What Judges Can Do About Implicit Bias

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Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making*: *How It Affects Judgment and What Judges Can Do About It*, in **Ensuring Justice: Reducing Bias** 87 (Sarah Redfield ed., forthcoming 2017), available at SSRN.

For some years now, scholars have discussed the influence of implicit bias on decision-making. While many argue that conscious bias is decreasing,[1] studies show that the impact of unconscious bias is significant. Although scholars, including Judge Andrew Wistrich and Jeffrey Rachlinski, have shown that judges possess such bias, judges—SCOTUS included—have not been sufficiently aware of the problem. The relatively recent change to the standard for dismissing a claim on a Rule 12(b)(6) motion illustrates this point.

In *Bell Atlantic Corporation v. Twombly*, Justice Souter formulated the new plausibility standard for deciding whether a claim should be dismissed. Later, in *Ashcroft v. Iqbal*, Justice Kennedy expounded on this new interpretation, stating that a judge should rely on her "judicial experience and common sense" to decide whether a claim should be dismissed. Despite the importance of this modern invocation, the Court cited no evidence to support relying on these intuitions. Scholars, including Steve Burbank, publicly questioned the use of this information as inviting subjective judgments by judges to dismiss cases that they disfavor. But courts continue to embrace this SCOTUS-endorsed phrase and employ it in their quest to decide whether claims should be dismissed. Should they?

Judge Wistrich and Rachlinski's important contribution to a new American Bar Association book, *Ensuring Justice: Reducing Bias*, should call into question the *Iqbal* rule that courts use their judicial experience and common sense. The authors show that judges' decision-making may be compromised by implicit bias and discuss what judges can do to combat this bias.

The authors first explain that people decide in two different ways: intuitive and deliberative. Intuitive decision-making is instinctual and emotional—referred to at times by psychologists as System 1 reasoning. Deliberative decision-making involves consciousness, effort, and time and is referred to at times by psychologists as System 2 reasoning. Where the two types of reasoning conflict, people—including judges—tend to rely on intuition.

But intuition can hamper judicial decision-making. For example, studies have shown that a number that is irrelevant to a determination of damages can influence a judge's decision regarding damages and that a judge likely also will consider inadmissible evidence. Additionally, while judges may deny the influence of emotions, emotions are a part of intuitive decision-making. Based on irrelevant emotions, judges may decide an issue of statutory interpretation favorably for the defendant because of certain characteristics of that individual, such as why they took a drug. Intuition also tends to make people possess bias toward their own groups. For example, a study demonstrated that a group of judges exhibited bias toward litigants from their own state. Racial bias may be another type of in-group bias. Using the Implicit Association Test (IAT), the authors found that judges possess the same level of implicit bias against African-Americans as most lay adults.

These studies show judges are human—sharing problems that the rest of us face. Thankfully, judges can try to combat these issues. First, deliberative, System 2 decision-making can help judges avert their reliance on intuition—that is, knowing they have bias can help judges avoid their bias. Second, several different tests and methods can aid judges. For example, they can take the IAT, which permits them to understand that they may need to account for implicit bias and alerts others to the need for training judges who possess such bias. Because judges tend to think they are better

than most at avoiding racial bias, actually taking the test will be a particularly useful first step to lessen the effects of bias.

In addition to awareness through the IAT, the authors propose a variety of ways to combat bias, only a few of which I highlight here. Increasing from one to three the number of trial judges who decide any important issue is a particularly innovative, interesting proposal. While the authors recognize the difficulty of implementation given the current allocation of resources, their idea is compelling because of the noted research on how outcomes improve by increasing diversity on appellate panels. Additionally, I want to point out that historically the importance of more than one judge deciding an issue was recognized. In late eighteenth-century England, a panel of three judges would determine issues such as whether a new trial should be ordered in a case or whether a case should be dismissed on a demurrer.

The authors propose a number of other ways to reduce implicit bias in the judiciary. Another favorite of mine is mindfulness meditation. Mindfulness is popular these days. It's used in companies and classrooms to train people to recognize their thoughts and emotions that arise, but to let go of them to be in the present. We encourage students at the University of Illinois to consider practicing it to reduce stress. The authors argue that mindfulness may help judges curb their reliance on inappropriate reactions.

Judge Wistrich and Rachlinski recognize that there are also indirect ways that implicit bias can be countered. For example, judges may rely less on intuitive decision-making if the time for decision-making were increased and more written opinions were required.

The authors also emphasize that others who help judges, such as police and prosecutors, should be trained to combat the implicit bias that they possess.

Judge Wistrich and Rachlinski's chapter and previous work on implicit bias in the judiciary are incredibly important. The chapter helps us to understand influences on judicial decision-making and how to combat these problems. Through the chapter, the ABA book, and other efforts, such as training of judges by the Federal Judicial Center under the leadership of Judge Jeremy Fogel, important efforts to reduce implicit bias are underway.

Lastly, the authors' chapter on implicit bias should specifically call into question the Supreme Court's admonition in *Iqbal* that judges should rely on their "judicial experience and common sense"—a phrase—as I mentioned—that the trial and appellate courts continue to invoke in their opinions.

1. Despite these arguments, my co-author and I show that quite a bit of conscious bias remains in employment settings. Sandra Sperino & Suja A. Thomas, Unequal: How America's Courts Undermine Discrimination Law (2017).

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