 10,999,950 bits of

1. BRITANNICA.COM, <https://www.britannica.com/science/information-theory/Physiology> (last visited Apr. 29, 2021).

2. *Id.*

3. Jennifer Edgoose, Michelle Quiogue & Kartik Sidhar, *How to Identify, Understand, and Unlearn Implicit Bias in Patient Care*, FAM. PRAC. MGMT., (July/August 2019), <https://www.aafp.org/fpm/2019/0700/p29.html>.

4. *Id.*

5. Charlotte Ruhl, *Implicit or Unconscious Bias*, SIMPLY PSYCHOLOGY (July 1, 2020), <https://www.simplypsychology.org/implicit-bias.html>.

information (per *second*) that our conscious brain is not capable of processing.⁶

Cognitive science research reveals that our automatic nervous system triggers unconscious frameworks of thinking that, in turn, influence our otherwise neutral, logical, and reasoned judgments.⁷ The brain processes information via schemas, which are templates of knowledge that assist us with organizing data into broader categories.⁸ For example, “when we see a figure with four equal sides, we quickly recognize that figure to be a square without giving much thought.”⁹

These schemas are “important and helpful because they allow us to function without unnecessarily expending mental resources.”¹⁰ Schemas apply not only to objects, shapes, or behaviors, but also to human beings.¹¹ Our brains naturally assign people into various categories “divided by salient and readily accessible traits, such as age, gender, and race.”¹² Just as schemas help us walk and drive, our brains create schemas and implicit social cognition, which can guide our thinking and action.¹³ These schemas develop not at once and not from one source, but rather over time through culture, direct or indirect

6. *Id.*

7. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1128 (2004).

8. See Alfred Ray English, *Understanding Implicit Bias*, 55 ARIZ. ATT’Y 10 (2019).

9. *See id.*

10. *Id.*

11. See MAHZARIN BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT* (2013).

12. See Shawn C. Marsh & Diane C. Marsh, *Being Explicit about Implicit Bias Education for the Judiciary*, 56 CT. REV. 92 (2020).

13. *Id.*

messaging, and past experiences.¹⁴ The sources of these schemas can be our parents, family, friends, school, and media, among infinite other sources.¹⁵

Beyond relying on schemas for daily activities, research on implicit bias identifies several other conditions in which individuals are likely to rely on their unconscious behaviors. These include situations that involve ambiguous or incomplete information; the presence of time constraints; and circumstances in which our cognitive control may be compromised, such as when we are fatigued or have too many other things on our mind.¹⁶

We are continuously exposed to certain identity groups paired with specific characteristics, and we begin to automatically and unconsciously associate the identity with the characteristic, whether or not that association finds any basis in reality.¹⁷ Without schemas, we would not be able to process as efficiently or effectively the “vast amount of sensory data” we obtain on a daily basis.¹⁸ Reliance on schemas our brain has created from past experiences or other sources is a natural occurrence, though this reliance can (and often does) lead to inaccurate and biased judgments.¹⁹ We are taught to be aware of our surroundings when walking alone or at night, and we therefore might react with caution when we see someone approaching us, but do we act differently depending upon what *type* of person approaches us? White, black, male, female, tall, short, old, young, person with a disability—do we change our reaction

14. *Id.* at 92.

15. *Id.*

16. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012).

17. *Id.* at 1130.

18. English, *supra* note 8, at 12.

19. *Id.*

based on any of these characteristics? For many, the answer is yes. Though unfortunate, these differing reactions are entirely human. Implicit bias is a result of those learned schemas from our environment, society, media, and other sources. How would one describe a drug dealer from a movie? What type of person comes to mind in the first split second? What about a professional football player, astronaut, or doctor? Our past experiences continuously and unrelentingly shape our unconscious decisions.

A person's actions or comments based on implicit bias may be discriminatory but not necessarily intentional.²⁰ Explicit biases are attitudes and stereotypes that are consciously accessible through one's own conscious, while implicit biases are not consciously accessible and are experienced without awareness.²¹ Explicit bias can be somewhat easy to recognize because it is "deliberately generated and consciously experienced as one's own belief."²² Common examples of explicit biases can be overt acts of racism and racist comments.²³

Implicit bias, however, does not require animus but instead only familiarity with some stereotype.²⁴ Nevertheless, implicit bias can be just as problematic as explicit bias because both can cause prejudice against a marginalized community.²⁵ With

20. *Id.*

21. Kang, *supra* note 16, at 1132.

22. J. BERNICE B. DONALD & SARAH E. REDFIELD, *ENHANCING JUSTICE: REDUCING BIAS*, Ch. 2 *Framing the Discussion*, 5, 14, (Sarah E. Redfield ed., 2017).

23. See Michele Benedetto Neitz, *Pulling back the Curtain: Implicit Bias in the Law School Dean Search Process*, 49 SETON HALL L. REV. 629, 655 (2019).

24. See B. Keith Payne, Heidi A. Vuletich & Kristjen B. Lundberg, *The Bias of Crowds: How Implicit Bias Bridges Personal and Systemic Prejudice*, 28 PSYCHOL. INQUIRY 233, 238 (2017).

implicit biases, individuals may not be mindful that their biases—rather than the reality of a situation—influence their decision-making.²⁶ By way of common example, implicit bias might make police officers automatically suspicious of two young African American males driving in a neighborhood where few African Americans reside.²⁷ While much education on implicit bias has centered on race and ethnic backgrounds, it is important to note that there are many other implications of the unconscious judgment, such as gender, body type, and age.²⁸

The social science on implicit bias has grown tremendously, becoming a popular topic in judicial education.²⁹ In the judicial context, education regarding implicit bias is critical because evidence from fields such as cognitive psychology suggests “that people can and do make decisions about others via cognitive mechanisms operating outside of their awareness.”³⁰ Since a judge’s primary role is to make decisions impacting others while sustaining objectivity, it is essential that judges understand both the existence of implicit biases and ways to counteract them.³¹

25. See Neitz, *supra* note 23, at 656.

26. *Id.*

27. See Meera E. Deo, *Faculty Insights on Education Diversity*, 83 FORDHAM L. REV. 3115 (2015).

28. See Marsh & Marsh, *supra* note 12, at 92.

29. See Catie Wheatley, *Honesty is the Best Policy: Addressing Implicit Bias in the Judiciary*, 9 IND. J.L. & SOC. EQUAL. 94, 96 (2021).

30. See Marsh & Marsh, *supra* note 12, at 92.

31. Justin D. Levison, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 65 (2017).

IMPLICIT BIAS IN CIVIL LAW

Civil cases make up the majority of cases in courts.³² But despite the prevalence of civil cases, the criminal system influences laypersons' perceptions of the civil system.³³ On the civil side, potential plaintiffs might forgo a lawyer's assistance in their case or even forgo filing suit entirely. In some cases, as many as three-quarters of low-income individuals, mostly minorities, did not even seek an attorney's service for their legal issues.³⁴ Perceived mistreatment and bias in the *criminal* system leads to a strong sense of disenfranchisement among minority groups even in the *civil* system.

In a perfect world, all parties to these civil cases would make rational decisions free from any biases or undue influence. Judges in particular, with their experience and knowledge of the law, are expected to look beyond any biases and extraneous influences that might alter their decision-making.³⁵ However, even those with a mind trained towards equality can hold biases against others.³⁶ In other words, even individuals who are

32. See *Federal Judicial Caseload Statistics 2018*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018>, (last visited Mar. 20, 2021) (displaying how there were 81,553 criminal cases and 277,010 civil cases in 2018).

33. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (Apr. 19, 2018) <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> (noting the over-representation of persons of color in the U.S. prisons and the "prevalence of bias in the criminal justice system").

34. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1265 (2016).

35. Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 25 (2006).

36. *U.S. Supreme Court Recognizes Role of Unconscious Bias in Disparate Treatment*, ASS'N FOR PSYCHOL. SCI. (July 1, 2015), <https://www.psychological>

trained to treat everyone equally can still attribute negative characteristics, such as “poverty, aggression, and even crime,” with certain demographics.³⁷

In 2013, the decision by the United States Supreme Court in *Shelby County v. Holder*³⁸ struck down Section 4(b) of the Voting Rights Act of 1965 containing a coverage formula that determined which state and local jurisdictions are subject to federal preclearance based on their histories of discrimination in voting. *Shelby County v. Holder* is an example of how even the pinnacle of the American judiciary is not exempt from these biases.³⁹ Writing for the majority, Chief Justice John Roberts noted the level of progress made since the enactment of the Voting Rights Act of 1965.⁴⁰ The law was “one of the most consequential, efficacious and amply justified exercises of the federal legislative power in our Nation’s history.”⁴¹ States could no longer pass blatantly discriminatory laws that made it difficult or almost impossible for minorities to vote.⁴² Minority populations had a voice in local and federal politics after years of being unduly silenced.

Many believe the *Shelby County* decision allowed voter suppression efforts in various states to occur — an issue we still face

science.org/news/releases/us-supreme-court-recognizes-role-of-unconscious-bias-in-disparate-treatment.html.

37. *Id.*

38. 570 U.S. 529 (2013).

39. See, e.g., Adam Bolotin, *Out of Touch: Shelby v. Holder and the Callous Effects of Chief Justice Roberts’s Equal State Sovereignty*, 49 J. MARSHALL L. REV. 751 (2016); Bridgette Baldwin, *Backsliding: The United States Supreme Court, Shelby County v. Holder and the Dismantling of the Voting Rights Act of 1965*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 251 (2015).

40. *Shelby County*, 570 U.S. at 551.

41. *Id.* at 561 (Ginsburg, J., dissenting).

42. Baldwin, *supra* note 39, at 251.

today.⁴³ In 2017 alone, minority voters were more than four times more likely to experience discrimination or voter disenfranchisement measures than white voters.⁴⁴ Considering the disparity between experiences at polling places, it is no stretch to imagine a scenario in which a bench with more minority voices might have viewed the case differently.⁴⁵ Perhaps someone who has personally dealt with discrimination might not view the progress under the Voting Rights Act of 1965 as complete.⁴⁶ A diverse judiciary⁴⁷ that is aware of biases can better ensure all voices are heard fairly in American courts.⁴⁸

43. See, e.g., Vann R. Newkirk, II, *How Shelby County v. Holder Broke America*, THE ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>.

44. *Discrimination in America*, ROBERT WOOD JOHNSON FOUND., <https://www.rwjf.org/en/library/research/2017/10/discrimination-in-america—experiences-and-views.html> (last visited Mar. 19, 2021).

45. “The grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in democracy undiluted by race.” *Shelby County*, 570 U.S. at 592 (Ginsberg, J., dissenting). Justice Ginsburg further noted in her dissent that getting rid of the Voting Rights Act of 1965 because of the progress it has made is like “throwing away your umbrella in a rainstorm because you are not getting wet.” *Id.* at 590 (Ginsburg, J., dissenting).

46. See Pat K. Chew & Robert E. Kelley, *The Realism in Judicial Decision Making: An Empirical Analysis of Plaintiffs’ Race and Judge’s Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91, 105 (2012) (noting how judges of different races and backgrounds can perceive things differently and might not be sensitive to racial harassment if never having personally experienced it).

47. Since President Reagan, every president has increased the racial diversity of the federal judiciary from his party’s predecessor. President Trump is the only president in that time to break the trend. John Gramlich, *Trump has appointed a larger share of female judges than other GOP presidents, but lags Obama*, PEW RES. CTR. (Oct. 2, 2018), <https://www.pewresearch.org/fact-tank/2018/10/02/trump-has-appointed-a-larger-share-of-female-judges-than-other-gop-presidents-but-lags-obama/>.

“[E]xperience and common sense” can lead to disparate conclusions based on otherwise identical information.⁴⁹ Studies indicate that immigration and discrimination claims before Asian American judges have a higher success rate than those before white judges.⁵⁰ The shared, firsthand experiences of immigration and discrimination give the Asian American judge a more sympathetic interpretation.⁵¹ Likewise, African American judges tend to view Fourth Amendment cases, prohibiting unreasonable searches and seizures, more favorably than white judges.⁵² Moreover, workplace discrimination and harassment cases are more likely to succeed on their claims when before a judge of the same race as the plaintiff.⁵³

Religion and gender can affect the outcome of judgments as well. With regard to religion, studies indicate that Jewish judges have a tendency to side in favor of minority religions, likely due to their belonging to a religion that has suffered much persecution.⁵⁴ Alternatively, Catholic and Evangelical judges are more likely to disfavor LGBTQ plaintiffs in their cases, and also

48. See Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 JUDGES' J. 20 (2015) (detailing one judge's need to remind herself that one culture's view of something as simple as direct eye contact or storytelling may be different).

49. Elizabeth Thornburg, *(Un)Conscious Judging*, 76 WASH. & LEE L. REV. 1567, 1582 (2019).

50. Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 ASIAN PAC. AM. L.J. 92, 108 (2006).

51. *Id.*

52. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. L. REV. 587, 606 (2011).

53. Chew & Kelley, *supra* note 46, at 105.

54. Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 206 (2017).

disfavor defendants in obscenity cases.⁵⁵ Female judges are far more likely to side with plaintiffs in sexual harassment and employment discrimination cases.⁵⁶ Likewise, women are more likely to deem statutes as violative of equal protection or LGBTQ rights.⁵⁷ Even age can influence a judge's decision; older judges tend to side with plaintiffs in discrimination cases.⁵⁸ They are more than twice as likely to favor the plaintiffs than their younger counterparts.⁵⁹

Lastly, life experiences and political party affiliation play a role in implicit biases. One study showed that judges identifying as Republican or Democrat were, depending on their political affiliation, more or less likely to discharge an individual's debts in simulated bankruptcy adjudications.⁶⁰ Beyond identity, life experiences have an impact on bias and perception. Judges with at least one daughter are more likely to side with plaintiffs in gender bias cases.⁶¹ Everything from education level, quality of education, military experience, or previous employment can influence a judge's perception.⁶² Racial identity is more readily identifiable as a way to explain a judge's naivete or sensitivity

55. *Id.*

56. Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759, 1776 (2005).

57. Fred O. Smith Jr., *Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?*, 57 STAN. L. REV. 2087, 2123 (2005).

58. Rachlinski & Wistrich, *supra* note 54, at 208.

59. *Id.*

60. Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1229–30 (2006).

61. Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 38 (2015).

62. Chew & Kelley, *supra* note 46, at 105.

to societal discrimination, but all facets of a judge's identity must be considered when examining potential implicit biases.⁶³

Pretrial rulings—those rulings that determine whether a case will even proceed to a jury—are also critically important and just as susceptible to the influence of biases.⁶⁴ While *Shelby County* might illustrate an example of implicit bias and its effects at large, *Ashcroft v. Iqbal*⁶⁵ shows how a decision can open the door for implicit bias solely within the judicial system.⁶⁶ In general, dismissals went from 46 percent to 61 percent following *Iqbal*'s heightened pleading standard.⁶⁷ One author notes that judges' decisions are now overly determinative at the pretrial stage, which increases the impact of their biases.⁶⁸ Even if a case survives a Federal Rules of Civil Procedure 12(b)(6) challenge, it is sure to face a motion for summary judgment. Plaintiffs at least have the benefit of an expanded narrative through the discovery phase when faced with a motion for summary judgment, but judges still have discretion regarding whether there is any "genuine dispute of material fact"⁶⁹ that is still subject to some degree of personal interpretation.⁷⁰ Thus, between a motion to dismiss and a motion for summary judgment, plaintiffs face two important challenges that allow for judicial discretion and possible implicit bias before a case even reaches the jury.

63. *Id.*

64. Thornburg, *supra* note 49, at 157.

65. 556 U.S. 662 (2009).

66. Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 213 (2015).

67. *Id.*

68. See Elizabeth Thornburg, *Law, Facts, and Power*, 114 PENN STATIM 1, 2 (2009), <http://pennstatelawreview.org/114/114%20Penn%20Statim%201.pdf>.

69. FED. R. CIV. P. 56(a).

70. Kang, *supra* note 16, at 1164.

Not only does this show the negative impact implicit bias can have on claims in general, but it highlights the problem that implicit bias can perpetuate throughout the system. As more minority plaintiffs choose to proceed *pro se* because of their perception of the legal system,⁷¹ they are even less likely to succeed on their claims.⁷² When examining the race of judges with *pro se* plaintiffs, it becomes clear that white and African American judges differ in their application of *Iqbal* to race discrimination claims.⁷³ White judges dismissed such claims almost twice as often as African American judges.⁷⁴

Implicit bias can also manifest in the voir dire process in civil matters. Not only may prospective jurors give answers more likely to please the judge, but a judge might also unduly weigh the opinions of certain attorneys in the selection process.⁷⁵ Excessive involvement from judges in the voir dire process can result in a jury that conforms with a judge's personal narrative.⁷⁶ Recent scholarship suggests judges should take a more passive approach to the jury selection process.⁷⁷ This approach allows trial lawyers who are more familiar with the case and their client's interest to question and select the jury rather than the judge.⁷⁸

71. See Hill, *supra* note 66, at 213.

72. *Id.*

73. *Id.*

74. *Id.* (noting that white judges dismiss 57.5 percent of race-discrimination claims, while African American judges dismiss just 33.3 percent).

75. J. 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*, 4 HARV. L. & POL'Y REV. 149, 160 (2010).

76. *Id.* at 165.

77. *Id.*

78. *Id.*

IMPLICIT BIAS IN CRIMINAL LAW

Judges, and the criminal justice system as a whole, must provide a defendant with a fair trial.⁷⁹ Implicit bias complicates this task.⁸⁰

A. *Adjudications and Judicial Response to IAT testing*

Indictments and the counts contained within those indictments can reveal implicit bias.⁸¹ As a judge, I often tell of my own experience during my early days on the bench. A prosecutor brought an indictment for felony possession of a firearm with eight counts to reflect the eight weapons possessed by the African American defendant. That same day, another prosecutor brought forward an indictment against a White defendant with the same charge but only two counts of felony possession of a firearm. This gave me pause because the White defendant also possessed eight weapons but only received one count for the eight weapons. I asked the prosecutor why the African American defendant had been punished so harshly for the same crime as a White defendant. The response: the prosecutor did not realize the disparity.

79. See U.S. CONST. amend VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”).

80. See Kang, *supra* note 16, at 1126 (explaining the presence of implicit bias in the criminal justice system from start to finish).

81. See Jeffery J. Rachlinski, et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 786 CORNELL L. FACULTY PUB. 1195 (2009) (explaining that implicit bias can interfere with a defendant’s right to a fair trial).

Given the nature of these biases, prosecutors are not always aware of their implicit biases when they decide what charges to bring against a particular defendant.⁸² When prosecutors have not been through implicit-bias training or are unaware of their biases, then the judge proves integral in filtering out implicit biases.

Judges are just as susceptible to implicit bias as prosecutors or any other participant in the criminal justice system. Jeffery Rachlinski, and his colleagues conducted a study on several judges from different regions across the United States.⁸³ The judges remained anonymous but were asked to divulge their race, gender, age, and political affiliation.⁸⁴

Rachlinski utilized the Implicit Association Test (“IAT”).⁸⁵ The IAT is a computerized priming test that measures implicit associations using pictures and words.⁸⁶ The test asks participants to pair an object, such as a racial group or gender group, with an evaluative dimension, such as “good” or “bad.”⁸⁷ Participants of the test quickly press a response key without

82. See Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution*, 29 CORNELL J.L. & PUB. POL’Y 257, 263–64 (2019) (citing *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (internal citation omitted)) (“Similarly, Radelet and Pierce reviewed prosecutorial decision making in over 1,000 Florida homicide cases and found a combination of harsher treatment of black defendants and more lenient treatment of white defendants. As Justice Powell acknowledged in *McCleskey v. Kemp*, ‘The power to be lenient is [also] the power to discriminate.’”).

83. Rachlinski, *supra* note 81, at 1209.

84. *Id.*

85. Marsh & Marsh, *supra* note 12, at 93.

86. DONALD & REDFIELD, *supra* note 22, at 14.

87. JUSTIN D. LEVISON ET AL., *ENHANCING JUSTICE: REDUCING BIAS*, Ch. 3 *Implicit Bias: A Social Science Overview* 43, 51 (Sarah E. Redfield ed., 2017).

thinking through their reactions.⁸⁸ The speed of the participant's response "indicates implicit and automatic attitudes and stereotypes."⁸⁹ Implicit measures such as the IAT have greater validity in predicting "spontaneous behaviors" like eye contact, seating distance, and other actions that could indicate discomfort.⁹⁰

Rachlinski's IAT test affirmed that judges in the criminal justice system harbor implicit bias.⁹¹ The White judges who participated in the study reported a preference for White defendants over African American defendants.⁹² The African American judges did not exhibit a preference either way during the initial IAT assessment.⁹³

Table 2: Results of Race IAT by Race of Judge⁹⁴

| Race of Judge (Sample Size) | Mean IAT Score in Milliseconds (and standard deviation)* | | Percent of Judges with Lower Average of Latencies on the White/good versus black/bad round |
|--------------------------------|---|-----------------|--|
| | Judges | Internet Sample | |
| White (85) | 216 (201) | 158 (224) | 87.1 |
| Black (43) | 26 (208) | 39 (244) | 44.2 |

88. *Id.*

89. *Id.*

90. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 954–55 (2006).

91. Rachlinski, *supra* note 81, at 1210.

92. By preference, the authors found that the judges were more likely to be lenient in sentencing or bail hearings toward White defendants and more harsh to African American defendants.

93. Rachlinski, *supra* note 81, at 1210.

94. *Id.*

*Note: Positive numbers indicate lower latencies on the white/good versus black/bad round

After the IAT test, Rachlinski gave the judges three hypothetical scenarios with different crimes and variations regarding the defendant's and victim's race.⁹⁵

The data [showed] that when the race of the defendant is explicitly identified to judges in the context of a psychology study (that is, the third vignette [an offense of Battery]), judges are strongly motivated to be fair, which prompts a different response from White judges (who may think to themselves "whatever else, make sure not to treat the Black defendants worse") than Black judges (who may think "give the benefit of the doubt to Black defendants"). However, when race is not explicitly identified but implicitly primed (vignettes one and two [an offense of Shoplifting]), perhaps the judges' motivation to be accurate and fair is not on full alert.⁹⁶

The study concluded with three findings: (1) judges, like others in the criminal justice system, have implicit bias, especially with regard to race; (2) implicit bias affects judges' judgments when they are unaware of the need to monitor their decisions for implicit racial bias; and (3) "when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so."⁹⁷

95. *Id.* at 1217–20.

96. Kang, *supra* note 16 at 1148.

97. Rachlinski, *supra* note 81, at 1221.

B. *Plea Bargaining: The Elusive Situation for Implicit Bias*

Judges have little leeway when it comes to plea bargains.⁹⁸ However, implicit bias can still infect these determinations. When assessing the validity of a plea bargain, judges are only allowed to consider whether the acceptance was knowing, voluntary, and uncoerced.⁹⁹ Prosecutors presenting these plea bargains, on the other hand, are certainly susceptible to implicit bias.¹⁰⁰

Less research has been done on implicit bias during plea bargaining as compared to sentencing. This is concerning because most criminal trials are resolved through the plea-bargaining process.¹⁰¹ Prosecutorial decision-making may be subject to implicit bias, and this reflects in their decisions of which charges to file, to enhance or reduce, or to drop altogether.¹⁰²

There an unfortunate lack of research regarding prosecutorial decision-making during plea bargains and implicit bias.¹⁰³ However, the amount of discretion a prosecutor has when

98. See Avery & Cooper, *supra* note 82, at 269.

99. *Fogus v. United States*, 34 F.2d 97, 98 (4th Cir. 1929).

100. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 798 (2012).

101. Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3601 (2013) (citing Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 151 (2012)).

102. *Research Finds Evidence of Racial Bias in Plea Deals*, EQUAL JUSTICE INITIATIVE (Oct. 26, 2017), <https://eji.org/news/research-finds-racial-disparities-in-plea-deals/>.

103. See Kang, *supra* note 16, at 1141 (“Unfortunately, we have very little data on this front. Indeed, we have no studies, as of yet, that look at prosecutors’ and defense attorneys’ implicit biases and attempt to correlate them with those individuals’ charging practices or plea bargains. Nor do we know as much as we would like about their implicit biases more generally.”).

determining bail, charges, and offering a plea deal invites associations infected by implicit bias.¹⁰⁴ Without oversight, implicit bias could run rampant during plea negotiations. As noted, the judge has the responsibility to ensure that a plea is accepted free from coercion and with knowledge and voluntariness; this responsibility should also extend to ensuring that implicit bias and its automatic responses are not infiltrating a prosecutor's plea offer to a defendant.¹⁰⁵

C. Sentencing: *The All-Star Proceeding Highlighting Implicit Bias*

Judicial impartiality is of utmost importance during the sentencing proceedings. "Some findings show that trial court judges 'rely extensively on intuition, more than deliberative judging, in deciding matters before the bench.'"¹⁰⁶ Scholars have observed that the fast-paced nature of the criminal courtroom creates the perfect storm for the influence of implicit biases: time pressure and quick decision-making.¹⁰⁷ Judges across America

104. See *id.* ("[T]here is no reason to presume attorney exceptionalism in terms of implicit biases. And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune. If this is right, there is plenty of reason to be concerned about how these biases might play out in practice. As we explain in greater detail below, the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments.").

105. *Fogus v. United States*, 34 F.2d 97, 98 (4th Cir. 1929).

106. See Shawn C. Marsh, *The Lens of Implicit Bias*, UCONN SCH. OF L., <https://libguides.law.uconn.edu/implicit/courts> (last updated Feb. 16, 2021, 11:48 AM) (quoting Laura Connelly, *Cross-Racial Identifications: Solutions to the "They All Look Alike" Effect*, 21 MICH. J. OF RACE & L. 125 (2015)).

107. See L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862 (2017) (reviewing NICOLE GONZALEZ VAN

deal with these same hectic situations and are susceptible to blind spots and implicit bias. Justice Anthony Kennedy noted that “bias is easy to attribute to others and difficult to discern in oneself.”¹⁰⁸

Two IAT studies given to trial judges in conjunction with judicial sentencing showed the same or greater implicit racial biases as with the public.¹⁰⁹ While the Rachlinski study focused on the bias against African Americans, the Levinson, Bennett, and Hioki study focused on the sentencing biases against Jewish people and Asian Americans.¹¹⁰ The Levinson study randomly selected magistrates, district court judges, and state court judges from eight states.¹¹¹ The researchers found that the federal and state judges displayed strong to moderate implicit bias against Asian Americans as compared to White people on the stereotype IAT.¹¹² The team also discovered that federal and state judges exhibited strong to moderate implicit bias against Jewish people as compared to Christians on the stereotype IAT.¹¹³ Asian Americans and Jewish people were associated with negative moral stereotypes (i.e., greed, dishonesty, and scheming) and White and Christian people were associated with positive moral stereotypes (i.e., trustworthiness, honesty, and generosity).¹¹⁴

CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT (2016)).

108. See *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

109. Rachlinski, *supra* note 81, at 1210–11; Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017).

110. *Id.*

111. *Id.*

112. *Id.* at 65–68.

113. *Id.*

114. *Id.*

The federal district judges gave longer sentences to Jewish defendants as opposed to the Christian defendants.¹¹⁵ However, the magistrate judges' sentences did not vary based on the defendant's group, and state judges sentenced White defendants to longer sentences than Asian American defendants. The Rachlinski study concluded that implicit biases among judges can influence their judgments.¹¹⁶ However, when judges are aware of these potential biases, they have the skill to avoid these biases when assessing sentences.¹¹⁷ "Awareness of implicit bias" and "doubting one's objectivity" are beneficial interventions to stop the spread of bias in sentencing.¹¹⁸

Factors such as skin tone can trigger an implicit bias response when a judge is sentencing a defendant.¹¹⁹ Other empirical studies suggest that skin tone, Afrocentric facial features, and sex can also trigger implicit bias in judges that result in longer sentencing.¹²⁰

Thus, it is not race alone, but Afrocentric features like darker skin tone, wider noses, coarser hair, darker eyes, and fuller lips that influence the length of a criminal sentence, because defendants with these characteristics are perceived as more likely displaying a Black stereotype of

115. *Id.*

116. Rachlinski, *supra* note 81, at 1225.

117. *Id.*

118. Richardson, *supra* note 107, at 887.

119. *Id.*

120. Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 402–03 (2017) (citing Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004); Jill Viglione et al., *The Impact of Light Skin on Prison Time for Black Female Offenders*, 48 SOC. SCI. J. 250 (2011)).

aggressiveness, criminality, dangerousness, and recidivist law-breaking.¹²¹

As one researcher suggests, something as simple as removing the defendant's photograph from the initial sentencing report can help.¹²² Without awareness that Afrocentric features might be triggering a bias response, judges cannot control or correct the potential bias.¹²³

D. *Putting it All Together*

Throughout these studies conducted by scholars, social psychologists, and even other judges, one thing is clear—implicit bias is real. During the entirety of the criminal justice process, judges make decisions, and those decisions are vulnerable to implicit bias. Training on implicit bias can only prove beneficial by bringing awareness to a potential flaw in a judge's thinking.

One recommendation is that judges be educated not only on the presence of implicit bias, but the science behind it as well.¹²⁴ If judges do not recognize and understand implicit biases, the effects could be dire, even for a single defendant. A single defendant must go through policing, charging, bail, plea bargaining, pretrial motions, evidentiary hearings, determinations of witness credibility, guilt determinations, sentencing proceedings, and appeals.¹²⁵ Throughout this process, there is typically a single judge making the decisions. If those decisions are

121. Bennett, *supra* note 120, at 403.

122. *Id.* ("One of my suggestions in my training is to eliminate the photograph of the offender on the front page of the pre-sentence report. The photograph is a classic psychological prime that can easily trigger implicit bias in the judges' evaluation of the rest of the pre-sentence report.").

123. Kang, *supra* note 16, at 1150.

124. *Id.* at 1175.

125. See *Criminal Justice Process*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/enrd/criminal-justice-process> (last visited Mar. 31, 2021).

tainted by implicit bias from the beginning, the defendant's fate is sealed before making it to trial.¹²⁶ Judges must be aware throughout a criminal proceeding of when their own implicit bias is affecting their decision-making, and they should also be aware of techniques to counteract and mitigate against the automatic tendency to label certain persons in certain ways based on those biases.

Implicit-bias education alone was never intended to eliminate bias; instead, it was initially viewed as adding to a greater discussion surrounding race in a justice context.¹²⁷ Proponents of implicit-bias education articulate that people need to be aware of their biases through instruments, such as the IAT, and build critical steps to change behavior.¹²⁸ Implicit-bias training and education can not only generate substantial awareness on the issue but can also inspire "serious individual and system reflection as to how experiences, environment, culture, and system design can lead to biased decision making."¹²⁹

126. Kang, *supra* note 16, at 1151.

127. Marsh & Marsh, *supra* note 12, at 93.

128. *Id.*

129. *Id.*

TECHNIQUES TO COMBAT IMPLICIT BIAS

The first and most important step is to become more knowledgeable about bias in general. The IAT offers a way for judges to see biases in action and how they can become interwoven into their thoughts and decision-making process. Judges should also work to build a more detailed and complete narrative to better understand the entire issue before making decisions.¹³⁰ Implicit bias works its way into cases when judges must make inferences that serve as gap-fillers in an incomplete narrative.¹³¹ These additional facts could be key information that frames a scenario with experiences and perspectives a judge does not personally know.¹³²

Increased diversity in the judiciary has offered “heightened awareness” of the adversity faced by certain disadvantaged populations.¹³³ The American Bar Association recognizes that everyone has biases in some way, and judges are not immune.¹³⁴ Judges, as neutral arbiters and gatekeepers, must strive to make decisions without any cognitive shortcuts.¹³⁵

Mentorship is one technique that can help combat the effect of implicit bias. However, research regarding biases shows that stereotypes and assumptions can be harmful in mentoring due

130. Thornburg, *supra* note 49, at 1659–64.

131. *Id.*

132. *Id.* at 1661.

133. Hsu, *supra* note 50, at 108.

134. Karen Steinhauser, *Everyone Is a Little Bit Biased*, AM. BAR ASS'N (Mar. 16, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/04/everyone-is-biased/.

135. Thornburg, *supra* note 49, at 1665.

to a phenomenon called “stereotype threat.”¹³⁶ Stereotype threat can occur when a group of people who regularly have a stereotype attributed to them suffer in performance because they *feel* as though others are using the stereotype against them. The pressure of worrying about being stereotyped itself actually creates enough mental “baggage” and negative feelings that individuals cannot focus as much energy on the tasks they need to perform.¹³⁷ This phenomenon can be seen not only in courtrooms, but classrooms and organizations across the world.

Yale Law School’s Cultural Cognition Project sought to study the impact of different backgrounds on judicial fact-finding.¹³⁸ Two sets of people were shown a video of a driver evading a police car.¹³⁹ Each group reached a different conclusion regarding the danger and fault of the suspect in the video.¹⁴⁰ Clearly, it is almost impossible to “allow the [evidence] to speak for itself” when there are so many different voices that can be heard.¹⁴¹

136. Christy Pettit, *Unconscious Bias in the Workplace: Managing Differences Through Mentoring*, POLLINATE (June 12, 2020), <https://pollinate.net/unconscious-bias-in-the-workplace-managing-differences-through-mentoring>.

137. *Id.*

138. Thornburg, *supra* note 49, at 1632.

139. See Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903 (2009) (detailing how the video came from the Supreme Court case *Scott v. Harris*, 550 U.S. 372 (2007), in which Justice Scalia and the majority believed there was only a single interpretation of the video).

140. *Id.*

141. *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007). See also Kahan, *supra* note 139, at 903 (“Whites and African Americans, high-wage earners and low-wage earners, Northeasterners and Southerners and Westerners, liberals and conservatives, Republicans and Democrats—all varied significantly in their perceptions of the risk that Harris posed, of the risk the police created by

Just two years after the decision in *Shelby County*, the Supreme Court took an important step by recognizing not only the existence but also the importance of implicit bias in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*¹⁴² There, Justice Kennedy noted how the Fair Housing Act allowed “plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”¹⁴³ With this he acknowledged we can continue our “historic commitment to creating an integrated society.”¹⁴⁴ Such a recognition is a crucial move toward creating a judiciary that benefits all members of our society. Techniques such as the IAT can further elucidate the biases that all judges contain and propel this work even further.¹⁴⁵

In 2012, Yale’s Horsley Laboratory conducted a large study on strategies that can help courts address implicit bias by surveying judges and judicial educators. Yale’s Laboratory emphasized that strategies used to combat implicit biases need to be concrete and applicable to an individual’s work to be truly effective.¹⁴⁶ In applying this logic to the judicial system, it is important to understand that although a majority of people may want to be fair in their judgment of others, they may nonetheless

deciding to pursue him, and of the need to use deadly force against Harris in the interest of reducing public risk.”).

142. 576 U.S. 519 (2015).

143. *Id.* at 521.

144. *Id.* at 546.

145. *U.S. Supreme Court Recognizes Role of Unconscious Bias in Disparate Treatment*, ASS’N FOR PSYCHOL. SCI. (July 1, 2015), <https://www.psychologicalscience.org/news/releases/us-supreme-court-recognizes-role-of-unconscious-bias-in-disparate-treatment.html>.

146. *Helping Courts Address Implicit Bias: Strategies to Reduce the Influence of Implicit Bias*, NAT’L CTR. FOR ST. CTS., (2012), https://horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf.

lack concrete and applicable strategies to counteract ways in which they are *not* fair and impartial.

Yale cites various triggers that can cause judicial professionals to rely on implicit bias rather than making more consciously cognitive decisions. These triggers include ambiguity, salient social categories, and lack of feedback. There are still underdeveloped areas of the law that call for ambiguity in a judge's decision-making, and when there is vagueness, there is a potential for biased judgments. Without more explicit, concrete criteria for decision-making, individuals tend to disambiguate the situation using whatever information is most easily accessible, including stereotypes.¹⁴⁷ The social categories in which people are placed come from a variety of influences, such as television, literature, and news reports. Yale emphasizes that by requiring judges, jurors, and court staff to become aware of easily placed stereotypes, they can correct their thoughts before making a decision infected by bias.¹⁴⁸ Lastly, providing periodic feedback to decision makers increases accountability. When organizations fail to provide feedback that holds decision makers accountable for their judgments and actions, individuals are less likely to remain vigilant for possible bias in their own decision-making processes.¹⁴⁹ People struggle to hold themselves accountable or change their own behavior if they receive little to no feedback. The judiciary and other legal organizations can preemptively combat negative effects of implicit bias by instituting periodic feedback sessions for employees.

When studying a foreign language, it is often said that the best way to learn is to expose oneself to the culture to understand what makes it unique; the same logic applies when

147. *Id.*

148. *Id.*

149. *Id.*

implementing techniques to combat implicit biases. To expose oneself in the educational sense means to become immersed in the topic. When people expose themselves to the first-person perspective of others, it can create a true impact in their understanding and treatment of others. Walking a mile in another's shoes can be as easy as taking the initiative to learn another person's life perspective. Gaining this exposure can come from spending time with groups of people outside of our own in-groups or immersing oneself in media (from movies to documentaries to virtual conferences) that allows the viewer to understand a different culture or point of view. We will not solve the negative effects of implicit bias overnight; rather, it will take years of increasing awareness, providing training and education, and enacting piecemeal changes that each solve one piece of the implicit bias puzzle.

At the 2015 Annual Meeting of the National Association of Bar Executives, Sharon E. Jones of Jones Diversity remarked that "you can disrupt your automatic pilot — which can lead you to act on your biases even if you do not intend to[.]"¹⁵⁰ What remains for us to do is understand more specific ways that we can repel these biases. According to Jones, microaggressions can slip into language, images, and daily habits when we do not intend them to, but by implementing and encouraging implicit-bias training and awareness and its effect as a dialogue within the legal profession, the level of accountability and awareness will rise, and when accountability and awareness rise, the negative effects of implicit bias in our legal system will fall.¹⁵¹

150. Marilyn Cavicchia, *How to Fight Implicit Bias? With conscious thought, diversity expert tells NABE*, AM. BAR ASS'N, https://www.americanbar.org/groups/bar_services/publications/bar_leader/2015-16/september-october/how-fight-implicit-bias-conscious-thought-diversity-expert-tells-nabe/ (last visited Mar. 30, 2021).

151. *Id.*