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Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and The Bench Trial

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ARTICLES

MAKING THE INVISIBLE VISIBLE: EXPLORING IMPLICIT BIAS, JUDICIAL DIVERSITY, AND THE BENCH TRIAL

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ABSTRACT

All people harbor implicit biases—which by definition, are not always consciously recognized. Although trial judges are specifically trained to compartmentalize and shield their decisions from their own biases, implicit biases nonetheless seep into judicial decision making. This article explores various strategies to decrease implicit bias in bench trials. Questions are then raised about whether a judge who has faced bias personally would be more amenable and more open to curbing implicit bias professionally. Ultimately, does diversifying the trial court judiciary minimize implicit bias, while also creating a varied, multidimensional judicial voice comprised of multiple perspectives? This article will explore this potential interplay between diversifying the trial court judiciary and reducing implicit bias, while urging future quantitative research.

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TABLE OF CONTENTS

INTRODUCTION

The exploration of implicit bias is flourishing within the academy. The particular intersection of law and implicit bias is a burgeoning area of thought-provoking study, combining concepts of law, legal decision making, brain science, psychology, and human behavior.

This article contributes to the existing body of literature by exploring implicit bias in trial courts, particularly in bench trials with a single decision maker. It addresses courts that encounter litigants who have appeared before the bench multiple times, such as in family courts and criminal courts. It also presents potential remedies for countering implicit bias in the courtroom. Ultimately, this article suggests exploring research pertaining to judicial diversity and its potential nexus to decreasing implicit bias in the courtroom.

Implicit biases have been described as the thoughts and preconceived notions that flow through our minds—often subconsciously—pertaining to particular people, groups, or situations. All humans harbor implicit biases in one way or another. Thus, it follows that judges themselves are not immune to implicit bias.[1] Nonetheless, judges are specifically trained to compartmentalize and shield their decisions from any extraneous influences, including any of their own biases, implicit or otherwise. "[J]udges are expected to" cull through and "transcend such internal biases."[2]

Yet, even if judges attempt to shield their decisions from their explicit biases, implicit biases may seep into judicial decision making.[3] This could be particularly consequential in trial courts

1. Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J.F. 391, 393, 396 (2017) ("[I]mplicit racial bias and other implicit biases exist even, and sometimes particularly, in egalitarian individuals. In fact, such individuals are less likely to be aware of these implicit biases, because they lack explicit biases.").

2. Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 25 (2006).

3. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1148 (2012); *see* A. Gail Prudenti, *No One Is Immune from Implicit Bias*, LONG ISLAND BUS. NEWS (Dec. 12, 2017), https://libn.com/2017/12/12/prudenti-no-one-is-immune-from-implicit-bias [https://perma.cc/D88S-NTUN].

when juries are not utilized, or when the same litigants appear before the same judges repeatedly.

How judges can recognize implicit bias—or even mitigate it—is the subject of ongoing research about human behavior and its relationship to bias. Research has identified ideas to reduce implicit bias ranging from the simple idea of identifying implicit bias as a reduction tool to novel ideas such as using technology, neuroscience, and virtual paraphernalia to reduce the effects of bias.[4] This article addresses potential bias reduction remedies and also raises the idea that perhaps a diverse judiciary would be more prone toward reducing implicit bias.[5] In other words, if a judge has faced bias and discrimination personally, would that judge then be more open to curbing his or her own biases professionally? If so, perhaps this awareness and sensitivity to implicit bias is an additional reason why diversifying the judiciary is beneficial, beyond creating a varied, multidimensional judicial voice comprised of multiple perspectives. This article urges further research to explore whether there is an actual association between a judge who has experienced bias personally and the amenability of that judge to identify and reduce implicit bias in courtroom decision making.

This article will address judicial diversity, implicit bias, and the potential ways in which they may be interrelated. In Part I, the article will provide definitions of implicit bias and cite to the pertinent social science literature on the topic. Part II will discuss how implicit bias impacts the legal system at the bench trial level, how litigants may perceive potential bias, and then proffer some suggestions for overcoming this bias. In Part III, the article introduces the possibility that a judge who has personally been

4. *See, e.g.*, Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 484–85 (2005); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 407, 411 (2007); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 112 (2002); Antony Page, Batson*'s Blind-Spot*: *Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 237 (2005).

5. David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 377 (2012) ("Heterogeneity across judges in sentencing by race suggests that courtroom outcomes may not be race blind. This potential lack of partiality may be one source of the substantial overrepresentation of African Americans in the prison population. Understanding the sources of variation in the criminal justice system is an important first step toward reducing disparities of various kinds.").

discriminated against in life could be more amenable to eradicating his or her own implicit biases. In other words, if a judge has faced bias on a personal level, that judge is acutely aware of the pernicious effects of bias and may therefore be more cognizant of his or her own personal biases in decision making. The article then concludes with an urging for further quantitative research.

I. THE UBIQUITY OF IMPLICIT BIAS

Bias is multifaceted. Although many speak of explicit bias and implicit bias, there are also various types of bias within and overlapping with these categories ranging from affinity bias,[6] to confirmation bias,[7] to hindsight bias,[8] to stereotype bias.[9] This article will focus primarily on implicit bias in the broader general sense.[10]

Implicit bias is distinct from explicit bias, but the two can coexist. Explicit bias typically refers to prejudice that a person

6. Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, COLO. LAW., May 2016, at 45, 46; Ronald M. Sandgrund, *Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part I—Implicit Bias,* COLO. LAW., Jan. 2016, at 45, 45 ("Many people automatically gravitate toward, trust, hire, and like those similar to themselves. This is often referred to as affinity bias, which may be learned, although some claim it has a biological component.").

7. Bill Kanasky, Jr., *Juror Confirmation Bias: Powerful, Perilous, Preventable*, TRIAL ADVOC. Q., Spring 2014, at 35, 35; Brian P. Kane, *Are Cognitive Biases Impeding Your Legal Advice Under Rule 2.1?,* ADVOCATE, Oct. 2015, at 23, 24; Nalty, *supra* note 6, at 45–46.

8. Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration That the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1400 (2006); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 571 (1998).

9. *See* Melissa L. Breger, *Reforming by Re-Norming: How the Legal System Has the Potential to Change a Toxic Culture of Domestic Violence*, 44 J. LEGIS. 170, 180–82 (2018) (explaining how stereotypes in regards to gender and intimate partner relationships contribute to domestic violence being tacitly accepted in society); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 950 (2006); Caitlin Millett, *Humans Are Wired for Prejudice but That Doesn't Have to Be the End of the Story*, CONVERSATION (Feb. 4, 2015, 6:16 AM EST), http://theconversation.com/humans-are-wired-for-prejudice-but-that-doesnt-have-to-be-the-end-of-the-story-36829 [https://perma.cc/L37C-EEY3] ("In social psychology, prejudice is defined as an attitude toward a person on the basis of his or her group membership.").

10. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991–93 (2004) (describing an experiment where employers were less likely to hire resumes with African American sounding names than Caucasian American sounding names); Kang et al., *supra* note 3, at 1129; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009).

maintains outwardly towards a particular group of people.[11] Examples of explicit bias might include hate crimes, the use of racial slurs, or misogynistic or homophobic language. While much of our society tends not to tolerate this kind of visible bias, it nevertheless endures.[12] Segments of our society, particularly in recent times, feel justified in displaying explicit prejudice in ways that were otherwise found unacceptable in an educated society years earlier.[13] In fact, explicit bias has become increasingly pervasive in our society, prompting some commentators to believe that literature and research focusing on implicit bias distract from the prevalence of open explicit bias in our society, that still very much exists.[14]

Unlike explicit biases, however, often the person holding the implicit bias does not consciously recognize it and would deny harboring such biases, if asked.[15] Similarly, people are often unaware of the impact of these biases upon their own decision making.[16] Implicit bias may reveal itself when individuals resort

11. Erik J. Girvan, *When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law*, 94 OR. L. REV. 359, 371 (2016).

12. Kang et al., *supra* note 3, at 1132–35, 1139.

13. *See* Girvan, *supra* note 11, at 371–72 ("Regular repetition of surveys on nationally representative samples of U.S. adults show that, at least as assessed in self-reported measures, explicit bias has declined substantially since the mid-1900s." (footnote omitted)).

14. *Cf.* Olivia Goldhill, *The World Is Relying on a Flawed Psychological Test to Fight Racism*, QUARTZ (Dec. 3, 2017), https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism/ [https://perma.cc/YG4V-9XF2] ("The implicit bias narrative also lets us off the hook. We can't feel as guilty or be held to account for racism that isn't conscious. . . . [W]e must confront the troubling reality that society is still, disturbingly, all too consciously racist and sexist. . . . If the science behind implicit bias is flawed, and unconscious prejudice isn't a major driver of discrimination, then society is likely far more consciously prejudiced than we pretend."); Rita Cameron Wedding, *Implicit Bias: More than Just a Few Bad Apples*, JUV. JUST. INFO. EXCHANGE (June 15, 2016), https://jjie.org/2016/06/15/implicit-bias-more-than-just-a-few-bad-apples/ [https://perma.cc/P8NG-MY63] ("In the absence of those more blatant and incontrovertible examples of racism, many people think that the racism that may exist is the result of the random acts of a few bad apples. But in this post-civil rights era racism has not disappeared. It has merely been transformed by colorblind practices that preclude us from noticing or talking explicitly about racism. By making conversations about race and racism taboo, colorblindness can mask the myriad ways that race and racism function today.").

15. *See* Justin D. Levinson, *Introduction* to IMPLICIT RACIAL BIAS ACROSS THE LAW 1, 2–3 (Justin D. Levinson & Robert J. Smith eds., 2012); Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias* 290 (GWU Law Sch. Pub. Law Res., Paper No. 2017-56, 2017), http://ssrn.com/abstract=3011381 [https://perma.cc/CRJ7-CDDA] ("One can honestly believe it is wrong to discriminate against others and thus have low self-reported measures of prejudice, yet still have biased thoughts and engage in discriminatory behavior.").

16. Kang et al., *supra* note 3, at 1129.

to preconceived notions or assumptions about particular groups, such as those defined by gender, gender identity, race or culture, automatically, without reflecting methodically upon what they are actually thinking.

Even though implicit biases can be damaging, such biases are not necessarily rooted in hate and negativity.[17] At times, biased thinking can be mistakenly construed as complimentary to a particular group, even though the so-called "positive" stereotype itself brings with it harm.[18] Because implicit biases are not generally deliberate or malicious, however, they can be that much harder to identify and to eradicate.[19]

When implicit biases are based on stereotypes, the concepts of stereotype bias and implicit bias are intertwined.[20] What I would call multipronged biases—in other words, biases that may fall under a variety of categories—are even more complicated to unravel because they involve the intersectionality of biases.[21]

When we engage in stereotype bias, for example, we often have difficulty modifying our thoughts "because our perceptions become impervious to new information. People interpret ambiguous information to confirm stereotypes and are often unaffected by information that a stereotype is invalid."[22]

17. *See* Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 560, 565–66 (2012) (addressing implicit biases about motherhood, that in some ways can be positive (nurturing or loving), but can manifest negatively in legal settings); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore,* 29 RES. ORGANIZATIONAL BEHAV. 39, 42–43 (2009).

18. Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y.C. L. REV. 33, 33–35 (2009) (discussing the stereotyping of Muslims, Sikhs, and South Asians in the courtroom); Breger*, supra* note 17, at 565 (describing stereotypes about motherhood); Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 88–89, 104 (2017) (measuring federal judges bias toward Jewish and Asian litigants as compared to Christian and Caucasian litigants; stating that stereotypes that Asians are hardworking, for example, can elicit hostility).

19. Breger, *supra* note 17, at 560. Due to the nature of implicit bias, an actor may not realize he or she is laboring under the influence of implicit bias unless informed of its nature and upon further reflection of its effects. Lee, *supra* note 15, at 291–92.

20. Jost et al., *supra* note 17, at 43.

21. *See* Kimberle Crenshaw, *Mapping the Margins*: *Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

22. Breger, *supra* note 9, at 180 (quoting Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930, 943 (2014)).

Moreover, it is critical to remember that the formation of biases often start while very young in childhood, becoming hardened and increasingly solidified over time.[23] In fact, implicit biases can begin to form in children as young as three-years old.[24] Such biases are further reinforced through institutional bias and systemic biases in society.[25] As a result, these implicit biases can shade how one ultimately views the world.[26] Even if society shuns explicit biases, it may "reinforce[] deeply embedded constructs . . . emanating from childhood" as implicit and persistent biases.[27] Larger society then, in effect, may perpetuate the bias.[28]

An example of this relationship between worldview and decision making can be found in one particularly infamous resume experiment.[29] The resume experiment demonstrates the classic example of implicit bias in hiring practices.[30] In this psychological

For a particular example of how stereotypes have staying power in regards to gender norms, see *id*. at 180–82:

> It is convenient as a culture to resort to gendered stereotypes as a way to define the role of men and women in society. Gloria Steinem notes that "[w]hen it comes to the cult of gender, ideas are hard to challenge or even to see as open to challenge, because they are exaggerated versions of the earliest ways we may have been taught to see people as groups rather than as unique individuals."

Id. (alteration in original) (quoting Gloria Steinem, Comments on *Taking Stock: A Symposium Celebrating the New York State Judicial Committee on Women in the Courts*, 36 N.Y.U. REV. L. & SOC. CHANGE 525, 526 (2012)).

23. Levinson, *supra* note 4, at 363.

24. *See id*. On a similar note, a Yale study in 2016 found that preschool children face implicit bias in the classroom by their preschool teachers. WALTER S. GILLIAM ET AL., YALE CHILD STUDY CTR., DO EARLY EDUCATORS' IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS? 3–5 (2016), https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf [https://perma.cc/V8BJ-EFVF].

25. *See* Jerry Kang, *Communications Law: Bits of Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 132, 134–45 (Justin D. Levinson & Robert J. Smith eds., 2012).

26. Page, *supra* note 4, at 203–04 ("Children as young as three years old have already formed stereotypes. These learned stereotypes become unconscious as a result of their frequent presentation and, eventually, overlearning. Even as people later develop their non-prejudiced views, the original beliefs remain in the unconscious, waiting to be activated." (footnotes omitted)). For instance, data indicates that children exposed to intimate partner violence at a young age create implicit bias and tendencies toward such violence. Breger, *supra* note 9, at 189. They may also be more likely to either be abused by or to abuse an intimate partner in the future. *Id*. at 180. Implicit bias, along with other cultural factors, may shape the worldview of intimate relationships in these individuals. *Id*.

27. Breger, *supra* note 9, at 182–83.

28. *See id*. at 181.

29. Bertrand & Mullainathan, *supra* note 10, at 991–92.

30. *See id*.

experiment, two identical resumes were sent out to employers who posted job openings in Boston and Chicago newspapers.[31] The resumes were identical in every way except that one set of applications was submitted with names that many might perceive as sounding white or Caucasian (Emily and Greg), while the other set of applications was submitted with names that many might perceive as sounding black or African American (Lakisha and Jamal).[32]

The results were dramatic. The applicants with Caucasian-sounding names received a disproportionately higher percentage of callbacks for interviews than did the African American ones.[33] Specifically, Emily and Greg received fifty percent more callbacks for interviews than did Lakisha and Jamal.[34] The statistical reporting of the callbacks was uniform across all occupations and industries.[35] Employers who advertised themselves to be Equal Opportunity employers discriminated just as much as the other employers did.[36]

Perhaps many of the employers in the experiment would likely not be conscious of the implicit bias that affected their decision making.[37] These employers would likely presume to be evaluating each resume objectively. Yet in reality, their brains were reviewing each resume through a highly personalized lens based upon their own life experiences and their own implicit biases.[38] Although the

31. *Id.* at 996.

32. *Id.* at 991–92. Throughout this article, I will generally use terms white and black to refer to race, or African American, Asian American, Caucasian American when referring to race. I am mindful, however, that many of these terms are not without controversy. *See, e.g.*, Shaila Dewan, *Has 'Caucasian' Lost Its Meaning?*, N.Y. TIMES (July 6, 2013), https://www.nytimes.com/2013/07/07/sunday-review/has-caucasian-lost-its-meaning.html [https://perma.cc/5HMA-R3GH]; Adelaide Lancaster, *Black Is Not a Bad Word: Why I Don't Talk in Code with My Children*, RAISING RACE CONSCIOUS CHILD. (May 8, 2015), https://www.raceconscious.org/2015/05/642/ [https://perma.cc/YN7F-G6TX].

33. Bertrand & Mullainathan, *supra* note 10, at 997 & tbl.1, 998.

34. *Id.*

35. *Id.* at 1005–06.

36. *Id.* at 1005.

37. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), https://www.nber.org/papers/w9873.pdf [https://perma.cc/C9WS-SJ8J] ("We find little evidence that our results are driven by employers inferring something other than race, such as social class, from the names. These results suggest that racial discrimination is still a prominent feature of the labor market.").

38. *Cf.* Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50

employers might think they were reviewing everything with impartial eyes, it is more likely they were seeing things through a biased prism.

Similar studies to the resume experiment have been replicated in the legal realm and various other fields as well.[39] Additionally, experiments have been conducted to demonstrate implicit biases against all types of groups.[40]

In another context, United States Supreme Court Justice Ruth Bader Ginsburg, in a 2016 speech at Georgetown Law Center, addressed implicit gender bias:

> Discrimination didn't end with the explicit lines in the law. Some of it went underground but a lot of it was not even conscious—the term is unconscious bias. . . . So how do you get rid of that unconscious bias? I've told many the stories about how the symphony orchestra got rid of it. Someone had the simple but brilliant idea "let's drop a curtain between the people who are auditioning and the testers." Well . . . into the seventies you never saw women in symphony orchestras. When—

ARIZ. ST. L.J. 193, 196–97 (2018) (arguing that employers may have acted on explicit bias or implicit bias, in the resume experiment).

39. *See, e.g.*, Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/ [https://perma.cc/CX9Y-XC38] (discussing an experiment where legal memoranda given to partners for evaluation were skewed to favor white men).

40. Ali M. Ahmed et al., *Does Age Matter for Employability? A Field Experiment on Ageism in the Swedish Labour Market*, 19 APPLIED ECON. LETTERS 403, 403–05 (2012) (studying ageism in Sweden job market); Michael Ewens et al., *Statistical Discrimination or Prejudice? A Large Sample Field Experiment*, 96 REV. ECON. & STAT. 119, 119–20 (2014) (explaining email rental application experiment); Leo Kaas & Christian Manger, *Ethnic Discrimination in Germany's Labour Market: A Field Experiment*, 13 GER. ECON. REV. 1, 1–3 (2012) (describing implicit bias based on ethnicity in German labor market); Lois A. Moher & Steve W. Henson, *Impact of Employee Gender and Job Congruency on Customer Satisfaction*, 5 J. CONSUMER PSYCHOL. 161, 162 (1996) (discussing gender bias in employment); Mason Ameri et al., *The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 21560, 2015) (describing an experiment testing implicit bias against the disabled); Magnus Carlsson et al., *Ethnic Discrimination in Hiring, Labour Market Tightness and the Business Cycle—Evidence from Field Experiments* 8 (IZA Inst. of Study of Labor, Discussion Paper No. 11285, 2018) (discussing how biases affect tight labor markets); Magnus Carlsson & Dan-Olof Rooth, *Evidence of Ethnic Discrimination in the Swedish Labor Market Using Experimental Data* 1–3 (IZA Inst. of Study of Labor, Discussion Paper No. 2281, 2006) (analyzing a Swedish equivalent to the classism experiment by Rivera and Tilcsik); Lauren Rivera & András Tilcsik, *Research: How Subtle Class Cues Can Backfire on Your Resume*, HARV. BUS. REV. (Dec. 21, 2016), https://hbr.org/2016/12/research-how-subtle-class-cues-can-backfire-on-your-resume [https://perma.cc/R3CX-L332] (explaining employer preference for wealthy class individuals when employers are determining class via hobby).

> in my growing up years there was perhaps a harp player but that was it. When the drop curtain [at the auditions] was used there was an almost overnight change. People who thought that they could tell the difference between a woman playing and a man, whether it was the violin or anything else, turned out they were all wrong. But we can't do that in every sphere of human activity—how good it would be if we could.[41]

Presumably, Justice Ginsburg is addressing the famous orchestra experiments conducted by researchers Goldin and Rouse about implicit bias.[42] Her observations, however, can be applied in a myriad of other scenarios.

Implicit bias testing research gained international notoriety at Harvard University with what is called Project Implicit and the Implicit Association Test ("IAT").[43] The IAT is typically computerized and tests various implicit biases by looking at split-second decisions one makes when one is not consciously deliberating or reflecting.[44] There are IATs for race, gender, age, ability, religion, and all types of identities.[45] Although the IAT and similar mechanisms for testing implicit bias have garnered criticism about whether or not they are valid instruments or

41. Justice Ruth Bader Ginsburg, Remarks at Georgetown Law School (Sept. 7, 2016), https://www.c-span.org/video/?414875-1/supreme-court-justice-ruth-bader-ginsburg-delivers-remarks-georgetown-law [https://perma.cc/Q786-Q3R7].

42. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000).

43. Nosek et al., *supra* note 4, at 112 (finding that IAT research indicates that all social groups hold implicit biases, regardless of age, gender, race, and political views); *Are You Prejudiced? Take the Implicit Association Test*, GUARDIAN (Mar. 6, 2009, 19:01 EST), https://www.theguardian.com/lifeandstyle/2009/mar/07/implicit-association-test [https://perma.cc/69Y6-665U].

44. Lee, *supra* note 4, at 484–85; *About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html [https://perma.cc/4FY8-3F7R] (last visited Apr. 1, 2019).

45. Lee, *supra* note 4, at 484–85; *see, e.g.*, Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence,* 59 HASTINGS L.J. 1285, 1298 (2008); David Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias,* 59 HASTINGS L.J. 1389, 1409 (2008); Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 895 (1998) (examining gender stereotypes and their relation to differences in parental roles for women and men); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 78–79 (2003) (addressing the difficulties family caregivers experience at work, like the "glass ceiling" and "maternal wall," due to bias against caregiver status).

accurately test for implicit bias,[46] the IAT remains a robust tool in research and is utilized by many psychologists.[47]

At times, the IAT is used in conjunction with or within other experiments,[48] as it was used in one study to explore empathic responses to others.[49] In one such experiment, individuals of various races viewed pain stimuli in members of their same race.[50] Researchers then compared such responses to those observed when the subjects viewed pain stimuli in members of a different race.[51] Videos were shown to the sample members depicting a person's hand of the same race as that of the subjects being injected with a needle, and then the same action upon a person's hand of a different race than that of the subjects.[52] Just as humans have physiological reactions to feeling pain, not surprisingly, humans have physiological reactions to witnessing others' pain.[53] Thus, during the viewing of the videos, the sample group was measured physiologically for their reaction to the video stimuli of others in pain.[54] Thereafter, each viewer of the video was given the IAT.[55] The results of the physiological test and the IAT correlated for those individuals of one race having an increased sensitivity or

46. Beth Azar, *IAT: Fad or Fabulous? Psychologists Debate Whether the Implicit Association Test Needs More Solid Psychometric Footing Before It Enters the Public Sphere*, 39 AM. PSYCHOL. ASS'N 44, 46 (2008); *cf.* Selmi, *supra* note 38, at 215 ("By design, the IAT requires instantaneous decisions with response times measured in milliseconds. Very few real-world decisions, however, occur in that way. Most, but not all, are the product of deliberation and a number of scholars have emphasized that explicit bias measures likely provide more accurate predictors of deliberate behavior than implicit bias measures, which are more closely connected to spontaneous behavior.").

47. *See* JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 4 (2009), https://www.courts.ca.gov/documents/BTB_XXII_WEDF_3.pdf [https://perma.cc/7U2N-4PU6]; *see also* Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?,"* 15 PSYCHOL. INQUIRY 257, 261–64, 266 (2004); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1031 (2006).

48. *See, e.g.*, Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 427 (2011) (referencing a second primary method of measuring implicit bias, evaluative priming, in which "participants are briefly exposed to a subliminal or supraliminal prime (e.g., photographs of [faces of different races]), and then asked to make decisions about whether certain words are negative or positive").

49. Alessio Avenanti et al., *Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018, 1018–20 (2010).

50. *Id.* at 1018–19.

51. *Id.*

52. *Id.* at 1018.

53. *Id.* at 1018–20.

54. *Id.* at 1018–19.

55. *Id.* at 1019–20.

reaction to members of their same race, and having less so for members of a different race.[56]

It is important to note that the IAT and other experiments test the existence of implicit biases, not the likelihood of such individuals acting on those biases.[57] Thus, "the IAT 'do[es] not measure actions. The [IAT], for example, does not measure racism as much as a race bias.' Professor Banaji 'tells . . . volunteers who show biases [on the IAT] that it does not mean they will always act in biased ways—people can consciously override their biases.'"[58] Likewise, other experiments have found that participants' reactions did not necessarily correlate to their explicit attitudes once surveyed.[59] Thus, while the test results yield the realities of implicit biases, they also demonstrate that despite the apparent nature of biases, they are not necessarily determinative of behavior.

II. IMPLICIT BIAS IN THE LEGAL SYSTEM

As noted, implicit bias is omnipresent. Every person who has grown up in any society has some implicit bias or biases, conscious or not. Thus, juries have biases, litigants in the courtroom have biases, and court personnel have biases.

Judges are not immune to implicit bias either,[60] even if trained to compartmentalize information and transcend their own biases.[61]

56. *Id.* Notably, I was unable to find a study that addressed experiments with multiracial testers or hands.

57. Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System,* 46 U.C. DAVIS L. REV. 1563, 1571 (2013).

58. *Id.* (alterations in original) (footnote omitted) (quoting Shankar Vedantam, *See No Bias*, WASH. POST (Jan. 23, 2005), https://www.washingtonpost.com/archive/lifestyle/magazine/2005/01/23/see-no-bias/a548dee4-4047-4397-a253-f7f780fae575/ [https://perma.cc/CA9W-7QXN]).

59. *See, e.g.*, Natalie Salmanowitz, *Unconventional Methods for a Traditional Setting: The Use of Virtual Reality to Reduce Implicit Racial Bias in the Courtroom*, 15 U. N.H. L. REV. 117, 125–26 (2016).

60. Bennett, *supra* note 1, at 397 ("In my recent national empirical study, I found that 92% of senior federal district judges, 87% of non-senior federal district judges, 72% of U.S. magistrate judges, 77% of federal bankruptcy judges, and 96% of federal probation and pre-trial services officers ranked themselves in the top 25% of respective colleagues in their ability to make decisions free from racial bias. Again, mathematically impossible." (footnote omitted)).

61. One study conducted by the National Center for State Courts, which looked at implicit bias within the judicial systems of forty-two states, found that judges in most jurisdictions "reached unfair decisions on the basis of personal characteristics such as

Therefore, the court system as a whole—an institution comprised of human beings—needs to address human characteristics, such as implicit biases.[62] Implicit bias "is the kind of bias that judges, caseworkers, or lawyers may employ, yet not even be aware that they are doing so. Regardless of intentions, however, implicit bias in the courtroom can be nonetheless harmful to litigants."[63] Studies have shown that implicit bias plays various roles in the legal system and the administration of justice on a number of levels.[64]

Benjamin Cardozo in his essay, *The Nature of the Judicial Process*,

> analyzed the ingredients of "that strange compound which is brewed daily in the cauldron of the courts . . . ." Among these ingredients, he distinguished between the judge's conscious and subconscious decision making. Whereas the conscious element comprises "guiding principles of conduct," the subconscious element is much more elusive, encompassing the judge's inherited instincts, traditional beliefs and acquired convictions. Like the conscious component, the judge's subconscious is inseparable from her decisions. Cardozo writes that, while "[w]e [as judges] may try to see things as objectively as we please . . . we can never see them with any eyes except our own."

gender." Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Biases*, 42 WILLIAMETTE L. REV. 1, 13 (2006). Following these results, thirty-four states released reports that contained recommendations to eradicate the effects of bias on judicial decisions. *Id.*

62. Some studies suggest that judges hold the same biases as everyone else and this can be mitigated if they are aware of such biases. *See, e.g.*, Rachlinski et al., *supra* note 10, at 1221; *cf.* Selmi, *supra* note 38, at 210–11 (discussing the reluctance of voters, when asked, to express views that would be identified as racist or sexist, also known as "the Bradley Effect").

63. Breger, *supra* note 17, at 565. The behaviors of implicit bias can range from minor, such as acts of courtesy, to more severe such as how one assesses an individual's work. *Id.* at 561. Either way, however, the effects of implicit bias can be harmful. For instance, a judge holding implicit bias about what a "bad" mother should be, could result in a mother having her child put in foster care or later having her rights terminated. *Id.* at 565–67. The judge may have an untenable standard of "mother" to live up to and "[c]ompound this with issues of poverty and lack of resources, along with race and age, and now you have a litigant facing a system that expects her to fail before she even walks into the courtroom." *Id.* at 572. In addition, "[i]f a judge believes the litigant in the courtroom has not mothered appropriately, it is much easier to agree with the child welfare agency that intervention or continued intervention is necessary." *Id.* at 567. Perhaps this is an explanation for why the majority of people accused of engaging in abuse or neglect are mothers. *Id.* at 571.

64. *See, e.g.*, Greenwald & Krieger, *supra* note 9, at 951, 966–67; *cf.* Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.").

> Furthermore, "[i]t is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another."[65]

When one is a judge and a sole finder of fact, even if the decision maker is unaware that bias could be shaping the outcome, the consequences can be serious.[66] Thus, it follows that "[t]he existence of unconscious bias carries a potentially powerful impact in legal proceedings, where the public has put its trust in the judicial system to achieve a fair result."[67]

Ideally, the law should endeavor to avoid decisions based upon biases, because "[t]he law serves as a normalizing force in society, delineating what society will tolerate and what is permissible under the law. In this sense, the law informs and reflects society's culture."[68] Thus, the law can serve as a conduit of change within society.[69]

Professor Jerry Kang, one of the pioneers researching implicit bias in the law, has addressed how the nature of a courtroom and litigation poses unique issues with regard to bias. Kang emphasizes the critical importance of a judge's role in countering bias:

> 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.[70]

Professor Kang highlights the importance of the players in the courtroom being aware of and educated about implicit bias.[71] As

65. Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C. J.L. & SOC. JUST. 229, 232 (2015) (alteration in original) (footnotes omitted) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10–13 (1921)).

66. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330–31 (1987).

67. Bassett, *supra* note 57, at 1576.

68. Breger, *supra* note 9, at 185.

69. *Id.* at 189.

70. KANG, *supra* note 47, at 6.

71. *Id.* at 5–6.

Kang notes: "[g]iven 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."[72] Several other researchers highlight the concerns of judicial bias in the courtroom and suggest ways we might combat such bias, as will be discussed later in this article.[73]

Similarly, the American Bar Association ("ABA") has recognized that a judge's awareness of bias serves as a key factor in diminishing the role that bias will play in the courtroom.[74] In response to this finding, the ABA has initiated a program to expand judicial consciousness of implicit biases and has initiated three pilot judicial education programs in California, North Dakota, and Minnesota to address the issue.[75]

While jurors and juries have their own biases,[76] this article is operating from the presumption that six or twelve personal biases can diffuse and counter each other in ways that just cannot apply to a single fact finder.[77] Yet, while this article focuses specifically upon bench trials and single finders of fact, it certainly does not deny the problems and inevitability of jury bias.

Influential research about implicit bias and the judiciary was conducted by two Cornell University professors, a Vanderbilt law professor, and a federal judge (hereinafter "Rachlinski Study").[78] The researchers tried to test courtroom implicit bias over a span of years, specifically with regard to criminal court trial judges.[79] The researchers wrote an article entitled *Does Unconscious Racial Bias*

72. *Id.* at 2.

73. *See, e.g.*, Kang et al., *supra* note 3, at 1172–79.

74. Bassett, *supra* note 57, at 1580.

75. *Id.*

76. Michael B. Hyman, *Implicit Bias in the Courts*, ILL. B.J., Jan. 2014, at 41–42 [hereinafter Hyman, *Implicit Bias*]; Michael B. Hyman, *Reining In Implicit Bias*, ILL. B.J., July 2017, at 26, 28 [hereinafter Hyman, *Reining In*]; Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 180–81 (2015) (discussing racial bias in regards to jurors and how this affects jury selection); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 830–31 (2012).

77. *See* Breger, *supra* note 2, at 23–24. *See generally* Hyman, *Implicit Bias*, *supra* note 76, at 40 (discussing implicit bias in judges and juries); Hyman, *Reining In*, *supra* note 76, at 26, 28 (emphasizing implicit bias and its effects on lawyers and judges); Joy, *supra* note 76, at 180–81; Roberts, *supra* note 76, at 830–33.

78. Rachlinski et al., *supra* note 10, at 1195.

79. *Id*. at 1197.

Affect Trial Judges? and ultimately concluded that the answer was "Yes."[80]

These researchers conducted a multipart study involving a sample of trial judges drawn from around the country.[81] The results demonstrated that judges do harbor the same kinds of implicit biases as others, which can thereby influence their judgment.[82] Yet, the data also shows that given sufficient motivation, judges can compensate for the influence of these biases by remaining aware and vigilant about these biases.[83] As the researchers noted:

> First, implicit biases are widespread among judges. Second, these biases can influence their judgment. Finally, judges seem to be aware of the potential for bias in themselves and possess the cognitive skills necessary to avoid its influence. When they are motivated to avoid the appearance of bias, and face clear cues that risk a charge of bias, they can compensate for implicit bias.[84]

Implicit biases often present themselves as what some may call intuition rather than deliberation.[85] Intuition has been referred to as "the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system."[86] The ability of judges to overcome the overuse of intuition "may require years of 'effortful study' as well as accurate and reliable

80. *Id*. at 1221.

81. *Id.* at 1205–06.

82. *Id.* at 1197.

83. *Id.*

84. *Id.* at 1225.

85. DANIEL KAHNEMAN, THINKING, FAST AND SLOW *passim* (2011); Andrew J. Wistrich & Jeffery J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* ENHANCING JUSTICE: REDUCING BIAS 87, 90 (Sarah E. Redfield ed., 2017) ("Intuitive decision making consists of relying on one's first instinct. Intuition is emotional. It relies on close associations and rapid, shallow cognitive processing. Intuitively, if a choice sounds right and feels right, then it is the right choice. Psychologists sometimes refer to this style of decision making as System 1 reasoning. System 1 produces rapid, effortless, confident judgments and operates outside conscious awareness. When we go with our gut, we decide quickly and feel that we are right. But human beings did not develop advanced civilizations with System 1. Human beings, of course, have an enormous capacity for higher-order deliberative reasoning. Mathematics, deductive logic, and analogical reasoning require much more than simple intuition. Psychologists sometimes refer to higher-order reasoning as System 2. System 2 is slower and conscious. It requires effort, and if we are distracted, rushed, or tired, we use System 2 less. Oddly, when the two conflict, people have less faith in System 2 than in System 1. But System 2 is where logic—and hence most legal reasoning—lies." (footnote omitted)).

86. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 31–32 (2007) (footnote omitted).

feedback on earlier judgments[,]" but conscious dedication to greater utilization of deliberation over intuition can limit bias in the courtroom as well.[87] As said by Benjamin Cardozo:

> There is in each of us a stream of tendency whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions . . . .[88]

The Rachlinski Study investigated whether the IAT test could ascertain judicial implicit bias, and if those biases would impact judicial decisions.[89] The sample of judges completed an IAT around the issue of race and also decided mock-court scenarios, where an actor was prepared to act out what some might perceive as "stereotypical roles" associated with African American and Caucasian American individuals.[90] The results showed that the IAT did predict decisions when the actor was prepped to act in so-called stereotypical roles.[91] In fact, when the defendant actors were presenting in a so-called stereotypical African American individual's role, the judges who scored more towards racial implicit biases in the IAT test levied stricter sentences upon the defendants.[92]

Had these trials been real instead of mock trials, the results would have been devastating. In fact, these are real judges. Thus, the Rachlinski Study offers an example of how its research plays out in real judicial decisions: research showing that implicit bias by judges is one reason why African American[93] criminal defendants fare worse in the courtroom than similarly situated Caucasian American criminal defendants.[94]

87. *Id.*

88. Sagiv, *supra* note 65, at 230 (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921)).

89. *See* Rachlinski et al., *supra* note 10, at 1197, 1208.

90. *Id*. at 1208.

91. *Id*. at 1209, 1210 & tbl.2.

92. *Id*.; *see also* Justin D. Levinson et al., *Implicit Racial Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 22 (Justin D. Levinson & Robert J. Smith eds., 2012).

93. One researcher suggests that harsher sentences are often given to those defendants who either are of persons of color, or share facial and other appearance characteristics associated with being a person of color, regardless if the defendant is actually a person of color. Bennett, *supra* note 1, at 403.

94. Rachlinski et al., *supra* note 10, at 1196.

Another study conducted by researchers Matthew Clair and Alix Winter further reveals how judges' implicit biases can lead to a disproportionate impact on racial minorities in the courtroom.[95] The results show that judges, "despite well-intentioned judging,"[96] by "acknowledg[ing], and attempt[ing] to account for, their implicit biases," may still contribute to disparate treatment of minority litigants by failing to take into account, during the decision-making process, potential systematic disparities that the minority litigant likely encountered at earlier stages of litigation.[97] Thus, "racial inequality is reproduced in subtle, contextually specific ways."[98]

A. *Remedies and Unique Aspect of Bench Trials*

As noted, recognition of implicit bias is a key factor to minimizing implicit biases;[99] if one is cognizant about implicit bias, then one can work to counter it.[100] Psychological data repeatedly supports the proposition that both being aware of one's own implicit bias and also being willing to change it actually lessens the effect of the bias.[101]

Yet, bias is also hard to alter and contextualize. When we talk about bias, it is essential to understand how potential bias may arise in a given situation or a given case. If facts are conveyed to a judge, such facts are absorbed through the lens of the judge's worldview.[102] Therefore, if we can have diversity in the context of

95. *See* Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332, 353 (2016).

96. *Id.*

97. *Id.* at 354.

98. *Id.*

99. Marouf, *supra* note 48, at 447–48 ("Judges must become aware of the impact of implicit bias in order to question the soundness of their decisions and make the effort to render more impartial judgments. Reforms such as 'exposing judges to stereotype-incongruent models, providing testing and training, auditing judicial decisions, and altering courtroom practices' could all help reduce implicit bias." (footnote omitted)).

100. Lawrence, *supra* note 66, at 331 ("[W]e must take cognizance of psychological theory in order to frame a legal theory that can address that affliction.").

101. Rachlinski et al., *supra* note 10, at 1221.

102. Levinson, *supra* note 4, at 353–54, 407 ("[J]urors . . . and . . . judges . . . misremember case facts in racially biased ways. These racially biased memory errors will distort case facts in ways that are completely unknown to the juror but prejudicial to the legal actor . . . . [D]ebiasing and cultural solutions . . . approaches hold promise that implicit memory bias may someday be significantly reduced or even eliminated.").

the judiciary, this awareness could ultimately promote fairer decision making and more productive court proceedings.[103]

There are various methods to raise awareness about bias, including the use of metrics to track case outcomes and employing "bias interrupters" to audit performance, as will be discussed further.[104]

As suggested by researchers John Irwin and Daniel Real:

> Judicial decisions could be reviewed by a diverse group of auditors to look for signs of implicit biases' influences. Jurisdictions could adopt a sort of peer-review process to evaluate decisions for effective impartiality and provide feedback. Even without utilizing diverse auditors or peer-review programs, providing judges with statistical data and breakdowns concerning past decisions will allow an individual assessment of trends and influences of implicit biases.[105]

In the judiciary, this methodology may yield positive results.[106] For example, a study completed by the National Center for State Courts demonstrated that teaching judges about both the source and the effects of bias are initial steps to ensuring courtrooms with a reduction in bias.[107]

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103. KATHERINE W. PHILLIPS, SCI. AM., HOW DIVERSITY WORKS 43 (2014), https://www.scientificamerican.com/index.cfm/_api/render/file/?method=inline&fileID=9F4FCDB9-A5B3-40AB-A9A525FDC71156AB [https://perma.cc/ZL6R-MCK7] ("Decades of research by organizational scientists, psychologists, sociologists, economists and demographers show that socially diverse groups (that is, those with a diversity of race, ethnicity, gender and sexual orientation) are more innovative, than homogeneous groups."); *see also* Elaine Martin, *Men and Women on the Bench: Vive la Difference?,* 73 JUDICATURE 204, 204 (1990). Differences have been found between male and female state supreme court justices with respect to age, localism, and career patterns. *See* Elaine Martin & Barry Pyle, *Gender and Racial Diversification of State Supreme Courts,* 24 WOMEN & POL. 35, 39–40 (2002).

104. *See* Joan C. Williams, N.Y. State Bar Ass'n, An Empirical Look at Implicit Bias and Bias Interrupters in the Legal Profession at the New York State Bar 2017 Annual Meeting, *in* NEW YORK STATE BAR ASSOCIATION 2017 ANNUAL MEETING (Jan. 26, 2017), https://www.nysba.org/AM2017IMPLICITBIAS/ [https://perma.cc/NA9Y-GD5J]; *Midyear 2016: Bias Interrupter Can Help Advance Legal Profession Diversity, Says Researcher*, (Feb. 2, 2016), https://www.americanbar.org/news/abanews/aba-news-archives/2016/02/midyear_2016_biasi/ [https://perma.cc/86DS-ZGHY].

105. John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 9 (2010) (footnotes omitted).

106. Letter from John S. Kiernan to Judge Betty Weinberg Ellerin (Aug. 25, 2016), *in* NEW YORK STATE BAR ASSOCIATION 2017 ANNUAL MEETING, *supra* note 104.

107. RACHEL D. GODSIL ET AL., PERCEPTION INST., THE SCIENCE OF EQUALITY, VOLUME 1: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE 47 (2014), https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Vol.-1-Perception-Institute-2014.pdf [https://perma.cc/ZH2K-25Q3].

The idea of judges contending with personal explicit biases is nothing new. There is an entire body of literature about how judges must face the challenges of their own biases as well as the overall biases that exist in the legal system.[108] One author even posits that "[j]udges have the most intractable bias of all: the bias of believing they are without bias."[109]

Yet, the study of implicit biases among judges is still developing. In fact, the Rachlinski Study showed that ninety-seven percent of judges asked in a survey believed that they were in the top twenty-five percent of judges avoiding racial prejudice in the courtroom as compared to the other thirty-six conference attendees.[110] There is clearly a disconnect here in terms of how these judges perceive their own freedom from biases as compared to others, and what is even numerically possible.[111] As Judge Bernard Shientag notes:

> by failing to appreciate [the universality of implicit bias], many judges are lulled into a false sense of security. . . . [P]rogress will be made only when judges recognize this condition as part of the weakness of human nature. Then, "[h]aving admitted the liability to prejudice, unconscious for the most part, subtle and nebulous at times, the next step is to determine what the judge, with his trained mind, can do to neutralize the incessant play of these obscure yet potent influences."[112]

Decision makers treating bias with intentionality may very well decrease the chance of bias affecting a decision. As Justice Hyman of Illinois notes, "[j]udges mindful of their ability to discriminate and determined to avoid it may be able to counteract their implicit bias."[113] Again, having judges be very deliberate about the work of implicit biases may help deter their biases from entering into the decision-making process.[114]

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108. *See* Bassett, *supra* note 57, at 1564; Breger, *supra* note 2, at 19; Kang et al., *supra* note 3, at 1181; Roberts, *supra* note 76, at 832; Selmi, *supra* note 38, at 228–29.

109. KENNETH CLOKE, MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION 13 (2001).

110. Rachlinski et al., *supra* note 10, at 1225.

111. Kang et al., *supra* note 3, at 1172.

112. Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507, 510–11 (1990) (quoting Bernard L. Shientag, *The Virtue of Impartiality*, *in* HANDBOOK FOR JUDGES 58 (Glenn R. Winters ed., 1975)); *see also* Breger, *supra* note 2, at 23 (finding that some judges even prefer juries to insulate themselves against accusations of bias).

113. Hyman, *Implicit Bias*, *supra* note 76, at 40.

114. *Cf.* Selmi, *supra* note 38, at 230 ("Again, this is not a simple proposition. Increasing

As stated earlier, there are a multitude of ways in which implicit biases may play out in cases, such as what the Rachlinski Study and others note, in criminal sentencing matters.[115] Judges at all levels must address biases and preconceived notions of litigants who appear before them.[116] In an ideal world, countering bias would be an ongoing daily process, but as a practical matter, fighting bias may often fall lower on the priority list due to substantial dockets and the emotional toll of tough cases.[117] This is a salient aspect of most busy, urban trial courts, particularly criminal and family courts, where there are lengthy dockets, difficult issues, repeat players, and often quick decision making from the bench.[118]

As noted by now retired Judge Richard Neely: "[t]here is . . . always an element of human judgment that enters any complicated case, which is why the process traditionally calls upon the organized collective intelligence of a trial court judge, [a] trial

awareness is likely to have the strongest effect on those who are receptive to the notion that implicit bias is a real issue, and that discrimination remains a pervasive societal force. In contrast, increasing awareness is likely to have little effect on those who resist the very concept of implicit bias."). *But cf.* Tryon P. Woods, *The Implicit Bias of Implicit Bias Theory*, 10 DREXEL L. REV. 631, 640 (2018) ("To wit, if racism is so deeply ingrained as to constitute the unconscious, then why would we expect a program of rational consciousness-raising about implicit bias to effectuate changes in the unconscious?").

115. Rachlinski et al., *supra* note 10, at 1214–16.

116. Gregory S. Parks, *Judicial Recusal: Cognitive Biases and Racial Stereotyping*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 681, 696 (2015) ("[E]ven where there is a black judge/black litigant dynamic—the judge should consider the possibility of his or her own subconscious bias in deciding whether to recuse him- or herself.").

117. Bennett, *supra* note 1, at 394 ("[W]here courtroom participants are overwhelmed with more cases than proper resources, such conditions create a rich environment for systemic implicit racial biases to thrive and infect every aspect of courtroom criminal proceedings."); *see* Marouf, *supra* note 48, at 436 (regarding immigration courts) ("Lustig's survey of IJs reveals shockingly high levels of burnout and low motivation. Overall, the responses received from fifty-nine IJs demonstrated 'significant symptoms of secondary traumatic stress.' Many IJs 'reported that the work was emotionally draining.'" (quoting Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 57, 74 (2008))).

118. NAT'L CTR. FOR STATE COURTS, STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 1–2 (2012), https://horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf [https://perma.cc/8BRY-EGZZ] (detailing research that suggests that when judges are in highly emotional states and forced to engage in low effort decision making there is an increased risk of a decision made under the influence of implicit bias). Although this article is focusing on implicit bias based upon characteristics or identify of litigants, this author has earlier suggested that the risk of judicial bias in another way can be seen if the same judge has presided over other parts of cases in that same family. Breger, *supra* note 2, at 18.

jury, and at least one appellate court."[119] The human judgment aspect can be even trickier and more problematic when the same trier of fact deals with the same family year after year, particularly as that family encounters multiple crises.[120] This is a situation that is not uncommon in family law cases, because many states have "One Family, One Judge" paradigms, which allows one judge to preside over a multitude of cases involving the same family members.[121] Furthermore, family court proceedings generally lack juries.[122] While having one finder of fact has multiple benefits, such as making decisions holistically and fully, and potentially increasing the speed of the process and reducing the expenditure of judicial resources, having one finder of fact may also create unique circumstances in which implicit biases can more readily manifest.[123] The judge may then have bias arising from both legal and factual knowledge of the cases that a different judge or a jury may lack.[124] A family court judge, for example, may be constantly

119. State v. Morgan Stanley, 459 S.E.2d 906, 914, 921 (W. Va. 1995).

120. *See* Breger, *supra* note 2, at 17–18; *e.g.*, *In re* Jamal S., 809 N.Y.S.2d 512, 513 (App. Div. 2006) (finding that the lower court committed reversible error when it refused to conduct a separate *Mapp* hearing prior to commencement of the fact-finding hearing). The court concluded that the error

> cannot be deemed harmless under the facts and circumstances of this case. Even though it is true that a judge, by reason of learning, experience, and judicial discipline, is uniquely capable of distinguishing the issues and making an objective determination based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision, in this case, the evidence adduced on the fact-finding and suppression issues was so intertwined that it cannot be determined what evidence the Family Court relied upon in making its determinations, and effective appellate review is therefore precluded.

Id. (citations omitted).

121. *See* NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ONE FAMILY, ONE JUDGE: EVALUATING A RESOURCE GUIDELINE'S "BEST PRACTICE" (2013), https://www.ncjfcj.org/sites/default/files/One%20Family%20One%20Judge%20Snapshot.pdf [https://perma.cc/5VYX-WN5H].

122. Breger, *supra* note 2, at 2; Breger, *supra* note 17, at 571.

123. *See* Breger, *supra* note 2, at 30–33. Several researchers have proposed making jurors aware of their own implicit bias by educating in various proposed ways with the hope that it will lead to less bias in juries. *See* Roberts, *supra* note 76, at 830–31; Kang et al., *supra* note 3, at 1181–84.

124. *See* Breger, *supra* note 2, at 17–18; Sherilynn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 444–45 (2000) ("Jurors, who serve only once a year or every two years at most, may be better able temporarily to suspend familiar stereotypes and judgments about facts than can judges. Judges, especially trial judges who face an overloaded docket of cases each day, may be more likely unconsciously to fall back on the stereotypes and stories, which we all use as a shorthand to categorize people and events in our lives." (footnotes omitted)).

exposed to the same family for multiple crises spanning across many years and possibly generations.[125] The litigants recount intimate details in front of the same judge.[126] Compare this to a jury, which would be unaware of the previous family law issues before the court without any preconceived notions about the litigants.[127]

Biases, including implicit biases, are not necessarily negative in every context, but can still be negative upon application in a trial court setting. In another example borrowed from family law, this author has previously written about the dangers of "implicit motherhood bias"—which, while on its face may seem positive (e.g., mothers as nurturing caregivers)—can then be damaging as applied in the courtroom (e.g., mothers as all-knowing, all-loving selfless creatures—anyone less is neglectful).[128] As Dr. Cameron Wedding notes, when training judges nationwide, implicit biases, even when not malicious, can impact judicial decision making in subtle ways, such as in "assessments of risk . . . [and] differential application of policies and procedures."[129]

Another issue that comes into play in busy, urban courts with emotionally laden facts is that such intense cases "may not resonate to the same degree to a factfinder who has heard 'the same story' before."[130] Judges are not immune from becoming jaded or skeptical after years of hearing traumatic stories.[131]

Furthermore, the issues that are often raised in many trial courts, such as in criminal and family courts, may fundamentally arise out of poverty or lack of resources on the part of litigants. This sets up a distinction between a litigant and a judge, in that a litigant may believe that a judge from a different cultural, racial, sexual, or socioeconomic background would be unprepared to grapple with certain issues that arise in the case, even if that were not actually true.[132] With regard to socioeconomic status, it is well-

125. *See* Breger, *supra* note 2, at 17.

126. *Id.* at 17–18, 23, 27.

127. *See id.* at 22–23.

128. Breger, *supra* note 17, at 573–74.

129. Wedding, *supra* note 14.

130. Breger, *supra* note 2, at 22.

131. *Id*.

132. *Id*. at 25. For instance, this can arise in domestic violence cases. *See* LINDA C. FENTIMAN, BLAMING MOTHERS 46 (2017) ("[S]ome judges may not believe female witnesses,

established that a judge's income is generally much higher than that of the average American's income, and "[l]ike all people, judges are influenced by their economic backgrounds."[133] Some researchers have argued that due to common economic disparities between judges and litigants, it often becomes difficult for a judge to fully understand the hardships faced by indigent litigants.[134]

> The difference in economic status between judges and litigants has not gone unnoticed, and the public is increasingly equating wealth with the ability to obtain fairness in American courts. A recent survey by the National Center for State Courts found that Californians believe the level of fairness in state courts is least for those with low incomes and non-English speakers. Nationally, 62% of Americans believe the courts favor the wealthy.[135]

Thus, even if it is not the case that many judges may, in fact, favor the wealthy, it is still a perception held by a wide swath of the population.

Some judges are already keenly aware of how personal experiences may impact how a judge views a particular case. For example, Judge Graffeo, a former judge on the New York State Court of Appeals, stated:

> I think many people underestimate to what extent people bring their personal philosophy and life experiences to cases, and I think that's true whether you're on the trial bench or whether you're on the appellate bench. Judges are still people. They have their own value systems, they have their own professional experiences, they have their own life experiences. That's the lens through which they examine the facts of a case. So, when you have people of different economic backgrounds, different ethnic, racial, gender, whatever, I think that it brings a different richness to the discussion.[136]

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especially victims of domestic violence, because they cannot conceive of themselves in that situation." (citing Diane P. Wood, *Sex Discrimination in Law and Life*, 1999 U. CHI. LEGAL F. 1, 5–6)); Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 252–53 (1993).

133. Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 142 (2013).

134. *Id.*; *see* FENTIMAN, *supra* note 132, at 45–46 (noting that most judges come from privileged backgrounds, often different from the litigants appearing before them); Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1229 (2006) ("[J]udges of different racial and ethnic backgrounds are likely to be more familiar with the reasoning and experiences underlying views commonly held within their particular communities.").

135. Neitz, *supra* note 133, at 143.

136. Interview by John Caher with Victoria A. Graffeo, Former Assoc. Judge, N.Y. State Court of Appeals, at Albany Law School (Oct. 27, 2016), https://ww2.nycourts.gov/sites/def

B. *Litigant Perceptions About Bias in the Courtroom*

For the legal system to remain a respectable institution, a litigant's sense of justice should not be eroded, as addressed more fully in the next part. A litigant may perceive that a judge is biased, even when that bias does not exist.[137] "In the mindset of the litigants, it may be impossible for a single jurist to purge her mind of previously formed impressions of the litigants, witnesses, and their families, especially if they have appeared before this same trier of fact in other proceedings."[138]

As a result, litigants may prefer finders of fact who have lived experiences similar to their own.[139] In earlier research, I have addressed the subject of litigants and procedural justice and how litigants may feel more obliged to comport with court orders, believe that justice was fairly served, or feel their voices have been heard if they believe that the legal system has treated them fairly.[140] This could be especially applicable in cases of family law or criminal law, where so much is at stake.

In 2016, the New York State Bar Association ("NYSBA") more deeply explored litigants' perspectives of court systems. In doing so, the NYSBA examined litigants' perceptions of those who work in the justice system, such as judges and attorneys.[141] The study found some dissonance between the legal system and the litigants, particularly when these litigants felt "othered" by their identity or role in contrast to the majority of the decision makers in the courtroom, such as the lawyers and the judges.[142] Thus, it is

ault/files/document/files/2018-04/VGraffeo10-27-16.pdf [https://perma.cc/5BPS-D6XM].

137. Breger, *supra* note 2, at 19–26.

138. *Id.* at 23.

139. *See* Breger, *supra* note 17, at 577–78.

140. *Id.* at 577 ("[A] particular female litigant may construe bias from a court, child welfare agency, or lawyer, even if it is not consciously intended. This sense that bias exists is especially probable when a female litigant recognizes the power imbalance between herself and those who work in 'the system' and are deciding the ultimate fate of her family and whether her family will be able to stay together."); *see* Breger, *supra* note 2, at 19–21.

141. Letter from John S. Kiernan to Judge Betty Weinberg Ellerin, *supra* note 106.

142. *Id.*; *see* Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1041 (2011); *see also* Wilson, *supra* note 112, at 512 ("[S]tudies confirm that male judges tend to adhere to traditional values and beliefs about the natures of men and women and their proper roles in society. The studies show overwhelming evidence that gender-based myths, biases, and stereotypes are deeply embedded in the attitudes of many male judges, as well as in the law itself. Researchers have concluded that gender difference has been a significant factor in judicial

important to keep in mind that litigants may be concerned about judicial implicit bias, whether or not it actually exists.

C. *Exploring Ways to Minimize or Counter Implicit Bias in the Courtroom*

The promising news is that there are some fairly straightforward strategies to lessen implicit bias in the judiciary. As noted above, if one is committed to countering biases, then one can work to decrease them. Data has consistently replicated and validated that the first step in minimizing implicit biases is to be aware and cognizant of one's own biases.[143] As addressed earlier, this can be accomplished in a number of ways within any organization, such as IAT test taking.[144]

While some scholars would argue that judges may only reduce bias by explicitly announcing their biases and prejudices before appearing on a case,[145] other scholars believe that there are less drastic measures. For example, states such as New York, Minnesota, and California have required sitting judges and practicing lawyers to include credit hours of diversity and inclusion training to eliminate bias as part of continuing legal education, required to continue practicing law.[146] This issue was raised nationally at the ABA meeting in February 2016 in the form of Resolution 107, which was approved unanimously by the ABA House of Delegates.[147] The report on Resolution 107 in relevant part:

> encourages all state, territorial and tribal courts, bar associations and other licensing and regulatory authorities that *currently* require

decision-making, particularly in the areas of tort law, criminal law, and family law. Further, many have concluded that sexism is the unarticulated underlying premise of many judgments in these areas, and that this is not really surprising having regard to the nature of the society in which the judges themselves have been socialized." (citing N.J. Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980))); Rhode, *supra* note 39.

143. *See* Lee, *supra* note 15, at 291; Woods, *supra* note 114, at 635, 637.

144. *See* Williams, *supra* note 104.

145. LINDA G. MILLS, A PENCHANT FOR PREJUDICE: UNRAVELING BIAS IN JUDICIAL DECISION MAKING 22–23 (1999).

146. *See* EILEEN M. LETTS & DAVID B. WOLFE, AM. BAR ASS'N, RESOLUTION 107, at 1–2 (2016); Katherine Suchocki, *New CLE Requirement: Diversity & Inclusion and Elimination of Bias in Legal Profession*, N.Y. ST. B. ASS'N, http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=75350 [https://perma.cc/AVK7-RXDY] (last visited Apr. 1, 2019).

147. RESOLUTION 107 (AM. BAR ASS'N 2016).

> mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias ("D&I CLE").[148]

In 2017, New York State mandated diversity and inclusion continuing legal education for all attorneys.[149] The diversity and inclusion component to training could be included in judicial continuing legal education nationwide for all judges as well.[150]

The Brennan Center, housed at New York University Law School, likewise recommends implicit bias training for judges, as well as training for those who are tasked with selecting judges.[152]

In jurisdictions where judges are not elected, judges are selected by various nominating groups.[153] "Some states mandate or offer voluntary training for judicial nominating commissioners[,]" as data indicates that implicit biases can influence who receives an interview, how candidates are evaluated, and who is ultimately selected for the judgeship.[154]

Training for new judges, as well as for sitting judges, is an important step in decreasing the effects of implicit bias in the judiciary. This effort can be furthered by the use of IAT scores, as they can be useful in "[h]elp[ing] newly elected or appointed judges understand the extent to which they have implicit biases . . . ."[155] Specifically, as the Rachlinski Study notes:

> [K]nowing a judge's IAT score might serve two other purposes. First, it might help newly elected or appointed judges understand the extent to which they have implicit biases and alert them to the need to

148. LETTS & WOLFE, *supra* note 146, at 2.

149. *See* Suchocki, *supra* note 146.

150. Though some would argue a small amount of training may lead participants to be overconfident about overcoming bias.

152. *See* KATE BERRY, BUILDING A DIVERSE BENCH: A GUIDE FOR JUDICIAL NOMINATING COMMISSIONERS 7 (2016), https://www.brennancenter.org/sites/default/files/publications/Building_Diverse_Bench.pdf [https://perma.cc/MK5N-N8HH].

153. *See id.*

154. *Id*. at 2, 7. Judicial nomination commissioners must also be aware of possible implicit bias in application materials such as cover letters and resumes as observed in the previously mentioned "resume experiment." *See* Bertrand & Mullainathan, *supra* note 10, at 991–92.

155. Rachlinski et al., *supra* note 10, at 1228.

> correct for those biases on the job. Second, it might enable the system to provide targeted training about bias to new judges.[156]

Judicial education is common these days, but often requires more than just education standing alone, unaccompanied "by any testing of the individual judge's susceptibility to implicit bias or any analysis of the judge's own decisions . . . ."[157] Research demonstrates that "judges are inclined to make the same sorts of favorable assumptions about their own abilities that non-judges do."[158]

Judge Stewart of Ohio's Court of Appeals addresses the origins of implicit bias and posits that it can ultimately be decreased on the bench.[159] In a 2012 opinion, Judge Stewart describes implicit bias as the result of stereotype formation from one's upbringing, which implicitly becomes a part of one's judicial discretion.[160] Although she argues there is no "cure" to eliminating these deeply hidden ideas, an appreciation of education, as well as discussion and research on implicit bias, could aid in the awareness, and possible elimination, of these influences.[161]

As researcher Masua Sagiv notes: "[t]he Supreme Court [of Canada] held that, although 'neutrality does not require judges to discount their life experiences[,]' it does prohibit them from basing (or appearing to base) their judgments 'on generalizations or stereotypes' rather than on the particular evidence and witnesses that are in front of them."[162]

156. *Id*. (footnotes omitted).

157. *Id*.

158. *Id.*; *see* Sandgrund, *supra* note 6, at 49, 54 ("Studies have shown that implicit racial bias is muted by deep friendships across racial lines. Others propose that each of us employ a 'bias' protocol when we become aware of a personal bias: (1) identify the potential bias; (2) describe the facts of the situation to yourself; (3) consider alternative interpretations; and (4) choose the interpretation most in line with the facts. Cynthia Mares urges that, '[w]e don't have to—and we shouldn't—throw up our hands and say that if the bias is 'unconscious,' it cannot be addressed. Studies have shown that people who pay attention to the assumptions they are making and challenge them can start to change those assumptions.'" (footnotes omitted)).

159. *See* State v. Sherman, 8th Dist. Cuyahoga No. 97840, 2012-Ohio-3958, ¶45 (Stewart, P.J., concurring) (citing Rachlinski et al., *supra* note 10, at 1221).

160. *Id*.

161. *Id*. ¶ 50.

162. Sagiv, *supra* note 65, at 235 (alteration in original) (quoting R.D.S. v. The Queen, [1997] 3 S.C.R. 484, 487 (Can.)).

As important as it is to be conscious of one's own biases as a method of mitigating the effects of such bias, it is by no means the only step. As Professor Cynthia Lee noted, "[r]aising awareness of the possibility of racial bias is a critical first step, but the existing research suggests educating people about implicit bias is not sufficient in and of itself to get them to break the prejudice habit."[163] The ways to decrease bias in bench trials continue to encourage invention and scholarly studies in the area of implicit bias. For example, a group of researchers, in outlining seven strategies to reduce implicit bias in the courtroom, notes that judges should "[i]dentify distractions and sources of stress in the decision-making environment and remove or reduce them."[164]

Another possible method of decreasing judicial bias is exposure to stereotype-incongruent modeling, which consists of "taking affirmative steps to expose decision-makers to situations and examples that specifically contradict the impressions most suggested by their implicit biases."[165] For example, if a judge has negative preconceived notions surrounding a particular race, "increased exposure to positive examples of that race" may assist in diminishing the negative conceptions.[166]

One extremely innovative method to nullify bias in the judiciary and jury was proposed by Natalie Salmanowitz, a Stanford professor, who offers the idea of employing virtual reality training to de-bias finders of fact.[167] Professor Salmanowitz proposes the novel idea of neurointerventions to decrease implicit bias in the courtroom.[168]

163. Clair & Winter, *supra* note 95, at 355 ("As we have shown, a recognition of implicit bias alone is likely insufficient for countering American racial inequality."); Lee, *supra* note 15, at 295.

164. Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 65–69 (2013) (listing strategy four of seven). The other strategies noted by the researchers were: "[r]aise awareness of implicit bias"; "[s]eek to identify and consciously acknowledge real group and individual differences"; "[r]outinely check thought processes and decisions for possible bias"; "[i]dentify sources of ambiguity in the decision-making context and establish more concrete standards before engaging in the decision-making process"; "[i]nstitute feedback mechanisms"; and "[i]ncrease exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes." *Id.*

165. Irwin & Real, *supra* note 105, at 8–9.

166. *Id.* at 9.

167. Salmanowitz, *supra* note 59, at 120.

168. Natalie Salmanowitz, Unconventional Methods for a Traditional Setting: The Use of Neurointerventions to Reduce Implicit Racial Bias in the Courtroom 2 (2015)

There are also proven techniques that can be applied in the courtroom, such as hiring "bias interrupters."[169] Bias interrupters are "tweaks to basic business systems (hiring, performance evaluations, assignments, promotions, and compensation) that interrupt and correct . . . the constant transmission of bias in basic business systems. Bias [i]nterrupters change systems, not people."[170] Thus, rather than "rely[ing] on elaborate 'culture change' initiatives[,]" bias interrupters change the systematic *process* by which bias leads to discrimination rather than the *source* of the bias.[171] One organization suggests a three-step approach: (1) use metrics and data to identify potential bias; (2) implement bias interrupters to comb through the data to reach specific findings of bias and how to go about eradicating it; and (3) repeat as necessary.[172]

Another group of researchers outline in their law review article four distinct ways judges can be less biased, such as judges: (1) doubting their own objectivity; (2) increasing the motivation to decrease bias; (3) improving the condition of decision-making; and (4) increasing judicial accountability by counting.[173]

Professor Tamar Birckhead argues that in order for players in the legal system to remain ethical and true to their beliefs, judges should recognize if they are feeling biased and then actively transcend the bias.[174] Professor Birckhead goes further to assert that the presence of bias in the legal system stems from the fact that the bench and bar are not yet fully diversified.[175]

(unpublished M.A. Thesis, Duke University) (on file with Duke University Libraries).

169. Patricia Devine et al., *Long-Term Reduction in Implicit Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1268, 1271, 1276 (2013) (during a twelve-week longitudinal study, researchers found significant reduction in implicit bias after employing habit-breaking intervention strategies); Williams, *supra* note 104. *But cf.* Vivia Chen, *Diversity Efforts Are Basically Worthless*, AM. LAW. (Sept. 11, 2018, 5:46 PM), https://www.law.com/americanlawyer/2018/09/11/diversity-efforts-are-basically-worthless/ [https://perma.cc/DF9G-JS59] (displaying skepticism of the efficiency of bias interrupters in curbing the ill effects of bias).

170. *See Bias Interrupters Model*, BIAS INTERRUPTERS, https://biasinterrupters.org/about/ [https://perma.cc/9N33-WR6A] (last visited Apr. 1, 2019).

171. *See id.*

172. *See Tools for Organizations*, BIAS INTERRUPTERS, https://biasinterrupters.org/toolkits/orgtools/ [https://perma.cc/69ER-DA6L] (last visited Apr. 1, 2019).

173. Kang et al., *supra* note 3, at 1172–74, 1177–78.

174. *See* Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 447 (2017).

175. *See id.* at 455.

In her article, Masua Sagiv suggests the use of cultural experts within the court.[176] Cultural experts are persons well-versed in the history of particular societies and cultures, most notably anthropologists and sociologists.[177] Sagiv states that such cultural experts may "temper the effect of bias by serving as translators and pushing back against the empirical assumptions that advocates and jurists make in the course of presenting and hearing evidence."[178] She goes on further to explain that:

> Cultural bias is intrinsic to human nature, and it cannot be completely eradicated. Therefore, judges must be aware of this bias even when relying on cultural experts and try as best as possible to minimize its effects on their decision making. Obtaining this awareness should start in law school and be reinforced through professional training programs for jurists and judges.[179]

Yet, as Sagiv also notes in her research, the use of such cultural experts—the very tool used to counter implicit bias—may also *create* a biased judgment, one even worse than before, due to it being "disguised as well-informed and objective."[180]

As Professor Evan Seamone emphasizes, judges are not the only professionals who are on "the quest for greater self-awareness."[181] Thus, "a reasonable course of action for judges would be to exchange ideas with, and borrow tactics from, other professionals who have a greater familiarity with resolving such problems. Even though these answers are not tailored specifically to legal problem-solving, they can enhance the process."[182] Professor Seamone urges judges to engage in the act of journaling to assist judges in increasing their awareness of such implicit biases.[183]

A question arises if diversifying the judiciary could reduce implicit bias. With such critical goals in mind, this article next

176. Sagiv, *supra* note 65, at 230.

177. *Id.* at 235.

178. *Id.*

179. *Id.* at 256.

180. *Id.* at 251. Sagiv states that judges may use these cultural experts to rationalize their preconceived notions and may even "hide the judge's preexisting cultural agenda." *Id.* at 251–52.

181. Seamone, *supra* note 61, at 30.

182. *Id.* at 30–31 ("Just as doctors use the wrong figures when making estimates, so do judges. Just as language limits doctors' diagnoses, it similarly limits judicial options. Just as doctors may see facts as pointing to one distinct answer only to realize that an alternative view was equally, if not more, permissible, so do judges." (footnote omitted)).

183. *Id*. at 68.

addresses the hypothesis about whether diversifying the judiciary would have any meaningful effect on minimizing implicit bias.

III. WOULD A JUDGE WHO HAS FACED BIASES IN PERSONAL LIFE BE MORE AMENABLE TO RECOGNIZING AND MINIMIZING HIS OR HER OWN IMPLICIT BIASES?

In this next part, I posit a bold hypothesis to be tested: would a judge who has faced personal bias in his or her own life be more amenable to recognizing, and thereby decreasing, implicit biases during trials? Judges who have lived experiences of the reality of biases are acutely aware of the pernicious effects of bias. Feeling bias searing into one's body at an almost cellular, personal level can perhaps make one more attuned to the feeling of how others similarly situated may feel. Thus, would that person be more sensitive to, or at least more willing to minimize, his or her own biases?

I borrow from various strands of social science literature to introduce this idea worthy of further research. A judge of color, or a female judge, or a Muslim judge, or an LGBTQ judge might see bias in different ways. Intersectionally, taken all together as one person, a female, Muslim, African American, lesbian judge,[184] may also see bias differently. All of theses judges may be painfully aware of societal bias and may see implicit biases on a daily basis, whether in the form of microaggressions or subtle racism or sexism.[185] That judge could perhaps be more amenable to recognizing her own biases on the bench.

If the first step in reducing implicit biases is to recognize such biases, this step may come more readily if one has already faced bias personally. In no way am I suggesting that only particular types of judges experience bias. A Christian male, heterosexual, cisgender Caucasian judge may also have faced multiple biases for various reasons: by virtue of his family structure, his marital choice, the composition of his family, a disability, his social class,

184. Sagiv, *supra* note 65, at 231 ("For example, an African-American lesbian woman belongs to at least three cultural groups, each with its own unique cultural content and distinct manifestations in the woman's life.").

185. *Cf.* Parks, *supra* note 116, at 696 ("For instance, a black judge may be explicitly pro-black but implicitly pro-white, which may influence his or her judgments and behaviors to an even greater degree.").

or a whole host of other reasons. The point in diversifying the judiciary is just that—it should be diverse in every way—and no one judge can argue that another judge has never faced bias.[186] A diversified bench might lead to better and informed decision making as well as reducing bias.[187]

Yet overall, a richly diverse bench, however diversity is defined, could bring experiences and perspectives to the table in more robust ways than may be possible with a less diverse bench.

A. *Diversifying the Judiciary*

Many who would argue for a more diverse judiciary would point to the benefits of a comparative, multifaceted understanding of the law, as opposed to a less diverse, uniform, and singular understanding of the law.[188]

At the trial level, diversity on the bench can be meaningful from a symbolic and substantive place to the litigants, to the public, and to the courtroom. Academics have written about the value of diversity at the appellate level, where there is already a process of group decision making not available in bench trials that may reduce implicit biases in the case outcome or decision.[189] Many

186. *See* American Judicature Society, Editorial, *Judicial Diversity—an Essential Component of a Fair Justice System*, 93 JUDICATURE 180, 180, 182 (2010) ("[Judges] exchange ideas on and off the bench. A judiciary that is comprised of judges from differing backgrounds and experiences leads to an interplay and exchange of divergent viewpoints, which in turn prevents bias, and leads to better, more informed decision making. Diversity of opinion among decision makers encourages debate and reflection and fosters a deliberative process that leads to an end product that is greater than the sum of its parts.").

187. *See id.*

188. *See id.*

189. *See* Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts,* 57 AM. J. POL. SCI. 167, 167 (2013) ("Because appellate courts are multimember courts, with cases decided by panels of judges, individual differences in voting may not necessarily lead to any differences in *case outcomes*, due to the fact that a minority judge is likely to be outnumbered on any given panel. Thus, whether judicial diversity has large-scale consequences depends on whether it leads to differences not just in individual voting by judges but also to differences in case outcomes, which is what litigants care about and what shapes the development of legal doctrine in a system of *stare decisis*." (emphasis omitted)); Milligan, *supra* note 134, at 1238 ("Within judicial panels, collegial deliberation allows alternative conceptions to be aired and passed from judge to judge. As judicial panels vary over time, this allows further diffusion. On a larger scale, the creation of new precedents upholding alternative conceptions of equality or fairness alters the legal framework itself and transmits new conceptions to other judges. At an informal level, judges may share their views on political morality via conversation at conferences and commentary in legal journals." (footnote omitted)). *See generally* Sherilynn A. Ifill, *Judicial Diversity*, 13

researchers have persuasively argued "why diversity matters" beyond the optics,[190] and why a diverse team of players increases the intelligence, the innovation, and the loyalty of the group.[191] Reasons garnered from various studies and surveys include:

> [A] judiciary that is representative of the population's diversity increases public confidence in the courts[, and] . . . a diverse bench provides decision-making power to formerly disenfranchised populations. . . . [T]he diversity of the bench is linked to broader issues of representation, as "some scholars assert that judicial legitimacy is increased with enhanced levels of nontraditional judges, as their decisions are more infused with 'traditionally excluded perspectives' and their presence enhances the appearance of impartiality for [both] litigants . . . and for the public at large."[192]

As observed in a NYSBA Report:

> Yet it is more than just the perception of fairness that impacts judicial efficacy. It is the actual quality of justice that suffers when judicial diversity is lacking. Although we know this intuitively, empirical studies have also confirmed that diverse judges decide certain types of cases differently than their white male colleagues and that minority and female judges on appellate benches can also influence the decisions of their colleagues and improve the collective decision-making process.
>
> In short, judicial diversity is essential because it provides equal opportunity to underrepresented groups, presents role models to encourage our youth, inspires confidence in our justice system and, most importantly, promotes justice.[193]

Judge Jenny Rivera, another New York Court of Appeals Judge, notes[194] the myriad reasons why diversity on the bench matters, including reasons such as: symbolism, role modeling, increase of public confidence in the administration of justice, and creation of

GREEN BAG 2D 45 (2009) (describing the importance of judicial diversity to public trust).

190. Marouf, *supra* note 48, at 446–47 ("[I]ncreasing the [Board of Immigration Appeals'] diversity by appointing more female members and people of color could help reduce implicit bias. The gender balance of the BIA, in particular, merits closer examination in exploring ways to reduce implicit bias, since female IJs grant asylum at a rate that is 44% higher than their male colleagues." (footnotes omitted)).

191. *See* Williams, *supra* note 104.

192. MALIA REDDICK ET AL., AM. JUDICATURE SOC'Y, EXAMINING DIVERSITY ON STATE COURTS: HOW DOES THE JUDICIAL SELECTION ENVIRONMENT ADVANCE—AND INHIBIT—JUDICIAL DIVERSITY? 1 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731012 [https://perma.cc/QFH3-GAM6].

193. N.Y. STATE BAR ASS'N, JUDICIAL DIVERSITY: A WORK IN PROGRESS 2 (2014), https://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html [https://perma.cc/8TC7-5NMF].

194. Jenny Rivera, *Diversity and the Law*, 44 HOFSTRA L. REV. 1271, 1271 (2016).

an environment supporting a popular belief that the system is fair.[195] She explains further that we need to recognize that some members of our population believe there can be no justice if they do not see someone like themselves in positions of power and influence.[196]

On the topic of symbolism, Judge Rivera cites a report that discusses the importance of having a diverse bench, because it creates increased levels of trust and perceived government legitimacy in the judiciary.[197] Goals of diversity in the judiciary are, as the report claims, important on the symbolic level, but also on the substantive level of legal decisions, because a more heterogeneous set of differences on the judiciary will yield more balance, access, and equal opportunity for individuals from any walk of life who come before a court.[198] As further supported by Professor Nancy Scherer, "the placement of black judges on the . . . bench is vital because it sends a message to black citizens that they, too, have access to positions of influence. . . . [T]hey provide *substantive* representation of black perspectives in the . . . courts."[199]

In terms of gender diversity, one area where researchers often see a disparity in substantive voting behavior between male and female judges is Title VII sexual harassment and sexual discrimination cases.[200] Judge Edward Chen, the first Asian Pacific American judge on the federal bench for the Northern District of California,[202] has also written on the topic of the need for diversity on the bench, writing:

195. *Id*. at 1274.

196. *Id*.

197. *Id*. at 1275 (quoting DINA REFKI ET AL., CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, WOMEN IN FEDERAL AND STATE-LEVEL JUDGESHIPS 1 (2011)).

198. *Id.*

199. Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655, 656 (2004).

200. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776 (2005). Although research does vary on the topic, data collected by Jennifer Peresie shows that although plaintiffs lost in a majority of cases, such plaintiffs had a noticeably higher chance of succeeding where a female judge was on the bench. *Id.* at 1779. This finding is further supported by research conducted by Matthew Knepper and research by Christina Boyd, Lee Epstein, and Andrew Martin. Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010); Matthew Knepper, *When the Shadow Is the Substance: Judge Gender and the Outcomes of Workplace Sex Discrimination Cases*, 36 J. LAB. ECON. 623, 659 (2018).

202. Edward M. Chen, *The Judiciary, Diversity, and Justice For All*, 91 CALIF. L. REV. 1109, 1110 (2003).

> Diversity can establish the credibility of an institution, build bridges to other communities, and increase sensitivity to and awareness of diverse clientele and constituents . . . .
>
> . . . .
>
> At the same time, diversity provides role models for those historically excluded. It can provide a source of hope and inspiration for those who would otherwise limit their horizons and aspirations.
>
> . . . .
>
> A diverse judiciary signals the public acknowledgment of historically excluded communities and sends an invaluable message of inclusion. It enhances courts' credibility among affected communities who would otherwise feel they have no voice within the institution. It helps dispel traditional stereotypes that Asian Pacific Americans and other minorities are not sufficiently intelligent, articulate, or decisive to be judges. And it assures students and young lawyers from historically underrepresented communities that they need not limit their aspirations.
>
> Of course, as with any other institution, diversity also enhances the quality of judicial decision making.[203]

Judge Bertha Wilson of Canada mentions yet another reason why diversity on the bench matters. Specifically, she found that having more women on the bench lessened sexist remarks and inappropriate language in the courtroom.[204] Judge Wilson bases her conclusions about professionalism in the courtroom, in part, upon data gathered by New York and New Jersey task forces on gender bias.[205] Furthermore, researcher Angela Melville addresses the importance of female inclusion into the judiciary.[206] Melville suggests that such gender diversity is necessary in order to bring a gendered perspective to judging (having different experiences and ways of understanding the law and other social constructs),[207] that it is a "basic tenet of democracy"[208] in that having more women on the bench better represents the demographics of those whom

203. *Id*. at 1116–17.

204. *See* Wilson, *supra* note 112, at 513.

205. *Id.* at 514 (citing REPORT OF THE NEW YORK TASK FORCE ON JUDICIAL DIVERSITY TO GOVERNOR CUOMO (1991), *reprinted in* Joaquin G. Avila, *The Future of Voting Rights Litigation: Judicial and Community College Board Elections*, 6 BERKELEY LA RAZA L.J. 127, 129–31 (1993)).

206. Angela Melville, *Evaluating Judicial Performance and Addressing Gender Bias,* 4 OÑATI SOCIO-LEGAL SERIES 880, 884 (2014).

207. *See id.*

208. *Id.* at 888.

judges serve and that it also provides a symbolic role in that female inclusion "ensure[s] public confidence in the judiciary."[209]

If a diverse bench could increase public confidence in the judicial system,[210] it may suggest to a litigant that decisions will reflect a diverse understanding of situations in society. As a service to the public, and theoretically a reflection of public opinion, the law reflects the ideal of fairness when exercised. In reality, however, the law's objectivity can become mired in various ways. This can give the perception of a monolithic institution of the law that only serves the interests of the majority or is not representative of minority groups. Ideally, the legal system and the law should reflect the entire society it represents.

B. *Why Might a Diverse Judiciary Reduce Bias?*

Beginning with the assumption that the legal system ideally should reflect all of society,[211] this then leads to my next question, where I urge further empirical research on the topic of implicit bias. Would a judge who has lived the reality of bias be uniquely positioned to recognize bias more readily when seeing it in the courtroom? Or, put differently, would a judge who has faced bias be more prone to see bias exhibited in a court?

Regarding gender diversity in the judiciary, Sherilynn Ifill writes:

> [N]obody is just a woman or a man. Each of us is a person with experiences that affect our view of law and life and decision-making. Nevertheless, as "'outsiders' in the American legal system,' women judges are uniquely positioned to recognize, engage, and legitimate outsider narratives in the deliberative process.[212]

209. *Id.* at 889.

210. *See generally* Letter from John S. Kiernan to Judge Betty Weinberg Ellerin, *supra* note 106 ("Studies [of the legal field] have demonstrated that diversity in staffing promotes differences in perspective that enhance professional performance."); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 10 (2004).

211. MICHAEL E. MORRELL, EMPATHY AND DEMOCRACY: FEELING, THINKING, AND DELIBERATION 1 (2010) ("There is a promise inherent in democracy: before a society makes decisions that it will use its collective power to enforce, it will give equal consideration to everyone in the community. The development of collective decision-making institutions that take into consideration a wider range of interests did not begin with the rise of modern democracies.").

212. Ifill, *supra* note 124, at 448–49 (quoting Shirley S. Abrahamson, *The Woman Has*

Ultimately, race, gender, sexual preference, and other identity characteristics are not proxies for how one might view a case, and being of a particular race or gender does not automatically make one more sympathetic to those of the same race or gender. In other words, we can never assume that all women judges will see certain types of cases one way, or that all African American judges will decide uniformly.[213] There is no monolithic view of any particular judge. All judges need to be mindful of their own idiosyncratic biases, which is especially true when a judge believes he or she is not biased toward a particular group. Indeed, some would argue that female judges are less sympathetic to female litigants or issues regarding gender, as they may be judging such litigants as to how they themselves would have acted in a similar situation.[214] That said, the lived reality of a judge is often the view that ultimately shapes how that judge sees a case.

Diversity should be examined through the lens of intersectionality.[215] Many litigants and lawyers who appear before the judiciary have multiple aspects of their identity—a black lesbian woman, for example. Likewise, the judiciary itself may also include individuals who identify with more than one group, and therefore possess a unique perspective on the issues before them.[216] Intersectionality addresses how these various aspects of a person comprise a complex, nuanced individual not to be essentialized into a particular group, stereotype, or monolithic mold.[217] Thus, when addressing diversifying the judiciary in this

Robes: Four Questions, 14 GOLDEN GATE U. L. REV. 489, 494 (1984)).

213. *Id.* at 409–10 ("In so doing, diversity advocates need not, and indeed should not, argue that the African American community is monolithic in its configuration, views, or values, or that only one 'black perspective' exists. Essentializing African American communities or judges denies the richness and complexity of African American political thought.").

214. *See* FENTIMAN, *supra* note 132, at 191; Breger, *supra* note 17, at 564–66; Czapanskiy, *supra* note 132, at 252–53.

215. Crenshaw, *supra* note 21, at 1244 (defining "intersectionality").

216. Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 POL. RES. Q. 219, 225 (2008) (concluding that minority female judges are significantly more likely to support criminal defendants' claims than minority male, Caucasian female, and Caucasian male colleagues).

217. *See* James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 789 (2004) ("However, it is generally difficult for a homogenous judiciary of affluent white men to understand and explain the socially diverse realities of poverty, race, and gender.").

article, I am speaking about increasing diversity on a number of levels.

We also need to be mindful that diversity exists even within particular groups. As Justice Sonia Sotomayor once explained: "[n]o one person, judge or nominee will speak in a female or [a] people of color voice."[218] This is true for any culture, gender, ability, or religion. There are wide variations within any particular group. As Professor Sherilynn Ifill notes in her law review article: "[i]t must also be recognized that despite common cultural connections, great diversity exists within the African American community as well."[219] One can never assume a particular viewpoint on any topic just based upon a person's identity. That being said, Ifill goes on to explain, "[i]ndividual African Americans cannot help but be aware of the history that links all African Americans to one another. Nor can African Americans deny the reality that present day racism continues to connect the collective future of all African Americans."[220]

With that being said, diversity on the bench potentially opens up the range of perspectives.[221] It can be argued that reform towards a diverse judiciary would promote systematic reform on multiple grounds beyond simply eliminating ideological biases. Again, if the goal is to minimize implicit biases, then we need to look at bias more globally.

Notably, Professor Nicole Negowetti speculates that implicit bias may actually be one reason why the bench is not as diverse as it should be.[222] While some researchers have suggested that implicit biases are more evident when we have a non-diversified bench, others disagree.[223] Some have argued that the justice

218. Hon. Sonia Sotomayor, Judge, Fed. Court of Appeals, Judge Mario G. Olmos Memorial Lecture at UC Berkeley School of Law Symposium: Raising the Bar (Oct. 26, 2001), https://www.berkeley.edu/news/media/releases/2009/05/26_sotomayor.shtml [https://perma.cc/ZF9A-ERQH].

219. Ifill, *supra* note 124, at 420.

220. *Id.* at 422.

221. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 986 (2006) (discussing that elimination of implicit bias can create interdependence among all group members and create accountability for decision makers' decisions).

222. *See* Negowetti, *supra* note 22, at 951–52.

223. Rivera, *supra* note 194, at 1276 ("Some data supports the argument that judges of different races, ethnicities, and genders may reach different conclusions. Some data finds no support for such a conclusion.").

system rewards those who conform to acceptable norms before a judge.[224] Diversifying the bench gives the possibility of ascertaining multiple norms for any individual to be accounted for in the legal system.[225] Implicit bias can further permeate the court system without the input of a multitude of judicial viewpoints.[226]

Some researchers posit that judicial diversity can itself be a remedy to counter implicit bias; the creation of a diverse bench introduces ideas that were once viewed as foreign to becoming the norm in decision making.[227] For example, assembling a judiciary from a cross section of society will reflect a judicial approach that is representative of an entire nation's people.[228] As explained by researchers Pat Chew and Robert Kelley: "[a] more integrated judiciary that is representative of American society would expand judicial perspectives, prompt a more deliberative process, and help assure more accountable and responsive decision-making for 'citizens of all walks of life,' thus facilitating a more fully-functioning democracy."[229]

Indeed, this concept does not rest on the physical attributes of the judge, but instead pivots on the views of the individual judge and perhaps the bias an individual judge may have experienced.[230] A court may then approach the case before it from a broader set of experiences, as opposed to the commonly held perception of the law

224. Birckhead, *supra* note 174, at 413.

225. Rivera, *supra* note 194, at 1280.

226. Birckhead, *supra* note 174, at 419; *see* Rivera, *supra* note 194, at 1274 ("Justice cannot be blind if it is imparted by a group that overwhelmingly shares a common experience and appearance to the exclusion of others.").

227. MILLS, *supra* note 145, at 23; N.Y. STATE BAR ASS'N, *supra* note 193, at 6; Johnson & Fuentes-Rohwer, *supra* note 210, at 10; Wynn & Mazur, *supra* note 217, at 783 ("Thus, judicial impartiality is not the absence of experience[,] but rather the presence of human experience coupled with an open mind. Accordingly, in our pursuit to attain an independent and impartial judiciary, we cannot escape the reality—and consequences—that each judge brings to the bench a sum of life experience.").

228. *See* Jerome McCristal Cuip, Jr., *Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy*, 38 LOY. L. REV. 61, 63–64 (1992). For insight into how critical race theory is defined and how it manifests in an academic setting, see *id*. *See also* Anthony Paul Farley, *Lacan & Voting Rights*, 13 YALE J.L. & HUMAN., 283, 290–91 (2001) (discussing the immersive impact of judicial opinions through the lens of critical race theory).

229. Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs Race and Judges' Race*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91, 115 (2012).

230. *See id.*

that is ruled upon by a narrow section of the population. As one researcher has noted:

> Implicit social cognition research indicates that implicit bias in decision makers can be reduced through exposure to individuals who are different from us. In other words, diversity is not only a result of a less biased workplace, profession, and legal system, but it is also a means of deactivating and countering stereotypes and implicit biases.[231]

Thus, perhaps diversifying the judiciary has an additional benefit: increasing the number of individuals who may readily embrace the idea of openly addressing and decreasing implicit biases in judging. This is, in fact, the genesis for my urging of actual quantitative research in this area.

Additionally, would a litigant of color or a litigant oppressed in any number of ways hold a perception that like-minded or similarly situated judges may be more empathetic to him/herself, and thus more empathetic to his or her case more broadly? Would such a litigant be more comfortable in the courtroom or be more apt to comply with any resulting court order?[232]

Of course, it must be noted that there exist minority group judges making legal claims contrary to minority interests, such as many commentators might say of United States Supreme Court Justice Clarence Thomas.[233] Some have argued that Thomas' judicial decisions are in fact antithetical to minority interests, as could also be the case for other judges of color or who are otherwise diverse.[234] Such voices and experiences as minority representatives are nonetheless imperative regardless of court

231. Negowetti, *supra* note 22, at 951–52 (footnote omitted).

232. Breger, *supra* note 2, at 3; Johnson & Fuentes-Rohwer, *supra* note 210, at 29 (demonstrating that it is in the interests of the judiciary to compel community respect, as opposed to being viewed as an illegitimate "kangaroo court").

233. Johnson & Fuentes-Rohwer, *supra* note 210, at 14–15, 47. In Johnson and Fuentes-Rohwer's reference to Justice Thomas, they also cite the decision of *Grutter v. Bollinger*, the landmark Supreme Court decision providing the use of affirmative action in student admissions as a compelling state interest in furthering educational goals. Grutter v. Bollinger, 539 U.S. 306, 308 (2003). Justice Thomas was among the four votes cast in dissent. *Id*. at 349 (Thomas, J., dissenting).

234. *See* Mary Kate Kearney, *Justice Thomas in* Grutter v. Bollinger*: Can Passion Play a Role in a Jurist's Reasoning?*, 78 ST. JOHN'S L. REV. 15, 32–34 (2004) (explaining that Justice Thomas did not vote in favor of affirmative action in *Bollinger*; however, his own experiences with affirmative action "strengthen[] his voice in the debate").

outcomes. Again, there is a wide range of possibilities here, which deserves further empirical research.

Another current Supreme Court Justice, then a federal circuit court judge, Sonia Sotomayor, addressed the issue of judges drawing from their life experiences when speaking with Berkeley Law students—thereafter catapulting to fame the phrase "a wise Latina woman."[235] Quoting our great Justice, who contends that the gender and ethnicity of a judge can alter judicial decision making:

> Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.
>
> . . . .
>
> Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. I can and do aspire to be greater than the sum total of my experiences[,] but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.[236]

C. *How Could Experiencing Personal Prejudice Be Relevant to Reducing Implicit Bias in the Courtroom?*

The effects of bias are lasting and pernicious. Those who have experienced prejudice personally "might experience shame, anger, sadness, withdrawal or an increase in motivation to make changes," notes sociology professor Laurie Mulvey.[237] Researcher Michael Inzlicht notes in a psychological study:

235. Sotomayor, *supra* note 218.

236. *Id*.

237. Lucie Couillard, *The Impact of Prejudice on Society,* DAILY COLLEGIAN (Sept. 27, 2013), https://www.collegian.psu.edu/news/crime_courts/article_a86ea0dc-270a-11e3-ad90-0019bb30f31a.html [https://perma.cc/Y4EP-WKHC].

> People who felt they were discriminated against[—]whether based on gender, age, race or religion[—]all experienced significant impacts even after they were removed from the situation.
>
> . . . .
>
> These lingering effects hurt people in a very real way, leaving them at a disadvantage[.] [E]ven many steps removed from a prejudicial situation, people are carrying around this baggage that negatively impacts their lives.[238]

If an individual has been subject to personal bias, will that individual be more motivated or more amenable to curbing bias in general? Would that individual be more cognizant of his or her own biases personally or professionally? Would that individual be more sensitive to the pernicious effects of bias upon decision making? If the answers to these questions are "yes" and that individual is in fact a judge, would that not mean that diversifying the judiciary might reduce implicit biases?

There is no conclusive answer yet about whether or not one who has suffered in the context of certain prejudices may be a better evaluator of individuals who have suffered similar prejudices. Many would argue, however, that a judge who clearly expresses "empathy" or "understanding" with a cause is more suitable to take a more exacting stance to claims where a prejudice is involved, as opposed to a judge who is not equipped with such emotional capacity.[239] The concept of empathy in the legal discourse comes with the benefit of enlarging one's understanding and hearing issues differently, which can ultimately reshape how legal problems are addressed.[240] A judge should be able to listen to stories and guide application of the law from a holistic standpoint.[241]

238. April Kemick, *Stereotyping Has Lasting Negative Impact,* U.S. NEWS (Aug. 12, 2010), https://www.usnews.com/science/articles/2010/08/12/stereotyping-has-lasting-negative-impact [https://perma.cc/NNM2-AJ9A].

239. *See, e.g.*, Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1562, 1564–65 (2012) (discussing President Obama's observation that "empathy" is an essential facet of a judge's understanding and identifying with individuals).

240. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1577 (1987). *But cf.* Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, JUDGES' J., Fall 2015, at 20, 21. Marks' own experiences of facing prejudice did not necessarily help eradicate her own implicit biases in the courtroom, "I remember thinking that, as a victim of bias myself, I would be particularly sensitive and skilled at detecting my own implicit bias and knowing how to neutralize it." *Id.*

241. *See* Note, *Being Atticus Finch: The Professional Role of Empathy*, *in* To Kill a Mockingbird, 117 HARV. L. REV. 1682, 1684–85 (2004).

The hypothesis of whether those judges who maintain empathy to litigants who appear before them are more capable of sound rulings than those judges who lack empathy must be tested by interdisciplinary quantitative or qualitative research. It is worth exploring further if the presence in the judiciary of those who believe that they have faced bias—any kind of bias—might help decrease bias in the overall legal system.

This article ends with the hope and challenge that these questions be explored scientifically. If the conclusion, after study and data, is that those judges who have experienced bias in life are more amenable to interrupting their own biases on the bench is "yes," then that is yet one more additional reason why diversifying the judiciary can benefit our larger society and the legal system.

CONCLUSION

In sum, judges must be mindful of the inevitable implicit biases they harbor, as every human admittedly does. If judges could be made aware of their particularized implicit biases, they may be successful in minimizing these biases from seeping into their own decision making. Furthermore, as this article outlines, there are a whole host of other strategies for judges to try to reduce their implicit biases. Thinking even beyond such strategies, perhaps judges who have faced personal biases in their own lived experiences would more readily or more honestly embrace the exercise of reducing implicit bias and seek more insight into the effect that implicit bias has upon their case decisions. There are numerous reasons why diversifying the judiciary is a benefit to society as a whole. Reducing bias may be yet one additional and invaluable benefit to strive toward. Research awaits.