

# Preface

Judge Theodore McKee

At the dawn of the 20th century, noted sociologist, activist, and scholar W.E.B. DuBois told those assembled at the first Pan-African conference in London, “The problem of the Twentieth Century is the problem of the colour-line.”<sup>1</sup> Now from the perspective of the 21st century, we see that our society and our institutions have clearly made dramatic progress since DuBois’s pronouncement in 1900, but the problems of the color line persist. To be sure, the kind of explicit overt discrimination and racism associated with the era of Jim Crow and DuBois’s time is no longer the social norm.<sup>2</sup> Yet, our society is still plagued by inequalities and inequities. The glaring disparities in our institutions that are committed to education and justice reveal that various bias-derived divides persist.<sup>3</sup> The disparity appears as early as elementary school, where disparate treatment is visited upon children because of entrenched biases. These differences increase potential exposure to, and inclusion in, the criminal justice system. Researchers call this the “school-to-prison pipeline” because poor children and children of color are funneled from school disciplinary systems into prisons by the time they are in their teens.<sup>4</sup>

Outcomes like these based on race, ethnicity, gender, socioeconomic level, and other differences among people are well known and all too common. We need to ask ourselves how and why these disparities persist and why they are so common, despite decades of commitment to diversity and equality. As Professor Philip Atiba Goff puts it,

How does one explain persistent racial inequality in the face of declining racial prejudice? This riddle, which I call the “attitude-inequality mismatch” question . . . is the fundamental problem facing contemporary scholars of race in the United States. . . . A related and equally provocative question, however, is this: Why have we not answered this question yet?<sup>5</sup>

Professor Goff—and many others—suggest the possible (albeit partial) answer lies in the emerging understanding of implicit bias, the subject of this book.

Having been a judge at the trial or appellate level for over 30 years, I can attest to the fact that, as a singular profession, we judges want our decisions to be based only on the unbiased application of the law to the facts or the record before us. We view fairness and objectivity as our hallmark and continuously work to ensure that our decisions are devoid of any improper influence. Yet, a substantial body of research casts doubt on our ability to do this because, like everyone else, we harbor biases of which we are not even aware.

As Daniel Gilbert, Professor of Psychology at Harvard University, has explained, “Judges . . . strive for truth more often than we realize, and miss that mark more often than they realize. Because the brain cannot see itself fooling itself.”<sup>6</sup>

Numerous studies have shown that even though we may not be aware of the bias that lurks within, our acculturation results in implicit bias in each of us that is imprinted onto our subconsciousness and is as intractable in its placement as it is pervasive in its influence. This bias is present in all jurisdictions, at all levels of our justice system, and in all types of cases. It affects our judgment as well as our actions and thereby infects the very institution that we depend upon for fairness and the just resolution of disputes: the courts.

In speaking for a plurality of the U.S. Supreme Court in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,<sup>7</sup> Chief Justice Roberts opined that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Yet, research shows that our neurological circuitry does not include an on/off switch that, when tripped, disables the bias that has accumulated in our subconscious mind. Rather, the most we can hope for is that each of us will be sensitized to our own unconscious bias and then consciously guard against allowing it to affect our attitudes or behavior. As Harry Edwards, the former Chief Judge of the U.S. Court of Appeals for the District of Columbia, has advised, “[O]ne’s personal beliefs should be consciously, rather than subconsciously recognized.”<sup>8</sup> Judge Edwards explains, “The real threat that a judge’s personal ideologies may affect his decisions in an inappropriate case arises when the judge is not even consciously aware of the potential threat.”<sup>9</sup>

Surely we all can agree that the most fundamental principle of any judicial system is fairness. Judges, no less than lawyers, victims, and defendants, want and expect equal treatment from courts. Like everyone else, judges abhor the notion that our actions are affected by any kind of bias. As Professor Gilbert correctly opined, we see ourselves as striving for fairness and giving equal treatment before the law. For us judges, that is the source of considerable pride as well as personal and professional satisfaction.

However, judges are not the only actors in the judicial system. Police exercise tremendous discretion in deciding whether to make the initial arrest that is the entree into the criminal justice system.<sup>10</sup> Prosecutors must decide whom to charge and what to charge them with, and jurors must decide who is telling the truth if the initial arrest results in a trial.

Police, prosecutors, and jurors all strive to be fair. During the decade I served as a trial judge, I was always struck by how seriously jurors tried to be fair as well as how earnestly they attempted to follow my instruction to find the facts based on the evidence before them and apply the law as I explained it to those facts. And yet, despite the good intentions and best efforts of those involved in our system of justice, there is significant evidence of bias in the system. Studies have found bias at every level of the judicial system, from the initial encounter with police to the judge who imposes the sentence. People of color have higher rates of conviction in contested matters, tend to get longer

sentences even when controlling for all other factors, and tend to more often have children removed from the home in child welfare matters.

It is therefore not surprising that communities of color have much lower trust and confidence in the justice system. Recent studies find that even those who identify as a member of an ethnic majority often receive a different level of justice. Decisions about whom to arrest, whom to charge, whom to convict, and the appropriate sentence are all affected by implicit bias. Given this unpleasant truth, it is understandably difficult for some members of our society to embrace the courts as champions of the rule of law. Such skepticism is understandable when the actions of courts and judges adversely impact people based (at least in part) on their race, ethnicity, or gender. Since we are not aware of the extremely subtle—yet powerful—subconscious bias that dwells within each of us, we cannot be aware of its influence on us, our actions, or our judgments. Rather than the insight most of us assume and hope that we have, our wiring contains a “blindspot” that conceals the underlying attitudes that are actually influencing, and even controlling, our actions,<sup>11</sup> just as Professor Gilbert has explained.

I submit that this is particularly true of judges, and research bears this out.<sup>12</sup> Our very identity is inextricably intertwined with the notion of fairness and the belief that our minds are as free of bias as are our rulings and judgments. That is our job, and we dedicate our professional (and often our personal) lives toward that end. We also set the tone for the proceedings we preside over, and we are therefore primarily responsible for ensuring the fairness of the judicial system.

It is therefore particularly difficult for us to acknowledge that, like everyone else, our human frailty conditions us to be unwitting hosts to what Mahzarin Banaji refers to as “mind bugs.” Mind bugs, she explains, are small cues, such as implicit biases, that can have a powerful impact on our decision making. “Mind bugs operate without us being conscious of them.” Banaji further explains that “[t]hey are not special things that happen in our heart because we are evil.”<sup>13</sup> But assumptions lead to attitudes, and attitudes lead to choices that, in the context of the judicial system, can have lasting, far-reaching consequences. It is especially difficult for those of us who are judges to recognize this frailty.

However, nothing suggests that we must accept or tolerate bias in our judges, ourselves, or our institutions. Rather, as Judge Edwards counseled and as research has confirmed, we can take steps to neutralize and control that bias if we recognize its existence and consciously struggle to negate its influence. Fortunately, steps are being taken to do precisely that. For example, the National Center for State Courts is actively engaged in helping judges recognize and neutralize implicit bias.<sup>14</sup> The Federal Judicial Center is integrating the concept of implicit bias into the curriculum for all new federal judges and ensuring that the subject is being discussed at national judicial workshops for federal judges. In the words of Judge Jeremy Fogel, Director of the Federal Judicial Center, “[B]eing able to recognize implicit bias and deal with it is one of the core competencies of being a judge.”<sup>15</sup>

While these and other constructive steps are being taken by the judiciary, our success can only be measured over time. Moreover, although judges do set the tone for the system, the fate of those caught up in it is also determined by the initial decision to arrest, the severity of any charge that is filed, the conclusion of jurors, and the crime of which one is ultimately convicted. As I noted at the outset, within the judicial system, important decisions are also being made by lawyers, parties, prosecutors, juries, and court personnel that can be unwittingly influenced by bias.

This book helps explain how so many who pride themselves on being fair can be part of a system that is so widely seen as unfair by those who have historically been the victims of bias and prejudice, as well as by others. It is the result of an effort undertaken by the American Bar Association to address the ubiquitous problem of subliminal bias and its impact on the judicial system. It was written by an exceptional and diverse team of authors, all with expertise relevant to understanding and ameliorating implicit biases. Judges, lawyers, social scientists, professors, and experienced trainers worked together to bring cutting-edge research and thinking to this effort. The result offers both perspective and practical advice from their disciplines and their collaboration. While not all the authors would agree on each possible approach, the focus is on best practices, as we know them today, which can enable courts to lessen the impact of implicit bias. As Drs. Devine and Forscher describe, we seek to “break the bias habit” by increasing knowledge and awareness of implicit bias, improved understanding and practice of procedural fairness and of culturally competent communication across cultures, and a sustained commitment to mindfulness.

While each chapter can be read and used on its own, there is a method to this book’s organization that should prove helpful. The first two chapters are introductory. Chapter 1, “Decision Making, Implicit Bias, and Judges: Is This Blindfold Really Working?,” is authored by Judge Chad Schumacher and his colleague Joseph Sawyer from the National Judicial College and serves to orient us to the task of reading and using the book. These lifelong educators offer a “pre-test” to spark our interest and thinking (and they suggest we revisit the test at the end of the book). Chapter 2, “Framing the Discussion,” written by Judge Bernice B. Donald and Professor Sarah E. Redfield, also orients us to the rest of the book. These women were part of the American Bar Association’s early entry to the field of implicit bias and are well-regarded thinkers and trainers on the topic. They share their own personal reflections on implicit bias and its ramifications, and then provide an introduction to the basic vocabulary of implicit bias, group identity, micromessaging, and debiasing. This chapter provides the scaffolding upon which the rest of the book builds in more depth and with more nuance.

The next three chapters introduce us to social science and its relationship to fairness in the judicial system. Chapter 3, “Implicit Bias: A Social Science Overview” by Professors Justin D. Levinson, Laurie A. Rudman, and Danielle

M. Young, provides the social science overview in the legal context. Chapter 3 is powerful in its review of the science, showing us how even the best-intentioned among us may, because of implicit unconscious bias, be making decisions with which we would honestly and explicitly disagree. Chapter 4, “Manifestations of Implicit Bias in the Courts,” is authored by Judge Mark W. Bennett, and Chapter 5, “Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do about It,” is by Judge Andrew J. Wistrich and Professor Jeffrey J. Rachlinski. These men are all pioneers in the field, known for their theoretical work, empirical research, and practical application of those to the actual courtroom and on-the-ground practices. Their chapters address the issue of implicit bias from the perspective of courts and judges and offer specific suggestions, grounded in law and science, for next steps.

The next two chapters consider the issues of implicit bias and group preference from additional perspectives. In Chapter 6, “When Myths Become Beliefs: Implicit Socioeconomic Bias in American Courtrooms,” Professor Michele Benedetto Neitz discusses implicit bias as it plays out around socioeconomic status and adds another valuable layer to our understanding. While much of what is written about implicit bias deals with race, this chapter reminds us that implicit bias is triggered by many associations and it negatively affects many groups. It is a dynamic that operates on and negatively affects “the other,” however that other might be defined. In Chapter 7, “With Malice toward None and Charity for Some: Ingroup Favoritism Enables Discrimination,” we reproduce a thought-provoking piece by two renowned psychologists, Professors Anthony G. Greenwald and Thomas F. Pettigrew. While Professor Greenwald is sometimes called the father of the Implicit Association Test (IAT—the most common method used to measure implicit bias), in this chapter he and his colleague draw our attention away from this topic to a related—they would say more important—area: group favoritism. Professors Greenwald and Pettigrew suggest that issues we thought of as outgroup hostility are better construed as ingroup favoritism and that this favoritism grounds much of the discriminatory behavior we see.

The next two chapters move us toward an understanding of what we can *do* to ameliorate the negative impacts of implicit bias or group favoritism. These chapters harken back to concepts we have seen before—cultural competence, community relations, and procedural fairness—and connect these ideas with the new thinking on implicit bias and how we might overcome such biases. Chapter 8, “Hearing All Voices: Challenges of Cultural Competence and Opportunities for Community Outreach,” is authored by an exceptional interdisciplinary team—Kansas Court of Appeals Judge Karen Arnold-Burger, cultural competence expert Jean Mavrelis, and attorney and mediator Phyllis B. Pickett. These experienced and expert authors provide strong insight into culture, communication, and community. Their discussion of hypothetical encounters offers an excellent opportunity to improve in these areas in a practical way. Chapter 9, “Procedural Fairness,” brings us the expertise of two absolute leaders in this field, Minnesota District Judge Kevin Burke and Kansas Court of Appeals Judge

Steven Leben. Here they provide important and practical steps for improving fairness and the perception of fairness while at the same time reducing the likelihood of implicitly biased decision making.

The next four chapters hone in further on ways to become aware of and ameliorate implicit bias and its negative impacts. Chapter 10, “Considering Audience Psychology in the Design of Implicit Bias Education,” is written by two social scientists/lawyers. Professor Victoria C. Plaut and her colleague Contra Costa County Deputy District Attorney Christina S. Carbone present best practices for designing and implementing implicit bias training. Recognizing there is still much to learn and assess, their examination of the issues of whether and how to train ourselves offers an excellent primer for next steps. Chapter 11, “Awareness as a First Step toward Overcoming Implicit Bias,” is authored by Cynthia Lee, a professor of criminal law who has written extensively about race, gender, and sexual orientation norms, particularly how these identities can influence verdicts in self-defense and provocation cases. Here, she focuses on the significance of awareness as a necessary step to other training. Chapter 12, “Knowledge-Based Interventions Are More Likely to Reduce Legal Disparities Than Are Implicit Bias Interventions,” is written by Dr. Patricia G. Devine and her colleague Dr. Patrick S. Forscher, both highly regarded social scientists. They offer their analysis of knowledge-based interventions as the preferred way to break the prejudice habit as they call for us to move our attention from the narrow focus on implicit bias and the IAT to a more established and sustainable focus grounded in the science of habit breaking. Chapter 13, “Assessing Interventions to Reduce Judicial Bias: Fighting Implicit Bias—What Judges and Lawyers Can Do,” is again a chapter crafted by a diverse team of lawyer/scientist authors. Drs. Lindsay M. Perez, Monica K. Miller, Alicia Summers, and Shawn C. Marsh bring insight from their analytical backgrounds coupled with their experience offering training to suggest methods for evaluating this kind of work.

The final two chapters return to judges and to reflection. In Chapter 14, “Combating Bias through Judicial Leadership,” Judge Sophia H. Hall, Presiding Judge of the Circuit Court of Cook County, Illinois, describes her journey learning and teaching about bias. The chapter is certainly aptly titled; her convening power and leadership are extraordinary. Also inspirational is Chapter 15, “On Being Mindful,” Judge Jeremy Fogel’s thoughtful—and dare I say mindful—essay on the value of mindfulness in the judicial arena. Judge Fogel gives us a chance to reflect, and well we should.

If we are to ever eradicate the “colour-line,” that DuBois spoke of over 100 years ago, each of us must be mindful; each of us must cast a critical eye inward and examine our attitudes far more carefully than will be comfortable. This book provides an excellent starting point for explaining the need for this introspection as well as for developing strategies and mechanisms that will hopefully, one day, allow each of us to “stop discriminating” so that we can more honestly and intelligently move toward a judicial system that is truly based on impartiality and fairness and is recognized as such.

## ABOUT THE AUTHOR

Judge Theodore McKee recently stepped down from the position of Chief Judge of the U.S. Court of Appeals for the Third Circuit. He was appointed to that court in 1994 by President Clinton after having served 11 years as a state trial judge and after serving as an Assistant U.S. Attorney and a Deputy City Solicitor. During his tenure on the court, he co-chaired a task force on racial bias within the Third Circuit and made implicit bias a focal point of his tenure as chief judge.

## ENDNOTES

1. PETER FRYER, *STAYING POWER: THE HISTORY OF BLACK PEOPLE IN BRITAIN* 285 (1984).
2. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2002); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).
3. See, e.g., Chapter 2, "Framing the Discussion," and Chapter 4, "Manifestations of Implicit Bias in the Courts" (discussing the manifestation of bias in the criminal justice system and elsewhere).
4. The U.S. Department of Education has collected data from which it has concluded that Black children represent only 19 percent of preschool enrollment but account for 47 percent of preschool children receiving out-of-school suspensions. The report concluded that racial disparities in suspensions are also apparent in K-12 schools. U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, 2013–2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3 (2016), available at <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.
5. Phillip Atiba Goff, *A Measure of Justice: What Policing Racial Bias Research Reveals, in BEYOND DISCRIMINATION: RACIAL INEQUALITY IN A POST-RACIST ERA* 157, 173 (Fredrick C. Harris & Robert C. Lieberman eds., 2013).
6. Daniel Gilbert, Op-Ed., *I'm O.K., You're Biased*, N.Y. TIMES, Apr. 16, 2006, <http://www.nytimes.com/2006/04/16/opinion/im-ok-youre-biased.html>.
7. 551 U.S. 701, 748 (2007).
8. Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 409–10 (1983–84).
9. *Id.*
10. See Jane W. Gibson-Carpenter & James E. Carpenter, *Race, Poverty, and Justice: Looking Where the Streetlight Shines*, 3–SPG KAN. J.L. & PUB. POL'Y 99, 101 (1994) ("Police officers who have worked in many types of neighborhoods acknowledge that they call home to middle-class parents more readily. Between suburban and urban departments, the difference can be even more striking. A department of college-educated officers in a suburb of Minneapolis in the 1970s went so far as to invite parents and children into the station to discuss their problems confidentially, with virtual immunity from formal handling."). The discrepancy in arrests rates based on race and socioeconomic factors has also been borne out by a 2013 report by the Sentencing Project, which pointed to a wide body of scholarship indicating that socioeconomic factors influence disparities in arrest rates. See generally THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (2013), available at <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCP.pdf>.
11. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).
12. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 3 (2009). Researchers studied judicial attitudes using questionnaires that had been completed by a random sample of 167 federal magistrate judges. Relying on that study, as well as others, the researchers concluded that judges harbor implicit bias like

others and the biases can affect judicial decision making when we are unaware of the need to monitor our decisions for racial bias. *Id.* The good news is that researchers also concluded that when judges are aware of a need to suppress implicit bias, it appears that we are willing and able to do so.

13. Shankar Vedantum, *The Bias Test*, WASHINGTON POST MAGAZINE, Jan. 23, 2005, at 42, *available at* [http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21\\_4.html](http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21_4.html).
14. *See generally* PAMELA M. CASEY ET AL., NAT'L CENTER FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), *available at* [www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB\\_report\\_033012.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx).
15. Personal interview with Judge Fogel, reprinted with his permission.