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Playing Favorites? Implicit Bias on the Bench

Michele Benedetto Neitz
Golden Gate University School of Law, mneitz@ggu.edu

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Prof. Michele Benedetto Neitz

**W**hat is Implicit Bias and In-group Favoritism?

When Starbucks announced that it would close all of its 8,000 stores for a few hours on a Tuesday afternoon in May 2018, its customers and employees were surprised. The company closed its stores to require all of its employees to attend a half-day training on implicit bias. The training was a response to the inappropriate arrest of an African-American man at a Starbucks in Philadelphia. By closing its stores and losing an estimated $12 million that Tuesday afternoon, Starbucks intended to send a message about the importance of inclusion and diversity. The company's actions also prompted a debate about implicit bias and the effectiveness of such trainings.

The concept of implicit bias has moved to the forefront of public discussion in the last decade, and many judges have already been trained on this issue. But it is worth considering how a specific type of implicit bias, in-group favoritism, may affect a judge's everyday decisions.

Implicit biases can be defined as the attitudes or stereotypes that affect our minds in an unconscious manner. Because they are unconscious, implicit biases can be activated without our awareness or control. In some cases, our implicit biases may differ from our explicit beliefs. For example, a "career woman" who has spent her life advancing the ladder in a corporate law firm may hold an implicit bias that women are actually supposed to be home with children.

How can there be such a disconnect? The answer lies in the fact that implicit biases stem from exposure to direct and indirect messages beginning in childhood. If a teacher or parent reinforced the message to a child that women
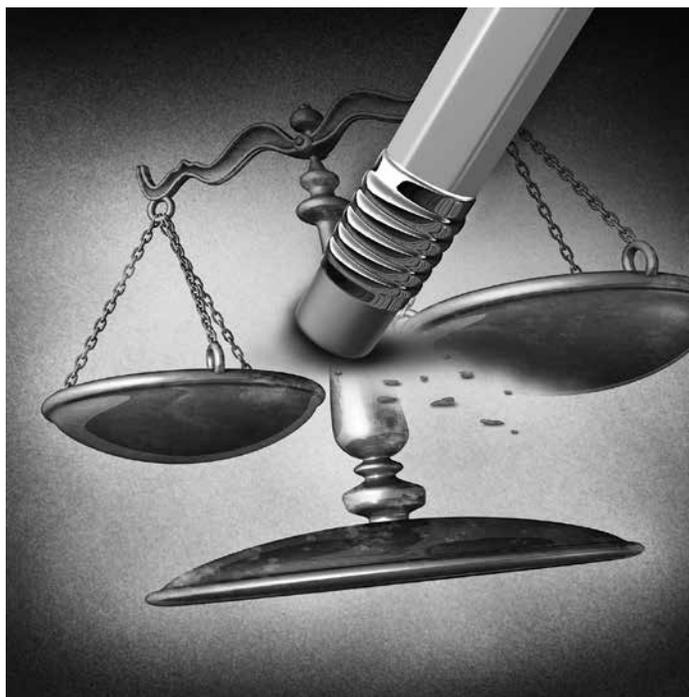
should remain in the home and not venture into the workplace, this association may remain with the child throughout her life. As the child becomes an adult, additional implicit associations from media or news sources may be influential. Consequently, despite consciously rejecting the stereotype of the stay-at-home woman, the corporate lawyer may subconsciously harbor a version of that stereotype without her awareness.

Everyone holds implicit biases. They may be based on associations related to gender, race, age, disability, sexual orientation, or socioeconomic status. Even individuals with avowed commitments to impartiality, such as judges, hold implicit beliefs that can affect their actions and decisions without awareness. In some cases, such as the corporate lawyer described above, these biases may actually contradict our explicit beliefs.

This is a particularly important issue for judges. Judges are among the most educated members of our society, and it would be comforting to believe that judges, more than the general population, can avoid the influence of implicit bias. To test this theory, two empirical studies recently examined implicit bias among judges. Both studies concluded that judges manifest implicit racial and other biases. For judges, therefore, it is especially critical to examine and challenge any implicit bias that may be unintentionally influencing the decision-making process.

Implicit biases may not always operate as hostile beliefs against a particular group. In fact, as privileged members of the legal profession, judges may be particularly influenced by a type of implicit bias called in-group favoritism. With in-group favoritism,

the personal connections individuals have with another person can affect favorable feelings, judgments and actions toward that person. In-group favoritism can be based on shared characteristics such as race, religion, educational background or even a shared birthday.

For example, a judge selecting law clerks may unconsciously prefer to hire clerks from her law school alma mater, on the implicit assumption that it will be easier to work with a graduate from her own school. This decision is not motivated by hostility toward students from other law schools, but is simply based on the shared experience of the alma mater. Another judge may decide opinions in favor of a litigant who shares his ethnic background because his story seems more "plausible." Again, this decision is not based on the judge's negative attitude toward the other defendant, but is based on a shared background.

Professor Anthony Greenwald theorizes that in-group favoritism actually has more discriminatory impact than outright hostility, because it is insidious and "unremarkable." Although the examples above were not motivated by hostility or negative beliefs, the end result is the same: the clerk applicants from other law schools are not hired, and the defendant who does not share the ethnic background of the judge loses his case.

Given that judges hold a prestigious place in our profession, with a great deal of power and discretion, the presence of in-group favoritism could mean that members of a judge's "in-group" have more access to privilege. This could include prominent jobs (such as clerkships), favorable opinions in court, and even something as minor as letters of recommendation for future employment opportunities.

In-group favoritism becomes more concerning when one looks at the demographic statistics of judges. Although California is one of the most diverse states in the country, California judges and judicial officers are overwhelmingly white and male. This simply means that judges should be aware not just of potential negative implicit biases, but also of the ways in which they may be more inclined to act favorably toward members of their in-group.

Identifying Implicit Bias and In-group Favoritism

There are a number of methods available to test the prevalence of implicit biases.

The Implicit Association Test ("IAT") is an online test that pairs an object (such as a gender or racial group) with an evaluative component (such as good or bad). A participant will attribute the evaluative dimension to the object by pressing a response key on the keyboard as quickly as possible. For example, a gender IAT would ask participants to respond to an image of a woman with "home or career," or "science or arts" responses. Because the response key is pressed automatically, without time for consideration, the response speed of the participants indicates whether implicit attitudes exist. The responses from an IAT can be very illuminating, particularly for individuals who hold implicit biases that differ from their explicit attitudes.

The IAT is not a perfect method. Some critics have noted that it is difficult, if not impossible, to measure whether someone's beliefs are fully subconscious or only partially subconscious. Other critics have argued that the IAT is not helpful unless it can actually predict real-world behaviors. For example, if an IAT shows that I have an implicit bias against scorpions, but I never actually manifest that bias in real life, what does that IAT result actually mean? In fact, several studies have shown an actual connection between implicit biases and real-world discrimination. While the IAT is not perfect, it remains a useful tool for identifying implicit bias.

Additional methods for establishing the existence of in-group favoritism are especially available for judges, who literally have a record of the decisions they make on the bench on a daily basis. A judge interested in determining whether implicit biases are affecting her opinions could ask the court for a data set of her opinions. For example, a criminal court judge could review statistical data to learn whether she tends to sentence defendants of color to longer terms than white defendants. A family court judge could review data to reveal whether she grants custody more often to mothers or fathers. An immigration judge could do the same to find out whether he grants asylum more often or less often to applicants from particular countries, or whether he favors applicants who share his ethnic heritage. In some cases, statistics may say more about the judges' unconscious beliefs than any anecdotal evidence.

How Can Courts and Judges Combat Implicit Bias and In-group Favoritism?

In an ideal world, judges would be able to take deliberative time with each case. This mindful behavior could minimize "snap" judgments and enable judges to consider whether their biases may be affecting their decision-making processes. In the real world, however, the fast-paced nature of California courtrooms leaves little time for consideration. How, then, can judges use their knowledge of implicit bias and in-group favoritism to ensure they are deliberating in a fair and neutral way?

Judges can implement both personal and institutional remedies for implicit bias. The first step is awareness: recognizing how implicit bias manifests in a judge's daily life. Taking one or more IATs would enable a judge to identify where implicit biases may exist in his or her subconscious.

But awareness alone is not enough. In addition to auditing the statistical data of their opinions, as described above, judges can take affirmative steps in their own courtrooms to combat the influence of implicit bias. For example, Judge Mark W. Bennett, Senior District Judge in the Northern District of Iowa and a leading expert on implicit bias, asked his probation officers to stop attaching photographs to probation reports. Judge Bennett was concerned that the photograph would trigger implicit biases that might affect his sentencing decisions. Without the photograph, Judge Bennett's decisions are based only on the facts in his report. Judge Bennett also placed images designed to challenge stereotypes, such as pictures of immigrants becoming new citizens, in strategic places around his courtroom. He even included such images on the "screen saver" on his computer.

Judges could also take steps in their private lives to challenge implicit bias. A judge who lives and works in wealthy neighborhoods could venture beyond her comfort zone to the places where her litigants live. For example, a housing court judge who is often frustrated with defendants who are late to court could try taking the bus from a low-income neighborhood to court. In doing so, the judge may realize that it takes three buses to get to court, none of which tend to arrive on time. Going forward, the judge's empathy and understanding for litigants from that neighborhood may reduce her frustration and result in more neutral decisions.

Judges should also press court systems to implement institutional remedies to address implicit bias. An important step would be modifying courtroom conditions. Judges, especially those in high-volume courts with overcrowded dockets, need more deliberative time to consider how their implicit bias or in-group favoritism may affect their decision-making processes. In this way, the atmosphere in a courthouse can affect the quality of the judging; judges who are not able to take regular breaks or consider cases in chambers cannot be expected to complete their dockets and minimize biases along the way.

Judicial burnout should also be a concern for anyone involved with the court system. One study found that immigration judges reported higher levels of burnout than any other group of professionals, including prison wardens and physicians in high-pressure hospitals. Rotating roles among judges may be one solution. For example, housing court judges could spend time in family court, and civil judges could spend a few months in criminal court. Moving to another bench or another courthouse could prevent burnout and offer a fresh perspective.

Starbucks seeks to be viewed as a corporate trailblazer against bias. With the power to decide the fates of millions of people each day, judges could be even more effective leaders in this area. As the neuroscience of implicit bias and in-group favoritism becomes more advanced, and as mainstream culture begins to accept the prevalent nature of such bias, judges have the opportunity to lead the charge toward a more fair and neutral court system—and a more fair and neutral society. ⊕

Michele Benedetto Neitz joined the Golden Gate University School of Law faculty in 2006. Prior to joining GGU, she worked as a law clerk in the Southern District of California and served as an Equal Justice Works Fellow at the Legal Aid Society of San Diego. She also worked an associate in the San Diego office of Morrison & Foerster, LLP, specializing in corporate labor and employment matters.

Professor Neitz researches, publishes and lectures in the areas of implicit bias and judicial ethics, professional responsibility, and corporate law. She will publish the first law review article examining implicit bias in the law school dean search process in the Seton Hall Law Review in January 2019, and is a contributing author in the recently published ABA book, Enhancing Justice: Reducing Bias. In 2013, she published the first article in legal academia focused on implicit socioeconomic bias on the part of judges. Her publications also include law review articles in the Georgetown Journal of Legal Ethics, The Southern Methodist University Law Review, and the Brooklyn Law Review, as well as smaller articles in the San Francisco Business Times, San Francisco Attorney Magazine, and the online Legal Ethics Forum. Professor Neitz teaches Business Associations, Poverty Law, Professional Responsibility, and Corporate Compliance. She has been voted "Most Outstanding Professor" by the graduating class of GGU Law four times.