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Implicit Bias In The Judiciary: Confronting The Problem Through Normalization

*Meagan Biwer**

INTRODUCTION

During a 2016 United States presidential debate, candidates were asked to address recent murders of unarmed black men at the hands of police. One question focused on implicit bias, or the notion that individuals can make subconscious judgments about others that ultimately affect their own actions. Then-candidate Hillary Clinton opined, “I think implicit bias is a problem for everyone, not just police. I think too many of us in our great country jump to conclusions about each other. All of us need to ask hard questions about, ‘Why are we feeling this way?’”¹ In response, then-candidate Donald Trump maintained that “[Clinton] accuses the entire country—including all of law enforcement—of implicit bias, essentially suggesting that everyone, including our police, are basically racist and prejudiced. . . . [S]he has such a low opinion of our citizens.”²

Similar dialogue has unfolded across the United States. Modern social science reflects the existence of implicit bias,³ but many people either have not heard of the concept or mistakenly conflate it with overt prejudice.⁴ This ignorance extends to the judiciary—the institution that reveres Lady Justice, whose blindness

* J.D., 2019, Indiana University Maurer School of Law; B.A., 2012, Claremont McKenna College. With many thanks to Professor Charles Geyh, whose guidance and zeal spurred my own devotion to this issue.

¹ Mark Hensch, *Clinton: We Must Fight ‘Implicit Bias’*, THE HILL: BALLOT BOX (Sept. 26, 2016, 10:15 p.m.), <http://thehill.com/blogs/ballot-box/presidential-races/297939-clinton-i-think-implicit-bias-is-a-problem-for-everyone>.

² Jenna Johnson, *Two Days After the Debate: Trump Responds to Clinton’s Comment on Implicit Bias*, WASH. POST (Sept. 28, 2016), http://wapo.st/2dEBrrB?tid=ss_mail&utm_term=.71a831e1f7f2.

³ See *infra* Part II.

⁴ See *infra* Part IV.

establishes her fairness.⁵ Many judges are unaware of implicit biases and remain unwittingly subject to their own.⁶ Under the current framework of judicial ethics, judges are free to proceed without actively seeking to understand or address their subterranean imperfections.⁷ To ensure that the judiciary performs its duties without bias, we must remove the stigma associated with implicit biases to allow for—and require—judges to address them.

This Note will proceed in five parts. Part I will review societal expectations and statutory requirements for objectivity in the judiciary. Part II will provide an overview of implicit bias—what it is, how it affects behavior, and how it can be measured. Part III will then assess the levels of implicit bias found in judges, followed by Part IV, which will review existing proposals aiming to curb the effects of those biases. Finally, Part V will present a novel solution that takes a fundamentally different approach to confronting the potential consequences of judges’ implicit biases.

I. OBJECTIVITY IN THE JUDICIARY: WHY IT MATTERS

Justice Cardozo once said that a judge can simply “disengage himself . . . of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decisions on elements of an objective nature.”⁸ In this classic model of judicial neutrality, a judge can embody objectivity and impartiality so long as he or she consciously sets aside any personal biases.⁹ Judges themselves are proponents of this theory. Most—if not all—judges believe that they decide cases fairly, objectively, and in a way that harmonizes the facts and legal issues at hand.¹⁰

⁵ *Id.*

⁶ *Id.*

⁷ See *infra* Part III.

⁸ Anne Richardson Oakes & Haydn Davies, *Process, Outcomes and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality*, 51 SANTA CLARA L. REV. 573, 617 (2011) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 121 (1920)).

⁹ *Id.* at 617–18.

¹⁰ Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 695 (2014).

Impartiality and objectivity are valued not only in practice, but also in appearance. The *appearance* of neutrality is just as important as *actual* neutrality in that the former establishes judicial legitimacy in the eyes of the public.¹¹ “The modern sensitivity to the importance of appearances represents . . . an acknowledgment of the importance now generally accorded to attempts to explain the relationship between government and the governed in terms of a commitment of respect for the value of individual human dignity and equality.”¹² In other words, “an appearance standard . . . better ensures procedural justice.”¹³ Procedural justice stems from the notion that the way an adjudicator handles a dispute affects the overall outcome for a party.¹⁴ Because a party’s trust in the system undergirds procedural justice, an unbiased result may not be ultimately just if the party perceives impropriety.

It makes sense, then, that these norms have been codified. Canon 2 of the Model Code of Judicial Conduct focuses on impartiality. Rule 2.2 requires all judges to “perform all duties of judicial office fairly and impartially.”¹⁵ Rule 2.3 addresses bias, stating, “[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”¹⁶ A comment to the same rule suggests that “[a] judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”¹⁷ And the United States Code requires that any justice or judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned” or “[w]here he has a personal bias or prejudice concerning a party”¹⁸ The purpose of these provisions is clear: they serve to protect the legitimacy of the judiciary and safeguard procedural justice for citizens. But what if one’s biases aren’t easy to detect or eradicate?

¹¹ See generally Oakes & Davies, *supra* note 8.

¹² *Id.* at 623–24.

¹³ Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1991 (2013).

¹⁴ *Id.* at 1983.

¹⁵ MODEL CODE OF JUD. CONDUCT r. 2.2 (AM. BAR ASS’N 2007).

¹⁶ MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2007).

¹⁷ *Id.* at cmt. 1.

¹⁸ 28 U.S.C. § 455 (2012).

II. DEFINING AND MEASURING IMPLICIT BIAS

A. *What is Implicit Bias?*

Known as “implicit biases,” these hidden biases involve “stereotypical associations so subtle that people who hold them might not even be aware of them.”¹⁹ Not only do they exist, but they are quite prevalent; most people harbor implicit biases—including individuals who consciously seek to embrace equality.²⁰

Implicit biases stem from the mental schemas all humans develop in learning to process the complexity of the world.²¹ Heuristics—mental shortcuts used by default in subconscious decision-making—have long been held to operate in the minds of all people.²² These subconscious algorithms developed through evolution to allow the human mind to more efficiently process stimuli.²³ In other words, “to simplify the complex flood of information from the world, we tend to categorize objects, people, and occurrences into groups, types, or categories . . . so that we can treat non-identical stimuli as if they were equivalent.”²⁴ Because our beliefs are heavily influenced by culture, and yet our neural development is not, many heuristics that may once have proved useful actually misfire today.²⁵ Our latent biases become “the price we pay for such efficiency.”²⁶

¹⁹ Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009).

²⁰ *Id.* at 1197.

²¹ Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY, Summer 2009, at 16, 17, <http://www.ncjfcj.org/sites/default/files/ImplicitBias.pdf>.

²² See Craig E. Jones, *The Troubling New Science of Legal Persuasion: Heuristics and Biases in Judicial Decision-Making*, 41 ADVOC. Q. 49, 56 (2013).

²³ See *id.* at 57.

²⁴ Negowetti, *supra* note 10, at 707.

²⁵ Jones, *supra* note 22, at 57.

²⁶ Negowetti, *supra* note 10, at 710.

*B. Measuring Implicit Bias: The Implicit
Association Test*

Because implicit biases are inherently latent, measuring them seems far from straightforward. Despite this difficulty, researchers at Harvard's Project Implicit developed the Implicit Association Test (IAT), which has become the gold standard for measuring implicit bias.²⁷

The IAT measures the strength of subconscious associations by comparing the amount of time an individual takes to make them.²⁸ Consider being asked to read two lists: one, comprised of a list of colors, each written in its namesake ink (for example, "blue" written in blue ink); the second, listing colors written in randomly colored inks (for example, "red" written in yellow ink). If you suspect that the first list might take less time for most people to read than the second, you are right—because individuals subconsciously associate colors with their names, being asked to perform a task incongruous with those associations takes more time.²⁹ This latency is the exact gauge by which the IAT measures implicit bias.

How does the IAT actually work? The "Race IAT," which tests for implicit biases toward people of color, provides an explicit example of the IAT's controlled performance. Rachlinski describes the process as follows:

First, researchers present participants with a computer screen that has the words "White or Good" in the upper left-hand corner of the screen and "Black or Bad" in the upper right. . . . [O]ne of four types of stimuli will appear in the center of the screen: white people's faces, black people's faces, good (positive) words, or bad (negative) words. . . . [P]articipants [are instructed to] press a designated key on the left side of the computer when a white face or a good word appears and press a designated key on the right side of the computer when a black face or a bad word appears. . . . Then, the computer is

²⁷ Rachlinski et al., *supra* note 19, at 1198.

²⁸ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 953 (2006).

²⁹ See J. Ridley Stroop, *Studies of Interference in Serial Verbal Reactions*, 18 J. EXPERIMENTAL PSYCHOL. 643, 659–60 (1935).

programmed to switch the spacial location of “good” and “bad” so that the words “White or Bad” appear in the upper left-hand corner and “Black or Good” appear in the upper right. [Participants then repeat the same process with the new opposite pairings.]³⁰

Ultimately, researchers have found that many Americans show a strong “white preference” on this test, as their response time is much faster in the first task (associating “white” with “good” and “black” with “bad”) than in the second (associating “white” with “bad” and “black” with “good”).³¹ Approximately seventy-five percent of all individuals who have taken the IAT through Project Implicit’s website have demonstrated white preference.³² This phenomenon is not limited to white individuals; Project Implicit reports that its research consistently shows that half of black individuals who have taken the Race IAT have also demonstrated a white preference (the remainder vary between showing no preference and black preference).³³ While someone taking the test may believe that they harbor no biases toward people of color, their response times may indicate otherwise.

C. *The Effects of Implicit Bias*

While the acquisition of implicit biases is normal, implicit biases can be “more dangerous and pernicious than . . . bigotry because [they are] ephemeral and difficult to eradicate.”³⁴ Individuals inevitably (if unwittingly) act on these biases. While implicit biases implicate a wide variety of traits, journalist Nicholas Kristof describes the phenomena best when discussing implicit racial bias:

³⁰ Rachlinski et al., *supra* note 19, at 1198–99.

³¹ *Id.* at 1199.

³² MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE 47 (2013).

³³ Project Implicit, *FAQs*, <https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq18> (last visited Nov. 16, 2017).

³⁴ L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 892 (2017).

[R]acial stereotyping remains ubiquitous, and . . . the challenge is not a small number of twisted white supremacists but something infinitely more subtle and complex: People who believe in equality but who act in ways that perpetuate bias and inequality.³⁵

The harmful effects of these biases can be compounded by peripheral circumstances. When circumstances appear ambiguous, an implicit bias might be magnified.³⁶ The same is true if an individual lacks the time or the cognitive capacity to think deeply in a given moment.³⁷ For example, whites have demonstrated more activation in the region of the brain associated with fear when they see black faces;³⁸ this innate bias in white individuals can be recognized on its face for the potentially serious consequences it could wreak on innocent black individuals.

So how do these biases ultimately manifest themselves? For their seemingly sterile origins in neurology, they can have widespread tangible effects. In healthcare, physicians' implicit biases against black patients have resulted in fewer recommendations for treatment of black patients than for similarly-situated white patients;³⁹ the same holds true for overweight patients.⁴⁰ In a study on employment decision-making, hiring managers demonstrated implicit racial bias, even

³⁵ Nicholas Kristof, Opinion, *Is Everyone a Little Bit Racist?*, N.Y. TIMES (Aug. 27, 2014), <https://nyti.ms/2kavMcg>.

³⁶ Erik J. Girvan, *When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law*, 94 OR. L. REV. 359, 375 (2016).

³⁷ *Id.*

³⁸ Gregory S. Parks & Andre M. Davis, *Confronting Implicit Bias: An Imperative for Judges in Capital Prosecutions*, 42 HUM. RTS. 22, 22 (2016).

³⁹ Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristel 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, 1235 (2007).

⁴⁰ Gina Kolata, *Why Do Obese Patients Get Worse Care? Many Doctors Don't See Past the Fat*, N.Y. TIMES (Sept. 25, 2016), <https://nyti.ms/2d2e7Bt>.

when the same individuals purported to value equality.⁴¹ In policing, more force has been used by officers arresting black children than when arresting white children.⁴² If these insidious effects can permeate other professions that demand integrity, how susceptible is the judiciary?

III. IMPLICIT BIAS IN THE JUDICIARY

Despite the norms and expectations set forth in Part I, judges may not have the capacity to be fully objective.⁴³ In 1947, John P. Frank—a former law clerk to U.S. Supreme Court Justice Hugo Black—noted that “a more recent humility has prompted the recognition’ of the possibility that ‘human judges’ may succumb to ‘less tangible prejudices’ and thereby deny justice.”⁴⁴

A. *Recent Research & Outcomes*

Misfiring heuristics can exert marginal influence over legal outcomes, but they have the capacity to fully subvert mental calculations. As a result, these misfiring heuristics can cause judges to render fully irrational decisions.⁴⁵ Recent studies have demonstrated that seemingly irrelevant factors have statistically had significant effects on legal outcomes. For example, judges who had recently contemplated their own deaths were more likely to make conservative decisions; appellate judges who were temporally further from their last meal were more likely to affirm; and judges in general were more likely to side on behalf of the party who argued

⁴¹ See generally Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence*, (Inst. for the Study of Lab. Discussion Paper No. 2764, 2007); see also John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 318 (2000).

⁴² Girvan, *supra* note 36, at 374 (citing Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 539–40 (2014)).

⁴³ See generally Jones, *supra* note 22.

⁴⁴ Oakes & Davies, *supra* note 8, at 616–17 (quoting John P. Frank, *Disqualification of Judges*, 56 YALE L. J. 605, 618–19 (1947)).

⁴⁵ Jones, *supra* note 22, at 53.

first.⁴⁶ Something as insignificant as an attorney's dress can also play a role in judicial decision-making.⁴⁷ These irrational correlations are not limited to seemingly innocuous factors; studies have shown disparities in legal outcomes based on a defendant's race alone. In one study, researchers found that judges set bail at amounts twenty-five percent higher and sentences at lengths twelve percent longer for black defendants than for similarly situated white defendants.⁴⁸ In another study, researchers studied 522 motions for summary judgment decided by 431 federal district court judges and found that there was roughly a fifty percent difference between white and minority judges who decided employment civil rights claims involving white plaintiffs.⁴⁹ A third study demonstrated that, in cases involving white victims, a black defendant with strong Afrocentric features was twice as likely to receive the death sentence than a defendant with weak Afrocentric features.⁵⁰ A final study demonstrated that the composition of panels in Voting Rights Act cases can affect the cases' outcomes, as panels with at least one black judge were notably more likely to vote for liability than panels without any black judges (even when controlling for political predispositions).⁵¹ Do these studies demonstrate judicial susceptibility to implicit biases, or are other factors at play?

⁴⁶ *Id.* at 50.

⁴⁷ *Id.* at 51.

⁴⁸ Ian Ayers & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994); see also David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001).

⁴⁹ Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 344 (2012).

⁵⁰ Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns, & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006). See generally William T. Pizzi, Irene V. Blair & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327 (2005).

⁵¹ Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1536 (2008).

B. Judges and the IAT

Professor Jeffrey Rachlinski and his colleagues conducted the first study examining 133 judges from three different regions of the United States for implicit bias.⁵² The judges' IAT results demonstrated that judges harbor implicit racial biases at rates consistent with the rest of the population.⁵³ Later, when the same judges were given hypothetical scenarios and asked to render a decision regarding the theoretical defendant's crime, the judges' implicit biases manifested themselves. After being primed to assume (but not specifically told) the defendant's race, judges primed to perceive the defendant as black imposed harsher punishments than those judges who had not been primed regarding the defendant's race.⁵⁴ This study was followed by another, conducted by Professor Justin Levinson, that demonstrated similar judicial bias against Jews and individuals of Asian descent.⁵⁵

While these implicit biases may seem predictable from a sociological perspective, they fly in the face of the judicial identity, and judges can be blindsided by their IAT results. An unnamed federal district court judge reflected, "I was eager to take the test. I knew I would 'pass' with flying colors. I didn't. . . . I ultimately realized that the problem of implicit bias is a little recognized and even less addressed flaw in our legal system."⁵⁶

Rachlinski does not recommend using the IAT as a "measure of qualification to serve on the bench," especially since judges can overcome implicit bias to a certain extent.⁵⁷ After all, should all judges be removed for harboring implicit biases, "there might be no one left to judge."⁵⁸ But given the fact that judges both harbor and

⁵² See generally Rachlinski et al., *supra* note 19.

⁵³ *Id.* at 1221.

⁵⁴ *Id.* at 1223.

⁵⁵ Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 104 (2017).

⁵⁶ 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, 150 (2010).

⁵⁷ Rachlinski et al., *supra* note 19, at 1228.

⁵⁸ Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry "Bias!"*, 28 GEO. J. LEGAL ETHICS 177, 184 (2015).

act on these biases, what can be done to combat their effects?

IV. CURRENT SUGGESTIONS & POTENTIAL CAVEATS

Given the prevalence of implicit bias among judges, many researchers have begun to propose approaches to eradicating them. This Part of the Note will explore some of those suggestions and their potential caveats.

A. Education

As the aforementioned federal district judge noted, implicit bias is a problem that has yet to be fully recognized.⁵⁹ To this end, most researchers begin by suggesting that a first step in eliminating the effects of implicit bias involves recognizing that the problem exists.⁶⁰ Judge Mark Bennett, who sits on the U.S. District Court for the Northern District of Iowa, noted that, in his work training judges on implicit bias, “only a tiny percentage—far less than [one percent]—have been aware of racial implicit bias and IAT scores[.]”⁶¹ This ignorance in itself not only keeps the problem from being addressed, but it can actually perpetuate the issue. In fact, the concept of colorblindness—the belief that race has effectively become a non-factor in the lives of Americans—can actually generate greater expressions of bias on both explicit and implicit levels.⁶²

How should one raise awareness, then? Several researchers advocate for widespread IAT testing to raise awareness, followed by targeted training to equip judges with the ability to mitigate their own biases.⁶³

The caveats of this approach are not without merit. For starters, most people—including judges—believe that they exceed the norm in their ability to control their own

⁵⁹ Bennett, *supra* note 56, at 150.

⁶⁰ Jones, *supra* note 22, at 114; Richardson, *supra* note 28, at 887.

⁶¹ Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L. J. F. 391, 404 (2017).

⁶² Richardson, *supra* note 34, at 888.

⁶³ Rachlinski et al., *supra* note 19, at 1228; Richardson, *supra* note 34, at 888.

biases.⁶⁴ This inclination illuminates another heuristic known as egocentric bias.⁶⁵ In the words of Judge Bennett, “Judges, like all vertebrates, have visual blind spots We also have cognitive blind spot bias—that is, the ability to see bias in others, but not in ourselves.”⁶⁶ The judges in Rachlinski’s study were asked to rate their ability to be objective and “avoid racial prejudice in decisionmaking” relative to the other participating judges.⁶⁷ Ninety-seven percent of the judges rated themselves in the top half.⁶⁸ Judge Bennett conducted his own study, and, like Rachlinski, found that “92% of senior federal district judges, 87% of non-senior federal district judges, [and] 72% of magistrate judges . . . ranked themselves in the top 25% of respective colleagues in their ability to make decisions free from racial bias.”⁶⁹ Judges, even when equipped with knowledge of and training on implicit biases, could remain overconfident in their own objectivity and thus struggle to combat the issue.

In addition to egocentric bias, trouble lies in the fact that the judges believe themselves to be objective. Studies have shown that “when a person believes himself to be objective, such belief licenses him to act on his biases.”⁷⁰ One study involved a group tasked with providing performance evaluations based on candidate profiles.⁷¹ When faced with two candidates with identical qualifications, but of opposite genders, a control group provided statistically similar evaluations for both candidates.⁷² But the experimental group, which had been primed to believe in its own objectivity, evaluated the

⁶⁴ Rachlinski et al., *supra* note 19, at 1225–26.

⁶⁵ Jones, *supra* note 22, at 72.

⁶⁶ Bennett, *supra* note 61, at 397.

⁶⁷ Rachlinski et al., *supra* note 19, at 1225–26.

⁶⁸ *Id.*

⁶⁹ Bennett, *supra* note 61, at 397.

⁷⁰ Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1173 (2012).

⁷¹ Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*”: *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 207, 210–11 (2007).

⁷² *Id.*

male candidate higher than the female candidate.⁷³ Belief in one's own objectivity can actually subvert it, especially given the rates of egocentric bias discussed in Bennett's and Rachlinski's studies. These findings demonstrate that, while education may serve as a valuable tool to combat implicit bias, education alone will likely not suffice.

B. Rational Deliberation & Taking the Time

Another set of proposed solutions capitalizes on the fact that "rational deliberation" with others can mitigate the effects of implicit biases.⁷⁴ Any quick-thinking decision shrouded by bias can be identified when a judge spends time discussing his or her reasoning; a biased decision can then be avoided after the judge or panel of judges realizes that it might not be the most rational outcome. For Professor Craig Jones, this approach takes the form of a heavier judicial reliance on bench memoranda and conferences with court attorneys.⁷⁵ For Rachlinski, such rational deliberation entails the reinstatement of three-judge panels where possible.⁷⁶ And Professor L. Song Richardson sees a solution merely in judges consciously taking the time and exercising the diligence that each defendant deserves.⁷⁷

While these solutions could conceivably succeed if put into practice, their impracticalities might outweigh their potential benefits. Judicial groupthink might minimize the potential benefit of intracourt collaboration; as a class of individuals that remains largely homogenous, judges may remain ill-equipped to fully "appreciate their decisions from the perspectives of diverse litigants."⁷⁸ Rachlinski also admits that three-judge panels have largely been abandoned in jurisdictions across the country because they drive up court costs and are perceived as

⁷³ *Id.*

⁷⁴ Daniel A. Yudkin & Jay Van Bavel, *The Roots of Implicit Bias*, N.Y. TIMES (Dec. 9, 2016), <https://nyti.ms/2huFHbl>.

⁷⁵ Jones, *supra* note 22, at 119–20.

⁷⁶ Rachlinski et al., *supra* note 19, at 1231.

⁷⁷ Richardson, *supra* note 34, at 889.

⁷⁸ Mitchel F. Crusto, *Empathetic Dialogue: From Formalism to Value Principles*, 65 SMU L. REV. 845, 859 (2012).

inefficient (why put three heads on a case when one will do?).⁷⁹ But the biggest caveat that spans each iteration above is the fact that “[j]udges, prosecutors, and defense lawyers in many criminal courtrooms across the country are laboring under the weight of far too many cases to give each one individualized treatments.”⁸⁰ As a result, “professionals struggle to quickly sort defendants into those who are deserving of time and attention and those who are not,” which results in the manifestation of implicit biases.⁸¹ While rational deliberation could clearly combat the manifestation of implicit biases, it remains unclear that it can serve as a standalone solution, given its impracticality.

C. *Diversifying the Bench & Judicial Perspective*

Yet other proposals entail diversifying both the bench and judicial perspective. Professor Rebecca Lee has proposed that “[a] bench consisting of judges with diverse characteristics and from diverse life paths will better relate to a wider range of litigants.”⁸² And while judicial diversity initiatives have emerged,⁸³ their beneficial value for the specific purpose of combating implicit bias remains to be seen. Rachlinski’s study demonstrated that “[e]xposure to a group of esteemed black colleagues apparently is not enough to counteract the societal influences that lead to implicit biases.”⁸⁴

Similarly, Professor Negowetti suggests empathy, or “an ‘imaginative experiencing of the situation of another,’” as a tool judges can employ to consciously combat the effects of their own implicit biases.⁸⁵ Yet this perspective-taking might fall prey to the same issues as

⁷⁹ Rachlinski et al., *supra* note 19, at 1231.

⁸⁰ Richardson, *supra* note 34, at 875.

⁸¹ *Id.*

⁸² Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 176 (2013).

⁸³ See generally Ciara Torres-Spelliscy, Monique Chase & Emma Greenman, *Improving Judicial Diversity*, BRENNAN CENTER FOR JUSTICE (2010),

http://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf.

⁸⁴ Rachlinski et al., *supra* note 19, at 1227.

⁸⁵ Negowetti, *supra* note 10, at 725–29 (citing Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1581 (1987)); see also Richardson, *supra* note 28, at 884.

both implicit bias training and deliberate rationalization: judges can be overconfident in their own ability to identify biases, and they may not have the time or mental space to thoroughly vet each situation.

D. The Overarching Caveat: Defensiveness

While the above solutions represent noble attempts to combat the effects of implicit biases, they are not without their own shortfalls. They also share an additional, particularly damaging caveat: the potential for defensiveness on the part of the implicitly biased.

The exchange between Hillary Clinton and Donald Trump featured in this Note's introduction illustrates the confusion that exists around implicit bias. Sociological research is well-established that implicit biases exist across the board,⁸⁶ but societal norms have yet to embrace the "normalcy" of the concept. As a result, mere suggestion that one might harbor implicit biases can serve as the worst kind of character assassination. In such situations, people "protest what they see as a character smear."⁸⁷ Vice President Mike Pence, in responding to allegations that police officers' implicit biases may lead to more shootings of black individuals, suggested that such "accusations" actually "demean law enforcement."⁸⁸ Writer David French asserted that one can "indict entire communities as bigoted" by invoking the concept of implicit biases.⁸⁹ And when Judge Shira Scheindlin held the stop-and-frisk policy of the New York Police Department to be unconstitutionally discriminatory, her "findings must have stung, not simply because she ruled against the City, but because she found that the conduct of the police and the City were influenced by unconscious *racial bias*."⁹⁰

Judges are particularly susceptible to defensiveness, as the suggestion of implicit bias is synonymous with questioning one's ability to do one's job. One case exemplifies this pattern. After a recent case

⁸⁶ *See supra* Part II.

⁸⁷ Yudkin & Bavel, *supra* note 74.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Green, *supra* note 58, at 189 (emphasis in original).

involving a white police officer who shot and killed an unarmed black man, the officer was found not guilty of murder despite what critics felt to be overwhelming evidence of guilt.⁹¹ In the written opinion for the case, St. Louis Circuit Judge Timothy Wilson wrote, “The Court observes, based on its nearly 30 years on the bench, that an urban heroin dealer not in possession of a firearm would be an anomaly.”⁹² Yet when faced with questions about implicit bias, Judge Wilson’s colleagues were quick to defend his “objectivity.” “He’s very methodical and a very objective judge,” said Jack Garvey, a lawyer and former St. Louis Circuit Judge, “I don’t think he’s ideological.”⁹³ Similarly, St. Louis defense attorney Joel Schwartz reflected, “My feeling on Judge Wilson is he’s a man who will do the right thing.”⁹⁴ Implicit in these reactions is the stigma associated with harboring an implicit bias.

Current sociological research reflects society’s tendency toward defensiveness when faced with implicit bias feedback; indeed, defensiveness may be an individual’s first reaction.⁹⁵ In one recent study, participants took the Race IAT and were asked for their reactions upon seeing their results.⁹⁶ Roughly two-thirds of the participants who displayed a bias on the IAT attributed their outcomes to factors unrelated to their own mental associations.⁹⁷ The study showed that the

⁹¹ See Shibani Mahtani, *St. Louis Protests Follow After Officer Found Not Guilty of 2011 Killing of Black Man*, WALL ST. J. (Sept. 16, 2017, 3:36 a.m.), <https://www.wsj.com/articles/st-louis-braces-for-protests-as-officer-found-not-guilty-of-2011-killing-of-black-man-1505493669>.

⁹² *Missouri v. Stockley*, No. 1622-CR02213-01 (Mo. Cir. Ct. 2017).

⁹³ Melissa Matthews, *Jason Stockley Verdict: How Bias May Have Influenced Judge Wilson’s Ruling*, NEWSWEEK (Sept. 15, 2017, 5:21 p.m.), <http://www.newsweek.com/judge-wilson-implicit-bias-acquittal-666231>.

⁹⁴ *Id.*

⁹⁵ Jennifer L. Howell & Kate A. Ratliff, *Not Your Average Bigot: The Better-Than-Average Effect and Defensive Responding to Implicit Association Test Feedback*, 56 BRIT. J. SOC. PSYCHOL. 125, 127 (2017).

⁹⁶ Margo J. Monteith, Corrine I. Voils & Leslie Ashburn-Nardo, *Taking a Look Underground: Detecting, Interpreting, and Reacting to Implicit Racial Biases*, 19 SOCIAL COGNITION 395, 407–08 (2001).

⁹⁷ *Id.* (detailing examples, such as, “White is usually associated with goodness and black with badness,” and “the White names were paired with pleasant things first, that set the ‘pattern’”).

larger the discrepancy between an individual's self-perceived and demonstrated biases, the more likely that individual was to externalize their results and blame factors unrelated to race.⁹⁸ As a result, individuals with the highest levels of bias were the least likely to feel guilty or motivated to address their biases.⁹⁹ A second study demonstrated that individuals with a stronger race preference on the IAT ultimately expressed more negative attitudes toward the test.¹⁰⁰ And a third study, which ties directly back to egocentric bias, demonstrated that individuals who believed themselves to be "better than average" in terms of avoiding biases were most susceptible to responding defensively when IAT results showed otherwise.¹⁰¹

Such defensiveness is likely tied to societal stigma surrounding implicit bias. IAT results "may produce unexpected and undesired feedback" that ultimately could prompt an increase in "avoidance of that feedback."¹⁰² As a result, individuals who receive undesirable IAT feedback "may dismiss or derogate it or deny it altogether,"¹⁰³ likely in an effort to downplay what they perceive to be a character flaw as opposed to an innate tendency.

So what measures can be taken to lessen the stigma? Chief Justice Mark Cady of the Iowa Supreme Court recently addressed this issue, noting, "Implicit bias is not racism or bigotry and must not be viewed as such. It involves a human condition and forces separate from racism and will perpetuate injustice and inequity until it can be meaningfully addressed."¹⁰⁴ His words stress the

⁹⁸ *Id.* at 411.

⁹⁹ *Id.*

¹⁰⁰ Amy L. Hilliard, Carey S. Ryan & Sarah J. Gervais, *Reactions to the Implicit Association Test as an Educational Tool: A Mixed Methods Study*, 16 SOC. PSYCHOL. EDUC. 495, 512 (2013).

¹⁰¹ Howell & Ratliff, *supra* note 82, at 138.

¹⁰² Jennifer L. Howell, Brian Collisson, Laura Crysel, Carlos O. Garrido, Steve M. Newell, Catherine A. Cottrell, Colin Tucker Smith & James A. Shepperd, *Managing the Threat of Impending Implicit Attitude Feedback*, 4 SOC. PSYCHOL. & PERSONALITY SCI. 714, 719 (2003).

¹⁰³ *Id.* (citations omitted).

¹⁰⁴ Mark S. Cady, *A Justice System's Response to Implicit Bias*, presented at the Iowa Defense Counsel Association Annual Convention (June 2017),

importance of removing the stigma of racism from implicit bias; only then will judges feel fully vindicated and begin acknowledging the extent of the problem. As Judge Bennett and Professor Richardson noted earlier, identifying manifestations of implicit bias as a problem needing redress is the first step toward that redress.

V. NORMALIZATION & UPDATING THE MODEL CODE

All proposed solutions mentioned above require judges to take conscious action at the outset of hearing cases and rendering decisions. As previously discussed, the potential for defensiveness may inhibit the benefits of these solutions. Instead, I propose a solution that begins to combat implicit biases by first addressing the stigma that continues to inhibit meaningful discussions of the problem. Once the stigma surrounding implicit biases is eliminated, the existing proposals can fully realize their potential in combating the effects of implicit bias.

A. *Defining Normalization*

Normalization is the process by which society begins to perceive a given behavior or trait as “normal.” In other words, it involves a “redefinition of modern discourse to allow extreme views to be considered normal.”¹⁰⁵ Like implicit bias, normalization is a subconscious process that can have a powerful, but completely hidden, influence on an individual’s actions and beliefs.¹⁰⁶ It is ultimately “the process through which wisdom becomes conventional and utopian ideals slam against questions of feasibility.”¹⁰⁷

[https://www.iowadefensecounsel.org/IDCAPdfs/Presentations/2017/Ju
sticeCady.pdf](https://www.iowadefensecounsel.org/IDCAPdfs/Presentations/2017/Ju
sticeCady.pdf).

¹⁰⁵ Emily Dreyfuss, *The Normalization of ‘Normalize’ is a Sign of the New Normal*, WIRED (Nov. 23, 2016, 3:59 p.m.), <https://www.wired.com/2016/11/normalization-normalize-sign-new-normal/>.

¹⁰⁶ Jessica Brown, *The Powerful Way That Normalisation Shapes Our World*, BBC (Mar. 20, 2017), <http://www.bbc.com/future/story/20170314-how-do-we-determine-when-a-behaviour-is-normal>.

¹⁰⁷ Hua Hsu, *What Normalization Means*, THE NEW YORKER (Nov. 13, 2016), <https://www.newyorker.com/culture/cultural-comment/what-normalization-means>.

Normalization can be dangerous—if one routinely experiences violence, for example, it can become a “new normal” that demotivates the individual from finding a way out. But normalization can also be used as a tool for change. Groups have made conscious (and successful) attempts to manipulate the norm in an effort to change attitudes. For example, extended efforts have been made to normalize recycling¹⁰⁸ and mental illness.¹⁰⁹

In the case of recycling, normalization initiatives stemmed from a desire to see certain behaviors increase.¹¹⁰ But in the case of mental illness, the push for normalization stemmed from a desire to eradicate a stigma.¹¹¹ A stigma “refer[s] to an attribute that is deeply discrediting” or a “special kind of relationship between attribute and stereotype.”¹¹² One specific type of stigma involves “blemishes of individual character perceived as weak will, domineering or unnatural passions, treacherous and rigid beliefs, and dishonesty.”¹¹³

Like mental illness, the concept of implicit bias is plagued with stigma. The current norm still involves an expectation for unbiased behavior; this expectation is especially heightened for judges. So, if a judge were inclined to openly confront his or her own implicit white preference, for example, this egalitarian motive could easily be overshadowed by a stigma assigned for bias. As discussed, such a stigma has strong—if not fatal—consequences in the judiciary.

But by striving to make the concept of implicit bias “normal,” judges would become free to engage against it rather than denying its existence altogether for self-

¹⁰⁸ See Ruth Rettie, Chris Barnham & Kevin Burchell, *Social Normalisation and Consumer Behaviour: Using Marketing to Make Green Normal 2* (Kingston Bus. Sch., Working Paper No. 8, 2011).

¹⁰⁹ See, e.g., Mary Walker Baron, *Calling in Crazy: Why We Must Normalize Mental Illness*, HUFFINGTON POST (Feb. 27, 2012, 5:49 p.m.), http://www.huffingtonpost.com/mary-walker-baron/mental-illness-stigma_b_1301514.html.

¹¹⁰ Brown, *supra* note 106.

¹¹¹ See B.A. Pescoslido, J.K. Martin, J.S. Long, T.R. Medina, J.C. Phelan & B.G. Link, “A Disease Like Any Other”? A Decade of Change in Public Reactions to Schizophrenia, Depression, and Alcohol Dependence, 167 AM. J. PSYCHIATRY 1321–22 (2010).

¹¹² ERVING GOFFMAN, STIGMA NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3–4 (1963).

¹¹³ *Id.* at 4.

preservation. No longer would the previously proposed proposals face backlash. But how does one initiate normalization?

B. Revisiting the Model Code

Recall that the Model Code of Judicial Conduct requires judges to operate “without bias.”¹¹⁴ Given the inherent nature of implicit biases, operating fully without bias is not entirely possible. After all, Americans, on average, demonstrate a strong white preference,¹¹⁵ and evidence demonstrates that judges are no different.¹¹⁶

To begin the process of normalizing implicit bias in the judiciary, I propose an addition to the comments under Model Rule 2.3. While the Rule itself should continue to require judges to “perform the duties of judicial office . . . without bias,”¹¹⁷ a comment appended to the Rule should reflect the unilateral existence of implicit biases and the need for judges to endeavor to combat them. First, such a change would signal to judges the ubiquity of implicit biases, which begins to normalize the concept at no one individual’s expense. Additionally, absent such a comment, one might interpret the Rule as providing that a confrontation of one’s own implicit biases could result in discipline, as such confrontation would acknowledge the existence of bias in the first place. Finally, this comment would place a burden on judges to confront their implicit biases; this affirmative duty does not yet exist, potentially to the detriment of countless parties whose outcomes are affected by manifestations of judges’ implicit biases.

While this comment would not be widely actionable—it would be very difficult to prove that a judge actively avoided either learning of his or her own implicit biases or attempting to combat them—its import lies in its symbolism. Creating an environment in which judges are exposed to the concept of implicit bias (and the faultlessness of unknowingly harboring them) has the potential to reduce collective defensiveness. As implied by the studies discussed earlier, reduction in the stigma or

¹¹⁴ MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2007).

¹¹⁵ Rachlinski et al., *supra* note 19, at 1199.

¹¹⁶ *Id.* at 1221.

¹¹⁷ MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2007).

“blame” surrounding implicit bias would only accelerate efforts to eradicate it.

C. An Important Note

A proposal to normalize implicit biases may be criticized for catering to white privilege, as it is centered around an effort to make implicitly-biased individuals—by the numbers, namely whites—feel comfortable in addressing racial issues and thus “trivializ[ing] [whites’] history of brutality towards people of color and perverts the reality of that history.”¹¹⁸ Creating a comment in the Code of Judicial Conduct aimed at normalizing implicit bias may allow whites to “protect their moral character against what they perceive as accusation and attack while deflecting any recognition of culpability or need of accountability.”¹¹⁹

This perspective should not be understated. While this proposal does minimize the personal culpability behind the development of implicit biases, it does so with two important underpinnings. First, this proposal has the same ultimate goal as that expressed by DiAngelo: that “[a]ll white people build the stamina to sustain conscious and explicit engagement with race,”¹²⁰ so that all forms of bias can ultimately be eradicated. Second, this proposal is truly aimed at implicit biases; it should not be read to absolve any explicit biases. Those who harbor implicit biases, by definition, do not know at the outset that they exist, and this proposal sets the groundwork for an environment conducive to their confrontation. The proposed comment would compel judges to unilaterally define and confront their own biases, and it would remove plausible deniability as an option for those who may have wished to remain willfully blind. While solutions that better confront white privilege must be explored, the proposed comment can be seen as a crucial first step.

¹¹⁸ Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54, 61 (2011).

¹¹⁹ *Id.* at 64.

¹²⁰ *Id.* at 66.

CONCLUSION

Judge Jerome Frank, sitting on the United States Court of Appeals for the Second Circuit, once opined, “If . . . ‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper.”¹²¹ It must become normal to accept that judges—like all humans and, indeed, vertebrates—harbor implicit biases; acceptance of these biases at the outset is the necessary first step in order to fully eradicate them.

¹²¹ Oakes & Davies, *supra* note 8, at 580 (quoting *In re JP Linahan Inc.*, 138 F.2d 650, 651 (2d Cir. 1943)).