

Chapter 1

Decision Making, Implicit Bias, and Judges Is This Blindfold Really Working?

Judge Chad Schmucker (ret.) and
Joseph Sawyer, the National Judicial College

Chapter Highlight

- The leading judicial educators offer their perspective on implicit bias and a pre-test to capture your interest.

At the National Judicial College, we have long worked to teach judges to make impartial decisions. Over the past decade, we have been leaders in talking with our participants about the emerging science concerning implicit bias. This chapter offers a brief introduction from our perspective at the college. While later chapters provide more in-depth information and analysis on implicit bias, we offer something of a pre-test to spark thinking on the subject and to spur interest in learning more.

We begin by asking whether all human beings have implicit bias, even judges. And we answer in the affirmative. Since they are implicit, we are unaware of these biases and their impact on judicial decision making. But we need to be aware of their potential impact. Also referred to as heuristics, mental shortcuts, cognitive blind spots, schemas, mental associations, and implicit associations, implicit biases allow the human brain to operate more efficiently. But unfortunately, the increase in efficiency can come at a price with a human toll. What are we to make of the claim of implicit bias in judges? Is it real? Is there something that can be done about it? Does it apply to you as a judge?

At the National Judicial College, we know many of us are active learners who learn the most not from reading but from interaction—such as answering questions or participating in a discussion. In this context, think about and answer the questions that follow. Write your answers down on a separate piece of paper and review them after you finish this book.

How Much Do You Know?

For questions 1–6, answer A (agree), D (disagree), or DK (don't know).

- 1. Fairness is a core value of judges and courts.
- 2. Decisions influenced by implicit bias are unfair.
- 3. If a judge is trying to be fair and is listening to the argument or evidence, it doesn't matter if the judge has an implicit bias.
- 4. Using common sense will avoid the effects of implicit bias.
- 5. Most judges who have an implicit bias already know they have it.
- 6. Implicit bias is a process that works unconsciously in our brain.

For questions 7–21, answer T (true) or F (false).

- 7. Judges are different from human resources managers, large law firm partners, college professors and doctors so we shouldn't expect any implicit bias in judges.
- 8. Judges are regularly given feedback on their decisions or courtroom behavior which would highlight the need for implicit bias training.
- 9. The appellate process is effective in preventing decisions based on implicit bias.
- 10. The judicial discipline process is effective in preventing decisions based on implicit bias.

We are assuming you have some idea of what is meant by implicit bias, but just in case you don't, here is what we mean: implicit bias is the bias that you have that you are unaware of. Although you can have an implicit bias relating to gender, race, national origin, religion, ethnicity, age, size, sexual orientation, and many other characteristics, for this quiz, let us assume we are talking about an implicit racial bias.

How do you think you did on the pre-test? From those of us who come to this book with little knowledge to those who come with much, there is no doubt still much to be learned. And why should we be paying attention? The science-based research on implicit bias is significant. Writing a decade ago, researchers observed, "As disturbing as this evidence is, there is too much of it to be ignored."¹ By 2015, the annual national review of evidence on implicit bias concluded, "As convincing research evidence accumulates, it becomes difficult to understate the importance of considering the role of implicit racial biases when analyzing societal inequities."² Indeed, by 2016 that same review observed, "It is hardly exaggeration to say that at times 2015 felt like the year that the term

- ___ 11. Merit selection of judges will reduce the amount of implicit bias.
- ___ 12. An independent Judicial Performance Evaluation system will reduce implicit bias.
- ___ 13. If you have an implicit bias there really isn't anything you can do about it.
- ___ 14. Most law schools include course work on implicit bias.
- ___ 15. Most attorneys as part of their CLE have attended training on implicit bias.
- ___ 16. As long as a judge has taken an oath to follow the law and faithfully perform the duties of the position of judge in an unbiased manner, training on implicit bias is unnecessary.
- ___ 17. Most "new judge schools" include implicit bias training.
- ___ 18. Most judges recognize the need for implicit bias training.
- ___ 19. Most judges believe other judges need the training more than themselves.
- ___ 20. If a judge needs the training an attorney or colleague is likely to recommend it to them.
- ___ 21. Surveys of public confidence in the fairness of the courts have shown that the general public and the African American population have about the same level of confidence.

'implicit bias' truly permeated society in ways that had previously been beyond compare."³ This cumulated research demonstrates that implicit bias is found across multiple areas of society—in medical care, in employment, in education, in housing, in criminal justice. So too emerging research continues to demonstrate the significance of ingroup and outgroup status where the structure of the human brain compels each of us to think in terms of "us and them."⁴

If the emerging science and our own perspective at the National Judicial College are correct, then what does this all mean? Can we deny that many of our decisions are probably affected by implicit bias? If fairness is a core value, then can we accept this as an unavoidable influence on decisions? Is periodic implicit bias education essential for the judiciary? As a judicial officer, when attending your next training event, will you sign up for the latest update on evidence or choose a session on implicit bias? Which subject matter, evidence or implicit bias, will most improve the administration of justice?

We expect these questions have started you thinking about the importance of regular judicial education on implicit bias for all judges. We trust that you

4 ENHANCING JUSTICE: REDUCING BIAS

will continue on with the other chapters in this book, which offer answers to most of the questions we posed; after completing this book, review your original quiz and see if your answers change.

SO YOU'D LIKE TO KNOW MORE

- ABA, Hidden Injustice: Bias on the Bench, <http://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission/implicit-bias.html>
- ABA, Implicit Bias & Judges: How Innate Attitudes Shape Behavior, Even on the Bench, <http://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission/implicit-bias.html>
- ABA, *The Science and Implications of Implicit Bias*, <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-videos.html>
- Mahzarin R. Banaji & Anthony G. Greenwald, *Blindspot: Hidden Biases of Good People* (2013)

ABOUT THE AUTHORS

Judge Chad C. Schmucker is president of the National Judicial College. He has been a lawyer, judge, and state court administrator. He is a graduate of the University of Michigan and Wayne State Law School. The National Judicial College has been teaching judges about bias since its inception over 50 years ago and incorporates implicit bias training into many of its courses.

Joseph Sawyer has been a member of the National Judicial College's staff since 1986 and is the Distance Learning and Educational Technology Director. He is a former president of the National Association of State Judicial Educators and serves on the association's diversity committee. He was a lecturer at the Russian Academy of Justice in Moscow during the summer of 2004, the James A.A. Pierre Judicial Center in Liberia in 2009 and 2011, and in Bosnia in 2011 for the Organization for Security and Cooperation in Europe. Mr. Sawyer is a graduate of the Leadership Institute for Judicial Education. Within the United States, he has taught more than 200 educational workshops for judges and judicial branch staff in 22 states and the District of Columbia on behalf of the National Judicial College, the U.S. Department of Justice, the Executive Office of Immigration Review, the U.S. Department of Labor, the American Bar Association Rule of Law Initiative, the Occupational Health and Safety Hearing Commission, and the Administrative Office of the Courts of various states.

ENDNOTES

1. Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CALIF. L. REV. 1063 (2006).
2. Cheryl Staats et al., *State of the Science: Implicit Bias Review* 61, KIRWAN INSTITUTE 2015, available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf>.
3. Cheryl Staats et al., *State of the Science: Implicit Bias Review* 11, Kirwan Institute 2016, available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf>.
4. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 69 (2013).