Addressing Implicit Bias in the Courts*

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Race & Ethnic Fairness in the Courts

Fairness is a fundamental tenet of American courts. Yet, despite substantial work by state courts to address issues of racial and ethnic fairness,[1] public skepticism that racial and ethnic minorities receive consistently fair and equal treatment in American courts remains widespread.[2] 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 Vedantam (2010) 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.[3] 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).[4] 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 Americans, approximately a third show a preference for African Americans, a third show a preference for European Americans, and a third show no preference (Greenwald & Krieger, 2006, pp. 956-958).

There is evidence that judges are susceptible to these implicit associations, too. Rachlinski, Johnson, Wistrich, and Guthrie (2009), for example, found a strong White preference on the IAT among White judges. Black judges also followed the general African American population findings, showing no clear preference overall (44% showed a White preference but the preference was weaker overall).

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 (e.g., Bertrand & Mullainathan, 2004; Rooth, 2010;

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Ziegert & Hanges, 2005), medical treatment (e.g., Green, Carney, Pallin, Ngo, Raymond, Lezzoni, & Banaji, 2007), a suspect's dangerousness (Correll, Park, Judd, & Wittenbrink, 2002; Correll, Park, Judd, Wittenbrink, Sadler, & Keesee, 2007; Plant & Peruche, 2005), and nominees for elected office (Greenwald, Smith, Sriram, Bar-Anan, & Nosek, 2009; Payne, Krosnick, Pasek, Leikes, Akhtar, & Thompson, 2010).

Kang (2009) describes 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? (p. 2)

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 (see, for example, Rachlinski, et al., 2009, p. 126, reporting that 97% of judges in an educational program rated themselves in the top half of the judges attending the program—statistically impossible—in their ability to "avoid racial prejudice in decisionmaking"). 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.

Rachlinski, et al. (2009) 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 the authors' 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" (p. 1221). 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 (Dasgupta, 2009). 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 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.[5]

Strategy 1: Raise awareness of implicit bias

Individuals can only work to correct for sources of bias that they are aware exist (Wilson & Brekke, 1994). Simply knowing about implicit bias and its potentially harmful effects on judgment and behavior may prompt individuals to pursue

corrective action (cf. Green, Carney, Pallin, Ngo, Raymond, Iezzoni, & Banaji, 2007). Although awareness of implicit bias in and of itself is not sufficient to ensure that effective debiasing efforts take place (Kim, 2003), it is a crucial starting point that may prompt individuals to seek out and implement additional strategies.

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.

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 (Apfelbaum, Sommers, & Norton, 2008). 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 multi-cultural viewpoints can help reduce implicit bias (Rudman, Ashmore, & Gary, 2001; Richeson & Nussbaum, 2004).

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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.

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 (Aarts, Gollwitzer, & Hassin, 2004). Moreover, when an individual (e.g., new employee) discovers that peers in the court community are more egalitarian, the individual's beliefs become less implicitly biased (Sechrist & Stangor, 2001). 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 (Plant & Devine, 2001).

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 (e.g., Djikic, Langer, & Stapleton, 2008; Lebrecht, Pierce, Tarr, & Tanaka, 2009; Corcoran, Hundhammer, & Mussweiler, 2009).

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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 (Bodenhausen & Wyer, 1985; Darley & Gross, 1983). 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 (Word, Zanna, & Cooper, 1973). Individuals interested in minimizing the impact of implicit bias on their own judgment and behaviors should actively engage in more thoughtful, deliberative information processing.

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).

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When sufficient effort is exerted to limit the effects of implicit biases on judgment, attempts to consciously control implicit bias can be successful (Payne, 2005; Stewart & Payne, 2008).

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 (Seamone, 2006) 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, 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 (e.g., Eells & Showalter, 1994; Hartley & Adams, 1974; Keinan, 1987). Specifically, situations that involve time pressure (e.g., van Knippenberg, Dijksterhuis, & Vermeulen, 1999), that force a decision maker to form complex judgments relatively quickly (e.g., Bodenhausen & Lichtenstein, 1987), or in which the decision maker is distracted and cannot fully attend to incoming information (e.g., Gilbert & Hixon, 1991; Sherman, Lee, Bessennof, & Frost, 1998) 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 stereotypes (Macrae, Bodenhausen, & Milne, 1995; Mitchell, Nosek, & Banaji, 2003) because race often is a salient, i.e., easily-accessible, attribute. In

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 (see Guthrie, Rachlinski, Wistrich, 2007).

addition, certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly (e.g., DeSteno, Dasgupta, Bartlett, & Cajdric, 2004; Dasgupta, DeSteno, Williams, & Hunsinger, 2009). Happiness may also produce more stereotypic judgments, though this can be consciously controlled if the person is motivated to do so (Bodenhausen, Kramer, & Susser, 1994).

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.

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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 (e.g., Dovidio & Gaertner, 2000; Johnson, Whitestone, Jackson, & Gatto, 1995).

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 (Uhlmann & Cohen, 2005). 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 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 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 (Sechrist & Stangor, 2001). 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 (e.g., Son Hing, Li, & Zanna, 2002). This feedback should include concrete suggestions on how to improve performance (cf. Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003) 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 already has committed to a particular course of action (see Lerner & Tetlock, 1999, for a review). Note, however, that feedback mechanisms which apply coercive pressure to comply with egalitarian standards can elicit hostility from some types of individuals and fail to mitigate implicit bias (e.g., Plant & Devine, 2001). By inciting hostility, these imposed standards may even be counterproductive to egalitarian goals, generating backlash in the form of increased explicit and implicit prejudice (Legault, Gutsell, & Inzlicht, 2011).

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.

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 (Blair, Ma, & Lenton, 2001), incidentally observing counter-stereotypes in the environment (Dasgupta & Greenwald, 2001; Olson & Fazio, 2006), engaging with counter-stereotypic role models (Dasgupta & Asgari, 2004; Dasgupta & Rivera, 2008) or extensive practice making counter-stereotypic associations (Kawakami, Dovidio, Moll, Hermsen, & Russin, 2000).

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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.

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 (see Pettigrew & Tropp, 2006). Moreover, positive and meaningful interactions work best: Cooperation is one of the most powerful forms of debiasing contact (e.g., Sherif, Harvey, White, Hood & Sherif, 1961).

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 (see Devine, 1989; Rudman & Lee, 2002; Anderson, Benjamin, & Bartholow, 1998; for examples of how such communications

can prime stereotypic actions and judgments; see also Kang & Banaji, 2006). 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 (Devine, 1989). 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.

Devine (1989) 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. 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" (Law, 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
- 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 (MOR), disproportionate minority contact (DMC), 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. (Marsh, 2009, p. 18)

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[1] See, for example, state court reports of racial fairness task forces and commissions, available through the National Center for State Courts at http://www.ncsc.org/SearchState and the National Center for State Courts' Interactive Database of State Programs to address race and ethnic fairness in the courts, available at http://www.ncsc.org/refprograms.

[2] See, for example, National Center for State Courts (1999, p. 37), reporting on a 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. 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 Rottman, 2005, p. 29).

[3] 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 "What Are the Key Criticisms of Implicit Bias Research?" in Appendix B in Casey, et al., 2012). There is much that scientists do not yet know. This project brief 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.

[4] See "How Is Implicit Bias Measured" in Appendix B in Casey, et al. (2012) for more information on measures of implicit bias.

[5] See Appendix G in Casey, et al. (2012) for more information on the strategies.

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Web Resources Cited

National Center for State Courts, Racial Fairness Task Forces and Reports:
http://www.ncsc.org/SearchState

National Center for State Courts, Interactive Database of State Programs:
http://www.ncsc.org/refprograms