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Addressing Implicit Bias in the Courts

Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, & Jennifer K. Elek¹

Fairness is a fundamental tenet of American courts. Yet, despite substantial work by state courts to address issues of racial and ethnic fairness,² public skepticism that racial and ethnic minorities receive consistently fair and equal treatment in American courts remains widespread.³ 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.”⁴ 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.⁵ It also is 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).⁶ 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 European 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

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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.
4. See SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* (2010).
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 affected 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

7. See Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 956-58 (2006).

8. See Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich, & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1209-11 (2009).

9. See, e.g., Marianne Bertrand & Sendhi L. Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AMER. ECON. REV. 991 (2004); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCH. 553 (2005).

10. See, e.g., Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I. Iezzoni, & Mahzarin R. Banaji, *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007).

11. See Joshua Correll, Bernadette Park, Charles M. Judd, & Bernard Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314 (2002); Joshua Correll, Bernadette Park, Charles M. Judd, Bernard Wittenbrink, Melody S. Sadler, & Tracie

Keesee, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006 (2007).

12. See Anthony G. Greenwald, Colin T. Smith, N. Sriram, Yoav Bar-Anan, & Brian A. Nosek, *Implicit Race Attitudes Predicted Vote in the 2008 U.S. Presidential Election*, 9 ANALYSES SOC. ISSUES & PUB. POL'Y 241 (2009); B. Keith Payne, Jon A. Krosnick, Josh Pasek, Yphtach Leikes, Omair Ahktar, & Trevor Thompson, *Implicit and Explicit Prejudice in the 2008 American Presidential Election*, 46 J. EXPERIMENTAL PSYCH. 367 (2010).

13. JERRY KANG, *IMPLICIT BIAS: A PRIMER FOR COURTS 2* (NAT'L CTR. FOR STATE COURTS 2009).

14. See Rachlinski et al., *supra* note 8, at 1225-26.

15. See Rachlinski et al., *supra* note 8, at 1221.

16. See Nilanjana Dasgupta, David DeSteno, Lisa A. Williams, & Matthew Hunsinger, *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009).

17. For more information about the strategies, see HELPING COURTS, *supra* note 1, Appendix G.

Strategy 1: Potential Actions to Take

- Individual: Seek information on implicit bias by attending educational sessions, taking the IAT, and reading relevant research.
- Courts: Provide education on implicit bias that includes judicial facilitators/presenters, examples of implicit bias across other professions, and exercises to make the material more personally relevant.

exist.¹⁸ Simply knowing about implicit bias and its potentially harmful effects on judgment and behavior may prompt individuals to pursue corrective action.¹⁹ Although awareness of implicit bias in and of itself is not sufficient to ensure that effective debiasing efforts take place,²⁰ it is a crucial starting point that may prompt individuals to seek out and implement additional strategies.

Strategy 2: Seek to identify and consciously acknowledge real group and 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.²¹ 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.²²

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.²³ 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.²⁴ Thus, a system-wide effort to cultivate a workplace environment that sup-

Strategy 2: Potential Actions to Take

- Individual: Participate in diversity training that focuses on multiculturalism, associate with those committed to egalitarian goals, and invest effort in identifying the unique characteristics of different members of the same minority groups.
- Courts: Provide routine diversity training that emphasizes multiculturalism and encourage court leaders to promote egalitarian behavior as part of a court’s culture.

ports 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.²⁵

In addition to considering and acknowledging group differences, individuals should purposely compare and individuate stigmatized group members. By defining individuals in multiple ways other than in terms of race, implicit bias may be reduced.²⁶

Strategy 3: 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.²⁷ 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

18. See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 *PSYCH. BULL.* 117 (1994).

19. Cf. Green et al., *supra* note 10, at 1237 (finding support for the IAT as an educational tool because most resident physicians were “open to the idea that unconscious biases could affect their clinical decisions, and that learning more about these biases could improve their care of patients” and that physicians who were aware of the study’s focus seemed to modulate the effects of implicit bias on their treatment decisions).

20. See Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 *SOC. PSYCH. Q.* 83 (2003).

21. See Evan P. Apfelbaum, Samuel R. Sommers, & Michael I. Norton, *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 *J. PERSONALITY & SOC. PSYCH.* 918 (2008).

22. See Laurie A. Rudman, Richard D. Ashmore, & Melvin L. Gary, “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 *J. PERSONALITY & SOC. PSYCH.* 856 (2001); Richard J. Nussbaum & Jennifer A. Richeson, *The Impact of Multiculturalism Versus Color-Blindedness on Racial Bias*, 40 *J. EXPERIMENTAL SOC. PSYCH.* 417 (2004).

23. See Henk Aarts, Peter M. Gollwitzer, & Ran R. Hassin, *Goal*

Contagion: Perceiving Is for Pursuing, 87 *J. PERSONALITY & SOC. PSYCH.* 23 (2004).

24. See Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 *J. PERSONALITY & SOC. PSYCH.* 645 (2001).

25. See E. Ashby Plant & Patricia G. Devine, *Responses to Other-Imposed Pro-Black Pressure: Acceptance or Backlash?*, 37 *J. EXPERIMENTAL SOC. PSYCH.* 486 (2001).

26. See, *e.g.*, Maja Djikic, J. Ellen Langer, & Sarah F. Stapleton, *Reducing Stereotyping Through Mindfulness: Effects on Automatic Stereotype-Activated Behaviors*, 15 *J. ADULT DEV.* 106 (2008); Sophie Lebrecht, Lara J. Pierce, Michael J. Tarr, & James W. Tanaka, *Perceptual Other-Race Training Reduces Implicit Racial Bias*, 4 *PLoS ONE* 4, e4215 (2009); Katja Corcoran, Tanja Hundhammer, & Thomas Mussweiler, *A Tool for Thought! When Cooperative Thinking Reduces Stereotyping Effects*, 45 *J. EXPERIMENTAL SOC. PSYCH.* 1008 (2009).

27. See Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 *PSYCH. SCI.* 319 (1990); John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 *J. PERSONALITY & SOC. PSYCH.* 20 (1983).

**Strategy 3:
Potential Actions to Take**

- Individual: Use decision-support tools such as note-taking, checklists, and bench cards and techniques such as writing down the reasons for a judgment to promote greater deliberative as opposed to intuitive thinking.
- Courts: Develop guidelines and/or formal protocols for decision makers to check and correct for implicit bias (e.g., taking the other person's perspective, imagining the person is from a non-stigmatized social group, thinking of counter-stereotypic thoughts in the presence of an individual from a minority social group).

other person.²⁸ 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.²⁹

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 making³⁰ to eliminate distractions, to minimize emotional decision making, and

**Strategy 4:
Potential Actions to Take**

- Individual: Allow more time on cases in which implicit bias might be a concern by, for example, spending more time reviewing the facts of the case before committing to a decision; consider ways to clear your mind (e.g., through meditation) and focus completely on the task at hand.
- Courts: Review areas in which judges and other decision makers are likely to be over-burdened and consider options (e.g., reorganizing court calendars) for modifying procedures to provide more time for decision making.

quickly³³ or in which the decision maker is distracted and cannot fully attend to incoming information³⁴ all limit the ability to fully process case information. Decision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes – recalling facts in ways biased by stereotypes and making more stereotypic judgments – than decision makers whose cognitive abilities are not similarly constrained. A decision-maker may be more likely to think in terms of race and use implicit racial stereotypes³⁵ because race often is a salient, i.e., easily-accessible, attribute. In addition, certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the

to objectively and deliberately 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, backlogged, 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.³¹ Specifically, situations that involve time pressure³² that force a decision maker to form complex judgments relatively

source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly.³⁶ Happiness may also produce more stereotypic judgments, though this can be consciously controlled if the person is motivated to do so.³⁷

Given all these potential distractions and sources of stress, decision makers need enough time and cognitive resources to thoroughly process case information to avoid relying on intuitive reasoning processes that can result in biased judgments.

28. See Carl O. Word, Mark P. Zanna, & Joel Cooper, *The Nonverbal Mediation of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCH. 553 (2005).

29. See B. Keith Payne, *Conceptualizing Control in Social Cognition: How Executive Functioning Modulates the Expression of Automatic Stereotyping*, 89 J. PERSONALITY & SOC. PSYCH. 488 (2005); Brandon D. Stewart & B. Keith Payne, *Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control*, 34 PERSONALITY & PSYCH. BULL. 1332 (2008).

30. See Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Bias*, 42 WILLAMETTE L. REV. 1 (2006).

31. See, e.g., Tracy D. Eells & Robert C. Showalter, *Work-Related Stress in American Trial Judges*, 22 BULL. AMER. ACAD. PSYCH. & L. 71 (1994); L.R. Hartley & R.G. Adams, *Effect of Noise on the Stroop Test*, 102 J. EXPERIMENTAL PSYCH. 62 (1974); Giora Keinan, *Decision Making Under Stress: Scanning of Alternatives Under Controllable and Uncontrollable Threats*, 52 J. PERSONALITY & SOC. PSYCH. 639 (1987).

32. See, e.g., Ad van Knippenberg, Ap Dijksterhuis, & Diane Vermeulen, *Judgment and Memory of a Criminal Act: The Effects of Stereotypes and Cognitive Load*, 29 EURO. J. SOC. PSYCH. 191 (1999).

33. See, e.g., Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCH. 871 (1987).

34. See, e.g., Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCH. 509 (1991); Jeffrey W. Sherman, Angela Y. Lee, Gayle R. Bessenoff, & Leigh A. Frost, *Stereotype Efficiency Reconsidered: Encoding Flexibility Under Cognitive Load*, 75 J. PERSONALITY & SOC. PSYCH. 589 (1998).

35. See C. Neil Macrae, Galen V. Bodenhausen, & Alan B. Milne, *The Dissection of Selection in Person Perception: Inhibitory Processes in Social Stereotyping*, 69 J. PERSONALITY & SOC. PSYCH. 397 (1995); Jason P. Mitchell, Brian A. Nosek, & Mahzarin R. Banaji, *Contextual Variations in Implicit Evaluation*, 132 J. EXPERIMENTAL PSYCH.: GEN. 455 (2003).

36. See, e.g., Dasgupta et al., *supra* note 16; David DeSteno, Nilanjana Dasgupta, Monica Y. Bartlett, & Aida Caidric, *Prejudice from Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCH. SCI. 319 (2004).

37. See Galen V. Bodenhausen, Geoffrey P. Kramer, & Karin Susser, *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. PERSONALITY & SOC. PSYCH. 621 (1994).

**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.

Strategy 5: Identify sources of ambiguity in the decision-making context and establish more concrete standards before engaging in the decision-making process. When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely. Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever

information is most easily accessible—including stereotypes.³⁸

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.³⁹ 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-

**Strategy 6:
Potential Actions to Take**

- Individual: Seek feedback through, for example, participating in a sentencing round table discussing hypothetical cases or consulting with a skilled mentor or senior judge about handling challenging cases; ask for feedback from colleagues, supervisors and others regarding past performance; document and review the underlying logic of decisions to ensure their soundness.
- Courts: Periodically review a judge's case materials and provide feedback and suggestions for improvement as needed; develop a bench-bar committee to oversee an informal internal grievance process and work with judges as needed; convene sentencing round tables to discuss hypothetical cases involving implicit bias issues and encourage more deliberate thinking.

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.⁴⁰ This feedback should include concrete suggestions on how to improve performance⁴¹ 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.⁴² 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.⁴³ By inciting hostility, these imposed standards may even be counterproductive to egalitarian goals, generating backlash in the form of increased explicit and implicit prejudice.⁴⁴

38. See, e.g., John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 *Psych. Sci.* 315, 318 (2000); James D. Johnson, Erik Whitestone, Lee Anderson Jackson & Leslie Gatto, *Justice Is Still Not Colorblind: Differential Effects of Exposure to Inadmissible Evidence*, 21 *Personality & Soc. Psych. Bull.* 893-896-98 (1995).

39. See Eric L. Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 *Psych. Sci.* 474 (2005).

40. See, e.g., Leanne S. Son Hing, Winnie Li, & Mark P. Zanna, *Inducing Hypocrisy to Reduce Prejudicial Response Among Aversive Racists*, 38 *J. EXPERIMENTAL SOC. PSYCH.* 71 (2002).

41. Cf. Saaid A. Mendoza, Peter M. Gollwitzer, & David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 *PERSONALITY & SOC. PSYCH. BULL.* 512 (2010) at 512 (finding that study participants given

instructions to develop specific implementation intentions—in which a specific behavioral response is linked to an anticipated situational cue—demonstrated improved performance accuracy and less implicit stereotyping in the Shooter Task, a reaction time measure of implicit bias, compared to participants who were simply prompted with a general accuracy goal); Kim, *supra* note 20 at 91 (finding that study participants given specific instructions for trying to fake the results of an IAT were more successful than participants given no or only general instructions for faking results).

42. For a review on feedback effects, see Jennifer S. Lerner & Philip E. Tetlock, 125 *PSYCH. BULL.* 255 (1999).

43. See, e.g., Plant & Devine, *supra* note 25.

44. See Lisa Legault, Jennifer N. Gutsell, & Michael Inzlicht, *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (But Also Increase) Prejudice*, 22 *PSYCH. SCI.* 1472 (2011).

Strategy 7: Potential Actions to Take

- Individual: View images (e.g., by hanging photos, creating new screen savers and desk top images) of admired individuals (e.g., Martin Luther King, Jr.) of the stereotyped social group; spend more time with individuals who are counter-stereotypic role models; practice making positive, i.e., counter-stereotypic, associations, with members of minority social groups.
- Courts: Assess visual and auditory communications for implicit bias and modify to convey egalitarian norms and present counter-stereotypic information; increase representation of stigmatized social groups in valued, authoritative roles in the court to foster positive intergroup relations and provide immediately accessible counter-stereotype examples.

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 extensive 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 bias. 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

45. See Irene V. Blair, Jennifer E. Ma, & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCH. 828 (2001).

46. See Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combatting Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCH. 800 (2001); Michael A. Olson & Russell H. Fazio, *Reducing Automatically Activated Racial Prejudice Through Implicit Evaluative Conditioning*, 32 PERSONALITY & SOC. PSYCH. BULL. 421 (2006).

47. See Nilanjana Dasgupta & Luis M. Rivera, *When Social Context Matters: The Influence of Long-Term Contact and Short-Term Exposure to Admired Group Members on Implicit Attitudes and Behavioral Intentions*, 26 SOC. COGNITION 54 (2008); Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCH. 642 (2004).

48. See Kerry Kawakami, John F. Dovidio, Jasper Moll, Sander Hermsen, & Abby Russin, *Just Say No (to Stereotyping): Effects of*

Training in the Negation of Stereotypic Associations on Stereotype Activation, 78 J. PERSONALITY & SOC. PSYCH. 871 (2000).

49. See Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOCIAL PSYCH. 751 (2006).

50. See, e.g., MUZAFER SHERIF, O.J. HARVEY, B. JACK WHITE, WILLIAM R. HOOD, & CAROLYN W. SHERIF, *INTERGROUP CONFLICT AND COOPERATION: THE ROBBERS CAVE EXPERIMENT* (1961 ed.).

51. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5 (1989); Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133 (2002). For examples of how such communications can prime stereotypic actions and judgments, see JERRY KANG & MAHZARIN R. BANAJI, *FAIR MEASURES: A BEHAVIORAL REALIST REVISION OF “AFFIRMATIVE ACTION”* (2006).

52. See Devine, *supra* note 51.

53. Devine, *supra* note 51, at 16.

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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55. Shawn Marsh, *The Lens of Implicit Bias*, 18 JUV. & FAMILY J. TODAY 16, 18 (2009)(acronyms omitted).