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COMMENT

Honesty Is the Best Policy: Addressing Implicit Bias in the Judiciary

Catie Wheatley

INTRODUCTION

People are likely to have an image of the perfect judge. Perhaps a wise old man in a long flowing robe sitting on high and handing down a measured and wise judgment. King Solomon, for instance, is often referred to as an idealized impartial judge.¹ Depictions show King Solomon on a throne with the requisite beard and robes, and portray him as wise, authoritative, and unambiguously patriarchal. In real life, however, judges are not godlike kings but mere mortals. And this is a good thing. By allowing judges to be human we can escape a narrative that continues to cast the aged, white, male patriarch as an infallible archetype. King Solomon's fallibility is evident: a judge who is willing to split a baby in half with a sword and use maternal instincts against a woman in order to solve a fairly straightforward problem.²

But, if mythical perfection is out of the question, what does this mean for judicial impartiality or the "capacity to decide cases with an open mind and without bias for or against those who appear before [them]"?³ It means that impartiality is, as it always has been, an aspiration. It is a worthy aspiration. One on which it is incumbent upon the legal profession to strive towards. But, as Charles Geyh et al. describe it, a realistic assessment of impartiality is not a question of whether a judge is impartial, but whether a judge is "impartial enough."⁴

In keeping with Geyh's realistic view of impartiality, I argue for a realistic view of implicit judicial bias, i.e. that it is inevitable but addressable. Part I will situate judicial bias within current social science research on implicit bias and establish an illustrative case study from Judge Richard Posner's decision in *Wassell v. Adams*.⁵ Part II addresses why judicial bias matters based on the normative and practical concerns of fairness and legitimacy. Part III then discusses current prohibitions against bias in the American Bar Association's (ABA) *Model Code of Judicial Conduct* ("*Model Code*") and the *Code of Conduct for United States Judges* ("*Code of Conduct*") and demonstrates that while they address explicit bias, they are not intended to address implicit bias and cannot do so adequately. And, Part IV proposes practical safeguards based on social science research and tailored to judges' unique role.

¹ See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 784 (1994).

² 1 *Kings* 3:16–28.

³ CHARLES GARDNER GEYH, JAMES J. ALFINI, STEVEN LUBET & JEFFREY M. SHAMAN, *JUDICIAL CONDUCT AND ETHICS* 1-3 (5th ed. 2013).

⁴ Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 *FLA. L. REV.* 493, 493 (2013).

⁵ 865 F.2d 749 (7th Cir. 1989).

I. IMPLICIT BIAS IN THE JUDICIARY

A. *Current Social Science Research and Its Application to the Judiciary*

For over eighty years, social science research on bias has contributed to a growing body of literature.⁶ Part of this research has given rise to the concept of implicit bias and how it affects behavior.⁷ Because judges are responsible for their own behavior and their job is to make decisions on other's behavior, implicit bias research should inform how we view the judicial role.

To begin, Jerry Kang differentiates explicit from implicit bias as that which is "introspectively accessible" versus that which is "introspectively inaccessible."⁸ As a result, while people may be *unwilling* to report explicit bias, people are *unable* to report implicit bias.⁹ Using the Implicit Association Test (IAT), Mahzarin Banaji and Anthony Greenwald measured unconscious mental associations by measuring response times to words and pictures.¹⁰ They found that "schema-consistent pairings," for instance white faces with positive words, took less time for people to recognize than "schema-inconsistent pairings," or black faces with positive words.¹¹ Similarly, they found that schema-consistent pairings of women with the word "family" took less time and fewer errors for people to recognize than schema-inconsistent pairings of women with "career."¹²

Further, according to Banaji and Greenwald's IAT research, implicit bias levels significantly exceed reported, or explicit, bias levels.¹³ Other researchers, using measures like facial electromyogram and galvanic skin response techniques also found that implicit bias measures sharply diverged from reported bias.¹⁴ Scholars have described implicit and explicit bias as "dual attitudes" that exist side by side; while the explicit attitude requires conscious retrieval, the implicit attitude is automatic.¹⁵

In analyzing implicit bias, Kang unequivocally states "no one is immune," in part because brains are good at sorting things.¹⁶ With this in mind, determining

⁶ MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT*, at xiv (2013).

⁷ *Id.*

⁸ IU Maurer, *Fuchs Lecture: Jerry Kang "Intending Equality,"* YOUTUBE (Apr. 17, 2015), <https://www.youtube.com/watch?v=4CqrGmuwWrs> [hereinafter *Kang Fuchs Lecture*].

⁹ *Id.*

¹⁰ BANAJI & GREENWALD, *supra* note 6, at 39–41.

¹¹ Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1130 (2012).

¹² BANAJI & GREENWALD, *supra* note 6, at 115.

¹³ *See id.* at 47, 67.

¹⁴ John F. Dovidio, Kerry Kawakami & Kelly R. Beach, *Implicit and Explicit Attitudes: Examination of the Relationship Between Measures of Intergroup Bias*, in *BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES* 175, 183 (Rupert Brown & Samuel L. Gaertner eds., 2001).

¹⁵ Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 *CAL. L. REV.* 997, 1041 (2006) (citation omitted).

¹⁶ *Kang Fuchs Lecture*, *supra* note 8.

whether judicial bias really exists is a simple syllogism: all people have implicit biases, judges are people, therefore judges have implicit biases. The views of leading jurists correspond with this conclusion. Justice Cardozo said, “deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”¹⁷ In keeping with this view, social scientists have confirmed that five prevalent “cognitive illusions” affect judicial decision-making¹⁸ and have also found that judges can associate negative attitudes with black people that influence judicial decisions.¹⁹ In explaining their findings on cognitive illusions, Chris Guthrie et al. concluded that “[j]udges, it seems, are human . . . [and subject to] cognitive illusions that can produce systematic errors in judgment.”²⁰

As a result, implicit bias can result in the unequal, albeit unintentional, treatment of negatively stereotyped group members. To see how this could play out for a judge deciding a case, consider Linda Krieger et al.’s statement that “stereotypes can bias decision making implicitly by skewing the manner in which inherently ambiguous information about the stereotyped target is perceived, characterized, attributed, encoded in and retrieved from memory, and used in social judgment.”²¹ Because of this, a decision-maker like a judge could apply a negative stereotype to a person while still “believ[ing] that his judgment and resulting decision were based entirely on legitimate nondiscriminatory reasons.”²² Banaji and Greenwald have established a correlation between implicit bias and prejudiced behavior that substantiates Krieger et al.’s conclusion.²³

However, simply because jurists draw implicit associations and can rationalize them after the fact does not mean that they act on a particular bias consistently. In fact, Krieger et al., drawing on psychological research spanning over fifty years, found that whether an individual acts according to bias is situational.²⁴ Krieger et al. explains that people operate under a certain “tension” as a result of dual attitudes.²⁵ In other words, some perceptions, thoughts, and motivations pull toward one course of action while others simultaneously pull toward another.²⁶ This means that a person will react differently to her stereotypes depending upon

¹⁷ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921).

¹⁸ Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777, 778 (2001).

¹⁹ Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges*, 84 *NOTRE DAME L. REV.* 1195, 1210 (2009).

²⁰ Guthrie et al., *supra* note 18, at 778.

²¹ Krieger & Fiske, *supra* note 15, at 1036.

²² *Id.*

²³ BANAJI & GREENWALD, *supra* note 6, at 48–50.

²⁴ Krieger & Fiske, *supra* note 15, at 1062.

²⁵ *Id.* at 1040 (citation omitted).

²⁶ *Id.* (citation omitted).

whether the implicit or explicit attitude is dominating her judgment while she is forming an impression about the stereotype's target.²⁷

Jerome Frank, a prominent legal realist, is said to have quipped that judges base their decisions on “what [they] had for breakfast.”²⁸ This is not my claim. Rather, I take the view, in Geyh's words, that “[i]n a post-realist age . . . the best empirical work to date shows that the decisions judges make cannot be divorced from the judges who make them because judicial decision-making is subject to a complex array of legal and extralegal influences.”²⁹ Of these extralegal influences, I focus on implicit bias because it is harder to quantify and identify than explicit bias,³⁰ its effect on the common law can be felt for generations, and, despite the current and unequivocal social science research on implicit bias, we have yet to address fully its effect on judges.

B. Wassell v. Adams: An Illustrative Case Study in Implicit Judicial Bias

To illustrate implicit bias's effect on judicial decision making, we can look at Judge Richard Posner's opinion in *Wassell v. Adams*³¹—a 1989 case that is in many first-year torts curriculums. The plaintiff was Susan Wassell, a twenty-one-year-old woman who was visiting Chicago to see her fiancé graduate from basic training at a nearby naval base.³² While visiting, Susan was attacked and raped in her hotel room.³³ Late one night, hearing a knock and thinking it might have been her fiancé, Susan opened the door to a man outside who asked for a glass of water.³⁴ She got the water and brought it back; the man, saying the water was not cold enough, then went into the bathroom.³⁵ When he came out, he was naked from the waist down, and Susan ran from the room.³⁶ The man chased Susan out, caught her, and dragged her back into the room, where he raped her several times.³⁷ After several hours Susan managed to escape.³⁸

The hotel was four blocks away from a high crime area, and the owners occasionally warned female guests not to walk in the neighborhood at night by themselves.³⁹ However, the owners did not warn Susan.⁴⁰ Susan sued the hotel for

²⁷ *Id.* at 1041.

²⁸ See, e.g., Gregory S. Parks, *Judicial Recusal: Cognitive Biases and Racial Stereotyping*, 18 LEGIS. & PUB. POL'Y 681, 682 (2015).

²⁹ Charles Gardner Geyh, *Why Judicial Disqualification Matters - Again*, 30 REV. LITIG. 671, 715 (2011).

³⁰ *Kang Fuchs Lecture*, *supra* note 8.

³¹ 865 F.2d 849 (7th Cir. 1989).

³² *Id.* at 850.

³³ *Id.* at 851.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

negligence as a third party to her rape.⁴¹ Under a comparative fault statute,⁴² the jury came back with the verdict that she was ninety-seven percent at fault for her own rape, and the hotel owners only three percent at fault, thus reducing her recovery.⁴³ Susan requested that the judge grant judgment for her notwithstanding the verdict either because she was legally nonnegligent or the hotel owners had wantonly disregarded her safety.⁴⁴ Alternatively, Susan requested a new trial because the fault apportionment was contrary to the manifest weight of the evidence.⁴⁵ The court denied both motions, and Susan appealed.⁴⁶

Upholding the verdict, Judge Posner, while not expressing any explicit discourtesy,⁴⁷ rested on some concerning description and reasoning. For instance, early in the analysis, Judge Posner identified the assailant as a “respectably dressed black man.”⁴⁸ The man’s race (or his attire) does not appear to be relevant to the law or facts implicated in the case. But, mentioning traits like race when not otherwise relevant can be evidence of either explicit bias or the unconscious expression of implicit bias.⁴⁹

On the other hand, if race was relevant to the court’s analysis, then its mention is even more concerning, because in the context of a comparative fault analysis, it suggests that the court’s view was that Susan should have known the stranger was a threat because he was a black man. This does not appear to be explicit bias because Judge Posner does not make any such connection in his analysis. However, the unnecessary disclosure of the man’s race juxtaposed with the assignment of Susan’s fault in her own rape points to implicit bias. It is especially suggestive of implicit bias given the extant backdrop of the pervasive social-sexual myth of black men raping white women,⁵⁰ and even more so when coupled with the fact that rapes are substantially more likely to be *intra*racial than *inter*racial.⁵¹

⁴¹ *Id.* at 852.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ There were times, in fact, when Judge Posner showed a sensitivity to Susan’s plight. For instance, he called the defendant’s claim that the hotel could not post a warning because it would be too expensive, “absurd[.]” *Id.* at 853. In addition, when he wrote that the plaintiff pretended, post-rape, to like the rapist, he clearly stated that she did it “[t]o save herself” and refrained from suggesting that this cast doubt on her rape assertions. *Id.* at 851.

⁴⁸ *Id.*

⁴⁹ See MODEL CODE OF JUDICIAL CONDUCT r. 2.3 cmt. 2 (AM. BAR ASS’N 2010).

⁵⁰ See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL FORUM, no. 1, at 159 n.54. Although Judge Posner does not disclose Susan’s race, she was white. Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 283 & n.52 (1994).

⁵¹ From 1973–82, reported rapes with a black offender and white victim represented twenty-three percent of rapes. PATSY A. KLAUS & MARSHALL DEBERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, PROD. NO. NCJ 96777, THE CRIME OF RAPE 3 (1985). The reporting guidelines changed in the 1980s and later research found that intraracial rape accounted for about eighty-eight percent of rapes. LAWRENCE A.

Finally, Judge Posner upheld the jury verdict in spite of, and without even a nod to, the fact that using comparative fault in rape litigation is painfully resonant with the age old victim blaming epitaph that “she was asking for it.”⁵² While these implications each arguably fall short of overt bias, their cumulative resonance with racism and misogyny nonetheless suggests a type of bias at work “deep below consciousness.”⁵³

Of course, the appellate judge’s role is often to review for abuse of discretion.⁵⁴ As a result, the easy explanation is that Judge Posner was simply observing his proper role by deferring to the trial court and jury verdict. However, Judge Posner is not shy about either correcting an application of law or pointing out that he is limited to his role, even though he may not like it.⁵⁵ In fact, there is one point in *Wassell* that Judge Posner is uncomfortable with, but his discomfort is focused exclusively on whether the jury got the percentage of fault correct because the jury asked a question about the hotel’s duty to warn that went unanswered.⁵⁶

But why is there no concern for the gender and racially problematic aspects of the opinion or its applicable law? Judge Posner could have broken new ground in third-party rape suits by applying a different standard.⁵⁷ For instance, one alternative is the no-duty approach, which is to “recognize important differences in the situation of the two actors that justify treating them differently.”⁵⁸ Under this approach, courts would: (1) “see a difference in failing to prevent injury to oneself as opposed to others,” (2) “recognize the different kind of costs that each actor pays for not being more cautious or prudent,” and (3) “decide whether reducing or barring recovery for rape victims will likely serve the social policy of curtailing high rates of sexual assaults.”⁵⁹

Of course, it would have required innovation to institute a no-duty exception in comparative fault doctrine for third-party rape suits. However, Judge Posner has written innovative opinions on many other matters,⁶⁰ and innovation is consistent

GREENFELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROD. NO. NCJ-163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 11 (1997).

⁵² See Martha Chamallas, *Symposium: Who Is the Reasonable Person? Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1381 (2010); Leah M. Slyder, Note, *Rape in the Civil and Administrative Contexts: Proposed Solutions to Problems in Tort Cases Brought by Rape Survivors*, 68 CASE W. RES. 543, 567–569 (2017).

⁵³ CARDOZO, *supra* note 17.

⁵⁴ *Wassell v. Adams*, 865 F.2d 849, 856 (7th Cir. 1989).

⁵⁵ See *State Oil Co. v. Khan*, 93 F.3d 1358 (7th Cir. 1996) (following antitrust precedent even though he referred to it as “moth-eaten,” “wobbly,” and “unsound”); *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990) (lowering the standard of legal liability a railroad company faced for a chemical spill); George M. Cohen, *Posnerian Jurisprudence and Economic Analysis of Law*, 133 U. PA. L. REV. 1117, 1117 (1985) (discussing Judge Posner’s “innovative methodological approach”).

⁵⁶ See *Wassell*, 865 F.2d at 856.

⁵⁷ A third-party rape case is a subset of tort cases where a plaintiff sues a third party to an attack for permitting dangerous conditions or failing to take other reasonable precautions to prevent such an attack. Chamallas, *supra* note 52, at 1354.

⁵⁸ Chamallas, *supra* note 52, at 1383 (citing Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999)).

⁵⁹ *Id.* (citation omitted).

⁶⁰ Cohen, *supra* note 55.

with how he views the judge's role.⁶¹ In his words, a flexible, innovative approach is required because the "multi-layered character of American law . . . thrust[s] on the courts a responsibility for *creative* lawmaking that *cannot* be discharged either *by applying existing rules* to the letter or *by reasoning by analogy*."⁶² And yet, in *Wassell* this approach is notably absent. Judge Posner did not acknowledge the policy implications of allowing courts to find victims responsible for their own rape, express personal distaste for the outcome or implication, mention misogyny or racism's possible effect on the jury, or discuss whether finding Susan ninety-seven percent responsible for her own rape could possibly vindicate her individual right to redress.⁶³

Based on these analytical gaps, and Judge Posner's view of rape published in *Sex and Reason* in 1992,⁶⁴ I posit that Judge Posner did not see the role that misogyny and racism played in allowing *Wassell's* jury to find the white plaintiff ninety-seven percent responsible for her own rape by a black man—or the common law rule that permits victim fault allocation in third-party rape suits in the first place. After *Sex and Reason's* publication, feminist scholars struggled with Judge Posner's rape discussion, particularly his conclusion that rape is "primarily a substitute for consensual sexual intercourse rather than a manifestation of male hostility toward women or a method of establishing or maintaining male domination."⁶⁵ One critic paraphrased that in this view, rape and other acts of subordination are not about subordination at all, but are merely efficient practices based on "successful adaptations to biological market conditions."⁶⁶

Excavating an old opinion through literary analysis is not proof that Judge Posner wrote *Wassell* under the influence of unacknowledged bias.⁶⁷ Rather, I use it here for illustrative value. Judge Posner was a fiercely academic, rational,⁶⁸ and

⁶¹ RICHARD A. POSNER, *OVERCOMING LAW* 12–13 (1995).

⁶² *Id.* (emphasis added).

⁶³ While *Wassell* presents a rape involving a black man and a white woman, under a theory of intersectionality, black women may have a different experience than either black men or white women, particularly when it comes to racism, feminism, misogyny, and rape. See Crenshaw, *supra* note 50, at 139, 140, 157–160.

⁶⁴ RICHARD A. POSNER, *SEX AND REASON* (1992).

⁶⁵ *Id.* at 384; see, e.g., Robin West, *Review Essay: Sex, Reason, and a Taste for the Absurd*, 81 GEO. L. J. 2413, 2440–41 (1993). Naturally, research available at the time of *Sex and Reason's* publication, and since then, suggests that the motivation to rape is much more complicated. See A. Nicholas Groth, Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape: Power, Anger, and Sexuality*, 134 AM. J. PSYCHIATRY 1239, 1239 (1977) (finding that interviewers of 133 convicted rapists concluded that their crimes "were not rapes in which sex was the dominant issue; sexuality was always in the service of other, nonsexual needs"); Crenshaw, *supra* note 50, at 158 (critiquing the exclusive focus on rape as an expression of male power over women while identifying the rape of black women as part of a racially motivated terror campaign); Heather Murphy, *What Experts Know About Men Who Rape*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/30/health/men-rape-sexual-assault.html> (identifying that while exclusive focus on convicted rapists may skew data, researchers continue to find that hostility to women and power are relevant factors in explaining rape).

⁶⁶ West, *supra* note 65, at 2445–46.

⁶⁷ See Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry "Bias!"*, 28 GEO. J. LEGAL ETHICS 177, 202 (2015) (stating that no social scientist would base a conclusion on one data point).

⁶⁸ See Michael B. Brennan, *Book Review*, 79 MARQ. L. REV. 329, 329 (1995).

dedicated jurist. He was not likely to say and do things that were overtly racist or misogynistic, and there is no reason to suspect a history of disciplinary proceedings for improper conduct toward women and racial minorities.⁶⁹ But if elements of the *Wassell* opinion can be explained by implicit bias and a person as academic and rational as Judge Posner can inadvertently manifest such bias, then without doubt, any jurist is susceptible.

In state trial courts, examples of possible implicit bias play out in the records of disciplinary proceedings. In *In re Jordan*, a disciplinary commission sanctioned a judge for twice referring to an attorney appearing before him as “little girl.”⁷⁰ In that case, the commission focused on the second time the judge said “little girl” because it found that he used the phrase intentionally to demean the attorney.⁷¹ Of primary interest here, however, was the commission’s conclusion that the first use of “little girl” may have been “an inadvertent expression of unconscious prejudice.”⁷² This is evidence that disciplinary commissions at least tacitly recognize that implicit bias is qualitatively different than explicit bias and are hesitant to discipline it in the same way.

While in *In re Jordan*, the bias’s target was an attorney, there are also many instances where trial court judges seemingly exhibit implicit bias toward litigants. For instance, a New York trial judge, in a case dealing with international students, told a prosecutor “you better deport these people” and “you better get them out.”⁷³ The disciplinary commission waffled about the words’ import.⁷⁴ Because it wasn’t “a continuous pattern of . . . *conduct*” they were unwilling to conclude that bias was at work and hedged their language about what “appear[ed] to indicate distrust and dislike of all those from outside his community.”⁷⁵ However, distrust or dislike is precisely the kind of passive antipathy that implicit association researchers have identified and we are concerned with here.⁷⁶

II. WHY IMPLICIT JUDICIAL BIAS MATTERS

Given the strength of contemporary social science research on implicit bias, it is clear that unconscious bias exists, and the judiciary is not immune from it. The question, however, is does it matter. I argue that bias in the judiciary does indeed matter because judges play a substantial role in a common-law system, because of normative concern for legitimacy and fairness, and because of the related practical concern for compliance and procedural justice.

⁶⁹ While complaints issued against federal judges are not made immediately public, substantiated complaints can lead to public censure and other sanctions that may become public knowledge. *See* 28 U.S.C §§ 351–55 (2018).

⁷⁰ GEYH ET AL., *supra* note 3, at 3-37.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 3-26.

⁷⁴ *Id.*

⁷⁵ *Id.* (emphasis added).

⁷⁶ *See infra* text accompanying notes 85–87.

In a common-law system, judges have the unique role of applying legal precedent to new facts. As a result, the common law is dynamic, and judges have significant power in shaping it.⁷⁷ While this is true for judges presiding over courts with both original and appellate jurisdiction, it is perhaps especially true for the appellate courts. According to Judge Roger Traynor, the “intellectual process of appellate judgment, [is] of the greatest public importance.”⁷⁸

At the same time, the legitimacy of government institutions and actors is a primary concern because of a representative democracy’s unique theoretical underpinnings⁷⁹ and because of the “wondrous” power that legitimacy has to “convince[] losers in law and politics to accept their losses.”⁸⁰ As a result, it is unsurprising that in our governmental system, the judiciary’s role is consistently subject to legitimacy concerns,⁸¹ many of which are tied to impartiality, both actual and its appearance.⁸² Because unchecked bias both directly reduces a judge’s ability to decide impartially⁸³ and gives the appearance of partiality,⁸⁴ it stands as a legitimacy measure.

One of implicit bias’s dangers is that it can consistently tip justice’s scales to the favor of one group and the disfavor of another. This is the case even though scholars generally think that people express explicit bias less now than at previous points.⁸⁵ For instance, “rather than antipathy, many now show ambivalence and avoid members of stereotyped

⁷⁷ See, e.g., VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, *PROSSER WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS* 1 (13th ed. 2015) (establishing that torts have largely been the creation of judicial opinions).

⁷⁸ Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 212 (1957).

⁷⁹ In a representative democracy, the government should reflect the will of the people. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 290 (1974). For this governmental system to have any meaning, the people must understand the institutions of government to be acting legitimately, that is to say, discharging the people’s will. See *id.* at 134 (stating that at the very least, “a legitimate government is one that most of its subjects view as legitimately ruling.”).

⁸⁰ JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* 130 (2012).

⁸¹ See Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in *BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA* 21, 22 (Keith J. Bybee ed., 2007).

⁸² See *id.* at 24, 30–31.

⁸³ See *supra* Part I.

⁸⁴ See John Sides, *White People Believe the Justice System is Color Blind. Black People Really Don’t.*, WASH. POST (July 22, 2013, 12:20 PM), https://www.washingtonpost.com/news/wonk/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont/?utm_term=.7f330f928deb (reporting that sixty percent of African Americans disagreed with the statement that “courts give all a fair trial” and that perceptions of procedural injustice informed these attitudes).

⁸⁵ See, e.g., Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011), at 17–18. According to Quintanilla, “[w]hile blatant racism has waned, prejudice still persists . . . the field of social psychology has shown a continuing divide between words and deeds toward people of color.” However, we should not construe this to mean that all bias is subtle. See Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 188 (reporting that while some gender bias was subtle “much was not subtle at all”). In addition, as Williams points out, once people recognize a pattern of bias, even implicit bias is then easy to spot. See *id.* at 227.

groups . . . resulting in decreased helping behavior and cooperation, passive harm, and neglect.”⁸⁶ At the same time, “many exhibit liking and trust toward in-group members, resulting in facilitation and cooperation with other majority group members.”⁸⁷

In a complex evaluative process, these mental errors can result in courts chronically undervaluing out-group members, such as women and racial minorities, and chronically overvaluing in-group members, such as white men. In *Wassell*, how can we explain the possibility that Judge Posner just did not assign value to irrelevant racial descriptions, the negative policy implications or plain injustice of holding a victim ninety-seven percent responsible for her own rape, or to racism and misogyny’s effect of legitimizing and encouraging human suffering? It could be that Judge Posner was simply unable to mentally recognize that his opinion implicated issues of racial and gender equality;⁸⁸ he instinctively valued them less than some other principles or policy outcomes,⁸⁹ or both.

There is good reason to think that implicit bias is especially likely to cause disparate valuing when there is ambiguity in the law or a particularly close question. Despite implicit racial prejudices, people are less likely to discriminate when there is a clear choice that would associate them with biased attitudes and behaviors versus one that would not.⁹⁰ However, in the law, there are many instances when there are no clear choices. Karl Llewellyn illustrates the point when he says that courts can decide a question, correctly, in twenty-six ways and goes on to say “the major defect in [our] system is a mistaken idea . . . that the cases . . . plus the correct rules . . . provide one single correct answer to a disputed issue of law.”⁹¹ Instead, Llewellyn says, “the available correct answers are two, three, or ten” and the salient question is “[w]hich of the available correct answers will the court select—and why?”⁹²

Because judges in a common law system have considerable discretion in applying the law, this opens the door to bias. Llewellyn describes the “felt need” and “felt sense” that judges use in their decision-making⁹³ and instincts are undoubtedly as essential to the judicial profession as they are in any other endeavor. However, it is very likely that in ambiguous cases, the type of split-second subconscious categorization described by implicit bias research informs “felt” needs and sense.⁹⁴

⁸⁶ Quintanilla, *supra* note 85, at 18.

⁸⁷ *Id.*

⁸⁸ See *supra* discussion accompanying notes 50–56, 61–63.

⁸⁹ Judge Posner’s self-professed take on feminism is suggestive here:

[L]aw or government should [not] prescribe a particular role for women or discourage them from exercising free choice regarding occupation, marriage, and style of life. Nor, however, do[es] [he] believe that women should be put ahead of men or encouraged to lead separate lives from men, or that ‘what’s good for women’ should be the lodestar for social governance instead of ‘what’s good for the United States’ or ‘what’s good for humankind.’

Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 191.

⁹⁰ Quintanilla, *supra* note 85, at 20 (citing John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1, 4–7 (2004)).

⁹¹ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950).

⁹² *Id.* (emphasis omitted).

⁹³ *Id.* at 398.

⁹⁴ See *supra* Part I.

In addition, information-rich environments or even the semblance of information give people adequate cover to act on bias.⁹⁵ Because judges often have substantial information supplied by the record, and, as both Llewellyn and Judge Posner suggest, law's application to facts is often ambiguous,⁹⁶ judicial decision-making is fertile ground for implicit bias.

Judge Posner recognized the relationship between ambiguity and bias in *McReynolds v. Merrill Lynch*.⁹⁷ In describing corporate practices in a discrimination case, he said that the white brokers in question “are more comfortable teaming with other white brokers” but that “they would doubtless ask a superstar broker to join their team regardless of his or her race.”⁹⁸ Where there is uncertainty, however, Judge Posner said, “people tend to base decisions on emotions and preconceptions.”⁹⁹

To allow the law to consistently favor an in-group while consistently disfavoring an out-group is fundamentally unfair. Fairness is central to judicial impartiality and, not surprisingly, *Merriam-Webster* defines fair as “marked by *impartiality*.”¹⁰⁰ In the first place, we should care about unchecked implicit bias's unfair effects on judicial decision-making for normative reasons. Our sense of fairness helps us intuitively gauge how people treat us against how we want them to treat us. In Llewellyn's words, fairness is part of our “felt sense,” and there is significant collective recognition that we should treat others as we would like to be treated.¹⁰¹

However, fairness, like legitimacy, is not just a normative concept to aspire to for its own sake. For the rule of law to provide order, there must be compliance.¹⁰² Procedural justice, resting on perceptions of both fairness and legitimacy, helps explain why people comply with the law despite adverse outcomes.¹⁰³ To do so, procedural justice captures how individuals subjectively experience the legal process.¹⁰⁴ Researchers have found that people care both about outcome and,

⁹⁵ Krieger & Fiske, *supra* note 15, at 1050–51.

⁹⁶ See *supra* text accompanying notes 60, 91–92.

⁹⁷ *McReynolds v. Merrill Lynch*, 672 F.3d 482 (7th Cir. 2012).

⁹⁸ *Id.* at 489.

⁹⁹ *Id.* One question is how Judge Posner could recognize this preference in *McReynolds* but not in *Wassell*. One obvious difference is that the opinions were written twenty-eight years apart. Another possible explanation is the “bias blindspot,” which is the name given to individuals' tendency to think they are more objective than others. See Kang et al., *supra* note 11, at 1173.

¹⁰⁰ *Fair*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

¹⁰¹ Lisa Capretto, *Scholar Points to One Thing Nearly All Major Religions Have in Common*, HUFFPOST (Aug. 17, 2016), https://www.huffingtonpost.com/entry/principle-in-nearly-all-major-religions_us_57b370a1e4b0edfa80d9e0e6 (identifying the Golden Rule as a principle common to most of the world's major religions).

¹⁰² RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 3 (2015).

¹⁰³ Tom Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103, 103 (1988).

¹⁰⁴ Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 134 (2011).

independently of outcome, the fairness of the process.¹⁰⁵ Based on this, procedural justice scholars conclude that how an individual perceives the legal process' fairness is "critical to assessments of legitimacy and deference to legal authority."¹⁰⁶

Our perceptions of fairness rest on unbiased, impartial decision makers. Tom Tyler has identified seven factors that determine whether citizens feel judges acted fairly.¹⁰⁷ Two factors are relevant to actions taken by the parties: the chance to have representation and the opportunity to appeal. *Five* of the seven factors directly pertain to the judge. They are the judge's (1) effort at fairness, (2) honesty, (3) ethical conduct, (4) quality of decisions, and (5) bias.¹⁰⁸ Tyler not only enumerates bias as a stand-alone concern, but it is also implicit in the other four judicial conduct factors. Thus, bias is highly relevant to legitimacy and compliance.

Moreover, litigation's very purposes include other practical concerns that raise the threat of lawlessness. Its purpose is largely to avoid vigilantism, act as a deterrent, encourage desirable social conduct, make the injured person whole, and provide justice for an individual's right to redress.¹⁰⁹ Judicial decision-making thwarts these purposes if subconscious undervaluing is taking place during a judge's evaluation process. We can easily imagine if a court undervalues certain people's claims, it will be unable to make them whole or fully validate their individual rights to redress. At the same time, if the court overvalues other people's claims, it is less likely to deter them completely or acknowledge how socially undesirable their conduct is. The disparity between one group's lack of redress and recovery against another group's diminished deterrence and limited social sanction can only diminish the legitimacy and power of our legal system. Simply put, unchecked implicit bias is not only unfair—it threatens the rule of law.

III. BIAS PROHIBITIONS IN THE *CODE OF CONDUCT* AND *MODEL CODE*

The ethical rules in both the *Code of Conduct* and the *Model Code* currently contain prohibitions against bias. The *Code of Conduct's* Canon 3(A)(3) specifies that "[t]he duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias."¹¹⁰ Similarly, the *Model Code's* rule 2.8 prohibits undignified and discourteous behavior¹¹¹ and rule 2.3 insists that "[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice."¹¹² Examples of discourteous conduct that have given rise to discipline are verbally abusing and intimidating parties in a courtroom, subjecting people to unwarranted searches,

¹⁰⁵ *Id.* at 132.

¹⁰⁶ *See, e.g., id.*

¹⁰⁷ *See* Tyler, *supra* note 103.

¹⁰⁸ *Id.*

¹⁰⁹ *See* SCHWARTZ ET AL., *supra* note 77.

¹¹⁰ CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(3) (JUDICIAL CONF. 2014).

¹¹¹ MODEL CODE OF JUDICIAL CONDUCT r.2.3, 2.8 (AM. BAR ASS'N 2010).

¹¹² *Id.*

criticizing jurors after a verdict, and using profanity in the courtroom.¹¹³ Sanctions for these acts include public reprimands, public reproof, suspension, removal, etc.¹¹⁴

Examples of racial bias that have given rise to disciplinary proceedings include using racial epithets, making racial “jokes,” referring to certain crimes in racial terms, stereotyping racial groups, and using racially charged language.¹¹⁵ Examples of gender bias include using gender loaded language and insults to disparage, making inappropriate comments during domestic abuse cases, referring to women as children, pontificating that a woman’s place is in the home, calling women terms of endearment in a professional context, and commenting on women’s appearance.¹¹⁶ Sanctions in bias proceedings are similar to those resulting from discourtesy and include reprimands, public reproof, suspension, and removal.¹¹⁷

In these examples, there are two common themes: 1) the conduct in question is overt, and 2) the biases most readily addressed tend to be explicit, or at least perceived to be explicit.¹¹⁸ While the current rules are effective when used to correct overt conduct that expresses explicit bias, they are a poor fit for addressing implicit bias. For instance, the prohibitions against bias and discourtesy do not easily reach a *Wassell*-type situation. Recall that in *Wassell*, Judge Posner was not discourteous and did not engage in any conduct that was clearly prejudiced toward women or racial minorities.¹¹⁹ Where a judge’s implicit associations may surreptitiously allow his brain to value women and black men less, fail to recognize racism at play in irrelevant references to skin color, or refuse to acknowledge the potential for misogyny and racism to inform a legal rule or jury verdict there is a gossamer-like quality that makes comparisons with using the “n-word” in open court problematic.¹²⁰

Moreover, much of the *Model Code* and the *Code of Conduct*’s concern for impartiality is focused on conflicts, not on bias per se.¹²¹ For instance, in *Caperton v. A.T. Massey Coal Co.*, the Court used the word bias often,¹²² but its context was violation of a disqualification rule similar to *Model Code* rule 2.11.¹²³ And the issue in the case was whether a West Virginia Supreme Court judge had a conflict in a

¹¹³ GEYH ET AL., *supra* note 3, at 3-3 n.5.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 3-23 to 3-28.

¹¹⁶ *Id.* at 3-36 to 3-41.

¹¹⁷ *See id.* at 3-23 to 3-28.

¹¹⁸ *See* Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1095 (2004) (“The canons focus on the tensions and potential conflicts that are most easily detected by an outside observer.”).

¹¹⁹ For instance, Judge Posner was seemingly sympathetic to Susan’s efforts to do whatever she could to get away from her attacker. *See supra* note 47. Additionally, while “respectably dressed black man” is certainly suspect in the context of the opinion, the language itself is not inherently prejudiced. *See supra* text accompanying notes 48–52.

¹²⁰ *Compare supra* Section I.B. *with supra* text accompanying notes 113–16.

¹²¹ *See Green, supra* note 67, at 183–84.

¹²² *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 *passim* (2009).

¹²³ “Bias” is used similarly in the disqualification rule for federal judges. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C) (JUDICIAL CONF. 2014).

lawsuit before his court because one of the litigants made very large contributions to the judge's campaign.¹²⁴

As the Supreme Court stated in *Caperton*, disqualification is normally the redress for a conflict that gives the appearance or has the actual result of impeding a judge's impartiality.¹²⁵ However, disqualification is not a viable option for cases involving implicit bias. Because all people subconsciously categorize others, we would have no judges left to adjudicate if we required judges to disqualify every time their brains engaged in an implicit association.¹²⁶

Finally, while social science research splits biases into the neat categories of explicit and implicit, it also recognizes that people may not always report their own biases or may attempt to hide them.¹²⁷ As a result, we should be careful about assuming that all instances of judicial bias will be easily identifiable as implicit or explicit, fit in a neat analytical framework, or be addressed mechanically through the measures proposed in Part IV. As *In re Jordan* suggests, it is possible for a judge to simultaneously express an implicit bias alongside an explicit bias,¹²⁸ and it may be hard to distinguish the two. We should also assume that judges are sometimes able to hide their explicit biases or might be able to use implicit bias as cover for what is in fact explicitly biased behavior. My goal is not to give biased judges a get out of jail free card, but rather to curb true implicit associations when these associations are married to a judge's good faith commitment to deliver impartial justice. I do not intend my analysis to reach judges who deliberately hide their equally deliberate bias.

For the bulk of jurists who are acting in good faith and are subject to implicit associations, the need for tailored guidelines is especially pressing because scholars have noticed that while overt racism has waned, "the manifestation of prejudice has grown more subtle."¹²⁹ As a result, while the bias prohibitions in the *Model Code* and the *Code of Conduct* generally do what they were intended to do, we need additional mechanisms to continue working toward our aspiration of an impartial judiciary.

IV. BEYOND THE STATUS QUO: NOT LETTING PERFECT GET IN THE WAY OF GOOD

Before turning to the recommendations, it is worth noting a subtle difference between the purpose of the *Model Rules* and *Code of Conduct* provisions just discussed and the measures I propose. The guides to professional ethics exist to govern misconduct.¹³⁰ Because implicit bias is a split-second neurological response

¹²⁴ See *Caperton*, 556 U.S. at 872.

¹²⁵ See *id.* at 888–89.

¹²⁶ See Green, *supra* note 67, at 184.

¹²⁷ See *supra* text accompanying notes 24–27; see also *infra* text accompanying notes 159–60.

¹²⁸ See *supra* text accompanying notes 70–72.

¹²⁹ Quintanilla, *supra* note 85, at 17.

¹³⁰ See GEYH ET AL., *supra* note 3, at ix.

that occurs unconsciously,¹³¹ we should be slow to term it misconduct by rote and automatically discipline it as such for two reasons. First, the culpability for manifesting implicit bias as compared to explicit bias is less. How can a person be morally responsible in any meaningful sense when she does not know what she is doing?¹³² Second, we intend ethical rules and their corresponding disciplinary processes to act as deterrents.¹³³ Because individuals are not initially in the driver's seat when it comes to their own implicit bias, ethical rules and discipline will be less effective as deterrents.

However, just because implicit judicial bias is unintentional does not mean it cannot cause grievous injustice. Sentencing's racially disparate effect, especially death sentences, suggest just how immoral the result of unchecked implicit bias can be.¹³⁴ While we may not have initial control as individuals over the quick categorization that our brain goes through when faced with different types of people,¹³⁵ collectively we have control over what we do from there—and willful ignorance is not a sufficient excuse. With that in mind, the *Model Code* and *Code of Conduct* should incorporate the methods below with their other aspirations and expectations for judicial conduct. With these expectations in place, disciplinary committees could sanction a judge for not engaging proactively in curbing her implicit bias but not for having an unconscious bias to begin with.

The question is whether, since implicit bias occurs in an unconscious process, there is anything we can do about it. The research is clear that our implicit associations do not always lead to biased decision-making.¹³⁶ Surveying social science research on behavior across many decades, Krieger et al. concluded that “whether attitudes predict behavior depends on the attitude, the context, and the person.”¹³⁷

In examining the correlation between bias and behavior, there are two key factors that influence when they will be closely correlated: motive and opportunity to deliberate.¹³⁸ When motive and opportunity are present, attitudes and behavior correlate less.¹³⁹ Krieger et al. build out these two factors into the saliency of social

¹³¹ See *supra* text accompanying notes 8–12.

¹³² In analyzing the purposes underlying our criminal law, arguably our legal system's most punitive area, Stuntz and Hoffman identify three overlapping purposes, including retribution. WILLIAM J. STUNTZ & JOSEPH L. HOFFMAN, *DEFINING CRIMES* 11 (2nd ed. 2014). For the purpose of retribution, “punishment . . . is a moral good because crime is a moral wrong.” *Id.* We can analogize between crime and judicial misconduct here to the extent they are both socially undesirable activities that cause harm.

¹³³ See Randall T. Shepard, *Foreword* to CHARLES GARDNER GEYH, JAMES J. ALFINI, STEVEN LUBET & JEFFREY M. SHAMAN, *JUDICIAL CONDUCT AND ETHICS*, at v-vi (2013) (stating that while the rare judge might be a “crook” many others are trying to discharge the duties of their office faithfully and use the ethical rules as a roadmap to handle avoidable pitfalls with “greater ethical sensitivity”).

¹³⁴ See Kang et al., *supra* note 11, at 1148.

¹³⁵ See *supra* Section I.A.

¹³⁶ See Krieger & Fiske, *supra* note 15, at 1049.

¹³⁷ *Id.*

¹³⁸ Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 *ANN. REV. PSYCHOL.* 297, 304 (2003).

¹³⁹ *Id.*

norms, the decision-maker's perceived sense of control, the decision-maker's desire to avoid the bias, and relevant information.¹⁴⁰ The checks proposed below incorporate these concepts and, because the research shows that these factors predict the greatest variance when each is present,¹⁴¹ my solutions will be most effective when used together. While the proposed solutions are not enough to root out all implicit bias, as this section's title suggests, my goal is to provide a framework for taking a meaningful step forward. I focus on using systems that are already largely in place in order to minimize the force of objections to moving forward.

The first question is how to provide judges with evidence of their own implicit bias so that they will be motivated to address it. Kang et al. suggest that one step is having judges take the IAT just like other individuals and professional groups do.¹⁴² In order to promote participation and avoid unnecessary shaming, the assessments should be confidential with respect to individual judges, but the aggregated data over time should be collected by court administrators in order to target and refine efforts. Kang et. al. also suggest judicial training on cognitive illusions, the fallibility of heuristics, and how to become sensitized to biases similar to the type used in other professional settings.¹⁴³ Most state court systems can build this into their current continuing legal education requirements¹⁴⁴ so that they require implicit bias training hours each year. In fact, Kang has already supplied a primer on implicit bias for courts in partnership with the National Center for State Courts.¹⁴⁵

While there are optional training programs for the federal judiciary, there is no mandated training,¹⁴⁶ so it would take an extra step to implement this suggestion for the federal bench. The Federal Judicial Center is the body charged with providing training to federal courts and it currently offers workshops on implicit bias.¹⁴⁷ For both state and federal courts then, access to adequate training materials is unlikely to be an issue.¹⁴⁸ Because annual judicial conferences already

¹⁴⁰ Krieger & Fiske, *supra* note 15, at 1050.

¹⁴¹ See Fazio & Olsen, *supra* note 138; see also Alexandra Kalev, Erin Kelly & Frank Dobbin, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 589 (2006) (finding that diversity measures were most effective when training, assigned responsibility, and steps to reduce minority isolation were employed together).

¹⁴² Kang et al., *supra* note 11, at 1175–77.

¹⁴³ *Id.*

¹⁴⁴ Forty states have continuing education requirements. *Legal Education/Bar Admission Resource Guide*, NAT'L CTR. FOR ST. CTS., <https://ncsc.contentdm.oclc.org/digital/collection/legserv/id/86> (last updated May 16, 2019).

¹⁴⁵ JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS (2009), <https://cdm16501.contentdm.oclc.org/digital/collection/accessfair/id/248>.

¹⁴⁶ S.I. Strong, *Symposium: Judicial Education and Regulatory Capture*, 2015 J. DISP. RESOL. 1, 14 (noting that judges “are largely in control of their own educational agendas”).

¹⁴⁷ *Programs and Resources for Judges*, FED. JUD. CTR., <https://www.fjc.gov/education/programs-and-resources-judges#SF> (last visited Sept. 1, 2020).

¹⁴⁸ In addition to the other resources mentioned, the ABA has a resource page dedicated to implicit bias training for attorneys and judges. *Diversity and Inclusion 360 Commission*, AM. BAR ASS'N, <https://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission.html> (last visited Sept. 1,

exist and judges typically attend them,¹⁴⁹ the easiest way to administer this requirement may be to push the training out in partnership with these conferences.

However, the key is to require the education because if an external body does not require it, judges are less likely to opt into this training. A mandate helps establish norms and contributes to motivation.¹⁵⁰ In addition, people who are uncertain in their knowledge are likelier to make more effective educational choices.¹⁵¹ While a confident judge is undoubtedly helpful in many contexts, because people are unable to perceive their own implicit bias,¹⁵² and tend to think that they are less biased than others,¹⁵³ a lack of uncertainty is especially problematic in this context. By requiring the training, judges are not left to self-diagnose what social scientists know is a typical blind spot.

The question is then which external body should mandate implicit bias training for federal judges. The answer is not the legislature. While there are some areas in which the legislature must exercise judicial oversight,¹⁵⁴ opening up this sensitive and nascent oversight role to the politics between the federal judiciary and Congress and the politics between Congress and its constituents, could affect the judiciary's independence and perceptions of its legitimacy,¹⁵⁵ would be excruciating to watch,¹⁵⁶ and would almost certainly result in the false and unfair cry of "Bias!" of such concern to Bruce Green.¹⁵⁷ With this in mind, the best suggestion is for a dedicated Judicial Conference committee to work with the chief judges to determine the most effective way to execute and enforce a training requirement.

Accountability and transparency are essential to successful efforts to counteract implicit bias because of the role of social norms in negating the

2020). While the efficacy of these trainings is largely untested, there are at least some interventions workshops that, while only tested in small numbers, are showing positive effects. See Jessica Nordell, *Is This How Discrimination Ends?*, ATLANTIC (May 7, 2017), <https://www.theatlantic.com/science/archive/2017/05/unconscious-bias-training/525405/> (reporting on an implicit bias workshop at the University of Wisconsin).

¹⁴⁹ See, e.g., JUDICIAL COUNCIL OF THE NINTH CIRCUIT, NINTH CIRCUIT UNITED STATES COURTS 2009 ANNUAL REPORT 22 (2009), https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2009.pdf.

¹⁵⁰ See *infra* notes 158–63 and accompanying text.

¹⁵¹ Strong, *supra* note 146.

¹⁵² See *supra* text accompanying notes 8–9; Strong, *supra* note 146, at 15.

¹⁵³ See Kang et al., *supra* note 11, at 1173.

¹⁵⁴ For instance, Congress is the only body that can establish the lower federal courts. See U.S. CONST. art. III, § 1.

¹⁵⁵ See CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE 280–82 (2008).

¹⁵⁶ For instance, consider the political grandstanding on both sides of the aisle accompanying the recent Kavanaugh nomination hearings. See Cavett Feazel, *Kavanaugh's Confirmation Hearings a Display of Political Grandstanding*, CIVILIAN (Oct. 9, 2018), <https://sites.law.lsu.edu/civilian/2018/10/kavanaugh-confirmation-hearings-a-display-of-political-grandstanding-september/>.

¹⁵⁷ Because implicit bias affects almost everyone but is hard to determine on a case-by-case basis, it would be hard to prove an implicit bias accusation, but also equally hard to disprove. See Green, *supra* note 67, at 180. As a result, it is unwise to use such accusations as a political club, which is almost certain to occur, at least periodically, if the legislature has oversight over this area. See GEYH, *supra* note 155, at 51–52 (describing the periodic upheaval that occurs between the public, Congress, and the Supreme Court in relation to disfavored opinions); Green, *supra* note 67, at 181 (discussing the way people might respond to disfavored opinions with unprovable bias allegations).

expression of bias. To see how this plays out, consider the case of the aversive racist. Aversive racism describes racial bias among people who claim to hold egalitarian beliefs but who nonetheless act on “indirect, subtle, and less obvious racial biases.”¹⁵⁸ Notably, aversive racists do not discriminate if strong norms against discrimination are present and the discrimination would be apparent to themselves or others.¹⁵⁹ Without transparency, there is no mechanism of visibility by which bias can become apparent to self or others.¹⁶⁰ At the same time, accountability helps reinforce and establish norms because it signals their relevancy and strength.¹⁶¹

Adopting language in the *Model Code* and *Code of Conduct* will promote salient norms, transparency, and accountability in relation to our expectation that judges take active steps to reduce the impact of their implicit biases on their judicial decision-making. Expressing norms in ethical guidelines increases focus on specific behaviors, which serves the interest of transparency because its very idea depends on the assumption that another actor is watching.¹⁶² Moreover, the *Model Code* and *Code of Conduct*'s language should be updated so that judges, while not subject to discipline for experiencing an implicit association, should be subject to discipline for not participating in good faith efforts to curb their implicit associations. If the guidelines have no teeth, there is nothing that will trigger formal accountability and the efforts will be less effective.¹⁶³

In addition to norms and motivation, having the opportunity for “mindful reflection on individuating features,”¹⁶⁴ is essential to overcoming an unconscious reaction.¹⁶⁵ One way to create the opportunity to deliberate is for judges to make the internal commitment before and during each case, bench memo, brief, hearing, opinion, and order to not make decisions influenced by bias. In the first place, this creates the opportunity to consider “individuating features.” In the second, research has demonstrated that people will not make decisions based on bias when the choice is clearly biased.¹⁶⁶ Judges can further operationalize this commitment by looking for situational explanations to replace individual stereotypes¹⁶⁷ and deliberately considering “countertypical associations” before and during judicial decision-making.¹⁶⁸ Countertypical association is exposure to members of stereotyped groups that we would respond to positively or exposure to a member of a negatively

¹⁵⁸ Dovidio et al., *supra* note 14, at 179.

¹⁵⁹ *Id.*

¹⁶⁰ See Krieger & Fiske, *supra* note 15, at 1050–51.

¹⁶¹ See *id.*; MCADAMS, *supra* note 102, at 7, 16, 62 (“By publicly endorsing a particular behavior, law tends to make that behavior salient, thereby producing self-fulfilling expectations that it will occur.”).

¹⁶² See Krieger & Fiske, *supra* note 15, at 1050–51.

¹⁶³ See Kalev et al., *supra* note 141, at 590 (finding that corporate diversity efforts were most effective when responsibility was assigned).

¹⁶⁴ Quintanilla, *supra* note 85, at 24.

¹⁶⁵ See Kang et al., *supra* note 11, at 1177–78.

¹⁶⁶ Krieger & Fiske, *supra* note 15, at 1050.

¹⁶⁷ Nordell, *supra* note 148.

¹⁶⁸ See also *infra* text accompanying notes 196–97 (discussing the use of indirect countertypical associations to reduce bias in lieu of diversity).

stereotyped group that does not share the stereotypical trait.¹⁶⁹ Judges could incorporate countertypical associations by a screensaver, desk photo, or work of art in their office.¹⁷⁰

Granted, there is no way to enforce compliance or ensure that a judge is meaningfully deliberating, but as Alex Kozinski succinctly pointed out, “[j]udicial ethics, where it counts, is hidden from view.”¹⁷¹ We already count on judges to do their best to discharge their duties faithfully and there is good reason to believe that if court systems adopt norms protecting against implicit judicial bias, judges will act responsibly to self-regulate in this area, just as they do in many others.¹⁷²

One potentially intransigent obstacle in creating the opportunity to deliberate is the workload for judges. Over the past 100 years, cases in district courts have shown an eleven-fold increase.¹⁷³ For federal appellate courts, the increase was sixty-four fold.¹⁷⁴ In contrast, the population only increased by a factor of four, district judges by a factor of ten, and circuit judges by a factor of six.¹⁷⁵ At the state level, growth in cases over time has outpaced the increase in judges as well with state judges increasing at only half the rate of cases.¹⁷⁶ I recognize that this limits the opportunity to deliberate, but pending costly and systemic change, these proposals are crafted with the judicial system’s status quo ante in mind.

A final method to curb implicit judicial bias is increasing the diversity on the bench and in chambers. In the first place, it may be that judges who are members of out-groups experience fewer implicit associations favoring in-groups than in-group members.¹⁷⁷ Studying a small pool of judges, Jeffrey Rachlinski et al. found that eighty-seven percent of white judges had a pro-white bias in contrast to forty-three percent of black judges.¹⁷⁸ In addition, black judges had a significantly weaker pro-white bias than their white counterparts.¹⁷⁹ At the same time, research shows that countertypical associations, or exposure to people who run counter to our implicit schemas, reduce the expression of implicit bias.¹⁸⁰ Lastly, some commentators

¹⁶⁹ Kang et al., *supra* note 11, at 1173.

¹⁷⁰ *See id.*

¹⁷¹ Kozinski, *supra* note 118, at 1106.

¹⁷² *See* Geyh, *supra* note 29, at 696–97 (discussing the judge’s responsibility to decide her own disqualification motion); Shepard, *supra* note 133.

¹⁷³ Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 133 (2014).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* 26 (2016).

¹⁷⁷ Rachlinski et al., *supra* note 19.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (finding that black judges made the schema-inconsistent match twenty-six milliseconds faster than the schema-consistent match while white judges made the schema-inconsistent match 216 milliseconds faster than the schema-consistent match).

¹⁸⁰ Kang et al., *supra* note 11, at 1170 (citing Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649–54 (2004)).

postulate that people in the in-group and people in the out-groups can “see two different realities.”¹⁸¹ For instance, “[w]hite people . . . might only hear a racist remark, [but] people of color might register subtler actions, like someone scooting away slightly on a bus—behaviors the majority may not even be aware they’re doing.”¹⁸²

Currently, white men hold judgeships in the greatest number. In federal courts, white men are 45.6% of circuit court judges and 49.3% of district court judges.¹⁸³ In comparison, women hold thirty-seven percent of circuit judgeships and thirty-four percent of district judgeships.¹⁸⁴ By race, black people are thirteen percent of circuit judges and fourteen percent of district judges.¹⁸⁵ Even more concerning is the fact that one circuit has only one woman out of nine judges, seven of thirteen circuits have only one black person sitting on them (this includes the Eleventh Circuit which has the largest population of black people in the country), and one circuit has no black judges at all.¹⁸⁶ For district courts, the disparity is worse. Eleven of ninety-one courts have no women on them and forty-four have no black people serving on them.¹⁸⁷ Even starker, black women hold only 4.4% of circuit judgeships and 6.1% of district judgeships.¹⁸⁸

State court judges and clerks in both federal and state courts have a higher ratio of white men, too. For instance, black judges are between seven to nine percent of state court judges across all levels¹⁸⁹ and female judges occupy thirty-one to thirty-six percent of state judicial seats across all courts.¹⁹⁰ At the same time, the

¹⁸¹ Nordell, *supra* note 148.

¹⁸² *Id.*

¹⁸³ BARRY J. McMILLION, CONG. RESEARCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 8, 20 (2017), <https://fas.org/sfp/crs/misc/R43426.pdf>.

¹⁸⁴ *Id.* at 4, 15.

¹⁸⁵ *Id.* at 5, 17.

¹⁸⁶ *Id.* Other racial minorities are also underrepresented. For instance, there are four circuit courts with no Hispanic judges and nine circuit courts with no Asian American judges. *Id.* at 5.

¹⁸⁷ *Id.* at 15, 17. As with circuit courts, Asian American and Hispanic judges are also underrepresented. Asian Americans hold 2.8% of district judgeships despite being 5.8% of the total U.S. population and Hispanic judges hold about 10% of district judgeships and represent 18% of the U.S. population. *Id.* at 20; *The Rise of Asian Americans*, PEW RES. CTR. (June 19, 2012), <http://www.pewsocialtrends.org/2012/06/19/the-rise-of-asian-americans/>; Antonio Flores, *How the U.S. Hispanic Population Is Changing*, PEW RES. CTR. (Sept. 18, 2017), <http://www.pewresearch.org/fact-tank/2017/09/18/how-the-u-s-hispanic-population-is-changing/>. By comparison, black people make up about 13% of the population and women about 50.8%. Kristen Bialik, *5 Facts About Black Americans.*, PEW RES. CTR. (Feb. 22, 2018), <http://www.pewresearch.org/fact-tank/2018/02/22/5-facts-about-blacks-in-the-u-s/>; *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/SEX255217#viewtop> (last visited Aug. 29, 2020).

¹⁸⁸ McMILLION, *supra* note 184, at 8, 20.

¹⁸⁹ *National Database on Judicial Diversity in State Courts*, AM. BAR ASS’N, <http://apps.americanbar.org/abanet/jd/display/national.cfm> (last visited Sept. 9, 2019) [<https://web.archive.org/web/20190909143807/http://apps.americanbar.org/abanet/jd/display/national.cfm>].

¹⁹⁰ *2017 US State Court Women Judges*, NAWJ, <https://www.nawj.org/statistics/2017-us-state-court-women-judges> (last visited Aug. 30, 2020).

estimated percentage of minority members in judicial clerkships is 6.5% and women in judicial clerkships is about eighteen percent.¹⁹¹

Perhaps because these numbers are so stark, Kang et al. recognize the value in diversifying the bench but also recognize that it would be a costly endeavor.¹⁹² While increasing judicial diversity at the federal level may require fewer economic resources because an appointment process is already in place,¹⁹³ it would still take significant political resources for alignment around diverse candidates. It is possible, however, as the Obama Administration's record shows.¹⁹⁴ In contrast, because many states select judges through election,¹⁹⁵ ensuring diverse results would be a very complicated and resource-laden endeavor that would likely require revamping entire selection processes through constituent and legislative support. With this in mind, one possible stopgap measure to true diversity is to stimulate countertypical associations by using pictures, videos, and other indirect contact.¹⁹⁶ Indirect countertypical associations are not a substitute for actual diversity, and cannot be expected to promote accountability, transparency, and other norm-reinforcing interactions among peers to the same degree. However, they are likely, as Kang et al. suggest, worth experimenting with.¹⁹⁷

Finally, it is possible that judges will be unable to acknowledge their implicit bias because they will not want to lose face or delegitimize their rulings.¹⁹⁸ However, drawing a broad conclusion like this is suspect given that judges occasionally admit general error in writing in legal opinions¹⁹⁹ or, notably, acknowledge bias even after leaving office.²⁰⁰ It might be helpful to remember our original premise, which is that judges are human. And humans are capable of change.²⁰¹

¹⁹¹ ELIZABETH CHAMBLISS, IILP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 16, 23, http://www.theiilp.com/resources/Pictures/IILP_2017_Demographic_Survey.pdf.

¹⁹² Kang et al., *supra* note 11, at 1170 (“[A]ny serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political.”).

¹⁹³ See *FAQs: Federal Judges*, U.S. CTS., <http://www.uscourts.gov/faqs-federal-judges>.

¹⁹⁴ Under President Obama, sixty-nine percent of circuit court appointees and sixty-two percent of district court appointees were nontraditional appointees, i.e. not white males. MCMILLION, *supra* note 184, at 9, 22.

¹⁹⁵ Forty-two states provide for the election of at least some judges. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L. J. 43, 52 (2003).

¹⁹⁶ Kang et al., *supra* note 11, at 1171.

¹⁹⁷ *Id.*

¹⁹⁸ See MCADAMS, *supra* note 102, 220–21.

¹⁹⁹ See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 316 (1999) (Souter, J., dissenting) (acknowledging a contrary position to one earlier stated and explaining it as “[i]gnorance, sir, ignorance” (quoting *McGrath v. Kristensen*, 340 U. S. 162, 178 (1950) (Jackson, J., concurring)).

²⁰⁰ See James C. McKinley, Jr., *Ex-Brooklyn Judge Seeks Reversal of His Verdict in 1999 Killing*, N.Y. TIMES (Dec. 12, 2013), <https://www.nytimes.com/2013/12/13/nyregion/ex-brooklyn-judge-seeks-reversal-of-his-verdict-in-1999-murder-case.html>.

²⁰¹ For instance, consider that in 2016, a C-SPAN caller made headlines after identifying as a white man from North Carolina and asking how he could become less biased, so he could “be a better American.” Paul Walter, *Caller Admits Racism and Is Gently Advised*, C-SPAN (Aug. 22, 2016), <https://www.c-span.org/video/?c4618001/user-clip-caller-admits-racism-gently-advised>.

CONCLUSION

Because the days of casting judges as perfectly impartial are gone, and because the social science research on implicit bias is clear, we should embrace a view of the judiciary that allows them to be human but also promotes fairness, legitimacy, and procedural justice. This means acknowledging that judges experience implicit bias, while neither concluding that impartiality is dead nor avoiding responsibility for implicit bias's effects. Rather, just as the ermine cloak used to be the litmus paper on which we gauged our judges' purity, now we should use their actions in response to, and in the face of, implicit associations to prove their sincerity in curbing unfairness resulting from unchecked implicit bias.

The methods I propose are intended to help us, and our judges, do just that. Court systems can employ these steps through existing administrative, ethical, and disciplinary frameworks by requiring judges to take the IAT, mandating implicit bias training, increasing judicial diversity while employing other opportunities for countertypical associations, and operationalizing mindful deliberation. In addition, norm-reinforcing steps like disciplinary sanctions for not participating in these measures and updates to the *Model Code* and *Code Conduct* should be employed. These efforts are unlikely to be perfect, but I share Kang et al.'s view that "[e]ffort is not always sufficient, but it ought to count for something."²⁰²

²⁰² Kang et al., *supra* note 11, at 1169.