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Addressing Implicit Bias in the Courts

Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, & Jennifer K. Elek

Fairness is a fundamental tenet of American courts. Yet, despite substantial work by state courts to address issues of racial and ethnic fairness, public skepticism that racial and ethnic minorities receive consistently fair and equal treatment in American courts remains widespread. Why?

THE INFLUENCE OF IMPLICIT ASSOCIATIONS

Perhaps one explanation may be found in an emerging body of research on implicit cognition. During the last two decades, new assessment methods and technologies in the fields of social science and neuroscience have advanced research on brain functions, providing a glimpse into what National Public Radio science correspondent Shankar Vedantam refers to as the “hidden brain.” Although in its early stages, this research is helping scientists understand how the brain takes in, sorts, synthesizes, and responds to the enormous amount of information an individual faces on a daily basis. It is also providing intriguing insights into how and why individuals develop stereotypes and biases, often without even knowing they exist.

The research indicates that an individual’s brain learns over time how to distinguish different objects (e.g., a chair or desk) based on features of the objects that coalesce into patterns. These patterns or schemas help the brain efficiently recognize objects encountered in the environment. What is interesting is that these patterns also operate at the social level. Over time, the brain learns to sort people into certain groups (e.g., male or female, young or old) based on combinations of characteristics as well. The problem is when the brain automatically associates certain characteristics with specific groups that are not accurate for all the individuals in the group (e.g., “elderly individuals are frail”). Scientists refer to these automatic associations as implicit—they operate behind-the-scenes without the individual’s awareness.

Scientists have developed a variety of methods to measure these implicit attitudes about different groups, but the most common measure used is reaction time (e.g., the Implicit Association Test, or IAT). The idea behind these types of measures is that individuals will react faster to two stimuli that are strongly associated (e.g., elderly and frail) than to two stimuli that are less strongly associated (e.g., elderly and robust). In the case of race, scientists have found that most African Americans who have taken the test are faster at pairing a white face with a good word (e.g., honest) and a black face with a bad word (e.g., violent) than the other way around. For African-

Footnotes
1. The Open Society Institute, the State Justice Institute, and the National Center for State Courts funded the preparation of this article. The views expressed are those of the authors and do not necessarily reflect the views of the funding organizations. For the full report of the project, see Pamela M. Casey, Roger K. Warren, Fred L. Cheesman II & Jennifer K. Elek, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012) (hereinafter HELPING COURTS), available at http://www.ncsconline.org/-/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx.
2. Various state-court reports of racial fairness task forces and commissions can be found through the National Center for State Courts’ website at http://www.ncsconline.org/Projects_Initiatives/REFI/SearchState.asp. To access the National Center for State Courts’ Interactive Database of State Programs to address race and ethnic fairness in the courts, go to http://www.ncsconline.org/D_Research/ref/programs.asp.
3. For example, a 1999 national survey of public attitudes about state courts that found 47% of Americans surveyed did not believe that African-Americans and Latinos receive equal treatment in America’s state courts, 55% did not believe that non-English-speaking persons receive equal treatment, and more than two-thirds of African-Americans thought that African-Americans received worse treatment than others in court. See NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999), available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_Public ViewCrsPub.pdf. State surveys, such as the public-opinion survey commissioned by the California Administrative Office of the Courts, report similar findings: A majority of all California respondents stated that African-Americans and Latinos usually receive less favorable results in court than others, approximately two-thirds believed that non-English speakers receive less favorable results, and, a much higher proportion of African-Americans, 87%, thought that African-Americans receive unequal treatment. See David B. Rottman, Trust and Confidence in the California Courts: A Survey of the Public and Attorneys (2005), available at http://contentdm.ncsconline.org/cgi-in/showfile.exe?CISO-ROOT=/ctcomm&CISOPTR=25.
5. Social-science research on implicit stereotypes, attitudes, and bias has accumulated across several decades into a compelling body of knowledge and continues to be a robust area of inquiry, but the research is not without its critics. See HELPING COURTS, supra note 1, Appendix B (“What Are the Key Criticisms of Implicit Bias Research?”). There is much that scientists do not yet know. This article and the full report on which it is based are offered as a starting point for courts interested in exploring implicit bias and potential remedies, with the understanding that advances in technology and neuroscience promise continued refinement of knowledge about implicit bias and its effects on decision making and behavior.
6. See HELPING COURTS, supra note 1, Appendix B (“How Is Implicit Bias Measured”), for more information on measures of implicit bias.
Americans, approximately a third show a preference for African-Americans, a third show a preference for European Americans, and a third show no preference.7

There is evidence that judges are susceptible to these implicit associations, too. One survey of judges found a strong white preference on the IAT among white judges. Black judges also followed the general population findings, showing no clear preference overall (44% showed a white preference but the preference was weaker overall).8

The question is whether these implicit associations can influence, i.e., bias, an individual’s decisions and actions, and there is growing evidence that the answer is yes. Research has demonstrated that implicit bias can affect decisions regarding, for example, job applicants,9 medical treatment,10 a suspect’s dangerousness,11 and nominees for elected office.12

Law professor Jerry Kang gave this description of the potential problem this poses for the justice system:

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense?13

The problem is compounded by judges and other court professionals who, because they have worked hard to eliminate explicit bias in their own decisions and behaviors, assume that they do not allow racial prejudice to color their judgments. For example, most, if not all, judges believe that they are fair and objective and base their decisions only on the facts of a case (in one study, for example, 97% of judges attending an educational program rated themselves in the top half of the attendees—statistically impossible—in their ability to “avoid racial prejudice in decisionmaking”14). Judges and court professionals who focus only on eliminating explicit bias may conclude that they are better at understanding and controlling for bias in their decisions and actions than they really are.

Law professor and social psychologist Jeffrey Rachlinski, Judge Andrew Wistrich, and law professors Chris Guthrie and Sheri Lynn Johnson also found preliminary evidence that implicit bias affects judges’ sentences. Additional research is needed to confirm these findings. More importantly for the justice system, though, is their conclusion that “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.”15 The next section discusses potential strategies judges and court professionals can use to address implicit bias.

**REDUCING THE INFLUENCE OF IMPLICIT BIAS**

Compared to the science on the existence of implicit bias and its potential influence on behavior, the science on ways to mitigate implicit bias is relatively young and often does not address specific applied contexts such as judicial decision making. Yet, it is important for strategies to be concrete and applicable to an individual’s work to be effective; instructions to simply avoid biased outcomes or respond in an egalitarian manner are too vague to be helpful.16 To address this gap in concrete strategies applicable to court audiences, the authors reviewed the science on general strategies to address implicit bias and considered their potential relevance for judges and court professionals. They also convened a small-group discussion with judges and judicial educators (referred to here as the Judicial Focus Group) to discuss potential strategies. These efforts yielded seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions.17

**Strategy 1: Raise awareness of implicit bias.** Individuals can only work to correct for sources of bias that they are aware

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14. See Rachlinski et al., supra note 8, at 1225-26.
15. See Rachlinski et al., supra note 8, at 1221.
17. For more information about the strategies, see HELPING COURTS, supra note 1, Appendix G.
individual differences. The popular “color blind” approach to egalitarianism (i.e., avoiding or ignoring race; lack of awareness of and sensitivity to differences between social groups) fails as an implicit-bias intervention strategy. “Color blindness” actually produces greater implicit bias than strategies that acknowledge race. Cultivating greater awareness of and sensitivity to group and individual differences appears to be a more effective tactic: Training seminars that acknowledge and promote an appreciation of group differences and multicultural viewpoints can help reduce implicit bias. Diversity-training seminars can serve as a starting point from which court culture itself can change. When respected court leadership actively supports the multiculturalism approach, those egalitarian goals can influence others. Moreover, when an individual (e.g., a new employee) discovers that peers in the court community are more egalitarian, the individual's beliefs become less implicitly biased. Thus, a system-wide effort to cultivate a workplace environment that supports egalitarian norms is important in reducing individual-level implicit bias. Note, however, that mandatory training or other imposed pressure to comply with egalitarian standards may elicit hostility and resistance from some types of individuals, failing to reduce implicit bias.

In addition to considering and acknowledging group differences, individuals should purposely compare and individual stigmatized group members. By defining individuals in multiple ways other than in terms of race, implicit bias may be reduced.  

Strategy 2: Routinely check thought processes and decisions for possible bias. When individuals engage in low-effort information processing, they rely on stereotypes and produce more stereotype-consistent judgments than when engaged in more deliberative, effortful processing. (Bodenhausen, 1990). As a result, low-effort decision makers tend to develop inferences or expectations about an individual early on in the information-gathering process. These expectations then guide subsequent information processing: Attention and subsequent recall are biased in favor of stereotype-confirming evidence and produce biased judgment. Expectations can also affect social interaction between the decision maker (e.g., judge) and the stereotyped target (e.g., defendant), causing the decision maker to behave in ways that inadvertently elicit stereotype-confirming behavior from the
other person. Individuals interested in minimizing the impact of implicit bias on their own judgment and behaviors should actively engage in more thoughtful, deliberative information processing. When sufficient effort is exerted to limit the effects of implicit biases on judgment, attempts to consciously control implicit bias can be successful. To do this, however, individuals must possess a certain degree of self-awareness. They must be mindful of their decision-making processes rather than just the results of decision making to eliminate distractions, to minimize emotional decision making, and to objectively and deliberatively consider the facts at hand instead of relying on schemas, stereotypes, and/or intuition.

Strategy 4: Identify distractions and sources of stress in the decision-making environment and remove or reduce them. Tiring (e.g., long hours, fatigue), stressful (e.g., heavy, back-logged, or very diverse caseloads; loud construction noise; threats to physical safety; popular or political pressure about a particular decision; emergency or crisis situations), or otherwise distracting circumstances can adversely affect judicial performance. Specifically, situations that involve time pressure that involves time pressure can result in biased judgments.

Strategy 5: Potential Actions to Take

- Individual: Commit to decision-making criteria before reviewing case-specific information.
- Courts: Develop protocols that identify potential sources of ambiguity; consider the pros (e.g., more understanding of issues) and cons (e.g., familiarity may lead to less deliberative processing) of using judges with special expertise to handle cases with greater ambiguity.

In cases involving ambiguous factors, decision makers should preemptively commit to specific decision-making criteria (e.g., the importance of various types of evidence to the decision) before hearing a case or reviewing evidence to minimize the opportunity for implicit bias. Establishing this structure before entering the decision-making context will help prevent constructing criteria after the fact in ways biased by implicit stereotypes but rationalized by specific types of evidence (e.g., placing greater weight on stereotype-consistent evidence in a case against a black defendant than one would in a case against a white defendant).

Strategy 6: Institute feedback mechanisms. Providing egalitarian consensus information (i.e., information that others in the court hold egalitarian beliefs rather than adhere to stereotypic beliefs) and other feedback mechanisms can be powerful tools in promoting more egalitarian attitudes and behavior in the court community. To encourage individual effort in addressing personal implicit biases, court administration may opt to provide judges and other court professionals with relevant performance feedback. As part of this process, court administration should consider the type of judicial decision-making data currently available or easily obtained that would offer judges meaningful but nonthreatening feedback on demonstrated biases. Transparent feedback from regular or intermittent peer reviews that raise personal awareness of biases could prompt those with egalitarian motives to do more to prevent implicit bias in future decisions and actions. This feedback should include concrete suggestions on how to improve performance and could also involve recognition of those individuals who display exceptional fairness as positive reinforcement.

Feedback tends to work best when it (a) comes from a legitimate, respected authority, (b) addresses the person's decision-making process rather than simply the decision outcome, and (c) when provided before the person commits to a decision rather than afterwards, when he or she has already committed to a particular course of action. Note, however, that feedback mechanisms that apply coercive pressure to comply with egalitarian standards can elicit hostility from some types of individuals and fail to mitigate implicit bias. By inciting hostility, these imposed standards may even be counterproductive to egalitarian goals, generating backlash in the form of increased explicit and implicit prejudice.

Strategy 7: Increase exposure to stigmatized group members and counter- stereotypes and reduce exposure to stereotypes. Increased contact with counter-stereotypes—specifically, increased exposure to stigmatized group members that contradict the social stereotype—can help individuals negate stereotypes, affirm counter-stereotypes, and “unlearn” the associations that underlie implicit bias. “Exposure” can include imagining counter-stereotypes,\(^{45}\) incidentally observing counter-stereotypes in the environment,\(^{46}\) engaging with counter-stereotypic role models,\(^{47}\) or effective practice making counter-stereotypic associations.\(^{48}\)

For individuals who seek greater contact with counter-stereotypic individuals, such contact is more effective when the counter-stereotype is of at least equal status in the workplace.\(^{49}\)

Moreover, positive and meaningful interactions work best: Cooperation is one of the most powerful forms of debiasing contact.\(^{50}\)

In addition to greater contact with counter-stereotypes, this strategy also involves decreased exposure to stereotypes. Certain environmental cues can automatically trigger stereotype activation and implicit biases. Images and language that are a part of any signage, pamphlets, brochures, instructional manuals, background music, or any other verbal or visual communications in the court may inadvertently activate implicit biases because they convey stereotypic information.\(^{51}\) Identifying these communications and removing them or replacing them with non-stereotypic or counter-stereotypic information can help decrease the amount of daily exposure court employees and other legal professionals have with the types of social stereotypes that underlie implicit bias.

CONCLUSION

Research shows that individuals develop implicit attitudes and stereotypes as a routine process of sorting and categorizing the vast amounts of sensory information they encounter on an ongoing basis. Implicit, as opposed to explicit, attitudes and stereotypes operate automatically, without awareness, intent, or conscious control, and can operate even in individuals who express low explicit bias.\(^{52}\) Because implicit biases are automatic, they can influence or bias decisions and behaviors, both positively and negatively, without an individual’s awareness. This phenomenon leaves open the possibility that even those dedicated to the principles of a fair justice system may, at times, unknowingly make crucial decisions and act in ways that are unintentionally unfair. Thus although courts may have made great strides in eliminating explicit or consciously endorsed racial bias, they, like all social institutions, may still be challenged by implicit biases that are more difficult to identify and change.

Psychology professor Patricia Devine argues that “prejudice need not be the consequence of ordinary thought processes” if individuals actively take steps to avoid the influence of implicit biases on their behavior.\(^{53}\) Avoiding the influence of implicit bias, however, is an effortful, as opposed to automatic, process and requires intention, attention, and time. Combating implicit bias, much like combating any habit, involves “becoming aware of one’s implicit bias, being concerned about the consequences of the bias, and learning to replace the biased response with non-prejudiced responses—ones that more closely match the values people consciously believe that they hold.”\(^{54}\)

52. See Devine, supra note 51.
54. Bridget M. Law, Retraining the Biased Brain, 42 MONITOR ON PSYCH. 42, 43 (2011).
Once judges and court professionals become aware of implicit bias, examples of strategies they can use to help combat it and encourage egalitarianism are:

- Consciously acknowledge group and individual differences (i.e., adopt a multiculturalism approach to egalitarianism rather than a color-blindness strategy in which one tries to ignore these differences);
- Routinely check thought processes and decisions for possible bias (i.e., adopt a thoughtful, deliberative, and self-aware process for inspecting how one’s decisions are made);
- Identify sources of stress and reduce them in the decision-making environment;
- Identify sources of ambiguity and impose greater structure in the decision-making context;
- Institute feedback mechanisms; and
- Increase exposure to stereotyped group members (e.g., seek out greater contact with the stigmatized group in a positive context).

Those dedicated to the principles of a fair justice system who have worked to eliminate explicit bias from the system and in their own decisions and behaviors may nonetheless be influenced by implicit bias. Providing information on implicit bias offers judges and court staff an opportunity to explore this possibility and to consider strategies to address it. It also provides an opportunity to engage judges and court professionals in a dialog on broader race and ethnic fairness issues in a thoughtful and constructive manner.

Recognizing that implicit bias appears to be relatively universal provides an interesting foundation for broadening discussions on issues such as minority over-representation, disproportionate minority contact, and gender or age discrimination. In essence, when we look at research on social cognitive processes such as implicit bias we understand that these processes are normal rather than pathological. This does not mean we should use them as an excuse for prejudice or discrimination. Rather, they give us insight into how we might go about avoiding the pitfalls we face when some of our information processing functions outside of our awareness.55

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