JUDICIAL COUNCIL OF CALIFORNIA

ADVISORY COMMITTEE ON PROVIDING ACCESS AND FAIRNESS

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ADVISORY COMMITTEE ON PROVIDING ACCESS AND FAIRNESS

MINUTES OF OPEN MEETING

February 10, 2016
12:15 p.m. to 1:15 p.m.
Judicial Council of California

Advisory Body Members Present:	*Hon. Kathleen O'Leary, Co-chair, Hon. Laurie Zelon, Co-chair*, Hon. Craig Arthur, Hon. Diana Becton, Ms. Tammy Grimm, Hon. Maria Hernandez, Hon. Teri Jackson, Hon. Victoria Kolakowski, Hon. Lia Martin, Ms. Carol Ross-Burnett, Ms. Julie Paik, Hon. Bobbi Tillmon, Ms. Kimberly Tucker, Hon. Juan Ulloa, Hon. Vanessa Vallarta, and Ms. Rheeah Yoo
Advisory Body Members Absent:	Hon. Sue Alexander, Ms. Cherri Allison, Ms. Deni Butler, Ms. Nancy Eberhardt, Hon. Ana España, Ms. Ana Maria Garcia, Hon. Ginger E. Garrett, Hon. William Murray, Jr., Ms. Leigh Parsons, Ms. Melanie Snider Mr. Bruce Soublet, and Hon. Erica Yew
Others Present:	Hon. Gail Dekreon, Ms. Bonnie Hough, Hon. Mark Juhas, Ms. Tara Lundstrom, Mr. Jason Mayo, Ms. Linda McCulloh, Hon. James Mize, Mr. Patrick O'Donnell, Ms. Julia Weber, and Ms. Kyanna Williams

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:15 p.m. and took roll call.

Approval of Minutes

The committee approved the January, 2016 meeting minutes.

DISCUSSION AND ACTION ITEMS (ITEMS 1–8)

Item 1
Reminders

In the interest of time, the committee skipped this item.

Item 2

Discuss ITAC Legislative Proposals on E-filing, E-service, and E-signatures

The Information Technology Advisory Committee (ITAC) is developing a legislative proposal that would amend the Code of Civil Procedure provisions governing e-filing, e-service, and e-signatures. The legislative proposal is being developed by ITAC's Rules and Policy Subcommittee. The proposal is intended for circulation for public comment during the 2016 spring cycle.

PAF members discussed the impact that the draft proposal would have on access to the courts and fairness in the judicial system. Much of the conversation centered on the question of what time e-filed documents must be filed in order to be deemed filed that day. Members expressed differing opinions as to whether a 5:00pm deadline or a 12:00am deadline would best serve members of the public.

Members agreed that, rather than have PAF take a formal position on the proposal at this time, ITAC staff should just report back to ITAC on the different types of opinions and concerns that PAF members expressed during the call. PAF members have until February 19, 2016 to contact Ms. Kyanna Williams with any additional comments they have regarding ITAC's proposal.

Item 3

Annual Agenda

The committee discussed the draft Annual Agenda that was circulated in the meeting materials. Members did not identify any projects that should be added to or removed from the draft agenda. PAF members have until the end of February to contact Ms. Kyanna Williams with any additional project ideas they have for the annual agenda.

Item 4

Update on Traffic Recommendations

On January 26, 2016, the Judicial Council's Traffic Advisory Committee discussed PAF's draft traffic recommendations. Judge Kolakowski and Ms. Kyanna Williams gave an overview of the types of comments and questions posed by Traffic Advisory Committee members. Two PAF members explained that some courts are making excellent use of new technologies or otherwise improving traffic court processes. They suggested that it may be helpful to learn more about which courts are having the most success in this area and help share best practices with other interested courts.

Item 5

Update on Access, Fairness and Diversity Self-Assessment Tool

Justice Zelon and Ms. Kyanna Williams provided background on the Access, Fairness and Diversity Self-Assessment Tool, which was inspired by data collected through focus groups on gender fairness and women of color in the courts. The tool has now been finalized. Justice Zelon presented the tool at the January 21, 2016 TCPJAC/CEAC joint meeting and encouraged PJ's and CEO's to use the tool in their courts. Justice Zelon will also include the tool in a February, 2016 presentation to the Judicial Council on Implicit Bias. Staff will then make the tool available to all courts through the Judicial Resources Network.

Item 6

Civil Grand Juries – Expanding Recruitment and Increasing Diversity

Ms. Kyanna Williams and Ms. Bonnie Hough noticed, through a court-oriented list serve, an increase in courts seeking guidance on how to improve civil grand jury recruitment. The Judicial Council has a number of high-quality resources to help courts expand recruitment and increase

diversity in civil grand juries. Many of these resources were created through the committee's past work. Ms. Williams and Ms. Hough shared those resources with list serve participants. These civil grand jury resources are also included in the Access, Fairness and Diversity Self-Assessment tool.

Item 7
Updates from Internal Liaisons
In the interest of time, the committee skipped this item.

Item 8
Open Discussion
In the interest of time, the committee skipped this item.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:15 p.m.

Approved by the advisory body on February 10, 2016.

Justice for All Project
Fast Facts

Project Goals and Strategy

- The Justice for All project recognizes that *no one program or approach* alone can suffice to provide all of those in need of help for their civil legal problems with appropriate and meaningful assistance. An array of innovations have been developed by bench and bar but they usually have been offered piecemeal rather than in an integrated approach that combines services across sectors to make the best use of resources for each person.

- The project aims to encourage state efforts that include all relevant stakeholders in the civil justice community—courts, access to justice commissions, legal aid, the private bar—in a partnership to implement CCJ/COSCA Resolution 5 (Meaningful Access to Justice for All). The Resolution envisions state systems in which everyone has access to meaningful and effective assistance for their civil legal needs through a comprehensive approach that provides a continuum of meaningful and appropriate services.

- The project seeks to enhance states' commitment to reimagining how to work across organizational boundaries and optimizing all available resources to advance access to justice for all.

Project Components

- *Strategic Action Plan Guidance materials:* An expert working group will develop guidance materials outlining and providing information about the key components of services and capabilities that states should have in place to achieve access to justice for all. The materials will contemplate a mix of services, as highlighted in the Resolution, for states to consider in their particular contexts (e.g., self-help services to litigants, new or modified court rules and processes that facilitate access, discrete task representation by counsel, pro bono assistance, effective use of technology, increased availability of legal aid services, enhanced language access services, enhanced coordination with the human services sector, and triage models to match specific needs to the appropriate level of services).

  The working group will provide a template for a strategic action plan, including the basic outline for the possible plan, along with the menu of options and service alternatives for states to consider to fill the identified gaps in services in their states. The expert group will also provide a template for a state assessment/inventory to help states identify the services and capability components they do and do not have, and consider how to address

gaps in services to better meet the legal aid needs of all. Related guidance materials will be provided. Templates and guidance materials will be available for all states.

- *Strategic Action Plan Grants:* Based on a Request For Proposal (RFP), the Justice for All Advisory Committee will award grants to states, based on a set of criteria, to help them conduct a state assessment inventory and also to design a strategic action plan to achieve access to justice for all. All core stakeholders-courts, access to justice commissions, the private bar, and legal aid providers-must be willing to work in full partnership to overcome fragmentation and create an integrated approach to accomplish the goal.

  Consultant-based technical assistance may be included in strategic action plan grants. The Advisory Committee will develop, and release with the RFP solicitation, a list of technical assistance providers/experts who can serve as resources for states to assist states during the *strategic action plan process*. Consultant-based technical assistance costs should be included as part of the application budget.

- *Technical Assistance Grants:* In the second year of the Project, the Advisory Committee will provide strategic action plan grantees targeted technical assistance grants to assist with implementation. The Advisory Committee will determine, after consulting with grantees, additional technical assistance areas particularly relevant to each grantee's needs. The Committee will then determine the best use of and process for obtaining the technical assistance grants. These grants may address targeted pilot implementation efforts as well as other needs that states might require and the Advisory Committee determines appropriate.

At the conclusion of the project, the expert working group will revise the guidance materials to reflect observations from grantee efforts as well as updated thinking among scholars and practitioners. Project staff will compile a repository of information around grantee efforts (e.g., award focus, implementation, outcomes) and make it available to others interested in achieving full access to justice in their states.

Grant Awards and Timeline

- The Committee will award grants to up to 10 states based on selection criteria developed by the Committee.

- Grant award amount and duration will vary from state to state, but no grant shall be for a period longer than 12 months

- While all dates will be confirmed in March, the Committee anticipates the following *tentative* timelines:

- Late May: Justice for All RFP release
- Early September: RFP return deadline
- Mid-October: Grant awarded
- Early-mid 2017: Technical assistance funding finalized and processed

- All awardees must demonstrate a commitment to working in full partnership with all core ATJ stakeholder groups in their states throughout the process, and must commit to evaluating and reporting on their efforts, and to share any materials developed.

Additional Project Information/Inquiries

- For additional project inquiries, contact Shelley Spacek Miller at sspacek@ncsc.org or 757.259.1538.

Access

The following is intended as a very, very preliminary way to think about ways to address 100% Access – from prevention of legal problems to appellate and systemic advocacy. It is just intended to start the discussion and lacks many case types, partners, steps, ideas for solutions, and specificity.

It starts with some initial thoughts on common case types – noting that there are many more to build out, and tries to identify who might already be working in this area and who might be able to work on this. Then considers special needs of certain populations for service in those case types or in legal issues relating to their status. It then starts to consider ways to expand or enhance general solutions – for example, we can develop lots of ideas about expanding funding for legal services and for representation for modest means people that don't necessarily need to be repeated in each case type.

It presumes many, many partners to develop a plan and take on pieces of the plan. All suggestions are most welcome!

By Case Type

FAMILY LAW

FAMILY LAW	What to do?	Who can lead?	Timing	Resources
Prevention of problems	Education for public and helpers on family law issues & resources	Family Law Section of the Bar, Legal Aid Family Law Providers, Court Self Help, Libraries	On-going	Curriculum can be adapted – may be accomplished with volunteer attorneys, legal services and court attorneys as part of outreach efforts
Outside of court solutions & negotiation assistance	Expansion of on-line tools	Judicial Council	2016-2017	Limited – already committed
	Expansion of settlement services in the courts	Judicial Council Partnerships with Bar, Schools, Mediation programs	?	On-going – staff to provide services and for supervision of volunteers
	Hotline and other services	Legal Aid organizations	On-going – look at ways to expand	On-going

	Mediation and other settlement assistance	Bar and Mediation organizations	On-going – look at ways to expand	Explore ways to increase services for low and modest means
Preparation of documents	Tyler Guide and File Hotdocs and Smartforms Education for non-attorneys on document preparation Forms available on-line – fillable/savable Continued work to simplify	Tyler courts Judicial Council Educational orgs. Paralegal groups Courts/Judicial Council Judicial Council	2016 – 2017 2016 – 2017 2016	Limited – already committed On-going, would benefit from additional staffing On-going
Preparation for court and in-court including order preparation	On-line resources including videos, simulations Expanding attorney representation (see below) Provide a record of what happened in court	Judicial Council, Legal Services See below for ideas on expanding attorney representation Futures Commission, Legislature		Limited – part of self-help website expansion Depends on whether electronic or in-person
Assistance with compliance with order/agreement	Develop tips for orders that are easier to enforce, provide in education for litigants, Bar and courts Coordinate with referral sources	Judicial Council, Bar, Law Enforcement, Mediators, Self-Help attorney Judicial Council, 211 services,		Limited Resources – allocation of time

	for court-ordered services to identify ways to streamline referrals			Limited resources – allocation of time
Systemic changes	Explore simplification of law, rules, forms and processes	Judicial Council Bar Legislature Legal Services		

LANDLORD/TENANT

LANDLORD/ TENANT	What to do?	Who can lead?	Timing	Resources
Prevention of problems	Education for public and helpers on housing law issues & resources	State Bar, Legal Aid, Court Self Help, Housing organizations	On-going	Curriculum can be adapted – may be accomplished with volunteer attorneys, legal services and court attorneys as part of outreach efforts
Outside of court solutions & negotiation assistance	Expansion of on-line tools Expansion of settlement services in the courts Hotline and other services Mediation and other settlement assistance – explore models from Shriver pilots	Judicial Council Judicial Council Partnerships with Bar, Schools, Mediation programs Legal Aid organizations Bar and Mediation organizations	2016-2017 ? On-going – look at ways to expand On-going – look at ways to expand	Limited – already committed On-going – staff to provide services and for supervision of volunteers On-going Explore ways to increase services for low and modest means
Preparation of documents	Tyler Guide and File Hotdocs and Smartforms Education for non-attorneys on document preparation	Tyler courts Judicial Council Educational orgs. Paralegal groups Courts/Judicial Council Judicial Council	2016 – 2017 2016 – 2017 2016	Limited – already committed On-going, would benefit from additional staffing

	Forms available on-line – fillable/savable Continued work to simplify			On-going
Preparation for court and in-court	On-line resources including videos, simulations Expanding attorney representation (see below) Provide a record of what happened in court	Judicial Council, Legal Services, Legal Aid Association/LawHelp See below for ideas on expanding attorney representation Futures Commission, Legislature		Limited – part of self-help website expansion Depends on whether electronic or in-person
Assistance with compliance with order/agreement	Develop tips for orders that are easier to enforce, provide in education for litigants, Bar and courts Coordinate with referral sources for housing assistance Develop protocols with building inspectors	Housing law specialists, Law Enforcement, Judicial Council, Mediators, Self-Help attorneys		Limited Resources – allocation of time Limited resources – allocation of time
Systemic changes	Explore simplification of law, rules, forms and processes	Judicial Council Bar Legislature Legal Services		

CONSUMER ISSUES -

CONSUMER ISSUES	What to do?	Who can lead?	Timing	Resources
Prevention of problems	Education for public and helpers on consumer issues & resources	State Bar, Legal Aid, consumer agencies, District Attorneys, FCC and other federal agencies, court Self Help	On-going	Curriculum can be adapted – may be accomplished with consumer advocates, volunteer attorneys, legal services and other advocates as part of outreach efforts
Outside of court solutions & negotiation assistance	Expansion of on-line tools			
	Expansion of settlement services in the courts	Judicial Council Partnerships with Bar, Schools, Mediation programs	?	On-going – staff to provide services and for supervision of volunteers
	Hotline and other services	Consumer organizations, governmental organizations, Legal Aid organizations	On-going – look at ways to expand	On-going
	Mediation and other settlement assistance –	Consumer groups, Bar and Mediation organizations	On-going – look at ways to expand	Explore ways to increase services for low and modest means
	Explore on-line assistance for negotiation, resolution of issues	Futures Commission, private providers, consumer groups		
Preparation of documents	Tyler Guide and File	Tyler courts	2016 – 2017	Limited – already committed
	Hotdocs	Baylegal	2016 – 2017	Limited- grant funds

	Education for non-attorneys on document preparation Forms available on-line – fillable/savable Continued work to simplify	Consumer Groups, Educational orgs. Paralegal groups Judicial Council	2016	On-going
Preparation for court and in-court	On-line resources including videos, simulations Expanding attorney representation (see below) Provide a record of what happened in court	Judicial Council, Legal Services, Legal Aid Association/LawHelp, Consumer groups See below for ideas on expanding attorney representation Futures Commission, Legislature		Limited – part of self-help website expansion Depends on whether electronic or in-person
Assistance with compliance with order/agreement	Develop tips for orders that are easier to enforce, provide in education for litigants, Bar, consumer advocates and courts Coordinate with referral sources for consumer law assistance	Consumer law specialists, District Attorneys, FCC and other agencies, judicial officers, Mediators		Limited Resources – allocation of time Limited resources – allocation of time

PROBATE ISSUES

PROBATE ISSUES	What to do?	Who can lead?	Timing	Resources
Prevention of problems	Education for public and helpers on probate issues & resources	Probate Section of State Bar Legal Aid, Area agency on aging, court Self Help	On-going	Curriculum can be adapted – may be accomplished with volunteer attorneys, legal services and other advocates as part of outreach efforts
Outside of court solutions & negotiation assistance	Expansion of on-line tools			
	Expansion of settlement services in the courts	Judicial Council Partnerships with Bar, Schools, Mediation programs	?	On-going – staff to provide services and for supervision of volunteers
	Hotline and other services	Senior Organizations, Legal Aid services	On-going – look at ways to expand	On-going
	Mediation and other settlement assistance –	Bar and Mediation organizations, Family Court Services for guardianships	On-going – look at ways to expand	Explore ways to increase services for low and modest means
	Explore on-line assistance for negotiation, resolution of issues	Futures Commission, private providers,		
Preparation of documents	Tyler Guide and File	Tyler courts	2016 – 2017	Limited – already committed
		Judicial Council	2016 – 2017	Limited- already committed

	Hotdocs – guardianship and conservatorship Education for non-attorneys on document preparation Forms available on-line – fillable/savable Continued work to simplify	Senior Groups, Educational orgs. Paralegal groups Judicial Council	2016	On-going
Preparation for court and in-court	On-line resources including videos, simulations Expanding attorney representation (see below) Provide a record of what happened in court	Judicial Council, Legal Services, Legal Aid Association/LawHelp, Senior Groups See below for ideas on expanding attorney representation Futures Commission, Legislature		Limited – part of self-help website expansion Depends on whether electronic or in-person
Assistance with compliance with order/agreement	Develop tips for orders that are easier to enforce, provide in education for litigants, Bar, consumer advocates and courts Coordinate with referral sources for assistance	Senior Citizen Groups, adult and child protection services, District Attorneys, and other agencies, judicial officers, Mediators Senior Citizen Groups, adult and child protection		Limited Resources – allocation of time Limited resources – allocation of time

		services, District Attorneys, and other agencies, judicial officers, Mediators		
Systemic changes	Explore simplification of law, rules, forms and processes	Bar Legislature Legal Services Judicial Council Adult and Child Protection groups		

OTHER CASE TYPES TO DEVELOP:

Criminal Law

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Administrative Law Issues

- DMV
- Wage

Federal Issues

- Bankruptcy
- Immigration
- Prisoner Cases
- ….

GENERAL ISSUES:

Appellate remedies

By Special Issues of Litigants (TO BUILD WITH PEOPLE WITH SPECIALIZED KNOWLEDGE)

PERSONS WITH DISABILITIES	What to do?	Who can lead?	Timing	Resources
Special challenges related to disability with regular legal issues	Provide navigators to assist with process			May be integrated with other support services
Legal issues related to disability				
PERSONS WITH LIMITED ENGLISH PROFICIENCY				
Special challenges related to LEP with regular legal issues	Provide interpreters in court and throughout process Provide translated information Increase # of bilingual attorneys & staff Encourage navigators, community support Identification of cultural/legal differences – develop information for immigrants and for helpers on those differences	Judicial Council Legal Services Language Partners Judicial Council Legal Services Language Partners State Bar, Law Schools and other schools, Language Partners Schools, Language Partners Schools, Language Partners		

Legal issues related to LEP				
VETERANS				
Special challenges related to veterans with regular legal issues				
Legal issues related to veterans				
ACTIVE DUTY MILITARY				
Special challenges related to active duty military with regular legal issues	Coordinate with JAG and other military service providers to identify issues – propose solutions			
Legal issues related to active duty military	Coordinate with JAG and other military service providers to identify issues – propose solutions			
PERSONS IN RURAL AREAS				
Special challenges related to rural communities with regular legal issues	Coordinate with rural providers to identify challenges – particularly related to limited broadband, and distance to travel			
Legal issues related to rural communities				
NATIVE AMERICANS				

Special challenges for Native Americans with regular legal issues	Collaborate with Tribal Courts	Tribal-State Court Forum		
Legal issues related to Native Americans	Collaborate with Tribal Courts	Tribal-State Court Forum		
INCARCERATED PERSONS				
Special challenges for incarcerated persons with regular legal issues				
Legal Issues related to incarcerated persons				

Support Private Bar to Expand Access

	What to do?	Who Can Lead?	Timing?	Resources?
Education on Providing Services to Modest Means Litigants	Prepare Guide similar to that developed by Colorado Develop Educational offerings	Commission on Access with Incubator Programs State Bar, Commission on Access with Incubator Programs, PLI	2016-2017 2016-2017	Fairly limited, one-time with launch and updates Limited – part of other educational resources
Increasing Limited Scope Representation	Simplify rules for withdrawal for attorneys after making court appearance Coordinating with Lawyer Referral Services to encourage LSR panels	Judicial Council State Bar, Lawyer Referral Services	2016-2017	Limited – already committed Limited – part of regular functions
Supporting Pro Bono	Develop on-line resources for education of pro bono attorneys that can be shared throughout the state Develop guidelines for court system attorneys to provide pro bono assistance	Legal Services agencies Supreme Court		

Increasing Funding for Legal Services

	What to do?	Who Can Lead?	Timing?	Resources?
Increasing Equal Access Fund	Work with Governor and Legislature to increase Equal Access Funding	Legislature, Commission on Access to Justice, Judicial Council	2016–2017	Limited - Commitment of existing resources
Continuation of Sargent Shriver Pilot Projects and Identification of Next Steps	Complete full evaluation of pilots, develop recommendations	Judicial Council, Pilot projects, Commission on Access, Legal Aid Association of California	2016-2017	Limited - Resources already committed to evaluation and report

Expanding Self Help Assistance in the Courts

	What to do?	Who Can Lead?	Timing?	Resources?
Expanding ability of self-help centers to serve litigants	Provide technical assistance for coordination of Skype and similar on-line services	Judicial Council Local Courts		Limited
	Explore on-line chat and phone assistance	Judicial Council Local Courts		
	Expand on-line self-help workshops in a variety of languages	Judicial Council Local Courts		
	Provide models of instructions and materials that can be adapted for local use	Judicial Council Local Courts		
	Expand self-help website to include information on how to negotiate and other outside court remedies	Judicial Council Local Courts Legal Aid Association of California		
	Develop systems for text reminders of court hearings, next steps in cases	Local Courts, Judicial Council		
	Expand on-line forms completion software, connect with e-filing	Local Courts, Judicial Council		

Continuation of Sargent Shriver Pilot Projects and Identification of Next Steps	Complete full evaluation of pilots, develop recommendations	Judicial Council, Pilot projects, Commission on Access, Legal Aid Association of California	2016-2017	Limited - Resources already committed to evaluation and report
Expand funding for self help services		Judicial Council		
Expand funding for mediation services		Judicial Council		

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JUDICIAL MINDFULNESS

Evan R. Seamone

JUDICIAL MINDFULNESS

*Evan R. Seamone**

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* J.D., University of Iowa College of Law; M.P.P., School of Public Policy and Social Research, University of California, Los Angeles; B.A., University of California, Los Angeles. I would like to thank Ken Kress, Margaret Raymond, Ellen Langer, Michael Basseches, Martin Katz, John Brogan, and especially The Honorable Celeste F. Bremer for their helpful insights on earlier drafts of this manuscript. This Article is dedicated to Avis Ridley-Thomas, the staff, and the volunteer mediators at the Los Angeles City Attorney's Dispute Resolution Program who, often against great odds, successfully assist disputants to become aware of and confront their biases on a daily basis.

Like all human beings, judges are influenced by personal routines and behaviors that have become second nature to them or have somehow dropped below the radar of their conscious control. Professor Ellen Langer and others have labeled this general state "mindlessness." They have distinguished "mindful" thinking as a process that all people can employ to gain awareness of subconscious influences, and thus increase the validity of their decisions. In this Article, I establish a theory of "judicial mindfulness" that would guard against two types of "cold" bias when interpreting legal materials. The first harmful bias involves traumatic past events that might unknowingly influence judges when they decide cases that are reminiscent of the trauma. The second harmful bias involves the elimination of valid legal theories or the interpretation of ambiguous phrases to mean only one thing, thus motivating premature decision-making. Judicial mindfulness is attainable when judges implement two psychological techniques that fit within psychologists Wilson and Brekke's general framework for correcting instances of mental contamination: (1) negative practice and (2) transitional or dialectical thought. These systems alert judges to their biases by allowing them to understand how they arrive at decisions, and then offer a framework that analyzes the processes they employ to achieve legitimate legal conclusions.

I. INTRODUCTION

> "There are Three things extreamly hard, Steel, a Diamond and to know one's self."[1]
>
> —*Benjamin Franklin*

Only once have I witnessed a law student behave in a manner disrespectful of a judge. The student recounted the tale of a federal

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1. POOR RICHARD: THE ALMANACKS FOR THE YEARS 1733-1758, at 175 (Richard Saunders ed., 1964) [hereinafter ALMANAC] (citing BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (1750)). As a caveat, this Article rests on the assumption that judges should exercise self-awareness—they should know whether biases have impaired the legal justifications they provide—whenever they have measurable discretion. Just as America's judicial circuits have concerned themselves with the threat of gender and racial biases influencing the courts, a majority of Americans are concerned with these types of influences as well. *See generally* Article, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force: The Quality of Justice*, 67 S. CAL. L. REV. 745 (1994) (discussing concerns); John M. Scheb & William Lyons, *Public Holds U.S. Supreme Court in High Regard*, 77 JUDICATURE 273, 274 (1994) (noting that sixty-nine percent of the national public believed Justices should recognize and eliminate political biases from decisions). When a decision is biased, even if judges provide legal bases for their decisions, they are inherently less accurate. *See infra* Part III (describing harmful judicial biases). In the pages that follow, I provide a practical approach for judges to achieve greater self-awareness.

judge who read a self-help book in her chambers as she decided a case.[2] Because the student acted as if the judge were neglecting her official duties, his tale inspired an important question: should it be the case that judges refrain from self-help? Seemingly, the vast majority of the American judiciary are no different than book dealers: they see self-help as "the Rodney Dangerfield of publishing"—it just doesn't get any respect.[3] Like the movers-and-shakers of the business world, judges are supposed to be self-reliant in the face of personal conflict.[4] Yet, notwithstanding doubts regarding self-help, many of which are

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2. A student at a conference on judicial clerkships described a particularly odd experience while interviewing with a federal judge. When he met the judge, she was completing the review of a dispute that required a prompt judgment. The judge held two items in her hands. While, in one hand, she grasped the case file, in the other, the judge clenched a worn copy of a generic self-help book on improving decision-making. The book had been opened to a dog-eared and thoroughly highlighted page featuring a shaded box containing instructions on stress-reducing breathing techniques. Supposedly, while in the student's presence, the judge followed these exercises by the number, and then commented that such exercises enabled her to withstand the toils of her role. Professors, and students alike, were startled upon hearing the story. In fact, the student referenced the meeting to convey the downside of interviewing with judges. He echoed the popular criticism that it is not a judge's place to search for help from anything but case law or treatises in resolving a given dilemma.

3. Daniel McGinn, *Self-Help U.S.A.*, NEWSWEEK, Jan. 10, 2000, at 44.

4. Judges must achieve a final decision, just as the working world requires unquestioned obedience while performing work routines. The duty to apply the law to cases may consequently raise conflicts for judges. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (observing that "it is more important that the applicable rule of law be settled than that it be settled right"). *Compare* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 255 (1998) (noting "traditional rules of finality of judgments" in all legal proceedings), *with* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1958) (stressing the importance of working within an occupational calling without concern for life's pressures).

A factor that complicates matters for judges is a relatively widely held belief among judges that they should avoid referring to any personal influences in their decision-making. This situation existed in the 1920s when judges would have been "stoned in the street" for acknowledging such influences. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 275, 278 (1929). A decade later, the stigma continued, requiring judges to deal with behavioral matters in "a sneaking, hole-in-corner manner." JEROME FRANK, LAW AND THE MODERN MIND 152 (1930). And, even today, little has changed. While judges recognize the need to reduce racial and gender bias in the courts, the only way they have been willing to address such issues has been in an anonymous forum where they can deny claiming responsibility for their beliefs. *See* Article, *supra* note 1, at 969 (describing a program that "used a series of real-life vignettes gathered from the news media [and] elicited audience participation by providing each participant with computer capacity to give their opinion, anonymously and immediately, about whether a given scenario constituted gender-biased conduct"). The following risk thus presents itself: pressure to limit disclosure of personal conflicts, which do not rise to a level requiring recusal from a case, may very well condition judges to ignore such factors.

Under these models, reliance on self-help resources becomes a sign of personal weakness. *See* Julia M. Klein, Book Review, *A Noodler's Chicken Soup*, THE NATION, Mar. 12, 2001, at 31 (noting Tom Tiede's popular sentiment that readers who buy self-help books "may be congenitally programmed to fail"); Ira J. Hadnot, Editorial, *Therapy By the Book; Increasing Popularity of "Self-Help" Works Sparks Debate About Their Pluses, Minuses*, DALLAS MORNING NEWS, Apr. 23, 2000, at 1J (doubting individuals' choices when they rely on advice from unsupported research).

reasonably based,[5] executives in all fields increasingly purchase self-help titles and government agencies increasingly send top-level officials to self-mastery workshops at taxpayers' expense.[6]

While the general public might be wise to continue seeking personal guidance in its faithful trips to the bookshelves, it is less evident that judges' unique problems are best addressed in the same generic self-help racks.[7] Although judges are well respected, judging is one of the most stressful professions known (*i.e.*, judges are often torn between the mandate of the law as opposed to their own conscience).[8] From a

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5. *See* Hadnot, *supra* note 4, at 1J (observing estimates that over ninety-five percent of these books are "published without any [supporting] research").

6. Consider that the number of Americans buying self-help titles rose 15% in only three years, from 33% in 1988 to 48% in 1991. *Compare* Leonard Wood, *Self-Help Buying Trends*, PUB. WKLY., Oct. 14, 1988, at 33 (reviewing Gallup Poll from 1988); Leah Garchik, S. F. CHRON., July 27, 1991 (providing statistics for 1991), *with* Robert D. Putnam, *Are We Joiners or Loners?*, ATLANTA J. & CONST., Dec. 27, 1995, at 7A (noting that 40% of Americans belonged to some type of support group in 1994). These purchasers, in fact, occupied many of the higher stations of American professional life. *See* Wood, *supra*, at 33 (noting that the majority of self-help book buyers are college educated, aged 35-49, and earn an annual income over $30,000); Margaret Jones, *'Convergence' at the Bookstore*, PUB. WKLY., Nov. 3, 1989, at 32 (noting a "typical clientele [that is] 30-55 years old [and] college-educated or better").

In the realm of public service, self-help has touched the lives of our nation's most powerful leaders. On December 30, 1994, President Clinton invited a number of self-help specialists to a retreat at Camp David for counsel. His guests included Anthony Robbins and Stephen R. Covey, both of whom are known for self-help publications and seminars. *See* Ann Devroy, *Clinton Turns to Two Wizards of Self-Help*, MEMPHIS COM. APPEAL, Jan. 4, 1995, at 4A (describing how former Minority Speaker Newt Gingrich had also summoned Covey for advice). Yet, in light of this novel visit, a "prominent" official within the Clinton Administration reported: "I was appalled . . . . My information is that the chief of staff (Leon Panetta) didn't even know about [the meeting]." Robert Nova, Editorial, *Ickes' Unseen Hand Running Democratic Party*, BUFFALO NEWS, Jan. 14, 1995, at 3. Seemingly, this episode received more public outcry than rumors of President Reagan's multiple meetings with psychics, which incidentally evidenced similar reliance on metaphysical solutions to public officials' problems. *Compare* Wayne R. Anderson, *Why Would People* Not *Believe Weird Things?*, 22 SKEPTICAL INQUIRER, 42, 43 (1998) ("We smiled when we learned that Nancy Reagan arranged her schedule (and that of the president?) on the advice of an astrologer . . ."), *with* McGinn, *supra* note 3, at 45 (noting that agencies are spending taxpayers' money to send an increasing number of military officials and public administrators to self-help workshops like the Covey symposium regarding habits of effective people).

7. Seemingly, self-help book readers strive for keys to unlock the doors to their subconscious minds. They want to know what restrains them from attaining personal goals. When we consider that Americans have relied on such documents since the inception of this nation, such desires hardly seem immature or childish. *See, e.g.*, *Introduction to* ALMANACK, *supra* note 1, at vii (observing how most Americans found the *Poor Richard's* series "virtually indispensable"). However, it is not so clear that judges will prosper from applying methods that are not specifically intended for the complex legal decision-making that they face on a daily basis. *See* William J. Brennan, Jr., *Foreword*, *in* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING, at xxi (3d ed. 1997) (noting that even college graduates are not prepared to handle the legal analyses performed by first-year law students, let alone judges).

8. *See* C. Robert Showalter & Tracy D. Eells, *Psychological Stress in the Judiciary*, 33 CT. REV. 6, 6 (1996) (noting the National Judges Health-Stress Project's findings that "judges are over-represented in . . . 'high stress' categor[ies] compared to other professionals"); James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. POL. 104, 114 (1981) ("Although American judges . . . are subject to the expectation that they 'follow' precedents in making decisions, they are just as obviously expected, by others *and* by themselves, to 'do justice.'"); Karl Georg Wurzel, *Methods*

psychological perspective, the major difficulty that results from such stress is increased difficulty recognizing the presence of unwanted thoughts. Studies indicate that "when individuals participate in complex tasks, they are much less aware of themselves," which is only compounded by the stress, which makes them "less self-conscious [and] undermine[s] self-regulatory processes."[9] Not only does this stress impair the judge's ability to understand limitations on his conscious control, it results in a diminished ability to "carefully weigh and elaborate upon the various sources of information impinging on them."[10] In light of such impositions, judges may very well be obligated to better understand their own limitations to successfully discharge their duties.

While generic self-help may not be the appropriate way to build necessary linkages between judges' own personalities and the judicial role,[11] this prohibition should not outweigh every imaginable self-help method. The challenge is creating a resource for resolving a judge's inner conflicts that is acceptable to peers who hold him to extremely high standards.[12] This Article creates such an alternative resource. It probes judicial mindsets with the hopes of revealing the human factors that will enable judges to achieve greater reliability in their interpretations of the most difficult cases and controversies. While we could call this method judicial self-help, we should call it judicial mindfulness because of how it is applied.

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of Judicial Thinking, *in* SCIENCE OF LEGAL METHOD 286, 298 (1921) (noting that "the judge is exposed more than any other thinker to emotional influences," which can lead to errors in judgment).

9. James W. Pennebaker, *Stream of Consciousness and Stress: Levels of Thinking*, *in* UNINTENDED THOUGHT 327, 330 (James S. Uleman & John A. Bargh eds., 1989) (hereinafter UNINTENDED THOUGHT).

10. *Id.* at 341. *See also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 783 (2001) ("[J]udges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment.").

11. For more on this connection, see Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2028-29 (1996): "[P]erceived [judicial] constraint comes from a text, or more precisely, [judges'] agreed-upon perception of a text.... [T]he judges' own personal ideologies are not law, as judges themselves well know. They become part of law through a process of integration and coordination whose contours are established by existing legal categories.".

12. *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1327 (1995) (noting how judges often write opinions to impress one another). To highlight the demands of peer pressure on the Supreme Court, see Jilda M. Aliotta, *Social Backgrounds, Social Motives and Participation on the U.S. Supreme Court*, 10 POL. BEHAV. 267, 279 (1988) (pointing out that "justices who graduated from less prestigious law schools [may] feel that they are at a disadvantage in attempting to persuade their colleagues").

II. PSYCHOLOGY AS TABOO IN LEGAL ADJUDICATION

The fact that scholars propound numerous conflicting theories of constitutional interpretation,[13] for example, suggests the possibility that these theories do not provide judges with enough guidance about how to achieve the best outcomes—how to weigh and balance the competing claims in a case. It follows that greater self-awareness of "blind spots" or internal biases will aid this balancing process. Yet, self-help hardly seems a leading contender for the appropriate solution to the problem of constitutional interpretation.[14]

The major difficulty with theories of constitutional interpretation is this: even if judges accepted them, none offer the kinds of practical guidance that judges need to improve their decisions.[15] For example, while Originalist methods of constitutional interpretation have been celebrated for eliminating instances of bias with a rigid analytical framework,[16] the theory has its drawbacks. It fails to identify how judges should prioritize conflicting historical sources or explain which approach for resolving such dilemmas is optimal in a particular instance.[17] Because the legal profession demands clarity and thorough evaluation in logical analyses, it seems hard to imagine that theories of constitutional interpretation are just too difficult for scholars to grasp or explain.[18] There has to be some other explanation that eludes us for determining whether a judge has achieved a sufficiently unbiased and

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13. Without listing the multiple variations of constitutional theories, scholars have noted the fundamental difficulty with most of these views. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 33-34 (1998) (observing the "irreconcilable tension" between variations of Originalism and living constitutionalism that "only increase as we move forward in time").

14. Presumably, some might argue that, at the most basic level, all theories of constitutional interpretation are essentially methods of judicial self-help. On this view, the only difference between the constitutional theories adopted by judges and self-help in general is the absence of psychological analysis. Yet, given the fact that constitutional scholars directly refute psychological models, this notion hardly seems compelling. *See* Robert A. Carter, *Self-Help: It All Started With Ben Franklin . . . And the Genre Continues Its Impressive Growth in Many Fields, Including Accounting Law and Medicine*, PUB. WKLY., Oct. 14, 1988, at 28 (referring to West's *Law in a Nutshell* series as a form of legal self-help); *infra* Part II.A (describing legal scholar's direct attacks on psychologists).

15. *See* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1014 (1978) ("[E]ach [theory] is theoretically defective, and . . . insofar as any of them are cast in ways that make them plausible, they would not, even if accepted, be of much assistance for actual Justices.").

16. *See* David M. Zoltnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1379 (1999) (expressing Justice Scalia's view that an Originalist perspective defies the "mainstream constitutional theory, which he believes allows judges to inject their own personal values into constitutional law").

17. *See infra* notes Part IV.B.III and accompanying text (describing potential inaccuracies in Justices' attempts to consult historical and other authoritative sources).

18. *See* Greenawalt, *supra* note 15, at 1014. (claiming that these theories may be too complex "to yield to capsulization"—that they are beyond the comprehension of mere mortals).

thus more accurate decision. In this Article, I propose one respect in which constitutional theories are deficient in practice. They fail to address an essential element of reality: judges are human beings,[19] and as a result, are motivated by influences originating beyond the scope of their immediate comprehension.[20] This is not to say that all judges experience subconscious conflicts and psychoses to a level where they are mentally disabled without aid of a special process.[21] Instead, the proposition states that theories of constitutional interpretation and popular methods of legal analysis will work optimally if judges are aware of how their own personalities and experiences might influence their legal reasoning.[22]

While many might label this the psychology of judicial decision-making,[23] we must be careful not to adopt an overly broad reading of the term *psychology* here. Psychology, in general, involves a number of analytical frameworks,[24] whereas the science to which I am referring involves the much narrower field of self-awareness. The centerpiece of this Article is the concept of mindfulness, a relatively new theory that focuses on transcending self-imposed limitations on one's decision-making and determining the alternatives that exist absent such impositions.[25] Whereas the self-awareness theory offers practical tools to modify behavior, traditional psychological methods can do more harm than good to interpreters of the Constitution for two reasons.

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19. *See* BERNARD L. SHIENTAG, THE PERSONALITY OF THE JUDGE 3 (1944) ("It has been intermittently discovered that judges are human beings, subject to the same fundamental laws of biology and of psychology as are human beings generally."); LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 12 (1999) ("Each justice is only human, and being human means sometimes making decisions that are self-serving or in other ways biased.").

20. *See* Harold D. Lasswell, *Self-Analysis and Judicial Thinking*, 40 INT'L J. ETHICS 354, 356 (1930) (recognizing that judges are influenced by "unseen compulsions" when analyzing and deciding cases); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11-12 (1921) (noting that judges are influenced by forces "so far beneath the surface that they cannot reasonably be classified as other than subconscious").

21. *See* ELLEN J. LANGER, MINDFULNESS 26-27 (1989) (observing that "[o]ne need not work through deep-seated personal conflict to make conscious those thoughts that are mindlessly processed"). In fact, scholars have doubted psychological models for this very same reason. *See* James R. Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735, 758-59 (1978) ("The essential unresolved question is whether insight for effective self-scrutiny is possible without the encouragement and guidance of an experienced psychoanalyst or psychotherapist.").

22. *See infra* Part IV.

23. *See generally* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998) (reviewing various theories in this category).

24. *See generally* James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7 (1983) (describing the applicability of multiple psychological components in the judging process, including role assumption, attitude, fact patterns, organizational behavior, environmental concepts, and self-esteem).

25. *See infra* Part III (explaining Langer's theory).

First, most psychological models are merely descriptive in nature and do not offer solutions to the problems they explore.[26] Second, and even worse, the great majority of these models are so obtuse and complex that many psychological theories exist, for all practical purposes, only within the confines of the ivory towers of the academics who originated them.[27]

Although the analytical methods that I propose would not force intensive therapy on judges before hearing cases, even my less demanding objective seems to be taboo in the field of American jurisprudence. Legal scholars dismiss the notion that judicial decisions should be evaluated on the basis of how a judge reached a particular decision. Most do not care if a judge was influenced by psychological factors, as long as the decision is justified by legally accepted methods.[28]

The remainder of this Article responds to the notion that psychology is useless in aiding judges in their decision-making by distinguishing several key points. Part II.B explains that the origin of a legal decision particularly matters to judges when facts give rise to legal indeterminacy, the condition in which "the correct theory of legal reasoning fails to yield a right answer or permits multiple answers to legal questions."[29] Next, Part III depicts the stages of the process by which judges exhibit any number of particular biases falling under five overarching categories. It then presents a model of judicial debiasing that envisions mindful judging as its objective. This Part attempts to preserve "good" biases and those instances where it is more optimal to keep a mental process operating within the judge's subconscious.[30] Part IV explains

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26. *See generally* Simon, *supra* note 23 (explaining the solely descriptive nature of current psychological models).

27. For example, consider the following "operationalized model" of judicial decision-making in the Supreme Court:

> Voting behavior on civil rights and liberties or economics = justice's party identification + appointing president's intentions index – southern regional origins – agricultural origins – family social status (for economics only) + non-Protestant religion – first born – father as government officer (for civil rights and liberties only) + judicial experience – prosecutorial/judicial experience index.

C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior: 1916-88*, 35 AM. J. POL. SCI. 460, 471-72 (1991). The researchers who developed this model confirmed that it accounts for up to fifty-one percent of the variance in decisions by forty-six Supreme Court Justices during the course of nearly six decades. *Id.* at 477. While this predictive model may be impressive to statisticians, it does little to improve the quality of judicial opinions. Just as a Justice cannot change the fact that she was born to a family of government officials, she probably would be unable to determine whether the characteristics of her fellow Justices fit neatly enough within the categories described to know how they would vote on a given issue.

28. *See infra* Part II.A (describing attacks on psychological theorists).

29. Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 320 (1989). *See also infra* Part III.A (discussing indeterminacy).

30. *See infra* Part III.C (distinguishing "good" from "bad" biases).

how and why the theory of judicial mindfulness successfully resolves some crucial problems of legal analysis. Part V addresses practical considerations regarding implementation of the theory. Part VI concludes that the proposed psychological model increases judges' decisional accuracy. We should note however, that the criticisms pointed out by philosophers and other legal practitioners, which are discussed immediately below, are often valid in cases where the law is determinate. Consequently, judicial mindfulness is not always required of the bench. We might say that this tactic should be reserved for the "tougher cases."[31]

A. The Demise of Social Science Approaches to Jurisprudence

Sociological jurisprudence—the implementation of psychological methodologies in legal analysis—emerged in the 1930s.[32] Judge Jerome Frank and Dean Roscoe Pound fostered this movement by echoing the sentiments of Justice Oliver Wendell Holmes[33] and challenging the legal profession to implement psychological methods in its analytical processes.[34] The movement grew so strong that lawyers and judges alike believed the Pound/Frank camp would soon transform the face of legal education.[35] But this raging inferno soon dwindled to no more than a candle's light.[36] And, while psychologists continue to float an occasional theory in the direction of our nation's law reviews, none have compelled

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31. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."); *infra* note 39 and accompanying text (explaining indeterminate and hard cases). Note, however, that cases can be "tough" for reasons other than legal indeterminacy.

32. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609-10 (1908) (calling for a legal system "adjusted to human conditions").

33. *See generally* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) (noting that "[t]he life of the law has not been logic: it has been experience"); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("Law is merely a prediction of what judges will do.").

34. *See* FRANK, *supra* note 4, at 29 (demanding a psychological method because:

> Most of us are unwilling—and for the most part unable—to concede to what extent we are controlled by . . . biases. We cherish the notion that we are grown-up and rational, that we know why we think and act as we do, that our thoughts and deeds have an objective reference, that our beliefs are not biases but are of the other kind—the result of direct observation of objective data.).

35. James A. Elkins, *A Humanistic Perspective in Legal Education*, 62 NEB. L. REV. 494, 505, 505 n.45 (1983) (discussing the psychological movement in legal education).

36. *See* Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 348 (1984) (noting that "the checks [legal realists] drew on [social science] went unpaid for insufficient funds"); *see also* Elkins, *supra* note 35, at 508 ("After the appearance of the psychoanalytic critiques in the 1960's and the early 1970's, the concern for psychology began to wane as legal educators followed new intellectual currents.").

law schools or legal practitioners to adopt uniform systems of psychological training.

Although a myriad of theories have been advanced casting doubt on the need for psychological methods of self-awareness in the law, they essentially reduce to three primary explanations: (1) the notion of the justification process, as advocated by Richard A. Wasserstrom;[37] (2) the theory of legitimate legal reasoning, as advanced in Steven Burton's good faith thesis;[38] and (3) the notion of moderate, or what I call *healthy* indeterminacy, as illustrated by Ken Kress.[39] Together, the

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37. Wasserstrom observed that the outcome of a judicial decision does not necessarily depend on a judge's motivations when determining the law regarding that outcome. He distinguished the process of discovery from the process of justification, where justification involves applying "logic[al] analysis" and discovery involves the imagination and creative impulses a person experiences before directing her attention to the task at hand. RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 26-27 (1961) (noting that the process of justification describes thought, rather than one's reaction to a text or situation). *See also* Scot W. Anderson, Note, *Surveying the Realm: Description and Adjudication in Law's Empire*, 73 IOWA L. REV. 131, 144 n.91 (1987) ("For example, Kekule discovered the structure of the benzene ring while dozing before his fireplace. This discovery came to him from the inspiration of his dream. That dream, however, does not justify that discovery. Justification rests, in this case, on the rigors of scientific investigation."); STEVEN J. BURTON, JUDGING IN GOOD FAITH 45 n.17 (1992) ("Some causal reasons bear no relationship to justification. We may be caused to act in some way by misfiring neurons, by operant conditioning, by emotional impulses, or by external threats of harm."). Accordingly, these reasons are not legal reasons because they fail to "establish that an act was right or wrong." *Id.*

38. The good faith thesis holds that judges can reach legally justified decisions even in the face of incompatible or indeterminate rationales because they follow legally acceptable guidelines. *See* BURTON, *supra* note 37, at 12 ("[T]he rules of interpretation might be indeterminate, but all relevant policies and principles supported by all relevant political moralities may converge on one resolution. Convergence is possible at any level of analysis and might produce determinate results in a case."). Burton observed the importance of serving the judicial role, from which judges would not intentionally depart. *See id.* at 35 (noting how "judges do not fulfill their legal duty if they act only on parts of the law with which they agree").

Burton's notion of judicial honesty represents the view that judges do not intentionally deceive. *Compare* Simon, *supra* note 23, at 93-94 (suggesting that judges are genuine because most cannot become aware of their own influences without the right tools), *with* Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y, 155, 156 (1994) (noting that because judges "must always deny their authority to make law, even when they are making law. . . . [c]ourts and judges always lie"). There are yet other explanations that mediate between these extremes. *See* Simon, *supra*, at 17 (noting that if judges are "deceptive," the deception exists when they believe "even though the law seems coherent and I am not constrained by a singularly correct decision, I will nonetheless report closure because that is what I am expected to do and that serves the judicial function best"). Others might simply cite cases like *United States v. Hatter*, 519 U.S. 801 (1996) (holding that it would be unconstitutional to make judges pay Social Security and Medicare taxes, as these taxes would diminish the judges' salaries while they are in office), for the proposition that judges are self-interested and have incentives to "regularly forego candor" when arriving at decisions. *See* Idleman, *supra* note 12, at 1310.

39. Professor Kress defined indeterminacy as a situation where "legal questions lack single right answers." Kress, *supra* note 29, at 283. *See also id.* at 320 ("[L]egal indeterminacy may properly be defined in terms of legal reasoning, as follows: Law is indeterminate where the correct theory of legal reasoning fails to yield a right answer or permits multiple answers to legal questions."). A number of scholars provide similar analyses. *See* H.L.A. HART, THE CONCEPT OF LAW 273 (2d ed. 1994) (defining indeterminate law as "incompletely regulated"); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB.

Wasserstrom-Burton-Kress model of legal decision-making (hereinafter *WBK*) rests on three principles. First, judges must use legitimate legal reasons to support their decisions. Second, judges are compelled by official duty and legal training to reject purely emotional views as the byproducts of the discovery process. Third, some level of indeterminacy is healthful for the judicial process, because it provides new avenues of exploration, as long as judges employ the prior two principles in their analyses of less determinate legal bases.

B. Indeterminacy and the Rebirth of Psychological Analysis

Seemingly, the three *WBK* principles reject the notion that psychology matters in the judicial process. However, a detailed analysis of the principles reveals that each respective theorist, at the least, recognizes the potential for unreliable legal analyses when judges use traditional methods of interpretation. In Wasserstrom's model, "[t]he value of the justification process is lost . . . if the judge does not pay attention in good faith to the value of the justification he comes up with."[40] Burton acknowledges not only that "indeterminacy can be stubborn" but that decisions made in ambiguous situations deserve extra attention because they become the very "reasons . . . that justify [a] particular law in the first place."[41] Furthermore, Professor Kress acknowledges the ever-present threat of conclusions that are so rigid and formalistic that they can actually limit the level of justice delivered to the public. Perhaps these limitations might even include a judge's own decision to refrain from realizing her own participation in a system characterized by radical indeterminacy.[42]

POL'Y 411, 411 (1996) (defining indeterminacy as "the extent to which any particular legal theory cannot provide knowable answers to concrete problems"). Some even compare indeterminacy with the notion of the hard case. *See* HART, *supra*, at 272-73 (noting that in hard cases, when there is no law to be found, a judge may "follow standards or reasons for decision which are not dictated by the law").

Professor Kress affirmed that some level of indeterminacy or indecisiveness is actually beneficial and necessary for the proper functioning of the judiciary. *See* Kress, *supra*, at 293 ("[I]t is arguable that justice not only permits, but indeed *requires* moderate indeterminacy. Although justice demands that most things be settled in advance, there must be room for flexibility in marginal and exceptional cases in order that equity be done.") (emphasis added).

40. WILLIAM L. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 60 (1980).

41. BURTON, *supra* note 37, at 48 (describing the "privileged status" that judicial decision-making should occupy in ambiguous situations because of its inherent risk). *Cf. also* Guthrie et al., *supra* note 10, at 781 ("As Jerome Frank put it, if judicial decisions are 'based on judge's hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge's hunches *makes the law*.'" (citing FRANK, *supra* note 4, at 104)).

42. *See* Kress, *supra* note 29, at 336 (surveying those who recommend the "instrumental use of the indeterminacy thesis to unfreeze the legal mind and encourage creative legal solutions[,]" which simultaneously cautions against the danger of inflexible analyses). *But cf.* Lawson, *supra* note 39, at 421 ("All

To a large extent, the reliability of each *WBK* theory rests on the proposition that a judge knows he is being influenced during the process by which he discovers some principle of law when deciding a case. After all, were a judge to say that it does not matter how he initially came upon an idea because he substantiated it later at some point with legitimate methods, for this assertion to be true, he would have to know: (1) the source and extent of the motivation for her idea; (2) the weight of the motivation in determining how he used legitimate methods of analysis; and (3) that he would have selected the same methods of interpretation if the motivation had differed.

The problem with theories like *WBK* is that, in their rejection of psychology, they leave the judicial decision-making process virtually unchecked. Professor Charles Lawrence has observed the exclusion and ostracism of "students of the unconscious" in legal forums whenever they address matters extending beyond expert testimony.[43] Lawrence further explains that this result is "hardly surprising" and that the reluctance may even be "appropriate":

> The law is our effort to rationalize our relationships with one another. It is a system through which we attempt to define obligations and responsibilities. Denial of the irrational is part of that system, as is our notion that one should not be held responsible for any thoughts or motives of which one is unaware.[44]

So, the legal community accepts the *WBK*, perhaps in an effort to let sleeping dogs lie.

In the scientific community, similar arguments prevail, limiting interest in locating and eliminating bias because of the unsettling implications of detecting such contamination: "As a colleague once remarked, 'If someone asks for constructive criticism, tell them something good, because they don't really want to hear anything bad.' In a way, [all] 'news' about human cognitive capacity *is bad.*"[45] Just as the *WBK* theories represent the "good news" in the legal system, the "good news" that the scientific community conjures up in defense of its disinterest in debiasing is a set of similar and "[t]ypical arguments—'The group overcomes the limitations of individual scientists,' or

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else being equal, the more certain we can be about our conclusions, the less indeterminacy we will find."). Also note Kress's rationale that "[t]he pervasiveness of easy cases undercuts . . . claim[s] of radical indeterminacy" does not preclude the possibility of unhealthy indeterminacy occurring. Kress, *supra*, at 296.

43. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329 (1987).

44. *Id.*

45. DAVID FAUST, *Preface to* THE LIMITS OF SCIENTIFIC REASONING, at xxvi (1984).

'Scientific method *ensures* protection from cognitive limitations'—[which] are put forth as self-evident, with little critical attempt to consider the substantive issues raised by the judgment literature."[46]

In judicial decision-making, the "good news" ignores these facts: "[M]aking true and making false are not things that facts do to judges. The facts don't reach out and grab the decision-maker, preventing her from deciding capriciously, or dictating themselves to her in any unavoidable way."[47] Because "[d]ifferent judges will reach different results even when they all take themselves to be pursuing the right answer," it logically follows that some level of self regulation is necessary.[48] Seeing that most of the small amount of what judges know about self-regulation has come from psychological research, the propositions for which the *WBK* theories stand exist more as a psychological defense mechanism than a true response to the issue of debiasing judges.

We are faced with the dilemma of whether judges can ever know whether or not the motivation for a decision masquerades as its justification—a justification that may happen to be false. If, indeed, judges deny recognizing their own behavioral influences, they run the risk of inaccurate[49] decisions.[50]

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46. *Id.* at xxv.

47. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 158, 183 (Robert P. George ed., 1992).

48. *Id.*

49. When I refer to inaccuracy, this does not mean judges are wrong. Instead it means they are less accurate. *See* Wurzel, *supra* note 8, at 300 (noting that "[e]*rrors* produced by emotion are felt most often and easiest in the field of legal thinking." (emphasis added)). Consider Robert Cover's model of the judging process. In it, he observes that judges use a process of elimination to achieve a desired result. *See* Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1624 (1999) (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) (defining term)):

> When a judge faces a question in which legal meaning is contested . . . the problem is not . . . that there is a "gap" in the law or that the law is "unclear." Rather, there is simply *too much* law—a host of meanings competing for recognition. . . . The role of the judge therefore is purely negative. It is "jurispathic" or law-killing . . . .

When judges unknowingly eliminate theories for the wrong reasons, while they are "not dishonest;" the writing of a judge's opinion will "not reflect the completeness and clarity essential to [the] thoroughgoing integrity" required of his office. Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 723 (1979). As a result, decisions lack accuracy because judges, in not stating the "real reasons" for their decisions "can be misled by th[e] pretense [of the opinion and a] hidden fact may not emerge, or may emerge incompletely." *Id.*

50. *See* Lawson, *supra* note 39, at 421-22 ("[B]ecause of the lack of consciousness about the need for standards of proof for legal claims, the standard employed in any context may shift without warning. It is difficult to apply a standard consistently if one is not aware of the standard or is not even aware that a standard is being applied.").

The concerns regarding whether a judge knows the real reasons for his decisions come into focus when we consider the risks posed by judges who do not show the "correctness of their action" when they adopt a particular theory or analyze a case in a particular way.[51] In such cases, justification may only "show that one or another way of going on should be advantaged over others without support for the reasons why."[52] Suppose that an analytical method justified under these circumstances leads to a correct decision only half of the time. Given that the decision could have gone another way, if psychological methods, such as the one proposed in this Article, help judges achieve a more well thought conclusion, it stands that the psychological method should count as a legitimate part of the justification process. In this instance, psychological methods would be relevant to the process of judging by helping judges determine and justify why they are using some approaches at the exclusion of others.[53] The next part of this Article will explore areas of legal analysis in which the lack of a psychological approach to limit bias threatens the accuracy of judicial determinations.

III. JUDICIAL BIAS AND ITS HARMFUL EFFECTS

A. Defining Judicial Bias

Critics of psychological methods of self-help in the law have treated the term "bias" in only the most general sense. The generic view of bias is so broad that it includes many aspects of the judge's own experience, which can be seen as a benefit rather than a drawback.[54] Often, the

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51. BURTON, *supra* note 37, at 19.

52. *Id.* (exploring the claims of "new jurisprudences").

53. Implementing psychological processes that reduce bias among judges makes sense for two reasons. First, scholars following the lead of Herbert Wechsler have argued that neutrality is an essential part of the judicial decision-making process. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (arguing for judges to provide "reasons that in their generality and their neutrality transcend any immediate result"). *See also* William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1263 (1986) (addressing concerns related to applying neutral principles in a modern context). Second, the Supreme Court publicly affirms these principles. *See infra* note 220 and accompanying text (explaining the position of the Supreme Court regarding the quest for neutrality).

54. Professor John Leubsdorf explains that lawmakers, by failing to define the criteria of bias or an unbiased "decision according to law," "cannot tell us what motives will subvert decision according to law and what motives will promote it." John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 241 (1987). In the most basic sense, "proof that a judge's mind is a complete *tabula rasa* demonstrates lack of qualification, not lack of bias," suggesting the value of certain personal experiences in judicial decision-making. LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 24 (2d ed. 1992). *Cf.* E. Tory Higgins & John A. Bargh, *Unconscious Sources of Subjectivity and Suffering: Is Consciousness the Solution?*, *in* THE CONSTRUCTION OF SOCIAL JUDGMENTS

definition of bias changes,[55] as legal scholars have understood that they "may omit important types of bias not yet envisioned."[56] Recognizing that certain biases are, in fact, healthy for the legal system,[57] the crucial determination becomes developing a method of debiasing that will simultaneously preserve the healthy aspects of judicial experience and eliminate the unhealthy aspects of partiality.[58] Regulations guiding judges in the area of judicial disqualification have attempted to strike this delicate balance.[59] The result has been law that is less than optimal and rife with "cloudy distinctions that disqualify an occasional judge while allowing many others to sit."[60] Even here, the Supreme Court expects sitting judges to detect and eliminate their own biases.[61]

67, 81 (Leonard L. Martin & Abraham Tesser eds., 1992) [hereinafter CONSTRUCTION] ("[I]f relatively slow, serial, limited conscious thought had to take over everything typically handled by unconscious processes, we would not be able even to get out of bed in the morning.").

55. The manner in which the definition of "bias" has transformed over the years in *Black's Law Dictionary* offers an intriguing perspective. As in the early years of *Bouvier's Law Dictionary*, *Black's* explanation of the term was similarly complex, attempting to offer a perspective on how the bias operated. *Compare* BOUVIER'S LAW DICTIONARY 238 (15th ed. 1883) (even recognizing exceptions that would permit courts to be biased against groups rather than individuals), *with* BLACK'S LAW DICTIONARY 130 (2d ed. 1910) [hereinafter BLACK'S SECOND] (containing a similarly lengthy definition). But, in more recent years, Black's has rescinded much of the former commentary. The most drastic omission occurred with the release of the Seventh Edition in 1999. No longer did the definition of bias require a judge's mind to be "perfectly open to conviction." *Compare* BLACK'S SECOND, *supra*, at 130 (alluding to a judge's "predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction"), *and* BLACK'S LAW DICTIONARY 205 (4th ed. 1968) (same), *and* BLACK'S LAW DICTIONARY 147 (5th ed. 1979) (same), *and* BLACK'S LAW DICTIONARY 162 (6th ed. 1990) (same), *with* BLACK'S LAW DICTIONARY 153 (7th ed. 1999) (limiting the definition to a pithy reference to "[i]nclination" or "prejudice," and noting that the state originates "during a trial"). Either the editors have recognized the impossibility of the mandate, or they have lost their grasp on the method by which a judge can attain such levels of impartiality. *See infra* note 72 (revealing that this is true even among the most learned judges).

56. ABRAMSON, *supra* note 54, at 24.

57. In *Liteky v. United States*, 510 U.S. 540 (1994), the Supreme Court recognized two such instances. First, it may be necessary for a judge to develop a certain animus towards a defendant to carry out his role:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) *necessary to completion of the judge's task*.

Id. at 550-51 (1994) (emphasis added). Second, the Court permits those types of judicial biases that arise from judges' exposure to legal scholarship and their resulting interpretations of the law. *Id.* at 554 ("[T]he judge's view of the law acquired in scholarly reading . . . will *not* suffice" as grounds for "'bias or prejudice' recusal").

58. *See infra* Part III.C.1 and accompanying text (explaining beneficial biases and unconscious processes of which judges lack awareness).

59. *See* 28 U.S.C. § 144 (1994) (regulating the disqualification of biased judges); 28 U.S.C. § 455(b)(1) (1994) (same); AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT § 3C (1990) (same).

60. Leubsdorf, *supra* note 54, at 238.

61. Justice Kennedy's concurrence in *Liteky* sheds light on the responsibilities of judges to detect and eliminate biases. In that case, he explains that the Court is not concerned with psychological types of biases that may be influencing the judge: "One of the very objects of law is the impartiality of its judges in fact

Vagueness is ultimately the greatest obstacle to debiasing judicial

and in appearance. So in one sense it could be said that any disqualifying state of mind must originate from a source outside law itself. That meta-physical inquiry, however, is beside the point." *Liteky*, 510 U.S. at 558 (Kennedy, J., concurring). The reason why this rejection may at first seem undeniable is the role of the judge. The Court sees it as a duty of judges to become aware of their own biases and exercise control over them. Justice Kennedy conveyed that the Court has "accept[ed] the notion that the 'conscientious judge will, as far as possible, make himself aware of his biases . . . and, by that very self-knowledge, nullify their effect.'" *Id.* at 562 (citing *In re* J.P. Linahan, Inc., 138 F.2d 650, 652 (2d Cir. 1943) (Kennedy, J., concurring)). He further noted as a "requisite[ ] of judicial office," the "skill and capacity to disregard extraneous matters," so that judges can remain "faithful" to their oaths and "approach *every* aspect of *each* case with a neutral and objective disposition." *Id.* at 561-62 (Kennedy, J., concurring) (emphasis added). Kennedy alluded to the fact that this skill had been "acquired" by the judge but failed to explain where. *Id.* at 562 (Kennedy, J., concurring).

If Justice Kennedy is mandating that judges should somehow know how to debias themselves with knowledge gained prior to their assumption of office, he appears to be overly optimistic. Simply consider the difficulty of the Justices and the counselors in oral arguments to definitively explain bias that would rise to a "really bad" level. First was the exchange between Chief Justice Rehnquist and Petitioner's Counsel Peter J. Thompson:

> MR. THOMPSON: I think–you know, Congress, by passing this statute, a broad statute like this, basically indicated that it may be very difficult to make these determinations. I don't –
>
> QUESTION: Whether it's difficult in a particular case for a judge to make it, I certainly agree with you, but don't we have to have some uniform definition of bias before we can get at the reasonableness and so forth, which may be very difficult?
>
> MR. THOMPSON: . . . [A] definition of bias as I think it would fit into the standards that were applicable in 455(a), and what I came up with was this: circumstances that would lead a reasonable person to question whether the judge's inclination or state of mind toward a party belies favor or aversion to a degree or kind that might affect the judge's impartiality in the case.
>
> I think a more exacting definition of bias or of the standard, or to anticipate all the different ways in which it could come up . . . would be almost impossible, and it needs to, of course, be handled on a case-by-case basis.
>
> QUESTION: The problem—your response to the Chief Justice disclosed this. The problem—what you're proposing is, it doesn't just open up every prior trial that a particular defendant has had before this judge. It opens up any prior trial that involved the same kind of issues. . . .
>
> . . . Isn't there any way to avoid subjecting the judiciary to that enormous burden?

United States Supreme Court Official Transcript, *Liteky* (No. 92-6921), *available at* 1993 U.S. TRANS LEXIS 129, at *10-12.

Another attempt similarly failed, this time initiated by Justice Scalia with Respondent's Counsel Thomas G. Hungar.

> QUESTION: Can you give me a definition of pervasive bias, because I really—I agree with Justice Kennedy, I don't see what's gained by adopting this rule with this exception.
>
> MR. HUNGAR: I'm not sure. It has to be—It has been fleshed out by the courts of appeals on a case-by-case basis, and obviously it would—
>
> QUESTION: Does it mean anything different than really bad bias? Is that what it means? (Laughter)
>
> MR. HUNGAR: That might be as good a way of putting it as any, Justice Scalia.

Id. at *29-30.

In both instances, counsel quickly entered into territory so murky that their best response was allusion to the difficulty of the hypotheticals offered and the suggestion that the definition of bias is so elusive, it is best interpreted on a case-by-case basis. *Liteky* never addressed the precise steps judges should take to improve their analyses if impeded by unconscious biases of some sort. Yet, in dicta, Justice Kennedy seemed adamant that judges have a duty to do so.

decisions. Without pointing to particular instances of unhealthy bias, it becomes relatively easy to oversimplify matters by explaining that no methods would be sufficient to solve the problem: "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."[62] This Article acknowledges the difficulties of determining when judges should disqualify themselves for being biased.[63] In part, it borrows from the literature in this field to identify the goal of impartiality and explain the basic premises behind bias that undercuts such impartiality. Yet, it focuses on the types of bias that may be eliminated upon their recognition, preventing the need for judicial disqualification.[64] To this end, the disqualification literature disfavors those instances in which the judge relies on "an extrajudical source, resulting in an opinion on the merits based on something other than what the judge learned from participating in the case,"[65] and favors circumstances when the judge is impartial (*viz*, "lacks motives and

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62. *In re* J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943). *Cf.* Leubsdorf, *supra* note 54, at 250 (challenging vague definitions of biases as mere "unconscious motives:" "If unconscious motives sway everyone, how can one find a judge who is free of them? If only Hercules can find the correct result—or if there is no correct result—how can we say that one judge is better suited to decide a case than another?").

A more popular method of oversimplifying matters is attributing anomalies in judicial decisions to the judges' politics. If "law is politics all the way down," short of changing political parties during a case, the judge has few options to remedy the problem. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L. J. 1515, 1526 (1991) (reviewing this popular view); *see also* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 47 (1996) (noting not only that judicial decisions are strongly based upon judges' political orientations, but also that their decisions show allegiance to the political party of the president who elected them). The problem with this theory is that it relieves judges of the responsibility to understand other nonpolitical influences on their decision-making. Critics of the political explanation demand that judges be provided the tools that are necessary to explore their decisions in greater depth. *See* WRIGHTSMAN, *supra* note 19, at 55 ("Though [political] labels fit, we need to move beyond them in order to understand the determinants of opinion formation [to the] . . . theory [that] emphasizes the differences in processing information.").

63. *See, e.g.*, JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 4 (1995) ("Within th[e] framework of rules that too often fail to give adequate guidance, disqualification issues are becoming increasingly complex."); Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 117 (1994) (observing "the generally accepted rule that virtually nothing the trial judge sees or hears during the proceeding in a case can spark a bias sufficiently serious to warrant her removal").

64. *Cf. infra* text accompanying note 115 (dispelling the notion that a stigma must accompany the treatment of all unconscious or preconscious processes occurring in one's decision-making).

65. ABRAMSON, *supra* note 54, at 24. *See also* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 4.6.5, at 138-39 (1996) (explaining same notion). Extrajudicial sources create impairments in legal decision-making and reasoning when they make "finding the correct answer—or the class of answers that are not wrong . . . difficult for judges." Leubsdorf, *supra* note 54, at 261.

assumptions that would tend to warp her perception of the correct results"[66]).

Some legal scholars have attempted to categorize judicial bias broadly. For example, one commentator suggests that "[j]udges are biased when they adopt and give power to myths or stereotypes about a group."[67] Such attempts, however, do not provide methods for overcoming such biases. As a representative example, consider the reflections of Justice Lewis F. Powell on his deciding vote in *Bowers v. Hardwick*[68] in 1990: "I think I probably made a mistake in that one."[69] Powell's admitted "mistake" was basing his decision on his own experience, or lack thereof, with an entire segment of American society —gays and lesbians.[70] Some may read the quotation and determine that Justice Powell's lack of experience rose to the level of bias observed at the outset of this paragraph, or at least, perhaps, some degree of homophobia.[71] If this is so, we must ask the harder question: does the definition provided explain how the bias operates—when a "myth or stereotype" rises to a level that can contaminate a decision? Seemingly not.[72] Further, acknowledging those biases that are the most obvious does little to help categorize others that operate more discreetly.[73] The problem is simply that "[h]uman judgments—even very bad ones—do

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66. Leubsdorf, *supra* note 54 at 261; *cf. also* SHAMAN & GOLDSCHMIDT, *supra* note 63, at 70 (stressing that "the areas of personal relationships and potential bias are in serious need of clarification").

67. Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 371 (2000).

68. 478 U.S. 186 (1986).

69. Arnold Agneshwar, *Ex-Justice Says He May Have Been Wrong: Powell on Sodomy*, NAT'L L.J., Nov. 5, 1990, at 3.

70. *See, e.g.*, Mark Tanney, Note, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 142 (1997) (suggesting that Powell was homophobic in his *Bowers* opinion based on his comments of 1990 and the fact that Powell "had never known a gay person").

71. *See* Brown, *supra* note 67 at 369-70 ("[I]n a legal system fraught with de jure discrimination against gay men and lesbians, what does it mean to say that a *judge* manifests bias on the basis of sexual orientation? To put the issue more provocatively, what does Canon 3 mean in a world where *Bowers v. Hardwick* is good law?"); Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1218 (2002) (suggesting that the *Bowers* decision and Powell's quote represent "underlying, unconscious bias against gay men").

72. *See* Diane Kobrynowicz & Monica Biernat, *Considering Correctness, Contrast, and Categorization in Stereotyping Phenomena*, *in* STEREOTYPE ACTIVATION AND INHIBITION 109, 111 (Robert S. Wyer, Jr., ed., 11th ed. 1998) (discussing the inherent difficulty of "determining the accuracy of a stereotype," let alone when one is, in fact, "bad"); Guthrie et al., *supra* note 10, at 782 (noting that "even the most learned judges have acknowledged that they do not understand *how* judges make decisions" because of the lack of probing research on the topic and the failure to connect the task with an advanced body of psychological research) (emphasis added). *But see* Brown, *supra* note 67, at 370 (explaining three instances that she believes would qualify as actionable biases under Canon 3).

73. *See* ABRAMSON, *supra* note 54 (explaining that there are many biases that have yet been discovered).

not smell."[74] The law, therefore, fails to distinguish where the line exists distinguishing good biases from bad.

Psychology can be useful in assisting judges in their analyses because a number of psychologists investigating bias and debiasing processes have begun to explain biases in terms of how they operate, rather than by their results in individual instances. Norbert Kerr and his colleagues have identified three such categories of bias, in which individuals act under "self-enhancing or self-protective motives," use "cognitive short-cuts or heuristics," or exhibit "inappropriate sensitivity or insensitivity to certain types of information."[75] Such biases lead to inevitable and detectable results. Most notably, and relevant to the process of judging, biased individuals commit "sins of omission," in which they "miss . . . good cue[s]"[76] or "sins of commission," in which they "use a bad cue" in decision-making.[77] The legal community has only recently begun to grasp these concepts,[78] and has of late focused more on sins of commission, which are easier to detect among samples of judges.[79]

In an exhaustive study of 167 federal magistrates, Professor Chris Guthrie and his colleagues investigated the effects on judges of several heuristics noted in the psychology literature during the decision-making process.[80] The study concluded that "even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment."[81] While observations on how to debias judges were minimal in comparison to the authors' efforts to identify the presence of the heuristics, the researchers doubted that the simple

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74. Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 121 (1994).

75. Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 687 (1996).

76. *Id.* at 689. Particularly, these sins are committed when "the judge fails to use information held to be diagnostic by the idealized model of judgment." *Id.*

77. *Id.* An example of this sin occurs when judges use a litigant's race to reach a decision that is different from what it would have without such consideration. *Id.*

78. Guthrie et al., *supra* note 10, at 782 ("Few [studies] have dealt with the sources of judicial error.").

79. The focus of Guthrie and his colleagues' research was admittedly directed towards sins of commission. "Just as certain patterns of visual stimuli can fool people's eyesight, leading them to see things that are not really there, certain fact patterns can fool people's judgment, leading them to believe things that are not really true." *Id.* at 780. Consequently, it is mainly errors in prediction of phenomena that occupied the attention of the researchers. *See also* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 38, 53-54 (Hal R. Arkes & Kenneth R. Hammond eds., 1986) (explaining that their focus on many of the same heuristics considered by Guthrie and Rachlinski was mainly concerned with errors in applying "fundamental statistical rules" or considering "the effect of sample size on sampling variability").

80. *See* Guthrie et al., *supra* note 10, at 784 (providing descriptions of the "five common cognitive illusions" tested on the judge-respondents); *id.* at 787-816 (applying the theories to their research results).

81. *Id.* at 779.

methods accepted by most legal commentators supporting prevailing *WBK* theories—they doubted that "increased attention and greater deliberation [would] enable judges to abandon the heuristics that they are otherwise inclined to rely upon [and] avoid the illusions of judgment that these heuristics produce."[82] Instead, the study recommended that "judges . . . learn to educate themselves about cognitive illusions so that they can try to avoid the errors that these illusions tend to produce."[83] Exactly how judges should do this was an uncertain question in the literature.

The Guthrie et al. study rejected the *WBK* approach to judicial decision-making, concluding that

> [e]ven with greater [legal] resources, judges will still resort to cognitive shortcuts. If judges are unaware of the cognitive illusions that reliance on heuristics produces, then extra time and resources will be of no help. Judges will believe that their decisions are sound and choose not to spend the extra time and effort needed to make a judgment that is not influenced by cognitive illusions.[84]

These findings are equally applicable to sins of omission because the biasing processes work nearly identically. In both cases, the judge's actions raise to the level of *sins* because he "cannot easily distinguish between what 'the law says' and what [he] believes . . . ."[85] He therefore "may not know how much he is (or should be) investigating what legal sources say, and how much he is applying his own ideals."[86] Consequently, biased judicial decision-making becomes detrimental to the justice system when the "investigation is so difficult that judges must use intuitions and short-cuts, or when there is an unclear boundary between questions having correct answers and those left to the values of judges."[87]

This Article is more interested in "sins of omission" because they are more difficult to detect and have been equally, if not more, neglected than the dialogue on heuristics. While there is likewise "no single, simple answer to" the question of "[w]hat . . . the legal system [can] do to avoid or minimize" such biases,[88] there have been significant advances in the exploration of sins of omission that are worthy of mention and experimentation in judicial self-awareness. At its heart,

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82. *Id.* at 819. In fact, increased scrutiny of difficult legal sources that initially brought on biases can "feed [directly] into some cognitive illusions." *Id.* at 820.

83. *Id.* at 821.

84. *Id.* at 820.

85. Leubsdorf, *supra* note 54, at 262.

86. *Id.*

87. *Id.* at 266.

88. Guthrie et al., *supra* note 10, at 821.

this Article aims to develop a more comprehensive view of what bias is and how it operates. To this end, the section below depicts a more complete picture of how a judge progresses through the levels of developing a biased judicial opinion.

B. The Elements of the Judicial Biasing Process

Figure 1, on the next page, charts five aspects of the biasing process that can lead to judicial inaccuracy under Professor Leubsdorf's theory of cognitive judging.[89]

1. Influences Present During Issue Framing

At the most basic level, the judge can potentially trigger certain networks of thought that lead to biases when determining the essential issues to be decided in a case. According to psychologist Donal E. Carlston, all decision-makers work their way to the conclusion of a determination by accessing nodes of senses and experiences that are connected to neural networks.[90] Essentially, distinctions are blurred between sight, sound, memory, and the other senses as these nodes are activated.[91] An individual can be led anywhere along the continuum of the past events he has experienced without intending that destination.[92] In the judging process, the determination of issues can relate to matters as varied as the existing precedent,[93] rules of interpretation,[94] the judge's experience with the issue in both legal and nonlegal terms,[95] and the audience for which the judge is writing.[96] Each of these sources for issue identification can raise unwanted though associated thoughts that increase a judge's propensity toward multiple varieties of bias.

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89. *See supra* notes Part II.A (explaining criteria).

90. Donal E. Carlston, *Impression Formation and the Modular Mind: The Associated Systems Theory*, *in* THE CONSTRUCTION OF SOCIAL JUDGMENTS 301, 318-22 & fig.11.4 (Leonard L. Martin & Abraham Tesser eds., 1992) [hereinafter CONSTRUCTION].

91. *Id.*

92. This also means that "retrieval of [specific] information . . . will vary depending on the nature of other currently accessible material." *Id.* at 320. *Cf.* Timothy D. Wilson & Sara D. Hodges, *Attitudes as Temporary Constructions*, *in* CONSTRUCTION, *supra* note 90, at 37, 38 (suggesting that "people often have a large, conflicting 'data base' relevant to their attitudes on any given topic, and the attitude they have at any given time depends on the subset of these data to which they attend").

93. *See supra* Part II.A and accompanying text (discussing the presumed reliability of accepted conventions of legal reasoning).

94. *Id.*

95. *See supra* notes 54 and 57 (explaining the necessity of judges to rely on such experiences, which they do often).

96. *See supra* note 12 and accompanying text (describing audiences judges may contemplate when authoring opinions).

FIGURE 1:

PROCESS THROUGH WHICH JUDGES' BIASES INFLUENCE THEIR LEGAL DETERMINATIONS

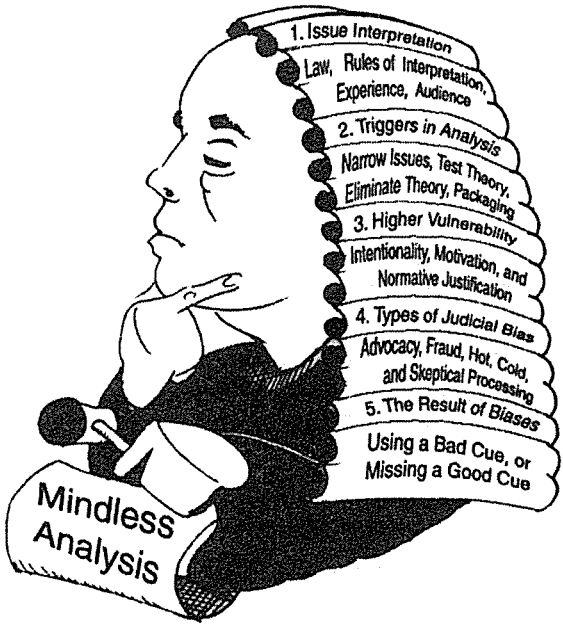

Illustration by Jamie Boling

2. Triggers in the Process of Legal Analysis

Following the specification of issues to be decided by the judge, certain conventions of legal reasoning can trigger biases related to the issues.[97] These trigger points emerge when the judge further limits an issue for the purpose of clarity,[98] selects and eliminates theories of

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97. *See infra* notes 148 and 228 (addressing practically infinite tools to aid the judge in legal reasoning).

98. The power of initially framing issues in resolving any dispute is best illuminated in the mediation literature. Professor James Stark observes the following: "For their part, lawyers—who, like physicians, are taught to think in diagnostic categories—often prematurely 'classify the flow of reality' into the wrong categories, because of insufficient training or insufficient sensitivity to the unique aspects of each client's situation." James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLIN. L. REV. 457, 480-81 (1996). Often, practitioners of the law will have to retrace their steps to alert themselves to issues missed on the first go around. *Id.* at 481.

interpretation,[99] attempts to test a theory's utility by applying particular unique facts to the theory,[100] or relies on certain aesthetic measures to package the final determination for a particular audience or the general audience who will be reading the opinion.[101]

3. Factors Increasing Susceptibility to Bias

In a third element of the biasing process, the judge's own personal characteristics will determine his susceptibility to a particular variation of bias. These characteristics include the judge's level of "intentionality," in which a "judge is aware of a bias yet chooses to express it when [he] could do otherwise";[102] his "motivation," which relates to conditions where "the bias has its origins in the judge's preferences, goals, or values,"[103] or the "normative justification" in which he engages.[104] In this final instance, judges use "some normative system" to "distinguish[] appropriate or defensible biases from inappropriate or indefensible biases."[105] Based on the invocation of these three factors that increase susceptibility to biases, the judge may display any of countless biases falling under five overarching categories.

4. The Types of Bias Influencing Judges

The first type of bias is "advocacy," which roughly equates to the "selective use and emphasis of evidence to promote a hypothesis,

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99. *See supra* note 49 and accompanying text (discussing jurispathic decision-making and law killing).

100. *See* Simon, *supra* note 23, at 27 (explaining a prevailing model of judicial decision-making that includes, as key elements "test[ing] conceptions" and using the results of such tests to "decide[] which conception is the most satisfactory"). Some have asserted the possibility and recommendation that judges attempt to test the validity of their hunches. On this view, judges similarly "follow the consequences of their decisions [and evaluate] whether their subjective feeling of rightness has consequences that verify it." Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 81 (2001) (responding to William James's pragmatic epistemology). Because each judge is an individual who views life and the law in different and unique ways, there are few specifications on exactly how analyses based on precedent or hunches are to be tested in any definitive way. For the judge presiding in *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 595 (5th Cir. 1995), as explored in context *infra* note 191, the Archie Bunker/Homer Simpson test for determining whether a defendant's behavior rose to a sufficient level of egregiousness may have been totally warranted.

101. *See infra* Part IV.A (describing use of ornamental quotations and science fiction in legal opinions); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051-52 (2002) (describing four distinctive systems of legal analysis that he labels "aesthetics").

102. Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANN. REV. PSYCHOL. 259, 267-68 (1998).

103. *Id.* Note the way MacCoun differentiates between motivation and intentionality: "intentional bias is motivated, but not all motivated biases are intentional." *Id.* at 268.

104. *Id.*

105. *Id.*

without outright concealment or fabrication."[106] The second is "fraud," or "intentional, conscious efforts to fabricate, conceal, or distort evidence, for whatever reason—material gain, enhancing one's professional reputation, protecting one's theories, or influencing a political debate."[107] The third is "cold bias," which operates at a largely "unconscious" level "even when the judge is earnestly striving for accuracy."[108] The fourth is "hot bias," which is likewise unintended but "directionally motivated," where "the judge wants a certain outcome to prevail."[109] The final variation is "skeptical processing," where a "judge interprets the evidence in an unbiased manner, but [his] conclusions may differ from those of other judges because of [his] prior probability estimate, his asymmetric standard of proof, or both."[110] While these biases may operate in different ways and their definitions may overlap to a degree, it is possible to understand practically all instances that commentators usually call biases as falling into one of these five groups.

5. Consequences of the Presence of Bias

Biases are bad when they either lead the decision-maker to use a bad cue or miss a good one. In anticipation of the following section, which identifies ways to become aware of biases, it is assumed that the more the judge increases the missing of good cues or the use of bad ones, the more mindless his decision is in the legal sense.

In the context of Figure 1, this Article is concerned with those judges whose biases are triggered by the elimination of theories or packaging of results, which evokes instances of cold biases that cause the judge to miss good cues. To address the debiasing process in this respect, this Article draws from a number of sources. The section below identifies the framework for the process of debiasing in the most general sense, which should be equally applicable to sins of omission and commission. At each stage of the process, it highlights those actions that judges should take to gain awareness of and correct instances of mental contamination.

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 269. This is the category in which most heuristics probably fall. *See supra* notes 79-83 and accompanying text (describing the operation of most heuristics).

C. *The Stages of the Judicial Debiasing Process*

1. The Necessity of Adopting a Pragmatic Approach

Before explaining the framework for debiasing mentally contaminated judgments, further comment is necessary on distinguishing good from bad biases. The disallowance of extrajudicial reasons for an opinion, which underlies legal definitions of bias, is too vague for use as a uniformly applicable standard to determine inappropriate biases.[111] "[S]ome forms of bias are more forgivable than others" and others "seem normatively defensible"[112] because certain mental processes are better left to the unconscious.[113] A body of literature addressing the values of unconsciously dictated thoughts and actions sheds much needed light on the issue.

Two pioneers in this field are psychologists E. Tory Higgins and John A. Bargh.[114] They have advocated that preconscious and unconscious thought processes are too often inappropriately stigmatized because unwanted and uncontrollable "psychoanalytic variables such as repression and perceptual defenses" have similar origins.[115] They suggest that people naively ignore the flipside of the equation indicating that "consciousness is good when unconsciousness is bad."[116] Namely, consciousness "may be less helpful when unconsciousness itself is good."[117] While, on their face, "neither [level of mental processing] is inherently good or bad,"[118] consciousness is good in instances when "unconsciously generated influences on decisions and responses are undesirable or inappropriate to current goals, or lacking altogether (as

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111. The Supreme Court so stated when it rejected extrajudiciality as the singular meaningful factor when determining whether judges should disqualify themselves:

> As we have described [the "extrajudicial source" doctrine] . . . there is not much doctrine to the doctrine. The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for "bias or prejudice" recusal, since *some* opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice.

Liteky v. United States, 510 U.S. 540, 554 (1994).

112. MacCoun, *supra* note 102, at 263.

113. *Infra* Part III.C.1.

114. *See generally* E. Tory Higgins & John A. Bargh, *Unconscious Sources of Subjectivity and Suffering: Is Consciousness the Solution?*, *in* CONSTRUCTION, *supra* note 90, at 67 (making several key distinctions).

115. *Id.* at 67 n.1

116. *Id.* at 81.

117. *Id.*

118. *Id.* at 97.

in completely novel circumstances)."[119] Consciousness is bad, however, when it "inhibits the use of relevant stored knowledge."[120] As the researchers have stated:

> When considering the advantages and disadvantages of consciousness, it might be useful to distinguish *consciousness of the problem* and *conscious problem solving*. When people are functioning maladaptively, it may be necessary for them to become conscious that there is a problem before the problem can be addressed. In this sense, consciousness may be critical to problem solving. This does not imply, however, that conscious processing is the best way to solve the identified problem. . . . Once one has identified the problem, perhaps the best next step is to "sleep on it." To attempt control at this stage may restrain rather than facilitate discovering a solution.[121]

The authors likewise suggest "distinguish[ing between] the generation of solutions and the assessment of solutions."[122] While "[u]nconscious processing may be most effective and efficient when attempting to generate the broadest range of possible solutions. . . . [c]onscious processing . . . may be best when assessing the comparative utility of alternative solutions."[123]

Essentially, judges can learn two lessons from the research situating unconscious biases. "[C]onsciousness implies awareness but not understanding. If understanding is lacking, conscious processing per se is not going to solve the problem."[124] Furthermore, "the relative advantages and disadvantages of conscious versus unconscious may vary for different stages and aspects of problem-solving."[125] Observing the various dimensions of the biasing process illustrated above in Figure 1, it is clear that judges may not need to scrutinize their decision-making until they are alerted to the fact that they have increased their own

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119. *Id.* at 80.

120. *Id.* at 97. Such inhibition occurs when reference to the "here and now" only has a "less informative" orientation than reflection on the past. *Id.* at 96. Furthermore, the researchers note how it is often optimal to "[l]et sleeping dogs lie" and not waste time on an issue when "there is no solution to the problem." *Id.* at 88. They present the following hypothetical to illustrate this point. "Telling a male friend, 'Women don't find you attractive because you're so short,' may increase his consciousness of the problem, but it is unlikely to improve matters." *Id.* Yet another related difficulty is the natural tendency of decision-makers to attempt to prove their theories correct even when new information indicates that they have erred: "[W]hen one becomes aware of information disconfirming one's belief, one does not change the belief. Instead, one mentally reworks the disconfirming evidence (*e.g.*, by discrediting its validity, or through a situational attribution) in order to preserve the prior belief." *Id.* at 95.

121. *Id.* at 96.

122. *Id.* (emphasis omitted).

123. *Id.*

124. *Id.*

125. *Id.*

susceptibility to bias or they have definitively identified one. Judges also need to know when their debiasing efforts are likely to succeed.

2. Goals for Judicial Debiasing

Just as biasing needs an overarching definition, so does debiasing. In this context, debiasing cannot merely mean thought suppression or exercising some modicum of conscious control. While it is possible to gain control over unwanted thoughts, many recognize the exhausting nature of the practice if it is exercised on a regular basis.[126] Others highlight the pitfalls of a premium on vague notions of suppressing unwanted thoughts.[127] To be of use to judges, debiasing should be defined according to a feasible objective. The definition must account for the difficulty of eliminating negative thought processes that have yet to be recognized by decision-makers,[128] let alone psychologists.[129] The proposed model for judicial debiasing envisions judges who can better understand how their particular personal experiences might trigger certain biases; who can appreciate the limitations that such biases impose; who can detect these biases once triggered; and finally, who can determine the strength of such biases. Such an objective provides the judge flexibility in responding to biases. If the judge is capable of suppressing the thought sufficiently, he can allocate his energy accordingly. If the judge experiences difficulty, he might seek other help or disqualify himself, if necessary.

The value of this pragmatic approach of limiting the scope of judicial debiasing's objectives is evident upon comparison to decision-making enhancers in other professional fields. Most notable is the Recognition-Primed Decision (RPD) Model,[130] which has been applied to decision-making settings as diverse as "firefighting, command and control,

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126. *See id.* at 79-80 ("Through constant, repeated suppression of the habitual impulse, and the substitution of a different, more acceptable or appropriate response, an undesirable unconscious response may be supplanted with a new, desired one—but only through deliberate, conscious effort.").

127. Daniel M. Wegner & David J. Schneider, *Mental Control: The War of the Ghost in the Machine*, *in* UNINTENDED THOUGHT, *supra* note 9, at 287, 303 (explaining that people who want to eliminate thoughts often can, yet "thought suppression [can] ha[ve] ironic and troubling effects . . . in that the suppressed thought can return, sometimes to be more absorbing than it was at the start").

128. *See supra* note 84 and *infra* note 210 and accompanying text (describing the difficulty of dealing with problems of which someone is unaware).

129. *See* Abramson, *supra* note 54 (explaining that definitions of bias are growing in the advent of new research).

130. *See* Gary Klein, *How Can We Train Pilots to Make Better Decisions*, *in* AIRCREW TRAINING AND ASSESSMENT 165, 171 fig.9.1 (Harold F. O'Neil, Jr. & Dee H. Andrews eds., 2000) (depicting and describing how the RPD model is used to assist professionals in making more accurate decisions under uncertain conditions).

process control, [and] medicine."[131] Experts who have implemented this measure have recognized that attempting to remove all harmful biases with any type of decision-making aid is an impossible undertaking.[132] Instead, these implementers recognize that certain heuristics can create error and adopt the more realistic objective of "build[ing] the experience base for [recognizing and] using heuristics more skillfully."[133] The method of judicial debiasing proposed in this Article will similarly assist the judge in becoming more knowledgeable of himself. The specific methods highlighted provide the judge vital tools sufficient to gain such awareness.

3. Debiasing in General

In a practical context, judicial debiasing involves three categories of action by the judge to eliminate instances of mindlessness, which will be developed more fully in Part IV. The framework for the process was developed by psychologists Timothy D. Wilson and Nancy Brekke.[134] After exploring aspects of several cold biases that extended far beyond the realm of heuristics to several sins of omission,[135] the authors pointed out the four criteria necessary to correct contaminated thought processes:[136] First, people "must be aware of the unwanted mental process," which they can detect "directly" or "suspect" with awareness of an appropriate "theory."[137] Second, "[p]eople must be motivated to correct the error."[138] Although, "[e]ven if motivated to correct the error, people must be aware of the magnitude of the bias."[139] Finally, the individual must exhibit "[c]ontrol over [personal] responses to be able to correct the unwanted mental processing."[140] One example of the exercise of such control is turning off the counterargument autopilot that

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131. *Id.* at 165.

132. *Id.* at 190.

133. *Id.*

134. *See generally* Wilson & Brekke, *supra* note 74, at 119 fig.1.

135. *See id.* at 142 app. B (describing "Unwanted Consequences of Automatic Processing" and mental contamination relating to "Source Confusion" as distinct from "Failure[s] of [Applying a] Rule of Knowledge and Application" and associating each type of bias with existing theories and specific studies).

136. "Mental contamination" is defined as "the process whereby a person has an unwanted judgment, emotion, or behavior because of mental processing that is unconscious or uncontrollable," with the term "unwanted" signifying that "the person making the judgment would prefer not to be influenced in the way he or she was." Wilson & Brekke, *supra* note 74, at 117.

137. *Id.* at 119. *See also id.* at 130.

138. *Id.* Elsewhere, the researchers explain that "people's motivation to correct for bias and, more generally, their motivation to form an accurate judgment are important determinants of the extent to which they will avoid mental contamination." *Id.* at 131.

139. *Id.* at 120.

140. *Id.*

Higgins and Bargh explained was likely to persist after realization of an error in judgment.[141] The Wilson and Brekke model for debiasing is no simple one.[142] Those legal scholars who have attempted to apply it in the absence of specific practices that build on the framework have found it to be of some value, but also that it poses a number of confusing and unanswered questions.[143]

4. Judicial Debiasing

In developing a judicial debiasing approach, it must be accepted that the task is extremely complex, if for no reason other than the fact that "people [often] do not have the proper control conditions, with random assignment, that would enable them to determine how biased their judgments are, even in the aggregate."[144] Stated differently,

> [D]ecision biases will not go away by manipulating simple variables, such as asking people to work harder, or informing them about the bias, or restructuring the task, but rather will require sophisticated theories and techniques dealing with basic cognitive processes.[145]

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141. *See id.* at 133; Higgins & Bargh, *supra* note 114.

142. Elsewhere, the authors have explained the difficulty of understanding mental processes. *See* Wilson & Brekke, *supra* note 74, at 121:

> When [people] form an evaluation of someone, what they experience subjectively is usually the final product (e.g., "This guy is pretty attractive"), not the mental processes that produced this product, such as the operation of a halo effect (e.g., people do not consciously think, "Well, I like this guy, so I guess I'll boost my perception of how attractive he is").

Id.

143. *See, e.g.*, Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1287-99 (1998) (applying Wilson and Brekke's theory to the hypothetical issue of evaluating an African American student's poor level of preparation in a class the author was teaching); *id.* (describing serious unresolved issues about the course of action she should pursue under the model to correct likely errors in her unconscious thought process).

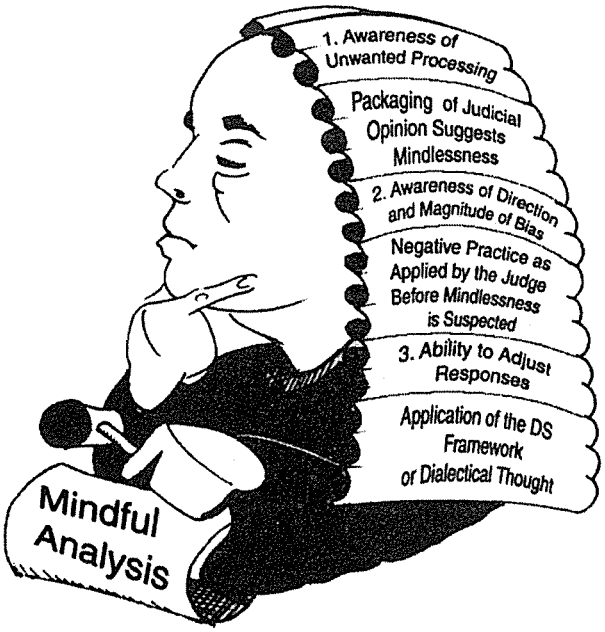
144. Wilson & Brekke, *supra* note 74, at 122. These concerns, however, have not stopped some commentators from praising simpler methods for uncovering unconscious biases. In one instance, a Web-based computer program has been theorized to settle the matter with regard to gender, race, and age bias. *See* Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 959-64 (1999) (describing several aspects of "Implicit Association Testing"); *see also Fight Hate and Promote Tolerance, Test for Hidden Bias*, *at* http://www.tolerance.org/hidden_bias/02.html (providing self-administered computer tests to detect unconscious "Sexual Orientation Bias," "Racial Bias (Arab/Muslims)," "Racial Bias (Weapons)," "Racial Bias (Black/White Children)," "Racial Bias (Black/White Adults)," "Racial Bias (Asian Americans)," "Age Bias," "Gender Bias," and "Body Image Bias"). The drawback of this approach is the level of specificity of the biases that the tests indicate. They fail to detect biases in particular instances, leaving one to determine the presence of unconscious bias in only the most general sense. Respecting particular cases, indications of the absence of a type of bias on the computer program may even be misleading to a judge who experiences such bias in the courtroom.

145. Phillip M. Massad et al., *Utilizing Social Science Information in the Policy Process: Can Psychologists Help?*, *in* ADVANCES IN APPLIED SOCIAL PSYCHOLOGY 213, 225 (Robert F. Kidd & Michael J. Saks eds., 1983).

A more intensive effort to build on these basic principles is not futile, however. "We may not be able to avoid a stereotypical or prejudiced thought, but we can stop ourselves from acting on it."[146] As depicted in Figure 2, below, the proposed method adopts three of Wilson & Brekke's four steps as guideposts. It dismisses the third step, which requires motivation to correct the bias, given that judges are required to correct biases they know may influence their judgment and that any method of self-help is of little use to those who do not desire such help.

FIGURE 2:

THE THREE STAGES OF THE JUDICIAL DEBIASING PROCESS



While Parts IV and V, below, explain the operation of the debiasing process in great detail, it is wise to highlight the fact that debiasing is a shared responsibility between judges and their educators. After judges

146. *Id.*

learn the types of strategies to identify and eliminate biases, they must endeavor to use the process in self-regulation. The judge's job at this stage is not all that daunting. As one scholar has noted:

> Judges can choose to forgo useless or misleading information. They can adjust their responses—if not internal representations—in light of information about nonrepresentativeness. They also have a third option: They can make different use of the nonrepresentative information. More specifically, they can use such information not as a basis for judgments, but as a standard of comparison. Judgments thereby acquire a comparative, relative quality, yielding a contrast effect.[147]

After a judge becomes alerted to an anomaly in his analysis, correcting the process may be as simple as relying on a different system of reasoning.[148] In Professor Pierre Schlag's view, judges inevitably resort to four of these legal "aesthetics," any of which may be shortsighted due to lack of conscious awareness.[149] Testing a theory using the DS Framework, explored in Part IV.B.1, *infra*, may demonstrate a more optimal form of reasoning that favors one aesthetic over the other. Consequently, the optimal decision may rely on a reinterpretation of fact or law in an analytical framework that enables more transitional thought.[150]

With these basic assumptions stated, the focus of this Article is not bias in the generic sense, if "generic" means an inclination to decide a case in a certain way based upon the judge's personal experience. This is because, as the *WBK* postulates, we would expect the judge to adopt legal justifications that make his ultimate decision valid regardless of his

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147. Fitz Strack, *The Different Routes to Social Judgments: Experiential Versus Informational Strategies*, *in* CONSTRUCTION, *supra* note 90, at 249, 270.

148. *See* Schlag, *supra* note 101, at 1051-52 (describing four types of legal aesthetics used by judges to achieve judicial decisions, including the "grid aesthetic," the "energy aesthetic," the "perspectivist aesthetic," and the "disassociative aesthetic"). Because all aesthetics under the model are necessary to the legal reasoning process, it is presumed that some further indication of cognitive limitation, besides the act of privileging one aesthetic over another, is necessary before a judge must implement a corrective measure. Greater awareness that an aesthetic may be limiting a judge after review of an opinion is more probable because "[a] legal aesthetic is something that a legal professional both undergoes and enacts, most often in an automatic, unconscious manner." *Id.* at 1102. After recognition that there is a problem, it may be more evident that "[a] position that may seem inexorable, or compelling [will] turn out to be an effect of operating or thinking within a particular aesthetic . . . that is itself neither necessary nor particularly appealing." *Id.* at 1112.

149. *Id.* at 1114.

150. To this end, different factors may result in biases depending on whether the analysis involves interpreting the law, facts, or mixed questions of law and fact. *See* Leubsdorf, *supra* note 54, at 262-63 (explaining that fact determinations most often create problems when they involve reliance on unproven assumptions, while legal determinations create problems when "judges do not know to what extent their own values do or should influence the result").

personal feelings.[151] Instead, the dangerous "bias" comes in two distinct forms. In the first case, the culprit is the traumatic past experience a judge may have had—one that a present legal dispute invokes and one that can ultimately determine the extent to which the judge considers and applies the governing law. The second culprit is the mistaken assumption resulting from the information a judge perceives in one way, but which could have, and should have, been understood in a completely different context. In both cases the problem is one of process (*i.e.*, these negative influences exist when judges initially review data and organize responses to them).[152] In other words, if judges have certain inclinations towards seeing things—or not seeing things—in certain ways, if the causes of these inclinations relate to the judges' past or another extralegal influence, the *WBK* approach to decision-making may not validate the judge's resolution of the legal issue.

Judges' past experiences, especially the more unsettling ones, have long been a cause for concern in the judicial disqualification literature.[153] When researchers have tested judges to determine the type of situations involving bias that would cause judges to disqualify themselves from deciding cases, they have found that the majority of judges are either ambivalent to or disposed against disqualification,[154] even when circumstances may create the appearance of impropriety.[155] Researchers explain that the "variety of factual situations with which judges are confronted daily" influence judges based on their past experiences to a much greater extent than the scenarios researchers have developed in laboratory settings.[156] Recognized examples of such situations may include instances where judges dislike defendants they

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151. It is not the aim of this Article to suggest that all of the biases indicated in Figure 1 can be eliminated or controlled sufficiently with any uniform process, or that *all* instances of such bias are possible to control or eliminate.

152. *See* LANGER, *supra* note 21, at 75-77 (describing the value of adopting a critical orientation toward process over outcome in improving one's ability to function optimally).

153. Consider Justice Frankfurter's noted comments as he disqualified himself from deciding *Public Utilities Commission v. Pollak* in 1952: "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it." Jeffrey M. Shaman, *Foreward to* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT, at ix, x (1986) (citing Justice Frankfurter).

154. *See* SHAMAN & GOLDSCHMIDT, *supra* note 63, at 31 (1995) (finding that fifty-four percent of judges in their sample were ambivalent and thirty-two percent of the judges were disposed against disqualification "in cases involving bias").

155. *See id.* at 37 (addressing the similarity of the current case to the judge's own recent divorce); *id.* at 40 (addressing a judge who is a member of a group that restricts membership based on race and gender deciding a similar case).

156. *Id.* at 31 (commenting that a judge's experiences to open-ended questions expanded the researchers' understanding of pertinent conflicts based on the researchers' limited estimates).

knew before hearing cases,[157] where judges are assaulted by defendants in the past and later decide cases involving the same defendants,[158] or where judges make public statements on topics regarding how certain cases should be decided in general and then are assigned several of those particular types of cases.[159]

A survey of 571 trial and intermediate court judges from Arkansas, Nebraska, New Hampshire, and Ohio[160] provides crucial insight into the types of issues that judges consider are worthy of recusal on the grounds of bias. More important than those cases in which judges would promptly disqualify themselves are those cases in which judges would sit throughout the case. On balance, the judge-respondents were more likely *not* to disqualify themselves when, for example, "a divorce case [was] similar to the judge's own divorce"—even when the divorce occurred "less tha[n] three years ago,"[161] and when the "judge's son [was] threatened by a party."[162] Judges were ambivalent to disqualification in situations similar to those where "the judge [was] a member of a restrictive club and the case involve[d] a claim of discrimination similar to the [racial and gender] restriction placed by the club."[163] These examples provide only a sampling of the majority of bias-related scenarios to which judges were either ambivalent or disposed against.[164]

One explanation for these prevalent behaviors may be that the judges lacked the ability to determine the degree to which their unsettling past experiences would influence their decision-making processes. For example, "[t]he judges that mentioned situations involving relationships noted that it was difficult to pinpoint just when a personal or professional relationship becomes too close to allow them to remain impartial in a proceeding."[165] Because the disqualification decision mainly rests with judges themselves, the judges may have been warranted in deciding to wait and see if any bias would emerge in such cases. Yet, in the context of those pre- and subconscious factors that threaten to limit the judges' analyses of theories or interpretations of phrases or facts during decision-making, there can be no similar hope

157. *Id.* app. A, Item 32, at 32.

158. *Id.* app. A, Item 21, at 77.

159. *Id.* app. A, Item 23, at 77.

160. *See id.* at 1, 8, 5, 31 (explaining conditions under which judges were tested).

161. *Id.* at 37.

162. *Id.* at 54 tbl.3.

163. *Id.* at 40.

164. For further investigation of particular scenarios that were tested, see *id.* app. A, in which the researchers labeled questions 20-25, 27-29, 31-33, and 39-40, as involving bias. *Id.* at 31 n.12 (labeling).

165. *Id.* at 61.

for self-awareness. Although these unconscious impediments on judgment may not rise to a level requiring recusal, they certainly caution us to the quality of the judges' product.

The neural networks that make judges more susceptible to bias involving past experiences can be activated by scenarios less charged than hearing a case dealing with a defendant who had formerly struck the same judge. More related to the potential bias involving the judge who had recently experienced a similar divorce, suppose that a judge had been assigned a case involving a rape or robbery resembling one that he had experienced—or, for that matter, a rape or robbery experienced by a relative or close friend. The judge's gut instinct will naturally tell him to vindicate the interests of the victim of the familiar crime. And, while the judge may attempt to control thoughts that incline him to decide the case in a manner favoring such vindication, the judge cannot deactivate preconscious networks of thought that may foreclose the evaluation of theories of law that would otherwise be available in the more traditional process of legal reasoning.[166] It becomes essential then for the judge to implement a process that evaluates the consistency and reliability of the analysis that created the outcome of his decision.[167]

The second, more prevalent, example of cold bias considered by this Article is best related in the following hypothetical scenario. Suppose that a state supreme court justice attends a distinguished panel at the local university's law school. While there, the Dean invites the justice to visit his home: "Justice, it would be an honor if you came to meet my son; he's so *spontaneous*, you'll just love him." The justice cheerfully agrees and proceeds to his waiting suburban utility vehicle. In the alternative, suppose the Dean instead had said: "Justice, it would be an honor if you came to meet my son; he's so *impulsive*, you'll just love

166. *See* Wegner & Schneider, *supra* note 127, at 303 ("[M]otivated thinking may not have the clean-cut success we sometimes find with motivated physical activities. When we want to brush our teeth or hop on one foot, we can usually do so; when we want to control our minds, we may find that nothing works as it should.").

167. Perhaps this example brings Sigmund Freud's work to mind. Freud often emphasized the concept of "working through" serious emotional issues to gain awareness of their influence in people's lives even years after the initial incident. Anne C. Dailey, *Striving for Rationality: Open Minded: Working out the Logic of the Soul*, 86 VA. L. REV. 349, 366 (2000) (book review) (describing concept). The resulting issue for the purpose of this Article becomes whether it is realistic for us to expect that the judge has the tolerance and capacity to scrutinize the horrific details of his own misfortunes and then direct his effort toward reducing their negative effects. One view might hold that judges, as most humans, will find the process too uncomfortable and would rather leave these types of decisions unexplored as not to bring skeletons out of the closet. The contrary view would recognize that these types of situations rarely arise. Because the resulting disruption will be infrequent, judges must still recognize their official duties and address factors that might potentially influence their impartiality, regardless of the discomfort associated with the task. As we shall see, this Article identifies tools that judges may use to locate, identify, and deal with such conflicts.

him." With that, the judge instead provides a well thought excuse and proceeds to mingle with the other guests. In these last two examples, the difference in the judge's response depended on the connotations he had preconceived about the meaning of the word "impulsive," as opposed to the word "spontaneous," even though they both meant the same thing.[168] Professor Langer provides similar examples of this judgmental phenomenon:

> [T]here are as many different views as there are different observers. . . . If there is only one perspective, you can't both be right. But with an awareness of many perspectives, you could accept that you are both right and concentrate on whether your remarks had the effect that you actually wanted to produce. . . . It is easy to see that any single gesture, remark, or act . . . can have *at least* two interpretations: spontaneous versus impulsive; consistent versus rigid; softhearted versus weak; intense versus overemotional; and so on.[169]

In fact, in an experiment she appropriately titled "Patient by Any Other Name,"[170] Langer documented the same type of error in judgment among mental health professionals. Langer was prompted to investigate the prevalence of premature labeling by the troubling realization that she considered people who described certain emotional problems in clinical settings as being "patients"[171] with troubles, while she viewed friends describing the same exact emotional difficulties outside of the clinical setting as being perfectly normal.[172] Consequently, to test how widespread these types of biases were in the decision-making process, Langer and her colleague recorded an interview with "a rather

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168. *See* WEBSTER'S II NEW COLLEGE DICTIONARY 1067 (1999) [hereinafter WEBSTER'S II] (defining "spontaneous" as "[i]mpulsive; unpremeditated"). On the view that it is questionable to rely on dictionary definitions and the ambiguity of these words appears dubious, *see infra* note 218 (describing the unreliability of dictionary definitions), consider the example of a judge determining the fate of a juvenile offender. In one instance, the defendant is described by the prosecutor as being a "troubled youth." In the alternative, the same defendant is described as "a good kid who made a mistake." Although the same defendant with the same record is being described, simply based on the difference between these two contrasting designations, the judge could foreseeably reach a different conclusion.

169. LANGER, *supra* note 21, at 68-69.

170. *See generally* Ellen Langer and Robert Ableson, *A Patient By Any Other Name . . .: Clinician Group Differences in Labeling Bias*, 42 J. COUNSELING & CLINICAL PSYCHOL. 4 (1974).

171. LANGER, *supra* note 21, at 155 ("When we discussed certain behaviors or feelings that they saw as a problem, I also tended to see whatever they reported as abnormal. I saw their behavior as consistent with the label of patient.").

172. *Id.* As Langer explains,

> Later, outside of the therapy context, when I encountered exactly the same behavior [as exhibited by the patients] (for example, difficulty in making a decision or in making a commitment) or feelings (like guilt or the fear of failure) in people whom I know, it appeared to be perfectly common or to make sense given the circumstances.

Id.

ordinary-looking man" discussing aspects of his employment.[173] They previewed the film to a group of psychotherapists and told one half that he was a "patient," as opposed to the other half, to whom they told he was a "job applicant." The researchers had further placed professionals trained in two different types of clinical theory—one that supported labeling patients and one that rejected the notion of labeling—in both the control and experimental groups.[174] They subsequently observed the following:

> [W]hen we called the man on the tape a job applicant, he was perceived by both groups of therapists to be well adjusted. When he was labeled a patient, therapists trained to avoid the use of labels still saw him as well adjusted. Many of the other therapists, on the other hand, saw him as having serious psychological problems.[175]

In Langer's study, it was the viewers who had not been immunized—those who had not eschewed the use of labels—who proceeded in a mindless way by letting their preconceptions dictate their interpretation of the evidence. Without a method for determining when judges have closed their minds to meaningful alternatives, judges often fall into the same trap when interpreting statutes or cases in which word meanings or theoretical concepts can potentially lead to contrary conclusions.[176] In other words, judges might prematurely assume that the facts of a case should lead them to a certain mode of constitutional interpretation, for example, or a specific method within that mode.[177] On balance, these

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173. *Id.*

174. Half of the subjects were familiar with the "classical doctrine of mental illness," which is heavily dependent on labels indicating patients' illnesses, while the other half were behavior therapists whose training "explicitly encourages" discounting such labels. Langer & Ableson, *supra* note 170, at 8, 9.

175. LANGER, *supra* note 21, at 156. *See also* Langer & Ableson, *supra* note 170, at 7 ("Do the traditional clinicians generate a significantly bigger adjustment difference between job applicant and patient than do behavioral clinicians? The answer is yes ($F = 4.75$, $p < .05$).").

176. *See also supra* note 168 (discussing a judge's possible different reactions to a youth offender described as a "troubled youth" versus "a good kid who made a mistake.")

177. Edward R. Hirt & Keith D. Markman, *Multiple Explanation: A Consider-an-Alternative Strategy for Debiasing Judgments*, 69 J. PERSONALITY & SOC. PSYCHOL. 1069, 1070 (1995). Psychology offers a number of possible explanations for this result. The following commentary synopsizes a number of studies. Consider the "change-of-standard" effect, in which "people make an initial judgment . . . in relation to one standard and then later, when using the judgment in their current responding, reinterpret the meaning of that judgment in relation to a different standard without taking the change of standard into account sufficiently." E. Tory Higgins & Akiva Liberman, *Memory Errors From a Change of Standard: Lack of Awareness or Understanding?*, 27 COGNITIVE PSYCHOL. 227, 228 (1994). On this view, a judge might see a similarity between the way he had interpreted a statute earlier and mindlessly jump into the same type of analysis without considering the unique new questions posed by the litigants or the facts. Alternatively, consider the notion of "self-enhancement bias," where people exhibit "the tendency to see [themselves] as better than [they] really are." Jonathan A. White & S. Plous, *Self-Enhancement and Social Responsibility: On Caring More, But Doing Less, Than Others*, 25 J. APPLIED SOC. PSYCHOL. 1297, 1297 (1995). The danger here is that such biases "lead to a complacency in which people ignore legitimate risks and fail to take necessary actions

types of bias show how judges may be stopping short their analyses and thus their achievement of the better or best resolution to the legal problem in question at any given time.

The thrust of this Article is that premature information processing during the judicial decision-making process poses a societal problem even if the legal analysis that results from the premature commitment is perfectly rational and legitimate from a legal standpoint. What we see both in the case of the judges whose past experiences triggered a subconscious reaction and the judge at the cocktail party is a harmful type of bias. The negative connotation does not arise because the judges failed to provide a reliable justification. After all, the cases on which the first grouping of judges would rely to support their decisions, and the dictionary meaning of the word "impulsive" on which the second justice proceeded, would be perfectly legitimate.[178] Instead, these biases are dangerous if the judges allow their first impressions of a situation to dominate the structure of their future analyses without recognizing other equally viable alternatives. Put differently, danger arises if these judges stop analyzing facts too soon.[179]

On a grand scale, when such biases go unchecked during the process of legal interpretation, there exists a risk that the optimum answer will not be given. It is a danger that judges may not consider all of the relevant arguments and will thus achieve a result that—albeit certainly legally legitimate—still falls short of the best answer in the given situation, or, at the very least, a better answer. One can base this result on the fact that continuing review and reflection might have resulted in a more informed decision. And, quite possibly, the more informed

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or precautions. For example . . . people who believe they will not become sick are less likely than others to immunize themselves against the flu." *Id.* at 1298 (citations omitted). In this case, judges might feel overconfident regarding their abilities to apply constitutional theories to issues based on the fact that they have implemented such analyses for years, all the while knowing the ironic truth that they may be determining new areas of law that have not yet been addressed and require the most demanding models of interpretation. The notion that certain legal issues have never been addressed should caution judges to be especially aware of unique circumstances, while routine application of an interpretive theory would call for the opposite (*i.e.*, finding similarities with predetermined outcomes to guide the present analysis).

178. WEBSTER'S II, *supra* note 168, at 1067.

179. Normally, it poses no problem when a judge decides to stop reviewing materials in a case. Professor Simon's theory of "satisficing" sees decisions to stop researching as a natural practice among all decision-makers. *See* J. MARCH & H. SIMON, ORGANIZATIONS 140 (1959) (describing how individuals settle for the solutions that are "good enough" to meet the criteria for a decision without continuing the search until they find the best answer); *see also* Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71, 141 (1998) (noting how the concept of satisficing embraces, rather than rejects rationality in its approximation of human nature). The problem I address does not attack judges for satisficing. Instead, it deals with judges' conclusions that fall short of a "good enough" decision because the materials on which they rely fail to account for equally compelling or legitimate theories or facts—facts that may be at their fingertips, though they choose to ignore them due to the influence of biases.

decision could have altered the outcome of the case and thus could have transformed the law into a more responsive body of authority capable of meeting the challenges of an ever-changing society.[180]

The two instances of bias described above threaten judges because they petrify the law and limit it to the past, while the social dynamics and norms of our lives are constantly changing.[181] Accordingly, limiting the influence of these biases should be among judges' major priorities. But this task poses a significant challenge: determining *when* judges should seek help and not only *where* they need to look when they find a dilemma. I offer the following framework to illustrate how judges can determine whether they should attempt debiasing in the two situations described above.

Assume that there are two types of judges: those who are willing to address biases of which they are made aware, and those who are unwilling to address biases they know exist in a given case (short of recusal) or in the course of decision-making in general. This Article concerns itself with the first group of judges because they are the ones who will benefit by learning about new methods of self-analysis. However, both categories of biased judges will fall into three groups based on their behaviors. In the first cluster, the biased judge represents himself to peers, the public, the press, or the parties in a case as if he has not been influenced in any way. In the second cluster, these audiences will suspect something unusual about the way the biased judge reached a decision based on the textual sources he quotes or the analogies he raises. Finally, the third cluster of biased judges will make statements or issue opinions that blatantly reveal the presence of the bias.

In responding to biases in these three groups, we can easily address two of the scenarios: the first and the third. The first group of biased judges poses the greatest risk because the biased judge's audience may assume that he achieved a legal decision by exhausting all legitimate avenues of analysis, when, in fact, the bias caused him to decide the case prematurely. These judges must become aware of their own inclinations and should constantly check themselves with the methods described in Parts IV and V of this Article when making decisions. Similarly, in the third group, we need not worry excessively about the effects of bias,

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180. *See* Guthrie et al., *supra* note 10 at 778 ("The quality of the judicial system depends upon the quality of decisions that judges make.").

181. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 309 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989) (1960) (noting that a "text . . . if it is to be understood properly—*i.e.*, according to the claim it makes—must be understood at every moment, in every concrete situation, in a new and different way.").

because the biased judge's audience will know of the bias and will most likely dismiss the validity of the contaminated analysis.[182]

The second group of judges, those who act peculiarly, create the most trouble for the public because they challenge their audiences, and even themselves, to gauge whether the deviant behavior reveals the presence of bias or exists for some other purpose. To eliminate these biases, a number of legal scholars have proposed tentative solutions. Some suggest further empowerment of juries.[183] Others would invest greater resources in litigants, such as the implementation of a peremptory challenge system to remove biased appellate court judges.[184] Yet others would develop multi-judge panels instead of having judges sit alone.[185] And still more explain that certain "rules of thumb" can succeed in limiting unconscious bias.[186]

The difficulty of implementing many of these reforms would stem from the complete overhaul of the justice system that they would require. As the dialogue expands on developing ways to implement such reforms, this Article offers temporary measures that might help

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182. For example, Professor Wrightsman points to the judge who decided that a father who had been convicted of murdering his former wife, had been accused of child molestation, and had been behind in paying his child support, should have custody of his eleven year-old daughter in a legal battle against her lesbian mother because of the judge's position on homosexuality: "I'm opposed to it, and that's my beliefs." WRIGHTSMAN, *supra* note 19, at 49 (citing L. Pitts, Jr., *Judicial Homophobia Led to Bizarre Custody Decision Favoring Killer Dad*, KANSAS CITY STAR, Feb. 8, 1996, at C13). In such a case, if the judge had not turned to any legal basis for proclaiming that the girl's mother was unfit, then his statements should naturally alert others to be weary of the assessment. *Cf. Panel to Examine Remarks of Judge on Homosexuals*, N.Y. TIMES, Dec. 21, 1988, at A16 (citing Judge Jack Hampton's reason for giving a murderer a lenient sentence, "I don't care much for queers cruising the streets, picking up teen-age boys. I've got a teen-age boy . . . . [I] put prostitutes and gays at about the same level . . . . I'd be hard put to give somebody life for killing a prostitute.").

Similar sentiments about obvious biases were expressed during oral arguments in *Liteky*:

> QUESTION: Supposing that a judge—take in this 1983 trial, Judge Elliot had made rulings that were beyond challenge at all, and—but commented when the defendant finally was led off to where—["Y]ou know, I think you're a worthless, mealy-mouthed little tool, and I hope I never see you in this court again.["] Now, is that pervasive bias?
>
> MR. HUNGAR: Obviously, Mr. Chief Justice, it's difficult to draw precise lines in this area. That might well rise to the level of pervasive bias.
>
> QUESTION: If that doesn't, what would?
>
> (Laughter).

United States Supreme Court Official Transcript, Liteky v. United States, 510 U.S. 540 (1994) (No. 92-6921), *available at* 1993 U.S. TRANS LEXIS 129, at *20-21.

183. *See* Patricia Cohen, *Judicial Reasoning Is All Too Human*, N.Y. TIMES, June 30, 2001, at B9 (recounting Professor Shari Seidman Diamond's recommendation to "[r]ely on juries because they can be shielded from unlawful evidence").

184. *See generally* Bassett, *supra* note 71.

185. *See* Cohen, *supra* note 183, at B9 (relating the recommendation of Professor Steven Landsman to "[c]onsider having a panel instead of a single judge rule on [lower court] cases, as is regularly done on the appellate level").

186. *Id.* at B9 (noting the comments of Professor Jeffrey J. Rachlinski).

biased judges and their audiences recognize the need for debiasing. Often the judicial opinion itself can provide the framework for the detection of bias through the manner in which judges package their arguments. In Professor Amsterdam and Bruner's work *Minding the Law*,[187] the researchers analyzed judicial opinions to determine whether judges internalized certain societal myths.[188] Professor Guthrie and his colleagues also recognized a point helpful to their research: "[m]ost importantly, published judicial opinions include examples of the influence of cognitive illusions."[189]

To illustrate this phenomena, I will address judges' reliance on fictitious texts as authoritative materials in the decision-making process.[190] In particular, I address authoritative uses of works by George Orwell and William Shakespeare.[191] Citations to these works may

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187. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

188. *Id.* at ch. III. For an overview of several limiting archetypes in legal opinion writing, see also Collin O'Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731, 751-74 (2000) (describing the operation of shadow jurisprudence in the courts).

189. Guthrie et al., *supra* note 10, at 821.

190. A growing body of literature suggests that judicial opinions do not reflect the judge's process of arriving at a ruling contained within it, and are thus useless as indicia of the decision-making process. *See* Simon, *supra* note 23, at 34-35 (explaining that judges themselves "emphasize[ ] the discrepancy between the opinion and the decision making process"). For the most part, this sentiment is true, since, for example, Supreme Court Justices involve themselves in multiple discrete levels of analysis before writing opinions. *See generally* JUDGES ON JUDGING: VIEWS FROM THE BENCH Part II, Chs. 7-11 (David M. O'Brien ed., 1997) (discussing these stages). However, in some respects, judges *do* show us aspects of their own behavioral influences, which are so powerful in cases that they survive through each decision-making stage and appear in the opinion. *See* Theodore Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CAL. L. REV. 89, 90, 94 (1918) (noting that "every [judicial] opinion is unavoidably a fragment of autobiography . . . [that] amounts to a confession" not to mention that the "genetic understanding" of an opinion constitutes a psychological revelation); William Domnarski, *Shakespeare in the Law*, 67 CONN. B.J. 317, 323 (1993) ("With the use of figurative language the judge declares his interest in going beyond the issue and facts before him and connecting them to the larger world of ideas . . ."). This section explores these particularly telling examples, which pertain to the entire judging process.

191. Consider that these extralegal sources represent only a small portion of a much more varied spectrum, ranging from reliance on television series and children's nursery rhymes to paintings, and even sculptures. For television series, see, for example, *De Angelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 595 (5th Cir. 1995) (comparing the conduct of an alleged harasser to that of fictional television characters: "The R.U. Withmi column did not represent a boss's demeaning harangue, or a sexually charged invitation, or a campaign of vulgarity . . . . R.U. Withmi intended to be a curmudgeon, the police department's *Archie Bunker* or *Homer Simpson*, who eyed with suspicion all authority figures, academy-trained officers . . . whatever had changed from the old days.") (emphasis added). For nursery rhymes, see, for example, *Ex parte Kailer*, 255 P. 41, 42 (Kan. 1927) (assessing the best interests of children: "Casuists could make a good argument that in the legendary case of the old woman who lived in a shoe, who had so many children she did not know what to do, the welfare and best interests of those children would be to rescue them . . . ."); *In re* Guardianship of Denlow, 384 N.Y.S. 2d 621, 630 (1976) (addressing child abandonment: "The predicament of this mother—even as [the party to proceedings] seemed to view it—was somewhat akin to the 'old woman who lived in a shoe'"); *see also* Lee v. Venice Work Vessels, Inc., 512 F.2d 85, 87-88 (5th Cir. 1975) (noting problems with "extending survival of the cause of action beyond the Administrator to the heirs" in inheritance matters: "[This] reminds us, somehow, of the fabled end of

provide a way to determine whether biases are at work. Yet, before beginning, it is noteworthy that some caution is necessary any time individuals attempt to point out biases in people other than themselves. As Professor Robert MacCoun observed:

> [T]alk is cheap—it is easier to accuse someone of bias then to actually establish that a judgment is in fact biased. Moreover, it is always possible that the bias lies in the accuser rather than (or in addition to) the accused. There are ample psychological grounds for taking such attributions with a grain of salt.[192]

While it is presumed that the review of written judicial opinions can work optimally as one method to indicate the need for judicial debiasing, judicial mindfulness moves beyond those judges who write only opinions.[193]

When judges refer to extralegal sources in their opinions, we can reach a number of conclusions. Usually, these citations are merely fleeting references, crafted by the judge to demonstrate his learnedness. One author appropriately defines these references as "ornamental" quotations, because they are merely decorative in nature.[194] However,

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'Humpty-Dumpty':

> Humpty-Dumpty sat on a wall
> Humpty-Dumpty had a great fall
> All the King's horses
> And all the King's men
> Couldn't put Humpty-Dumpty together again.

Id. at 88 & n.4). For paintings, see, for example, *In re Subpoenaed Grand Jury Witness Subpoenaed Witness v. United States*, 171 F.3d 511, 513 (7th Cir. 1999) (citing the difficulty of interpreting the Mona Lisa's smile as the basis for applying precedent and the case's outcome: "While a bright line rule would be easy to understand and enforce, *Cherney* requires that we read the nuance in Mona Lisa's smile."). For sculptures, see, for example, *Johnson v. State of Florida*, 351 So.2d 10, 13 (Fla. 1977) (Adkins, J., dissenting) (alluding to two sculptures to justify that a graphic magazine was not obscene:

> The magazine "Climax" was examined. Just as the sculpture "Bound Slave" by Michelangelo, and "David with the Head of Goliath" by Donatello, the magazine contained pictures of men with their genitals completely exposed. Just as Rembrandt's "Danae," the magazine contained pictures of a nude female stretched out in a sensuous position. . . . Granted, the magazine lacked serious literary, artistic, or scientific value, but this alone does not bring it within the rule prohibiting certain publications.).

192. MacCoun, *supra* note 102, at 263.

193. While analyzing judicial opinions to detect bias may be a useful form of oversight, the process disregards the many decisions of trial judges that are not supported by written opinions. Judicial mindfulness reaches trial judges as well.

194. Domnarski, *supra* note 190, at 318 (defining ornamental quotations as "quotations invoked because of their subject, theme or key word relationship with the judicial opinion"). *See also* Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1237 (1998) (noting that judges use extralegal allusions "not . . . to derive constitutional norms but simply to sell them"). In the present context, various citations to Orwell show no more than an ornamental use. *See* USW v. Weber, 443 U.S. 193, 219-20 (1979) (citing a passage relating to the fictional government of Oceania's declaration of war in a way that "[w]ithout words said, [sent] a wave of understanding

while ornamental quotes predominate the federal reporters, certain references are instrumental in nature—ones that seemingly convey legal principles where the law is apparently silent. I am of the view that we can gain much from distinguishing between ornamental and instrumental uses of fiction because instrumental uses are more likely to indicate that some type of force—very likely bias rooted in a past experience or hasty interpretation of an ambiguous term—has altered the way a judge has been trained to resolve a legal dispute. Consider the following example.

The case of *Florida v. Riley*[195] is one of the most illustrative examples of a judge's instrumental use of a fictional work. *Riley* involved police deployment of a helicopter to monitor an individual who cultivated marijuana bushes in his back yard. Here, the Court addressed whether police surveillance was unreasonable based on the low altitude of the helicopter (*i.e.*, it determined when surveillance exceeded the bounds of plain view and became particularized and intrusive to the individual). On balance, *Riley* emphasizes that the issue of privacy invasion is among the hardest constitutional issues to adjudicate, especially since the Framers of the Constitution could not contemplate many of the technological advances that currently define our society.[196] Seemingly then, it should raise no eyebrows that this privacy case generated conflicting beliefs and legal justifications.[197] When a plurality of the *Riley* court held that helicopters traveling above 400 feet did not violate

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rippl[ing] through [a] crowd [of spectators]" for the proposition that the majority's decision regarding Title VII "represent[ed] an equally dramatic and . . . unremarked switch in this Court's interpretation" (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR 181-82 (1949)); United States v. 15324 County Highway E., 219 F.3d 602, 603 (7th Cir. 2000) ("The year 1984 came and went without the government's transformation into the ubiquitous and all-seeing Big Brother of George Orwell's book. (This, at least, is how everyone but dyed-in-the-wool conspiracy devotees would characterize things.)").

195. 488 U.S. 445 (1988).

196. *See* David Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 796 (1987) (noting "issues that the framers and ratifiers did not consider, or could not have considered").

197. *See* Erwin Chemerinsky, *The Supreme Court 1988 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 51 (1989) (noting difficulties with "open textured" constitutional terms like "speech," "search," "cruel and unusual," and "excessive fines"); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 63 (1994) ("The textual provisions at issue in constitutional adjudication are usually susceptible to more than one reasonable construction, at which point an interpreter must refer to something else to settle the ambiguity of the relevant text."). Accordingly, judges commonly refer to the Orwellian conception of an imposing government as a "Big Brother" who sees all. *See, e.g.*, United States v. 15324 County Highway E., 219 F.3d 602, 603 (7th Cir. 2000) (referencing the notion of "Big Brother" in a short line without citing the novel). They similarly cite Orwell for the notion of "double-thinking." *See, e.g.*, Rushman v. City of Milwaukee, 959 F. Supp. 1040, 1044 n.3 (E.D. Wis. 1997) ("Double-thinking is the deliberate reversal of facts and words. So, in Oceania, the Ministry of Peace waged wars; the Ministry of Truth spread lies"); Passarell v. Glickman, 1997 U.S. Dist. LEXIS 2719, at *8 (D.D.C. 1997) (noting Orwell's notion of double-speak and adding that "Orwell did not anticipate that the current Department of Agriculture of the United States would add to that list . . . .").

individual privacy interests, Justice Brennan responded by citing eight lines of George Orwell's *1984*—a passage involving Big Brother's use of helicopters:

> The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.[198]

This was a far cry from the run-of-the-mill Orwell reference for two reasons. The first striking thing about this quote is its length in comparison to the majority of such citations. But second, and even more intriguing, is Brennan's statement immediately following the quote: "Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent."[199] Characteristic of a great many cases, *Riley* represents a bold leap by a court official. In it, Justice Brennan directly defied the notion that judges are not supposed to be literary.[200] In doing so, he also exposed his inner-self to the public and his fellow Justices.[201] We gain much from this form of irregular behavior, especially when contrasted with other judges' uses of the same passage.

Compare *Gibson v. Florida Legislative Investigation Committee*,[202] in which Justice Douglas cited the very same passage from *1984*, but for a contrary purpose. *Gibson* involved the determination of whether compelled production of documents relating to membership in an organization violated the Free Exercise clause and individuals' rights to associate. In the following excerpt, note the passages redacted by Justice Brennan in *Riley*, which I have marked in italics:

> *Outside, even through the shut window pane, the world looked cold. Down in the street little eddies of wind were whirling dust and torn paper into spirals, and though the sun was shining and the sky a harsh blue, there seemed to be no color in anything except the posters that were plastered everywhere.* The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said, *while the dark eyes looked deep into*

198. *Riley*, 488 U.S. at 466 (Brennan, J., dissenting) (citing ORWELL, *supra* note 194, at 4).

199. *Id.* at 467 (Brennan, J., dissenting).

200. *See* Domnarski, *supra* note 190, at 344 (recounting the recommendations of Chief Justice Charles Evans Hughes).

201. *See* Schroeder, *supra* note 190, at 90 (referencing judicial opinions as windows to the judge's mind).

202. 372 U.S. 539 (1963).

> *Winston's own. Down at street level another poster, torn at one corner, flapped fitfully in the wind, alternately covering and uncovering the single word INGSOC.* In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue-bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows. *The patrols did not matter, however. Only the Thought Police mattered.*[203]

Something obviously missing from Brennan's reference was the fact that "[t]he patrols did not matter," which, in *Riley*, would have undercut Brennan's claim that society deems helicopter surveillance an unreasonable invasion of privacy.[204]

While readers might interpret a fictional text in an infinite number of ways,[205] Brennan's disingenuous use of *1984* may demonstrate a strong personal attachment to the work, which most likely interfered with his interpretation of the passage.[206] The danger inherent in Brennan's actions is that he may have imported other past experiences and emotional inclinations along with the initial interpretation, thus increasing the likelihood of inaccurate, or what I will soon define as mindless, decision-making. Given the good faith thesis and other affirmations of judicial honesty,[207] Brennan most probably interpreted the passage in the same way it struck him during an initial read, long

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203. *Id.* at 375-76 n.11 (Douglas, J., concurring) (noting additionally "[w]here government is the Big Brother, privacy gives way to surveillance" (footnote omitted)). While it is not my role to be a literary critic here, I still find it interesting that Justice Douglas's use of the passage shifts its focus away from the individual to society, while Brennan's draws our attention to the individual's plight.

204. It may be true that only Orwell can tell us what this phrase means. However, on its face, the notion that citizens found helicopter surveillance permissible ran contrary to Brennan's argument. The cannons of legal interpretation would direct Brennan to explain how the sentence supported his view. Justice Brennan did not explain the meaning of the quote. Instead, he let it stand as if the sentence never followed.

I should acknowledge the alternative view that Brennan's use of the Orwell passage merely underscored the invasiveness of Orwell's fictional government, which might require no mention of the omitted sentence to support its validity. Even on this reading, the sheer length and contents of the passage in both *Riley* and *Gibson* alert us to stirred emotions not normally present in judicial opinions.

205. *See* John F. Coverdale, *Text as Limit; A Plea for Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501, 1511 (1997) (explaining the deconstructionist view that "words are so subjective that texts are open to numerous or even infinite interpretations, none of which can be shown to be correct in preference to any other").

206. While there is always the possibility that one of Justice Brennan's clerks wrote the portion of the opinion referencing Orwell, it is still a safe assumption that Brennan reviewed that passage and let it stand. In any event, the question becomes why he would not address a portion of the cited work that contradicts his major point. Without a better explanation, it is likely that Brennan felt so strongly about the passage that he did not care to dilute it. Seemingly these types of abnormal behaviors alert us that judges are influenced by some other source besides the law when making their determinations. In these types of situations, it behooves the judge to consider self-analysis.

207. *See supra* note 38 and accompanying text (confirming that judges do not intentionally deceive).

before he became a judge.[208] In this respect, one could say he may have been influenced by his emotions, which were evoked by the memory of this portion of the text [209]

In analyzing *Riley*, we must look to the mechanics of Justice Brennan's reasoning process, and not necessarily its product. In other words, we must resist falling prey to an argument that may seem perfectly reasonable to the uninformed reader—an argument suggesting that *Riley* actually supports philosophers' rejection of psychology's relevance in the decision-making process. After all, none of Brennan's fellow Justices adopted or even referred to his citation of Orwell. Not to mention, Brennan's cite appeared in the dissenting section of the opinion, suggesting that the *Riley* plurality gave it no weight because of its irrelevance to the law. But the key assumption underlying this deceiving rationale is the notion that either the judge is capable of spotting the extralegal influence or his audience is. This notion ignores the fact that when judges do not disclose personal influences, it is extremely difficult for their peers to establish the possibility of bias. Furthermore, when the

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208. Researchers confirm the notion that judges return to their initial interpretations of fictional works by observing how judges cite different volumes and editions of works published in the years when they attended college, thereby increasing the probability that they used a personal edition for reference. *See* Domnarski, *supra* note 190, at 349 ("The Shakespeare judges have used is not just the Shakespeare found in *Bartlett's Book of Quotations* . . . . [J]udges have cited to more than a score of different editions of Shakespeare. . . ." With respect to quotations of *1984*, older judges cite the Hartcourt & Brace version from 1949, while those who have been appointed in more recent years cite the newer versions. *See* Florida v. Riley,, 488 U.S. 455, 466 (1988) (citing 1949 edition); USW v. Weber, 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting) (same); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 576 (1963) (Douglas, J., concurring) (same). *Contra* Cramer v. Consolidated Freightways, Inc., 209 F.3d 1122, 1136 (2000) (Fisher, J., dissenting) (citing 1992 Signet Classic version); Rushman v. Milwaukee, 959 F. Supp. 1040, 1044 (E.D. Wis. 1997) (citing from an edition reprinted in 1977).

209. At this point, I should distinguish that this Article does not take sides in the popular debate regarding whether emotions should have a place in moral decision-making. In this debate, some scholars argue that judgments made on the basis of the judge's morality are characterized by emotivism, "the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, . . . attitude, or feeling." ALASDAIR MACINTYRE, AFTER VIRTUE 11-12 (2d ed. 1984). On this view, "reason is employed only in the selection of means to ends or values already given, but not in the critical examination or clarification of the ends or values themselves." Frank I. Michelman, *The Supreme Court 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25 n.118 (1986). Others refute "emotivism" with the process of "reflective equilibrium," in which interpreters follow the "subtle process" of "adjusting the settled law by deleting mistakes." Ken Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 378 (1984) (summarizing Dworkin's version of reflective equilibrium from RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 159-68 (1977), which built on Rawls's theory in JOHN RAWLS, A THEORY OF JUSTICE 20-21, 48-50 (1971) and John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 184-90 (1951)); *see also* Larry Alexander & Ken Kress, *Against Legal Principles*, *in* LAW AND INTERPRETATION 279, 306 (Andrei Marmor ed., 1995) ("In the moral realm, reflective equilibrium is championed as the correct epistemological method for discovering (constructing?) correct moral principles."). This Article does not reach the debate noted above because it addresses practical psychological tools to deal with judicial biases—a far step from the broader philosophical debate regarding the role of morals in the law.

judge doesn't know about his own influences, he can't alert others to them, and lack of self-searching makes it more likely that he will not discover them.[210] This result is more than likely guaranteed by the lack of self-inquiry that characterizes the bench, introducing the greater danger—a hidden danger—that the judge may be unaware of his combining of factual analyses with emotional ones in the creation of hierarchies of legal reasoning.[211] We can see these threats more clearly when we consider legal decision-making as a process of elimination.

According to Professor Robert Cover, law is a process of elimination where a judge eliminates theories until he arrives at the appropriate solution.[212] On this model, as Professor Burton's comments suggest, when law is indeterminate, elimination *is* justification.[213] Consequently, if judges eliminate theories on the basis of emotional attachments, they decrease the legitimacy of their legal analyses. Accordingly, if other judges have no way to know that the biased judge's reasoning is illegitimate, and adopt the same reasoning, the eventual judicial decision will be less accurate. *Riley* therefore shows us an exceptional circumstance: unless the biased judge is bold enough to provide the real reasons for his decision, or is bold enough to address these reasons with the appropriate psychological tools before sharing his view, all of the judges may fail to achieve the most accurate legal determination possible, which would be a different outcome under the same circumstances if no bias were present. The key becomes recognizing one's own biases and restraining them or alerting other judges that such influences are present.

Riley hardly stands alone. In fact, it provides a fresh perspective on countless judicial opinions, and, in each situation, compels us to shed a new light on the citing judges' conceptions of legal reasoning. When in *Levy v. Louisiana*,[214] for example, a majority of the Supreme Court addressed the issue of discrimination against children born out of wedlock and inaccurately cited lines from a despicable character in Shakespeare's *King Lear*, the quote suggests that Justices were in search

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210. *See* Simon, *supra* note 23, at 36-37 (explaining how judges are "[n]aturally" helpless to act on forces "of which they are not consciously aware").

211. Scholars have long recognized the danger of the judicial hunch—that a judge will jump to conclusions and find legal reasons to support them. *See* Hutcheson, *supra* note 4, at 277 (noting the practically uncontrollable intensity of judicial hunches as the "restless, eager ranging of the mind to overcome the confusion and the perplexities of the evidence, or of constricting and outworn concepts"); Lasswell, *supra* note 20, at 359-61 (noting unexplained feelings judges have toward attorneys based on their past experiences).

212. *See* Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) (describing the elimination process).

213. *See* BURTON, *supra* note 37, at 48 (discussing the danger of ambiguous law).

214. 391 U.S. 68 (1968).

of a message with social or moral value, even though it was codified in an extralegal source.[215]

While fiction may be the most telling of behavioral influences, a number of scholars evidence the biased use of history in Originalist interpretations. In one study, a comparison of Justice Brennan and Rehnquist's opinions revealed that "both Justices . . . use[d] the intent of the framers to support an outcome consistent with their [ideological rather than legal] predispositions."[216] With Originalism, as in their use of fiction, judges often act contrary to their professed rationales.[217] The same can be said of judges' authoritative use of dictionaries.[218] Quite

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215. *Id.* at 72 n.6 (Douglas, J.) (citing WILLIAM SHAKESPEARE, KING LEAR ACT 1, SC. 2, 1.6) (supporting rights for children born out of wedlock with the following citation:

> Why bastard, wherefore base?
> When my dimensions are as well compact,
> My mind as generous, and my shape as true,
> As honest madam's issue? Why brand they us
> With base? with baseness? bastardy? base, base?)

Contra Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 77 n.3 (1968) (Harlan, J., dissenting) (noting how Edmund, the character cited by the *Levy* majority, was an awful and untrustworthy individual, thereby conveying a different contextual message in the cited text). Note the commonality of inaccurate statements regarding such sources. *See* Domnarski, *supra* note 190, at 333 ("To a surprising and embarrassing degree judges have misused these quotations on law by not knowing the quotation's original context."). While it would not be difficult for a judge to read an entire work, and in the case of Brennan's dissent in *Riley* only one line further, emotional and behavioral inclinations evidence the operative factors dictating such mischaracterizations.

216. John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49 POL. RES. Q. 245, 256 (1995) (noting how, in some cases, both Justices used vague language with no historical examples to support the Framers, while, in other cases, they provided detailed historical analyses). *Compare* Valley Forge Christian Coll. v. American's United, 454 U.S. 464, 494 (1982) (Brennan, J., dissenting) (commenting how the Framers "surely intended" a result, without explaining how); Cent. Hudson Gas & Elec. Corp. v. PSC of N. Y., 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) (describing commercial speech as "the kind of speech that those who drafted the First Amendment had in mind" but refraining from further historical analysis), *with* National League of Cities v. Usery, 426 U.S. 833, 876-77 (1976) (Brennan, J., dissenting) (citing extensively THE FEDERALIST NOS. 45 and 46 to support the adequacy of state protections against government encroachment); Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 466 (1982) (Rehnquist, J.) (interpreting extensively THE FEDERALIST NO. 42 to determine the constitutionality of a uniform bankruptcy law).

217. *See* Gates & Phelps, *supra* note 216, at 257 (1996) (noting inconsistency in rationales); *see also* Raymond, *supra* note 63, at 1242 (noting the way references to totalitarian governments like those depicted by Orwell are used inconsistently and unpredictably by judges in the same circumstances (observing Justice Frankfurter's "understate[ment]" of circumstances where individuals would expect him to draw such an analogy in *Rochin v. California*, 342 U.S. 165 (1952))).

218. While dictionary quoting has become a "fanatical movement," judges use them haphazardly and unpredictably. Nicholas Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Noncontractability and the Proper Incentives*, 44 DUKE L.J. 1133, 1143 (1995); *see also* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1446-47 (1994) ("[T]here has been no apparent pattern to (or discussion of) the Justices' choices of volume or vintage" of dictionary. "Individual judges must make *subjective* decisions about which dictionary . . . to use." (emphasis added)).

Critics point to cases like *Chisom v. Roemer*, 501 U.S. 380 (1991), in which Justice Scalia turned to a dictionary published in 1950 to define the word "representatives" for the purpose of interpreting a

possibly, each of these dilemmas are related to unrecognized biases, the type of which I described above.

For those who argue that emotional factors are not at work in the way judges justify their decisions, the initial burden of proof is on them to prove otherwise.[219] On this note, we should consider the comments of Professor Erwin Chemerinsky, which I will define as the Chemerinsky challenge. After recognizing that the only thing that accurately characterizes the Rehnquist Court is the quest for impartiality in decision-making,[220] Chemerinsky observed the following: Either the Court should reject the quest for neutrality all together as "a rhetorical gloss to explain . . . rulings . . . that the Court favors," or we should accept that "the Court truly seeks neutrality, but lacks a consistent theory and is thus left with an inconsistent method of decision-making."[221] In the next part of this Article, I propose that psychology can meet the demands of the Chemerinsky challenge by demonstrating the possibility of an adequate and consistent method for achieving neutrality.

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statute passed in 1982, ignoring more recent definitions of the word. *See id.* at 410 (Scalia, J., dissenting) ("There is little doubt that the ordinary meaning of 'representatives' does not include judges, see Webster's Second New International Dictionary 2114 (1950)."). These types of misuse suggest that Justices would rather use dictionaries as "'a second robust coordinating device' that permits [them] to decide and dispose easily of technical cases that they . . . find uninteresting as well as to 'reach some methodological consensus, in the face of substantive disagreements.'" Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 278-79 (1998) (citing Frederick Shaver, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV., at 232, 253). While dictionary definitions accordingly provide an "optical illusion" of "certainty—or 'plainness,'" when all that exists may be the "appearance" of these notions, the Court refrains from addressing the threat of inaccuracy. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL. 71, 72 (1994) (citation omitted). *See also* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (refusing to create a method for determining which of two conflicting definitions of the same word in the same dictionary prevailed as the correct meaning).

219. *See* Chemerinsky, *supra* note 197, at 51 (noting the worthlessness of Justices' dedication to neutral principles when they fail to define "what constitutes such principles or how they are to be determined"). For generations, scholars have commented against "sententious admonitions to 'know thyself'" and mere assertions that judges have the ability to reach unbiased decisions. *See* Lasswell, *supra* note 20, at 362; FRANK, *supra* note 4, at 260 (noting "Peter Pan legends of juristic happy hunting ground in a land of legal absolutes"); *see also* Jerome Frank, *Are Judges Human? Part One, The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 42 (1931) (explaining the "fiction" in jurisprudence that "so-called rules were the controlling influences affecting decisions, although *we know perfectly well that what we are saying is not true*"). With assertions of this nature, it seems likely that judges, like all decision-makers, cannot combat the negative effects of behavioral influences until they can observe these influences in action.

220. *See* Chemerinsky, *supra* note 197, at 91 (noting that the Court "sweepingly reject[s] all judicial value imposition," finds "certain types of value judgements are impermissible," and yet "never explain[s] the line between the allowable and the unacceptable"); *see also id.* at 48 (noting that commentators are "hard pressed to find a coherent approach to constitutional decisionmaking" on the Rehnquist court, even in light of their goal of neutrality).

221. *See id.* at 59.

IV. JUDICIAL MINDFULNESS

This section aims to develop the general framework for judicial debiasing by exploring aspects of Professor Ellen Langer's theory of mindfulness. The theory is extremely helpful in clarifying the goals of debiasing and in identifying what debiasing seeks to avoid with respect to two types of cold biases outlined above in Part III.C. Professor Langer's theory developed out of her investigations of the way people limit themselves during the decision-making process.[222] Her research explored the conditions required for overcoming such limitations, distinguishing mindful thinking from mindless thinking by highlighting the importance of "cognitive flexibility,"[223] a condition in which people view "[a] situation or environment from several perspectives," instead of "rushing headlong from questions to answers."[224] Put simply, mindful thinking involves "drawing novel distinctions, examining information from new perspectives, and being sensitive to context,"[225] whereas mindless thinking is characterized by "treat[ing] information as though it were *context-free*—true regardless of circumstances."[226] This theory echoed the concerns of sociological jurisprudes and others, who warned against judges with slot machine minds.[227]

At first glance, it may seem reasonable to assume that judges are engaging in a mindful approach when they analyze facts and apply

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222. *See generally* LANGER, *supra* note 21 (exploring the human process of decision-making).

223. Justin Brown & Ellen Langer, *Mindfulness and Intelligence: A Comparison*, 25 EDUC. PSYCHOLOGIST 305, 314 (1990).

224. Ellen J. Langer, *A Mindful Education*, 28 EDUC. PSYCHOLOGIST 43, 44 (1993).

225. *Id.*

226. LANGER, *supra* note 21, at 3. Mindlessness occurs in three distinct ways. The first form, "entrapment by category," applies when we limit ourselves to interpreting the facts in life in the way we originally encountered them, which is harmful because we do not update our original assumptions. *Id.* at 10. The second form, "automatic behavior," occurs when "we take in and use limited signals from the world around us . . . without letting other signals . . . penetrate as well." *Id.* at 12. Finally, in the third form, "acting from a single perspective," we simply see rules as "inflexible." *Id.* at 6. In each of these cases, the danger is "moving directly from problem to solution" without exploring other viable alternatives. Brown & Langer, *supra* note 223, at 314.

To Langer, the more we force ourselves to follow regimented rules, the greater the chances are that we will miss our marks. In essence, the less certain we are about an issue, the more we will have an opportunity to recognize viable alternatives. So, it is ultimately the illusion of control and order that can hurt, rather than help, our interpretations. Langer explored mindlessness in a number of studies, during which she found that mindless thought can reduce an individual's performance by more than half of his potential. *See generally* Benzion Chanowitz & Ellen J. Langer, *Premature Cognitive Commitment*, 41 J. PERSONALITY & SOC. PSYCHOL. 1051 (1981) (measuring the performance trends in research subjects who believed they had a debilitating disease, as opposed to others who were provided with information leading them to doubt the accuracy of the estimate).

227. Hutcheson, *supra* note 4, at 275.

calculated tests to weigh them. After all, judges apparently have a variety of resources with which to distinguish and interpret facts, each of which seemingly counts as one of Langer's requisite diverse perspectives.[228] But we must take Langer's theory a step further. That is, we must look not only at the way judges distinguish and interpret facts, but also at the way judges select analytical systems that necessarily limit the use of particular analyses (*e.g.*, how judges decide which constitutional theories to apply in specific cases). This last distinction raises an entirely different issue.

While it is no news that lacking theoretical options poses the greatest danger to anyone applying a theory, as the *WBK* rationale emphasizes,[229] Langer offers a practical solution to the problem based on her research of people's discriminatory beliefs. Langer's work suggests that people's levels of prejudice drop when they "increase rather than decrease the number of distinctions" they establish about "the relative importance of any particular difference."[230] This finding highlights the benefits of creating new categories of understanding. It also expands on the notion of healthy indeterminacy, under which "[f]lexibility is needed to permit experimentation with and investigation of alternative normative structures, to assure fairness, and to promote other substantive values in situations not anticipated or fully appreciated in advance."[231]

Langer's findings stress that informed decision-making is not automatic. Since one must challenge a theory or mental process that formerly defined the limits of a given realization, there is some illusion of risk.[232] Nevertheless, the reward for taking the first bold step is

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228. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73-75 (1990) (describing a virtual "grab bag" of resources judges use to attribute meaning, including: "introspection, "common sense," and "memory"); *but cf.* Lawson, *supra* note 39, at 412 (questioning whether theories like Originalism can solve these problems since they still do not codify "*what materials count* towards establishing a provision's original meaning," "*how much* the various materials ought to count[,]" or clarify matters of "*application*" (*i.e.*, how much the actual materials reflect history).

229. *See supra* notes 39 and 42 and accompanying text (describing the danger of inflexibility in judicial interpretation).

230. Ellen Langer et al., *Decreasing Prejudice by Increasing Discrimination*, 49 J. PERSONALITY & SOC. PSYCHOL. 113, 113 (1985) (reporting the results of various tests involving studies of disabled individuals and questions intended to provoke various levels of mindful thought). Here, whereas research subjects first categorized handicapped persons as generally disabled, after learning to make calculated distinctions, the same subjects were more likely to label the same person as a "person who cannot do *X*." *Id.* at 114.

231. Kress, *supra* note 29, at 294.

232. *See* MICHAEL BASSECHES, DIALECTICAL THINKING AND ADULT DEVELOPMENT 29 (1984) (discussing the dangers of self-questioning but noting the benefits of a more accurate thought process). Basseches particularly notes that "[i]n questioning these boundaries, we may be questioning precisely those points of reference which provide us with a sense of intellectual stability and coherence about our world." *Id. But cf. id.* at 30 ("The dialectical analysis is more likely to allow one to experience [such] pain as loss and

greater consistency and reliability in the final product of the analysis. In other words, the more a person admits areas of uncertainty, the more he will "create[] the freedom to discover meaning where experts choose to see only random noise."[233]

Langer used the common experience of starting a car each morning to illustrate these benefits. While there is "very little choice involved" with turning the key in an ignition each morning, "the degree of choice increases" whenever your car will not start.[234] In essence, by finding yourself in a situation that calls into doubt your initial assumption, you as the driver, must become more aware of factors that you would not have originally considered.[235] You might even decide to look under the hood, only to find that other dangerous conditions exist besides the fact that your battery is low. Seemingly, the same is true of the judicial decision-making process.

With Langer's theory in mind, if judges were truly confident that they could select the right method of constitutional interpretation, it follows that they would explain the merit of selecting a particular constitutional theory in the same painstaking detail with which they describe factual evaluations under those very theoretical systems. Yet judges rarely, if ever, write opinions in this way. Instead of defining each of the factors needed for an appropriate analysis (including defining the appropriateness of the theory and its limitations in the case-specific context),[236] most judges apply an interpretive theory as if the theory speaks for itself.[237] Subsequently, if judges are simply searching for ways

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to mourn the loss. At the same time, the pain of loss may be counterbalanced by an emotionally positive intellectual awareness of (a) order in the developmental process, (b) new discovery, and (c) the opening of new possibilities.").

233. Brown & Langer, *supra* note 223, at 324.

234. *Id.*

235. Langer supports this proposition by citing the discovery of alternative uses for the drug Monoxidil, which began as a product to lower blood pressure, and an agricultural machine that initially destroyed crops with its icy foam byproduct. In both cases, the alternative uses (*i.e.*, using the crop machine as a snowmaker and Monoxidil as a hair growth stimulant) "occurred because the discoverers recognized that their unsuccessful attempts to resolve problems could be viewed from other perspectives." Brown & Langer, *supra* note 223, at 314.

236. *See* Lawson, *supra* note 39, at 412 (describing necessary factors for justifying use of a constitutional theory like Originalism).

237. Justice Walter Schaefer stressed that judges should articulate the bases for their decisions to increase the legitimacy. *See generally* Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966) (suggesting that judges explicitly state reasoning for decisions individually rather than in a unified manner). And, while it seems that Justices like Antonin Scalia provide detailed analyses of their methodological processes, his actual judicial opinions reveal blatant contradictions. *See* Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) (noting specific types of documents he believes to "display how the text of the Constitution was originally understood"); *but cf. supra* note 218 and accompanying text (discussing Justice Scalia's inaccurate reliance

to achieve predetermined outcomes and conceal their motives for arriving at a particular solution, their decision-making processes are more likely to be susceptible to bias.[238] Langer implies that judges should articulate to themselves the reasons for selecting a particular theory and then employ an objective procedure to address mindless impulses. The following section provides a method for achieving mindfulness and address the conditions that are necessary to achieve mindful adjudication.

The Elements of Judicial Mindfulness

Because the goal of mindfulness does not explain how to achieve its objectives, we must distinguish the conditions required by Langer's theory. Langer's theory presupposes that judges not only have a method to determine how their own beliefs influence analyses of facts in a particular case, but also whether these beliefs influence selection of a particular theory of interpretation.[239] The concept of judicial mindfulness, as opposed to mindfulness in general, involves applying two steps.[240] First, judges need to determine the magnitude and direction of their own bias: this essentially requires identification of the ways that they are influenced by factors related to the cases they hear. In the case of interpreting the Constitution, judges must thus know what the Constitution means to them, as viewed through the lens of their past experiences.[241] They can accomplish this goal by applying the

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on a weak dictionary as a source of meaning). Seemingly, in permitting interpreters to consult Justices' external materials regarding the decision-making process, supporters of this approach would need an additional method of interpretation for interpreting each Justice's interpretative theory of each method of constitutional interpretation.

238. Determining which theories to use in their analyses, judges are more vigilant rather than mindful. To Langer, vigilance represents a condition in which "one has to have a particular stimulus in mind, an expectation of what the stimulus is rather than what it could be." Langer, *supra* note 224, at 44. Consequently, the risk judges run is "pay[ing] attention to something[,] [while] at the same time, something else may go unnoticed." *Id.*

239. Langer's theory is thus the psychological translation of Professor Chemerinsky's objective in challenging the Court. Let us recall his challenge, which demands a consistent theory demonstrating self-awareness. The general notion of mindfulness achieves this objective by increasing the distinctions that individuals make about their experiences. Therefore, by showing how to achieve mindfulness in the judicial realm, we simultaneously show that it is possible to achieve awareness of biases in reaching judicial opinions, thus increasing our likelihood of selecting a correct model of constitutional interpretation.

240. That is, assuming that judges have alerted themselves to the manifestations of mindlessness (entrapment by category or automatic behavior), as evident in analyses of their opinions (perhaps after locating ornamental quotations rising above the level of decoration).

241. While the trend among judges may be to ignore instances in which personal issues arise in the decision-making process, at least some have been willing to explore the effects of their personality types on their interpersonal relations and general attitudes. A growing number of judges have experimented with the Meyers-Briggs Type Indicator (MBTI), a forced-choice test designed to evaluate a subject's preferences

psychological theory called negative practice, a method for discovering subconscious influences by consciously engaging in an activity that is the opposite of one's initial inclinations (*e.g.*, reading the Constitution in a totally subjective manner). Second, with knowledge of their personality preferences and subconscious constitutional influences, judges should engage in what psychologists call transitional thinking to adjust for unwanted responses in decision-making; that is, they must begin to ask themselves directed questions that move beyond the limitations of their own belief systems. Each of these steps is described below in detail.

A. Gauging Subconscious Constitutional Influences Using Negative Practice

A necessary condition for self-modification is awareness about unconscious behavioral influences, an object many constitutional scholars fear judges will never attain.[242] In America's psychology wards, however, clinicians turn to a number of methods to achieve this goal. The theory of negative practice emerged from the overarching theory of satiation, which dictates, *inter alia*, that patients can extinguish unwanted habits by overindulging in them.[243] While monitoring the process, psychoanalysts observed how "troublesome symptoms—including obsessive-compulsive ones—often disappear when the client intentionally engages in them rather than fights ineffectually against

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toward certain behaviors. For a general overview of the MBTI, see generally MOST EXCELLENT DIFFERENCES: ESSAYS ON USING TYPE THEORY IN THE COMPOSITION CLASSROOM (Thomas C. Thompson ed., 1996) (explaining the origin and operation of the MBTI).

For an overview of the MBTI's effectiveness in helping judges, see John W. Kennedy, Jr., *Personality Type and Judicial Decision Making*, 37 JUDGES' J. 4, 9 (1998) ("If judges are tuned into their own personality type . . . they can minimize the extent to which their own biases affect their evaluation of . . . [a] case."). Judge Homer Thompson also experienced similar success in his training of fellow judges. *See* Larry Richard, *Law Practice; How Your Personality Affects Your Practice*, 79 A.B.A.J. 74, July 1993, at 76 (noting Judge Homer Thompson's comment: "I observed that they [several hundred judges to whom he administered the MBTI] found it tremendously valuable in better understanding themselves, their associates and the public they serve"). Judge Kennedy even warns that judges are "unable to guard against the type of biases that influence their decisions" if they are "unaware of typological differences." Kennedy, *supra*, at 9. While these words of praise suggest that the MBTI might solve all of a judge's problems, the test has a number of limitations, the foremost of which is the fact that it cannot predict how a judge would approach a given case. For general criticisms of the MBTI, see generally M.H. Sam Jacobson, *Themes in Academic Support for Law Schools: Using the Meyers-Briggs Type Indicator to Assess Learning Style: Type or Stereotype*, 33 WILLAMETTE L. REV. 261 (1997) (doubting the MBTI and supporting this sentiment with various studies).

242. *See* Idleman, *supra* note 12, at 1321 (quoting Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 989-90 (1993) (arguing the impossibility of developing an adequate psychological model because "neither full self-awareness nor full disclosure is possible").

243. *See generally* ARNOLD A. LAZARUS, BEHAVIOR THERAPY AND BEYOND (1971) (introducing the concept of paradoxical intention to counter patients' obsessive fears by intentionally inflating them).

them."[244] Negative practice, as a subset of satiation, helps patients explore the sources of their compulsions by "deliberately . . . performing [any unwanted] behavior while consciously attending to it."[245] For the purposes of this Article, negative practice is more promising than general satiation theory because it places the subject in control of realizing solutions to her own problem, which is exactly what judges need to do. A pioneer in the field explained why negative practice can benefit judges:

> The value of . . . negative practice is that of increased insight. The student is assigned deliberately to create situations in which the former insecurities and inadequate behavior would tend to be present. The old inadequate reactions, however, are not to be used, but, instead, the appropriate behavior is to be carried out. . . . [D]eliberate entrance into insecure situations not only teaches new reactions, but also gets rid of a great deal of the fear associated with them.[246]

While the theory might be applied by judges in a number of ways, the proposed modification specifically addresses implementation of the theory in the area of constitutional interpretation.

In the proposed modification of negative practice, a judge should begin the awareness process with two essentials: a copy of the Constitution and some scratch paper. He should then analyze the textual provisions of the Amendments that have created the most difficulty for judges, writing exactly how each phrase applies to his own collective life experiences, in the absence of case-specific factual

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244. JOHN L. SHELTON & MARK ACKERMAN, HOMEWORK IN COUNSELING AND PSYCHOTHERAPY: EXAMPLES OF SYSTEMATIC ASSIGNMENTS FOR THERAPEUTIC USE BY MENTAL HEALTH PROFESSIONALS 149 (1974). In practice, therapists "often assign intentional obsession or compulsion times" for compulsive worriers to "obsess thoroughly. . . . [and] [w]rite a one page description of each worry-time" for discussion during treatment. *Id.* at 149-50. The researchers note that "[c]lients often do the homework once or twice, then begin to forget to do so—at the same time recording fewer (and sometimes no) obsessions or compulsions per day on their data sheet." *Id.* at 150.

245. DAVID L. WATSON & RONALD G. THARP, SELF-DIRECTED BEHAVIOR: SELF-MODIFICATION FOR PERSONAL ADJUSTMENT 89 (6th ed. 1993). In one clinical case: "Garrett, who habitually cracked his knuckles, spent five minutes each morning and five minutes each evening [engaging in the behavior] while paying close attention to every aspect of the behavior. This helped him learn to pay attention to the target behavior." *Id.* at 90. Negative practice is useful to judges in the same way it was useful for Garrett: It can make them aware of their behavior when interpreting the Constitution in a biased way. *See also* FREDRIC M. LEVINE & EVELYN SANDEEN, CONCEPTUALIZATION IN PSYCHOTHERAPY: THE MODELS APPROACH 80-81 (1985) (describing successful applications of the theory in up to ninety percent of the cases where it was implemented and exploring the diverse settings where the theory was used, including inhibiting nervous tics and stuttering); *cf.* G.K. YACORZYNSKI, MEDICAL PSYCHOLOGY 113 (1951) (explaining the value of the process in a strictly physiological sense).

246. C. VAN RIPER, SPEECH CORRECTION: PRINCIPLES AND METHODS 85 (1939).

circumstances.[247] With little more, this process should help begin to reveal to judges what their own inclinations are regarding the Constitution. While this process may seem almost trivial, we must ask ourselves whether judges actually do engage in this kind of inquiry or whether any judge would otherwise have reason to engage in it.[248] Ultimately then, regardless of its simplicity, the proposed method allows judges to develop a baseline for analyzing the intensity of their constitutional inclinations. The process might resemble a method proposed by one judge in an effort to address levels of confidence in one's decision, "Use a mental meter that establishes a blue zone between 30% to 50% confidence, a green zone from 50% to 90%, and a red zone from 90% to 100%."[249] Judges could rate the intensity of their dispositions toward or against certain provisions of the Constitution in a similar way. This model, however still does not explain what judges can do to discount these influences while making decisions. Part IV.B, below, explores this notion.

B. Transcending Self-Imposed Belief Systems Through Transitional Thinking

1. The Dialectical Schemata

Assuming that the process of interpreting the Constitution in a personal way (negative practice) helps some judges become aware of (a) their reliance upon past experiences to evaluate new facts and/or (b) their inclinations to view a certain constitutional phrase in a narrow-minded manner, these judges must still determine whether they bypassed viable alternatives for resolving issues in the case. In essence, this next logical step in the evaluation process requires a judge to move beyond the limits of the *legal* decision-making process[250] to transitional thought (*i.e.*, "distinguishing between the actual ideas or answers [you]

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247. In fact, she should go through great lengths to support her conclusions as clearly as possible, perhaps to the point where she uses specific emotional experiences to justify her conclusion, as if applying a legal precedent.

248. If anything, the multiple incentives compelling judges to deny behavioral influences have probably prevented the application of negative practice—that is, until now.

249. STEPHEN D. HILL, DECISIONS: THE SYSTEMATIC APPROACH TO MAKING COMPLEX DECISIONS FOR BUSY TRIAL JUDGES 24 (1999).

250. *See* Emily Souvaine et al., *Life After Formal Operations: Implications for a Psychology of the Self*, *in* HIGHER STATES OF HUMAN DEVELOPMENT 229, 229 (Charles N. Alexander & Ellen J. Langer eds., 1990) (noting that "[t]he very nature of being subject to a system prevents the individual from reflecting upon the limits of that system"). Also note Langer's observation that "the freedom to define [a] process—outside of which the outcome has no inherent meaning or value—may be more significant than achieving that outcome." Brown & Langer, *supra* note 223, at 327.

produce[] and the reasoning or process by which [you] arrive[] at these ideas or products").[251] This thinking involves, *inter alia*, the ability (1) "to reflect on one's basic premises and pursue evidence of their limitations," (2) "to be somehow qualitatively less defensive in relation to others," and (3) "to recognize and [temporarily] tolerate paradox and contradiction."[252]

This kind of transitional thought calls for a dialectical evaluation process similar to the one envisioned by Professor Michael Basseches. For the purpose of this Article, dialectics characterizes thought that occurs in a fluid and moving way.[253] Because the object of dialectical thinking is "actively oriented toward shifting categories of analysis and creating more inclusive categories,"[254] transitional thinking encompasses it, and judges can use the criteria that characterize a dialectical system to determine if they have achieved a transitional state. The concept of the dialectic relates back to mindfulness because Langer actually envisions two simultaneous systems in her theory. First, a person can "simply resolv[e] [a] crisis in a mindful manner."[255] Second, and of greater significance, he can use the process of being mindful as "an opportunity for [further] innovation."[256] Langer terms this innovation "second-order mindfulness,"[257] which ultimately involves fixing the cognitive system that created the problem, rather than only the problem itself, the objective of both transitional and dialectical thinking.

In 1984, Professor Michael Basseches introduced the Dialectical Schemata (DS) Framework, an analytical tool that identifies nine discrete attributes of cognitive functioning that help a person achieve systems-transcending thought.[258] Each of these nine schemata addresses

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251. Souvaine et al., *supra* note 250, at 245.

252. *Id.* at 237.

253. *See* BASSECHES, *supra* note 232, at 55 ("Dialectical thinking is thinking which looks for and recognizes instances of dialectic—developmental transformation occurring via constitutive and interactive relationships."); *id.* at 24 ("Orienting toward dialectic leads the thinker to describe changes as dialectical movement (*i.e.*, as movement that is developmental movement through forms occurring via constitutive and interactive relationships) and to describe relationships as dialectical relationships (*i.e.*, as relationships that are constitutive, interactive, and that lead to or involve developmental transformation)"). Importantly, however, the dialectical process does not "preclude a formal analyses," thus condemning judges to replace traditional methods of decision-making. *Id.* at 27.

254. *Id.* at 29 (noting additionally that "formal analyses which establish categories of analysis from the thinker's own perspectives tend to remain relatively impermeable" in contrast).

255. LANGER, *supra* note 21, at 198.

256. *Id.*

257. *Id.* at 199.

258. While, in total, Professor Basseches identified twenty-four methods of thinking Dialectically, he highlighted nine particular Meta-formal approaches within the larger group. This section focuses on Meta-formal principles for the following reason: Not only do they "most clearly reflect[] the meta-systematic level of . . . dialectical thinking," they "enable the thinker to describe (a) limits of stability of forms; (b)

the multiple ways we can limit ourselves by failing to recognize transitions, and especially inconsistencies and incompatibilities, between different types of thought structures. For example, one of Basseches's research subjects observed the way people often point out contradictions in theories to show why the theories inevitably fail. The subject noted how this type of criticism is less optimal than using a different method to critique the theory because relying on a flawed theory leaves the potential for further contradiction. Accordingly, to achieve more consistent results in one's criticisms of a contradictory theory, the critic, after recognizing the flaw, should instead synthesize the two opposing views and find a more "inclusive" way to represent the contradiction.[259] Basseches denotes this activity as "Understanding the Resolution of Disequilibrium or Contradiction in Terms of a Notion of Transformation in Developmental Direction"[260] (hereinafter Disequilibrium Schema).

The rest of this subsection examines portions of Professor Basseches's interviews with research subjects. To test what he calls the Disequilbrium Schema, Basseches asked a research subject to share his views about philosophical paradoxes, like the one that the Greek mathematician Zeno had identified, *circa* 400 B.C. Zeno's paradoxical theory against movement can best be described by the Race Course:

> Starting at point *S* a runner cannot reach the goal, *G*, except by traversing successive "halves" of the distance, that is, subintervals of *SG*, each of them *SG/2n* (where $n = 1, 2, 3, \ldots$). Thus, if *M* is the midpoint of *SG*, he must first traverse *SM*; if *N* is the midpoint of *MG*, he must next traverse *MN*; and so forth. Let us speak of *SM*, *MN*, *NO*, . . . as *the Z-intervals* and of traversing any of them as *making a Z-run*. The argument then comes to this:
> [*F*1] To reach *G* the runner must traverse all *Z*- intervals (make all the *Z*-runs).
> [*F*2] It is impossible to traverse infinitely many intervals (make infinitely many *Z*-runs).
> [*F*3] Therefore, the runner cannot reach *G*.
> But why would Zeno assert [*F*2]? Probably because he made the following further assumption:
> [*F*4] The completion of an infinite sequence of acts in a finite time interval is logically impossible.

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relationships among forms; (c) movements from one form to another (transformation); and (d) relationships of forms to the process of form-construction or organization." BASSECHES, *supra* note 232, at 76. While this Article highlights three of these schemata, each of the nine offers a significant tool with which judges can enhance their decision-making. *See id.* at 74 tbl.1. (labeling schemata).

259. *Id.* at 126.

260. *Id.*

This assumption has enormous plausibility.[261]

After discussing philosophical theories, the research subject in this particular inquiry made the following comments about Zeno's Paradox, which satisfied the criteria of the Disequilibrium Schema described above:

> [SUBJECT]: [T]ake a classic paradox like [Z]eno's paradox, you know, where you have the paradoxical conclusion that there is no motion . . . . [T]he classic skeptic's response is to walk across the room. Now, in one sense, yeah, that person is right, that does refute the paradox, I mean, shows you that the conclusion is false. On the other hand, the paradox seemed to arise by rather straightforward reasoning, involving our usual conceptions of space and time and motion; and so, to me, the *deep response to this paradox, you know, is then to articulate the concepts of space, time and motion* and *to define the logic in such a way that the paradoxes can no longer be drawn—that is, the contradiction can no longer be drawn—from them*[262]. . . . So, in other words, there was a tension between the facts of the real world namely, that there is motion—and the way the Greek philosophers were describing that motion. The two won't go together because when you put them together you did get a contradiction, right? So then the theoretical problem, you know, which forced Aristotle ultimately to formulate a highly sophisticated physical theory, was to find a way of getting around this.
> [BASSECHES]: SO WOULD YOU SAY THAT THE GUY WHO WALKED AROUND THE ROOM—THAT THAT SOLUTION WAS INADEQUATE?
> [SUBJECT]: Yeah, that's sort of failing to, or refusing to accept . . . to face a certain reality because that same skeptic . . . I mean, he is right, there is motion, but *he is going to go on using language which generates the paradox, rather than trying to do better and get deeper into the world and our way of expressing the world, in order to avoid that contradiction.*[263]

Basseches emphasized certain sentences with italics because they represent the Disequilibrium Schema in two ways. First, they recognize a contradiction between the "skeptic's response" and the "deep response."[264] Second, they "describ[e] the deep response as a movement to a more inclusive (more developed) form which integrates a language for describing the physical world, a logic, *and the observed facts of motion*: [as evident in the subject's prescription] to articulate the concepts of space, time, and motion and to define the logic in such a way that the

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261. Gregory Vlastos, *Zeno of Elea*, *in* 7 THE ENCYCLOPEDIA OF PHILOSOPHY 369, 372 (Paul Edwards ed., 1967).

262. Basseches uses italics in a passage to indicate instances of dialectical thinking.

263. BASSECHES, *supra* note 232, at 127.

264. *Id.*

paradoxes can no longer be drawn."[265] As demonstrated below, these observations also apply to the legal analyses employed by judges. [266]

To Professor Basseches, two additional schemata, besides the Disequilibrium Schema, relate particularly to the task of judicial decision-making.[267] Judges' foremost concern should be to display the analytical characteristics of the schema titled "Criticism of Formalism Based on the Interdependence of Form and Content" (hereinafter Criticism of Formalism Schema),[268] which also relates to the schema known as "Multiplication of Perspectives as a Concreteness-Preserving Approach to Inclusiveness" (hereinafter Multiplication Schema).[269] The examples cited below illuminate these two Meta-Formal tools.

In the first case, the Criticism of Formalism Schema deals with the "effort to describe relationships and movements of particulars as governed by rules or laws which can be stated at a general or universal level, with no reference to the content of the particulars."[270] In the legal realm, we encounter this phenomenon whenever a judge identifies formal rights, such as statutory rights, requiring the application of standardized analytical procedures.[271] An example of this might include applying a subsection of the Uniform Commercial Code and working through each provision, only to arrive at some preordained point. This type of formality, however, is susceptible to criticism when the legal questions deal not with a clearly defined statute, but rather with a

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265. *Id.* at 128.

266. *See infra* Part IV.B.3.A (describing Justice Scalia's analysis of the passage of time in *Printz*).

267. *See* Interview with Michael Basseches (Apr. 3, 2001).

268. BASSECHES, *supra* note 232, at 142.

269. *Id.* at 146.

270. *Id.* at 142. Basseches further notes how: "In the sphere of logic, one finds statements such as 'If *p* is true, then *not-p* is false.' This statement is meant to apply to any proposition which may be substituted for *p*, regardless of its content." *Id. But cf.* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949) (recognizing that legal reasoning is the kind "in which the classification changes as the classification is made [and] [t]he rules change as the rules are applied."). Professor Levi's description of the "moving classification system" suggests that the legal reasoning process can develop valid classifications even where specifics appear to be absent. *Id.* at 4. What seems indisputable is the increased level of attention that the interpreter must devote to situations where classifications move easily—a requirement upon which Basseches seems to focus his attention with the Criticism of Formalism Schema.

271. According to Basseches, these are "statements of formal rights which cannot be violated and formal procedures which must be followed no matter what one's particular purpose might be." *Id.* at 142. *See also id.* at 142-43 (noting how these outcomes are supported by the following inferences:

> [G]eneral laws and rules (form) govern relationships and movements of particulars (content) which exist separately from the general statements themselves. These pre-existing particulars are considered to confirm (in the case of theories and facts) or conform to (in the case of rules and behaviors) the laws by acting in accordance with them, or to disconfirm or violate them by acting in discordance with them. Formalism appeals to impartiality as justification, claiming either that impartial rules should be obeyed because they are fair, or that theoretical generalizations are justified by the conformity to them of impartially collected facts.).

"theoretical law."[272] For example, in the case of a constitutional principle, such as the prohibition against Congress compelling states to enact a federal scheme,[273] while

> a formalist may claim that [the law's] validity is demonstrated by facts which conform to it [,]. . . if sets of stimulus conditions, response classes, or positive reinforcements are not particulars which exist prior to the law, but are rather defined by the experimenter . . ., there is every reason to believe that another law could be formalized which would apply *equally well* to the same events but which would conceptualize those events using different categories.[274]

To guard against this threat, the transitional thinker must instead adopt an outlook that reflects the Criticism of Formalism—a perspective that envisions form and content as being "interdependent." The legal theorist must recognize her own role in developing the very categories that ultimately comprise the "universal statement" to which she is appealing. In the following excerpt, the subject mindfully comments on an instance in which a music aficionado interpreted a meaning in a composer's work of which the composer was not yet aware:

> [SUBJECT]: I'm saying that if you start off with the notion that there is *a* conceptual framework involved and that a perception of that framework is either closer to or further from being accurate, depending on whether it agrees with the conceptual model, you've got problems. There has to be the interaction between what?—the conceptual, and what?—the perceptual source.[275]

Here, the subject identified a problem that relates to "a single abstract 'conceptual' *form* to which different listeners' perceptions of the composition (substantive content) conform more or less accurately."[276] The subject stressed the need for interdependence by "saying that the way the composer or an analyst conceptualizes the piece should *depend* on what listeners hear and that unanticipated perceptions should be viewed as sources of conceptual enrichment, rather than as inaccuracies. (What listeners hear clearly *depends* on how the piece was

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272. BASSECHES, *supra* note 232, at 143.

273. The Court developed this rule in the recent case of *New York v. United States*, 505 U.S. 144 (1992), where it deemed unconstitutional any attempt by Congress to "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 288 (1981)).

274. BASSECHES, *supra* note 232, at 143. With this observation, Basseches validates the notion that such mindless thinking can potentially keep a person from achieving the better or best answer by confining them to a state of theoretical indeterminacy.

275. *Id.* at 144-45.

276. *Id.* at 145.

conceptualized.)."[277] In a legal sense, judges should make similar distinctions in their analyses by synthesizing alternative theories and expanding them, rather than limiting themselves by endorsing only one of multiple approaches.

In the final instance, the Multiplication Schema complements the Criticism of Formalism in that it "treat[s] a large problem as a *whole* by viewing the whole from several vantage points (either from within or without the whole) at one time."[278] Basseches provides the example of evaluating hospitals in America, an objective that can include each of the following considerations: (1) the quality of "healthcare delivery," (2) the "organizational structure" of the hospital, (3) the historical economic developments of the hospital in relation to America's changing corporate structure, and (4) the experiences of staff members in the hospital.[279] Evidently, by comparing and contrasting these several perspectives, an evaluator will enjoy a more informed decision-making process. Albeit this schema is hardly complex, the challenge becomes acknowledging the one-sidedness of any perspective[280] and balancing it with others to generate more accessible outcomes. The subject who epitomized this schema responded to a question requiring him to distinguish "the nature of education in general,"[281] as opposed to the nature of education at his small private college:

> [BASSECHES]: WELL, I GUESS THE FIRST QUESTION HAS TO DO IN A BROADER SENSE WITH WHAT EDUCATION IS ABOUT, AND THEN THE SECOND . . .
> [SUBJECT]: For the broader sense, I throw up my hands in despair. The only way I could deal with that question would be to disaggregate it. . . . *I would start to try to pick out centers. It seems to me you have to cut that cake up so many different ways and you start talking about the different sections, primary, secondary; the considerations such as ethnicity, social class, parental background; whether it is education geared specifically towards occupational preparation or whether it is more general.* This is all off the top of my head. I think before you can view the question of education in America you have to start making these kinds of discriminations . . . .
> [BASSECHES]: SO YOU DON'T THINK YOU COULD SAY SOMETHING ABOUT WHAT EDUCATION IS ABOUT . . . ?

277. *Id.*

278. BASSECHES, *supra* note 232, at 147.

279. *Id.*

280. *Id.* at 149. This result implicates a three step process: acknowledging (1) "the limits of abstraction," (2) the necessary one-sidedness of perspectives, and (3) " the essential importance of the concrete." *Id.*

281. *Id.* at 149.

> [SUBJECT]: *Not meaningfully. I could certainly say something.* I'm pretty glib. But I don't think I could say anything that either you or I would be very impressed with.[282]

In the excerpt above, the subject's reference to picking out centers indicated analysis of multiple perspectives, while his unwillingness to speculate regarding the unknown indicated a preference for concreteness (evident in the assumption that "the subject is suggesting that what he would say at a general level would not be meaningful because it would be so abstract").[283] The subsections below will apply these three most prevalent schemata, as described above, to the reasoning adopted by the Supreme Court in *Printz v. United States*.[284]

2. *Printz*'s Appeal to the Dialectical Schemata

Because the systems of analysis discussed above work best when judges apply them willingly,[285] it would be deceptive to pretend that any particular judicial opinion demonstrates influenced decision-making or that any particular method of psychological analysis would have caused a different result.[286] However, judicial opinions criticized by scholars for being inconsistent may be valuable as analytical tools to hypothesize how a particular method of self-analysis might have assisted the judges who wrote those opinions.

Printz is useful for demonstrating the hypothetical benefits of the analytical approaches presented because scholars with divergent viewpoints have criticized the numerous inconsistencies present in the opinion.[287] Foremost among these inconsistencies is the seemingly biased interpretation of historical materials considered by the Justices in rendering their decision.[288] Some of these commentaries essentially

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282. BASSECHES, *supra* note 232, at 149-50.

283. *Id.* at 150.

284. 521 U.S. 898 (1997).

285. *See infra* Part V (explaining that judges need to apply theories on their own initiative).

286. *See supra* text accompanying note 191 (expressing doubt into the ability to show what Justices are thinking based solely on analysis of their written opinions).

287. *See* Neil Colman McCabe, *"Our Federalism," Not Theirs: Judicial Comparative Federalism in the U.S.*, 40 S. TEX. L. REV. 541, 553 (1999) (referring to *Printz's* reasoning as "an aberration"); Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. L. REV. 199, 202, 210 (1997) (noting the "ad hoc" nature of the decision for which Justice Scalia is accused of having "sidestepped th[e] obvious issue"); Martin S. Flaherty, *Part II: Are We to be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1284, 1289 (1999) (calling *Printz* "[t]he Court's most far reaching exercise in sovereignty federalism" and "disjointed"); Gene R. Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, at 962, 967 (1999) (describing the *Printz* opinion as a "mischaracterization of history and intention" and "thin").

288. Much of this commentary focused on Justice Scalia's use of THE FEDERALIST, which I will

suggest that the Justices exhibited mindlessness.[289] Professor Evan Caminker's observation that Justice Scalia succumbed to a process-based bias apparently reflects the second type of dangerous bias where interpreters automatically default to a rigid analytical system without comparison.

> [*Printz*] is particularly striking because of the analytical route the Court took to its doctrinal destination; all but the most unreflective formalists should find its reasoning process troubling . . . . My concern here is not with arbitrating this dispute at a high level of abstraction . . . . My concern is rather with maintaining the integrity of each [interpretive] approach, which requires that each is . . . skillfully applied and invoked only when appropriate. Where foundational sources of text, structure, and history provide scant guidance, interpretive formalism can easily become an exercise in undirected choice from among competing conceptions and formulations—choice that seems arbitrary because it appears neither dictated by the underlying sources, nor counseled by articulated purposes, values, or consequences.[290]

The question involved is one of "process." As another author recognizes: "*Printz* could not have been more straightforward about the constitutional sources it relied on for the result it reached."[291] Instead of the sources used, the trouble apparently rests in the mechanics of the Justices' analyses.

Certain of the Justices' commentaries in *Printz* seem ripe for analysis under the Disequilibrium, Criticism of Formalism, and Multiplication Schemata identified by the DS Framework,[292] even though numerous

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explore in depth below. *See infra* Part IV.B.3 (describing the Court's use of THE FEDERALIST). However, the criticisms of *Printz* to which I am referring not only addressed the dangers scholars normally note are inherent in relying on THE FEDERALIST, they went beyond these common complaints. *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 201 (1996) ("Within the language of the Constitution, as it turned out, there was indeterminacy enough to confirm that both Federalists and Antifederalists were right in predicting how tempered or potent a government the Convention had proposed."). Instead, the critics attacked the Justices' specific analytical decisions—attacks which defied the notion that the Federalist Papers are historically indeterminate and noting that the case should have been clear cut. *See* Nichol, *supra* note 287, at 963 ("At bottom, Justice Scalia's federalism analysis constitutes little more than a bow to his constituents, a wave to the crowd. We know we are supposed to support states' rights. Yet we are not told what that means."); McCabe, *supra* note 287, at 554 ("The *Printz* majority's invocation of federalism without a coherent and convincing explanation of the theory raises the question of whether federalism is nothing but a convenient 'device for permitting activist (conservative) judges to impose their policy preferences from the bench.'").

289. *See* discussion *supra* Part III.B (discussing Langer's theory of mindfulness).

290. Caminker, *supra* note 287, at 200-02.

291. Flaherty, *supra* note 287, at 1285.

292. The applicability of the DS Framework is suggested by three factors in the case. First, members of the Court found two extremely different meanings in the same historical materials. *See infra* notes 331

analytical shortcomings in this Supreme Court decision have been raised.[293] While these connections between the analyses adopted by the Justices and the DS Framework may be somewhat tangential, the existence of any linkage to the psychological theory offers essential insight into the value and practical utility of such methods in aiding judges. Rather than criticizing the opinion with sweeping absolutes, such as "right" or "wrong" or "good" or "bad," the use of the examples below questions what the Framework might have suggested to the Justices if they had had the opportunity to consult it.

The *Printz* case involved a determination of whether Congress could require a local law enforcement official to enact an interim federal plan for conducting background checks on purchasers of handguns.[294] Citing the recent case of *New York v. United States*,[295] which outlawed "direct[ ] comp[ulsion of states] to enact or enforce a federal regulatory program,"[296] law enforcement officers from two states attacked the provision on constitutional grounds because of the federal law's

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and 334-341 and accompanying text (describing the Court's battle over Alexander Hamilton's writings in No. 27 of THE FEDERALIST). While this is surely not the first time the Court has viewed the same facts in mysteriously different ways, we shall see that *Printz* displays mindlessness and eligibility for the resolution of bias with the DS framework. *See* WRIGHTSMAN, *supra* note 19, at 52-55 (describing the startling differences between Justice Marshall and Justice Rehnquist's analysis of the very same facts in *Ake v. Oklahoma*, 470 U.S. 68 (1985), and using these diverging interpretations to suggest that judges' "values serve as filters for the way that 'facts' are perceived"). Second, members of the Court applied different analytical frameworks. *See infra* text accompanying notes 331 and 334-341 (comparing analyses); *see* Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1061, 1645 (2000) ("[T]he dueling opinions in *Printz* dramatize the extent to which political theory has replaced text and original understanding by parsing the abstract discussions in *The Federalist* as carefully as a tax opinion might parse the Internal Revenue Code."). Third, Justice Scalia wrote for the majority in a way some might argue defied the very principles for which he is supposed to stand when applying his unique brand of Originalist interpretation. *Compare* Antonin Scalia, *Originalism, The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) (finding repugnant judicial opinions "rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean"), *and* Zoltnick, *supra* note 16, at 1378 (noting how Justice Scalia sees the Constitution as "dead" to eliminate the potential that judges will use it to advance their own values), *with* Nichol, *supra* note 287, at 968 (1999) (noting that Scalia made "no effort . . . to tie the judge-made principle to" either "text" or "particular tradition" and that "[t]he fur would have flown" had Scalia been "asked to write a dissent to his own opinion"); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1521-22 (1998) (using Scalia's own reference to Harold Leventhal, who said "the trick [in using legislative history] is to look over the heads of the crowd and pick out your friends," to cast doubt on his "creat[ion] [of] a constitutional limit on the national government where none appears on the face of the Constitution") (alteration in original).

293. *See supra* notes 287, 288, and 292 (identifying criticisms).

294. *See* Printz v. United States, 521 U.S. 898, 902 (1997) (describing aspects of the Brady Handgun Violence Protection Act that "required the Attorney General to establish a national instant background-check system" by 1998 in an effort to keep guns away from convicted criminals).

295. 505 U.S. 144 (1992).

296. *Id.* at 176.

expansion of their existing local duties.[297] A number of states and political organizations filed supplemental amicus briefs.[298]

The officers argued that the powers Congress had exercised were reserved to the states and that various constitutional provisions prohibited the federal legislature's interference with those powers.[299] The government responded that the burdens imposed by Congress were minimal and represented a tradition of "cooperative federalism" that the founders of the nation sought to promote.[300] These views raised a serious historical question that involved the practices adopted by the first Congress to enact a huge body of federal laws.[301]

Given this apparent respect for cooperation between states and the federal government, two possible historical models potentially resolved this dilemma. On the one hand, the alternative championed by Justice Scalia and the majority held that it was implicit in every historical instance that states still had a choice regarding whether or not to comply with congressional "requests."[302] On the other hand, Justice Stevens

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297. The officers also addressed a number of negative repercussions stemming from the requirement to conduct these investigations. Sheriff Jay Printz, for example, complained that the Act required him to "pull[] deputies off patrol and investigation duties" for time intervals ranging from an hour to several days. Brief for the Petitioner at *3, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1478), *available at* LEXIS 1995 U.S. Briefs 1478. Further administrative burdens included the fact that the officers "ha[d] no mechanism for carrying out the duties assigned by § 922(s) and no budget provision authorizing the expenditures." *Id.* Sheriff Mack identified a closely related dilemma: "To the extent [that Mack] attempted to perform the Federal duties, he incurred civil liability. Under Arizona law, a county official who expends funds in excess of statutory authority is personally liable for their refund." Brief for the Petitioner at *4, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1503), *available at* LEXIS 1995 U.S. Briefs 1503.

298. *See Printz*, 521 U.S. at 901-2 (noting the participation of several states and organizations).

299. Specifically, they argued that (1) Congress had no power to compel state compliance under Article I § 8 of the Constitution, Petitioner's Brief at *9, *Printz* (No. 95-1478), *available at* LEXIS 1995 U.S. Briefs 1478; (2) that the commands violated the Tenth Amendment, Petitioner's Brief at *7, *Printz* (No. 95-1503), *available at* LEXIS 1995 U.S. Briefs 1503; (3) that Article II of the Constitution requires the President to appoint federal officers to faithfully execute federal laws, Petitioner's Brief at *15, *Printz* (No. 95-1478), *available at* LEXIS 1995 U.S. Briefs 1478; and (4) that Congress's requirements were not permissible as an extension of its enumerated powers, such as regulation of commerce. *Id.* at *4.

300. Respondent's Initial Brief at *2, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1478 and 95-1503), *available at* LEXIS, 1995 U.S. Briefs 1478. The government added that the obligations of local officers did not constitute the compulsion outlawed by *New York v. United States*, *id.* at *7, and that the requirements imposed by Congress were less burdensome than more demanding requirements that the Court had upheld in the past. *Id.* at *3 (citing FERC v. Mississippi, 465 U.S. 742 (1982), as upholding a more burdensome demand on states than the interim Brady Act provisions).

301. Notably, the newly formed Congress called on state officials to execute necessary adjudicative tasks, including the transportation of fugitives to their respective overseers, *see* Act of Feb. 12, 1793, Ch. 7 § 1, 1 Stat. 302, the determination of the condition of seafaring vessels, *see* Act of July 20, 1790, ch. 29 § 3, 1 Stat. 132, and the enforcement of federal laws dealing with immigration. *See* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (addressing the maintenance of citizenship applications by states).

302. *See, e.g.*, *Printz*, 521 U.S. at 917 (noting how "President Wilson did not commandeer the services of state officers, but instead requested" their assistance).

supported the government's assertion that the historical materials represented instances of a long tradition of "cooperative federalism,"[303] in which states would clearly benefit from the opportunity to execute the federal laws in a manner sensitive to local concerns,[304] which negated the burdens of complying with the government's orders.

Justice Scalia gained the support of Justices Rehnquist, Kennedy, and Thomas, who resolved the historical question by refuting Justice Stevens's position."[305] Justice O'Connor, who concurred with the *Printz* majority, strayed further from it by advocating that the Tenth Amendment spoke directly to the issue at hand.[306] In the final analysis, the decision expanded *New York*'s holding by outlawing not only compulsion of states to enact a federal regulatory program, but also "conscription" to enforce one temporarily.[307]

3. *Printz*'s Mindless Analyses

That the *Printz* majority and dissent offered contrasting approaches to interpreting historical documents does not, in itself, indicate the existence of mindlessness, even though some scholars have insinuated as much.[308] Nor does this mean that *Printz* was wrongly decided, no matter how mindless the Justices may have appeared in their analyses. Instead, this section highlights how judges in similar positions might use the DS Framework to alert themselves to moments in the decision-making process where they have not fully explored an issue.

The four instances of mindlessness suggested by *Printz* occur in (1) the way Justice Scalia conceived differences in conceptions of legal obligations based on modern meanings, (2) Justice Scalia's and Justice Stevens's reliance on modern secondary sources to explain the meaning

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303. *Id.* at 960 (Stevens, J., dissenting); Respondent's Initial Brief at *2, *Printz* (No. 95-1478), *available at* LEXIS, 1995 U.S. Briefs 1478 ("The challenged provisions of the Brady Act continue the extremely valuable and constitutionally sound tradition of 'cooperative federalism' in the law enforcement arena . . . .").

304. *See generally* Respondent's Initial Brief, *Printz* (No. 95-1478), *available at* LEXIS, 1995 U.S. Briefs 1478 (describing the benefits of "cooperative federalism").

305. *Printz*, 521 U.S. at 917.

306. *See Printz*, 521 U.S. at 936 (O'Connor, J., concurring) ("The Brady Act violates the Tenth Amendment to the extent that it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers.").

307. *See* Caminker, *supra* note 287, at 205 (noting "compulsion"/"conscription" distinction).

308. To one commentator, *Printz* resembled the noted film NIGHT OF THE LIVING DEAD (Columbia TriStar Entertainment 1990), in which constitutional meanings arose from their textual coffins and compelled Justice Scalia to adopt a different analysis. *See* Eskridge, *supra* note 292, at 1516 (observing how "[t]he dead Constitution that Scalia describes in the Tanner Lectures came alive in *Printz* because Scalia cobbled together a constitutional limit from several sources . . . .").

of original historical materials, (3) Justice Scalia's and Justice Souter's deference to the notoriety and popularity of certain Framers as determinants of the Framers' meanings in specific writings, and (4) Justice Scalia's and Justice Stevens's treatment of constitutional questions on which the writings of the Framers' remained silent. It appears that examples one and two defy the Disequilibrium Schema, example three negates the Criticism of Formalism Schema, and example four implicates the Multiplication Schema.

a. Time Distinctions and the Lack Thereof

At one point in *Printz*, Justice Scalia adamantly distinguished the present legal system from the one the Framers knew. The issue arose because Justice Stevens's opinion referenced a 1790 statute that required state courts to "appoint an investigative committee of three persons 'most skillful in maritime affairs'" to determine whether a ship was worthy of travel.[309] Justice Stevens analogized this process to "an expert inquisitorial proceeding, supervised by a judge but otherwise more characteristic of executive activity."[310] Justice Scalia consequently responded to Stevens in a lengthy footnote, pointing out the fact that Stevens impermissibly tried to use modern concepts associated with "contemporary regulatory agencies"[311] to make his point—concepts that clearly did not apply to the time period in question:

> The dissent's assertion that the Act of July 20, 1790 . . . caused state courts to act "like contemporary regulatory agencies" . . . is cleverly true—because contemporary regulatory agencies have been allowed to perform adjudicative ("quasi-judicial") functions. . . . It is foolish, however, to mistake the copy for the original, and to believe that 18th-century courts were imitating agencies, rather than 20th-century agencies imitating courts. The Act's requirement that the court appoint "three persons in the neighbourhood . . . most skillful in maritime affairs" to examine the ship and report on its condition certainly does not change the proceeding into one "supervised by a judge but otherwise more characteristic of executive activity" . . .; *that requirement is not significantly different from the contemporary judicial practice of appointing expert witnesses, see, e.g., Fed. Rule. Evid. 706.*[312]

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309. *Printz*, 521 U.S. at 951 (Stevens, J., dissenting) (citing Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132-33).

310. *Id.* (Stevens, J., dissenting) (rejecting Scalia's observation that these requirements were merely "adjudicative in nature").

311. *Id.* at 950-51 (Stevens, J., dissenting).

312. *Id.* at 908 n.2 (emphasis added).

In response to the passage above, the Disequilibrium criteria would caution against observations similar to Justice Scalia's. After recognizing a contradiction, namely that Justice Stevens misapplied a theory (*i.e.*, that executive duties required of judges in the 1700s were the same as those required in the 1990s), Scalia then attempted to apply his correct interpretation of judges' roles in the 1700s by referencing Rule 706 of the Federal Rules of Evidence. The trouble with his application of the Federal Rules is the fact that they did not come into existence until 1974.[313] Furthermore, until that time, each state had developed its own rules regarding selection of expert witnesses or blue ribbon panels of jurors, which would negate the notion that pre-1974 expert witness provisions have any bearing on the maritime proceedings of 1790.[314] Scalia, much like the traditional skeptic who walked across the room to disprove Zeno's paradox, used the very misgiving he had identified in Stevens's approach (improper time comparisons) to point out the correct mode of interpretation.[315]

The Disequilibrium Schema would counsel one in Justice Scalia's position not to terminate his analysis early on, even if his initial understanding of the premises supporting the Federal Rules analogy were legitimate from an argumentative standpoint. With the aid of this Schema, a decision-maker in Justice Scalia's position should probably complete the analysis only after finding examples that applied at the time period in question so as not to negate his own point.

b. Reliance on Secondary Sources

The historical questions posed in *Printz* required the Justices to consult a great many sources of law developed by the first Congress. But, in a number of instances, Justices quoted modern secondary sources simultaneous with the originals, as if they had the same persuasive weight. In one example, Justice Scalia authoritatively cited a book written in 1948 in a paragraph featuring nothing but statutes from the

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313. *See generally* H.R. REP. NO. 650 (1974) (exploring the historical development of the Federal Rules of Evidence).

314. *See* Mark Lewis & Mark Kitrick, Kumho Tire Co. v. Carmichael: *Blowout From the Overinflation of* Daubert v. Merrell Dow Pharmaceuticals, 31 U. TOL. L. REV. 79, 80 (1999) (observing that "[c]ourts [in the mid-1800s] did not employ a generally agreed upon test for admissibility, causing inconsistency and unpredictability in the admission of expert witness testimony").

315. *See supra* text accompanying notes 263-265 (describing flaws in the skeptic's approach to disproving Zeno's paradox). Even if this statement seems logical for the purpose of demonstrating how Stevens's example is similar to the modern practice of appointing expert witnesses, the form of the argument apparently resembles the same problem observed in Basseches's interview with the subject who referred to Zeno.

1700s.[316] In yet another instance, Justice Stevens introduced a historical theory proposed in a 1993 law review article to explain the meaning of references in the Federalist Papers regarding states' administrative capabilities.[317] These quotations raise a number of concerns about the legitimacy of *Printz*'s outcome. At one point, Justice Stevens attacked Justice Scalia for thinly supporting certain propositions with no more than the "speculation" of a footnote in a law review article.[318]

The trouble with authoritative citations to secondary sources derives partly from considerations about the role of the historian and his potential biases.[319] It is sometimes unavoidable that certain judges will

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316. *See Printz*, 521 U.S. at 909-10 (citing Justice White for the proposition that "Georgia refused to comply with [a] request").

317. *See id.* at 945-46, 946 n.4 (Stevens, J., dissenting) (quoting Beer).

318. In the majority opinion, Justice Scalia doubted the dissenters' theory that requiring certain "discrete ministerial tasks specified by Congress" was permissible and did not amount to compulsion because the requirement would not "diminish the accountability" of state officials. *Id.* at 929-30. Scalia heightened his criticism by claiming that, were this practice to grow, Congress would be able to take credit for all of the states' toil. In this respect "even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Id.* at 930. To support this claim, Scalia cited a footnote in the *Vanderbilt Law Review*. Although he did not quote or paraphrase the citation, the footnote, after citing the District Court's opinion in *Printz* for the proposition that the Brady Act "both absorbs government resources that the states might direct elsewhere and confuses the lines of political accountability," read in its entirety:

> The Brady Act raises at least three accountability issues: (1) the lack of federal funds to support the Act's mandates may force local law enforcement agencies to cut other essential services, leading voters to blame local officials for those cuts; (2) voters opposed to gun control may identify the Act with the local officials charged with administering it, and blame those officials for the statute's enactment; and (3) citizens may blame law enforcement officers for erroneous applications of the Act. Although the Act specifically exempts local officers from civil liability for erroneous determinations, 18 U.S.C. § 922(s)(7), it does not shield them from popular criticism or electoral retaliation for those decisions.

Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 n.65 (1994) (citing Printz v. United States, 854 F. Supp. 1503, 1514-15 (1994)). Justice Stevens attacked the quote as unfounded: "The Court cites no empirical authority to support the proposition, relying entirely on the speculations of a law review article. This concern is vastly overstated." *Printz*, 521 U.S. at 957 n.18 (Stevens, J., dissenting). Seemingly, Scalia would have been better off citing the actual district court opinion, which he might very well have done had he been sensitive to the concerns about secondary sources mentioned in this section.

In another instance, Justice Scalia neglected to provide a pinpoint citation for one of the works he referenced, as if hoping to appease critics wishing to call his bluff with a catchall citation. *See Printz*, 521 U.S. at 923 (referencing generally a 1994 article). Yet, the Justices were not the only ones to fall prey to this practice. *See, e.g.*, Petitioner's Reply Brief at *10, *Printz* (No. 95-1478), *available at* 1996 WL 650918 (citing a 1983 article from the *Washington University Law Quarterly* to drive home the point that "The Framers intended that voluntary cooperation between the States and the federal government would be integral to federalism").

319. Often, scholars note the predominance of confusing language used even after the writing of the Constitution, the clarity of which represented only a temporary respite. *See* PETER M. TIERSMA, LEGAL LANGUAGE 45-46 (1999) (noting how "American legal language came to resemble the statutes of King George III" even though individuals like Thomas Jefferson "seriously considered abolishing the entire

encounter difficulties when interpreting the writings of historians who have interpreted the Framer's meanings from their original writings. This dilemma arises because the historian adds his own interpretation to the finished product.[320] In *Printz*, two specific references highlight the danger of over-reliance on these more modern sources, even more than the examples illustrated above.

First, as Justice Stevens debated with Justice Scalia the issue of whether an early act addressing Selective Service registration equated to a request or compulsion of state officers, he attempted to impeach the portion of the secondary work Scalia cited. Stevens did this by citing seemingly contrary information written by that same author in the same piece.[321] Of key importance, the note to which Stevens referred only spanned a few short pages. Because it is difficult to imagine that Justice Scalia overlooked or intentionally avoided information contrary to his main proposition, some other explanation is necessary to explain why his opinion failed to take this information into account.[322]

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existing system of laws" for the purpose of clarity). The law became so confusing that states like "Massachusetts forbad lawyers from serving in [their] legislature and required that parties in court represent themselves rather than engage an attorney." *Id.* at 43. Given the confusion that existed then, the likelihood that judges now will face a great deal of indeterminacy is no understatement.

Other scholars turn not only to the laws and statutes of earlier years but to the changing role of judges to confirm such doubts. *See* Susanna Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151, 159 (1998) (noting how judges' roles transformed from "romantic" figures "whose judgements were, at once, emanations of [their] own mind[s] [as well as] expressions of the 'rule of law'" and the way the objective of self-analysis gave way to notions of legal realism); *See* DENNIS E. MITHAUG, SELF-REGULATION THEORY: HOW OPTIMAL ADJUSTMENT MAXIMIZES GAIN 32 (1993) (explaining how the 1900s transformed the process of justification: "The relationship between factfinding and theory building reversed positions. Top-down Aristotelian deduction of the past gave way to bottom-up inductive inquiry of the present."). Although the newer inductive system demanded "the development of systematic searches, selections, uses, and reuses of solutions to achieve prescribed goals" it suggests that the prior body of decision-making still rests on the more abstract principles. *Id.* at 40 (emphasis omitted).

Without recommending any specific process, Professor Louis E. Wolcher stated the need for methodological self-consciousness to resolve historical dilemmas. Under his model, the goal would be "neither a privileging of structure over subject, nor subject over structure, but rather a privileging of *the historian's own part in the process of reconstructing the past.*" Louis E. Wolcher, *The Many Meanings of "Wherefore" in Legal History*, 68 WASH. L. REV. 559, 572 (1993) (emphasis added). For Wolcher, this would be the only way to overcome the challenge of determining whether writers' accounts related to the "extralegal life changes," autonomous of legal ones or not. *Id.*

320. Depending upon how many historians the most current author references, this process of removal from the initial interpretation of meaning could continue infinitely. *See* William N. Eskridge, Jr., *Textualism and Original Understanding: Should the Supreme Court Read The Federalist but Not Statutory Legislative History?* 66 GEO. WASH. L. REV. 1301, 1310 (1998) (observing how "sources still being published" about the Framers increase the indeterminacy of their understandings).

321. *See Printz*, 521 U.S. at 953 n.13 (1997) (Stevens, J., dissenting) ("Indeed, the very commentator upon whom the majority relies noted that the 'President *might*, under the act, have issued orders directly to every state officer, and this would have been, for war purposes, a justifiable Congressional grant of all state powers into the President's hands.'" (citation omitted).

322. Here, such conduct raises issues similar to Justice Brennan's use of George Orwell's work in *Riley*.

In a similar vein, Justice Souter attacked Justice Scalia's use of Clinton Rossiter's commentaries about particular Framers. Here, when Scalia commented that Madison's view prevailed over Hamilton's, giving him reason to discount Hamilton's statements, Souter replied citing Rossiter for the proposition that there was no prevailing view among the Framers since the writers of the Federalist Papers had a unified voice:

> This, indeed, should not surprise us, for one of the Court's own authorities rejects the "split personality" notion of Hamilton and Madison as being at odds in The Federalist, in favor of a view of all three Federalist writers as constituting a single personality notable for its integration:
> "*In recent years* it has been popular to describe Publius [the nominal author of The Federalist] as a 'split personality' who spoke through Madison . . . ."[323]

The most striking thing about the paragraph above is not merely the contrast between the Justices' interpretations of the Framers' meanings. More importantly, the highlighted portion of the excerpt above indicates that Justice Souter shifted his analysis to discussions of modern conceptions of the meanings of original documents. In effect, in both examples, the Court began to battle over the historians' views of the original matter, rather than the original matter, which substantially detracted from the Court's interpretive capacity.

It is the Criticism of Formalism Schema that can potentially assist judges facing these kinds of dilemmas. This Schema enables judges to distinguish the ways in which authors' interpretations evidence historical meanings and the author's own meanings simultaneously. Criticism of Formalism provides this capability because it focuses on "assertion[s] of interdependence."[324] By employing this schema, judges could avoid having to rely solely on a scholar's account merely because the author utilized reliable sources in developing the scholarship. Instead, the judge would question how those sources helped to create the depiction that she found compelling when evaluating the facts of the case. This Schema would prompt the judge to consult those very materials to gain a better understanding by implementing the author's rationale, but not the author's verbatim result.

See supra note 204 (suggesting that Brennan omitted the portion of the text he quoted that would have eviscerated the persuasiveness of his claim).

323. *Printz*, 521 U.S. at 973 n.2 (Souter, J., dissenting) (citing CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 58 (1964) (emphasis added)).

324. *See supra* note 263 (describing flaws in the critic's approach).

c. Deference to the Personal Reputations of the Federalists

At two separate points of the *Printz* decision, Justices resorted to a method of interpretation that I call "popularity weighting." This method consists of weighting a Framer's popularity in the same way that one might weight a particular historian's conception of meaning. My concern is that this process detracts from the Justices' mindful analyses. In the first instance, Justice Scalia refuted Justice Souter's assertion that No. 27 of *The Federalist* should be read to uphold the requirement that states comply with the orders of Congress, stating that

> [e]ven if we agreed with JUSTICE SOUTER'S reading of The Federalist No. 27, it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed.... Hamilton was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution."[325]

The preceding analysis invokes a number of questions, the most pressing of which is, what does Hamilton's reputation for being a nationalist have to do with the issue at bar?[326] The answer seems to be nothing, as is evident from Souter's response to this criticism. But the net effect of the squabble resulted in diverting the attention of the Justices from the legal questions involved in the dispute.[327]

Before departing from this example, we should note that two phenomena are occurring here. At the most basic level, Justice Scalia relied upon the assumption that Hamilton was a nationalist, although he elected not to define that term in the context of his opinion.[328] On another level, Scalia's comment that a valid Framer's opinion must reflect a collective view rather than an individual one seriously undermines his own view. This mandate sets the interpretive bar so

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325. *Printz*, 521 U.S. at 915-16 n.9 (citing two more recent historical pieces by Rossiter and Farrand to confirm Hamilton's reputation).

326. As one of *Printz*'s critics put it:

> Justice Scalia's reliance on Clinton Rossiter [1964] and Farrand's *Records of the Federal Convention* [1911] at best supports the commonly known proposition that Hamilton was comparatively far more nationalistic than most of the other Founders, *not* that his views on the commandeering of state executive officials failed to "prevail."

Flaherty, *supra* note 287, at 1292 n.91 (1999) (citation omitted).

327. For commentary regarding Justice Souter's off-topic response, see *infra* note 331 and accompanying text.

328. *See* Nichol, *supra* note 287, at 967 (finding preposterous the assumption that simply because Hamilton was "Nationalistic" one is naturally to "suppose[ ] his views should be dismissed out of hand").

high that it, taken to its natural limit, would deny reliance on any of the materials written by the Federalists and would potentially undercut the Originalism that Justice Scalia holds so near and dear to his heart.[329] In other words, by requiring that multiple voices confirm the content of any opinion in *The Federalist Papers*, Scalia would be condemning that interpretive practice to reliance on multiple voices, each of which represent different political and value-based influences—a pitfall of Originalism that the theory's critics castigate the most emphatically.[330] We must ask ourselves then, if such a precarious interpretation on Scalia's part can reasonably be understood to indicate anything other than a mindless state. Perhaps it does not.

An even more compelling example of the dangers of mindless constitutional interpretation is present in Justice Souter's response to Scalia, which heightened the existing state of mindlessness to an unprecedented level. In a passage clearly intended to rebut Scalia's attacks, Souter focused attention on the words Hamilton used in *The Federalist* No. 27. Souter specifically remarked:

> The Court reads Hamilton's description of state officers' role in carrying out federal law as nothing more than a way of describing the duty of state officials "not to obstruct the operation of federal law," with the consequence that any obstruction is invalid. But I doubt that Hamilton's English was quite as bad as all that. Someone whose virtue consists of not obstructing administration of the law is not described as "incorporated into the operations" of a government or as an "auxiliary" to its law enforcement. One simply cannot escape from Hamilton by reducing his prose to inapposite figures of speech.[331]

Justice Souter's use of the vague term "bad" in combatting the majority's interpretation of Hamilton's grammar, without further explanation of what was actually "bad" about Scalia's interpretation, had little judicial value. Even more troubling was his failure to ground his reasoning in the meanings of the words as Hamilton would have understood them.

The Criticism of Formalism Schema would have addressed both instances of mindlessness. With respect to Scalia's reference to

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329. *See* McCabe, *supra* note 287, at 544 (noting how, in *Printz*, "Scalia's use of The Federalist Papers as proof supports a conclusion opposite to his").

330. *See* Flaherty, *supra* note 287, at 1309 (discussing problems associated with understanding collective intent based on the writings of one Framer).

331. *Printz*, 521 U.S. 898, 972-73 n.1 (1997) (Souter, J., dissenting) (citation omitted) (citing Hamilton's writings and trying to prove invalid Justice Scalia's comparison between "auxiliaries" and "nonobstructors"). *Id.* at 973 n.2.

Alexander Hamilton, the Schema would compel several questions: (1) who measured Hamilton's level of popularity; (2) how did that person conduct such an evaluation; and (3) what types of secondary sources were used to arrive at that conclusion? Justice Scalia's analysis makes no mention of these underlying questions; nevertheless, as a result of his remark, there is real danger that future legal practitioners will cite these references for their authoritative weight whenever Hamilton's nationalistic reputation furthers their cause. Because of the precedential force of Scalia's opinion, future judges will have little incentive to engage in the analysis that Scalia neglected. Likewise, with respect to Souter's pithy remark regarding Hamilton's use of grammar, the Criticism of Formalism Schema would urge him to explore the possible meanings of words and standards of grammar that characterized Hamilton's era before interpreting Hamilton's intentions.

d. Ultra-Narrow Interpretations of Silence

This final subsection will focus on Justice Scalia and Souter's dispute over the meaning of a passage written by Alexander Hamilton in No. 27 of *The Federalist Papers*. Scalia's response, in particular, shows us how he considered only one potential interpretation among a number of competing possibilities.[332] Unlike the Criticism of Formalism Schema,

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332. This is not to say that the case only featured one such instance. In fact, Justice Scalia blithely asserted his interpretation on multiple occasions. *See, e.g.*, Nichol, *supra* note 287, at 967-68 ("Even if the dissenters are wrong that the Framers clearly indicated a belief in the acceptability of the federal use of state actors, that, of course, does not mean, without more, that they clearly rejected the practice."); *id.* at 966-67 (pointing out the following drawbacks regarding Scalia's historical analyses:

> Justice Scalia's response to [a] litany of counter-examples is somewhat out of character for such a forceful advocate. The listed examples, he writes, "do not necessarily" conflict with his proffered constitutional rule; they do not "necessarily imply" or provide "clear support" or "clearly confirm" or "conclusively" determine the "precise issue" before the Court. It is possible, he seems to say, to find at least some ambiguity in the cascade of historical practices offered to contradict his new constitutional rule. (Admittedly, the "possible ambiguity" claim grows tiresome after seven or eight uses.) The reader of the opinion is almost left with the impression that Justice Scalia is playing a game of cat and mouse, ending by saying "you can't force me to admit that history is on your side—sure, it's true, but I'll never admit it.).

See also McCabe, *supra* note 287, at 551 ("In the end, Scalia more or less admitted his approach in *Printz* was somewhat 'formalistic,' although he effectively said 'same to you,' when the dissenters accused him of 'empty formalistic reasoning of the highest order.'") (citation omitted).

Additionally, in one example, Justice Scalia noted that although the power to commandeer was "highly attractive" to Congress, Congress did not use the power as much as it could have. *Printz*, 521 U.S. at 905. Scalia thus concluded: "[I]f . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist." *Id.* One commentator appropriately notes the following: "By the end of this discussion, what began as a potential 'reason to believe' transmogrified into a dispositive rationale. . . ." Flaherty, *supra* note 287, at 1290. In contrast to these simpler examples,

which would have encouraged Scalia to explore the many sources that compromised his initial interpretations of a formalistic theory, the Multiplication Schema is appropriate to critique this instance of interpretation because it would require any judge in the same position to dig deeper than the single perspective embraced by Justice Scalia. The following passage by Hamilton led Scalia and Souter to two completely opposed conclusions:

> It merits particular attention . . . that the laws of the Confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.[333]

To the *Printz* Court, the meaning of the word "magistracy" was the key issue.[334] If the word pertained to all civil servants, including the functionaries of a state's executive branch, then the provision seemingly permitted the action sought by the gun control legislation. If, however, the word applied only to judges, the provision would not necessarily permit the desired compulsion. For Justice Souter, the first view constituted the only viable alternative, as he confirmed: "[I]t is The Federalist that finally determines my position."[335] Grasping tightly onto the sentence referencing "[l]egislatures, [c]ourts, and [m]agistrates," Souter proclaimed it evident that magistrates included more than judges in Hamilton's interpretation.[336]

Justice Scalia adhered to the contrary view that magistrates meant judges only.[337] Furthermore, he attacked Souter's analysis, noting how Hamilton and Justice Souter simply presumed that it "flowe[d] automatically" from the reference to complying with the laws of the Confederacy that state officers are "incorporated" into federal service

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the excerpt featured above provides the clearest indication of the type of pervasive mindlessness that can be avoided with the DS Framework.

333. THE FEDERALIST NO. 27, at 162 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

334. *See* David M. Sprick, *Ex Abundanti Cautela (Out of An Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Constitutional Dilemma Over "Federal" Power*, 27 CAP. U. L. REV. 529, 568-69 (1999) (observing the determinative value of this question to the outcome of the case).

335. *Printz*, 521 U.S. at 971 (Souter, J., dissenting).

336. *Id.* Some say that Souter's distinction here had the effect of "rendering Justice Scalia's opinion indefensible." Sprick, *supra* note 334, at 569.

337. *Printz*, 521 U.S. at 907 (proclaiming that historical sources "establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions").

and made "auxiliary" to the government.[338] In a detailed footnote, Scalia presented an alternative theory showing why the argument based on "automatic" flow was mistaken:

> Both the dissent and JUSTICE SOUTER dispute that the consequences are said to flow automatically. They are wrong. The passage says that (1) federal laws will be supreme, and (2) all state officers will be oathbound to observe those laws, and thus (3) state officers will be "incorporated" and "rendered auxiliary." The reason the progression is automatic is that there is not included between (2) and (3): "(2a) those laws will include laws compelling action by state officers." It is the mere existence of all federal laws that is said to make state officers "incorporated" and "auxiliary."[339]

Justice Souter loudly voiced his discontent with Scalia's characterization of his analysis, attacking, *inter alia*, Scalia's view that state duties "not to obstruct the federal law" were their only obligations in carrying out the laws.[340] He further assaulted the inferences underlying Scalia's model, accusing Scalia of creating the straw man notion of "automatic" flow and then assigning this fabricated conception to Souter and Alexander Hamilton without providing a scintilla of support.[341]

Critics have labeled Scalia's behavior in a number of contrasting ways. To some, Scalia's analysis embodies many positive attributes associated with judicial restraint.[342] To others, Scalia's interpretation evidenced unfounded "conclusive reliance on negative inference."[343] Still more argue that Scalia relied on Hamilton "affirmatively"[344] to establish and support the majority's position, while others suggest that Scalia merely grafted *Printz*'s considerations onto arguments that he had

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338. *Id.* at 912 n.4.

339. *Id* (emphasis omitted).

340. *Id.* at 972-73 n.2. It is said that Souter was not the only Justice to criticize Scalia in this way. *See* Jeffrey Rosen, *Dual Sovereigns*, NEW REPUBLIC, July 28, 1997, at 17 (observing Justice Stevens who "remarked spontaneously that Justice Scalia's opinion reminded him of Justice Douglas's opinion in the Griswold Contraceptives case of 1965, which extrapolated a right to privacy from the Constitution's 'penumbras' and 'emanations'").

341. *See Printz*, 521 U.S. at 972 n.1 ("[N]either Hamilton nor I use the word 'automatically'; consequently, there is no reason on Hamilton's view to infer a state officer's affirmative obligation without a textual indication to that effect.").

342. *See* John F. Manning, *Textualism and Original Understanding: Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1363 (1998) (noting that Scalia's actions were calculated and suggesting that his opinion "consciously seeks to assign *The Federalist* only such weight as its analysis merits"). On this view, Scalia is merely responding to the government and Justice Souter "defensive[ly]." *Id.*

343. Flaherty, *supra* note 287, at 1290.

344. *See* Eskridge, *supra* note 292, at 1520 (noting how "Scalia's opinion . . . affirmatively relied on *The Federalist* to establish" the majority's position).

formerly asserted less successfully in other cases.[345] These varied conclusions suggest an almost infinite number of possibilities for using the lessons from *Printz* to improve judicial decision-making.

Amid the din of confusion, the Multiplication Schema rises to the occasion as a reasoned and instructive evaluative criterion. While Scalia's analysis may have been based on a legitimate study of history and the texts composed by the Framers, critics rightly challenge his one-sidedness in interpreting the requirement that all magistrates be judges and then failing to consider other alternatives. Scalia's decision to embrace a singular theoretical resolution highlights the need for the Multiplication of Perspectives as a Concreteness-Preserving Approach to Inclusiveness.

The greatest benefit of this cognitive approach in the context of the *Printz* decision would have been that reliance on this schema might have rebutted the notion that silence in *The Federalist* No. 27 could only mean one thing: that the idea of state compulsion had to be directly indicated with the word "compulsion." The problems inherent in this analysis will surely resurface whenever the Court adjudicates an issue related to compulsion. The meaning of the original text has demonstrably changed; no longer will *The Federalist* No. 27 stand for the more inclusive concepts that it had prior to *Printz*. Whereas, before the case, Hamilton's commentary might have provided guidance to states about resolving dilemmas in complying with federal mandates, *The Federalist* No. 27 is reduced to a justification why Congress cannot compel state governments to act—a meaning that will be forever intertwined with *Printz*'s precedential value.

Even in light of apparent instances of mindlessness, however, it is hardly fair to claim that *Printz* was wrongly decided.[346] The better observation is that *Printz* left several questions unanswered while it wasted time on mindless banter. While one author concludes that "we are left in the dark as to the broader meaning of *Printz*,"[347] others point to more specific examples of remaining uncertainty about *Printz*'s holding.[348]

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345. *See* Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 737 (1999) (noting that Scalia "sugarcoat[ed]" the separation-of-powers argument "directly from his dissent in *Morrison v. Olson*" in *Printz*).

346. Given a virtual cornucopia of explanations for the majority opinion, how would one prove conclusively the correctness of the ruling?

347. Caminker, *supra* note 287 at 202.

348. *See* Nichol, *supra* note 287, at 961-62 (describing a virtual laundry list of cases in which the federal government may still compel states to serve certain federal functions even in light of *Printz*); McCabe, *supra* note 287, at 550 (noting Scalia's "assumption" that law enforcement agents were "state executive branch officials" and recognizing contrary statutes in Texas, for example, that consider sheriffs

V. JUDICIAL MINDFULNESS IN PRACTICE

Part IV, above, introduced the workings of a judicial self-help process. The tough question now is *how much* help does the model actually provide? The proposed model of judicial mindfulness does not enable a judge to emerge with an understanding of every single behavioral influence that affects him. Nor does the model enable him to travel back in time and know the true meanings of the Framers. Yet, we should still recognize the benefits of the model. If the two methods I propose above—using negative practice and transitional thinking—comply with Langer's general theory, then judges can potentially decrease the bias underlying their decisions by fifty percent, if they are currently operating mindlessly.[349] Even if the model only improved decisional accuracy five percent, the model would still be extremely beneficial for judges since indeterminate law more than likely weights potential theoretical solutions equally.[350]

We can critique the proposed model further by analyzing it with a criterion that characterizes effective self-help methods in general: the ease with which judges can implement the process. If judicial mindfulness withstands this test, the theory will stand as a practical approach to increasing the accuracy of judicial decision-making.

For any self-help model to work, the people who use it must understand it. More importantly, they must also be committed to the process.[351] At one level, it makes sense for judges to know that certain debiasing processes exist. Awareness is naturally the first step.[352] But

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to be members of the judiciary); Caminker, *supra* note 287, at 202 ("[T]he Court left open the possibility that particular constitutional provisions outside of Article I, Section 8 might still authorize congressional commandeering, but the Court provided little guidance for determining when this would be so.").

349. *See* Chanowitz & Langer, *supra* note 226, at 1051 (describing results of *Mindfulness* training).

350. *See supra* notes 39-41 and accompanying text (defining and explaining legal indeterminacy). Also note that judges will be more informed regarding which influences they need to subtract from an analysis, fulfilling Professor Schroeder's call, more than eight decades ago, for a process where judges are "knowing [of] the present action, and the immediate stimulus from without, [so that] as if by a process of subtraction, [they] may uncover the contributing motive from within, which is the product of past experience." Schroeder, *supra* note 190, at 90.

351. *See* CARL E. THORESEN & MICHAEL J. MAHONEY, BEHAVIORAL SELF-CONTROL 9 (1974) ("To exercise self-control the individual must understand what factors influence his actions and how he can alter those factors. . . . [t]his understanding requires that the individual in effect become a sort of personal scientist."); Schroeder, *supra* note 190, at 96 (requiring that judges "habitually check[]" themselves for biases).

352. HILL, *supra* note 249, at 21 ("One method to improve decisions, is simply to make decision makers aware of the nature of limitations of biases of which they may not be aware. By simply becoming informed of innate biases and perception distortions, the decision maker can take the steps to correct them . . . *But awareness alone does not create a system.*") (emphasis added); Cohen, *supra* note 183, at B9 ("The first

without actually attempting the practices regularly, the "knowing-doing" gap will remain an impediment to the attainment of judicial mindfulness.[353] Because judges are overloaded, if not overwhelmed, with a growing docket of cases, they need a simple program that allows for quick implementation, a requirement I call the judicial economy of self-help.[354] Judicial mindfulness passes this test because it comports with the general requirements of effective self-help models.[355] Judges only have to use negative practice once to create a baseline for evaluating their behavioral inclinations regarding the Constitution, for example. Given the simplicity of this first step, the only real challenge becomes achieving transitional thought in relation to problem cases as they arise. To meet this challenge, judges might simply create a self-monitoring chart implementing Professor Basseches's examples from the Dialectical Schemata with the results gained from the exercise interpreting the Constitution in a personal way. Because these requirements are minimal in comparison to clinical self-help programs, which require frequent consultation with mental health professionals, judges should be able to use these tools in their chambers as they review cases.

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hurdle is to get judges to admit they are subject to the same psychological hiccups as everyone else."); *cf.* Jonathan Baron & Rex Brown, *Toward Improved Instruction in Decision Making to Adolescents: A Conceptual Framework and Pilot Program*, *in* TEACHING DECISION MAKING TO ADOLESCENTS 95, 107 (Jonathan Baron & Rex Brown eds., 1991) (recognizing that "simply warning . . . of the existence of a bias does not usually help" those affected by it).

353. In explaining this dilemma, Professors Lowenstein and Thompson point out studies indicating that a large proportion of people have faulty conceptions of the way that thermostats operate. They compare the causes of the problem to classes they have taught in which students of negotiation were still unable to implement the theories they learned immediately following instruction. Jeffrey Lowenstein & Leigh Thompson, *The Challenge of Learning*, NEGOTIATION J., Oct. 2000, at 400, 401, 404. While the advanced students in such negotiation classes surely benefited from the luxury of having directed instruction and feedback from the instructors, the success of the self-awareness methods described in this Article is totally contingent upon the judge himself. *See id.* at 403-405 (describing a number of benefits when the learning process is facilitated in classroom settings and explaining the unpredictable value of these methods even as applied in supervised conditions).

354. *See* MITHAUG, *supra* note 319, at 32 (observing that "problem solvers use the least expensive method to gain the minimal amount of information necessary to decide").

355. *See* MICHAEL J. TANSEY & WALTER F. BURKE, UNDERSTANDING COUNTERTRANSFERENCE FROM PROJECTIVE IDENTIFICATION TO EMPATHY 87 (1989) (noting that productive self-checking processes create frameworks for answering the following questions: "What am I experiencing?", "Why am I feeling this way?", "How did this come about?" or "What purposes might this serve for the [litigants or their counsel] to arouse this experience within me?"); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 58 (1994) (noting that, "[a]t a minimum, judges should mentally list potential biases that may permeate their decision-making process [and] review and add to the list daily.").

VI. CONCLUSION

This Article has shown that two types of cold bias—one involving the judge's past traumatic experiences and the other relating to his interpretation of ambiguous terms or words—can negatively influence judges by causing them to interpret the law in a hasty manner without fully exploring alternative channels of interpretation. Either type of bias can limit the utility of the judge's legal determination to the needs of an ever-changing society. While the bias does not corrupt the legitimacy of the materials upon which the judge relies to achieve his final judgment, the bias impedes the process that the judge implements to interpret such materials. In response to these harmful biases, this Article identified certain methods of self-awareness that psychologists have used to solve similar dilemmas in decision-making in a non-legal context. Although these methods have apparently been neglected by the legal community based on doubts about the utility of psychological approaches in aiding legal analyses, they offer a number of important analytical tools to the American judiciary.

While this Article may be the first to adopt Ellen Langer's concept of mindfulness as a judicial objective, judges should have little difficulty embracing the idea. It promotes many of the standards to which judges are held accountable within their own profession. The greater difficulty comes, however, with adopting psychological methods like Michael Basseches's Dialectical Schemata as a legal approach. The problem arises because, regardless of effectiveness of the DS Framework in pointing out specific analytical problems, the Framework was never intended to critique legal decision-making, specifically—a way of thinking that is distinguishable from all others.

This Article urges the legal academy to experiment more with the notion of transitional thinking as a method for judges to check and address their own biases. With enough experimentation in this field, judges should ultimately use psychologically tested models as checks against their natural thought processes when reaching decisions. The general debiasing framework proposed by Wilson and Brekke provide a foundation upon which new advances in transitional thinking can be built.

While this proposal has certain costs in that it requires legal ethicists to promote the system and adapt it to administrative constraints on the courts, these demands are realistic when compared to expensive anonymous training sessions and the risks related to confused legal outcomes.

The recommendation to experiment further with transitional thinking comes not only because the system helps us identify better approaches

to dealing with hard cases like *Printz v. United States*[356]—approaches that scholars, not to mention the *Printz* Justices themselves, were unable to resolve with traditional analytical methods—but also because judges can implement analyses under the framework without devoting incredible amounts of time and energy to learning and implementing the system. While judicial mindfulness may not be the panacea to improve *all* legal analyses, it offers practical tools that will potentially improve legal decision-making in a number of sensitive analytical areas that limit the judicial role or permit unchecked legal outcomes, such as where the law is indeterminate.

In sum, judicial mindfulness recognizes those judges who have realized the need for greater self-awareness in their decision-making. As one such jurist put it: "'Why do I make the decisions I do?' I make them because I have to. But I can do better."[357]

356. *See* Eskridge, *supra* note 320, at 1309 n.53 (calling *Printz* a "hard constitutional case[ ]"); Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS 138 (2001) (same).

357. HILL, *supra* note 249, at 28.

Implicit Bias Education and Resources
Provided by the Judicial Council's
Center for Judicial Education and Research

Distance Education

From Oscar Grant to Trayvon Martin—A Dialogue about Race, Public Trust, and Confidence in the Justice System (#6942, 2014)
This broadcast focuses on the role that courts may play in reducing racial bias, disparity, and disproportionality in the criminal justice system.

Overcoming Implicit Bias: Guidance for Court Personnel (#6847, 2013)
This broadcast explores how cognitive biases, which sometimes help us process information efficiently, also can lead to pernicious errors in judgment.

Neuroscience and Psychology of Decisionmaking, Part 3: Dismantling and Overriding Bias (#6537, 2010)
This show highlights neuroscientific and psychological evidence that we can dismantle and override bias using specific techniques.

Neuroscience and Psychology of Decisionmaking, Part 2: The Media, the Brain, and the Courtroom (#6508, 2010)
A group of nationally recognized experts discusses exciting emerging research on how the brain reacts when different images are presented.

Neuroscience and Psychology of Decisionmaking, Part 1: A New Way of Learning (#6433, 2010)
In this broadcast, experts will discuss both emerging and well-settled research in neuroscience and social psychology, describing how unconscious processes may affect our decisions.

Fairness and Access Bench Handbook (2010). This handbook covers (1) fairness and its attendant requirements, the appearance of fairness and the avoidance of bias; and (2) access to the courts. http://www2.courtinfo.ca.gov/protem/pubs/Fairness&Access.pdf.

Live, In-Person Courses for Judicial Officers

New Judge Orientation is mandatory for all new judicial officers. The program was redesigned two years ago and is now structured around Judge David Rothman's *Central Principle of Being a Judge* and the related Eight Pillars. In order to uphold the Central Principle - "The basic function of an independent, impartial, and honorable judiciary is to maintain the utmost integrity in decision-making" – means that judges need to be aware of their own biases and maintain a

high degree of self-awareness. The weeklong course includes time to social cognition research as it relates to implicit or unconscious bias. Harvard's online Implicit Association Test (IAT), which measures attitudes and beliefs that individuals may be unwilling or unable to report because it is an implicit attitude that you are not aware of consciously is recommended as a useful tool for learning about subconscious preferences that can negatively impact judicial fairness.

Faculty for New Judge Orientation
Hon. Laura Birkmeyer, San Diego County
Hon. Suzanne Bolanos, San Francisco County
Hon. David Brown, Sacramento County
Hon. David Cunningham, Los Angeles County
Hon. James Dabney, Los Angeles County
Hon. William Dato, San Diego County
Commissioner Cindy Davis, San Diego County
Hon. Laurie Earl, Sacramento County
Hon. Delbert Gee, Alameda County
Hon. Denine Guy, Santa Cruz County
Hon. Maureen Hallahan, San Diego County
Hon. Maria Hernandez, Orange County
Hon. Lon Hurwitz, Orange County
Hon. Tamila Ipema, San Diego County
Hon. Carol Isackson, San Diego County
Hon. Morris Jacobson, Alameda County
Hon. Samanthan Jessner, Los Angeles County
Hon. Curtis Karnow, San Francisco County
Hon. Renee Korn, Los Angeles County
Commissioner Monique Langhorne-Johnson, Napa County
Hon. Edward Lee, Santa Clara County
Hon. Lisa Lench, Los Angeles County
Commissioner Debra Losnick, Los Angeles County
Hon. Clare Maier, Contra Costa County
Hon. Linda Marks, Orange County
Hon. Marla Miller, San Francisco County
Hon. Craig Mitchelle, Los Angeles County
Referee J. O'Mara, Yolo County
Hon. Gilbert Ochoa, San Bernardino County
Hon. David Reed, Yolo County
Hon. Stanford Reichert, San Bernardino County
Commissioner Terrie Roberts, San Diego County
Hon. B. Scott Silverman, Los Angeles County
Hon. Dylan Sullivan, El Dorado County
Hon. Robert Tamietti, Nevada County

Hon. Randa Trapp, San Diego County
Hon. Leo Valentine, San Diego County
Hon. Alice Vilardi, Alameda County
Hon. Dale Wells, Riverside County
Hon. Denise Whitehead, Fresno County
Hon. Zeke Zeidler, Los Angeles County

The Qualifying Ethics core course (mandatory for all judicial officers to participate in the Judicial Council insurance coverage for proceedings before the Commission on Judicial Performance) for the current 3-year training cycle running from 2106-2018 (QE6) is also structured using Rothman's eight pillars of being a judge. The content for the fourth pillar "No Assumptions" focuses on unconscious/implicit bias and cultural awareness. Before the course, participants will be emailed a link to the Implicit Association Test (IAT). The link will also be distributed to participants post-course as a prompt to experience the test a second time. If participants are taking the IAT for the first time, we recommend the "Race IAT" (also referred to as the "Black-White IAT"), but there are tests in many more categories. The IAT will help participants understand the face-to-face discussion of implicit bias and stereotypes.

Faculty for Qualifying Ethics 6 Core Course

Hon. Gregory Wilson Alarcon, Los Angeles County
Hon. James N. Bianco, Los Angeles
Hon. Andrew S. Blum, Lake County
Hon. Shelyna V. Brown, Santa Clara County
Hon. Daniel J. Buckley, Los Angeles County
Hon. Marjorie Laird Carter (Ret.), Orange County
Hon. Kimberly E. Colwell, Alameda County
Hon. Michelle Williams, Los Angeles County
Hon. James P Cramer, Alameda County
Hon. James R. Dabney, Los Angeles County
Hon. Tara M. Desautels, Alameda County
Hon. Harry M. Elias, San Diego County
Hon. Eugenia A. Eyherabide, San Diego County
Hon. Timothy L. Fall, Yolo County
Hon. Robert C. Fracchia, Solano County
Hon. Mary J. Greenwood, Santa Clara County
Hon. Dodie A. Harman, San Luis Obispo County
Mr. Mark Jacobson, Judicial Council of California
Hon. Samantha P. Jessner, Los Angeles County
Hon. Barbara A. Kronlund, San Joaquin County
Hon. Edward Frederick Lee, Santa Clara County
Hon. Renée F. Korn, Los Angeles County
Hon. Lisa B. Lench, Los Angeles County
Hon. Catherine Lyons, San Francisco County

Hon. Ronni B. MacLaren, Alameda County
Hon. Michael M. Markman, Alameda County
Hon. Marc R. Marmaro, Los Angeles County
Hon. Darrell S. Mavis, Los Angeles County
Hon. Terri A. Mockler, Contra Costa County
Hon. Stephen M. Moloney, Los Angeles County
Hon. Anthony J. Mohr, Los Angeles County
Hon. Joanne B. O'Donnell, Los Angeles County
Hon. Lori E. Pegg, Santa Clara County
Hon. Joe T. Perez, Orange County
Hon. Terrie E. Roberts, San Diego County
Hon. John Steven Salazar, Santa Cruz County
Hon. B. Tam Nomoto Schumann (Ret.), Orange County
Hon. Charles A. Smiley III, Alameda County
Hon. Andrew A. Steckler, Alameda County
Hon. Thomas E. Stevens, Alameda County
Hon. Andrew E. Sweet, Marin County
Hon. David P. Warner, San Joaquin County
Hon. Theodore M. Weathers, San Diego County
Hon. Elia Weinbach, Los Angeles County

Implicit Bias and Judicial Decision Making was held at the 2015 Cow County Judges Institute as a plenary session. The course explored how unconscious biases can impact the impartiality and integrity of judicial decisions. The course will help judges become more comfortable in identifying potential biases and provide suggestions and tools for mitigating them.

Faculty for the Implicit Bias and Judicial Making Course

Hon. Nancy Case Shaffer, Sonoma County
Hon. Randa Trapp, San Diego County

Access, Fairness, and Diversity:
Toolkit of Educational Resources for California Courts

Background Information

Goal 1 of the Judicial Branch's Strategic Plan is to ensure access, fairness and diversity in California's courts. This is also a key goal in some local court strategic and operational plans. Ensuring access, fairness and diversity can be a challenging undertaking for any court. The attached "Access, Fairness and Diversity Self-Assessment Toolkit" is designed to help courts: 1) voluntarily look at how they are working to achieve access, fairness and diversity in their court; 2) get ideas about other aspects of access, fairness, and diversity they may want to improve on; and 3) obtain links to existing educational and training resources that may help courts achieve their goals of improving access, fairness and diversity.

The toolkit was largely inspired by concerns that judicial officers, court personnel, and members of the bar raised during a series of focus groups conducted by the Advisory Committee on Providing Access and Fairness (PAF). While the focus groups were designed to solicit information about the experience of women of all races in the court system, the comments collected addressed a variety of intersecting access, fairness and diversity concerns. PAF's working group on Gender Fairness/ Women of Color Focus Groups compiled and reviewed the focus group comments. On a positive note, they found that focus group participants identified areas of access, fairness, and diversity where they felt courts had significantly improved in the last few decades. They also found, however, that participants had serious concerns about lack of education in many areas, including unconscious bias, cultural sensitivity, effective communication with self-represented litigants, and diversity in various jobs throughout the court system. The working group determined that more education was needed, at all levels of the courts, to address these and other access, fairness and diversity concerns.

The Access, Fairness and Diversity Self-Assessment Toolkit addresses many of the concerns raised in the focus group data and provides links to high quality educational materials relevant to many of these concerns. Working group members provided input and feedback on the toolkit. The toolkit will be made available to all courts via the Judicial Resources Network. Judicial Council staff will also use the toolkit as a handout in court-related education.

Toolkit

Introduction: Goal 1 of the Judicial Branch's Strategic Plan is to ensure access, fairness and diversity in California's courts and is also a key goal in some local court strategic plans. Ensuring access, fairness and diversity can, however, be a challenging undertaking for any court. The checklist and links to materials below make it easy for courts to access the information they may need in their ongoing efforts to make California courts accessible and fair to everyone.

This toolkit is intended for Presiding Judges, Court Executive Officers, and a variety of court staff, including those involved in management, information technology, education, and self-help services. This toolkit will be periodically updated to ensure that relevant and timely educational resources are provided that address the changing needs of California's courts.

Access, Fairness, and Diversity Checklist: You can use this checklist to ensure that your court has considered access, fairness and diversity from many angles. Visit the resources page or click on the links throughout the document to access related educational resources.

- ☐ **Court Operations:** [i]
  - ☐ Access, Fairness and Diversity are considered in our court's
    - ☐ Strategic Plan and Operational Plan
    - ☐ Process for adopting new rules, standards or forms
    - ☐ Review of proposed statewide rules, forms and policies[ii]

- ☐ **Education:**
  - ☐ Education Modules - Access, Fairness and Diversity considerations are incorporated into all of our court's education modules.[iii]

  - ☐ Judicial Officers - All court Judicial Officers receive the following trainings
    - ☐ Unconscious Bias[iv]
      (Unconscious Bias (also known as "implicit bias" or "implicit social cognition") is a growing aspect of mind science. Unconscious bias refers to the unconscious attitudes and stereotypes that each of us harbor, causing us to unintentionally form positive and negative associations about other people based on a variety of characteristics including race, gender or gender-identity, sexual orientation, and age. Education in this area should include exploration of what unconscious bias is, how it operates in our subconscious minds, and strategies for counteracting these unconscious biases.)
    - ☐ Cultural Sensitivity[v]
    - ☐ Sexual Harassment Prevention[vi]
    - ☐ Handling Cases with Self-Represented Litigants and Effective Communication with Self-Represented Litigants[vii]

  - ☐ Court Employees - All court employees and security officers receive the following trainings
    - ☐ Unconscious Bias[viii]
    - ☐ Cultural Sensitivity[ix]
    - ☐ Sexual Harassment Prevention[x]

- ☐ Effective Communication with Self-Represented Litigants

- ☐ Court Volunteers - All court volunteers receive the following trainings
  - ☐ Unconscious Bias[xi]
  - ☐ Cultural Sensitivity
  - ☐ Sexual Harassment Prevention
  - ☐ Effective Communication with Self-Represented Litigants

☐ **Access to the Courts for Persons with Disabilities[xii]:**

- ☐ Our court regularly assess its
  - ☐ physical accessibility throughout court facilities
  - ☐ technological accessibility for persons with disabilities (ex. accessibility of phone, website, computer-based court forms)
  - ☐ accessibility for pregnant and/or lactating court-users
  - ☐ restroom accessibility for all persons who may not feel comfortable using a gendered restroom. (This includes people with caregivers or personal attendants who are a different gender from them; parents/caregivers whose children are a different gender from them; people who are transgender/ gender nonconforming)

☐ **Effectively Responding to Public Concerns:**

- ☐ Our court has developed procedures where members of the public can address concerns regarding potential misconduct or mistreatment by a judicial officer[xiii], court staff member, or court security person.
  - ☐ These procedures include mechanisms for effective follow-up on a complaint
  - ☐ Information about these procedures is made available to the public

☐ **Effective Community Collaboration and Outreach:**

- ☐ Legal Services/Legal Aid
  - ☐ Our Court regularly works with Legal Services/Legal Aid to[xiv]:
    - ☐ Discuss issues related to low-income and vulnerable populations of court-users
    - ☐ Collaborate on:
      - ☐ Educational programming and resources
      - ☐ Improving self-help services
      - ☐ Strategies for improving referrals between our court and local legal services provider
      - ☐ Obtaining grants / expanding funding for courts and legal services[xv]

- ☐ Community Organizations
  - ☐ Our court regularly coordinates with or conducts community outreach to Community-Based Organizations[xvi] that address the needs of:

- ☐ Racial or ethnic minority community members
  - ☐ Local Native American tribes (where applicable)[xvii]
- ☐ Persons with disabilities
- ☐ LGBTQ persons
- ☐ Senior Citizens

☐ Our court regularly discusses the following issues with community organizations
- ☐ Improving court processes for self-represented litigants
- ☐ Local strategies for improving racial or ethnic disparities within the court system[xviii]
- ☐ Making the court a welcoming environment for all court-users

☐ Bar Associations

☐ Our court regularly coordinates with or conducts community outreach to
- ☐ Local Bar Associations
- ☐ Specialty Bar Associations (including Minority, Women, and LGBT Bar)[xix]

☐ Our court regularly discusses the following issues with bar associations
- ☐ Improving attorney civility in and out of the courtroom[xx]
- ☐ Developing or improving pro bono assistance programs[xxi]
- ☐ Developing or improving modest-means assistance programs
- ☐ Education about and encouragement of limited scope representation

☐ **Diversity In Our Court -** Our court proactively addresses diversity in

☐ Judicial Officer
- ☐ Assignment[xxii]
- ☐ Outreach[xxiii]

☐ Employee[xxiv]
- ☐ Hiring
- ☐ Recruitment
- ☐ Promotions
- ☐ Mentorship

☐ Volunteer
- ☐ Recruitment
- ☐ Outreach

☐ Court-Appointed Counsel, Mediator Panel, Temporary Judges, and other Court-Connected Service Providers
- ☐ Recruitment
- ☐ Outreach

☐ Civil Grand Jury[xxv]
- ☐ Outreach and Advertisement

- ☐ Maintenance of database on the court's civil grand jury demographics (See California Rule of Court 10.625)
- ☐ Make the court's civil grand jury demographic data accessible and available to the public

Links to Educational Resources

[i] **Court Operations:**
Judicial Branch Strategic Plan:
http://www.courts.ca.gov/documents/Strategic_Plan_text_2006_2016.pdf; and
http://www.courts.ca.gov/4629.htm

[ii] **Statewide Policies:**
Judicial Council Invitation to Comment: http://www.courts.ca.gov/policyadmin-invitationstocomment.htm

Judicial Council Informational Sheet - "How a Proposal Becomes a Rule":
http://www.courts.ca.gov/documents/howprorule.pdf

[iii] **Access, Fairness and Diversity – General Education Modules**
Helping Courts Address Implicit Bias: Resources for Education – National Center for State Courts
http://www.ncsc.org/ibeducation

CJER Fairness and Access Bench Handbook (2010):
http://www2.courtinfo.ca.gov/protem/pubs/Fairness&Access.pdf (See §§ 1.1; 1.5; 2.2; and 3.3)

CJER Judicial and Executive Officer Education – Access, Ethics and Fairness Toolkit:
http://www2.courtinfo.ca.gov/cjer/judicial/1022.htm

CJER Leadership and Court Staff Education – Access, Ethics and Fairness Toolkit::
http://www2.courtinfo.ca.gov/cjer/492.htm

[iv] **Unconscious Bias Educational Resources – General Education and Judicial Officer Resources**
CJER Fairness and Access Bench Handbook (2010):
http://www2.courtinfo.ca.gov/protem/pubs/Fairness&Access.pdf

The Neuroscience and Psychology of Decisionmaking, Part 1: A New Way of Learning (video)
http://www2.courtinfo.ca.gov/cjer/judicial/1011.htm

The Neuroscience and Psychology of Decisionmaking, Part 2: The Media, the Brain, and the Courtroom (video): http://www2.courtinfo.ca.gov/cjer/judicial/1014.htm

The Neuroscience and Psychology of Decisionmaking, Part 3: Dismantling and Overriding Bias (video): http://www2.courtinfo.ca.gov/cjer/judicial/1015.htm

Implicit Association Test - Harvard University-Project Implicit:
https://implicit.harvard.edu/implicit/takeatest.html

Implicit Bias: A Primer for Courts – Professor Jerry Kang – Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts (August 2009). http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf

[v] **Cultural Sensitivity/ Cultural Responsiveness – Judicial Officer Educational Resources**
Tools for Understanding: The Real Meaning of Court Users' Verbal Communication: http://www2.courtinfo.ca.gov/cjer/845.htm

Cultural Competency and Court Culture: http://www2.courtinfo.ca.gov/cjer/944.htm

Becoming a Culturally Competent Court, article (2007): http://www.courts.ca.gov/partners/documents/CultComp.pdf

Considering Cultural Responsiveness in Domestic Violence Cases (2011): http://www2.courtinfo.ca.gov/cjer/judicial/1118.htm

In the Interest of Justice (2001, video on cultural awareness, focusing on aspects of the Southeast Asian Culture. Produced by the Superior Court of San Joaquin County.): http://www2.courtinfo.ca.gov/cjer/judicial/1591.htm

[vi] **Sexual Harassment – Judicial Officer Education**
Preventing and Responding to Sexual Harassment (For Judges and Subordinate Judicial Officers): http://www2.courtinfo.ca.gov/cjer/judicial/1549.htm

Sexual Harassment Prevention (Training materials for courts that wish to conduct their own training in the area of sexual harassment prevention): http://www2.courtinfo.ca.gov/cjer/judicial/1409.htm

[vii] **Communication with Self-Represented Litigants – Judicial Officer Education**
Handling Cases Involving Self-Represented Litigants: A Benchguide for Judicial Officers (2008): http://www2.courtinfo.ca.gov/protem/pubs/self_rep_litigants.pdf

Equal Access Project: Self-Represented Litigant Service Delivery Model Resources Website: http://www.courts.ca.gov/partners/58.htm

Equal Access Project: Self-Help Center Staff Resources: http://www.courts.ca.gov/partners/54.htm

Judicial Communication with Self-Represented Litigants (Video, 2008, designed for Judicial Officers, including Judges Pro Tem): http://www2.courtinfo.ca.gov/cjer/judicial/1210.htm

Communicating with Self-Represented Litigants (Judge Pro-Tem Guided Self-Study Course): http://www2.courtinfo.ca.gov/protem/courses/srl/

Self-Represented Litigants: Special Challenges (Judge Pro-Tem Guided Self-Study Course): http://www2.courtinfo.ca.gov/protem/courses/srl-2/

Effective Communication with Self-Represented Litigants (Video, 2010, designed for Judicial Officers, including Judges Pro Tem): http://www2.courtinfo.ca.gov/cjer/judicial/1364.htm

[viii] **Unconscious Bias Educational Resources – Court Personnel**
Overcoming Implicit Bias: Guidance for Court Personnel
http://www2.courtinfo.ca.gov/cjer/939.htm

The Neuroscience and Psychology of Decisionmaking, Part 1: A New Way of Learning (video): http://www2.courtinfo.ca.gov/cjer/857.htm

The Neuroscience and Psychology of Decisionmaking, Part 2: The Media, the Brain, and the Courtroom (video): http://www2.courtinfo.ca.gov/cjer/863.htm

The Neuroscience and Psychology of Decisionmaking, Part 3: Dismantling and Overriding Bias (video): http://www2.courtinfo.ca.gov/cjer/864.htm

Implicit Association Test - Harvard University-Project Implicit:
https://implicit.harvard.edu/implicit/takeatest.html

[ix] **Cultural Sensitivity / Cultural Responsiveness – Court Personnel Educational Resources**
Making Life Easier for Court Staff: Better Understanding the Variations in Non-Verbal Communication with Court Users: http://www2.courtinfo.ca.gov/cjer/936.htm

[x] **Sexual Harassment – Court Personnel Education**
Sexual Harassment: Understanding Your Rights and Responsibilities (video for court employees in non-supervisory roles): http://www2.courtinfo.ca.gov/cjer/877.htm

[xi] **Unconscious Bias Educational Resources – Court Volunteers**
The Neuroscience and Psychology of Decisionmaking, Part 1: A New Way of Learning (video)
http://www2.courtinfo.ca.gov/cjer/857.htm

The Neuroscience and Psychology of Decisionmaking, Part 2: The Media, the Brain, and the Courtroom (video) http://www2.courtinfo.ca.gov/cjer/863.htm

The Neuroscience and Psychology of Decisionmaking, Part 3: Dismantling and Overriding Bias (video) http://www2.courtinfo.ca.gov/cjer/864.htm

Implicit Association Test - Harvard University-Project Implicit: https://implicit.harvard.edu/implicit/takeatest.html

[xii] **Access to the Courts for Persons with Disabilities**

Handling a Request for Disability Accommodation (Video, 2012): http://www2.courtinfo.ca.gov/cjer/judicial/1722.htm

The Role and Responsibility of Court Leaders in Handling ADA Issues (Video, 2010): http://www2.courtinfo.ca.gov/cjer/judicial/1236.htm

Disability Terminology Chart (2012): http://www2.courtinfo.ca.gov/cjer/judicial/documents/secured/ada-terms.pdf

Developmental Disability (Video, 2012): http://www2.courtinfo.ca.gov/cjer/judicial/1516.htm

ADA Update (Video, 2012): http://www2.courtinfo.ca.gov/cjer/judicial/985.htm

ADA Awareness: Nonapparent Disabilities (Video, 2014): http://www2.courtinfo.ca.gov/cjer/judicial/1991.htm

ADA Awareness: Court Users Who Are Deaf or Hard of Hearing (Video, 2013): http://www2.courtinfo.ca.gov/cjer/judicial/981.htm

Lactating and Nursing Jurors, Attorneys and Court Users (Video, 2014): http://www2.courtinfo.ca.gov/cjer/judicial/2113.htm

Transcript of Video – Lactating and Nursing Jurors, Attorneys and Court Users: http://www2.courtinfo.ca.gov/cjer/judicial/documents/secured/6982-transcript.pdf

Sample notice of lactation feeding room, Orange County: http://www2.courtinfo.ca.gov/cjer/judicial/documents/secured/6982-orange-county.pdf

Sample Gender Neutral Restroom Sign: http://www.uua.org/sites/live-new.uua.org/files/images/things/signs/asset_upload_file61_287336.png

[xiii] **Handling Public Complaints – Judicial Officer Performance**

A Dialogue with the Commission on Judicial Performance (Video, 2011): http://www2.courtinfo.ca.gov/cjer/judicial/1244.htm

Commission on Judicial Performance: http://www.courts.ca.gov/5360.htm; and http://cjp.ca.gov/

Filing a Complaint – Commission on Judicial Performance: http://cjp.ca.gov/file_a_complaint.htm

Commission on Judicial Performance – Compendiums (Summaries of private and public discipline for different types of judicial misconduct): http://cjp.ca.gov/compendiums.htm

[xiv] **California Legal Services Programs**
Legal Aid Association of California (Learn about the work of California's legal aid programs and search for programs by region): http://www.laaconline.org/

LawHelp (Search for legal aid programs by region and type of case handled. Also a resource to refer court-users to): http://lawhelpca.org/

[xv] **Obtaining Grants / Expanding Funding for Courts and Legal Services**
California State Bar - Partnership Grant Information: http://www.calbar.ca.gov/AboutUs/LegalAidGrants/PartnershipGrants.aspx

Legal Services Corporation – Technology Initiative Grant Program: http://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig

JusticeCorps Program: http://www.courts.ca.gov/justicecorps.htm

United States Department of Justice – Access to Justice Initiatives: http://www.justice.gov/atj; and U.S. D.O.J. Access to Justice Grants: http://www.justice.gov/atj/grant-information

[xvi] **Community Engagement**
Judicial Council's Efficient and Effective Trial Court Programs – Community Outreach webpage. (Includes information, submitted by courts, about successful and replicable community engagement programs. Includes background information and supporting documents available for use by other courts interested in replicating the program.): http://serranus.courtinfo.ca.gov/reference/innovation/trialcourtprograms/communityoutreach/

San Joaquin County Superior Court – Community Outreach webpage (Includes links to the Courtroom to Schoolroom program; Court – Community Leadership and Liaison program; and the Community-Focused Planning Team.): https://www.sjcourts.org/general-info/community-outreach/

Santa Clara County Superior Court – Flyer on Court Visits; Mock Trial; and Speaker's Bureau: http://www.scscourt.org/documents/community/Community_Court.pdf

Los Angeles Superior Court - Court-Clergy Conference. (A number of courts hold similar conferences, designed to engage local clergy on issues related to the community and educate clergy on the justice system.): http://www.lacourt.org/generalinfo/communityoutreach/GI_CO002.aspx

[xvii] **Community Engagement Re. Tribal Issues and Concerns**

Indian Child Welfare Act (ICWA) Stakeholder's Roundtable – Los Angeles Superior Court: http://serranus.courtinfo.ca.gov/reference/innovation/trialcourtprograms/tribal/LosAngeles-IndianChildWelfareAct.htm

Riverside Superior Court – Tribal Alliance: http://jrn.courts.ca.gov/reference/innovation/trialcourtprograms/tribal/Riverside-TribalAlliance.htm

[xviii] **Addressing Racial and Ethnic Disparities**

Keeping Kids in School and Out of Court program – Chief Justice's program addressing racial and ethnic disparities in California schools and courts: http://www.courts.ca.gov/23902.htm

State Interagency Team Workgroup to Eliminate Disparities: https://sites.google.com/site/sitwged/home

From Oscar Grant to Trayvon Martin—A Dialogue about Race, Public Trust, and Confidence in the Justice System (This broadcast is intended as a dialogue between experts about race and the justice system focusing on the role that courts may play in reducing racial bias, disparity, and disproportionality in the criminal justice system.): http://www2.courtinfo.ca.gov/cjer/judicial/1916.htm

[xix] **California Specialty Bar Associations**

State Bar of California, Minority Bar Associations: http://members.calbar.ca.gov/search/ba_browse.aspx?c=Minority;

State Bar of California, Women's Bar Associations: http://members.calbar.ca.gov/search/ba_browse.aspx?c=Womens.

State Bar of California, LGBT Bar Associations: https://members.calbar.ca.gov/search/ba_results.aspx?txtan=&txtln=&County=&District=&ClassTypes=L

[xx] **California Bar Resources Re. Attorney Civility**
Civility Toolbox: http://ethics.calbar.ca.gov/Portals/9/documents/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf

Attorney Civility and Professionalism – Guidelines:
http://ethics.calbar.ca.gov/Ethics/AttorneyCivilityandProfessionalism.aspx

[xxi] **Pro Bono Services**
Judicial Council Pro Bono Toolkit for Judicial Officers:
http://www.courts.ca.gov/partners/56.htm

[xxii] **Judicial Officer Assignments**
Making Judicial Assignments: Considerations for Presiding Judges and Supervising Judges - http://www2.courtinfo.ca.gov/cjer/judicial/documents/secured/pjceo-2014-04_assignments.pdf

[xxiii] **Increasing Diversity in the Judiciary**
Judicial Branch: Summit Report to Promote Diversity in the California Judiciary (Accepted by Judicial Council, 2015): http://www.courts.ca.gov/documents/jc-20150728-itemF.pdf

Pathways to Achieving Judicial Diversity in the California Courts: A Toolkit of Programs Designed to Increase the Diversity of Applicants for Judicial Appointment in California (2010):
http://www.courts.ca.gov/documents/Judicial-Diversity-Toolkit.pdf

[xxiv] **Mentorship – Court Personnel**
Model Mentoring Program for Trial Court Staff (2014) – website:
http://serranus.courtinfo.ca.gov/reference/innovation/trialcourtprograms/admin/Solano-ContraCosta-ModelMentoringProgram.htm;

Training Tools (Model Mentoring Program for Trial Court Staff):
http://serranus.courtinfo.ca.gov/jc/documents/mentoring_program_training_tools.pdf

Report to Judicial Council (Model Mentoring Program for Trial Court Staff):
http://www.courts.ca.gov/documents/jc-20131025-itemF.pdf

[xxv] **Civil Grand Jury Resources**
Civil Grand Jury Resources Page: http://serranus.courtinfo.ca.gov/reference/grandjury.htm

"Recruiting Grand Juries: A Guide for Jury Commissioners and Managers". Handbook. (2009):
http://serranus.courtinfo.ca.gov/reference/documents/grandjury-guide.pdf

"Grand Jury Resource Manual for California Courts". (2005):
http://jrn.courts.ca.gov/reference/documents/grandjury.pdf

Civil Grand Jury Demographic Data Collection resources:
http://serranus.courtinfo.ca.gov/reference/grandjurydatacollection.htm

Automated Civil Grand Jury Program – Monterey County:
http://www.courts.ca.gov/14127.htm; and
http://jrn.courts.ca.gov/reference/innovation/trialcourtprograms/communityoutreach/Monterey-AutomatedCivilGrandJuryProgram.htm

Self-Help Information on the Civil Grand Jury process:
http://www.courts.ca.gov/civilgrandjury.htm

Research Article

The Influence of Afrocentric Facial Features in Criminal Sentencing

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ABSTRACT—*Prior research has shown that within a racial category, people with more Afrocentric facial features are presumed more likely to have traits that are stereotypic of Black Americans compared with people with less Afrocentric features. The present study investigated whether this form of feature-based stereotyping might be observed in criminal-sentencing decisions. Analysis of a random sample of inmate records showed that Black and White inmates, given equivalent criminal histories, received roughly equivalent sentences. However, within each race, inmates with more Afrocentric features received harsher sentences than those with less Afrocentric features. These results are consistent with laboratory findings, and they suggest that although racial stereotyping as a function of racial category has been successfully removed from sentencing decisions, racial stereotyping based on the facial features of the offender is a form of bias that is largely overlooked.*

Stereotypes are commonly defined as widely shared beliefs about the attributes of social groups (Fiske, 1998; Judd & Park, 1993). As such, they are assumed to influence judgment through categorization: People are judged to have stereotypic attributes if and only if they are categorized as members of the relevant social group (Bodenhausen & Macrae, 1998; Brewer, 1988; Fiske & Neuberg, 1990). Recently, we (Blair, Judd, Sadler, & Jenkins, 2002) argued that stereotypes might also be applied on the basis of individuating features. More specifically, we suggested that Afrocentric facial features may be used to stereotype individuals within, as well as between, racial groups.[1] Across a series of studies, we showed that attributes stereotypically associated with Black Americans (e.g., criminal, athletic) were judged to be more true of individuals the more Afrocentric their facial features, and this effect was independent of any stereotyping due to racial category. That is, feature-based stereotyping was found when all of the individuals were clearly members of the same racial category, Black or White. Additionally, when judgments of both Black and White individuals were made, racial category and (within-race) Afrocentric features were shown to have independent effects on judgment.

On the basis of that evidence, we argued that a person's facial features may lead to stereotyping in two ways. First, as suggested by standard stereotyping models (Bodenhausen & Macrae, 1998; Brewer, 1988; Fiske & Neuberg, 1990), racial-category membership may be inferred from Afrocentric features, and category-based stereotyping may ensue on that basis. Additionally, direct feature-trait associations are likely to form over time through associative learning processes (Anderson & Bower, 1972; Hayes-Roth, 1977; Hebb, 1948). As a result, Afrocentric features may directly activate associated traits and lead to stereotypic inferences within a racial category.

In subsequent work (Blair, Judd, & Fallman, in press), we investigated the automaticity of category- and feature-based stereotyping. Replicating other research, we found that stereotyping based on racial category is an efficient process, occurring even when cognitive resources are compromised. Nonetheless, people are sensitive to racial stereotypes and are able to suppress them when instructed to do so (see also Wyer, Sherman, & Stroessner, 1998, 2000). We also found feature-based stereotyping to be an efficient process. However, people were largely unaware of the influence of Afrocentric features and were unable to avoid making stereotypic inferences on the basis of those features, even when they were given explicit information about the problem and demonstrated that they could reliably identify the relevant features. Thus, although people appear to be able to control some aspects of race-based stereotyping, they appear unaware of and unable to control stereotyping based on Afrocentric features. This work has broad implications for the operation of racial bias in society.

RACIAL STEREOTYPING IN THE CRIMINAL JUSTICE SYSTEM

Consider the important arena of the criminal justice system, where the role of racial bias has long been debated (Tonry, 1995). Nearly all aspects of the criminal justice system have been criticized for showing racial bias; however, some of the harshest criticism has been directed at sentencing decisions (Spohn, 2000). Until the mid-1970s, most

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[1]Afrocentric features are those physical features that are perceived as typical of African Americans (e.g., dark skin, wide nose, full lips).

courts used a system whereby an offender was given both a minimum sentence and a maximum sentence, and the release date was determined by a parole board. In view of the wide discretion such sentencing permitted and the well-documented racial disparities that existed, critics contended that "racial discrimination in the criminal justice system was epidemic, [and] that judges, parole boards, and corrections officials could not be trusted" (Tonry, 1995, p. 164). Largely in response to such concerns, both state and federal governments passed laws designed to severely limit the discretion of judges and ensure the neutrality of sentencing (Spohn, 2000; Tonry, 1995; Zatz, 1987). Many states adopted sentencing guidelines for determining the appropriate sentence on the basis of the seriousness of the crime and the offender's prior criminal record, with some allowance for judges to take aggravating and mitigating circumstances into account. In addition, some laws explicitly stated that sentences should be neutral with respect to race, gender, and socioeconomic status. Research now shows that the primary determinants of sentencing decisions are the seriousness of the offense and the offender's prior criminal record. Racial disparities still exist, but researchers largely agree that they are not the consequence of direct racial bias (Spohn, 2000; Tonry, 1995). Once the seriousness of the crime and past criminal record are equated, Black offenders do not generally receive harsher sentences than White offenders.[2]

Although this evidence is encouraging, our analysis of Afrocentric features suggests that a more subtle form of racial bias may still operate. Judges may be careful to avoid giving different sentences to members of different racial categories, but such efforts to control category-based bias may have little effect on the operation of stereotypes associated with Afrocentric features (Blair et al., in press). Moreover, because people are generally not aware of feature-based stereotyping, they are unlikely—and perhaps even unable—to control it effectively. Thus, controlling for legally relevant factors, Black offenders as a group may not receive harsher sentences than White offenders, but members of both groups who have relatively more Afrocentric features may receive harsher sentences than group members with less Afrocentric features. Racial bias based on racial category is avoided, yet racial bias based on Afrocentric features might still be operating.

THE PRESENT RESEARCH

The State of Florida Department of Corrections maintains a public database that contains information, including photographs, on all inmates incarcerated in the state. Using this database, we randomly selected samples of young Black and White male inmates to determine whether their sentences depended both on race and, within race, on the degree to which they manifested Afrocentric facial features, controlling for the seriousness of the crimes they had committed and their prior criminal histories.

Our decision to use the Florida database was based primarily on its availability and completeness. These data are all the more interesting in light of the state's demonstrated commitment to race neutrality in sentencing. Like other states, Florida once permitted considerable judicial discretion in sentencing. But in 1979, the Florida Sentencing Study Committee determined that ethnic-minority offenders were significantly more likely to receive prison sentences than White offenders, and it recommended that sentencing guidelines be implemented to decrease bias (Bales, 1997). Such guidelines were adopted in 1983, and an explicit statement of race neutrality in sentencing was added to the Florida Statutes (§921.001[a][4]). Today, all noncapital felonies are placed into 10 levels of offense severity, and judges are provided with a worksheet that specifies the sanction and, when applicable, the prison time appropriate given the severity of the primary offense, additional offenses, and prior offenses, as well as other pertinent factors. In 1997, the Florida Department of Corrections conducted a study to determine whether race influenced either sentencing decisions (prison vs. no prison) or, for offenders sentenced to prison, the length of prison sentences. For both types of outcomes, it was determined that race had no "meaningful" effect on decisions once relevant sentencing factors were taken into account: "This leads to the conclusion that the goal of racial equity explicit in the sentencing guidelines law has been met . . ." (Bales, 1997, p. 3).

METHOD

Sample Selection

From the population of all young (18 to 24 years of age) male inmates in the Florida Department of Corrections database, a sample of 216 was randomly selected, stratified by race, as designated on their court record (*n*s = 100 Black inmates and 116 White inmates). We selected only cases involving a current offense committed between October 1, 1998, and October 1, 2002. These date restrictions ensured that the offenders in our sample were all sentenced under the same laws.[3]

Coding Criminal Histories

With the assistance of a third-year law student, we researched the Florida criminal statutes and coded each case on a number of different variables. Specifically, we coded the total amount of time the inmate was currently serving, the seriousness of the primary offense, the number of any additional offenses and their average seriousness, and the number of prior offenses and their average seriousness.[4] In this sample of cases, a total of 138 different types of offenses had been committed. The seriousness of each was determined by consulting the Florida state statutes (§921.0022). In Florida's 10-point system, lower numbers indicate less serious felonies. For example, supplying an unauthorized driver's license is a Level 1 offense, possessing child pornography or selling cocaine is a Level 5 offense, and murder is a Level 10 offense.

[2]Indirect forms of racial bias may still exist. Tonry (1995) has argued that certain crime-control policies result in more negative outcomes for ethnic minorities than majorities, and Spohn (2000) has demonstrated that race interacts with other variables in influencing sentencing.

[3]Because the database did not permit the selection of cases by offense date, we initially drew a total of 350 cases. We then excluded those cases with offense dates outside our parameters ($n = 113$). Twenty-one additional cases were excluded, either because the crimes could not be coded or because the photographs were severely degraded.

[4]For multiple sentences (served concurrently), total sentence length was determined by the length of the longest sentence; life sentences were coded as 99 years. For multiple current offenses, the offense given the longest sentence was defined as the primary offense. Only felony crimes were included in this analysis because there was no system to code the seriousness of the relatively infrequent misdemeanors.

TABLE 1

Unstandardized Parameter Estimates, Standard Errors, and* t *Values for Variables Predicting Sentence Length in Models 1 and 3

	Model 1			Model 3		
Predictor[a]	*B*	*SE*	*t*(207)	*B*	*SE*	*t*(205)
Primary	0.29	0.028	10.35***	0.29	0.028	10.29***
Primary squared	0.04	0.010	3.73***	0.04	0.010	3.77***
Additional	0.04	0.021	1.70	0.04	0.021	1.72
Additional squared	0.02	0.008	2.65**	0.02	0.008	2.71**
Additional number	0.06	0.014	4.23***	0.06	0.014	4.22***
Prior	−0.02	0.056	0.29	−0.01	0.055	0.25
Prior squared	0.00	0.012	0.39	0.00	0.012	0.34
Prior number	0.02	0.036	0.61	0.02	0.036	0.58
Race	—	—	—	−0.16	0.071	2.28*
Afrocentric features	—	—	—	0.09	0.040	2.29*

[a]Primary = seriousness of primary offense, mean deviated; additional = seriousness of additional offenses, mean deviated; additional number = number of additional offenses; prior = seriousness of prior offenses, mean deviated; prior number = number of prior offenses.
*$p < .05$. **$p < .01$. ***$p < .001$.

Coding Facial Features

The 216 facial photographs associated with the selected cases were randomly divided into two sets, each with approximately equal numbers of Black and White inmates. Each set was given to a group of undergraduate research participants ($n = 34$ and $n = 35$) who were asked to make a single, global assessment of the degree to which each face had features that are typical of African Americans, using a scale from 1 (*not at all*) to 9 (*very much*).[5] Prior research has shown that participants can make this judgment easily and reliably for both Black and White faces (Blair et al., 2002). Reliable judgments were likely facilitated by the fact that the inmates were otherwise similar in appearance (i.e., same hairstyle, clothing, and expression; no accessories). Half of the participants were asked to rate the Black photographs before rating the White photographs; the other participants made their ratings in the reverse order. Within racial group, the photographs were presented in a random order. Obtained reliabilities of mean ratings varied between .88 and .95. Although the Black inmates were rated, on average, as possessing significantly more Afrocentric features than the White inmates ($M = 5.92$ vs. 3.33), $t(214) = 16.06$, $p < .0001$, there was considerable variance within each group ($SD = 1.11$ and 1.27, respectively).

Because the attractiveness and babyishness of faces have been shown to influence judicial outcomes (Downs & Lyons, 1991; Stewart, 1980; Zebrowitz & McDonald, 1991), the participants were asked to rate the faces on these dimensions after completing the ratings for Afrocentric features. The correlations of Afrocentric features with attractiveness and babyish features, controlling for race, were .17, $p < .05$, and −.04, n.s., respectively.

RESULTS

Our first analysis used multiple regression to determine the degree to which sentence length was influenced by only those factors that should lawfully predict sentencing: seriousness of the primary offense, the number and seriousness of additional concurrent offenses, and the number and seriousness of prior offenses.[6] We also included quadratic terms for seriousness of the primary offense, seriousness of additional offenses, and seriousness of prior offenses, because the Florida Criminal Punishment Code specifies that for more serious offenses, the length of the sentence ought to increase dramatically as the seriousness of the offense increases. Because sentence length was positively skewed, a log-transformation was performed on this variable prior to analysis.

The results of the analysis showed, as expected, that criminal record accounted for a substantial amount of the variance (57%) in sentence length.[7] The resulting unstandardized coefficients (and their standard errors and associated *t* statistics) are given in Table 1 (Model 1). Unsurprisingly, the seriousness of the primary offense (linear and quadratic effects) and both the seriousness (quadratic effect) and the number of additional offenses were significant predictors of sentence length. Neither the seriousness nor the number of prior offenses predicted sentence length. We attribute these null effects to the relative youthfulness of the inmates, who had relatively few prior felony offenses ($M = 0.95$, $SD = 1.90$).

We turn next to the question of race differences in sentencing. We estimated a second model (Model 2) in which inmate race (−1 if White, +1 if Black) was entered as a predictor along with the variables from the previous model. The results of this analysis were consistent with the findings of Florida's Race Neutrality in Sentencing report (Bales, 1997): The race of the offender did not account for a significant amount of variance in sentence length over and above the effects of seriousness and number of offenses, $t(206) = 0.90$, $p = .37$, proportional reduction in error (PRE) = .00.

In a third model, we added the degree to which the inmates manifested Afrocentric features as a predictor of sentence length, controlling for the race of the inmates and the seriousness and number of offenses they had committed. This analysis showed that Afrocentric

[5]These participants received research credit toward a course requirement and were blind to all other details of the research.

[6]In Florida, other factors, such as the victim's injury and supervision violations, are also considered in sentencing. However, the public database does not supply information on these aspects of each case.

[7]This figure is comparable to the 42.2% of variance accounted for in the analysis conducted by the Florida Department of Corrections (Bales, 1997).

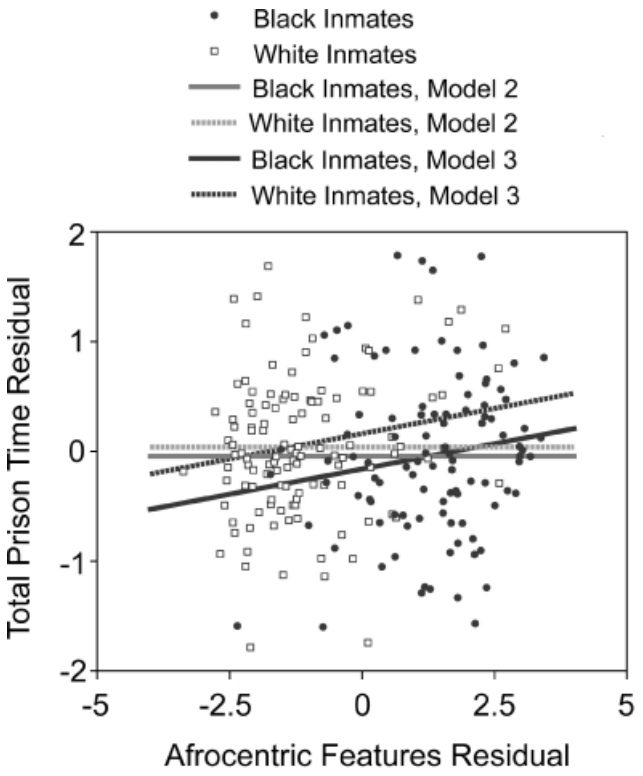

Fig. 1. Residualized sentence length as a function of residualized Afrocentric features, for Black and White inmates. The regression lines displayed are from Model 2, which examined sentence length as a function of race, controlling only for criminal history, and from Model 3, which examined sentence length as a function of race and Afrocentric features, each controlling for the other variable as well as criminal history.

features were a significant predictor of sentence length over and above the effects of the other factors, $t(205) = 2.29$, $p < .025$, $PRE = .02$. Table 1 provides the parameter estimates from this model (Model 3). The table shows that with Afrocentric features in the model, race significantly predicted sentence length, $t(205) = 2.28$, $p < .025$, $PRE = .02$, but in the direction opposite to what one might expect—with White inmates serving longer sentences than Black inmates.

Figure 1 presents a residual plot of all data points and the prediction functions from the second and third models. The vertical axis is the residual sentence length for each case, partialing out effects of all criminal-history variables. The horizontal axis represents the residual Afrocentric-features variable, again partialing out the effects of all criminal-history variables. This plot thus illustrates the partial relationships between sentence length, on the one hand, and race and Afrocentric features, on the other, over and above any influence of criminal history. The predicted sentence lengths in the second model, which included race (but not Afrocentric features) as a predictor along with the criminal-history variables, are given by the two gray, horizontal lines, which show that the mean residual sentence lengths for White and Black offenders were not significantly different. The predicted functions from the third model, in which Afrocentric features and race were both predictors, along with the criminal-history variables, are shown by the black lines. The positive (and significant) slopes for these lines indicate that within each race, more Afrocentric features were associated with longer sentences, given equivalent criminal histories. Additionally, as the vertical distance between these two lines indicates, there was a significant difference between the two races: Given equivalent criminal histories and equivalent Afrocentric facial features, White inmates had longer sentences than Black inmates.

In a fourth model, we examined whether the impact of Afrocentric features was the same for Black and White inmates by testing the interaction between Afrocentric features and race. This interaction did not approach significance ($p > .70$), thus suggesting that the plotted lines in Figure 1 really are parallel: The effects of Afrocentric features on residual sentence length within the two racial groups were statistically equivalent.[8]

Finally, we examined the influence of facial attractiveness and babyish features on sentence length. Controlling for criminal record, neither variable was a significant predictor of sentence length, $t(206) = 0.05$ and $t(206) = 0.65$, respectively. Moreover, Afrocentric features continued to predict sentence length when these variables were controlled, $t(203) = 2.32$, $p < .025$, $PRE = .03$.

DISCUSSION

The results we have reported confirm both earlier research on the role of race in sentencing and our own work on stereotyping. As found previously, we observed little effect of race on sentencing in Florida: Black and White offenders, given equivalent criminal histories, were given roughly equivalent sentences. We suggest that the state's efforts to ensure race neutrality in sentencing over the past 20 years have largely been successful. Our results are also consistent with the psychological literature showing that people can effectively reduce category-based stereotyping (Blair et al., in press; Wyer et al., 1998, 2000); it appears that judges have effectively learned to give sentences of the same length when Black and White offenders with equivalent criminal histories come before them.

However, Afrocentric facial features were associated with sentence length, such that offenders who had equivalent criminal histories and came from the same racial group (Black or White) were given longer sentences the more Afrocentric their features. These findings are consistent with the results of our laboratory research showing that people use Afrocentric features to infer traits that are stereotypic of African Americans. It is important to remember that this form of stereotyping appears to occur without people's awareness and outside their immediate control (Blair et al., 2002, in press). We suspect that, like our laboratory participants, judges were unaware of the fact that Afrocentric features might be influencing their decisions and were not effectively controlling the impact of such features.

How large were the effects of Afrocentric features? One way to calibrate them is to derive predicted sentence lengths (for the mean levels of the criminal-history variables) for individuals within each race who were 1 standard deviation above and below the mean level of Afrocentric features for their racial group. These calculations indicate

[8]Separate analyses of the data for Black and White inmates produced the following estimates for Afrocentric features: $B = 0.06$, $t(90) = 0.84$, n.s., $PRE = .01$, and $B = 0.11$, $t(106) = 2.11$, $p < .05$, $PRE = .04$, respectively. Although the effect was somewhat larger among the White than among the Black inmates, the lack of a significant race-by-features interaction suggests that this difference is not reliable. Moreover, when race differences have appeared in our laboratory research, they have not been consistent: Sometimes Afrocentric features have produced stronger effects for White targets, and sometimes they have produced stronger effects for Black targets. We do note that there was slightly more variability in Afrocentric features among the White inmates than the Black inmates in the present sample.

that individuals 1 standard deviation above their group mean would receive sentences 7 to 8 months longer than individuals 1 standard deviation below their group mean (for the same typical criminal record). This is clearly a meaningful difference.

We argue that the effect of Afrocentric features on sentencing is due to the associations that have formed between those features and stereotypic traits. We suggest that when judges are faced with the difficult task of weighing the blameworthiness of the offender, the need to protect the community and deter potential offenders, and other concerns about the costs and benefits of incarceration, the activation of those associations leads to the perception that an offender with more Afrocentric features is more dangerous or culpable than other offenders from the same racial group. Furthermore, this feature-based stereotyping occurs independently of category-based stereotyping, which the present data suggest is well controlled.

The racial category of the inmates in our sample was determined by the court records available to judges. On the basis of appearance alone, some of these individuals might be judged racially ambiguous. Thus, we cannot entirely eliminate the possibility that the effects of spontaneous racial categorization by judges and the effects of Afrocentric features are confounded to some degree in these data. Our attempt to separate effects due to race categorization and those due to Afrocentric features may have been only partially successful.

The finding that is initially surprising is that race made a significant difference in sentences once criminal history and Afrocentric features were both controlled: White offenders were given longer sentences than Black offenders, given equivalent criminal histories and equivalent Afrocentric facial features. It is this last statement that helps explain this result. As Figure 1 reveals, race and Afrocentric features were highly related ($r = .74$, $p < .001$). Although there is some overlap, most of the White inmates appear on the left half of the figure and most of the Black inmates appear on the right. Clearly, the two groups had very different mean levels of Afrocentric facial features. At the two within-group mean levels, there was no difference in sentence lengths between the groups. Yet within each group, inmates with more Afrocentric features received longer sentences than those with less Afrocentric features. This means that White inmates with high levels of Afrocentric features (relative to their racial group) received more severe sentences than White inmates on average. And Black inmates with low levels of Afrocentric features (relative to their racial group) received less severe sentences than Black inmates on average. As a result, when we examined the race difference in sentence length controlling for Afrocentric features, we were comparing White inmates with relatively high levels of Afrocentric features and Black inmates with relatively low levels. And because the two groups on average received the same sentences, White inmates who were above their group mean in Afrocentric features were punished more severely than Black inmates who were below their group mean. Thus, the race difference emerged when we controlled for Afrocentric features.

Another finding that may seem surprising is the lack of effects for facial attractiveness and babyish features. One might expect that more attractive inmates and those with more babyish features might receive lighter sentences. However, prior research has shown that the effects of attractiveness and babyish features are not always straightforward. For example, Downs and Lyons (1991) found that compared with less attractive defendants, more attractive defendants received lower bail and fine amounts for misdemeanor charges, but not for felonies; Stewart (1980) found that more attractive defendants received shorter prison sentences than less attractive defendants, but attractiveness had no effect on whether the defendants were convicted or acquitted. Zebrowitz and McDonald (1991) found that in small-claims court, having babyish features increased defendants' likelihood of winning cases involving intentional actions, but decreased their likelihood of winning cases involving negligent actions. Zebrowitz and McDonald also found that some outcomes depended on whether the plaintiff, as well as the defendant, had babyish features.

Taking the results as a whole, some readers might be tempted to say that the picture is fairly positive. Race is not being used in sentencing decisions, and, if anything, the minority group is coming out ahead (i.e., when Afrocentric features are equated). But such a conclusion is a serious misinterpretation of our results. Racial stereotyping in sentencing decisions is still going on, but it is not a function of the racial category of the individual. Instead, there is perhaps an equally pernicious and less controllable process at work. The racial stereotyping in sentencing that is now occurring is based on the facial appearance of offenders. Be they White or Black, offenders who possess more Afrocentric features are receiving harsher sentences for the same crimes, compared with less Afrocentric-looking offenders. Our research shows that addressing one form of bias does not guarantee that the other will also be eliminated. Both must be considered to achieve a fair and equitable society.

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Helping Courts Address Implicit Bias

Resources for Education

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Preface and Acknowledgments

The National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts was launched in 2006 to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness in the nation's state courts. Phase I of the Campaign resulted in an interactive database of promising programs to achieve racial and ethnic fairness in five key areas: (1) diverse and representative state judicial workforces; (2) fair and unbiased behaviors on the part of judges, court staff, attorneys, and others subject to court authority in the courthouse; (3) comprehensive, system-wide improvements to reduce racial and ethnic disparities in criminal, domestic violence, juvenile, and abuse and neglect cases; (4) the availability of timely and high-quality services to improve access to the courts for limited-English-proficient persons; and (5) diverse and representative juries. Phase II of the Campaign focused on implicit bias, an issue relevant to each of the five key areas and central to "fair and unbiased behaviors" in the courthouse. Phase II developed educational resources and provided technical assistance to courts on implicit bias. The results of those efforts are presented in this report to guide others in planning discussions, focus groups, presentations and/or educational programs about the role implicit bias may play in everyday decisions and actions.

The authors wish to thank a number of individuals and organizations who supported and provided assistance during Phase II of the Campaign. Our thanks go first to the Open Society Institute (OSI) and the State Justice Institute (SJI) for their generous support of both Phases of the Campaign. In particular, Dr. Thomas Hilbink from OSI and Ms. Janice Munsterman from SJI were instrumental in crafting the Campaign's Phase II design, and Mr. Jonathan Mattiello ensured SJI's continued support when he became Executive Director.

Led by former Chief Justice Ronald T. Y. Moon of Hawaii, the Campaign's Steering Committee continued to provide overall guidance and included representatives of the Conference of Chief Justices, the Conference of State Court Administrators, the National Consortium on Racial and Ethnic Fairness in the Courts, the National Association for Court Management, the National Association of State Judicial Educators, and the National Association of Women Judges. In addition, project staff also freely relied on the expertise and good will of the members of the National Training Team: the Honorable Ken M. Kawaichi, the Honorable J. Robert Lowenbach, the Honorable Patricia M. Martin, Ms. Kimberly Papillon, and the Honorable Louis Trosch, Jr.

The authors also are grateful to the many judges and court staff who participated in the project's training efforts in California, Minnesota, and North Dakota. We are especially appreciative of the time and energy contributed by each of the site coordinators: Ms. Kimberly Papillon from California, Ms. Connie Gackstetter from Minnesota, and Ms. Lee Ann Barnhardt from North Dakota. They all exhibited a strong professional commitment to delivering a quality program as well as good humor under pressing deadlines.

Several judges and judicial educators also participated in a focus group on implicit bias in court settings. Thanks very much to Ms. Lee Ann Barnhardt, the Honorable Donovan J. Foughty, the Honorable John F. Irwin, the Honorable Ken M. Kawaichi, the Honorable J. Robert Lowenbach, Mr. Michael Roosevelt, Ms. Kathleen F. Sikora, and the Honorable Louis A. Trosch, Jr. for sharing their insights and expertise with project staff.

Finally, the authors also thank their colleagues on the project who worked so hard to ensure good products were developed and delivered to each site. Our thanks go first to our two expert advisors on the project: Mr. Jerry Kang, Professor of Law at the UCLA School of Law, and Dr. Shawn Marsh, Director of the Juvenile and Family Law Department of the National Council of Juvenile and Family Court Judges. They both contributed substantially to our scientific understanding of implicit bias as well as its likely reception among judges and court staff. Our colleague Mr. William Raftery provided technical expertise throughout the project, and our thanks to Ms. Theresa Jones for running numerous statistical analyses of the program evaluations and to Ms. Stephanie Montgomery and Ms. Alicia Walther for their administrative assistance.

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Introduction

State courts have worked diligently over the last 25 years to address issues of racial and ethnic fairness. In the late 1980s, state court commissions were formed in the states of Michigan, New Jersey, New York, and Washington to address racial and ethnic bias in their court systems. In January 1989, the four commissions formed the National Consortium of Commissions and Task Forces on Racial and Ethnic Bias in the Courts, later renamed the National Consortium on Racial and Ethnic Fairness in the Courts.[1] Membership in the National Consortium today has grown to include representatives from 37 states and the District of Columbia. During the last 20 years the state commissions have issued voluminous reports and recommendations to improve racial and ethnic fairness in their respective states (see National Center for State Courts' [hereafter, NCSC] State Links for Racial Fairness Task Forces and Reports) and have implemented numerous programs and projects to carry out those recommendations (see, for example, the NCSC's Interactive Database of State Programs to address race and ethnic fairness in the courts).

Despite these substantial efforts, public skepticism that racial and ethnic minorities receive consistently fair and equal treatment in American courts remains widespread. A comprehensive national survey of public attitudes about the state courts commissioned by the NCSC and released at the National Conference on Public Trust and Confidence in the Justice System in May 1999 found that 47% of Americans did not believe that African Americans and Latinos receive equal treatment in America's state courts and 55% did not believe that non-English speaking persons receive equal treatment (NCSC, 1999, p. 37). Moreover, more than two-thirds of African Americans thought that African Americans received worse treatment than others in court (p. 38). State surveys, such as the comprehensive public opinion survey commissioned by the California Administrative Office of the Courts (Rottman, 2005, p. 29), confirmed the earlier national survey results. A majority of all California respondents stated that African Americans and Latinos usually receive less favorable results in court than others. About two-thirds believed that non-English speakers also receive less favorable results. Once again, a much higher proportion of African Americans, 87%, thought that African Americans receive unequal treatment.

What explains the disconnect between the extensive work undertaken by state courts to ensure racial and ethnic fairness and lingering public perceptions of racial unfairness? At least one explanation may be found in an emerging body of research on implicit cognition. This 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. Because they are automatic, working behind-the-scenes, they can influence or bias decisions and behaviors, both positively and negatively,

[1] When available, the authors cite internet sources that can be accessed directly from the on-line version of this report.

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 much more difficult to identify and change.

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, Johnson, Wistrich, & Guthrie, 2009, p. 126, reporting that 97% of judges in an educational program rated themselves in the top half of the judges attending the program in their ability to "avoid racial prejudice in decisionmaking"). This belief may actually undercut the effectiveness of traditional educational programs on diversity that focus on explicit bias. Judges and other court professionals may be less motivated to attend and fully participate in educational programs discussing racial and ethnic fairness if they do not view themselves as explicitly biased.

In addition, educational programs that do not discuss implicit biases may lead participants to conclude that they are better at understanding and controlling for bias in their decisions and actions than they really are. Stone and Moskowitz (2011, p. 772) note that "research on stereotyping finds that although teaching people how to avoid explicit bias may control it at certain points in an interaction, it may also ironically increase the likelihood that stereotypes are activated and unknowingly used early in the impression formation and interaction process." Alternatively, educational programs that discuss the scientific research on how the human brain categorizes and uses information and the implications of unconscious stereotype activation may have the benefit both of engaging participants in a less threatening discussion of bias and providing a fuller picture of how biases may be triggered and come to influence decisions and actions. Promoting awareness about implicit sources of bias in this way may help motivate participants to do more to correct for bias in their own judgments and behaviors (Burgess, van Ryn, Dovidio, & Saha, 2007; also see Appendix G for more information about potential strategies to address implicit bias).

This report explores the content and delivery of educational programs on implicit bias for judges and court staff. It draws upon an extensive literature on implicit bias, the perspectives of expert practitioners and scholars in the area, the development and delivery of judicial education programs on implicit bias in three states, and a focus group of judges and judicial educators interested in strategies to address the influence of implicit bias in court settings. It begins with a brief overview of the concept of implicit bias, provides a summary of the educational strategy used to deliver information on implicit bias in each of the three states, and offers lessons learned based on the synthesis of information across the literature, state educational programs, and expert discussions.

Implicit Bias Overview

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. It also is providing intriguing insights into how and why individuals develop stereotypes and biases, often without even knowing they exist.

The research paints a picture of a brain that learns over time how to distinguish different objects (e.g., an apple and an orange) based on features of the objects that coalesce into patterns. These patterns or schemas help the brain process information efficiently—rather than figuring out what an apple is every time it encounters one, the brain automatically recognizes it and understands that it is red, edible, sweet, and juicy—characteristics associated with apples. 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'). In his implicit bias primer for courts (see Appendix A), Kang (2009) describes the problem this presents 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)

What is interesting about implicit biases is that they can operate even in individuals who may not be considered explicitly biased (e.g., Devine, 1989). Scientists have developed a variety of methods to measure implicit bias, but the most common measure used is reaction time (e.g., the Implicit Association Test, or IAT; also see Appendix B, FAQ #3, for more about this and other implicit bias measures). 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 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. Indeed, even many African Americans are faster at pairing good words with White faces than with Black faces. Research also shows that these implicit biases can influence decisions and behaviors in a variety of real-life settings without the individual's knowledge (Greenwald, Poehlman, Uhlmann & Banaji, 2009; also see Appendix B, FAQ #4, for more information).

Despite conscious efforts to be fair and objective, research also shows that judges may be susceptible to implicit bias as well. Rachlinski, Johnson, Wistrich, and Guthrie (2009), for example, found a strong White preference on the IAT among White judges while Black judges showed no clear preference overall (44% showed a White preference but the preference was weaker overall). The authors also reported that implicit bias affected judges' sentences, though this finding was less robust and should be replicated. Finally, and most importantly for this report, the authors concluded 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).

While motivation to be fair is a good start, it is not enough. Research shows that individuals need to understand what implicit bias is, that it exists, and that concrete steps must be taken to reduce its influence (e.g., see Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003). These studies show that implicit racial bias is something that can be controlled, but only if individuals are equipped with the tools necessary to address it.

Educational programs on implicit bias offer judges and court staff those tools. Because they focus on science and how the brain works, they offer an opportunity to engage judges and court staff in a fuller dialog on race and ethnic fairness issues, as described by Marsh (2009):

> 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. (p. 18)

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 Appendix B, FAQ #5, for a discussion of key criticisms). There is much that scientists do not yet know. This report is 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.

The report does not review the substantial body of research on implicit bias. Rather it offers two summary documents for readers interested in learning more. Appendix A includes *Implicit Bias: A Primer for Courts* by Professor Jerry Kang, and Appendix B includes a set of frequently asked questions on implicit bias:

- What is implicit bias?
- What do researchers think are the sources of implicit bias?

- How is implicit bias measured?
- Does implicit bias matter much in the real world?
- What are the key criticisms of implicit bias research?
- What can people do to mitigate the effects of implicit bias on judgment and behavior?
- Can people eliminate or change implicit bias?

Both of these documents summarize the key research on implicit bias, offer references to source materials, and can be used as background readings or handouts in judicial education programs.

Judicial Education on Implicit Bias: Three Examples

This section describes the efforts of three states that participated in a national project to provide information on implicit bias to judges and court staff.[2] Table 1 presents the template the project used for working with the three states: California, Minnesota, and North Dakota.[3] The template walks planners through the process of articulating why and how the education program will be delivered. It also serves as a starting point for other jurisdictions interested in developing a program on implicit bias.

Achieving the long-term goal, described in Table 1, of reducing the influence of implicit bias on the decisions and behaviors of judges and other court staff requires a concerted effort across time. It involves a multi-step process of building awareness that implicit bias exists, helping participants understand their own implicit biases, exploring the potential influence of their implicit biases on their decisions and behaviors, and taking steps to mitigate the influence. Jurisdictions engaged in a long-term effort to reduce implicit bias should understand that the three programs described in this report are only one component of this multi-step process.

Because the national project was available to work with the selected states for only a finite period of time, the focus was on developing a specific program and identifying the short-term outcomes (see column four in Table 1) resulting from the program. The project examined how judges and court staff reacted to the information. It did not measure the long-term effects (see column five in Table 1) of education on implicit bias.

A description of each program's specific objectives, target audience, inputs and resources, processes and activities, outputs, and outcomes follows. General observations across all sites are:

- *Program objectives*. In general, because the states had a limited amount of time to introduce new judicial education material, all of the programs focused primarily on the first objective in Table 1—demonstrating a basic understanding of implicit bias—and provided relatively less time to explore strategies (second objective) and develop action plans (third objective) to address implicit bias.

- *Target population* varied across states. One state focused primarily on judges, another on general members of the Judicial Branch, and another on the members of a Racial Fairness Committee, including representatives from the court as well as community organizations.

[2] See "Preface and Acknowledgments" for information on the national project.
[3] The three states were selected through an application process.

- *Inputs and resources* specified in Table 1 refer to the unique aspects of a state's program on implicit bias and do not include resources such as meeting rooms and notebooks that are part of most education programs. Appendices C, D, and E include copies of resources available to the national project from the California, Minnesota, and North Dakota programs, respectively. In addition, all three states provided information on the Implicit Association Test (IAT), an on-line reaction-time assessment of preferences (see Project Implicit Web site; see also Appendix B, FAQ #3). Two of the states provided a link to a secure IAT site set up for the project, and the other chose to link to the general public site. Program inputs also included questionnaires to assess implicit bias knowledge before and after the delivery of a state's program. The questionnaires were developed by the national project team in consultation with the state program coordinators. The national project team also developed an on-line questionnaire to obtain participant impressions and actions taken several months after the delivery of one state's program.

Table 1. Template for Implicit Bias Program Development

Long-term Goal: To reduce the influence of implicit bias on the decision making and other behaviors of judges and court staff

Objectives: As a result of participation in the implicit bias program, participants will be able to:

- Demonstrate a basic understanding of implicit bias
- Identify possible strategies to mitigate the influence of implicit bias on behavior
- Develop an individualized action plan to address implicit bias

Target Population: Judges and other court staff

Inputs/Resources	Processes/Activities	Outputs	Outcomes	Impact
▪ Program Content ▪ Delivery methods/ presentation strategies ▪ Onsite experts, trainers, facilitators	▪ Provide pre-program work ▪ Provide implicit bias information using specified curriculum delivery strategies (e.g., lecture, interactions with subject matter experts, small group discussions) ▪ Administer a pre- and post-test of implicit bias knowledge ▪ Administer follow-up questionnaire to determine post-program effects	▪ Number of participants in program ▪ Number of completed pre- and post-tests of implicit bias knowledge	▪ Participants express satisfaction with the training ▪ Participants demonstrate increase in implicit bias knowledge ▪ Participants develop individualized action plan to address the influence of implicit bias on their behaviors	• Judges/court staff engage in activities to address their implicit biases • There are observable changes in judicial & staff decisions and behaviors ▪ Disparate case outcomes based on race and ethnicity are reduced

- The *processes and activities* varied based on program content and delivery methods. Each state administered a pre- and post-program questionnaire.

- *Outputs* refer to the work accomplished during the training session. The number of participants in the training program and the number of completed pre- and post-program assessment questionnaires serve as two measures of program outputs.

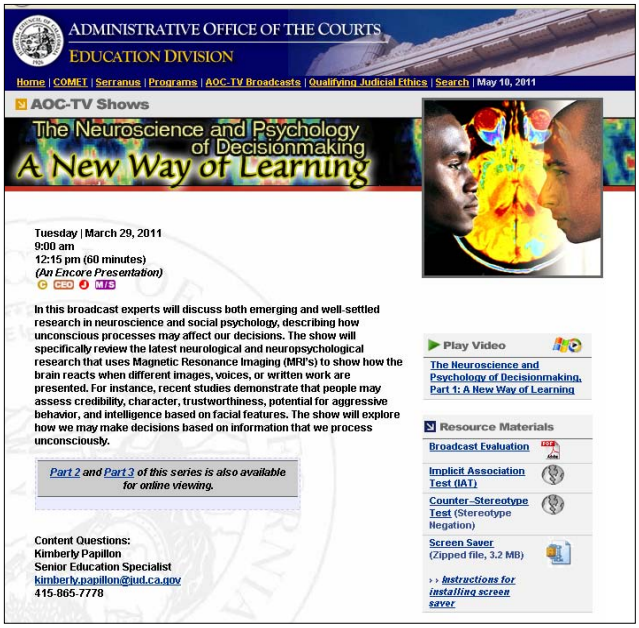
- For purposes of the national project, the primary outcome measures were whether participants were satisfied with the program (e.g., how did they react to a program on this topic) and whether their knowledge of implicit bias increased pre- and post-program. The project also examined whether or not participants planned to take some follow-up actions (e.g., learn more about implicit bias and take some steps to attenuate its influence) as a result of the program. The questions on the pre- and post-program assessment questionnaires differed somewhat by state because of (a) variations in key concepts emphasized in the three programs and (b) learning about which questions worked better as the project progressed from one state to the next.

The remainder of this section describes the specific program elements for each state.

California

Program Objectives. California's program focused on the science of implicit bias, e.g., what it is, how it develops, and how it is measured, and provided a brief overview of strategies to mitigate its influence. The program coordinator also created a Web site (see Figure 1) for participants to learn more about strategies to address implicit bias. Subsequent programs, not included in this report, addressed strategies and action planning (see objectives in Table 1) more directly and thoroughly.

Figure 1: California Web Site



Target Population. Because the program was offered through the court system's closed circuit cable television station, any member of the Judicial Branch could participate in the program. Among those who watched the broadcast were judges and other judicial officers, court professionals, attorneys, clerks, and support staff. The program was shown three times and was advertised in newsletters, letters to educational coordinators in each courthouse, and emails

and phone calls to other individuals who might be interested in the program. The program also was posted on the California Web site for viewing by anyone interested in seeing the program after its initial broadcasts.

Inputs/Resources. Table 2 summarizes the inputs and resources used in the California program. Appendix C includes California program materials available to the national project. California chose video as the medium for providing information on implicit bias. The program coordinator videotaped interviews with national experts in the field and created an hour-long documentary. The program's Web site, The Neuroscience and Psychology of Decisionmaking (see Figure 1), provided links to the documentary and additional resources to help address the influence of implicit bias. Among the resources was a link to the Implicit Association Test (IAT).

Table 2. California Inputs/Resources

- Developed *The Neuroscience and Psychology of Decision-Making: A New Way of Learning*, a one-hour video documentary of scientists and judges discussing research in neuroscience and social and cognitive psychology that demonstrates how unconscious processes may affect decisions.
- Developed Web site with access to a secure IAT site and additional resources for viewers to explore after watching the documentary
- Developed pre- and post-program evaluation

Although California relied on experts in developing the documentary, the state did not provide on-site experts during the actual broadcast of the program. The original plan for the program included post-broadcast conference calls with experts to discuss selected readings on various issues presented in the documentary. However, because of staff and other resource issues, the conference calls did not take place during the course of the national project.

Processes/Activities. California did not provide participants with any readings in advance of broadcasting the documentary. To administer the pre- and post-assessment of viewers' knowledge of implicit bias, the site coordinator worked with several jurisdictions to set up a central screening room in which questionnaires could be distributed to and collected from viewers. The documentary was aired at three different times and posted on the Judicial Branch Web site. The documentary encouraged viewers to take advantage of the various resources located on the program's Web site page.

Outputs. Because California's program was broadcast on the Judicial Branch's cable television station and posted on the internet, there is no way to know how many individuals across the state watched the video. Web site statistics show over 350 hits in the first two months after the documentary's broadcast. In addition, sign-in sheets at the central screening sites indicate that at least 107 individuals watched the program at these locations. Of these, information is available on 71 individuals who completed at least a partial pre- and post-

program assessment questionnaire.[4] These individuals represent a variety of positions in the court (e.g., judges, court staff, attorneys, clerks) with no one position identified by more than 22 percent of respondents (see Table C-1 in Appendix F). Almost 65 percent had at least five years of experience, and 66 percent indicated they had minimal knowledge of the topic (see Tables C-2 and C-3 in Appendix F).

Outcomes. As shown in Table 3, at least 90 percent of the 60 California viewers responding expressed satisfaction with the documentary, thought it was effective in delivering information on implicit bias, and planned to apply the information in their work. As indicated in Table 4, content knowledge generally was better after watching the documentary.[5] The percentage of correct responses across all viewers increased from the pre-assessment to the post-assessment (see ☑ columns in Table 4) for all items.[6] However, not all viewers improved pre- and post-assessment. Tables C-4 and C-5 in Appendix F display the percentage of correct and incorrect responses for those who scored correctly and incorrectly, respectively, on the pre-program assessment.

Table 3. California Participants' Satisfaction and Likely Use of Program Content (n=60)

Question	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Total
1. Overall, I am satisfied with this documentary program	48%	45%	7%	0%	0%	100%
2. The program documentary was effective in delivering content	47%	43%	10%	0%	0%	100%
3. I will apply the course content to my work	28%	62%	8%	2%	0%	100%

[4] Questionnaires were included in the California analyses if at least one question (the same question) was completed on both the pre- and post-assessment questionnaire.

[5] The California pre- and post-assessment questionnaires included eight questions. One question was eliminated from the analyses because it included two correct response options but did not allow respondents to select both. Two other items did not have specific correct answers; rather they gauged opinions about the extent of implicit bias. These items were analyzed separately and thus not included in Table 4.

[6] Tables showing the percentages of correct and incorrect answers for the pre- and post-program assessment questions include percentages for those who did not answer each question. A case could be made that missing responses are an indication that individuals did not know the correct answer and thus should be included with the incorrect responses. However, individuals may not have responded for other reasons such as they were in a hurry, thought the item was poorly worded or did not understand it, or inadvertently skipped the item. By including the missing information, readers can draw their own conclusions. The missing data also provide an indication of which items were the most troublesome or frustrating for individuals and should be revisited before using again.

Table 4. California Program Assessment Results (n=71)

Questionnaire Item (bolded answer is correct)	Pre-Program Responses*			Post-Program Responses*		
	☑	☒	?	☑	☒	?
1. Implicit or unconscious bias: (a) Is produced by the unconscious processing of stereotypes, (b) Is not influenced by an individual's belief that people should all be treated the same, (c) Is difficult to alter, (d) **All of the above**	66%	32%	1%	73%	25%	1%
2. Which of the following techniques have been shown to limit the influence of implicit or unconscious bias? (a) Judicial intuition, (b) Morality plays, (c) **Exposure to positive, counter-stereotypical exemplars**, (d) All of the above	52%	42%	6%	66%	28%	6%
3. The Implicit Association Test (IAT): (a) Measures reaction time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Is better suited for educational rather than diagnostic purposes, (d) **All of the above**	37%	49%	14%	56%	42%	1%
4. What is the best evidence that implicit bias exists? (a) Analysis of criminal justice statistics, (b) **Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior**, (c) Self-reports, (d) All of the above	31%	58%	11%	62%	38%	0%
5. Which of the following techniques have <u>not</u> been used to measure implicit bias? (a) Implicit Association Test (IAT,) (b) **Polygraph**, (c) MRIs, (d) All of the above	38%	45%	17%	94%	6%	0%

***☑ =correct response, ☒=incorrect response, ? =no response**

Two additional questions gauged viewers' opinions regarding the frequency with which implicit biases might be activated. The assumption was that viewers would see implicit biases as influencing decisions and actions more often after they watched the documentary. Figures 2 and 3 demonstrate that the assumption was correct: More viewers rated the prevalence of implicit bias as higher after seeing the documentary.

The write-in comments from viewers who completed the pre- and post-program assessment questionnaires indicated that they found the documentary interesting and surprising (e.g., "raising my awareness of prevalence of implicit bias," "enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same," and "greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested"). Many viewers indicated they would take additional action such as explore the topic further, visit the Web site and review the resources, take an IAT, or generally try to be more aware of their own implicit biases.

Figure 2. Pre and Post Documentary Ratings of Pervasiveness of Implicit Bias

Question: It has been suggested that a judge's decisions and court staff's interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups. To what extent do you think that this occurs?

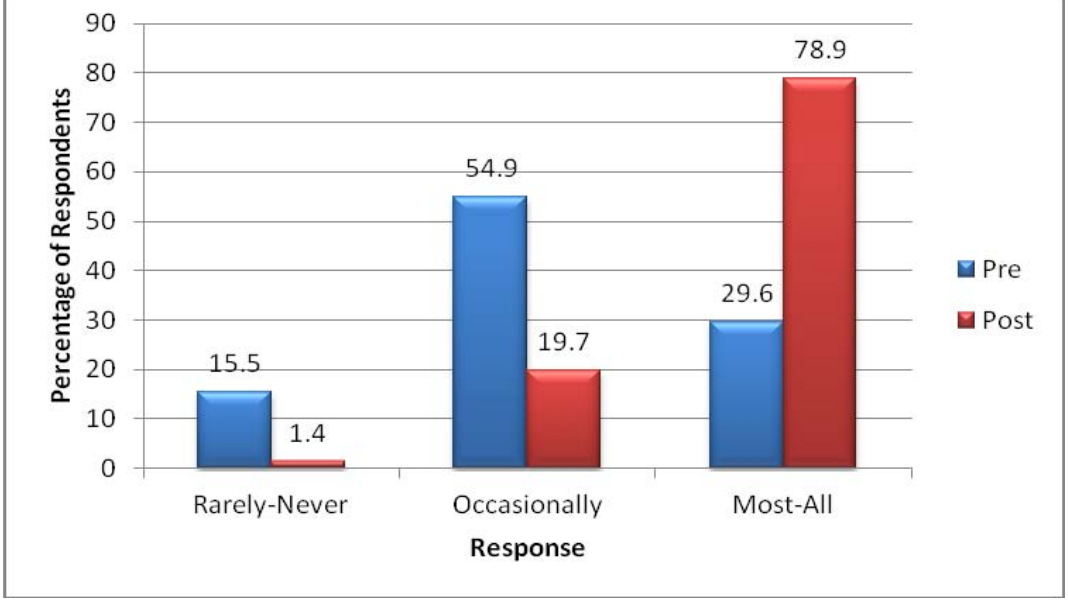
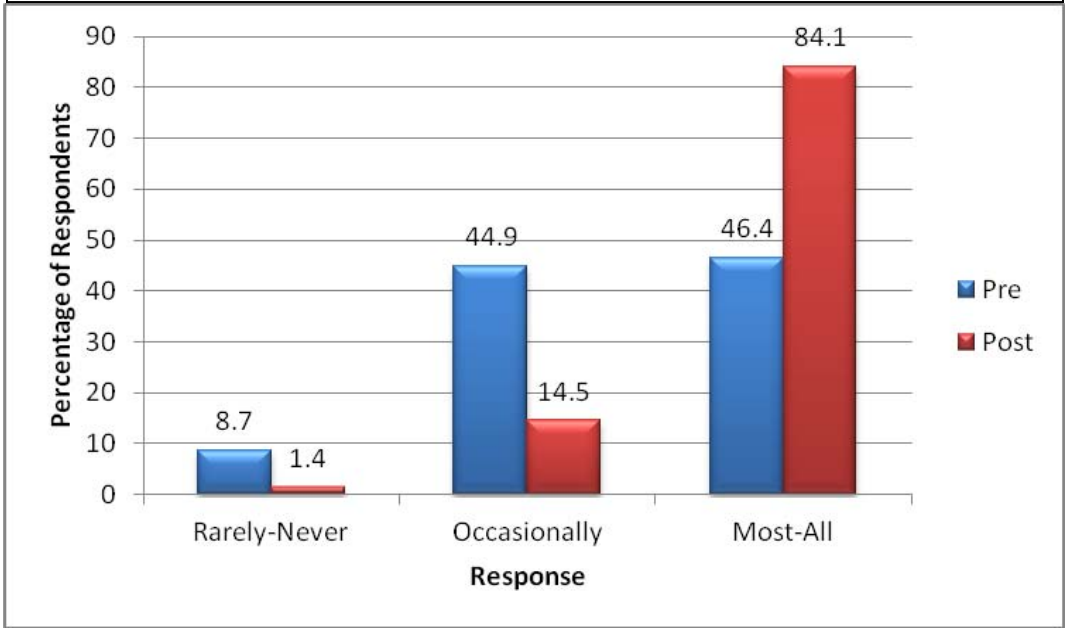


Figure 3. Pre and Post Documentary Ratings of Influence of Implicit Bias if No Explicit Bias

Question: Can a person who is free of explicit racial bias nonetheless be unwittingly influenced by unconscious or implicit racial bias?



Minnesota

Program Objectives. Minnesota's program sought to engage participants in exploring implicit bias and its potential effects on fairness in the courts. It also began a discussion about possible methods to address implicit bias. Presentation materials (see Appendix D) identified the following objectives for program participants:

- Experience and assess responses to the Implicit Association Test (IAT),
- Understand the research on implicit bias,
- Explore the implications for decision making due to implicit bias in the courts,
- Specify the most critical behaviors affecting fairness that may be subject for dedicated action, and
- Identify personal and professional methods that can reduce the impact of bias.

Target Population. The program planners developed a pilot program for the Judicial Branch Racial Fairness Committee. The intent was to deliver the information to Committee members who would then recommend whether it should be included in new judge or other training. The Racial Fairness Committee included representatives of a variety of criminal justice perspectives (e.g., judge, prosecutor, defender, court interpreter, service agency representative).

Inputs/Resources. Table 5 summarizes the inputs and resources developed and/or used by the program planners. Minnesota incorporated both the California documentary as well as PowerPoint lecture and small group and plenary discussions to deliver program content on the science of implicit bias, the potential effects of implicit bias on the fairness of courts, and possible methods to reduce its impact. (See Appendix D for program materials available to the national project.)

Table 5. Minnesota Inputs/Resources

- Convened conference calls with experts to enhance facilitator subject knowledge
- Developed directions for participants to take IAT at Project Implicit Web site prior to training and drafted questions to assess reactions
- Developed 2.5-hour live pilot program on implicit bias and fairness in the courts, including the following elements:
  - Debriefing reactions to IAT in a pairs dialogue
  - Showing documentary produced by California followed by small group and plenary discussions on themes and reactions
  - PowerPoint lecture introducing and reinforcing key implicit bias concepts
  - Small group breakout session on professional and personal methods to manage implicit bias
- Developed pre- and post-program evaluation

Minnesota chose to develop its own cadre of on-site experts by identifying local faculty and convening conference calls with national experts to gain a better understanding of the subject matter and typical questions raised by court audiences. Assuming the information was well-received by the Racial Fairness Committee, the plan was to have local experts available to provide information about the topic during regularly-scheduled training

sessions such as the new judge orientation program.

Processes/Activities. Minnesota provided program participants with a set of instructions for taking the IAT prior to attending the program. The instructions requested that participants take the Race IAT and a second IAT of their choosing. After taking the IAT, participants completed an on-line survey consisting of six questions about their thoughts and observations related to taking the IAT. Participants discussed their reactions to the experience of taking the IAT during one of the program's small group sessions.

A Minnesota judge and judicial educator led the program that included a PowerPoint presentation punctuated with small group and plenary discussions. A primary component of the Minnesota program included watching and debriefing the California documentary. Participants also spent time discussing what they could do to manage implicit bias both personally and professionally. The program began and ended with participants completing an assessment of their implicit bias knowledge.

Outputs. Minnesota's Racial Fairness Committee consists of 20-25 judges, attorneys, justice system partners, and community representatives. The implicit bias program was opened to all members of the Committee. Because the Committee was considering whether to recommend the program content for new judge orientation programs, the Committee also extended an invitation to a few new judges to gauge their reaction to the material. Twenty-five participants completed at least some portion of the program evaluation. To ensure the anonymity of responses, given the small number and diversity of the participants, Minnesota's evaluation form did not ask questions about the participant's position and length of time in the position.

Outcomes. As shown in Table 6, the majority of participants were satisfied with the program: 82 percent of the 16 participants responding rated the program content medium high to high, 69 percent rated program process medium high to high, and 81 percent rated the program's applicability medium high to high.[7]

Table 6. Minnesota Participants' Ratings of Content, Process, and Applicability (n=16)

Question	Scale Rating: 5=High and 1=Low					
	5	4	3	2	1	Total
1. Overall Rating: Content	44%	38%	12%	0%	6%	100%
2. Overall Rating: Process	50%	19%	25%	6%	0%	100%
3. Overall Rating: Applicability	50%	31%	12%	6%	0%	100%

Of the seven pre- and post-program assessment questions displayed in Table 7 ((see ☑ columns), the number of correct responses increased for four questions, decreased for two, and

[7] The percentages are based on the responses of 16 of the 25 participants who completed these items on the post-program assessment.

stayed the same for one.[8] (Tables M-1 and M-2 in Appendix F display the percentage of correct and incorrect responses for those who scored correctly and incorrectly, respectively, on the pre-program assessment.) Because the Minnesota results are based on a small number of respondents, they should be interpreted with caution.[9]

Table 7. Minnesota Program Assessment Results (n=17)

Questionnaire Item (bolded answer is correct)	Pre-Program Responses*			Post-Program Responses*		
	☑	☒	?	☑	☒	?
1. Implicit bias: (a) Is produced by the unconscious processing of schemas and stereotypes, (b) Is not influenced by an individual's belief that people should all be treated the same, (c) Is difficult to alter, (d) **All of the above**	**53%**	**47%**	**0%**	**65%**	**35%**	**0%**
2. Which of the following thought processes are activated automatically, without conscious awareness? (a) **Implicit bias,** (b) Explicit bias, (c) Profiling, (d) All of the above	**35%**	**65%**	**0%**	**53%**	**47%**	**0%**
3. Research has shown that unconscious or implicit bias: (a) Exists in only a few jurisdictions in the US, (b) Does not occur in people who are free of explicit bias, (c) **Is related to behavior in some situations,** (d) All of the above	**53%**	**47%**	**0%**	**65%**	**35%**	**0%**
4. The Implicit Association Test (IAT): (a) Measures response time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Should not be used to diagnose a particular individual as being biased, (d) a and b, (e) **All of the above**	**47%**	**53%**	**0%**	**29%**	**71%**	**0%**
5. Which of the following techniques have been shown to limit the influence of implicit bias? (a) Check lists, (b) Paced, deliberative decision-making, (c) Exposure to positive, counter-stereotypical exemplars, (d) **All of the above**	**77%**	**24%**	**0%**	**77%**	**24%**	**0%**
6. What evidence do we have that implicit bias exists? (a) Analysis of criminal justice statistics, (b) Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior, (c) Magnetic Resonance Imaging (MRIs), (d) **b and c**, (e) All of the above	**41%**	**53%**	**6%**	**18%**	**82%**	**0%**
7. Justice professionals can fail to recognize the influence of implicit bias on their behavior because: (a) They are skilled at constructing arguments that rationalize their behavior, (b) The large volume of work they are required to do makes it difficult to be cognizant of implicit bias, (c) They do not believe they are biased, (d) **All of the above**	**77%**	**18%**	**6%**	**82%**	**18%**	**0%**

*☑ =correct response, ☒=incorrect response, ?=no response

[8] The Minnesota pre- and post-assessment questionnaires included eight questions. One of the items was eliminated from the analyses because a typographical error resulted in a flawed question.

[9] The pre- and post-assessment results are based on the responses of 17 participants who completed at least one question (the same question) on both the pre- and post-assessment questionnaires. Most of the 17 also completed the items in Table 6, but the respondents are not identical for both tables.

A closer look at the frequency of responses to Questions 4 and 6, the two questions that received more incorrect responses on the post-program assessment, reveals that several participants were confused about (a) whether the IAT should be used for individual diagnostic purposes, and (b) whether analysis of criminal justice statistics serves as evidence that implicit bias exists. In retrospect, the confusion about the IAT may stem from the fact that participants were asked to take the IAT prior to the program. The experience of taking an IAT is similar to taking other diagnostic tests, and thus participants may have viewed the IAT as a more authoritative source of feedback about their own implicit racial bias than is warranted. Although the IAT has been shown to be predictive of behaviors in the aggregate – across many people—the test is not currently deemed reliable enough for use as a diagnostic tool at the individual level:

> [I]t is clearly premature to consider IATs as tools for individual diagnosis in selection settings or as a basis for decisions that have important personal consequences. The modest retest-reliability of IAT measures together with the unanswered questions concerning the explanation of IAT effects make evident that potential applications should be approached with care and scientific responsibility. Meanwhile, IATs are a fascinating research tool at the interface of social cognition and personality psychology that help to draw a more holistic picture of individual behavior and experience. (Schnabel, Asendorpf, & Greenwald, 2008, p. 524)

The Minnesota assessment results reinforce the importance of emphasizing this point. Indeed, one of the program facilitators noted that "we should emphasize that the IAT is not a diagnostic tool" in written comments assessing the program.

With regard to the confusion about using criminal justice statistics as evidence of implicit bias, this may have occurred because of discussions about the potential implications of implicit bias for the justice system. During one discussion, some individuals suggested that implicit bias might account partially for the disproportionate representation of ethnic and minority groups in the criminal justice system. Some participants may have heard this discussion of disproportionate minority representation as demonstrating the existence of implicit bias rather than possible implications of implicit bias.

Comments from participants who completed the pre- and post-program assessment questionnaires indicated that they thought the most useful information gained from the session regarded the development and operation of implicit biases (e.g., "causes/reasons for implicit bias; ways to counteract implicit bias both personal and professional" and "brain-neurological discussion"). Several listed actions they were likely to take as a result of the program: For example, "consider ways to increase positive stereotypes—photos in offices, etc." and "try to deal with my biases and learn techniques to counteract."

North Dakota

Program Objectives. North Dakota's program was longer than the California and Minnesota programs and thus had more time to explore the three objectives in Table 1, though relatively more time was devoted to the first objective to ensure participants understood implicit bias concepts. At the start of the program, the presenters identified the following objectives (see presentation materials in Appendix E):

- Normalize the association between information processing and how we relate to others,
- Examine implicit bias and the "condition" of being human, and
- Challenge the notion of being "color-blind."

In addition, the presenters explained that the program was focusing on race but that the concepts extended to many other characteristics or groups and that implicit bias should not be used as an excuse for prejudicial behavior.

Target Population. North Dakota's program targeted participants of its winter judicial conference. The majority of the 44 participants were judges or other judicial officers (e.g., referees). In addition, a few attorneys and members of court administration attended the program.

Inputs/Resources. North Dakota developed resources that included PowerPoint slides, video clips, and small group exercises to deliver content on the automaticity of information processing, the development of stereotypes and implicit attitudes, and strategies to reduce the influence of implicit bias. The project team also developed an on-line questionnaire for North Dakota to obtain participant impressions and actions taken several months after the program was delivered.

With assistance from the national project team, North Dakota identified two national experts—a judge and social psychologist—to deliver its program. As part of its judicial conference, North Dakota also convened a law and literature session led by another national consultant. Although not

Table 8. North Dakota Inputs/Resources

- Developed 4-hour live conference presentation on social cognition and decision making, including the following elements:
  - PowerPoint lecture on social cognition research
  - Video clips from *Race: The Power of an Illusion* followed by plenary discussion about race as a social construction and the impossibility of being "color blind"
  - Short film *The Lunch Date* followed by plenary discussion of stereotypes
  - Small group breakout session on stereotypes
  - Small group breakout session on strategies to reduce implicit bias and personal planning
  - Background readings
- Faculty included a social psychologist and judge from another state
- Developed pre- and post-program evaluation
- Provided link to secure IAT site
- Developed follow-up questionnaire

part of the national project on implicit bias, the session served to reinforce several of the concepts discussed during the implicit bias program offered earlier in the day.

Processes/Activities. North Dakota provided participants with a copy of *Implicit Bias: A Primer for Courts* (see Appendix A) prior to the start of the implicit bias program. The national faculty, a judge and social psychologist, delivered the program during the afternoon session of the winter judicial conference. After providing information on implicit bias and possible strategies to attenuate its influence, participants worked on individualized action plans to address the influence of implicit bias. Faculty suggested participants take the IAT as one of their action steps. Participants also completed an assessment of their knowledge of implicit bias at the beginning and the end of the program. Approximately four months after the program, the site coordinator requested participants to complete a short on-line questionnaire about the program and any efforts they have made to address their implicit bias.

Outputs. Of the 44 participants attending the program, 35 completed at least some questions on the pre- and post-program assessment. Almost all of the participants responding to demographic questions (n=34) were judges with at least five years of experience on the bench (see Tables ND-1 and ND-2 in Appendix F). Only one of the 34 participants listed his or her race as different than White, noting that it was White and Native American (see Table ND-3 in Appendix F). Roughly half of the participants rated their knowledge of the subject as moderate; another 44 percent rated their knowledge as minimal (see Table ND-4 in Appendix F).

Outcomes. As shown in Table 9, 84 percent of the 32 participants responding were satisfied with the program, 97 percent indicated they would apply the course content to their work, and 87 percent considered the presentation effective in delivering the content.[10]

Table 9. North Dakota Participants' Satisfaction and Likely Use of Program Content (n=32)

Question	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Total*
1. Overall, I am satisfied with this presentation	25%	59%	12%	3%	0%	99%
2. I will apply the course content to my work	19%	78%	3%	0%	0%	100%
3. The presentation was effective in delivering content	28%	59%	12%	0%	0%	99%

*Total may be less than 100% because of rounding fractional numbers to whole numbers.

[10] North Dakota's analyses are based on the responses of 35 participants who completed at least one question (the same question) on both the pre- and post-assessment questionnaires. Of the 35, 32 also completed the questions in Table 9.

Of the seven pre- and post-program assessment questions displayed in Table 10 (see ☑ columns), the number of correct responses increased for four questions, decreased for two (although one decreased only slightly), and stayed the same for one.[11] (Tables ND-5 and ND-6 in Appendix F display the percentage of correct and incorrect responses for those who scored correctly and incorrectly, respectively, on the pre-program assessment.).

Table 10. North Dakota Program Assessment Results (n=35)

Questionnaire Item (bolded answer is correct)	Pre-Program Responses*			Post-Program Responses*		
	☑	☒	?	☑	☒	?
1. In general, do you think that it is possible for judges' decisions and court staffs' interactions with the public to be unwittingly influenced by unconscious bias toward particular racial/ethnic groups? (a) **Yes**, (b) No	**100%**	**0%**	**0%**	**100%**	**0%**	**0%**
2. Research has shown that unconscious or implicit bias: (a) Exists in only a few jurisdictions in the US, (b) Does not occur in people who are free of explicit bias, (c) **Is related to behavior in some situations**, (d) All of the above	**69%**	**29%**	**3%**	**83%**	**17%**	**0%**
3. Implicit bias: (a) Is produced by the unconscious processing of schemas and stereotypes, (b) Is not influenced by an individual's belief that people should all be treated the same, (c) Is difficult to alter, (d) **All of the above**	**74%**	**26%**	**0%**	**72%**	**26%**	**3%**
4. Which of the following techniques have been shown to limit the influence of implicit bias? (a) Judicial intuition, (b) Moral maturity enhancement, (c) **Exposure to positive, counter-stereotypical exemplars**, (d) All of the above	**23%**	**77%**	**0%**	**40%**	**54%**	**6%**
5. The Implicit Association Test (IAT): (a) Measures response time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Should not be used to diagnose individual bias, (d) **All of the above**	**26%**	**69%**	**6%**	**34%**	**63%**	**3%**
6. What evidence do we have that implicit bias exists? (a) Analysis of criminal justice statistics, (b) **Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior**, (c) Self-report, (d) All of the above	**14%**	**86%**	**0%**	**9%**	**89%**	**3%**
7. Which of the following techniques has not been used to measure implicit bias? (a) Implicit Association Test (IAT), (b) **Polygraph**, (c) Paper and pencil tests, (d) MRIs	**26%**	**74%**	**0%**	**31%**	**66%**	**3%**

*☑ =correct response, ☒=incorrect response, ?=no response

Although the percentage of correct responses increased from pre-assessment to post-assessment for the majority of items, four of the items had correct responses of 40 percent or less on the post-program assessment. Of the items that were answered incorrectly by the

[11] The North Dakota pre- and post-program assessment questionnaires included eight questions. One question was eliminated from the analyses because, in retrospect, it could have been confusing to respondents.

majority of participants, no one clear explanatory pattern emerges from this data. For Questions 4 and 6, a majority of participants answered "all of the above," indicating they may have misread the questions, thought that at least two of the answers were correct, or guessed at the correct response. For Question 5, a majority of participants answered "pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone." Although correct, the other responses also were correct; thus the program may not have covered all of the material equally or equally well, or there was a lack of congruence between evaluation items on the tests and the actual curriculum as delivered on-site. Participants may have also guessed when answering Question 7, for which there was no majority—the highest percentage was 40 percent answering "MRIs." In written comments, a few participants expressed that there was a lot of material covered and they would have preferred less time in small groups and more time on lecture and discussion: "more time—feel we went through this rather quickly and I needed more [time] to have a more concrete grasp. But it is a good start—thank you;" "more real experiences – too many slides – too little time – speaker knows subject of slides better than we do;" "too much small group…." Although participants were engaged (other comments noted "keep up the good work!" and "this is a great program!"), they seemed to need more time to fully understand the information and its implications.

Approximately three months after the North Dakota program, the program coordinator sent an email to participants requesting they complete a short, Web-based survey. Only fourteen of the original participants responded to the survey, so the results should not be considered representative of all the participants.

The majority of those responding thought that it was at least somewhat important for judges to be aware of the potential influence of implicit bias on their behavior: On a scale of 1 (unimportant) to 7 (very important), the average rating was 4.7 and the most frequent rating was "6". Most (nearly 70 percent) indicated that they had not made any specific efforts to increase their knowledge of implicit bias; however, most (nearly 77 percent) indicated that they had made efforts to reduce the potential influence of implicit bias on their behavior. Examples of the efforts participants said they had taken are:

- Concerted effort to be aware of bias,
- I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination,
- Simply trying to think things through more thoroughly,
- Reading and learning more about other cultures, and
- I have made mental notes to myself on the bench to be more aware of the implicit bias and I've re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part.

Lessons Learned

The project worked with three states to see how information on implicit bias could be delivered to members of their respective court community. Each state chose a time, venue, and approach for delivering implicit bias content based on its judicial branch education goals, resources, needs, and opportunities. Consequently, the three programs the states developed and delivered differed on a variety of factors and their outcomes cannot be directly compared to one another.

Taken as a group, however, the results of the three programs provide insights about the court community's interest in implicit bias and suggestions for future judicial branch education programs on the topic. This section describes six "lessons learned" or "takeaways" identified by examining the three programs in concert.

1. Court audiences are receptive to implicit bias information.

An initial challenge for educators presenting information on implicit bias is whether they can engage audience members in an honest, open, and constructive discussion about personal biases. This may be difficult for a number of reasons, such as participant unwillingness to explore one's own possible biases, an inability to identify those biases, or a concern about acknowledging those biases publicly.

Cultivating audience receptivity and personal accountability may be especially challenging with members of the court community who have been taught to focus on the facts and disregard irrelevant information. Judges have attained an important decision making role in society—a role they acquired based on their past performance. Their ability to exercise impartial and objective judgment is central to their self-identity. Research shows, however, that they tend to overestimate their ability to avoid bias (Rachlinski, Johnson, Wistrich, & Guthrie, 2009). As a consequence, they may not see a need for further education on racial and ethnic fairness issues. Thus one question the project team had at the outset was whether judges and other court professionals would be interested in learning about implicit bias and consider the subject matter relevant to their work.

Table 1 indicates that at least 80% of participants who responded to assessment questions in each state expressed satisfaction with the implicit bias program and saw its applicability to their work. Their comments used adjectives such as excellent, valuable, important, relevant, informative, worthwhile, and eye-opening to describe their reactions to the programs. This does not mean that the programs worked for all participants, but they seemed to work for a large majority.

Given the variation in target audiences and program features across the states (see Table 12), the findings suggest that judges and court professionals in other states also would be receptive to information about implicit bias. Comments from participants indicated that the programs raised their awareness of the presence and prevalence of implicit bias and piqued their interest to explore the topic more. Thus the findings indicate that implicit bias programs

offer judicial educators a vehicle to motivate and engage members of the court community to explore issues of bias.

Table 11. Overall Program Ratings by State

California (n=60)	Minnesota (n=16)	North Dakota (n=32)
• 93% satisfied with this documentary program • 90% will apply the course content to their work	• 81% gave the program content a medium high to high rating • 81% gave the program's applicability a medium high to high rating	• 84% satisfied overall with this presentation • 97% will apply the course content to their work

Table 12. Summary of Implicit Bias Program in Each State

Program Feature	California	Minnesota	North Dakota
Target Audience	• General court community	• Mix of justice system professionals	• Mostly judges
Type of Program	• 1-hour video program	• 2.5-hour in-person program	• 4-hour in-person program
Program Components	• Aired program • Provided Web site for follow-up	• Viewed CA video • Provided lecture, small group discussions and exercises	• Provided lecture, small group discussions, and exercises
Faculty/ Facilitators	• No facilitators on site	• Local judge & judicial educator	• Judge and psychologist from outside of ND

2. Complexity of the implicit bias subject matter demands time and expertise.

Table 13 shows that posttest scores improved on all or a majority of the assessment questions across all three programs. However, the results are more complicated to interpret because those who responded correctly to an item on the posttest were not always the same individuals who responded correctly to the item on the pretest, i.e., some participants' knowledge decreased from pretest to posttest.[12] An ideal program reinforces participants' correct answers and changes participants' incorrect answers on the posttest. Incorrect posttest responses may be the result of ineffective delivery of some program information, a poor fit between the evaluation item and program content, participant misunderstanding of the test

[12] Interpretation of the data is limited by small samples in some jurisdictions (limiting the number of responses on some items) and the representativeness of participants who were willing to complete the pre and posttests.

question, and/or guessing correctly on the pretest question and incorrectly on the posttest question. Based on the number of responding participants who mentioned needing more time to digest the information, incorrect posttest responses likely are also due to the complexity of the subject matter.

Unlike some judicial branch education programs that involve the delivery of factual information on new laws, procedural requirements, or appellate court decisions, education on implicit bias involves social science research that is unfamiliar to most legally-trained individuals and ultimately has behavioral change as its goal. Implicit bias training seeks to improve not only deliberate behaviors like judicial decision-making but also more spontaneous verbal and non-verbal behaviors of judges and court staff. Devine (see Law, 2011, p. 42) reports that combating implicit bias is much like combating any habit and involves specific steps:

- Becoming *aware* of one's implicit bias.
- Being *concerned* about the consequences of the bias.
- Learning to *replace* the biased response with non-prejudiced responses—ones that more closely match the values people consciously believe that they hold.

Table 13. Pre and Posttest Results by Program

Pre and Posttest Results	California (n=71)	Minnesota (n=17)	North Dakota (n=35)
Range of correct posttest responses	56% to 100%	18% to 82%	9% to 100%
Correct responses from pre to posttest	Increased on 5 of 5 questions	Increased on 4 questions, same on 1, decreased on 2	Increased on 4 questions, same on 1, decreased on 2
# of questions that had at least one participant answer incorrectly on posttest after answering correctly on pretest	4 questions	6 questions	6 questions

Judicial educators should understand the difficulty of comprehending the scientific material for many of their program participants and the need to walk participants through the behavioral change process. Spreading the material across several sessions likely will result in better comprehension and application than trying to accomplish all of Devine's steps in one session. Any introductory session, however, should let participants know that there are strategies for addressing implicit bias and that the strategies will be discussed; otherwise, program participants may leave the first session feeling somewhat helpless about what to do. In addition, as with any behavioral change program, continued efforts to periodically revisit implicit bias concepts (e.g., by hosting follow-up or refresher sessions; by integrating the topic into seminars on other, related issues) will promote vigilance and encourage sustained habit formation.

The complexity of the information also requires faculty and facilitators who are experts in the science of implicit bias and who are vigilant about correcting misinformation (e.g., the use of the Implicit Association Test for diagnostic purposes as discussed in Lesson Learned #4) that may arise during discussions about the material. Research on implicit bias continues to expand, and thus those teaching the course need to remain current with new findings. While it is helpful to have judges and other practitioners serve as faculty to reinforce the subject matter's applicability to court audiences, implicit bias program faculty should include at least one subject matter expert to ensure that the science is properly presented and understood.

3. Tailor implicit bias programs to specific audiences.

Any judicial branch education program should be based on considerations of the target audience's composition; this is particularly true for programs on implicit bias. Key considerations for program planners are:

- Prior experience discussing race and ethnic fairness issues. To what extent has the target audience participated in other educational programs related to cultural competence and sensitivity? Participants' expectations will vary based on their prior experience. Program planners may need to allow more time for audiences new to discussing these issues and/or for audiences frustrated with the content of prior programs (see, for example, Juhler, 2008).
- Demographic diversity of the state. To what extent have program participants witnessed biased behaviors? In one program, a participant noted that more examples ("anecdotal references") would be helpful given the lack of racial diversity in the work environment. Whereas this type of real-world contextual information may help frame the concept of implicit bias for individuals who live in more homogeneous communities with fewer racial minorities, educators may not need to spend as much time listing or elaborating such examples when training audiences from culturally diverse areas, for whom the real-world applicability of implicit bias may be more readily perceived. Educators also may have more success initially discussing implicit biases in the context of groups with which the audience is more familiar, such as teenagers or the elderly, before discussing implicit biases related to race and ethnicity.
- Audience characteristics. The audiences of the project sites varied in professional orientation, i.e., one program focused on judges while the other two included a wide array of justice system professionals. The audiences also varied on demographic factors such as age, race and ethnicity, and gender, and, as noted above, on prior level of exposure to cultural competency, diversity, and other related educational programs. These differences are important to acknowledge in developing program content and delivery. They will affect the types of examples educators use to relate implicit bias concepts to audience members' every-day work environments as well as examples of strategies for combating implicit bias.
- Audience motivation. How willing is the audience to discuss bias in the court system? One program participant noted that his or her training group seemed

"collectively uncomfortable about talking about their bias."As noted under Lesson Learned #1, court system professionals may believe that they are not as susceptible to bias as those in other fields. They may need to be convinced of the reality of implicit bias and the benefits of the educational program before they become fully engaged in program participation. Educational approaches that incorporate information about the empirical evidence of unintended bias may help promote awareness and instill intrinsic motivation to change. However, educators should avoid relying on extrinsic motivators (e.g., mandatory compliance, punitive measures) as they can engender backlash that escalates and perpetuates prejudice in some individuals (e.g., Plant & Devine, 2001).

4. Content delivery methods affect participant understanding and satisfaction

Additional research is needed to identify the most effective combination of content delivery methods for a judicial education curriculum on implicit bias. Regarding the assortment of approaches used in this triad of pilot studies, some noteworthy considerations for judicial educators emerged from direct feedback from pilot participants as well as general knowledge of effective educational delivery methods. Information on the various delivery methods used in the programs follows.

- Video documentary. Overall, California's video documentary was well-received by participants in the California and Minnesota pilot programs and seemed to be an effective mechanism for delivering content about implicit bias. In the feedback provided from participants at both sites, many identified the video documentary as the most beneficial or useful part of their program. Participants indicated that the video was informative, interesting, and enlightening, despite some comments suggesting that the video could benefit from a more rigorous editing process and other comments regarding various technical difficulties (e.g., scratches on the source DVD, insufficient volume for some participants).

  Several participants wanted the documentary to provide more information on strategies to address implicit bias. The greater focus on the science behind implicit bias likely led one participant to comment that "the science was daunting for some participants and made them feel somewhat powerless to change because how do you change how our brains work?" Although the video referenced some strategies, pointed participants to a Web site with additional resources, and indicated that upcoming programs would address solutions in more detail, [13] participant comments indicated an interest in hearing about possible strategies during the initial broadcast.

  A few participants also suggested building exercises into the video and making the content more interactive. One such approach could present the video documentary to a live audience of participants, but parse the video into shorter viewing segments. The California documentary could be paused at three points to produce four

[13] California produced two additional videos: The Neuroscience and Psychology of Decision making, Part 2—The Media, the Brain, and the Courtroom and The Neuroscience and Psychology of Decision making, Part 3—Dismantling and Overriding Implicit Bias to further explore implicit bias and strategies to address it.

approximately 15-minute clips that (1) provide an introduction to the neurological and psychological science behind bias, (2) explain the IAT, (3) present research illustrating how implicit bias affects real world behaviors, and (4) describe some strategies for addressing implicit bias. Facilitators could then incorporate guided group discussion and/or illustrative experiential exercises into these breaks to reinforce learning as new topics are introduced. If this approach helps clarify and elaborate on difficult concepts and prompt further discussion of practical solutions, perhaps participants will be less likely to feel overwhelmed by the material.

- PowerPoint presentation and lecture. One pilot program presented the educational material on social cognition and implicit bias via a live PowerPoint lecture delivered by a content expert, and another program used PowerPoint lectures to augment information presented in the video documentary. Several participants indicated that, in general, they needed a much slower pace and more time to fully digest such complex information. Some participants mentioned that additional real-world or anecdotal examples that illustrated the phenomenon would have helped them develop a more concrete understanding of the material.
- Small group discussion. In general, skillfully facilitated small group discussions can help raise self-awareness and cultivate more active, engaged participation (e.g., Teal, Shada, Gill, Thompson, Fruge, Villarreal, & Haidet, 2010). Interestingly, however, pilot participants who only viewed an educational presentation about implicit bias showed more consistent improvement from pretest to posttest than those who also engaged in small group discussion following an educational video or lecture. For example, in the results of an assessment question on scientific evidence that implicit bias exists, 62% of participants who viewed only a video documentary provided the correct response (see Table 4), whereas only 18% (see Table 7) and 9% (see Table 10) of participants from each program that incorporated a discussion group component answered this question correctly. Obvious explanations, given the substantial variation among pilot programs and evaluation tests, are that this counterintuitive trend emerged not from differences in learning, but from variations in the evaluation questions and response options used across programs and/or other inherent program differences (e.g., audience composition, content emphasized).

  Another possibility to consider is that these results reflect cognitive processing errors, with group discussion opening the door for some common memory errors to enter and influence participant learning processes. For example, participants may have confused the source of information delivery, attributing or generalizing content they gleaned from peers in group discussion to the knowledgeable expert facilitator in the educational component of the session. Source memory information (i.e., who said it) is more likely to be disrupted than content memory (i.e., what was said), and this is particularly likely to occur when attention and cognitive resources for processing new information are divided (see Mitchell & Johnson, 2000). Alternatively, discussion with and misinformation from others may alter participants' memories of previously learned information; this is more likely to occur when cognitive processing is constrained by factors like time pressure (e.g., Roediger, Meade, & Bergman, 2001; Zaragosa & Lane, 1998).

As noted earlier, some participants thought they would have benefitted from a slower pace and more time to process the information presented on implicit bias. If participants do not have a clear understanding of the material from the educational lecture or video component of the session, it is possible that misinformation may circulate in subsequent group discussions. This misinformation may then either fill in the gaps of a participant's memories about the original educational content or impair accurate recall of what was originally conveyed by the educator or expert (e.g., Zaragoza, Belli, & Payment, 2006; Gabbert, Memon, Allen & Wright, 2004; Gabbert, Memon, & Wright, 2006). The answer is not to eliminate small group discussions but to structure them to increase their effectiveness and avoid misinformation (see below). It is worth noting that several participants at both sites with small group discussion indicated that better structure was needed to more effectively guide conversations. As discussed in Lessons Learned #2, having a subject-matter expert on the science of implicit bias on hand during the educational program would help prevent misinformation and facilitate better participant comprehension of the material.

- Experiential exercises and other illustrative activities. In general, participants commented favorably on exercises such as the Stroop test[14] to demonstrate automatic cognitive processing. Educators, however, should select and use exercises judiciously to reinforce a point and not consume precious time that could be allotted elsewhere. One participant, for example, noted that a story on gender stereotyping was not really necessary in the context of the specific information that was being presented.

  All three programs included information on the Implicit Association Test (IAT). One pilot site asked participants to complete the IAT prior to the program and answer a brief questionnaire regarding their thoughts and reactions to taking the test. This exercise was used as the basis for some initial discussion in the program. Participants described the IAT experience as challenging and revealing. The other two sites encouraged participants to take the IAT as a follow-up to the program. Several participants from those two sites thought that it might have been helpful if they had taken the IAT prior to the program or had been given an opportunity to take it during the program.

  Although incorporating the IAT into a program may help provide insight and motivation for participants, judicial educators should weigh the IAT's overall value to the course. If the IAT is taken prior to the program, it may unsettle some participants and require a lengthy explanation at the beginning of the program to place participants' results in the proper context. If unplanned, this discussion can use valuable program time. Participants may have fewer questions and concerns about taking the IAT after the

[14] The Stroop test (Stroop, 1935) may be used to illustrate the concept of reaction time as a measure of automaticity (i.e., that cognitively easy or routine tasks can be performed more quickly or "automatically" than more cognitively challenging tasks). Although several variations of the test exist, in one popular version of the test, participants are asked to read a list of several color words (e.g., "red," "blue," "green") in black ink—which they do easily. They are then given a list of colors that are written in ink colors that are incongruent with the semantic meaning of the word (e.g., "blue" is written in red ink). Rather than read the words, participants are asked to name the ink color of each word. Participants find this task much more difficult. The test demonstrates that for most people, reading has become an automatic process; people must override the semantic meaning of the word in order to name the font color when performing the second task.

program content has been delivered. If the IAT is offered during the program, educators need to consider issues of cost for laptops to connect to the Project Implicit Web site to take the test as well as privacy issues—some participants may be uncomfortable taking the test in public and possibly having their results visible to others. Some presenters have overcome these concerns by conducting an IAT with program participants as a group. They ask the participants to clap or hit the table to respond to the paired associations. Participants can hear how the pace slows when stereotype-incongruent pairs are displayed on a screen. This approach, however, may not work as well in a program with a small number of participants.

Regardless of whether taking the IAT is incorporated as a program activity, presenters should emphasize that the instrument is educational and not diagnostic in nature (Stanley, Sokol-Hessner, Banaji, & Phelps, 2011). The program assessment question focusing on the IAT was one of the most incorrectly answered items on the posttest for all three programs. Based on the assessment results, many participants may have misunderstood or not fully understood that the IAT is malleable and "that its predictive validity is moderated by situational variables" (Nosek, Greenwald, & Banaji, 2007, p. 285).

- Supplemental resources. Well-advertised Web sites with additional resources (e.g., a link to Project Implicit where visitors can take an IAT online, recommended supplemental readings, support tools for implicit bias intervention strategies) can encourage participant follow-up by guiding them to an organized, centralized hub of the most relevant and useful resources on the topic.

  Intermittently throughout the piloted program in California, participants heard about additional resources available on the California Administrative Office of the Courts' Education Division Web site. At the conclusion of the educational session, several California participants indicated that they planned to visit the program Web site or seek more information about the topic on their own. In addition, the North Dakota conference included a "law and literature" program in the evening following the implicit bias program. Although this session was not considered part of the implicit bias program, participants referred back to information from the implicit bias program as they discussed several short stories. Based on observation, participants seemed to enjoy the opportunity to further discuss the implicit bias concepts in this more informal setting.

To take full advantage of and adapt the delivery methods from the pilot programs, judicial educators should consider, as noted in Lesson Learned #2, planning a series of targeted seminars as opposed to one 2- to 4-hour session. An expanded curriculum would allow more time to supplement primary educational instruction like the California video documentary with interactive and experiential exercises to illustrate concepts and heighten awareness, and would afford participants time to fully digest the complex and thought-provoking information.

A multi-session approach also may improve participant comprehension. Instead of trying to cover all program information in a single session, faculty could present the material in more manageable portions to improve retention. This approach also has the advantage of

reinforcing the educational message over repeated exposures, and thus better facilitating actual behavioral change over time.

Breakout sessions may be more productive and misinformation minimized if trained facilitators who are content experts help guide the discussions of each small group. Some small group participants indicated that discussion segments ran too long and would have benefitted from a more structured approach. Knowledgeable small group facilitators can help guide participants through key discussion points while accurately resolving any subject-matter questions or errors that arise in conversation.

Given the range of responses to the array of illustrative exercises used in the pilot studies, program planners should select exercises strategically, limiting them in the curriculum to only the few most effective options for their target audience. In an expanded curriculum, instructors could also offer more anecdotal or real-world examples, as requested by some pilot participants, to make the content more accessible and applicable to the local audience.

Finally, faculty should reinforce the availability of strategies to address implicit bias and, if intervention strategies are not covered in detail in the session, provide specific information about upcoming programs, Webinars, or conference calls that will address them. Faculty should also consider providing participants with handouts of easily accessible resources on such strategies (see Lesson Learned #5). Knowing that education on viable interventions is available may attenuate feelings of helplessness regarding the inevitability of implicit bias and may encourage interested individuals to learn more while they are motivated to do so.

If a second session is not possible, planners should ensure that participants leave the program with at least a basic overview of strategies to address implicit bias, and, if possible, provide follow-up opportunities through, for example, conference calls, Web sites, and newsletter articles to learn more about and encourage the practice of various strategies.

5. <u>Dedicate time to discuss and practice strategies to address the influence of implicit bias.</u>

Because the pilot programs primarily were introductory in nature, program planners allotted the most time to explaining the concept of implicit bias and how it might influence a person's decisions and actions. Extensive time was spent on the science because program planners were not sure how receptive the audience would be to the concept of implicit bias. As a consequence, faculty spent relatively less time discussing strategies to address implicit bias. The experience across all three programs, however, demonstrated that once participants learned about the potential of implicit bias to influence their decisions and actions, they were very interested in learning how to address it.

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).[15] To address this gap in concrete strategies applicable to court audiences, the project team reviewed the science on strategies and identified their potential relevance for judges and court professionals. The team also conducted a small group discussion with judges and judicial educators (referred to as the Judicial Focus Group or JFG) to discuss potential strategies.

Appendix G includes four tables. The first, "Combating Implicit Bias in the Courts: Understanding Risk Factors" identifies and describes conditions that exacerbate the effects of implicit bias on decisions and actions. The risk factors include:

- the presence of certain emotional states,
- ambiguity in decision-making criteria,
- environmental cues that make the social categories associated with cultural stereotypes more salient,
- low-effort decision-making,
- distracted or pressured decision-making, and
- environments that lack appropriate feedback mechanisms and accountability.

The second table "Combating Implicit Bias in the Courts: Seeking Change" identifies and describes seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions. The strategies ask people to:

- raise awareness of implicit bias (this in and of itself is insufficient to mitigate the effects of implicit bias on judgment and behavior),
- seek to identify and consciously acknowledge real group and individual differences,
- routinely check thought processes and decisions for possible bias,
- identify sources of stress and remove them from or reduce them in the decision making environment,
- identify sources of ambiguity in the decision making context and establish a structure to follow before engaging in the decision making process,
- institute feedback mechanisms; and
- increase exposure to stigmatized group members and/or counter-stereotypes and reduce exposure to stereotypes.

The table briefly summarizes empirical findings that support the strategies and offers concrete suggestions, both research-based and extrapolated from existing research, to implement each strategy. Some of the suggestions in the table focus on individual actions to minimize the influence of implicit bias, and others focus on organizational efforts to (a) eliminate situational or systemic factors that may engender implicit bias and (b) promote a more egalitarian court culture.

[15] In addition, some seemingly intuitive strategies such as directing individuals to suppress or ignore stereotypes can actually result in more stereotypic thoughts (Macrae, Bodenhausen, Milne, & Jetten, 1994).

The third and fourth tables provide summaries of the research findings cited in the preparation of the first two tables for those interested in better understanding the basis for the risk factors and suggested strategies. The project team offers the four tables as a resource for judicial educators developing programs on implicit bias with the understanding that the information should be reviewed and revised as new research and lessons from the field expand current knowledge.

The implicit bias intervention strategies provided in Appendix G rely on an individual's self-awareness (the ability to see how one's own decisions may be biased) and self-control (the ability to regulate one's own thoughts and behavior). Some audience members may already possess these skills at a high level, whereas others may need to refine them. Judicial educators should consider whether exercises to enhance these two skills are necessary for participants to apply implicit bias intervention strategies.

6. <u>Develop evaluation assessment with faculty.</u>

Evaluating the effectiveness of the programs proved difficult for two main reasons. First, although each program covered roughly the same topics, the programs varied in the extent of time devoted to each topic. Thus some of the pre- and post-program assessment questions focused on topics that were covered in detail in a particular program, and others did not address those same topics or did so in a more cursory manner. Although the project team designed evaluation questions in consultation with program coordinators, this did not guarantee that program faculty sufficiently addressed the material that appeared on the pre- and post-tests. As a result, the project team could not determine whether poor performance on an assessment question was due to specific program content and/or delivery problems or a lack of congruence between the content of the educational program and the content of the evaluation questions. Program coordinators, faculty, and evaluators should agree on the key "takeaways" participants should have when the program is completed and develop assessment questions to address those topics. Faculty should cover the "takeaway" topics in sufficient detail such that participants could be reasonably expected to answer related assessment questions correctly.

The second evaluation issue was generating assessment items that were neither too easy nor too difficult for participants. For example, in retrospect, the correct answer to the following item was obvious: "In general, do you think that it is possible for judges' decisions and court staffs' interactions with the public to be unwittingly influenced by unconscious bias toward particular racial/ethnic groups?" Appendix H discusses the challenges of evaluating programs on implicit bias and offers examples of process, outcome, and impact measures. It also includes a discussion of why the IAT should not be used as a pre- and posttest measure of the effectiveness of a program.

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http://www.consortiumonline.net/history.html

Project Implicit: https://implicit.harvard.edu/implicit/

Appendix A
Implicit Bias Primer for Courts

Implicit Bias

A Primer for Courts

Jerry Kang

Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts

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ABOUT THE PRIMER

This Primer was produced as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts. The Campaign seeks to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness across the nation's state courts. The Campaign is funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. Points of view or opinions expressed in the Primer are those of the author and do not represent the official position of the funding agencies. To learn more about the Campaign, visit www.ncsconline.org/ref.

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Schemas and Implicit Cognitions (or "mental shortcuts")

Stop for a moment and consider what bombards your senses every day. Think about everything you see, both still and moving, with all their color, detail, and depth. Think about what you hear in the background, perhaps a song on the radio, as you decode lyrics and musical notes. Think about touch, smell, and even taste. And while all that's happening, you might be walking or driving down the street, avoiding pedestrians and cars, chewing gum, digesting your breakfast, flipping through email on your smartphone. How does your brain do all this simultaneously?

It does so by processing through schemas, which are templates of knowledge that help us organize specific examples into broader categories. When we see, for example, something with a flat seat, a back, and some legs, we recognize it as a "chair." Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category "chair." Without spending a lot of mental energy, we simply sit. Of course, if for some reason we have to study the chair carefully--because we like the style or think it might collapse--we can and will do so. But typically, we just sit down.

We have schemas not only for objects, but also processes, such as how to order food at a restaurant. Without much explanation, we know what it means when a smiling person hands us laminated paper with detailed descriptions of food and prices. Even when we land in a foreign airport, we know how to follow the crazy mess of arrows and baggage icons toward ground transportation.

These schemas are helpful because they allow us to operate without expending valuable mental resources. In fact, unless something goes wrong, these thoughts take place automatically without our awareness or conscious direction. In this way, most cognitions are implicit.

Implicit Social Cognitions (or "thoughts about people you didn't know you had")

What is interesting is that schemas apply not only to objects (e.g., "chairs") or behaviors (e.g., "ordering food") but also to human beings (e.g., "the elderly"). We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail--such as the elderly--we will not raise our guard. If we think that another category is foreign--such as Asians--we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term "implicit bias"

includes both implicit stereotypes and implicit attitudes.

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? Or have we already internalized the lessons of Martin Luther King, Jr. and navigate life in a perfectly "colorblind" (or gender-blind, ethnicity-blind, class-blind, etc.) way?

Asking about Bias (or "it's murky in here")

One way to find out about implicit bias is simply to ask people. However, in a post-civil rights environment, it has become much less useful to ask explicit questions on sensitive topics. We run into a "willing and able" problem.

First, people may not be willing to tell pollsters and researchers what they really feel. They may be chilled by an air of political correctness.

Second, and more important, people may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection. For example, slight environmental changes alter our judgments and behavior without our realizing. If the room smells of Lysol, people eat more neatly. People holding a warm cup of coffee (versus a cold cup) ascribe warmer (versus cooler) personality traits to a stranger described in a vignette. The experiments go on and on. And recall that by definition, implicit biases are those that we carry without awareness or conscious direction. So how do we know whether we are being biased or fair-and-square?

Implicit measurement devices (or "don't tell me how much you weigh, just get on the scale")

In response, social and cognitive psychologists with neuroscientists have tried to develop instruments that measure stereotypes and attitudes, without having to rely on potentially untrustworthy self-reports. Some instruments have been linguistic, asking folks to write out sentences to describe a certain scene from a newspaper article. It turns out that if someone engages in stereotypical behavior, we just describe what happened. If it is counter-typical, we feel a need to explain what happened. (Von Hippel 1997; Sekaquaptewa 2003).

Others are physiological, measuring how much we sweat, how our blood pressure changes, or even which regions of our brain light up on an fMRI (functional magnetic resonance imaging) scan. (Phelps 2000).

Still other techniques borrow from marketers. For instance, conjoint analysis asks people to give an overall evaluation to slightly different product bundles (e.g., how do you compare a 17" screen laptop with 2GB memory and 3 USB ports, versus a 15" laptop with 3 GB of memory and 2 USB ports). By offering multiple rounds of choices, one can get a measure of how important each feature is to a person even if she had no clue to the question "How much would you pay for an extra USB port?" Recently, social cognitionists have adapted this methodology by creating "bundles" that include demographic attributes. For instance, how

would you rank a job with the title Assistant Manager that paid $160,000 in Miami working for Ms. Smith, as compared to another job with the title Vice President that paid $150,000 in Chicago for Mr. Jones? (Caruso 2009).

Scientists have been endlessly creative, but so far, the most widely accepted instruments have used reaction times--some variant of which has been used for over a century to study psychological phenomena. These instruments draw on the basic insight that any two concepts that are closely associated in our minds should be easier to sort together. If you hear the word "moon," and I then ask you to think of a laundry detergent, then "Tide" might come more quickly to mind. If the word "RED" is painted in the color red, we will be faster in stating its color than the case when the word "GREEN" is painted in red.

Although there are various reaction time measures, the most thoroughly tested one is the Implicit Association Test (IAT). It is a sort of video game you play, typically on a computer, where you are asked to sort categories of pictures and words. For example, in the Black-White race attitude test, you sort pictures of European American faces and African American faces, Good words and Bad words in front of a computer. It turns out that most of us respond more quickly when the European American face and Good words are assigned to the same key (and African American face and Bad words are assigned to the other key), as compared to when the European American face and Bad words are assigned to the same key (and African American face and Good words are assigned to the other key). This average time differential is the measure of implicit bias. [If the description is hard to follow, try an IAT yourself at Project Implicit.]

Pervasive implicit bias (or "it ain't no accident")

It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the stereotype of "career" versus "family"), light-skinned over dark skin, youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of implicit bias, are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements.

These pervasive results do not mean that everyone has the exact same bias scores. Instead, there is wide variability among individuals. Further, the social category you belong to can influence what sorts of biases you are likely to have. For example, although most Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks, African Americans show no such preference on average. (This means, of course, that about half of African Americans do prefer Whites, but the other half prefer Blacks.)

Interestingly, implicit biases are dissociated from explicit biases. In other words, they are related to but differ sometimes substantially from explicit biases--those stereotypes and attitudes that we expressly self-report on surveys. The best understanding is that implicit and explicit biases are related but different mental constructs. Neither kind should be viewed as the solely "accurate" or "authentic" measure of bias. Both measures tell us something important.

Real-world consequences (or "why should we care?")

All these scientific measures are intellectually interesting, but lawyers care most about real-world consequences. Do these measures of implicit bias predict an individual's behaviors or decisions? Do milliseconds really matter>? (Chugh 2004). If, for example, well-intentioned people committed to being "fair and square" are not influenced by these implicit biases, then who cares about silly video game results?

There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world--in ways that can have real effects on real lives. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- implicit bias predicts the rate of callback interviews (Rooth 2007, based on implicit stereotype in Sweden that Arabs are lazy);
- implicit bias predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- implicit bias predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- implicit bias predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decisionmaking in hard cases;
- implicit bias predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);
- implicit bias predicts the amount of shooter bias--how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);
- implicit bias predicts voting behavior in Italy (Arcari 2008);
- implicit bias predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).

With any new scientific field, there remain questions and criticisms--sometimes strident. (Arkes & Tetlock 2004; Mitchell & Tetlock 2006). And on-the-merits skepticism should be encouraged as the hallmark of good, rigorous science. But most scientists studying implicit bias find the accumulating evidence persuasive. For instance, a recent meta-analysis of 122 research reports, involving a total of14,900 subjects, revealed that in the sensitive domains of stereotyping and prejudice, implicit bias IAT scores better predict behavior than explicit self-reports. (Greenwald et al. 2009).

And again, even though much of the recent research focus is on the IAT, other instruments and experimental methods have corroborated the existence of implicit biases with real world consequences. For example, a few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment (Banks et al. 2006; Blair 2004).

Malleability (or "is there any good news?")

The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit. Fortunately, there is evidence

that implicit biases are malleable and can be changed.

- An individual's motivation to be fair does matter. But we must first believe that there's a potential problem before we try to fix it.
- The environment seems to matter. Social contact across social groups seems to have a positive effect not only on explicit attitudes but also implicit ones.
- Third, environmental exposure to countertypical exemplars who function as "debiasing agents" seems to decrease our bias.
    - In one study, a mental imagery exercise of imagining a professional business woman (versus a Caribbean vacation) decreased implicit stereotypes of women. (Blair et al. 2001).
    - Exposure to "positive" exemplars, such as Tiger Woods and Martin Luther King in a history questionnaire, decreased implicit bias against Blacks. (Dasgupta & Greenwald 2001).
    - Contact with female professors and deans decreased implicit bias against women for college-aged women. (Dasgupta & Asgari 2004).
- Fourth, various procedural changes can disrupt the link between implicit bias and discriminatory behavior.
    - In a simple example, orchestras started using a blind screen in auditioning new musicians; afterwards women had much greater success. (Goldin & Rouse 2000).
    - In another example, by committing beforehand to merit criteria (is book smarts or street smarts more important?), there was less gender discrimination in hiring a police chief. (Uhlmann & Cohen 2005).
    - In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking. This recognition is the opposite of various forms of "blindness" (e.g., color-blindness).

In outlining these findings of malleability, we do not mean to be Pollyanish. For example, mere social contact is not a panacea since psychologists have emphasized that certain conditions are important to decreasing prejudice (e.g., interaction on equal terms; repeated, non-trivial cooperation). Also, fleeting exposure to countertypical exemplars may be drowned out by repeated exposure to more typical stereotypes from the media (Kang 2005).

Even if we are skeptical, the bottom line is that there's no justification for throwing our hands up in resignation. Certainly the science doesn't require us to. Although the task is challenging, we can make real improvements in our goal toward justice and fairness.

The big picture (or "what it means to be a faithful steward of the judicial system")

It's important to keep an eye on the big picture. The focus on implicit bias does not address the existence and impact of explicit bias--the stereotypes and attitudes that folks recognize and embrace. Also, the past has an inertia that has not dissipated. Even if all explicit and implicit biases were wiped away through some magical wand, life today would still bear the burdens of an unjust yesterday. That said, as careful stewards of the justice system, we

should still strive to take all forms of bias seriously, including implicit bias.

After all, Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done--and be seen to be done.

Glossary

Note: Many of these definitions draw from Jerry Kang & Kristin Lane, A Future History of Law and Implicit Social Cognition (unpublished manuscript 2009)

Attitude

An attitude is "an association between a given object and a given evaluative category." R.H. Fazio, et al., Attitude accessibility, attitude-behavior consistency, and the strength of the object-evaluation association, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 339, 341 (1982). Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. See also stereotype.

Behavioral realism

A school of thought within legal scholarship that calls for more accurate and realistic models of human decision-making and behavior to be incorporated into law and policy. It involves a three step process:

First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of human behavior and decision-making embedded within the law. These latent theories typically reflect "common sense" based on naïve psychological theories.

Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of "the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view." Kristin Lane, Jerry Kang, & Mahzarin Banaji, Implicit Social Cognition and the Law, 3 ANNU. REV. LAW SOC. SCI. 19.1-19.25 (2007)

Dissociation

Dissociation is the gap between explicit and implicit biases. Typically, implicit biases are larger, as measured in standardized units, than explicit biases. Often, our explicit biases may be close to zero even though our implicit biases are larger.

There seems to be some moderate-strength relation between explicit and implicit biases. See Wilhelm Hofmann, A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures, 31 PERSONALITY & SOC. PSYCH. BULL. 1369 (2005) (reporting mean population correlation r=0.24 after analyzing 126 correlations). Most scientists reject the idea that implicit biases are the only "true" or "authentic" measure; both explicit and implicit biases contribute to a full understanding of bias.

Explicit

Explicit means that we are aware that we have a particular thought or feeling. The term sometimes also connotes that we have an accurate understanding of the source of that thought or feeling. Finally, the term often connotes conscious endorsement of the thought or feeling. For example, if one has an explicitly positive attitude toward chocolate, then one has a positive attitude, knows that one has a positive attitude, and consciously endorses and celebrates that preference. See also implicit.

Implicit

Implicit means that we are either unaware of or mistaken about the source of the thought or feeling. R. Zajonc, Feeling and thinking: Preferences need no inferences, 35 AMERICAN PSYCHOLOGIST 151 (1980). If we are unaware of a thought or feeling, then we cannot report it when asked. See also explicit.

Implicit Association Test

The IAT requires participants to classify rapidly individual stimuli into one of four distinct categories using only two responses (for example, in a the traditional computerized IAT, participants might respond using only the "E" key on the left side of the keyboard, or "I" on the right side). For instance, in an age attitude IAT, there are two social categories, YOUNG and OLD, and two attitudinal categories, GOOD and BAD. YOUNG and OLD might be represented by black-and-white photographs of the faces of young and old people. GOOD and BAD could be represented by words that are easily identified as being linked to positive or negative affect, such as "joy" or "agony". A person with a negative implicit attitude toward OLD would be expected to go more quickly when OLD and BAD share one key, and YOUNG and GOOD the other, than when the pairings of good and bad are switched.

The IAT was invented by Anthony Greenwald and colleagues in the mid 1990s. Project Implicit, which allows individuals to take these tests online, is maintained by Anthony Greenwald (Washington), Mahzarin Banaji (Harvard), and Brian Nosek (Virginia).

Implicit Attitudes

"Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects." Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection. See also attitude; implicit.

Implicit Biases

A bias is a departure from some point that has been marked as "neutral." Biases in implicit stereotypes and implicit attitudes are called "implicit biases."

Implicit Stereotypes

"Implicit stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category" Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection. See also stereotype; implicit.

Implicit Social Cognitions

Social cognitions are stereotypes and attitudes about social categories (e.g., Whites, youths, women). Implicit social cognitions are implicit stereotypes and implicit attitudes about social categories.

Stereotype

A stereotype is an association between a given object and a specific attribute. An example is "Norwegians are tall." Stereotypes may support an overall attitude. For instance, if one likes tall people and Norwegians are tall, it is likely that this attribute will contribute toward a positive orientation toward Norwegians. See also attitude.

Validities

To decide whether some new instrument and findings are valid, scientists often look for various validities, such as statistical conclusion validity, internal validity, construct validity, and predictive validity.

- Statistical conclusion validity asks whether the correlation is found between independent and dependent variables have been correctly computed.
- Internal validity examines whether in addition to correlation, there has been a demonstration of causation. In particular, could there be potential confounds that produced the correlation?
- Construct validity examines whether the concrete observables (the scores registered by some instrument) actually represent the abstract mental construct that we are interested in. As applied to the IAT, one could ask whether the test actually measures the strength of mental associations held by an individual between the social category and an attitude or stereotype
- Predictive validity examines whether some test predicts behavior, for example, in the form of evaluation, judgment, physical movement or response. If predictive validity is demonstrated in realistic settings, there is greater reason to take the measures seriously.

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Appendix B
Implicit Bias Frequently Asked Questions

IMPLICIT BIAS:
FREQUENTLY ASKED QUESTIONS

1. WHAT IS IMPLICIT BIAS?

Unlike *explicit bias* (which reflects the attitudes or beliefs that one endorses at a conscious level), *implicit bias* is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control. The underlying implicit attitudes and stereotypes responsible for implicit bias are those beliefs or simple associations that a person makes between an object and its evaluation that "...are automatically activated by the mere presence (actual or symbolic) of the attitude object" (**Dovidio, Gaertner, Kawakami, & Hudson, 2002**, p. 94; also **Banaji & Heiphetz, 2010**). Although automatic, implicit biases are not completely inflexible: They are malleable to some degree and manifest in ways that are responsive to the perceiver's motives and environment (**Blair, 2002**).

Implicit bias research developed from the study of attitudes. Scientists realized long ago that simply asking people to report their attitudes was a flawed approach; people may not wish or may not be able to accurately do so. This is because people are often unwilling to provide responses perceived as socially undesirable and therefore tend to report what they think their attitudes *should* be rather than what they know them to be. More complicated still, people may not even be consciously aware that they hold biased attitudes. Over the past few decades, scientists have developed new measures to identify these unconscious biases (see FAQ #3: *How is implicit bias measured?*).

2. WHAT DO RESEARCHERS THINK ARE THE SOURCES OF IMPLICIT BIAS?

Although scientists are still working to understand implicit bias, current theory and evidence indicate that it may arise from several possible sources (as listed by **Rudman, 2004**). These interrelated sources include:

Developmental History

Implicit bias can develop over time with the accumulation of personal experience. Personal experiences include not only traditional learning experiences between the self and the target (i.e., classical conditioning; **Olson & Fazio, 2001**), but also social learning experiences (i.e., via observing parents, friends, or influential others; **Greenwald & Banaji, 1995**). For example, implicit biases in children are positively correlated with the implicit biases of their parents; however, consistent with social learning theory (**Bandura, 1997**), this congruence occurs only between children who identify with their parents and not for children who do not have a positive attachment relationship with their parents (**Sinclair, Dunn, & Lowery, 2005**). Implicit biases can develop relatively quickly through such experiences: Implicit racial bias has been found in children as young as 6 years old, and discrepancies between implicit and explicit attitudes emerge by the age of 10 (**Baron & Banaji, 2006**).

Affective Experience

Implicit bias may develop from a history of personal experiences that connect certain racial groups with fear or other negative affect. Recent developments in the field of cognitive neuroscience demonstrate a link between implicit (but not explicit) racial bias and neural activity in the amygdala, a region in the brain that scientists have associated with emotional learning and fear conditioning. Specifically, White individuals who score highly on measures of implicit racial bias also react to images of unfamiliar Black faces with stronger amygdala activation (**Phelps, O'Connor, Cunningham, Funayama, Gatenby, Gore, & Banaji, 2000**; see also **Stanley, Phelps, & Banaji, 2008**). Other researchers have demonstrated a causal relationship between the experience of certain types of emotions and the emergence of implicit bias, showing that inducing people to experience anger or disgust can create implicit bias against newly encountered outgroups (**Dasgupta, DeSteno, Williams, & Hunsinger, 2009**). Another study found that increased exposure to a socially valued Black instructor in the context of a diversity education course decreased participants' implicit bias

against Blacks, and that a reduced fear of Blacks – in addition to other affective factors – predicted this attitudinal change (**Rudman, Ashmore, & Gary, 2001**).

Culture

People share a common social understanding of the stereotypes that are pervasive in our culture, and this knowledge can foster implicit bias even if a person does not necessarily endorse the cultural stereotype (**Devine, 1989; Fazio, Jackson, Dunton, & Williams, 1995**). One explanation is that people implicitly make associations and evaluations based on cultural knowledge in a way that "may not be available to introspection and may not be wanted or endorsed but is still *attitudinal* because of its potential to influence individual perception, judgment, or action" (**Nosek, 2007**, p. 68 [emphasis added]). Another explanation offered by Nosek (2007) is that responses on implicit measures are easily influenced by cultural knowledge, but that this cultural knowledge does not reflect the respondent's actual attitude (e.g., **Karpinski & Hilton, 2001**).

The Self

People tend to possess consistent and strongly positive attitudes toward themselves, and this positive attitude about the self can transfer very easily to other things, people, and groups that share attributes with the self (for a review, see **Banaji & Heiphetz, 2010**). This transference can occur without conscious awareness; hence, such effects are termed "implicit egotism." For example, people demonstrate a biased preference for new products that resemble their own names (**Brendl, Chattopadhyay, Pelham, & Carvallo, 2005**). They appear to be disproportionately likely to live in locations that reflect their birth date (e.g., people born on February 2nd and residing in the town of Two Rivers, Wisconsin) and to choose careers or marry others with names that resemble their own (e.g., people named Dennis or Denise in dentistry, a marriage between two unrelated Smiths). They are also more attracted than usual to others who have been assigned an allegedly random experimental code number that matches their birth dates and whose alleged surnames share letters with their own surnames (**Pelham, Mirenberg, & Jones, 2002; Jones, Pelham, Carvallo, & Mirenberg, 2004**). Provocative and strange, this research illustrates the impressive automaticity of the human mind and the influence of implicit processes in our daily lives. Fundamental attitudes toward the self may underlie implicit racial bias by facilitating a general tendency to prefer one's ingroup (a group with which one identifies in some way) over outgroups (any group with which one does not affiliate; see **Greenwald, Banaji, Rudman, Farnham, Nosek, & Mellott, 2002**). As **Rudman (2004)** explains, people tend to believe that "If I am good and I am X *[X being any social group with which one identifies],* then X is also good" (p. 137; italicized text added).

3. HOW IS IMPLICIT BIAS MEASURED?

Researchers use a number of scientific methods in the measurement of implicit bias (for reviews, see **Fazio & Olson, 2003; Gawronski, 2009; Wittenbrink & Schwarz, 2007**). Although the specific procedures involved in the individual approaches differ widely, implicit measures take on one of the following three general forms:

Computerized Measures

Computerized implicit measures typically gauge the direction and strength of a person's implicit attitudes by assessing their reaction times (i.e., response latencies) when completing a specific computerized task. The exact nature of each task varies, but usually falls into one of two classes of procedures (see **Wittenbrink & Schwarz, 2007**): *sequential priming* or *response competition*.

Sequential priming procedures. Sequential priming procedures are based on a long history of evidence in the field of cognitive psychology demonstrating that when two concepts are related in memory, the presentation of one of those concepts facilitates the recall or recognition of the other (see **Neely, 1991**). In the context of racial bias, people with a negative implicit racial bias toward Blacks will more quickly and easily respond to concepts associated with the negative stereotype of Blacks than concepts that are not associated with that stereotype. One popular procedure for measuring this phenomenon is the evaluative priming task or "bona-fide pipeline" (**Fazio, Sanbonmatsu, Powell, & Kardes, 1986**).

In this task, respondents are briefly presented with a Black or White face immediately before a positive or negative target word appears on the screen. They must then identify, as quickly as possible, the meaning of the presented word as "good" or "bad." In the standard paradigm, respondents with racial bias more quickly identify negative words as "bad" and more slowly identify positive words as "good" when that word appears immediately after the presentation of a Black face (**Fazio et al., 1995**). A similar priming procedure, called the Affect Misattribution Procedure (AMP; **Payne, Cheng, Govorun, & Stewart, 2005**), briefly presents respondents with a prime of a Black or White face before viewing a neutral Chinese character they know they must evaluate as more or less visually pleasant than the average Chinese character. These researchers found that individuals' racial attitudes colored their evaluations of the characters, with White respondents reporting more favorable ratings for characters that appeared after White primes than Black primes. This effect emerged even when respondents received a forewarning about the influence of the racial primes on subsequent evaluations.

Response competition procedures. Another approach to implicit attitude measurement emerged from research on interference effects. Specifically, when a target has multiple different meanings (e.g., the word "red" written in blue font), these different meanings can imply competing responses (e.g., color identification as red or blue) in a given task that can slow down the overall performance of the respondent (note that the well-known Stroop effect is one example of interference effects at work; see **Stroop, 1935; MacLeod, 1991**). These implicit measures, called response competition procedures (**Wittenbrink & Schwarz, 2007**), takes advantage of the informational value of interference effects by presenting two competing categorization tasks in a single procedure and measuring response latencies. Thus, unlike the sequential priming procedures discussed above in which shorter response times indicate bias, *longer* response times denote implicit bias when response competition procedures are used. One of the most popular of these types of measures is the Implicit Association Test (IAT; **Greenwald, McGhee, & Schwartz, 1998**). In the IAT, respondents are asked to categorize a sequence of images (as a Black or White face) and words (as either good or bad) by pressing one of two pre-labeled buttons. For example, the respondent may be instructed to press the left button whenever they see a Black face or whenever a negative word appears, and to press the right button whenever they see a White face or a positive word. Alternatively, they may be informed to press one button when they see a Black face or positive word, and the other button for a White face or negative word. Because of interference effects, individuals who associate "Black" with "bad," for example, will respond much more slowly when "Black" and "good" share the same response button. Related measures include the Go/No-Go Association Task (GNAT; see **Nosek & Banaji, 2001**) and the Extrinsic Affective Simon Task (EAST; see **De Houwer, 2003**).

Paper & Pencil Measures

Several paper & pencil measures of implicit attitudes exist (see **Vargas, Sekaquaptewa, & von Hippel, 2007** for a review). Some of these measures are simply adaptations of existing computerized assessments. Although researchers have primarily focused on developing manual adaptations of the IAT (e.g., **Kitayama & Uchida, 2003; Lemm, Sattler, Khan, Mitchell, & Dahl, 2002**), Vargas and colleagues (2007) suggest that the AMP (see description under "Computerized Measures," above) may be more easily adapted to a paper & pencil format because the procedure does not involve measurement of response time.

Other paper & pencil implicit measures assess memory accessibility. One example is the Word Fragment Completion (WFC) task, in which people are presented with fragments of words (e.g., POLI_E) and are asked to fill in the missing letters. These word fragments, however, can be completed in stereotypic or non-stereotypic ways (e.g., POLITE, POLICE; **Gilbert & Hixon, 1991**). The number of stereotypic word completions in the WFC task has been used as an implicit measure of racial prejudice (e.g., **Son Hing, Li, & Zanna, 2002**).

Finally, two other implicit bias measurement approaches assess attributional processing styles. One such example is the Stereotypic Explanatory Bias (SEB; **Sekaquaptewa, Espinoza, Thompson, Vargas, & von Hippel, 2003**), which is the tendency to ascribe the stereotype-consistent behavior of minorities to factors intrinsic to the individual (e.g., trait or dispositional attributions like hard work or talent), but stereotype-inconsistent behavior to extrinsic, situational factors (e.g., the weather, luck). Similarly, the Linguistic Intergroup Bias (LIB; **Maass, Salvi, Arcuri, & Semin, 1989**) is the tendency to describe stereotypic behavior using abstract language (e.g., by ascribing the behavior to a global trait) but

non-stereotypic behavior using concrete language (e.g., by describing the behavior as a specific event). By carefully examining the respondent's choice of language or agreement with particular summaries of a behavioral event, researchers have used these tendencies as indicators of implicit prejudice (see **von Hippel, Sekaquaptewa, & Vargas, 1997** and **Sekaquaptewa et al. 2003**).

Physiological Measures

Psychologists have long expressed interest in determining the physiological correlates of psychological phenomena. Those interested in the study of intergroup attitudes have examined autonomic nervous system responses such as the amount of sweat produced (e.g., **Rankin & Campbell, 1955**), heart rate (e.g., **Shields & Harriman, 1984**), and even small facial muscle movements that are nearly imperceptible to the untrained human eye (e.g., **Vanman, Saltz, Nathan, & Warren, 2004; Mahaffey, Bryan, & Hutchison, 2005**). More recently, neuroscientists have attempted to understand the neural underpinnings of implicit bias (e.g., **Stanley, Phelps, & Banaji, 2008; Cunningham, Johnson, Gatenby, Gore, & Banaji, 2003**). With further technological advances in physiological measurement, researchers will gain greater insight into the connection between psychological and physiological phenomena that could make some physiological techniques invaluable in the measurement and study of implicit bias. Given the current state of the science, however, the following common techniques are appropriate for advancing scientific understanding of implicit bias, but not for the detection of implicit bias (i.e., "diagnosing" implicit bias in an individual).

Common physiological measures used in the study of attitudes (as described more thoroughly in reviews by **Banaji & Heiphetz, 2010**; **Blascovich & Mendes, 2010**; and **Ito & Cacioppo, 2007**) include:

EDA. The measurement of sweat production is interchangeably referred to as skin conductance response (SCR), galvanic skin response (GSR), and electrodermal activity (EDA). When an individual experiences greater arousal in response to a stimulus, the eccrine glands in the skin (particularly in the hands and feet) excrete more sweat (**Banaji & Heiphetz, 2010,** p. 363). However, sweat production as a response and, therefore, EDA as a measurement tool do not discriminate between positive and negative responses to a stimulus. That is, by itself, EDA provides no information about the valence of the individual's response, but simply detects arousal. For example, as Banaji & Heiphetz (2010) explain, greater EDA in the presence of Black individuals but not White individuals (**Rankin & Campbell, 1955**) indicates only that the respondent reacts more strongly to the Black individual, and not that the reaction is necessarily a negative one.

Cardiovascular responses. Although a number of techniques have been used to measure cardiac and vasomotor responses, the most common measurement is that of heart rate. Like EDA, heart rate is a valence-insensitive measure of autonomic nervous system arousal and therefore cannot be used to distinguish between positive and negative reactions to a stimulus.

EMG. Facial electromyography (EMG) is the measurement of electrical activity associated with facial muscle contractions. With this technique, researchers can detect the presence of muscle movements and measure the amplitude of the response. Unlike some of the earlier measures discussed, however, the facial EMG can be used to assess response valence because different facial muscles are associated with positive and negative reactions. One study found that greater cheek EMG activity towards Whites than Blacks predicted racial bias in participant selection decisions when evaluating candidates for a teaching fellowship (**Vanman, Saltz, Nathan, & Warren, 2004**). Unlike the IAT, the facial EMG remained unaffected by participants' motivation to control for prejudiced responses, indicating its potential value as a measure of implicit attitudes.

Another physiological measure, the *startle eyeblink response*, relies on similar response mechanisms; however, only highly arousing stimuli evoke a startle response, limiting the utility of this measurement approach.

fMRI. Functional magnetic resonance imaging (fMRI) is a relatively new technique that measures blood flow in the brain. Because increased blood flow in any specific region of the brain signals increased activity in that region, blood flow can be used as a proxy measure for neural activity. In a groundbreaking study, **Phelps, O'Connor, Cunningham,**

Funayama, Gatenby, Gore, and Banaji (2000) demonstrated a correlation between the degree of activation in the amygdala region of the brain, as measured by fMRI, and scores on the IAT; moreover, people exhibit greater amygdala activation when processing negative, rather than positive, stimuli (**Cunningham, Johnson, Gatenby, Gore, & Banaji, 2003**). Although other brain areas are involved in social cognitive processes like implicit bias, the amygdala has been extensively studied because it is so important to evaluation and preference development (**Banaji & Heiphetz, 2010**).

ERP. Event-related brain potentials (ERPs) are measurable electrical signals emitted by brain activity (i.e., neural firing) and provide information on the strength and valence of a person's response to a stimulus. Because this technique measures real-time changes (within milliseconds) in neural activity, researchers can correlate individual ERP data with specific temporal events (e.g., changes in brain activity from a baseline measurement after exposure to a photo of a Black man). Several specific components of ERPs (e.g., larger late-positive potentials or LPPs; **Ito, Thompson, & Cacioppo, 2004**) provide information about an individual's responses to others that are related to implicit bias (for more information, see **Ito & Cacioppo, 2007**, pp. 134-138).

4. DOES IMPLICIT BIAS MATTER MUCH IN THE REAL WORLD?

A recent meta-analysis of 122 research reports found that one implicit measure (the IAT) effectively predicted bias in a range of relevant social behaviors, social judgments, and even physiological responses (r = .274; **Greenwald, Poehlman, Uhlmann, & Banaji, 2009**). Implicit bias can influence a number of professional judgments and actions in the "real world" (see **Jost, Rudman, Blair, Carney, Dasgupta, Glaser & Hardin, 2009**) that may have legal ramifications.

Some particularly relevant examples are:

Police Officers: The Decision to Shoot

Police officers face high-pressure, high-risk decisions in the line of fire. One seminal research report reveals that these rapid decisions are not immune to the effects of implicit biases. Specifically, college participants in this study played a computer game in which they needed to shoot dangerous armed characters as quickly as possible (by pressing a "shoot" button), but decide not to shoot unarmed characters (by pressing a "don't shoot" button). Some of the characters held a gun, like a revolver or pistol, and some of the characters held innocuous objects, like a wallet or cell phone. In addition, half of the characters were White, and half were Black. Study participants more quickly chose to shoot armed Black characters than armed White characters and more quickly chose not to shoot unarmed White characters than unarmed Black characters. They also committed more "false alarm" errors, electing to shoot unarmed Black characters more than unarmed White characters and electing not to shoot armed White characters more than armed Black characters (**Correll, Park, Judd, & Wittenbrink, 2002**). This research was inspired by the 1999 New York City shooting of Guinean immigrant Amadou Diallo: Police officers fired 41 rounds and killed Diallo as he pulled out a wallet. Other studies produced similar results with police officers and community members, and also showed that training and practice can help to reduce this bias (e.g., **Correll, Park, Judd, Wittenbrink, Sadler, & Keesee, 2007; Plant & Peruche, 2005; Plant, Peruche, & Butz, 2005**).

Physicians: Treatment Decisions

Physicians routinely make crucial decisions about medical care for patients whose lives hang in the balance. In the face of such high stakes, it may be surprising to think that automatic associations can unknowingly bias professional decision-making. One study showed that the implicit racial biases of ER physicians predicted fewer thrombolysis treatment recommendations when the patient was described as Black as opposed to White (**Green, Carney, Pallin, Ngo, Raymond, Iezzoni, & Banaji, 2007**). The implicit racial biases of White physicians also seem to play a role in predicting how positively or negatively Black patients respond to the medical interaction (**Penner, Dovidio, West, Gaertner, Albrecht, Daily, & Markova, 2010**), which might lead to a greater incidence of malpractice lawsuits (cf. **Stelfox, Gandhi, Orav, & Gustafson, 2005**).

Managers: Hiring Decisions

When screening a pool of job candidates, hiring managers must review hundreds if not thousands of resumes of qualified applicants. Studies show that interview and selection decisions reflect bias against minorities (e.g., **Dovidio & Gaertner, 2000; Bertrand & Mullainathan, 2004; Ziegert & Hanges, 2005**). In one such study, hiring managers were three times less likely to call highly qualified Arab job candidates in for an interview compared to equally qualified candidates of the racial majority. Interestingly, the implicit racial bias scores of hiring managers predicted their likelihood of offering callbacks to the Arab job applicants (**Rooth, 2010**).

Judges and Jurors: Capital Punishment and Sentencing

If implicit biases can affect both the intuitive, split-second decisions of police officers and sway the more deliberate decisions of physicians and hiring managers, it stands to reason that judges and jurors may exhibit similar tendencies. Indeed, one archival study of 600 death-eligible cases in Philadelphia appears to support this possibility. Researchers identified all cases (n=44) in which a Black male defendant was convicted of murdering a White victim and presented a photograph of each defendant to participants, who in turn rated each defendant on how "stereotypically Black" he appeared to be. Stereotypicality of appearance predicted death penalty sentencing outcomes: 57.5% of those judged as more stereotypically Black were sentenced to death, compared to 24.4% of those who were perceived as less stereotypically Black (**Eberhardt, Davies, Purdie-Vaughns, & Johnson, 2006**). Eberhardt and colleagues explain this effect in the context of other empirical research (**Eberhardt, Goff, Purdie, & Davies, 2004**) that demonstrates a tendency to implicitly associate Black Americans with crime. Other studies further illustrate racial biases in the context of detain-release decisions, verdicts, and sentencing (e.g., **Gazal-Ayal & Sulitzeanu-Kenan, 2010; Sommers & Ellsworth, 2001**).

Voters and Other Decision-Makers

Other research also shows that implicit racial biases can predict voting intentions and behavior. In one study of 1,057 registered voters, pro-White implicit bias scores predicted reported intent to vote for McCain over Obama a week before the 2008 U.S. Presidential election (**Greenwald, Smith, Sriram, Bar-Anan, & Nosek, 2009**). Another study found that, after controlling for explicit prejudice, voters who were more implicitly prejudiced against Blacks were less likely to vote for Obama and more likely to abstain from the vote or vote for third party candidates (**Payne, Krosnick, Pasek, Lelkes, Akhtar, & Tompson, 2010**). Implicit biases may, in particular, help "tip the scales" for undecided decision-makers (e.g., **Galdi, Arcuri, & Gawronski, 2008**).

5. WHAT ARE THE KEY CRITICISMS OF IMPLICIT BIAS RESEARCH?

The mounting research evidence on the phenomenon of implicit bias may lead to two disconcerting conclusions: (1) People know less about their own mental processes than common sense would suggest, and (2) overt racism may be diminishing, but subtler forms of racism persist. As is often the case with provocative science, this program of research has its proponents and its skeptics. Scholarly debate revolves primarily around the definition and appropriate measurement of implicit bias, and some have questioned the existence of implicit bias as an attitudinal phenomenon.

Some individuals stridently resist the idea of implicit racial prejudice and are vocal about their opposition (e.g., **Mitchell & Tetlock, 2006; Wax & Tetlock, 2005**). These individuals argue that they are "under no obligation to agree when a segment of the psychological research community labels the vast majority of the American population unconsciously prejudiced on the basis of millisecond reaction-time differentials on computerized tests. It is our view that the legal community should require evidence that scores on these tests of unconscious prejudice map in replicable functional forms onto tendencies to discriminate in realistic settings…" and that, because of this and because the IAT is informed by a variety of factors that "cannot plausibly be labeled precursors to discrimination," the IAT does not tap into "100% pure prejudice" (**Mitchell & Tetlock, 2009**).

In response to these criticisms, the proponents of implicit bias argue that the large body of research over several decades and hundreds of neuroscientific, cognitive, and social psychological studies has produced sufficient if not overwhelming evidence to support the existence of the kinds of automatic negative associations referred to as "implicit

bias" (for a review and one of many direct responses to the opposing allegations of Tetlock and colleagues, see **Jost et al., 2009**). An exponentially increasing number of empirical studies demonstrate a relationship between measures of implicit bias and real-world discriminatory behavior (see FAQ #4: *Does Implicit Bias Matter Much in the Real World?*, above). Moreover, attitudes are flexible constructs – not rigid ones – and one's expressed attitude at any given moment is responsive to a variety of relevant and seemingly irrelevant factors. For example, one now-classic study showed that people's judgments of even their own life satisfaction could be influenced by incidental factors such as the weather (i.e., sunny or cloudy) on the day they were surveyed (**Schwarz & Clore, 1983**). Similarly, the expression of implicit bias is sensitive to a range of sometimes subtle moderating factors (e.g., see **Blair, 2002**).

A key component of the implicit bias controversy is the concern that the IAT, specifically, is problematic. Some believe that proponents of the IAT overstate the consequentiality of their research findings (e.g., **Blanton & Jaccard, 2008; Blanton & Jaccard, 2006**), and others argue that although evaluative priming measures may be construed as "automatic evaluations," what exactly the IAT technique measures is debatable (**Fazio & Olson, 2003**). Indeed, the IAT and a popular evaluative priming implicit measure, the *bona-fide pipeline*, fail to show correspondence with one another even though both are supported by empirical evidence demonstrating correspondence with actual behavior (**Olson & Fazio, 2003**). These researchers and others (e.g., **Karpinski & Hilton, 2001**) argue that the IAT measures not attitudes but extrapersonal associations acquired through the environment, whether those associations are personally endorsed at an attitudinal level or not. In response to this assertion, **Nosek (2007)** argues that regardless of whether these implicit processes are labeled as attitudes or as associations, the effect is still the same: These automatic processes are capable of guiding our thoughts and actions in predictable – and biased – ways.

Opponents of the IAT have gone on to propose a number of alternative explanations to discount the IAT as a measure of implicit bias, although variation in the interpretation of how the phenomenon is defined may be partly responsible for this scholarly discord. Proponents of the IAT have thus far presented evidence discrediting several, but not all, of these alternative explanations (e.g., **Dasgupta, Greenwald, & Banaji, 2003; Nosek, Greenwald, & Banaji, 2005; Greenwald, Nosek, & Banaji, 2003**; see Dr. Anthony Greenwald's IAT Page for a complete listing of relevant research). These disparate views will likely be resolved as the science advances and new methods for the measurement of implicit bias are developed.

6. WHAT CAN PEOPLE DO TO MITIGATE THE EFFECTS OF IMPLICIT BIAS ON JUDGMENT AND BEHAVIOR?

Once people are made aware of their own implicit biases, they can begin to consider ways in which to address them. Scientists have uncovered several promising implicit bias intervention strategies that may help individuals who strive to be egalitarian:

- 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 were 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)

For more detailed information on promising intervention strategies, see Appendix G in Casey et al. (2012).

7. CAN PEOPLE ELIMINATE OR CHANGE AN IMPLICIT BIAS?

There is a difference between reducing the influence of implicit bias on decisions (see FAQ #6: *What can people do to mitigate the effects of implicit bias on judgment and behavior?*) and reducing implicit bias itself. Although implicit bias

is malleable, many "debiasing" strategies seem to only temporarily reduce or shift it. Longer-term change might be possible only through substantial and persistent effort (for a discussion about the conditional limitations of some existing strategies for reducing implicit bias, see **Joy-Gaba & Nosek, 2010**).

If applied long-term, people may be able to reduce or eliminate implicit bias by modifying their underlying implicit attitudes. Generally, increased contact with or exposure to a stigmatized social group in a positive context may reduce prejudice toward that group over time (e.g., **Binder, Zagefka, Brown, Funke, Kessler, Mummendey et al., 2009**) and may even reduce prejudice toward other out-groups in general (**Tausch, Hewstone, Kenworthy, Psaltis, Schmid, Popan et al., 2010**). Reductions in implicit bias, specifically, have occurred as a result of longer-term exposure to minorities in socially valued roles (**Dasgupta & Rivera, 2008; Dasgupta & Asgari, 2004**), in the context of diversity education (**Rudman, Ashmore, & Gary, 2001**), and even as a result of simply imagining (rather than actually encountering) counter-stereotypes (**Blair, Ma, & Lenton, 2001**). In addition, some research indicates that people who have developed chronic egalitarian goals may be able to beat implicit bias at its own game by automatically inhibiting implicit stereotypes (e.g., **Moskowitz & Li, 2011; Moskowitz, Salomon, & Taylor, 2000**).

IMPLICIT BIAS: FREQUENTLY ASKED QUESTIONS
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Appendix C
California Program Resources

ADMINISTRATIVE OFFICE OF THE COURTS
EDUCATION DIVISION

Home | COMET | Serranus | Programs | AOC-TV Broadcasts | Qualifying Judicial Ethics | Search | November 16, 2011

AOC-TV Shows

The Neuroscience and Psychology of Decisionmaking
A New Way of Learning

Tuesday | March 29, 2011
9:00 am
12:15 pm (60 minutes)
(An Encore Presentation)
C CEO J M/S

In this broadcast experts will discuss both emerging and well-settled research in neuroscience and social psychology, describing how unconscious processes may affect our decisions. The show will specifically review the latest neurological and neuropsychological research that uses Magnetic Resonance Imaging (MRI's) to show how the brain reacts when different images, voices, or written work are presented. For instance, recent studies demonstrate that people may assess credibility, character, trustworthiness, potential for aggressive behavior, and intelligence based on facial features. The show will explore how we may make decisions based on information that we process unconsciously.

Part 2 and Part 3 of this series is also available for online viewing.

Content Questions:
Kimberly Papillon
Senior Education Specialist
kimberly.papillon@jud.ca.gov
415-865-7778

General Questions:
Lynn Muscat
lynn.muscat@jud.ca.gov
415-865-4573

Play Video

The Neuroscience and Psychology of Decisionmaking, Part 1: A New Way of Learning

Resource Materials

- Broadcast Evaluation
- Implicit Association Test (IAT)
- Counter–Stereotype Test (Stereotype Negation)
- Screen Saver (Zipped file, 3.2 MB)

› › *Instructions for installing screen saver*

Education Credit

This video qualifies for:
Continuing Education: 1 hr
MCLE (Elimination of Bias): 1 hr
DV Component: no

The Personal Record of Attendance can be found in the broadcast evaluation or handouts.

CTD Archives

AOC-TV Links

- Schedule
- Viewing Locations/Training Coordinators
- Show Archives
- Satellite Troubleshooting
- Online Video FAQs
- Order DVDs
- Live-Event Audiocasts
- MCLE Credit
- Personal Record of Attendance Form (blank)

ADMINISTRATIVE OFFICE OF THE COURTS

Internet 100%

Broadcast Evaluation

CONTINUING THE DIALOGUE
The Neuroscience and Psychology of Decisionmaking, Part 1: A New Way of Learning

POSITION _____

EXPERIENCE IN CURRENT ASSIGNMENT
☐ 0–6 mos ☐ 6 mos–1 year ☐ 1–3 years ☐ 3–5 years ☐ 5–10 years ☐ 10+ years

PRIOR KNOWLEDGE OF THIS SUBJECT ☐ Minimal ☐ Average ☐ Extensive

	Strongly Agree	Agree	Some-what Agree	Disagree	Strongly Disagree
1. Overall, I am satisfied with this course.					
2. The course content was relevant to my work.					
3. The faculty was effective in delivering content.					
4. I would recommend this course to my colleagues.					
5. The course materials were helpful (if applicable).					

6. The length of the course was:	Just about right	Too short	Too long

WHY DID YOU ATTEND THIS COURSE? (check all that apply)
☐ Subject matter is relevant to my job ☐ Directed by supervisor
☐ Self development or career development ☐ Continuing education is a job requirement
☐ Other (specify) _____

1. What was the most beneficial or helpful part of this course?

2. What will you do differently as a result of this course?

3. Was there anything about the course that hindered your learning experience?

4. What are the greatest strengths of specific instructors and do you have any suggestions for improvement?

Use additional sheets if needed. Thank you for taking the time to complete this evaluation!
Please send completed form to (415) 865-4335 (fax) or CJEREVALS@jud.ca.gov (e-mail)

ADMINISTRATIVE OFFICE OF THE COURTS
EDUCATION DIVISION/CENTER FOR JUDICIAL EDUCATION AND RESEARCH

PERSONAL RECORD OF ATTENDANCE—EDUCATION HOURS EARNED

(Pursuant to California Rules of Court 10.451 – 10.491)

REMINDER: Keep this record of attendance for your records.
This is the ***only*** record of your attendance you will receive.

Provider:	**AOC Education Division/Center for Judicial Education and Research (CJER)**
Subject Matter/Title:	**Continuing the Dialogue: The Neuroscience and Psychology of Decisionmaking: A New Way of Learning**
Date and Time of Activity:	
Length of Activity:	**60 minutes**
Number of Hours Achievable:	**1**

*Complete **either** the participant section or the faculty section, whichever is applicable to you.*

Name:_____

To be completed and retained by participants for their own record of participation:

Number of hours you are claiming for participation: _____

For judicial officers only:
Number of hours applied to Qualifying Ethics Elective Credit, if applicable _____

☐ This program contains content on domestic violence and contributes to meeting the provisions of California Rules of Court, rule 10.464(a). (check if applicable)

Number of MCLE hours*, if applicable _____

Legal Ethics: _____
Elimination of Bias: _____
Prevention, detection, and treatment of substance abuse or mental illness that impairs professional competence: _____

* Videos that qualify for MCLE credit are considered self-study unless the provider has you sign-in at the time of the activity and issues a certificate of attendance. The sign-in sheet must be returned to the AOC by your local court.

To be completed and retained by faculty for their own record of faculty service

Calculate the number of hours of faculty credit for this course:

Duration of a **New Course** (in hours): _____ x 3 = _____ Hours of Faculty Credit**
Duration of a **Repeated Course** (in hours): _____ x 2 = _____ Hours of Faculty Credit**

**Total Faculty Credit Earned: ****_____

** No more than half of the required or expected hours of continuing education outlined in California Rules 10.451 – 10.491 may be earned through faculty service.

Appendix D
Minnesota Program Resources

MN Implicit Bias Pilot Training Project:
"Exploring the Impact of Implicit Bias on Fairness in the Courts"

Session Agenda

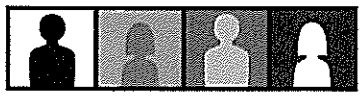
	Content Area	Facilitator	Time
I.	*Welcome and Session Overview & Participant Introductions*	*Judge Tanya Bransford, Connie Gackstetter*	*12:15-12:35 PM*
II.	*Pairs Dialogue about the IAT Experience*	*Connie Gackstetter*	*12:35-12:45 PM*
III.	*Documentary: "The Neuroscience and Psychology of Decision-Making: A New Way of Learning"*	*Judge Tanya Bransford*	*12:45-1:40 PM*
IV.	*Small Group Discussion about learning from the Documentary and identification of significant themes*	*Judge Tanya Bransford, Connie Gackstetter*	*1:40- 2:10 PM*
V.	*Stroop Test illustration*	*Connie Gackstetter*	*2:10-2:20 PM*
VI.	*Methods for "managing" Implicit Bias*	*Judge Tanya Bransford*	*2:20-2:30 PM*
VII.	*Small Group Discussion about professional and personal methods for managing Implicit Bias*	*Connie Gackstetter*	*2:30-2:55 PM*
VIII.	*Summary and Final Comments*	*Judge Tanya Bransford*	*2:55 - 3:00 PM*

Thank you to the MN Judicial Racial Fairness Training Sub-Committee, the Education & Organization Development Division and the National Center for State Courts for making this training possible and to the MN Judicial Branch Racial Fairness Committee for sponsoring this event!

Continuing Education Credits:
3.0 Elimination of Bias continuing education credits have been applied for from the Board of Continuing Legal Education and 3.0 continuing education credits have been approved for Continuing Judicial Education(CJE) credits and for MJB Continuing Managerial Education (CME) credits.

Questions/ Comments?
If you have any additional comments or questions about this session, please contact Connie Gackstetter. MJB Education & Organization Development Division Manager at 651-215-0047 or connie.gackstetter@courts.state.mn.us

NCSC
National Center for State Courts



Race & Ethnic Fairness in the Courts

HELPING COURTS ADDRESS IMPLICIT BIAS: PHASE II OF A NATIONAL CAMPAIGN TO ENSURE THE RACIAL AND ETHNIC FAIRNESS OF AMERICA'S STATE COURTS

PROJECT DESCRIPTION

PURPOSE

Phase II builds on the first phase of the campaign to mobilize the expertise, experience, and commitment of state court judges and officers across the country to address both the perception and reality of racial and ethnic fairness. The first phase resulted in a national compilation of promising programs to achieve racial and ethnic fairness in five key areas:

- diverse and representative state judicial workforces;
- fair and unbiased behaviors on the part of judges, court staff, attorneys, and others subject to court authority in the courthouse;
- comprehensive, system-wide improvements to reduce racial and ethnic disparities in criminal, domestic violence, juvenile, and abuse and neglect cases;
- the availability of timely and high-quality services to improve access to the courts for limited-English-proficient persons; and
- diverse and representative juries.

The programs are available on the Campaign's Web site at http://www.ncsconline.org/ref/.

Phase II is developing national resources and providing technical assistance on implicit bias, an issue relevant to each of the five key areas and central to "fair and unbiased behaviors in the courthouse. Research indicates that all individuals develop implicit attitudes and stereotypes as a result of their experiences with the world. Because implicit biases are unconscious, they can affect behaviors and attitudes in ways, both positive and negative, unknown to the individual. Thus strategies to ensure fairness, such as education and training on diversity and cultural competency issues, should address implicit biases as well as explicit behaviors and attitudes.

STRATEGY

During Phase II, the project is working with three states—California, Minnesota, and North Dakota—to incorporate information about implicit bias into their judicial education programs and assess the effects of including this information. A National Training Team (NTT), consisting of six experts in diversity issues, judicial education, and project evaluation, is assisting the states with incorporating the information in the most appropriate way given each state's needs and resources, and determining the best method for evaluating the effects of providing the information.

Following the delivery of the education programs in the pilot jurisdictions, the NTT and project staff will summarize the lessons learned from each site and offer suggestions to other jurisdictions interested in adding implicit bias components to their judicial education curricula. In addition, limited assistance will be provided to all states through the Campaign's Web site, electronic newsletter, presentations to national organizations, and facilitation of discussions with experts and/or representatives from the pilot jurisdictions. Please visit the Campaign's Web site (http://www.ncsconline.org/ref/) and click on the implicit bias tab to obtain information on the project and available resources.

ORGANIZATION

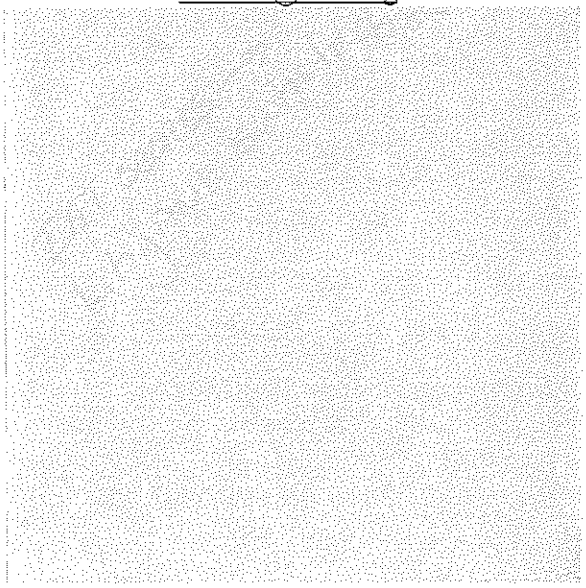
The Campaign's Steering Committee of representatives from the Conference of Chief Justices, the Conference of State Court Administrators, the National Consortium on Racial and Ethnic Fairness in the Courts, the National Association for Court Management, the National Association of State Judicial Educators, and the National Association of Women Judges continues to guide the work of the project. Because of the specialized nature of the topic, the project also relies on the advice of two scholars in the implicit bias area as well as the National Training Team of experts. The project team also relies on the primary contacts designated by the chief justice of each state and U.S. Territory as a primary vehicle for input and dissemination.

FUNDING

The Open Society Institute, the State Justice Institute, and the National Center for State Courts fund the project.

CONTACTS

- Dr. Pamela Casey, National Center for State Courts, pcasey@ncsc.org
- Hon. Roger K. Warren, President Emeritus, National Center for State Courts, rwarren@ncsc.org



Race & Ethnic Fairness in the Courts

"Exploring the Impact of Implicit Bias in the Courts"

A PILOT TRAINING PROJECT

MAY 25, 2010 12:30-3:00PM

Sponsored by:
the MN Judicial Branch Racial Fairness Committee in conjunction with the Education & Organization Development Division with technical support from the National Center for State Courts

MINNESOTA JUDICIAL BRANCH

Our Charge

2

The mission of the Minnesota Judicial Branch:
"To provide justice through a system that assures equal access for the fair and timely resolution of cases and controversies.

Judicial Council Policy 10.02:" It is the policy of the Minnesota Judicial Branch to *identify and eliminate barriers* to racial, ethnic, and gender fairness within the judicial system, in support of the fundamental principle of fair and equitable treatment under law. "

The mission of the Racial Fairness Committee:

- "to identify and eliminate barriers to racial and cultural fairness in all components of the Minnesota judicial system *and create action plans* to ensure public trust and confidence in the courts."
- the Racial Fairness Committee workplan supports providing ongoing education to maximize racial and cultural awareness, education and skill to promote equal access to justice and specifically requires *Cultural Competency Training for Judges and Court Staff and members of the Racial Fairness Committee*

MINNESOTA JUDICIAL BRANCH

Bias-the Real World Impact

3

- Influences:
  - Family History — *Social, Private?*
  - Personal Experience — *Impact, Influence?*
  - Personal Values — *Engrained, Revisited*
  - Professional influences — *Standards, Informal Rules*
  - Cultural Influences — *Mine, Yours, Ours*
  - Historical Influences — *Past, current, ubiquitous*
  - **Biological??** — *The mind - body connection*

MINNESOTA JUDICIAL BRANCH

Session Objectives:

4

- Experience & assess responses to the Implicit Attitude Test (IAT)
- Understand the research on implicit bias
- Explore the implications for decision making due to implicit bias in the Courts
- Specify the most critical behaviors affecting fairness that may be subject for dedicated action
- Identify personal and professional methods that can reduce the impact of bias

MINNESOTA JUDICIAL BRANCH

DISCUSS:
Your Experiences with the IAT

5

IN PAIRS, DISCUSS:

1. Your thoughts about the IAT before you took it.
2. Observations about your physical actions as you were taking the IAT.
3. Observations about your thoughts as you were taking the IAT.
4. Initial and later thoughts about the results of your IAT assessment.
5. Questions you have about how the IAT works.

MINNESOTA JUDICIAL BRANCH

6

Components of bias include:

STEREOTYPES –
Generalizations about perceived "typical" characteristics of a social category
(cognitive component)

PREJUDICE–
How one feels about members of a given social category
(affective component)

DISCRIMINATION –
How one acts toward members of a given social category
(behavioral component)

Key Definitions

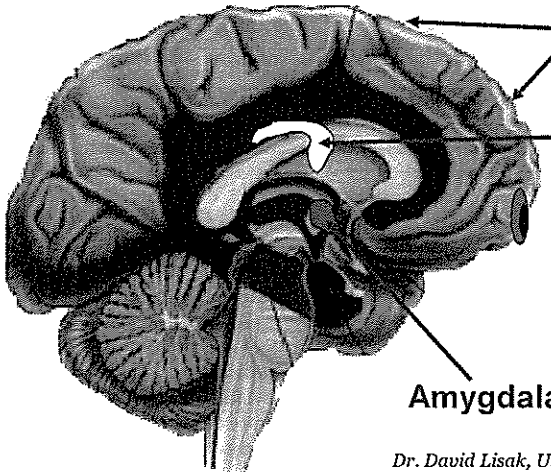
- Explicit bias:
  A Conscious preference for (positive or negative) for a social category
- Implicit bias:
  A preference (positive or negative) for a social category that operates outside of our awareness
- Schemas:
  Mental "maps" by which we process *information with little or no conscientious* thought

Shawn Marsh, Ph.D., Social Psychologist; Director of NCJFC Juvenile and Family Law Department

MINNESOTA JUDICIAL BRANCH

Foundations of Implicit Bias:
The Basic Neurobiology of Emotions/Fear

7



Dr. David Lisak, University of Massachusetts, Boston

MINNESOTA JUDICIAL BRANCH

Exploring bias and the Mind-Body connection

8

"The Neuroscience and Psychology of Decision-Making: A New Way of Learning"

A documentary produced by the State Courts of California with support and technical assistance from the National Center for State Courts

MINNESOTA JUDICIAL BRANCH

DISCUSS:
Your Observations from the Documentary

9

IN SMALL GROUPS, DISCUSS:

1. What research reported in the video struck you as the most interesting?

2. What characteristics about the factors that make us susceptible to implicit bias were most notable to you?

3.How does implicit bias occurs when we intend the opposite?

*** Be prepared to report out on the themes you identified in your group***

MINNESOTA JUDICIAL BRANCH

The boy, his Dad & the surgeon

10

MINNESOTA JUDICIAL BRANCH

Automatic Processing:
Say the **Word**

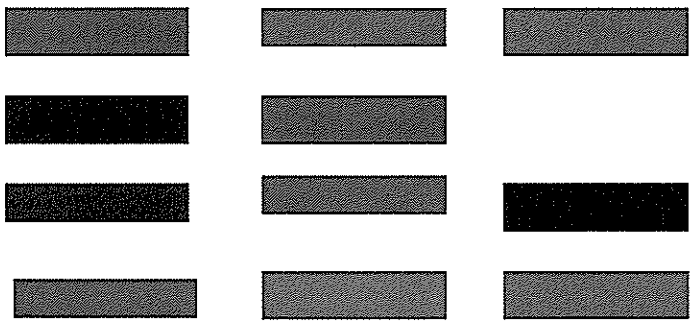
11

YELLOW BLUE ORANGE
BLACK RED GREEN
PURPLE YELLOW RED
ORANGE GREEN BLACK
BLUE RED PURPLE
GREEN BLUE ORANGE

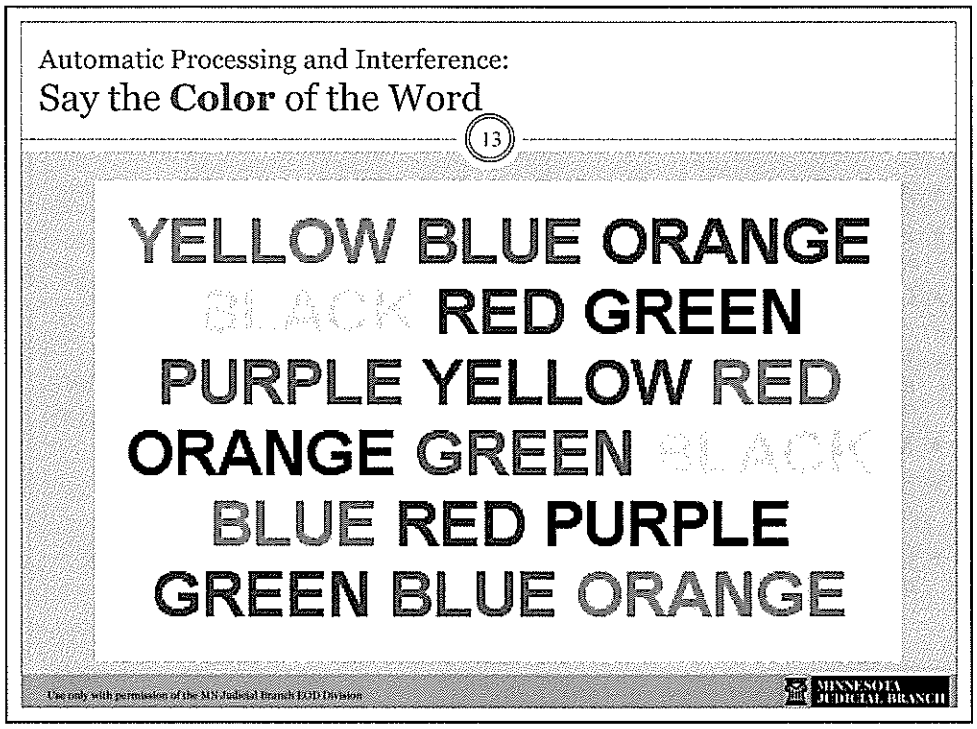
MINNESOTA JUDICIAL BRANCH

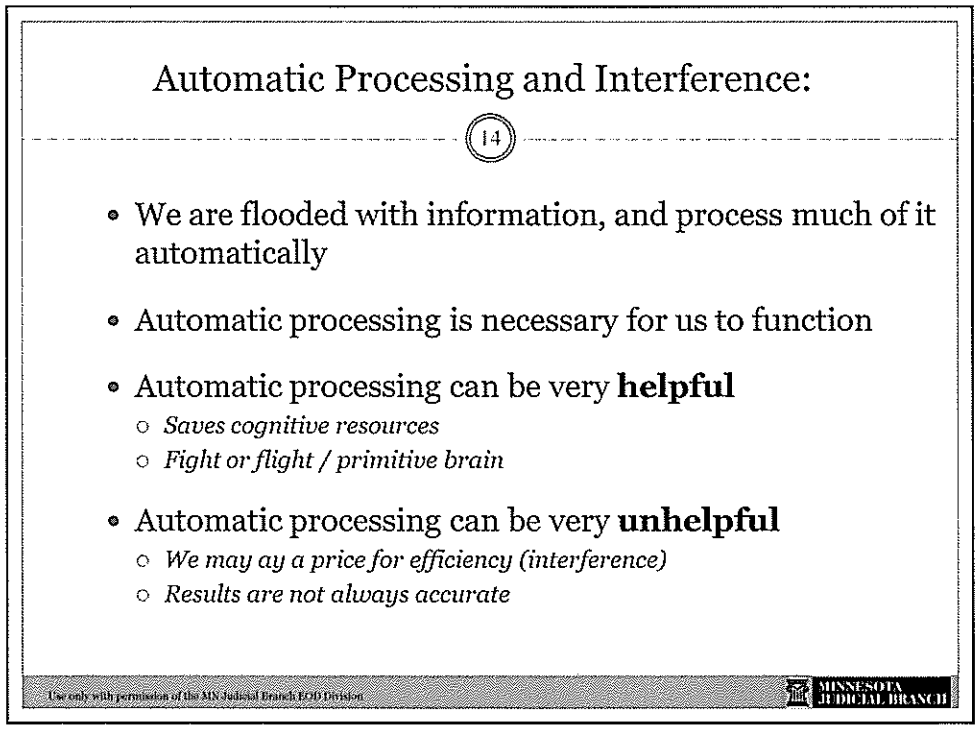
Automatic Processing:
Say the **Color**

12



MINNESOTA JUDICIAL BRANCH


Automatic Processing and Interference:
Say the Color of the Word
13
YELLOW BLUE ORANGE
BLACK RED GREEN
PURPLE YELLOW RED
ORANGE GREEN BLACK
BLUE RED PURPLE
GREEN BLUE ORANGE
Use only with permission of the MN Judicial Branch EOD Division
MINNESOTA JUDICIAL BRANCH


Automatic Processing and Interference:
14
We are flooded with information, and process much of it automatically
Automatic processing is necessary for us to function
Automatic processing can be very helpful
Saves cognitive resources
Fight or flight / primitive brain
Automatic processing can be very unhelpful
We may ay a price for efficiency (interference)
Results are not always accurate
Use only with permission of the MN Judicial Branch EOD Division
MINNESOTA JUDICIAL BRANCH

Emerging Strategies for Reducing Bias:

15

- Awareness & Education: *Create opportunities for learning and discussion.*
- Environment/ Exposure: *Assess environmental stimuli; reduce stereotypical cues and increase exposure to counter-stereotypical cues*
- Cognitive Load; *Reduce time constraints for acting on issues that are:*
  - At high risk for bias / - More complex / - are Irreversible decisions
- High Effort Processing: *Minimize inclination to rely on intuition and past experience ("heuristics" -mental rules of thumb or "gut" instincts) when motivation and high effort is needed in the work at hand.*
- Mindfulness: *Maintain awareness of decision-making processes*
- Structure Management: *create group review, checklists, established processes to "structure" out the opportunity for biased actions.*
- Organizational Review: *Assess processes, roles and organizational rules to assess systemic fairness*

MINNESOTA JUDICIAL BRANCH

DISCUSS:
Your Observations from the Documentary

16

IN SMALL GROUPS, DISCUSS:

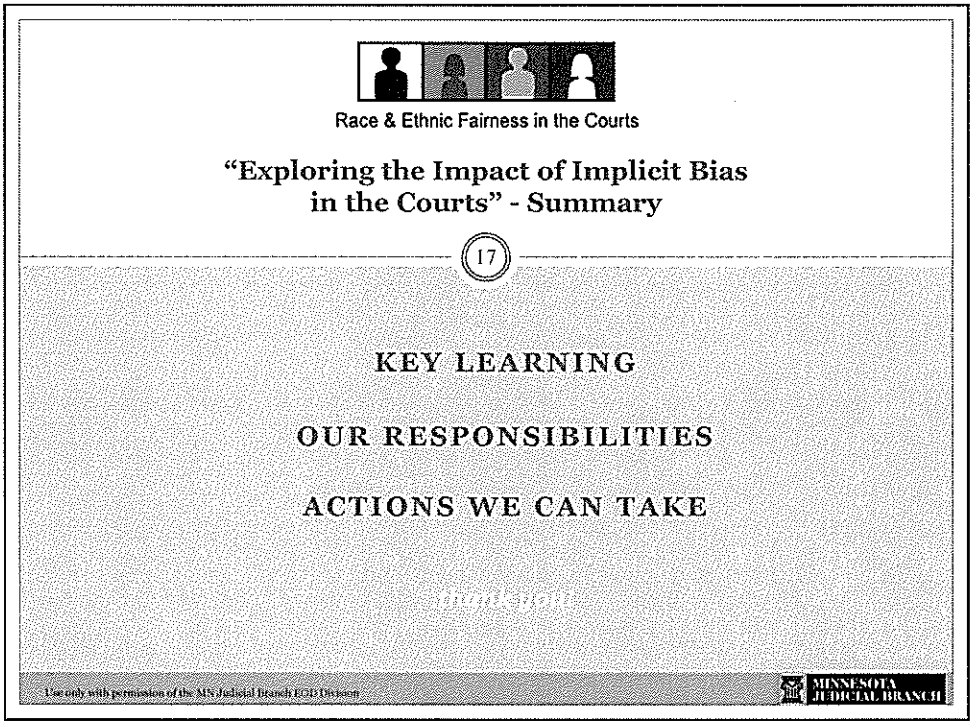
1. If we are not able to "solve" implicit bias, what can we personally do to manage it?

2. Professionally, what techniques can we use to manage implicit bias?

Record the personal and professional actions your group identified on the action planning worksheets

*** Be prepared to report out on actions you identified in your group***

MINNESOTA JUDICIAL BRANCH


Race & Ethnic Fairness in the Courts
"Exploring the Impact of Implicit Bias in the Courts" - Summary
17
KEY LEARNING
OUR RESPONSIBILITIES
ACTIONS WE CAN TAKE
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MINNESOTA JUDICIAL BRANCH

Race & Ethnic Fairness in the Courts

"Exploring the Impact of Implicit Bias in the Courts"

Participant Worksheet

I. Your Experience with the Implicit Attitude Test:

IN PAIRS, Discuss:

1. Your thoughts about the IAT before you took it.

2. Observations about your physical actions as you were taking the IAT.

3. Observations about your thoughts as you were taking the IAT.

4. Initial and later thoughts about the results of your IAT assessment.

5. Questions you have about how the IAT works.

II. Your Observations from the Documentary- Part I

IN small groups, Discuss:

1. What research reported in the video struck you as the most interesting?

2. What characteristics about the factors that make us susceptible to implicit bias were most notable to you?

3. How does implicit bias occurs when we intend the opposite?

** Be prepared to report out on the themes you identified in your group**

Race & Ethnic Fairness in the Courts

"Exploring the Impact of Implicit Bias in the Courts"

III. Your Observations from the Documentary – Part II

IN small groups, Discuss:

1. If we are not able to "solve" implicit bias, what can we personally do to manage it?

2. Professionally, what techniques can we use to manage implicit bias?

4. Other comments about what can be done?

* Be prepared to report out on actions you identified in your group*

The Lens of Implicit Bias

By Shawn C. Marsh, Ph.D.

Consider for a moment the number of people and decisions involved in even the most common situations within our justice system. Take an adolescent who is accused of shoplifting. The store security officer first decides whether or not the youth actually shoplifted merchandise, then the store owner decides whether or not the act warrants involving the police. Law enforcement, if called, then decides whether or not to charge or even arrest the youth. Depending on that decision, detention or probation staff may become involved and make decisions around detainment or diversion. Decisions continue to accumulate as the youth moves through the system—up to and including decisions made by juvenile and family court judges.

Decision points exist from the moment of initial contact with the justice system until case resolution, and each decision point is an opportunity for dozens (if not many dozens) of people to make a choice that can have a profound effect on the life of the juvenile and his or her family. Given the impact of these decisions on children, youth, families, victims, and communities, it is in our best interest to understand factors that shape our thinking—particularly those that can lead to unintentional, but real, disparate treatment in cases before juvenile and family courts.

Social psychologists are fundamentally interested in understanding how people think, feel, and behave in the presence of others. Accordingly, social psychological research tends to focus on groups of two or more people (e.g., juries or gangs) and how people respond to social information (e.g., perceived norms and power). Many social psychologists have joined the "cognitive revolution," born in part from advances in neuroscience, which has refocused the science of psychology on developing a fuller understanding of how our brains process information and influence behavior. For social psychologists, this shift means exploring social cognition—or how we actually perceive and process information about others and our interactions with others. One area of research in social cognition that has gained substantial attention from social and cognitive psychologists alike is implicit bias. This phenomenon also has gained pop-culture recognition after being explored in Malcolm Gladwell's best-selling book *Blink*. Before providing an overview of implicit bias, however, it is important to set a foundation for the discussion.

THE PROS AND CONS OF AUTOPILOT

We process a lot of information in a typical day, and not just the steady stream of phone calls, e-mails, and paperwork most of us face. For example, in one fashion or another, you are at this moment receiving information about the temperature of the room, the boldness of the typeset in this article, the hum of lights or nearby appliances, the feeling of being hungry or full, to name just a few possible sensory inputs. We are literally bombarded by stimulus and information. Imagine for a moment if you had to attend to and accurately process all of this data. Most would agree this would be a daunting or even impossible task. In fact, if we did have to attend to and fully process all of the stimulus and information we face, we likely could not function or at least not function well.

Fortunately for us, we have a (relatively) sophisticated brain. As human beings, we possess the ability to deal efficiently with the

Appendix E
North Dakota Program Resources

Implicit Bias

A Primer for Courts

Jerry Kang

Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts

August 2009

Training Agenda for Implicit Bias

North Dakota

November 23, 2009

1:00 p.m. – 1:10 p.m.:	Introductions and overview of training
1:10 p.m. – 1:50 p.m.:	Video clips from "Race: The Power of an Illusion" and discussion questions
1:50 p.m. – 2:00 p.m.:	Break
2:00 p.m. – 3:00 p.m.:	Social cognition and decision-making
3:00 p.m. – 3:10 p.m.:	Break
3:10 p.m. – 4:00 p.m.:	Small group breakout # 1 [debrief and stereotype exercise]
4:00 p.m. – 4:10 p.m.:	Break
4:10 p.m. – 4:55 p.m.:	Small group breakout # 2 [strategies to reduce implicit bias and personal planning (self-efficacy priming/goal setting exercise)]
4:55 p.m. – 5:00 p.m.:	Closing and evaluations

Materials:

The Lens of Implicit Bias [article]
Is Your Baby Racist? [article]

[Pictures of various groups for stereotype exercise]

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What's this?
NOVA
THE FABRIC OF THE COSMOS
WITH BRIAN GREENE
STARTS TONIGHT
Be more
PBS
WATCH A PREVIEW
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PROGRAMS A-Z
TV SCHEDULES
WATCH VIDEO
DONATE
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SEARCH PBS
The online companion to California Newsreel's 3-part documentary about race in society, science & history
RACE - The Power of an Illusion
How valid are your beliefs about the human species?
Learn More >
About the Series
Background Readings
Ask the Experts
Resources
For Teachers | Discussion Guide | Check Local Listings | Order the Video | Site Map | Credits
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Social Cognition and Decision-Making

Shawn C. Marsh, Ph.D.

Director
Juvenile and Family Law Department
National Council of Juvenile and Family Court Judges

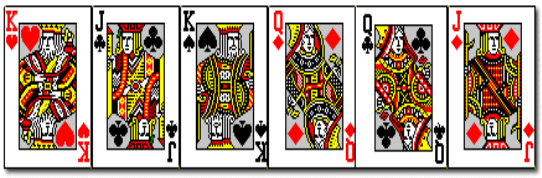
North Dakota
November 2009

NCSC | NCJFCJ National Council of Juvenile and Family Court Judges | Race & Ethnic Fairness in the Courts

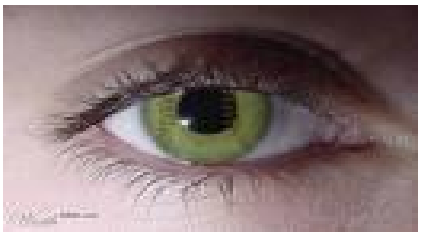
Goals of this Presentation

- Normalize the association between information processing and how we relate to others.
- Examine implicit bias and the "condition" of being human.
- Challenge the notion of "color blind".
- Context is race (DMC/MOR), but could extend to many other characteristics or groups.
- Nothing presented today, however, is an excuse.

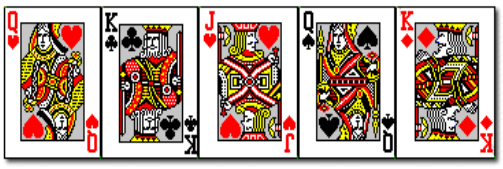
But First… Pick A Card



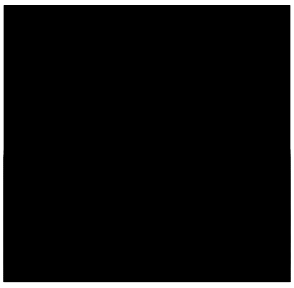
Focus On Your Card



Your Card Is Gone



Names?



Repeat After Me…

Croak
Poke
Joke
Soak
Broke

???

Bias and Decision-Making

- Complex and nuanced.
- Intertwined with many other social cognitive processes.
  - Attitudes
  - Heuristics
  - Schemas
  - Stereotypes
- So… let's start with some basic definitions…

Terminology

- Social cognition: how people process social information
- Racism: prejudice and/or discrimination based on race
  - Prejudice (affective)
  - Discrimination (behavioral)
  - Stereotype (cognitive)

Terminology

- In group (us) versus out group (them)
- Minimal group paradigm – it doesn't take much
- Bias is a preference (+ or -) for a group based on attitudes, heuristics, stereotypes, etc.
- Heuristic: mental "rule of thumb"
- Explicit (aware) versus implicit (unaware)

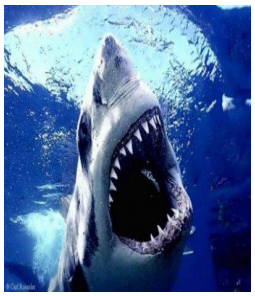
Implicit (unaware)

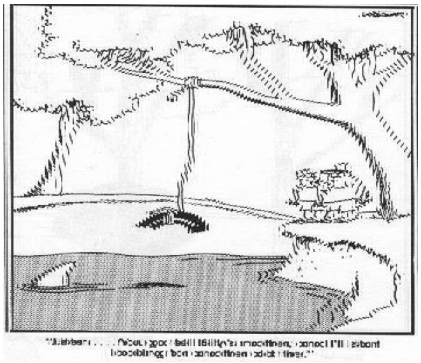
- Processes affectionately known as…
  - "mind bugs" or "brain bugs"
- Also known as…
  - "head hiccups"
  - "cranium critters"
  - "mind moles"
  - "noggin gnomes"
  - "chrome dome noggin gnomes"
  - "psyche mice"
  - "gourd goblins"
- Example: Basketball Game

Information Processing

- We are bombarded with information and stimulus every minute of our existence.
- Processing all of this "stuff" would simply overwhelm us.
- Our brain has to quickly sort through and categorize information and stimulus for us to function.
- And that (automatic processing) can be very useful…

…for example…!



…and another (more routine) example…

- Please read the following…
  - I adda a qwer zcada eqai adfjk, fdaklad qeeqmoxn pwiq te nveh majdury. U dogn fo usni rep soz cocley. Zorg noyb goo?
- Now, read this…
  - I cnnoat blveiee I aulaclty uesdnatnrd waht I am rdanieg. Aoccdrnig to rscheearch at Cmabrigde Uinervtisy, it deosn't mttaer inwaht oredr the ltteers in a wrod are, the olny iprmoatnt tihng is taht the frist and lsat ltteer be in the rghit pclae. The rset can be a taotl mses and you can sitll raed it wouthit a porbelm. Tihs is bcuseae the huamn mnid deos not raed ervey lteter by istlef, but the wrod as a wlohe.

Automatic Processing and Interference: Read the Word

BLUE BLACK GREEN
YELLOW RED BLUE
RED BLACK GREEN

Automatic Processing and Interference: Say the Color of the Word

BLACK BLACK GREEN
YELLOW BLUE RED
RED SHARK! BLUE

Recap

- We are flooded with information, and process much of it automatically
- Automatic processing is necessary for us to function
- Automatic processing can be very **helpful**
  - Saves cognitive resources
  - Fight or flight / primitive brain
- Automatic processing can be very **unhelpful**
  - On some tasks we pay a price for efficiency (interference)
  - Is not always accurate

The Lunch Date

Stereotypes

- The process of developing **categories** of information begins at birth.
- As we mature, categories develop around observables.
  - Color
  - Gender
  - Age
  - Body type
- Categories also begin to include those that are socially constructed.
  - Professor
  - Truck driver
  - Nurse
  - Basketball player

Stereotypes

- Over time, we learn to associate certain characteristics with certain categories of information.
- We acquire characteristics of categories from many sources (e.g., parents).
- The characteristics attached to a given category are a stereotype.
- Stereotypes can be positive or negative as well as generally accurate or inaccurate.
- They are roughly diagnostic ("quick and dirty")

Think of Stereotypes



Think of Stereotypes

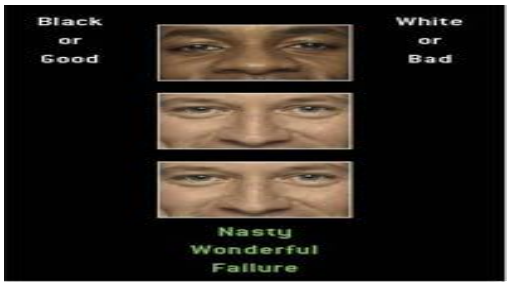



Implicit Bias

- In contrast to explicit bias, implicit bias operates outside of awareness.
- All of these things "flavor" our decisions.
  - Automatic processing
  - Stereotypes
  - Fundamental attribution error
- Implicit bias is a preference for a group based on implicit attitudes, stereotypes, etc.

How Do We Know It Exists?

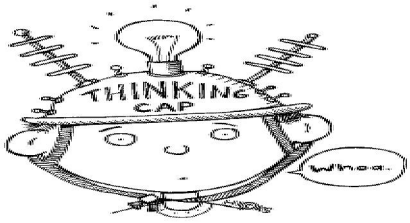
- Implicit Association Test (IAT)



Implications

Can It Be Controlled?

- First, we need to think about thinking some more…
- Also known as "meta-cognition"



Thinking about Thinking

- Low effort processing
  - Quick and peripheral
  - Relies on heuristics
  - Low accuracy in many circumstances
  - More likely when we are under high cognitive load or stress
  - Weaknesses related to ordinary personology (our understanding of how the world works)

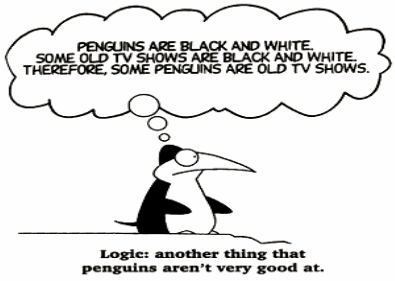
Low Effort Processing

- Example: coin flips (probability)
  - Nine fair coin flips come up heads – what are the chances the next flip is going to be heads as well?

Low Effort Processing (continued)

- Example: bank teller (representativeness)
  - Angie is 30 years old. In college, she majored in accounting. She also was very concerned with issues of social justice and discrimination. Is Angie more likely to be:
    - a bank teller, or
    - bank teller and active in the feminist movement?
- Heuristic / logic errors can contribute to biased decisions…

Thinking Errors: We Are Not Alone



Thinking about Thinking

- High effort processing
  - Deliberate and central
  - Considers "rules" carefully
  - More likely under low cognitive load and low stress
  - Accuracy tends to be better
  - Accuracy can be further enhanced through training (e.g., regarding probability)
  - Can help suppress acting on "generalized" information (e.g., stereotypes)

So…?

- We can work to process information differently and counteract some of the influence of stereotypes and judgment heuristics.
- Requires…
  - Self awareness
  - Intrinsic and/or extrinsic motivation
  - An "active fight" each and every time
- Let's look at some specific strategies…

Strategies

- Education
- Reduce cognitive load and stress
- Engage high effort processing

Strategies (continued)

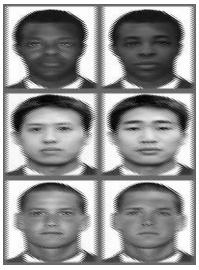
- Organizational review
  - Honest examination of workforce and power structure.
  - Strive to set new and positive norms (tell me what to do right alongside what is wrong).
  - Open communication.
  - Culture of holding each other accountable.

Strategies (continued)

- Exposure
- Environment
- Checklists

Strategies (continued)

- Mindfulness
- Debiasing
- Look to other fields



Summary: No Easy Answers

- Stereotyping and implicit bias are normal cognitive processes.
- Everyone is susceptible to implicit social cognition - understanding this provides a common ground for dialogue.
- Much of social cognition is an automatic process - but not an excuse.
- Education can reduce stereotypes, prejudice, and discrimination. (Talk to your children!)

Summary: No Easy Answers

- Historical, sociological, and shame based approaches to reducing MOR/DMC **alone** are likely inadequate.
- Considering the psychology of how we process and act on information must be part of the discussion regarding MOR/DMC.
- Efforts must be made to provide the conditions conducive to "controlling" implicit social cognitive processes.

Final Exam

- **A man and his teenaged son went fishing for the day.**
- **On the way home they had a terrible accident.**
- **The father was killed and the son was seriously injured.**
- **When the son arrived in the emergency room, the doctor looked down of the boy and said, "Oh no! This is my son!"**
- **How can this be?**

QUESTIONS?

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The Lens of Implicit Bias

By Shawn C. Marsh, Ph.D.

Consider for a moment the number of people and decisions involved in even the most common situations within our justice system. Take an adolescent who is accused of shoplifting. The store security officer first decides whether or not the youth actually shoplifted merchandise, then the store owner decides whether or not the act warrants involving the police. Law enforcement, if called, then decides whether or not to charge or even arrest the youth. Depending on that decision, detention or probation staff may become involved and make decisions around detainment or diversion. Decisions continue to accumulate as the youth moves through the system—up to and including decisions made by juvenile and family court judges.

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Fortunately for us, we have a (relatively) sophisticated brain. As human beings, we possess the ability to deal efficiently with the

Appendix F

Additional Data on State Programs

This appendix includes the following tables based on pre- and post-assessment questionnaires completed for each state program on implicit bias:

California

- C-1: Participants' Current Position
- C-2: Participants' Experience in Current Position
- C-3: Participants' Rating of Prior Knowledge of Subject
- C-4: Post-Assessment Responses of Those Who Scored Correctly on Pre-Assessment
- C-5: Post-Assessment Responses of Those Who Scored Incorrectly on Pre-Assessment

Minnesota

- M-1: Post-Assessment Responses of Those Who Scored Correctly on Pre-Assessment
- M-2: Post-Assessment Responses of Those Who Scored Incorrectly on Pre-Assessment

North Dakota

- ND-1: Participants' Current Position
- ND-2: Participants' Experience in Current Position
- ND-3: Participants' Rating of Prior Knowledge of Subject
- ND-4: Participants' Race/Ethnicity
- ND-5 Post-Assessment Responses of Those Who Scored Correctly on Pre-Assessment
- ND-6 Post-Assessment Responses of Those Who Scored Incorrectly on Pre-Assessment

California Tables[1]

Table C-1: Participants' Current Position

Position	Number	Percentage
Judge/Justice	12	16.9
Manager/Supervisor	16	22.5
Attorney	10	14.1
Other judicial officer	5	7.0
Clerk	11	15.5
Analyst	4	5.6
Support staff	9	12.7
Other	4	5.6
Total	**71**	**100.0**

Table C-2: Participants' Experience in Current Position

Length of Experience	Number	Percentage
6 months or less	2	2.8
6 months to 1 year	2	2.8
1 to 3 years	13	18.3
3 to 5 years	8	11.3
5 to 10 years	21	29.6
More than 10 years	25	35.2
Total	**71**	**100.0**

Table C-3: Participants' Rating of Prior Knowledge of Subject

Length of Experience	Number	Percentage
Minimal	46	65.7
Moderate	21	30.0
Extensive	3	4.3
Total	**70**	**100.0**

[1] California tables are based on the responses of 71 participants who answered at least one question (the same question) on both the pre- and post-program assessment questionnaires.

Table C-4: Post-Assessment Responses of Those Who Scored Correctly on Pre-Assessment[2]

Questionnaire Item (bolded answer is correct)	Correct responses Prior to Program	Post-Program Responses*		
		☑	☒	?
1. Implicit or unconscious bias: (a) Is produced by the unconscious processing of stereotypes, (b) Is not influenced by an individual's belief that people should all be treated the same, (c) Is difficult to alter, (d) **All of the above**	47	85%	13%	2%
2. Which of the following techniques have been shown to limit the influence of implicit or unconscious bias? (a) Judicial intuition, (b) Morality plays, (c) **Exposure to positive, counter-stereotypical exemplars**, (d) All of the above	37	78%	16%	5%
3. The Implicit Association Test (IAT): (a) Measures reaction time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Is better suited for educational rather than diagnostic purposes, (d) **All of the above**	26	62%	39%	0%
4. What is the best evidence that implicit bias exists? (a) Analysis of criminal justice statistics, (b) **Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior**, (c) Self-reports, (d) All of the above	22	96%	5%	0%
5. Which of the following techniques have <u>not</u> been used to measure implicit bias? (a) Implicit Association Test (IAT,) (b) **Polygraph**, (c) MRIs, (d) All of the above	27	100%	0%	0%

***☑ =correct response, ☒=incorrect response, ?=no response**

[2] Of the eight items included on the California pre- and post-assessment questionnaires, one question was eliminated from the analyses because it included two correct response options but did not allow respondents to select both. The omitted question is "Which of the following thought processes is consciously activated? a. Implicit bias, b. explicit bias, c. automatic processing, d. stereotypes, or e. none of the above." Both b and d are correct responses. Two other items did not have specific correct answers; rather they gauged opinions about the extent of implicit bias. These items were analyzed separately. Thus Tables C-4 and C-5 include five questions.

Table C-5: Post-Assessment Responses of Those Who Scored Incorrectly on Pre-Assessment[3]

Questionnaire Item (bolded answer is correct)	Incorrect Responses Prior to Program	Post-Program Responses*		
		☑	☒	?
1. Implicit or unconscious bias: (a) Is produced by the unconscious processing of stereotypes, (b) Is not influenced by an individual's belief that people should all be treated the same, (c) Is difficult to alter, (d) **All of the above**	**23**	**52%**	**48%**	**0%**
2. Which of the following techniques have been shown to limit the influence of implicit or unconscious bias? (a) Judicial intuition, (b) Morality plays, (c) **Exposure to positive, counter-stereotypical exemplars**, (d) All of the above	**30**	**47%**	**47%**	**7%**
3. The Implicit Association Test (IAT): (a) Measures reaction time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Is better suited for educational rather than diagnostic purposes, (d) **All of the above**	**35**	**54%**	**43%**	**3%**
4. What is the best evidence that implicit bias exists? (a) Analysis of criminal justice statistics, (b) **Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior**, (c) Self-reports, (d) All of the above	**41**	**42%**	**59%**	**0%**
5. Which of the following techniques have <u>not</u> been used to measure implicit bias? (a) Implicit Association Test (IAT,) (b) **Polygraph**, (c) MRIs, (d) All of the above	**32**	**91%**	**9%**	**0%**

***☑ =correct response, ☒=incorrect response, ?=no response**

[3] See Footnote 2.

Minnesota Tables[4]

Table M-1: Post-Assessment Responses of Those Who Scored Correctly on Pre-Assessment[5]

Questionnaire Item (bolded answer is correct)	Correct responses Prior to Program	Post-Program Responses*		
		☑	☒	?
1. Implicit bias: (a) Is produced by the unconscious processing of schemas and stereotypes, (b) Is not influenced by an individual's belief that people should all be treated the same, (c) Is difficult to alter, (d) **All of the above**	**9**	**67%**	**33%**	**0%**
2. Which of the following thought processes are activated automatically, without conscious awareness? (a) **Implicit bias,** (b) Explicit bias, (c) Profiling, (d) All of the above	**6**	**67%**	**33%**	**0%**
3. Research has shown that unconscious or implicit bias: (a) Exists in only a few jurisdictions in the US, (b) Does not occur in people who are free of explicit bias, (c) **Is related to behavior in some situations,** (d) All of the above	**9**	**89%**	**11%**	**0%**
4. The Implicit Association Test (IAT): (a) Measures response time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Should not be used to diagnose a particular individual as being biased, (d) a and b, (e) **All of the above**	**8**	**50%**	**50%**	**0%**
5. Which of the following techniques have been shown to limit the influence of implicit bias? (a) Check lists, (b) Paced, deliberative decision-making, (c) Exposure to positive, counter-stereotypical exemplars, (d) **All of the above**	**13**	**85%**	**15%**	**0%**
6. What evidence do we have that implicit bias exists? (a) Analysis of criminal justice statistics, (b) Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior, (c) Magnetic Resonance Imaging (MRIs), (d) **b and c**, (e) All of the above	**7**	**29%**	**71%**	**0%**
7. Justice professionals can fail to recognize the influence of implicit bias on their behavior because: (a) They are skilled at constructing arguments that rationalize their behavior, (b) The large volume of work they are required to do makes it difficult to be cognizant of implicit bias, (c) They do not believe they are biased, (d) **All of the above**	**13**	**100%**	**0%**	**0%**

***☑ =correct response, ☒=incorrect response, ?=no response**

[4] The Minnesota pre- and post-assessment results are based on the responses of 17 participants who completed at least one question (the same question) on both the pre- and post-assessment questionnaires.

[5] One of the eight items included on the Minnesota pre- and post-assessment questionnaires, was eliminated from the analyses because a typographical error resulted in a flawed question. The omitted question is "Methods to consider when managing implicit bias are: a. exposure to stereotypical images, b. adherence to use of procedure and checklists, c. reduce cognitive load in situations at high risk for bias, d. a and c." Both b and c are correct, but there was no response option for both b and c. Thus Tables M-1 and M-2 include seven questions.

Table M-2: Post-Assessment Responses of Those Who Scored Incorrectly on Pre-Assessment[6]

Questionnaire Item (bolded answer is correct)	Incorrect Responses Prior to Program	Post-Program Responses*		
		☑	☒	?
1. Implicit bias: (a) Is produced by the unconscious processing of schemas and stereotypes, (b) Is not influenced by an individual's belief that people should all be treated the same, (c) Is difficult to alter, (d) **All of the above**	**8**	**63%**	**38%**	**0%**
2. Which of the following thought processes are activated automatically, without conscious awareness? (a) **Implicit bias,** (b) Explicit bias, (c) Profiling, (d) All of the above	**11**	**46%**	**55%**	**0%**
3. Research has shown that unconscious or implicit bias: (a) Exists in only a few jurisdictions in the US, (b) Does not occur in people who are free of explicit bias, (c) **Is related to behavior in some situations,** (d) All of the above	**8**	**38%**	**63%**	**0%**
4. The Implicit Association Test (IAT): (a) Measures response time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Should not be used to diagnose a particular individual as being biased, (d) a and b, (e) **All of the above**	**9**	**11%**	**89%**	**0%**
5. Which of the following techniques have been shown to limit the influence of implicit bias? (a) Check lists, (b) Paced, deliberative decision-making, (c) Exposure to positive, counter-stereotypical exemplars, (d) **All of the above**	**4**	**50%**	**50%**	**0%**
6. What evidence do we have that implicit bias exists? (a) Analysis of criminal justice statistics, (b) Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior, (c) Magnetic Resonance Imaging (MRIs), (d) **b and c**, (e) All of the above	**10**	**10%**	**90%**	**0%**
7. Justice professionals can fail to recognize the influence of implicit bias on their behavior because: (a) They are skilled at constructing arguments that rationalize their behavior, (b) The large volume of work they are required to do makes it difficult to be cognizant of implicit bias, (c) They do not believe they are biased, (d) **All of the above**	**4**	**25%**	**75%**	**0%**

***☑ =correct response, ☒=incorrect response, ?=no response**

[6] See Footnote 5.

North Dakota Tables[7]

Table ND-1: Participants' Current Position

Position	Number	Percentage
Judge/Justice	31	91.2
Attorney	1	2. 9
Other judicial officer	1	2.9
Court executive officer	1	2.9
Total	**34**	**100.0**

Table ND-2: Participants' Experience in Current Position

Length of Experience	Number	Percentage
6 months or less	1	2.9
6 months to 1 year	1	2.9
1 to 3 years	0	0.0
3 to 5 years	6	17.6
5 to 10 years	4	11.8
More than 10 years	22	64.7
Total	**34**	**100.0**

Table ND-3: Participants' Rating of Prior Knowledge of Subject

Length of Experience	Number	Percentage
Minimal	15	44.1
Moderate	18	52.9
Extensive	1	2.9
Total	**34**	**100.0**

Table ND-4: Participants' Race/Ethnicity

Length of Experience	Number	Percentage
White	33	97.1
White and Native American	1	2.9
Total	**34**	**100.0**

[7] North Dakota's analyses are based on the responses of 35 participants who completed at least one question (the same question) on both the pre- and post-assessment questionnaires.

Table ND-5: Post-Assessment Responses of Those Who Scored Correctly on Pre-Assessment[8]

Questionnaire Item (bolded answer is correct)	Correct responses Prior to Program	Post-Program Responses*		
		☑	☒	?
1. In general, do you think that it is possible for judges' decisions and court staffs' interactions with the public to be unwittingly influenced by unconscious bias toward particular racial/ethnic groups? (a) **Yes**, (b) No	35	100%	0%	0%
2. Research has shown that unconscious or implicit bias: (a) Exists in only a few jurisdictions in the US, (b) Does not occur in people who are free of explicit bias, (c) **Is related to behavior in some situations**, (d) All of the above	24	92%	8%	0%
3. Implicit bias: (a) Is produced by the unconscious processing of schemas and stereotypes, (b) Is not influenced by an individual's belief that people should all be treated the same, (c) Is difficult to alter, (d) **All of the above**	26	69%	31%	0%
4. Which of the following techniques have been shown to limit the influence of implicit bias? (a) Judicial intuition, (b) Moral maturity enhancement, (c) **Exposure to positive, counter-stereotypical exemplars**, (d) All of the above	8	88%	13%	0%
5. The Implicit Association Test (IAT): (a) Measures response time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Should not be used to diagnose individual bias, (d) **All of the above**	9	67%	22%	11%
6. What evidence do we have that implicit bias exists? (a) Analysis of criminal justice statistics, (b) **Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior**, (c) Self-report, (d) All of the above	5	40%	40%	20%
7. Which of the following techniques has not been used to measure implicit bias? (a) Implicit Association Test (IAT), (b) **Polygraph**, (c) Paper and pencil tests, (d) MRIs	9	67%	33%	0%

***☑ =correct response, ☒=incorrect response, ?=no response**

[8] The North Dakota pre- and post-program assessment questionnaires included eight questions. One question was eliminated from the analyses because, in retrospect, it could have been confusing to respondents. The omitted question is "Which of the following thought processes is consciously activated? a. Implicit bias, b. explicit bias, c. automatic processing, d. stereotypes, e. schemas, or f. none of the above." B is always consciously activated; d and e can be consciously and unconsciously activated. Thus Tables ND-5 and ND-6 include seven questions.

Table ND-6: Post-Assessment Responses of Those Who Scored Incorrectly on Pre-Assessment[9]

Questionnaire Item (bolded answer is correct)	Correct responses Prior to Program	Post-Program Responses*		
		☑	☒	?
1. In general, do you think that it is possible for judges' decisions and court staffs' interactions with the public to be unwittingly influenced by unconscious bias toward particular racial/ethnic groups? (a) **Yes**, (b) No	0	0%	0%	0%
2. Research has shown that unconscious or implicit bias: (a) Exists in only a few jurisdictions in the US, (b) Does not occur in people who are free of explicit bias, (c) **Is related to behavior in some situations**, (d) All of the above	10	60%	40%	0%
3. Implicit bias: (a) Is produced by the unconscious processing of schemas and stereotypes, (b) Is not influenced by an individual's belief that people should all be treated the same, (c) Is difficult to alter, (d) **All of the above**	9	67%	22%	11%
4. Which of the following techniques have been shown to limit the influence of implicit bias? (a) Judicial intuition, (b) Moral maturity enhancement, (c) **Exposure to positive, counter-stereotypical exemplars**, (d) All of the above	27	26%	67%	7%
5. The Implicit Association Test (IAT): (a) Measures response time, (b) Pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone, (c) Should not be used to diagnose individual bias, (d) **All of the above**	24	17%	83%	0%
6. What evidence do we have that implicit bias exists? (a) Analysis of criminal justice statistics, (b) **Scores on tests that measure implicit bias (e.g., IAT) have been shown to correlate with behavior**, (c) Self-report, (d) All of the above	30	3%	97%	0%
7. Which of the following techniques has not been used to measure implicit bias? (a) Implicit Association Test (IAT), (b) **Polygraph**, (c) Paper and pencil tests, (d) MRIs	26	19%	77%	4%

***☑ =correct response, ☒=incorrect response, ?=no response**

[9] See footnote 8.

Appendix G
Resources 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 project team 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. The results of these efforts are presented in four tables:

Table G-1. *Combating Implicit Bias in the Courts: Understanding Risk Factors* identifies and describes conditions that exacerbate the effects of implicit bias on decisions and actions.

Table G-2. *Combating Implicit Bias in the Courts: Seeking Change* identifies and describes seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions. The table briefly summarizes empirical findings that support the strategies and offers concrete suggestions, both research-based and extrapolated from existing research, to implement each strategy. Some of the suggestions in the table focus on individual actions to minimize the influence of implicit bias, and others focus on organizational efforts to (a) eliminate situational or systemic factors that may engender implicit bias and (b) promote a more egalitarian court culture.

Table G-3. *Combating Implicit Bias in the Courts: Understanding Risk Factors—Selected Research Findings* and Table G-4. *Combating Implicit Bias in the Courts: Seeking Change—Selected Research Findings* provide summaries of the research cited in the preparation of the first two tables for those interested in better understanding the basis for the risk factors and suggested strategies.

The project team offers the four tables as a resource for judicial educators developing programs on implicit bias with the understanding that the information should be reviewed and revised as new research and lessons from the field expand current knowledge.

Reference

Dasgupta, Nilanjana. (2009). Mechanisms underlying the malleability of implicit prejudice and stereotypes: The role of automaticity and cognitive control. In T. Nelson (Ed). *Handbook of prejudice, stereotyping, and discrimination* (pp. 267-284). New York: Psychology Press.

G-1 Combating Implicit Bias in the Courts: Understanding Risk Factors

The following conditions increase the likelihood that implicit bias may influence one's thoughts and actions.

Risk factor: **Certain emotional states**
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).
Risk factor: **Ambiguity**
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).
Risk factor: **Salient social categories**
A decision maker may be more likely to think in terms of race and use racial stereotypes because race often is a salient, i.e., easily-accessible, attribute (Macrae, Bodenhausen, & Milne, 1995; Mitchell, Nosek, & Banaji, 2003). However, when decision makers become conscious of the potential for prejudice, they often attempt to correct for it; in these cases, judges, court staff, and jurors would be less likely to exhibit bias (Sommers & Ellsworth, 2001).
Risk factor: **Low-effort cognitive processing**
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 a person 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).

Risk factor: **Distracted or pressured decision-making circumstances**
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.
Risk factor: **Lack of feedback**
When organizations fail to provide feedback that holds decision makers accountable for their judgments and actions, individuals are less likely to remain vigilant for possible bias in their own decision-making processes (Neuberg & Fiske, 1987; Tetlock, 1983).

G-2 Combating Implicit Bias in the Courts: Seeking Change

The following strategies show promise in reducing the effects of implicit bias on behavior.

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 the types of strategies listed throughout this document.

What can the individual do?	What can the organization do?
1. **Seek out information on implicit bias.** Judges and court staff could attend implicit bias training sessions. Those who choose to participate in these sessions should ensure that they fully understand what implicit bias is and how it manifests in every day decisions and behavior by asking questions, taking the IAT, and/or reading about the scientific literature as a follow-up to the seminar.	1. **Provide training on implicit bias.** Courts could develop an implicit bias training program that presents participants not only with information about what implicit bias is and how it works, but that also includes information on specific, concrete strategies participants could use in their professional work to mitigate the effects of implicit bias. Judicial educators could present information about some of the other strategies listed in this report, or they could engage participants in a critical thinking activity designed to help them develop and/or tailor their own strategies. The Judicial Focus Group (JFG) thought that this type of training would be more effective if the program contained the following: a. **A facilitator judge to help conduct the training or sit on the panel.** If the court conducts a training program or hosts a panel on implicit bias as part of a symposium on judicial ethics, the JFG indicated that judges would add credibility to the session. Judges typically respond well when one of "their own" speaks out in support of an issue or position. The judge's presence could help make the session less threatening to participating judges and could help couch the discussion in terms of what can be done to make better decisions.

	b. **Many diverse examples of implicit bias in professional judgment and behavior.** The JFG felt that training should provide illustrative examples of implicit bias that span several professional disciplines (e.g., NBA officials, medical treatment decisions, hiring decisions) to show how pervasive the phenomenon is. c. **Experiential learning techniques.** The JFG suggested that small group exercises and other experiential learning techniques could help make information more personally relevant, which could provide a valuable frame of reference for those who are expected to resist the idea of implicit bias. Brain teaser exercises may be used to introduce the topic and demonstrate its broad application beyond race to gender, class, age, weight, and other stigmatized social categories. Note: The JFG also encouraged a focus on implicit bias training for judges *before* they take the bench by making this training a component of new judge orientation. This way, future implicit bias training and requirements will simply be a part of "business as usual" and will incur less resistance.

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).

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).

What can the individual do?	What can the organization do?
1. **Seek out and elect to participate in diversity training seminars.** Judges and court staff could seek out and participate in diversity training seminars that promote an appreciation of group differences and multicultural viewpoints. Exposure to the multiculturalism approach, particularly routine exposure, will help individuals develop the greater social awareness needed to overcome implicit biases. 2. **Seek out the company of other professionals who demonstrate egalitarian goals.** Surrounding oneself with others who are committed to greater egalitarianism will help positively influence one's own implicit beliefs and behaviors in the long run. 3. **Invest extra effort into identifying the unique attributes of stigmatized group members.** Judges and court staff could think about how the stigmatized group members they encounter are *different* from others – particularly from other members of the same social/racial group. This type of individuating exercise will help reduce one's reliance on social or racial stereotypes when evaluating or interacting with another person.	1. **Provide routine diversity training.** Offer educational credits for voluntary judicial participation in elective diversity or multiculturalism seminars. Levinson (2007) also suggests that this could be a valuable process for jurors. Recruit a judge to help conduct the training or sit on the panel. In this training, lead by example. Any highly esteemed judge could serve as a role model in this context to promote egalitarian goals. 2. **Target leadership in the jurisdiction first.** Egalitarian behavior demonstrated by judicial leaders can serve to encourage greater adherence to egalitarian goals throughout the court community. The Judicial Focus Group argued that systemic change only occurs with buy-in from leadership – an essential step toward improved egalitarianism. Note: See *Strategy 7* for more suggestions on what an organization can do to cultivate more egalitarian norms in the court community.

Strategy 3: **Routinely check thought processes and decisions for possible bias.**

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 (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 (see "Understanding Risk Factors").

Instructions on how to correct for implicit bias may be effective at mitigating the influence of implicit bias on judgment if the instructions implement research-based techniques. Instructions should detail a clear, specific, concrete strategy that individuals can use to debias judgment instead of, for example, simply warning individuals to protect their decisions from implicit bias (e.g., Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003). For example, instructions could help mitigate implicit bias by asking judges or jurors to engage in mental perspective-taking exercises (i.e., imagine themselves in the other person's shoes; Galinsky & Moskowitz, 2000).

As discussed in Strategy 2, however, some seemingly intuitive strategies for counteracting bias can, in actuality, produce some unintended negative consequences. Instructions to simply suppress existing stereotypes (e.g., adopt the "color blindness" approach) have been known to produce a "rebound effect" that may increase implicit bias (Macrae, Bodenhausen, Milne, & Jetten, 1994). Others also perceive individuals instructed to implement the "color blindness" approach as more biased (Apfelbaum, Sommers, & Norton, 2008). For these reasons, decision makers should apply tested intervention techniques that are supported by empirical research rather than relying on intuitive guesses about how to mitigate implicit bias.

What can the individual do?	What can the organization do?
1. **Use decision-support tools.** Legal scholars have proposed several decision-support tools to promote greater deliberative (as opposed to intuitive) thinking (Guthrie, Rachlinski, & Wistrich, 2007). These tools, while untested, would primarily serve as vehicles for research-based decision-making approaches and self-checking exercises that demonstrably mitigate the impact of implicit bias. The Judicial Focus Group (JFG) also supported the use of such tools, which include: a. **Note-taking.** Judges and jurors should take notes as the case progresses so that they are not forced to rely on memory (which is easily biased; see *Understanding Risk Factors* and Levinson, 2007) when reviewing the evidence and forming a decision. b. **Articulate your reasoning process (e.g., opinion writing).** By prompting decision makers to document the reasoning behind a decision in some way before announcing it, judges and jurors may review their reasoning processes with a	1. **Develop guidelines that offer concrete strategies on how to correct for implicit bias.** Courts could develop and present guidelines to decision makers on how to check for and correct for implicit bias. These guidelines should specify an explicit, concrete strategy for doing so that has been empirically shown to reduce the effects of implicit bias on judgment and behavior. Some research-based strategies could include instructions that walk people through a perspective-taking exercise (Galinsky & Moskowitz, 2000) or a cloaking exercise (i.e., checking decisions for bias by imagining how one would evaluate the stigmatized group member if he or she belonged to a different, non-stigmatized social group), or that direct people to adopt specific implementation intentions to control for potential bias in specific instances (e.g., if-then plans such as *if: encounter a stigmatized group member, then: think counter-stereotypic thoughts*; see Mendoza, Gollwitzer, & Amodio, 2010). It should NOT instruct a person to ignore or suppress stereotypes and/or implicit biases or offer any other intervention technique that

critical eye for implicit bias before publicly committing to a decision. Techniques or tools that help decision makers think through their decision more clearly and ensure that it is based on sound reasoning before committing to it publicly will protect them from rationalizing decisions *post hoc* (also see *Strategy 6* on instituting feedback mechanisms). Sharing this reasoning up front with the public can also positively affect public perceptions of fairness. c. **Checklists or bench cards.** The JFG suggested the use of checklists or bench cards that list some "best practice" questions or exercises (e.g., perspective-taking, cloaking). These tools could prompt decision makers to more systematically reflect on and scrutinize the reasoning behind any decision for traces of possible bias. Note that this strategy should be used only after the decision maker has received implicit bias and diversity training, and should be offered for voluntary use. If untrained judges rely on these tools, their efforts to correct for bias may be sporadic and restricted to isolated cases. If resistant judges are compelled to use these tools, checklists as a forced procedure could backfire and actually increase biases in these types of individuals.	is not supported by empirical literature on implicit bias. 2. **Institute formal protocols or develop decision-support tools for guidance.** Courts could establish "best practice" protocols or self-checking procedures (e.g., perspective-taking, cloaking; see above) to help judges identify and override implicit bias. The judiciary could also develop protocols to help minimize situational ambiguity (see *Understanding risk factors* for more on situational ambiguity and *Strategy 5* for further discussion about strategies that may be used to reduce ambiguity).

Strategy 4: **Identify distractions and sources of stress in the decision-making environment and remove or reduce them.**

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 (see *Understanding Risk Factors*).

What can the individual do?	What can the organization do?
1. **Allow for more time on cases in which implicit bias may be a concern.** The Judicial Focus Group (JFG) suggested that judges prepare more in advance of hearings in which disadvantaged group members are involved (as attorneys, defendants/litigants, victims,	1. **Conduct an organizational review**. An organizational review could help the court determine whether and how the court fosters bias. Part of this review should include a critical assessment of the burden on judges and other decision makers.

key witnesses). If possible, judges could slow down their decision-making process by spending more time reviewing the facts of the case before committing to a decision. If implicit bias is suspected, judges could reconvene and review case material outside of the court environment to reduce time pressure. 2. **Clear your mind and focus on the task at hand.** Judges should become adept at putting distractions aside and focusing completely on the case and evidence at hand. Meditation courses may help judges develop or refine these skills (Kang & Banaji, 2006; Seamone, 2006).	Some stressors that could adversely affect judicial performance include time pressure (as a result of heavy caseloads, complex cases, or dockets with a broad array of case types), fatigue (as a result of long hours, threats to physical safety, or other emergency or crisis situations), and distractions (as a result of multi-tasking, overburdened workloads, or even loud construction noise that day). Courts could modify procedures to allow judges sufficient time to consider each case by, for example, reorganizing the court calendar to reduce the typical caseload for each judge, minimizing the necessity for spur-of-the-moment decisions, or permitting the judge to issue tentative decisions or reconvene if further deliberation is necessary (e.g., see Guthrie, Rachlinski, & Wistrich, 2007).

Strategy 5: **Identify sources of ambiguity in the decision-making context and establish more concrete standards before engaging in the decision-making process**

Situational ambiguity may arise for cases in which the formal criteria for judgment are somewhat vague (e.g., laws, procedures that involve some degree of discretion on behalf of the decision maker). These especially include (but are not limited to) cases that involve the interpretation of newly established laws or case types that are unfamiliar or less familiar to the decision maker. In these cases, 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).

What can the individual do?	What can the organization do?
1. **Preemptively commit to more specific decision-making criteria.** Before entering into a decision-making context characterized by ambiguity or that permits greater discretion, judges and jurors could establish their own informal structure or follow suggested protocol (if instituted) to help create more objective structure in the decision-making process. Commit to these decision-making criteria before reviewing case-specific information to minimize the impact of implicit bias on the reasoning process.	1. **Institute formal protocol to help decision makers.** The court could establish and institute formal protocols that decision makers could follow to help them identify sources of ambiguity and that offer suggestions on how to reduce these types of ambiguity in the decision-making context. 2. **Specialization.** The Judicial Focus Group (JFG) discussed the possibility that case decisions by judges with special expertise in that particular area of law may be less prone to implicit bias than decisions made by judges without such expertise. They reasoned

	that without familiarity, there is greater ambiguity and uncertainty in decision making. However, the JFG also discussed how this could be a double-edged sword: Specialist judges may be on autopilot with familiar case types and may not be engaged in the kind of deliberative thinking that helps reduce the impact of implicit bias on judgment. To prevent "autopilot" stereotyping, specialist judges in particular should commit to thinking deliberatively (see Strategy 3 for some suggestions on how to check decisions and thought processes for possible bias).

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 has already 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).

What can the individual do?	What can the organization do?
1. **Actively seek feedback from others**. Judges can seek out their own informal "checks and balances" by organizing or participating in sentencing round tables, or by consulting with a skilled mentor or senior judge for objective feedback on how to handle a challenging case or difficult situation.	1. **Adopt a peer-review process.** Judges could benefit from additional feedback about possible bias in their judicial performance. The court could arrange to have judges observe and provide feedback to one another on a rotating schedule. Guthrie, Rachlinski, and Wistrich (2007) offered a more formal approach: Every 2-3 years, an experienced team of reviewers (comprised of peer judges) could

2. **Actively seek feedback from others regarding past performance.** With an open mind, judges and court staff could talk to colleagues, supervisors, or others to request performance feedback. This information could be helpful in determining whether a person's current efforts to control or reduce implicit bias are effective or could be improved. 3. **Articulate your reasoning process.** To ensure sound reasoning in every case, judges could choose to document or articulate the underlying logic of their decisions. Not only does this exercise afford judges the opportunity to critically review their decision-making processes in each case, but taking it a step further—making this reasoning transparent in court—can have positive effects on public perceptions of fairness (see *Articulate your reasoning process* in *Strategy 3*, above).	visit the court and for each judge at that court, the team would review the transcripts, rulings, and other material for a few past cases. The team would then provide each judge with performance feedback and suggestions, if necessary, for improvement. The team should be trained to deliver this feedback in a constructive, non-threatening way. 2. **Develop a bench-bar committee.** The Judicial Focus Group (JFG) also suggested that courts develop a bench-bar committee, which could oversee an informal internal grievance process that receives anonymous complaints about judicial performance in the area of racial and ethnic fairness. Similar to the peer review process mentioned above, this committee (or a select group of trained peer or mentor judges) could review a sample of past cases or observe workplace behavior and offer feedback and guidance to the judge. 3. **Hold sentencing round tables.** The JFG suggested that judges convene a sentencing round table to review hypothetical cases involving implicit bias. Prior to the round table, the judges review the hypothetical cases and arrive prepared to discuss the sentencing decision they would issue in each case. When they convene, all judges reveal their decisions and discuss their reasoning frankly and candidly. This process can help judges think more deliberatively about the possibility of implicit biases entering their decisions and offers a forum for judges to obtain feedback from peers.

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).

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.

What can the individual do?	What can the organization do?
1. **Imagine counter-stereotypes or seek out images of admired exemplars.** To reduce the impact of implicit bias on judgment, judges and court staff could imagine or view images of admired or counter-stereotypic exemplars of the stereotyped social group (e.g., Martin Luther King, Jr.) before entering a decision-making scenario that could activate these social stereotypes. To accomplish this, researchers on implicit bias have suggested that people hang photos or program screen savers and desktop images of role models or others that challenge traditional racial stereotypes. 2. **Seek greater contact with counter-stereotypic role models.** Individuals who are motivated to become more egalitarian could also spend more time in the presence of people who are counter-stereotypic role models to reinforce counter-stereotypic associations in the brain and make traditional stereotypes less accessible for use. **3. Practice making counter-stereotypic associations.** Individuals who are motivated to change their automatic reactions should practice making positive associations with minority groups, affirming counter-stereotypes, and negating stereotypes. Implicit biases may be "automatic," but corrective and debiasing strategies can also become automated with motivation and practice.	**1. Conduct an organizational review**. An organizational review could help the court determine whether and how the court fosters bias. Part of this review should include an assessment of court communications (visual and auditory) to identify all communications in the courthouse that convey stereotypic information. Change these communications to convey egalitarian norms and present examples of counter-stereotypes. These positive cues can serve as subtle reminders to judges and court staff that reinforce a culture of equality. **2. Follow equal-opportunity and affirmative action (EOAA) hiring practices.** Members of stigmatized groups, when fairly represented in valued, authoritative roles (Richeson & Ambady, 2003), offer opportunities to foster positive intergroup relations and present other judges with readily accessible counter-stereotypes that they can draw upon to reduce implicit bias.

G-3 Combating Implicit Bias in the Courts: Understanding Risk Factors

Selected Research Findings

Risk factor: **Certain emotional states**

Cited Source	Major Research Findings	Implications
Dasgupta, N., DeSteno, D., Williams, L., & Hunsinger, M. (2009). Fanning the flames of prejudice: The influence of specific incidental emotions on implicit prejudice. *Emotion, 9*, 585-591.	Three studies examined the impact of incidental emotions (i.e., emotions aroused by sources irrelevant to the task at hand) on social judgment. One study showed that when experiencing these emotional states, individuals could develop implicit biases about newly encountered outgroups (i.e., people identified as belonging to different social categories from oneself). For known groups, two studies showed that the presence of incidental emotions increased implicit bias, as measured by the IAT. However, participants only responded with increased bias if the experienced emotion (e.g., anger) was linked with the cultural stereotype about the particular outgroup (e.g., Arabs) to which the evaluated figure belonged.	Emotional states, regardless of the source of those emotions, may create or enhance implicit bias toward other social groups. People may rely more on heuristics (i.e., cognitive shortcuts like stereotypes) when experiencing certain emotional states. Resulting judgments may be more punitive and stereotype-consistent than judgments made in absence of these emotional states. For judges and other legal decision-makers, incidental emotions unrelated to the case at hand could be particularly insidious because they may be misattributed to elements of the case. These emotional experiences may then be interpreted as "intuition" or "gut feelings" about a case that could result in or help to justify a biased decision.
DeSteno, D., Dasgupta, N., Bartlett, M., & Cajdric, A. (2004). Prejudice from thin air: The effect of emotion on automatic intergroup attitudes. *Psychological Science, 15*, 319-324.	Two experiments demonstrated that certain emotional states (arguably, those relevant to intergroup competition and conflict) can evoke "automatic" prejudice toward previously unknown outgroups (i.e., new groups for which no preexisting cultural stereotypes exist). Participants induced to experience anger, but not those induced to experience sadness or a neutral emotional state, demonstrated implicit bias against outgroup members using two different implicit measures.	
Bodenhausen, G., Kramer, G., & Susser, K. (1994). Happiness and stereotypic thinking in social judgment. *Journal of Personality and Social Psychology, 66*, 621-632.	Across four experiments, participants induced to feel happy rendered more stereotypic judgments than participants in a neutral mood. Researchers investigated whether this result could be explained by a higher level of distraction on the part of those induced to feel happy (relative to those in a neutral mood) but found no evidence of such a difference, eliminating this alternative explanation for mood effects. Researchers did find, however, that happy participants could correct for this affect-related bias when held accountable for their judgments.	Happiness can prompt superficial processing and a greater reliance on stereotypes when formulating judgments, but this occurs at a level that can be consciously controlled if the person is motivated to do so.

Risk factor: **Ambiguity**

Selected Source	Major Research Findings	Implications
Dovidio, J., & Gaertner, S. (2000). Aversive racism and selection decisions: 1989 and 1999. *Psychological Science, 11*, 319-323.	In a simulated hiring scenario, participants reviewed and evaluated a job candidate's qualifications for a position as a peer counselor. Each participant was randomly assigned to one of three possible conditions in which they reviewed a candidate with strong, ambiguous, or weak qualifications. Participants did not discriminate against Black applicants compared to White applicants when their qualifications were clearly strong or clearly weak; however, when the decision was more ambiguous, racial bias emerged.	When making decisions in an environment that contains some measure of ambiguity or in which the specific criteria for evaluation are unclear, biased judgments are more likely.
Johnson, J. Whitestone, E., Jackson, L, & Gatto, L. (1995). Justice is still not colorblind: Differential racial effects of exposure to inadmissible evidence. *Personality and Social Psychology Bulletin, 21*, 893-898.	This research examined the effects of introducing damaging yet inadmissible evidence in a criminal case against a White or Black defendant. When no inadmissible evidence was presented, verdict decisions did not vary by defendant race. However, when inadmissible evidence was presented, White participants were more likely to endorse a guilty verdict (but were less likely to think the inadmissible evidence affected their decisions) when the defendant was Black than when the defendant was White.	People tend to experience greater difficulty disregarding information when it supports their social stereotypes than when it does not (e.g., inadmissible evidence).

Risk factor: **Salient social categories**

Selected Source	Major Research Findings	Implications
Macrae, C., Bodehausen, G., & Milne, A. (1995). The dissection of selection in person perception: Inhibitory processes in social stereotyping. *Journal of Personality and Social Psychology, 69*, 397-407.	In 3 experimental studies, researchers illustrated how social stereotyping processes depend on the social categories that are most salient in a given situation. Participants who viewed a videotape of a Chinese woman eating with chopsticks demonstrated Asian stereotype activation and Female stereotype inhibition, whereas those who viewed a videotape of the same Chinese woman applying makeup showed Female stereotype activation and Asian stereotype inhibition (using implicit reaction time measures).	People can categorize others in a number of different ways, and often do so based on whichever social category (e.g., race, gender, age group) is most salient at that moment. For example, if race is made more salient than gender in a given situation, racial stereotypes are more likely to become activated than gender stereotypes.
Mitchell, J., Nosek, B., & Banaji, M. (2003). Contextual variations in implicit evaluation. *Journal of Experimental Psychology: General, 132*, 455-469.	Across five studies, category salience determined whether or not implicit biases emerged. Instructing White participants to attend to the race when viewing pictures of White men and Black women caused them to exhibit an implicit preference for White over Black. However, instructing them to attend to gender (i.e., to classify the same individuals along a different dimension), they exhibited an implicit preference for Black women and a bias against White men (i.e., implicit gender bias but no implicit racial bias).	The expression of implicit bias may also depend on the particular personal characteristics on which the individual focuses. For example, if race is made more salient than gender in a given situation, a person is more likely to express implicit racial bias (and less likely to express implicit gender bias).
Sommers, S. & Ellsworth, P. (2001). White juror bias: An investigation of prejudice against black defendants in the American courtroom. *Psychology, Public Policy, and Law, 7*, 201-229.	This study of 196 White adults demonstrated that implicit bias is less likely to affect judgments in interracial trials that contain overtly racial issues than in trials without such blatant racial overtones. Mock jurors were more likely to convict a Black defendant in an interracial trial when the criminal act in question was not racially charged than when it was racially charged, were more likely to convict a Black defendant than a White defendant when the case was not racially charged, and demonstrated no difference in conviction rates between Black and White defendants when the case was racially charged. Authors argue that these patterns emerge because most people strive for egalitarianism or at least the appearance of egalitarianism; they work to counteract racial bias if they are made aware of this potential influence on their judgments.	Most Whites attempt to behave in egalitarian ways when making decisions about matters that clearly involve the potential for bias (e.g., racially charged cases). However, when race is made salient in a subtle way, Whites may not be aware of the potential for bias and thus may not attempt to correct for such bias when making judgments.

Risk factor: **Low-effort cognitive processing**

Selected Source	Major Research Findings	Implications
Bodenhausen, G. (1990). Stereotypes as judgmental heuristics: Evidence of circadian variations in discrimination. *Psychological Science, 1*, 319-322.	Two studies showed that people tend to rely more on social stereotypes as an effort-saving tool at times when they are not at their peak level of mental functioning. Specifically, "morning people" produced more stereotype-consistent judgments about another's personal characteristics (Study 1) and presumed guilt (Study 2) when evaluating that person in the evening (8 PM) vs. morning (9 AM), and vice-versa for "night people."	When people engage in low-effort information processing, they may rely on stereotypes and produce more stereotype-consistent judgments than when engaged in more deliberative, effortful processing.
Bodenhausen, G., & Wyer, R. (1985). Effects of stereotypes in decision making and information processing strategies. *Journal of Personality and Social Psychology, 46*, 267-282.	Two studies illustrated how stereotypes can bias the information-seeking process. Participants read a case file that described a person's transgression (Study 1: a job-related infraction; Study 2: a criminal act) and made judgments about immediate punishment severity, likelihood of recidivism, and punishment severity following recidivism. Participants evaluated the transgression as more likely to recur and as deserving of more severe punishment (for both the initial and future offenses) when the type of transgression matched the cultural stereotype of the minority person than when it did not. Moreover, they tended to recall less crime-relevant information about the person's life circumstances (but more non-diagnostic background information) when the transgression was stereotype-consistent than when it was stereotype-inconsistent. This is presumably because participants needed to think less extensively to understand the information presented when it was consistent with their stereotypes than when it violated their expectations. Participants for whom no stereotype was activated tended to recall the most information and apparently used this information to help formulate their judgments: They made more lenient judgments when favorable information was presented than when it was not.	When decision-makers (judges, attorneys, jurors, the public) rely on stereotypes to help them process information, they tend to formulate inferences about the offender early on in the information-gathering process. These presumptions then guide how effortfully they process later information. People tend to recall more diagnostic information about a person or event when they expect it to clash with existing stereotypes and expectations, but tend not to effortfully process and recall information when they expect it to be stereotype-consistent. However, when stereotypes do not guide information processing, people tend to review all available information and use that information to develop a more comprehensive understanding of events. This, in turn, allows them to produce fairer judgments of the offender.

Darley, J., & Gross, P. (1983). A hypothesis-confirming bias in labeling effects. *Journal of Personality and Social Psychology, 44*, 20-33.	This classic psychology study examined the impact of stereotypes on the judgments of others. Participants learned about a fourth-grade girl named Hannah and watched a videotape of her taking an oral test. Hannah's performance was ambiguous: She incorrectly answered both hard and easy questions, but also answered some of each correctly. When asked to estimate the grade level of Hannah's performance, participants who were told that Hannah came from a very poor family rated her performance at or below the fourth grade. However, participants who were told that she came from a very wealthy family rated her performance as significantly above the fourth grade level, despite having watched the exact same videotape.	Stereotypes and expectations can subtly influence our perceptions and the behavior of others in ways that uphold cultural stereotypes. Judges may inadvertently construct their information-gathering approach in a manner that, regardless of the information obtained, confirms the stereotype. Moreover, they may exude nonverbal communications that elicit stereotypic responses and behaviors from stigmatized parties, creating a "self-fulfilling prophecy."
Word, C., Zanna, M., & Cooper, J. (1973). The nonverbal mediation of self-fulfilling prophecies in interracial interaction. *Journal of Experimental Social Psychology, 10*, 102-120.	Seminal research demonstrated how racial bias can produce nonverbal behavior that adversely affects the interpersonal exchange between majority and stigmatized group members – here, in a job interview setting. Study 1 demonstrated that naïve, White job interviewers behaved with less immediacy (i.e., physical proximity), exhibited more frequent speech errors, and ended the interview sooner with Black than with White job applicants. Study 2 examined the performance of White job applicants when treated the same way as Study 1 Black applicants vs. Study 1 White applicants. "Black" treatment caused White applicants to exhibit more nervousness and to perform worse in the interview situation than those who received "White" treatment. These applicants also sat farther away from the interviewer and rated him as less friendly and less competent than those in the "White" treatment condition.	

Risk factor: **Distracted or pressured decision-making circumstances**

Selected Source	Major Research Findings	Implications
Bodenhausen, G., & Lichtenstein, M., (1987). Social stereotypes and information-processing strategies: The impact of task complexity. *Journal of Personality and Social Psychology, 52*, 871-880.	In two studies, participants read information about a hypothetical criminal trial in which the defendant was ethnically nondescript or described as Hispanic. Participants, who had been told at the beginning of the session that they would be asked to formulate judgments of either defendant guilt (a complex task) or aggressiveness (a simpler task), then evaluated the defendant on both guilt and aggressiveness. They also completed a memory test on evidence presented in the criminal trial scenario. Participants who expected to answer the complex judgment question judged the defendant as more guilty and aggressive, and recalled more negative information about him, when he was described as Hispanic than when he was ethnically nondescript. Participants initially charged with the simple task demonstrated no such bias in evaluations or in recalled content.	When people must make complex judgments in a relatively short amount of time, they tend to rely more on stereotypes than when faced with simple judgments or have ample time to formulate their judgments.
Eells, T., & Showalter, C. (1994). Work-related stress in American trial judges. *Bulletin of the American Academy of Psychiatry & the Law, 22*, 71-83.	This study surveyed a sample of 88 judges who completed to the National Judges Health Stress Questionnaire, the Judicial Stress Inventory, and the Brief Report Inventory. Judicial stress correlated positively with case backlog, pressure to move cases, and highly diverse caseloads, and correlated negatively with skill use and control over one's workday.	Heavy caseloads, particularly those that contain highly diverse types of cases, and pressure to resolve these cases are associated with occupational stress that may adversely affect judicial performance.
Gilbert, D., & Hixon, J. (1991). The trouble of thinking: Activation and application of stereotypic beliefs. *Journal of Personality and Social Psychology, 60*, 509-517.	Across two studies, authors examined the impact of "cognitive load" (i.e., distracted or preoccupied mental state in which the perceiver has a limited capacity for information processing) on the activation and application of stereotypes. In this seminal work, cognitive load (induced by requiring participants to complete a second concurrent task that involved the mental rehearsal of an 8-digit number) decreased the likelihood that stereotypes became activated. (However, an extensive body of literature points out methodological flaws that undermine this conclusion and demonstrates that stereotypes do become automatically activated when those stereotypes are relevant to the goals of the perceiver: e.g., Spencer, Fein, Wolfe, Fong, & Dunn, 1998 and see Sherman, Macrae, & Bodenhausen, 2000 for a review). Critically, cognitive load increased the likelihood that stereotypes, once activated, were applied in social judgment.	Once stereotypes become activated, they are more likely to influence judgments if the decision-maker is distracted than not.

Hartley, L., & Adams, R. (1974). Effect of noise on the Stroop test. *Journal of Experimental Psychology, 102*, 62-66.	Two studies examined the effects of stress on cognitive performance. Study 1 showed that people who were exposed to stressful auditory stimuli performed more poorly on a task that required greater mental focus (i.e., a Stroop task) than when the same task was performed in a quiet environment. Performance impairment increased with duration of exposure to the environmental stressor (Study 2).	Acute stress can cause people to perform more poorly on tasks that require mental focus and executive control.
Keinan, G. (1987). Decision making under stress: Scanning of alternatives under controllable and uncontrollable threats. *Journal of Personality and Social Psychology, 52*, 639-644.	Across a sample of 101 young to middle aged participants, participants who experienced stress – regardless of whether stress stemmed from a controllable or uncontrollable source – tended to arrive at untimed problem-solving decisions prematurely, without fully considering all alternatives.	Stress appears to limit information sampling and prevent decision-makers from fully considering all available information. People may tend to arrive at premature decisions and may be less vigilant when experiencing stress.
Sherman, J., Lee, A., Bessenoff, G., & Frost, L. (1998). Stereotype efficiency reconsidered: Encoding flexibility under cognitive load. *Journal of Personality and Social Psychology*, *75*, 589-606.	Five studies examined the hypothesis that stereotypes are efficient because they facilitate information encoding when cognitive resources are constrained. Studies 1-3 showed that participants attended more to information inconsistent with held stereotypes when cognitive resources were low (e.g., when distracted by a second, concurrent task). Study 4 showed that in both conditions (high and low cognitive resources), participants encoded the perceptual details of stereotype-inconsistent information more than stereotype-consistent information. However, the final study demonstrated that participants with depleted cognitive resources were more likely to extract the conceptual meanings of stereotype-consistent behaviors than stereotype-inconsistent behaviors.	Stereotypes emerge to support more efficient information processing. Information that is inconsistent with held stereotypes receive greater attention and more thorough perceptual encoding in an effort to integrate this seemingly contradictory information with our expectations about the world. However, when processing capacity is low (due to distractions, exhaustion, multi-tasking, etc.), people are more likely to derive meaning from information that is consistent with held stereotypes than from information that is inconsistent.
van Knippenberg, A., Dijksterhuis, A., & Vermeulen, D. (1999). Judgment and memory of a criminal act: The effects of stereotypes and cognitive load. *European Journal of Social Psychology, 29*, 191-201.	Undergraduates judged a defendant's guilt and recommended severity of punishment in a mock criminal case. Participants completed the task in one of four possible conditions, which differed as a function of activated stereotype (positive vs. negative) about the defendant and cognitive load (high vs. low via a time pressure manipulation). Participants with negative activated stereotypes provided higher estimates of the defendant's guilt, more severe punishment, and better memory for incriminating evidence than participants with positive activated stereotypes, but this difference emerged only for participants under high cognitive load.	When pressed for time, decision-makers (e.g., judges, jurors, witnesses) more often rely on stereotypes to help them formulate judgments. By relying on relevant stereotypes, decision-makers may produce more stereotype-consistent judgments and may recall information in a manner biased by those stereotypes.

Risk factor: **Lack of feedback and accountability**

Selected Source	Major Research Findings	Implications
Neuberg, S., & Fiske, S. (1987). Motivational influences on impression formation: Outcome dependency, accuracy-driven attention, and individuating processes. *Journal of Personality and Social Psychology, 53*, 431-444.	In each of three experiments, participants expected to interact with a young schizophrenic man ("Frank") on a design creativity task and received information about his personal attributes that were either unrelated to or inconsistent with the schizophrenic label. Some participants learned that a desirable outcome (winning $20 for designing the most creative game) depended only on their own contributions (outcome-independent condition), whereas others learned that this outcome depended on both their own and Frank's contributions to the final product (outcome-dependent condition). Outcome-dependent participants (Studies 1 & 2) and participants who simply had the goal to form accurate impressions (Study 3) spent more time reading about Frank's personal attributes and were more likely to base their impressions about Frank on this individuating information, when available, than on the stereotype associated with the schizophrenic label.	Accountability may motivate people to think more deliberatively and formulate more accurate evaluations of others in some cases.
Tetlock, P. (1983). Accountability and complexity of thought. *Journal of Personality and Social Psychology, 45,* 74-83.	This study surveyed participant attitudes on three controversial social issues after informing them (a) that their responses were anonymous or (b) that they would need to justify their responses to another participant who held either liberal, conservative, or unknown views. The researcher coded each participant response for complexity of reasoning processes. When participants knew the other participant's beliefs in the advance, they simply reported attitudes consistent with the beliefs of the person to whom they were to justify their response (i.e., more liberal when the other held liberal views, compared to participants in the unaccountable condition; more conservative when the other was conservative). Participants who expected to justify their attitudes to another participant with unknown beliefs demonstrated significantly greater thought complexity than participants from any of the other three conditions.	

G-4 Combating Implicit Bias in the Courts: Seeking Change

Selected Research Findings

Strategy 1: **Raise awareness of implicit bias.**

Selected Source	Major Research Findings	Implications
Green, A., Carney, D., Pallin, D., Ngo, L., Raymond, K., Iezzoni, L., & Banaji, M. (2007). Implicit bias among physicians and its prediction of thrombolysis decisions for black and white patients. *Journal of General Internal Medicine, 22*, 1231-1238.	Researchers examined physician decision-making in response to a clinical vignette for evidence of racial bias. Although these physicians reported no explicit racial prejudice, physicians demonstrated an implicit preference for Whites over Blacks and an implicit stereotype of Blacks as less cooperative (in general and specifically with medical procedures) than Whites on IAT measures. Implicitly biased physicians were less likely to recommend thrombolysis as a treatment when the patient in the vignette was described as Black than when the patient was described as White. Interestingly, 67 physicians were excluded from this analysis for reporting some awareness of the nature of the study. These "aware" physicians were *more* likely to recommend thrombolysis for Black patients as their implicit biases increased. Thus, this awareness did seem to prompt physicians to control for racial bias in their medical decisions.	Implicit racial biases can affect decision-making of expert professionals in the medical field, causing a tendency for White physicians to recommend disparate treatments for White vs. Black patients in a manner biased by their racial stereotypes. However, physicians aware of this type of bias did not exhibit the same discrepancy. Awareness about possible implicit biases may help professionals control for its effects on decision-making.
Kim, D. (2003) Voluntary controllability of the implicit association test (IAT). *Social Psychology Quarterly, 66*, 83-96.	In two studies, participants did not spontaneously correct for their implicit biases on IATs and were incapable of misrepresenting their preferences on the tests when asked to suppress their bias. However, participants could reduce biased IAT scores if explicitly instructed on *how* to do so (i.e., to respond more slowly toward the subset of stimuli known to have a positive cultural association). Only when instructed on how to alter their implicit bias scores were these participants able to appear pro-Black instead of pro-White on the race IAT (Study 2).	Instructions that explicitly detail a concrete strategy for counteracting implicit bias can mitigate the effects of the bias on behavior. However, instructions that fail to sufficiently explain a concrete intervention strategy are not effective.
Wilson, T. D., & Brekke, N. (1994). Mental contamination and mental correction: Unwanted influences on judgments and evaluations. *Psychological Bulletin, 116*, 117-142.	In this seminal review and reconceptualization of the research literature on mental contamination (defined as "the process whereby a person has an unwanted response because of mental processing that is unconscious or uncontrollable"), these authors argued that mental contamination is "difficult to avoid because it results from both… a lack of awareness of mental processes… and faulty lay beliefs about the mind" (p. 117).	People only take steps to correct for bias if they believe bias exists. The steps they do take in response to known biases are guided by their lay theories (which may be faulty) about how the bias operates.

Strategy 2: **Acknowledge group and individual differences.**

Cited Source	Major Research Findings	Implications
Aarts, H., Gollwitzer, P., & Hassin, R. (2004). Goal contagion: Perceiving is for pursuing. *Journal of Personality and Social Psychology, 87*, 23-37.	Six experimental studies provide evidence that individuals may nonconsciously mimic the goals of others. Studies 1-3 show that participants automatically adopted and pursued a goal implied in the observed behavior of another. However, Studies 4-6 show that "automatic goal pursuit" occurs only when the observed goal pursuit was deemed appropriate and, therefore attractive.	If socially valued judges and court staff members model egalitarian goal pursuit, this overt egalitarianism may be "contagious:" Other judges and court staff members may automatically engage in egalitarian behaviors simply by observing the egalitarian behaviors of role models.
Apfelbaum, E., Sommers, S., & Norton, M. (2008). Seeing race and seeming racist? Evaluating strategic colorblindness in social interaction. *Journal of Personality and Social Psychology, 95*, 918-932.	Across four studies, authors reported evidence that the colorblindness approach to minimizing the appearance of bias in race-relevant social interactions (i.e., avoidance of race and race-relevant discussion) backfires. White individuals who implemented this strategy actually produced more negative nonverbal behavior (i.e., less nonverbal friendliness; Study 1). Study 2 provides evidence for why this occurs: The colorblind strategy decreases individuals' capacity to exert inhibitory control over their own nonverbal behaviors by diverting these mental resources to the task of ignoring race. In Study 3, White observers with higher *external* motivation (i.e., motivated by social standards and conformity pressures) to respond without prejudice tended to view actors who implemented the colorblind strategy more favorably, and consider them less prejudiced, than actors who implemented a race-acknowledging strategy. Alternatively, Black observers and White observers who were more *internally* motivated (i.e., motivated by internalized, personal standards) to respond without prejudice reported the opposite reaction: They tended to view the colorblind actor as more prejudiced than the race-acknowledging actor in interracial interactions. However, actors who talked about and acknowledged race when race was not seen as immediately relevant were viewed as more prejudiced by all by both White and Black observers than actors who ignored race (Study 4).	Whites who use the colorblind strategy in their attempts to appear unbiased actually exhibit more negative nonverbal behaviors and, thus, more implicit bias. For social interactions in which race is relevant, White observers who are *internally* motivated to respond without prejudice and Black observers both see colorblind-strategy users as more prejudiced than individuals who implement a race-acknowledging strategy, but White observers who are only *externally* motivated to respond without prejudice like colorblind-strategy users more and erroneously view colorblind-strategy users as less prejudiced than individuals who acknowledge race.

Corcoran, K., Hundhammer, T., & Mussweiler, T. (2009). A tool for thought! When comparative thinking reduces stereotyping effects. *Journal of Experimental Social Psychology, 45,* 1008-1011.	Participants in two studies were primed to focus on differences or similarities (by first completing a task in which they had to compare sketches of two scenes for differences vs. similarities). Participants primed to focus on differences sat closer to a chair ostensibly occupied by a stereotypical "skinhead" (Study 1) and attributed less gender-stereotypic skills to a hypothetical job candidate (Study 2) than participants primed to focus on similarities.	Judges and jurors may override implicit bias in behavior and judgment by engaging in a more open, inquisitive, deliberative approach to information processing in which they consider various individuating attributes of stigmatized group members rather than focusing on their membership in a stigmatized category.
Djikic, M., Langer, E., & Stapleton, S. (2008). Reducing stereotyping through mindfulness: Effects on automatic stereotype-activated behaviors. *Journal of Adult Development, 15*, 106-111.	Langer (1978, 1989, 1997, 2005) describes mindfulness as "a state in which individuals continually make novel distinctions about objects of their attention." Although mindfulness may reduce explicit prejudice (see Langer, Bashner, & Chanowitz, 1985), Langer and colleagues sought to determine whether mindfulness could override implicit forms of bias. Participants in this study viewed and categorized a set of photographs of the elderly four times by age only, by gender only, by four different assigned categories (age, gender, attractiveness, race), or by four different self-generated categories. Similar to the now-classic Bargh, Chen, & Burrows (1996) study on the influence of automaticity on behavior, Langer and colleagues measured participants' walking speed following the categorization task and found that conditions Langer felt produced greater mindfulness (categorizing four different ways) predicted faster moving speed than less mindful conditions (categorizing one way four times), reflecting less age-related stereotype expression.	
Lebrecht, S., Pierce, L., Tarr, M. & Tanaka, J. (2009). Perceptual other-race training reduces implicit racial bias. *PLoS ONE, 4*, e4215.	Participants either categorized photos of African American faces as African American or not, or learned to discriminate between several different African American faces. Participants in the latter (individuation) condition exhibited less implicit bias than participants in the former (racial categorization) condition.	

Levinson, J. D. (2007). Forgotten racial equality: Implicit bias, decisionmaking, and misremembering. *Duke Law Journal, 57*, 345-424.	The author draws on social science research and presents a study with judges and jurors to demonstrate that implicit biases affect how these legal decision-makers process and recall case-related information. Specifically, participants were more likely to recall certain facts of the case when they were stereotype-consistent (i.e., aggressive behavior from an African-American character) than when they were not (i.e., same behavior from a Caucasian character). The author concludes with several applied suggestions for how to mitigate or eliminate the effect of implicit biases in judgment and decision-making.	Implicit bias affects how judges and jurors process new information and how they recall information. However, some strategies or decision-support tools could be developed based on the social science literature to help mitigate these effects.
Plant, A., & Devine, P. (2001). Responses to other-imposed pro-black pressure: Acceptance or backlash? *Journal of Experimental Social Psychology, 37,* 486-501.	Three studies demonstrated that imposed pressure to comply with egalitarian standards, regardless of whether that pressure was real (Study 3) or simply perceived (Studies 1 & 2), elicited hostile backlash in participants' attitudes and behavior amongst those who are primarily *externally* motivated to respond without prejudice (i.e., those with low internal motivation). Thus, although forced accountability may elicit initial compliance from those with low internal motivation, these studies show that these individuals may lash out, presumably in an attempt to reassert their personal freedom.	External motivators to respond without prejudice, such as mandatory diversity training and enforced accountability mechanisms, can elicit hostile resistance and fail to reduce prejudice amongst individuals who possess low internal motivation to do so.
Richeson, J., & Nussbaum, R. (2004). The impact of multiculturalism versus color-blindness on racial bias. *Journal of Experimental Social Psychology, 40*, 417-423.	Participants read a one-page statement that endorsed either a multicultural ideology (in which racial differences are highlighted and construed in a positive light) or a colorblindness perspective (in which people are told to ignore race) as an approach to reducing interethnic tension. Afterwards, they were asked to provide five reasons why the approach they read about was a positive one in combating bias prior to taking the IAT. Participants in the colorblind condition displayed greater racial bias on explicit and implicit measures than those exposed to a message advocating multiculturalism.	Anti-bias messages work if presented from a multicultural perspective that construes racial differences in a positive light, but not a color-blindness perspective in which people strive (and fail) to ignore race.
Rudman, L., Ashmore, R., & Gary, M. (2001). "Unlearning" automatic biases: The malleability of implicit prejudice and stereotypes. *Journal of Personality and Social Psychology, 81*, 856-868.	Across two studies, participants who enrolled in and attended a voluntary interethnic diversity course showed less implicit and explicit racial biases compared to those who did not attend the diversity course.	Elective multicultural diversity training can reduce racial stereotyping and implicit bias.

Sechrist, G., & Stangor, C. (2001). Perceived consensus influences intergroup behavior and stereotype accessibility. *Journal of Personality and Social Psychology, 80*, 645-654.	In two empirical studies, Whites' implicit beliefs about Blacks became less stereotypic if they discovered that their peer group was more egalitarian than themselves compared to a situation in which they had no information about peer opinion. However, their beliefs became more stereotypic if they discovered that their peer group was less egalitarian than themselves compared to no information controls.	Readily available consensus information guides individual behavior. Cultivating a workplace environment that supports egalitarian norms can reduce individual-level implicit bias.

Strategy 3: **Routinely check thought processes and decisions for possible bias.**

Selected Source	Major Research Findings	Implications
Apfelbaum, Sommers, & Norton (2008)	See *Strategy 2*.	See *Strategy 2*.
Galinsky, A., & Moskowitz, G. (2000). Perspective-taking: Decreasing stereotype expression, stereotype accessibility, and in-group favoritism. *Journal of Personality and Social Psychology, 78*, 702-724.	Three studies explored perspective-taking (i.e., imagining how one would feel and act if one was in another person's shoes or seeing the world from another person's point of view) as a strategy for controlling stereotype activation. Compared with the stereotype suppression strategy, studies 1 and 2 showed that perspective-taking decreased stereotypic biases on explicit (essay content) and implicit (reaction time) measures. Study 3 showed that perspective-taking also produced more favorable attitudes and evaluations of outgroup members, reducing implicit bias.	By providing judges and jurors with specific instructions to engage in perspective-taking, they may successfully override implicit bias.
Guthrie, C., Rachlinski, J., & Wistrich, A. (2007). Blinking on the bench: How judges decide cases. *Cornell Law Review, 93*, 101-141.	Authors review and contrast the concepts of intuitive thinking vs. deliberative thinking, illustrate the tendency of judges to rely on intuitive rather than deliberative, deductive reasoning, and discuss strategies and decision-making tools that could be used to promote greater deliberative thought and prevent faulty intuitive thought processes from contaminating judgments. The authors report data to support their conclusion that judges are not exempt from these pitfalls: Like the majority of people, judges overwhelmingly tended to use three heuristics common in intuitive reasoning that result in faulty judgments (anchoring, representativeness, and hindsight biases). They discuss and support the use of tools that induce or facilitate greater deliberative thinking, such as more time, opinion writing, training and feedback, scripts or checklists, and the reallocation of decision-making authority between more than one judge.	Intuitive modes of processing are highly susceptible to an array of decision-making biases (beyond just implicit bias). Decision-support tools of various types could help judges redirect their mode of thinking to foster greater cognizance and deliberative processing, which can help judges bypass these pitfalls.
Kim (2003)	See *Strategy 1*.	See *Strategy 1*.
Levinson (2007)	See *Strategy 2*.	See *Strategy 2*.

Macrae, C., Bodenhausen, G., Milne, A., & Jetten, J. (1994). Out of mind but back in sight: Stereotypes on the rebound. *Journal of Personality and Social Psychology, 67*, 808-817.	Three studies provide evidence that stereotype suppression produces a rebound effect that results in even more pejorative evaluations of and behavioral reactions to stereotyped targets, relative to stereotype users. Stereotype suppressors (i.e., participants instructed to avoid thinking about the target in a stereotypic manner) included more stereotype-consistent descriptions when hypothesizing about the typical day in the life of a stereotyped target (Studies 1-3) and maintained greater interpersonal distance from the stereotyped target (Study 2) than participants who did not receive suppression instructions. Study 3 showed greater stereotype activation (measured by reaction time) in stereotype suppressors than in stereotype users.	Directing people to suppress their stereotypes can backfire, resulting in greater stereotype activation and more prejudiced thoughts and behaviors than simply allowing people to use stereotypes.
Mendoza, S., Gollwitzer, P., & Amodio, D. (2010). Reducing the expression of implicit stereotypes: Reflexive control through implementation intentions. *Personality and Social Psychology Bulletin, 36*, 512-523.	Across two studies that examined accuracy on the Shooter Task (a computer simulation in which participants are instructed to shoot only armed criminals and not unarmed bystanders; people tend to make rapid decisions to shoot Black people more often than White regardless of whether or not a weapon is present), authors examined the effectiveness of "implementation intentions" as a strategy for reducing or controlling implicit bias. Implementation intentions are planned "if-then" response contingencies that may become automated; the individual foresees some undesirable circumstance (e.g., a specific instance that may evoke implicit bias) and links it with an intended response that is more desirable (e.g., an egalitarian response). Participants in both studies who used such implementation intentions when completing the Shooter Task performed with greater accuracy and exhibited less racial bias.	When judges and jurors are made aware of concrete strategies for overcoming specific instances of racial bias, they can implement those strategies and exert control over stereotyping even at the automatic level. These strategies could be as simple as thinking specific counter-stereotypical thoughts upon encountering a disadvantaged group member.

Payne, K. (2005). Conceptualizing control in social cognition: How executive functioning modulates the expression of automatic stereotyping. *Journal of Personality and Social Psychology, 89*, 488-503.	Two studies illustrated how efforts at controlling automatic stereotyping may prove effective. Study 1 provided correlational evidence that people with better executive control (defined by the authors as "the capacity to constrain thought processes and behavior to reach goal-relevant ends") on tasks unrelated to social stereotyping also demonstrated greater control and less racial bias on several well-known measures of automatic race bias (i.e., Shooter Task, evaluative priming task, and the IAT); people with poor executive control exhibited greater racial discrimination on these speed tasks. These differences emerged regardless of participants' motivations to respond without prejudice. Moreover, participants with stronger implicit bias formed more negative impressions of a Black person based on a long, multifaceted description (Lambert, Payne, Ramsey, & Shaffer, 2004 showed that these participants evaluated the target more negatively when the description identified him as Black compared to White).	Regardless of a person's motivation to respond without prejudice, those individuals with greater executive control capabilities are less likely to engage in automatic stereotyping than people with poorer executive control.
Stewart, B., & Payne, B. (2008). Bringing automatic stereotyping under control: Implementation intentions as efficient means of thought control. *Personality and Social Psychology Bulletin, 34*, 1332-1335.	Three experiments examined the value of implementation intentions (see Mendoza, Gollwitzer, & Amodio, 2010, above) in overriding implicit bias. Overall, implementation intentions to think "safe" in response to Black faces (instead of experiencing feelings of threat) significantly reduced automatic stereotyping in the Shooter Task (i.e., mitigated the Shooter Bias; Studies 1 & 2) and implicit bias measured by the IAT (Study 3) compared to implementations to think "quick" or think "accurate" (goals already made explicit as the purpose of the Shooter Task).	If people are presented with very concrete instructions that explicitly detail an effective approach to override implicit bias, people's efforts at control can be successful.

Strategy 4: **Identify distractions and sources of stress in the decision-making environment and remove or reduce them.**

Selected Source	Major Research Findings	Implications
Guthrie, Rachlinski, & Wistrich (2007)	See *Strategy 3*.	See *Strategy 3*.
Kang, J., & Banaji, M. (2006). Fair measures: A behavioral realist revision of 'affirmative action'. *California Law Review*, *94*, 1063-1118.	**Review and opinion piece.** See pp. 1096-1098 for a discussion about the benefits of avoiding or changing subtle and obvious environmental cues that trigger stereotypes, particularly as they pertain to the psychological phenomenon known as "stereotype threat." Stereotype threat is the acute, disruptive concern that a negative stereotype about one's group membership will influence how one is evaluated. When cued to the relevant stereotype by environmental or situational factors, this resultant anxiety often causes the individual to exhibit behavior consistent with the negative stereotype, despite one's best efforts at avoiding this undesirable outcome (see Steele & Aronson, 1995). Thus, individuals responding to stereotype threat can evoke stereotypic thought in others by demonstrating stereotypic behaviors. Authors also offer some applied suggestions for how to mitigate the effects of implicit bias on judgment and behavior.	Environmental cues may not only activate stereotypes and facilitate implicit bias amongst Whites or majority group members, but also activate stereotypes and facilitate "stereotype threat" amongst Blacks or other disadvantaged group members.
Seamone, E. R. (2006). Understanding the person beneath the robe: Practical methods for neutralizing harmful judicial biases. *Willamette Law Review, 42*, 1-76.	**Review and opinion piece.** The author offers a critique of the checklist method and suggests several alternative strategies that judges may be able to use to enhance mental focus and self-awareness in a more process-oriented approach to mitigating bias in decision-making.	Judges who use the checklist method may focus more on the results of a biased process (which they may still be able to justify) rather than on debiasing the process itself.

Strategy 5: **Identify sources of ambiguity and impose greater structure *before* entering the decision-making context.**

Selected Source	Major Research Findings	Implications
Uhlmann, E., & Cohen, G. (2005). Constructed criteria: Redefining merit to justify discrimination. *Psychological Science, 16*, 474-480.	Three studies showed that participants tended to assign male and female job applicants to gender-stereotypical positions. These participants inadvertently changed the criteria they felt were necessary to succeed at the gender-stereotypic position to better suit the desired candidate. However, committing beforehand to specific merit criteria for the positions eliminated gender discrimination in hiring a police chief.	Judges who establish and make salient specific decision-making criteria relevant to the case *before* hearing the case or learning any information about the defendants (i.e., judges who focus on debiasing the process rather than trying to debias the outcome) may be better at overcoming the effects of implicit bias.

Strategy 6: **Institute feedback and accountability mechanisms.**

Selected Source	Major Research Findings	Implications
Guthrie, Rachlinski, & Wistrich (2007)	See *Strategy 3*.	See *Strategy 3*.
Kim (2003)	See *Strategy 3*.	See *Strategy 3*.
Legault, L., Gutsell, J., & Inzlicht, M. (2011). Ironic effects of antiprejudice messages: How motivational interventions can reduce (but also increase) prejudice. *Psychological Science, 22*, 1472-1477.	Authors examined how two strategies for motivating antiprejudiced behavior can have opposing effects. In two studies, participants who received antiprejudice messages that encouraged internal or intrinsic motivation to regulate prejudice (i.e., an antiprejudice message that appealed to personal standards for egalitarianism) exhibited less explicit and implicit prejudice than a control group that did not employ any prejudice-reduction strategy. Alternatively, participants who received antiprejudice messages that employed external or extrinsic motivation to regulate prejudice (i.e., an antiprejudice message indicating that participants should comply with social standards) exhibited more explicit and implicit prejudice than the control group.	The type of motivational appeal used in antiprejudice messages can play a direct role in the effectiveness of that message. Antiprejudice messages that encourage intrinsic motivation can successfully reduce both explicit and implicit prejudice. However, antiprejudice messages that impose extrinsic motivation can backfire, incite hostility, and generate backlash in the form of increased explicit and implicit prejudice.

Lerner, J., & Tetlock, P. (1999). Accounting for the effects of accountability. *Psychological Bulletin, 125,* 255-275.	Reviews an extensive body of empirical research on the effectiveness of accountability in mitigating an array of biases. - When faced with evaluators whose personal beliefs are known, people tend to conform to those beliefs; when the evaluator's beliefs are unknown, people tend to engage in more deliberative thinking. - When accountability mechanisms are instituted after the person has already committed to a course of action (post-decisional), people tend to become defensive in support of their past actions; when they are instituted beforehand (predecisional), it attenuates such commitment. - Accountability for the decision-making process tends to increase deliberative thinking, whereas accountability for the decision outcome tends to increase self-justification. - Accountability demands from legitimate authorities tend to elicit positive responses; demands from authorities perceived to be illegitimate tend to be seen as intrusive/insulting and tend to backfire. Predecisional accountability to a respected audience or evaluator whose personal beliefs are unknown will tend to improve judgment if the demonstrated bias is one that emerges as a result of lazy, effortless, or intuitive thinking processes. This may occur particularly if the accountability focus lies on the decisional process as opposed to outcome.	The success of accountability mechanisms in mitigating social judgment and behavioral biases depends on several factors (including who the evaluator is and whether his or her beliefs are known; at what point the accountability demands were instituted and what those demands emphasize as important). With the confluence of several of these factors, accountability mechanisms can mitigate some types of bias. However, some accountability mechanisms not only fail to attenuate observable bias but may instead exacerbate such bias.
Mendoza, Gollwitzer, & Amodio (2010)	See *Strategy 3*.	See *Strategy 3*.
Plant & Devine(2001)	See *Strategy 2*.	See *Strategy 2*.
Sechrist & Stangor (2001)	See *Strategy 2*.	See *Strategy 2*.
Son Hing, L., Li, W., & Zanna, M. (2002). Inducing hypocrisy to reduce prejudicial response among aversive racists. *Journal of Experimental Social Psychology, 38*, 71-77.	This research made aversive racists (people who are explicitly egalitarian but who still have implicit bias) aware of their past race-based transgressions, increasing their negative affect (guilt/discomfort). These people also allocated more money to a racial minority student club on campus compared to those truly low in implicit bias and compared to aversive racists who were not made aware of their past hypocrisies. Truly low prejudiced participants responded no differently when reminded vs. not reminded of these past acts; their funding allocation decisions were significantly less prejudiced than aversive racists in the same control condition.	Accountability mechanisms that review past performance and provide judges with evidence of possible bias could prompt those with egalitarian motives to exert more conscious control to prevent bias from informing future judgments and behavior.

Strategy 7: **Increase exposure to stigmatized group members and counter-stereotypes, and reduce exposure to stereotypes.**

Selected Source	Major Research Findings	Implications
Anderson, C., Benjamin, A., Bartholow, B. (1998). Does the gun pull the trigger? Automatic priming effects of weapon pictures and weapon names. *Psychological Science, 9*, 308-314.	Over 40 years of research demonstrates that the mere presence of a weapon in a room increases aggressive behavior. In two studies, the present research demonstrates that this "weapons effect" occurs automatically, increasing the cognitive accessibility of aggression-related thoughts known to influence behavior. In a speeded task, participants responded more quickly to aggressive words than nonaggressive words after viewing weapon-related words (Study 1) and pictures (Study 2) than after exposure to non-weapon stimuli, demonstrating that aggressiveness is indeed more accessible after exposure to weapons-related stimuli.	Given that the cultural stereotype of Blacks associates them with hostility/aggression (see Devine, 1989, below), the prevalence of visible weapons (e.g., worn by courthouse security) or signage about weapons (e.g., "Weapons of Any Kind Prohibited") at the entrance and throughout the courthouse may inadvertently facilitate implicit bias.
Blair, I., Ma, J., & Lenton, A. (2001). Imagining stereotypes away: The moderation of implicit stereotypes through mental imagery. *Journal of Personality and Social Psychology, 81*, 828-841.	Five empirical studies provide convergent evidence that participants who engaged in mental imagery of counter-stereotypes (by following detailed instructions regarding what to imagine) presented substantially weaker implicit biases (as measured by the IAT, other measures of reaction time, signal detection sensitivity, and false recognition judgments) than those who engaged in neutral, stereotypic, or no mental imagery. Moreover, people who engaged in mental imagery of relevant stereotype-consistent information responded with greater implicit biases than those in a neutral imagery condition.	Implicit biases can be controlled. By imagining counter-stereotypes before encountering a situation in which race is or may be an issue, people should be able to reduce the influence of their own implicit biases in social behavior and judgment.
Dasgupta, N. & Asgari, S. (2004). Seeing is believing: Exposure to counterstereotypic women leaders and its effect on the malleability of automatic gender stereotyping. *Journal of Experimental Social Psychology, 40*, 642-658.	Two studies demonstrated that elements of the social environment can undermine (or fuel) implicit biases. Exposure to women in leadership positions (i.e., female professors and deans) decreased implicit gender bias for college-aged women, an effect that was mediated by the frequency with which the participant encountered those female leaders.	Increasing the frequency of exposure to, or increasing the frequency of positive interactions with, counter-stereotypic role models may reduce implicit bias. Environments that do not fairly represent disadvantaged group members in leadership positions can fuel implicit bias.

Dasgupta, N. & Greenwald, A. (2001). On the malleability of automatic attitudes: Combating automatic prejudice with images of admired and disliked individuals. *Journal of Personality and Social Psychology, 81*, 800-814.	Two experiments demonstrated that exposure to pictures of admired exemplars (e.g., Denzel Washington) of a marginalized group (e.g., Blacks) or disliked exemplars (e.g., Jeffrey Dahmer) of the non-marginalized group (e.g., Whites) significantly decreased implicit bias (as measured by the IAT) towards the disadvantaged group (Blacks in Study 1; the elderly in Study 2).	As one implicit bias intervention strategy, people could increase their daily exposure (through images, video, etc.) to positive exemplars from the disadvantaged group.
Dasgupta, N., & Rivera, L. (2008). When social context matters: The influence of long-term contact and short-term exposure to admired outgroup members on implicit attitudes and behavioral intentions. *Social Cognition, 26*, 54-66.	In this year-long longitudinal study, a short-term situational intervention exposed some participants to counter-stereotypic exemplars of a disadvantaged group (gays & lesbians); a control group did not receive this exposure. Participants who naturally had substantial prior contact with the outgroup showed less discrimination in later voting behaviors regardless of experimental condition. For participants with little prior outgroup contact, those who received the short-term situational intervention were less biased in their voting behaviors than the control group.	For people who have little prior contact with outgroup members, exposure to counter-stereotypic role models can reduce bias. Contact with counter-stereotypic exemplars can produce enduring effects; people showed less bias after receiving only short-term exposure.
Devine, P. (1989). Stereotypes and prejudice: Their automatic and controlled components. *Journal of Personality and Social Psychology, 56*, 5-18.	In this seminal work, three studies illustrated how stereotyping and prejudice may in some ways be automatic processes. Study 1 demonstrated that, regardless of personal beliefs, all respondents possessed knowledge of the cultural stereotype of Blacks (e.g., as aggressive, hostile, criminal). Study 3 confirmed that low prejudiced people reported fewer pejorative thoughts about Blacks than high prejudiced people. Study 2 showed that nonconsciously priming participants with words primarily associated with the cultural stereotype of Blacks produced more stereotypic judgments of another, compared to those exposed to racially neutral words; this effect emerged for both high and low prejudiced individuals.	When subtle environmental or situational cues (e.g., words used on signage in and around the courthouse) activate cultural stereotypes, people – regardless of their own explicit beliefs – respond with more stereotypic judgments.
Kang & Banaji (2006)	See *Strategy 4*.	See *Strategy 4*.
Kawakami, K., Dovidio, J., Moll, J., Hermsen, S., & Russin, A. (2000). Just say no (to stereotyping): Effects of training in the negation of stereotypic associations on stereotype activation. *Journal of Personality and Social Psychology, 78*, 871-888.	Three studies provide convergent evidence that extensive practice with countering or negating stereotypes (i.e., saying "NO" in response to stereotype-consistent stimuli) effectively reduces the automatic activation of those stereotypes (as determined by several reaction-time measures) compared with individuals who receive no training or training with an unrelated stereotype category.	Extensively practicing reversed or counter-stereotypic associations can reduce implicit bias by making it less likely that those stereotypes become spontaneously activated.

Olson, M. & Fazio, R. (2006). Reducing automatically activated racial prejudice through implicit evaluative conditioning. *Personality and Social Psychology Bulletin, 32*, 421-433.	Three studies illustrated one possible mechanism for reducing implicit racial prejudice. Participants, surreptitiously presented with counter-stereotypical pairings (i.e., pictures of Black faces with positive stimuli, White faces with negative stimuli; Study 1), showed less implicit racial bias immediately afterward (Study 2) and 2 days later (Study 3).	People need not be conscious of exposure to counter-stereotypes for this exposure to successfully reduce implicit biases in the short and longer-term.
Pettigrew, T., & Tropp, L. (2006). A meta-analytic test of intergroup contact theory. *Journal of Personality and Social Psychology, 90*, 751-783.	A meta-analysis of 713 independent samples from 515 studies shows that intergroup contact that adheres to Allport's optimal contact conditions typically leads to greater prejudice reduction than other forms of contact, but these conditions are not essential for prejudice reduction to occur. Increased social contact across social groups seems to have a positive effect not only on explicit attitudes but also on implicit ones.	Greater contact with disadvantaged groups can reduce bias against those groups.
Richeson, J., & Ambady, N. (2003). Effects of situational power on automatic racial prejudice. *Journal of Experimental Social Psychology, 39*, 177-183.	This study led White females to expect to have a superior or subordinate role in an upcoming interracial or same-race interaction. Then, they completed the IAT. Participants expecting an interracial interaction exhibited less implicit bias when assigned to the subordinate role than when assigned to the high-power role. Situational power had no influence on participant attitudes when they anticipated a same-race interaction.	Situational power can affect the implicit bias exhibited by Whites. When members of disadvantaged groups occupy high-status roles, implicit bias in White subordinates may be attenuated. Moreover, this study suggests that White authority figures (e.g., judges) may be more susceptible to the effects of implicit bias than those who do not occupy high-powered professional roles. These individuals should therefore be more vigilant in monitoring their behaviors for potential bias.
Rudman, L., & Lee, M. (2002). Implicit and explicit consequences of exposure to violent and misogynous rap music. *Group Processes and Intergroup Relations, 5*, 133-150.	Two experiments showed that exposure to rap music with violent and misogynistic content increased automatic accessibility of racial stereotypes in both high and low prejudiced participants (Study 1) and elicited more stereotypic judgments (Study 2) compared to controls.	Type of music may be another environmental cue that triggers stereotype activation and implicit bias.

Sherif, M., Harvey, O., White, B., Hood, W., & Sherif, C. (1961). *Intergroup conflict and cooperation: The Robbers Cave experiment*. Norman: University of Oklahoma Book Exchange.	Reviews the now-infamous Robbers Cave Experiments on intergroup conflict and cooperation in which the authors conducted a summer camp with psychologically healthy boys, created social groups amongst them, and watched conflict develop as a result of the artificially-created social groups. Sherif and colleagues found that superordinate goals that could be achieved only through multi-group cooperation reduced intergroup bias and conflict much more than other strategies (e.g., communication, increased contact).	Cooperation is now widely regarded by experts as one of the most effective evidence-based strategies for reducing bias and conflict.

Appendix H
Program Evaluation Questions

Suggestions for Evaluating Judicial Branch Educational Programs on Implicit Bias

As noted in the report, educators should work with the evaluator to construct a logic model similar to the one used for the pilot programs and presented in Table H-1. This exercise is beneficial to both parties because it requires them to commit their assumptions about the program to paper, allowing them to identify and clarify different program expectations. The process also fosters collaborative thinking about how program activities can be expected to produce short-term outcomes and long-term impacts.

Table H-1. Template for Implicit Bias Program Development

Long-term Goal: To reduce the influence of implicit bias on the decision making and other behaviors of judges and court staff

Objectives: As a result of participation in the implicit bias program, participants will be able to:

- Demonstrate a basic understanding of implicit bias
- Identify possible strategies to mitigate the influence of implicit bias on behavior
- Develop an individualized action plan to address implicit bias

Target Population: Judges and other court staff

Inputs/Resources	Processes/Activities	Outputs	Outcomes	Impact
• Program Content • Delivery methods/ presentation strategies • Onsite experts, trainers, facilitators	• Provide pre-program work • Provide implicit bias information using specified curriculum delivery strategies (e.g., lecture, interactions with subject matter experts, small group discussions) • Administer a pre- and post-test of implicit bias knowledge • Administer follow-up questionnaire to determine post-program effects	• Number of participants in program • Number of completed pre- and post-tests of implicit bias knowledge	• Participants express satisfaction with the training • Participants demonstrate increase in implicit bias knowledge • Participants develop individualized action plan to address the influence of implicit bias on their behaviors	• Judges/court staff engage in activities to address their implicit biases • There are observable changes in judicial & staff decisions and behaviors • Disparate case outcomes due to race and ethnicity are reduced

Program evaluation focuses on three types of measures: process, outcome, and impact. A discussion of each follows.

Process Measures

Process measures examine the delivery process. They seek information from participants regarding their satisfaction with the program content, specific delivery methods (e.g., lecture, small group discussions, and exercises), faculty, and the applicability of the program to their work. They also ask for feedback regarding what participants liked the most about the program and areas in which the program could be improved. Information from these types of questions guides revisions to the design and execution of future programs.

Outcome Measures

Outcome measures describe the immediate consequences of participating in a program. The pilot programs focused on the first objective specified in Table H-1: demonstrate a basic understanding of implicit bias. The outcome measures for this objective examined participants' knowledge of implicit bias before and after the delivery of the program. Some suggestions for developing pre and posttest measures are:

- Make sure that questions designed to assess learning align well with the information presented in the program to avoid quizzing participants about facts not covered or covered superficially. This is one of the reasons a logic model is so important; it helps ensure that program developers, faculty, and evaluators are on the same page regarding what information will be presented and emphasized to achieve specific program objectives.
- Develop a protocol that will enable the evaluator to match pretests and posttests from the same participants while maintaining participants' anonymity. Given the sensitive nature of the subject matter, it is essential that participants know that their responses will be anonymous. As an example, one pilot program distributed an evaluation package that included both the pretest and the posttest with a page separating the two. The pretest and the posttest in each packet had the same identification number. Once participants completed the pretest, they reached a page that told them to stop and not answer any more questions until the end of the program. Program planners collected the pretests before the program began, collected the posttests after the program was completed, and matched the identification numbers on both tests before coding and analyzing the responses.
- Be careful in crafting forced-choice questions that are not too hard or too easy. The experience from the pilot programs demonstrated that it was difficult to design questions that were general (i.e., not too specific for an introductory program) and not too obvious regarding the correct response. Table H-2 lists a set of questions the project team suggests to measure gains in knowledge about implicit bias. Note that most of these questions are designed to address the first objective in the logic model; question 2 also addresses the second objective related to strategies to mitigate the influence of implicit bias. Educational programs that emphasize the second and third objectives in the logic model will need additional questions to measure outcomes for these objectives.

Table H-2. Suggested Items for Measuring Implicit Bias Knowledge Gain

Questionnaire Item	Response Options (bolded answer is correct)
1. Implicit biases:	(a) are produced by the unconscious processing of stereotypes (b) can influence the behavior of a person who is not overtly or consciously biased (c) are difficult to alter (d) **All of the above**
2. Which of the following techniques have been shown to limit the influence of implicit biases?	(a) Judicial intuition (b) Suppressing stereotypic thoughts **(c) Exposure to positive, counter-stereotypical exemplars** (d) All of the above
3. The Implicit Association Test (IAT):	(a) measures reaction time (b) pairs a value judgment (e.g., good or bad) with a stimulus such as a photo of someone (c) should not be used to diagnose an individual as biased (d) **all of the above**
4. What is the best evidence we currently have that implicit biases exist?	(a) Analysis of criminal justice statistics **(b) Scores on tests that measure implicit biases (e.g., IAT) have been shown to correlate with behavior** (c) Self-reports (d) All of the above
5. Justice professionals can fail to recognize the influence of implicit bias on their behavior because:	(a) they are skilled at constructing arguments that rationalize their behavior (b) of work-related pressures (c) they are confident they can avoid racial prejudice in decision making (d) **All of the above**

- Along with forced-choice questions, consider including questions with responses along a measurement scale that can be used to gauge shifts in participant beliefs about implicit bias. For example:

  > In your opinion, how often do implicit biases influence judges' decisions and court staff interactions with the public? (a) Always, (b) Often, (c) Occasionally, (d) Rarely, (e) Never

  This type of question was helpful in demonstrating shifts in opinions as a result of the program.

- Do not use the IAT as an outcome measure. Program planners contemplated administering the IAT or a paper-and-pencil test of implicit bias (see, e.g., Vargas, Sekaquaptewa, & von Hippel, 2007) to directly assess whether participants attitudes about race changed as a result of the implicit bias program. They rejected this approach for two primary reasons. First, the test-retest reliability of the IAT is useful for research in the aggregate, but is not very reliable or diagnostic as an individual difference measure:

> [I]t is clearly premature to consider IATs as tools for individual diagnosis in selection settings or as a basis for decisions that have important personal consequences. The modest re-test-reliability of IAT measures together with the unanswered questions concerning the explanation of IAT effects make evident that potential applications should be approached with care and scientific responsibility. (Schnabel, Asendorpf, & Geeenwald, 2008, p. 524)

Even modest test-retest reliability has the potential to confound the type of pre- and post-testing contemplated for the implicit bias programs. A valid and reliable diagnostic instrument should be able to produce the same diagnosis when the same individual is tested on more than one occasion (assuming that there has been no deliberate intervention to change the diagnosis). However, an individual's IAT result may change depending on the situational context in which the test is taken (e.g., Castelli & Tomelleri, 2008). Moreover, features of the test itself, such as the order in which a test-taker completes components of an IAT test, can affect individual test results (e.g., Greenwald, McGhee, & Schwartz, 1998). If evaluators cannot reliably expect an individual to produce the same IAT score upon re-testing without an intervention, then they will be unable to rule out that a change in IAT score following an intervention is the product of measurement "noise" rather than the intervention itself.

Second, all three educational programs were brief, low-intensity interventions and were not likely, on their own, to be sufficiently powerful to produce measurable changes in implicit bias. As noted in the report, these programs served as the first step to combating implicit bias—raising awareness that implicit bias exists. As Greenwald and Krieger (2006, p. 964) point out while discussing interventions that attempt to alter the level of implicit bias:

> In studies using the Race IAT, these effects were typically modest, taking the form of reduction, but not elimination, of implicit biases. Although the necessary research has not yet been done, caution is warranted in speculating that repeated interventions of the types demonstrated to be effective in these experiments will have enduring effects on levels of implicit bias.

As a result, program planners should be careful in distinguishing interventions to reduce implicit bias and interventions to reduce the influence of implicit bias (see Lesson Learned #5 in the report).

Impact Measures

Impact measures focus on the long-term consequences of the intervention. Although this project did not investigate the long-term effects of the implicit bias programs (except for one 3-month follow-up as described below), the logic model offers three potential impact measures program planners can consider: (1) judges and court staff engage in activities to address their implicit biases, (2) there are observable changes in judicial & staff decisions and behaviors, and (3) disparate case outcomes due to race and ethnicity are reduced.

Surveys can assess the extent to which participants are undertaking efforts to personally address and learn more about implicit bias. The project team recommends that an initial follow-up survey be administered three to six months after the educational program to determine participants' opinions on the program after some time to reflect and to learn if they took any actions as a result of the program information. Another survey should be administered at least one year after participation in the educational program to properly assess long-term impacts.

One indicator of success for an introductory program is if it motivated participants to learn more about and take steps to mitigate the influence of implicit bias (Brookfield, 1986). To measure this, one of the pilot programs issued a Web-based survey to participants 3 months after the program session. The short questionnaire included the following questions:

- Given the information you learned about implicit bias, how important do you think it is for judges in North Dakota to be aware of the potential influence of implicit bias on their behavior? Scale: 1 (Very unimportant) to 7 (Very important)
- Since participating in the November program, have you made any efforts to increase your knowledge about implicit bias, such as taking the IAT or doing additional reading on the subject? If yes:
    - Have you taken any of the IATs?
    - Have you engaged in any other activities to increase your knowledge of implicit bias?
- Have you personally made any efforts to reduce the potential influence of implicit bias on your behavior? If yes:
    - Please describe the specific efforts you have taken to reduce the potential impact of implicit bias on your behavior.
- Do you have any suggestions for improving the training that you received on implicit bias?

Program planners also tried another approach to determine whether program participants were motivated to learn more about implicit bias after the program. This approach investigated the number of visits by participants to secure Web sites to take the IAT. Data for this approach was too sparse to interpret and thus the approach is not recommended for future programs.

Measurable changes in judicial decision-making and other behaviors of participating judges (by, e.g., examining changes in sentencing decisions over time, particularly the impact on disparate sentencing outcomes) would provide evidence of possible long-term impact from the interventions, consistent with the goal of the project. Official statistics, direct observation of judge and court staff behavior, and surveys or focus groups of defendants could provide the data needed to make this assessment. Relying on official statistics alone is not recommended since these are subject to the influence of any number of factors, of which a training program is only one. A convincing evaluation of official statistics would be able to tease out the effect of the program from these other "confounding" influences, which is virtually impossible to accomplish without an experimental design. Further, any such evaluation would be necessarily longitudinal in design, requiring time, patience, and resources.

Systematic observation of courtroom behavior over time, using a structured court observation instrument, may be a more practical approach. Although such observations could be made in any court, implicit bias may be more evident in high volume, speedy dockets such as traffic court or arraignments—environments where judges maybe prone to take mental short-cuts such as relying on stereotypes to make relatively complex judgments quickly.

Finally, courts should also consider surveying defendants over time to measure their perceptions of fairness at the hands of the court. For example, some of the "fairness" questions from *CourTools Measure 1, Access and Fairness* (National Center for State Courts, 2005), could be used in such an investigation. Survey respondents are asked to indicate their extent of agreement or disagreement with the following statements:

1. The way my case(s) was handled was fair.
2. The judge listened to my side of the story before he or she made a decision.
3. The judge had the information necessary to make good decisions about my case.
4. I was treated the same as everyone else.

Such surveys of defendant perceptions of fairness at the hands of the court could be administered periodically, and the results disaggregated by relevant defendant characteristics (e.g., defendant race and/or gender). By measuring changes in defendant perceptions over time, changes in courtroom behavior may be documented.

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NEWS RELEASE

Los Angeles Superior Court
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Feb. 25, 2016

L.A. SUPERIOR COURT ANNOUNCES INAUGURAL YOUNG WOMEN'S LEADERSHIP CONFERENCE

The Los Angeles Superior Court is pleased to announce the inaugural Young Women's Leadership Conference to be held on March 3, 2016, at the Stanley Mosk Courthouse, located at 111 N. Hill St., Los Angeles. The Court will host over 100 students from 28 LA County high schools.

The purpose of the conference is to provide an opportunity for young women, particularly young women of color, to learn about the legal profession and possibly a career on the bench. During the invitation only event, the students will hear from a number of distinguished speakers, participate in question and answer sessions with speakers and panelists, and take part in breakout sessions with judicial officers and attorneys. Also in attendance will be representatives from various diversity bar organizations.

Anticipated guest speakers are, in order of appearance: Los Angeles Superior Court Presiding Judge Carolyn B. Kuhl; Justice Audrey B. Collins, Associate Justice, 2nd District Court of Appeal; Judge Nicole C. Bershon, Los Angeles Superior Court; Judge Beverly Bourne, Los Angeles Superior Court. Sheila Kuehl, Los Angeles County Supervisor for District 3, will give the closing remarks.

Expected panel participants include: Justice Lee Smalley Edmon, Presiding Justice, 2nd District Court of Appeal; Janice Fukai, Los Angeles County Alternate Public Defender; Jackie Lacey, Los Angeles County District Attorney; Judge Raquel A. Marquez, Riverside County Superior Court; Judge Conseuelo B. Marshall, Senior Judge of the United States District Court, Central District of California; Judge Sunshine S. Sykes, Riverside County Superior Court; and Mia Yamamoto, Esq., criminal defense attorney.

More-more-more

The student attendees, who represent Los Angeles County's varied communities, were hand-picked as the result of the promise they demonstrated during their involvement with the Teen Court program. Teen Court is a diversion program for young offenders designed to keep them out of the criminal justice system. Students who volunteer to participate in Teen Court as jurors and other roles learn how courts operate and what it is like to be a part of the justice system. Many Teen Court jurors later express an interest in studying law.

Participating high schools include Anahuacalmecac, Antelope Valley, Birmingham, Canoga Park, Cesar Chavez Continuation, Harriet Tubman, Columbus, Compton, Dorsey, Downey, El Rancho, Gardena, Inglewood, Los Angeles, Lawndale, Narbonne, New West Charter, Pasadena, R. Rex Parris, Redondo Union, Roosevelt, Sacred Heart, Santee Education Complex, Torres, South Gate, Taft, Warren, West Covina, and Wilson high schools.

The conference has been designed to bring together the students and professional women with diverse backgrounds to discuss their personal and professional journeys in the justice system. It is hoped that by exposing these young women to others who have reached the very apex of their careers, the trend of under representation from these communities within the legal profession can be decreased.

Lunch will be provided to the participants courtesy of grant funds contributed by the California Judges Foundation.

The conference is another of LASC's creative and dynamic community outreach programs which include Teen Court, SHADES (Stop Hate and Delinquency by Empowering Students), Power Lunch, Court-Clergy Conference, Teachers Courthouse Seminar, etc.

WHO: Female students from 28 Los Angeles County high schools, judicial officers, justice partners, members of the bar.

WHAT: Students will hear from distinguished speakers, participate in question and answer sessions, and take part in breakout sessions with judicial officers and attorneys.

WHEN: 10:00 a.m. – 3:00 p.m. Thursday, March 3, 2016.

WHERE: Stanley Mosk Courthouse, 111 N. Hill St., Los Angeles 90012, Presiding Judge's Courtroom, Room 222.

Please contact the Court's Community Outreach Office at 213-633-1016, or the Public Information Office at 213-830-0801 for further information. Note: filming opportunities will be limited – please contact the Public Information Office for details.

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