Can Implicit Bias in Judicial Decision Making be Cured by Greater Diversity on the Bench?

Prof Brian Opeskin*

Accepted for publication in

(2023) 35(11) *Judicial Officers' Bulletin*

There has been growing interest in the psychology of human decision making and in the biases that are implicit in the way people form judgments. The implications of these empirical discoveries for judicial systems are still being investigated across the social sciences. This article examines whether greater diversity in the composition of the judiciary—by gender, ethnicity, social class, and other attributes—can help address the challenges of implicit bias in an institution founded on an ethic of impartiality, neutrality, and fairness.

The salience of the question stems from a report of the Australian Law Reform Commission (ALRC) that examined the law of impartiality and bias in relation to the federal judiciary.[1] Among a suite of reforms, the ALRC proposed two institutional safeguards to support impartiality: (a) a more transparent process for appointing federal judges, with a commitment to promoting diversity (Rec 7); and (b) a requirement that the federal Attorney-General collect and report on statistics regarding the diversity of the federal judiciary (Rec 8).

The Australian Government's acceptance of these recommendations[2] marks a significant step forward because no government in Australia has ever published periodic data on the composition of its judicial officers.[3] I investigate whether greater judicial diversity can redress the malady of implicit bias, not just for federal judges but for all judicial officers. But first, some context.

1. Thinking, Fast and Slow

In 2002, Daniel Kahneman was awarded the Nobel Prize for his groundbreaking work in understanding the economics of human decision making. In the classical economic paradigm, individuals make decisions as *rational* beings to maximise their utility in circumstances of 'perfect information'. Kahneman's work on behavioural economics demonstrated that this was not so. Summarising 40 years of research in his book, *Thinking, Fast and Slow*,[4] his key message was that humans are intuitive thinkers, human intuition is imperfect, and these imperfections often result in judgments that deviate from the predictions of classical economic models based on the assumption of rational behaviour.[5]

According to Kahneman, human judgments can be produced in two ways—a rapid, associative, automatic, and intuitive process (called System 1, or 'fast thinking'); and a

slower, rule-governed, deliberate, and effortful process (called System 2, or 'slow thinking'). The two systems are interconnected, but the division of labour between them is designed to minimise human effort and optimise performance.

Most of our normal decision making is based on fast thinking (System 1) because the human mind has evolved to allow individuals to reach quick solutions to complex problems. As an evolutionary adaptation, fast thinking generally does very well at modelling familiar situations.[6] Alas, it can also lead to systemic errors of judgment because it relies on heuristics (mental shortcuts) and biases, with the consequence that some critical information is ignored, while less relevant information receives undue attention.[7] Intuitive thinking has selective value, but it comes at a price.

2. Psychological Tests for Implicit Bias

Kahneman's work unseated the rationalist underpinnings of classical economics,[8] but it also connected with parallel themes in the field of cognitive psychology on the nature of human biases.[9] It is unsurprising that some people are *explicitly* racist, sexist, ageist, or ableist. Yet one of the insights from psychology research is that people also have *implicit* biases (sometimes called unconscious biases) of which they are unaware and over which they have no mindful control. I may pride myself on being egalitarian, but my subconscious (and yours!) is marked by a deep thumbprint of culture and social life that embed preferences and attitudes learned during early childhood and beyond. Through socialisation, we all acquire insistent associations between certain groups and sets of attributes (typically, with a positive or negative valence), and these associations become part of our own value structure.[10]

The direction and strength of these biases can be measured. In 1998, Greenwald et al developed a test of implicit bias by documenting the speed with which respondents were able to associate different concepts when flashed quickly on a computer screen—for example (but greatly simplifying) 'White/good', 'White/bad', 'Black/good', 'Black/bad'.[11] Slower response times were taken as a measure of the cognitive strain (and hence bias) in associating certain concepts with others (eg 'Black' and 'good'). The Implicit Association Test (IAT) has now been administered millions of times across the globe and it reveals that implicit bias is rife.[12] You and I might not have implicit bias towards the same categories, or to the same degree, but we both have it (even if you are a judicial officer).[13] At a population level, these biases favour culturally dominant and societally valued groups, such as White over Black, rich over poor, young over old, and straight over LGBTI. Interestingly, non-dominant groups can share the same implicit biases as dominant groups because of their positive evaluations of a higher status group to which they do not belong.[14] The impact of implicit biases on real-life behaviours is discussed in Section 4.

3. Relevance to Judicial Decision Making

These revelations have importance for judges and magistrates, who make decisions daily on legal matters large and small. Judicial officers take an oath or affirmation upon appointment, binding them to an ideal of neutral decision making in service to the law. In the terms of the affirmation required of appointees to the High Court, justices solemnly promise to 'do right to all manner of people according to law without fear or favour, affection or ill-will'.[15] The

core meaning is that a judicial officer will apply the law without 'prejudice, partiality or prejudgment'[16] and without concern for the consequences to them. In Lord Mansfield's immortalised words, 'let justice be done, though the heavens fall'.[17]

Research on behavioural economics and social psychology throws down the gauntlet to the ideal of judicial impartiality (as does the growing scholarship on law and emotions).[18] If all humans have implicit biases in their decision making, how can judicial officers acquit their duties without partialities towards persons who come before them? These need not be negative, hostile, or adverse assessments of litigants, witnesses, or counsel. Many implicit biases concern the favouritism unconsciously displayed by decision makers towards others in their 'ingroup'; reserving admiration, sympathy, and trust for them, while withholding it from individuals beyond their ingroup.[19]

The risk of implicit bias (whether positive or negative) may be lower in an apex court or in intermediate courts of appeal, which place a premium on weighing arguments, deliberating with care, and producing comprehensive written reasons—activities that reflect System 2 thinking. Yet nine out of ten matters finalised in Australian courts each year are *not* made in that milieu but in magistrates' courts,[20] where there is much less distance between the judicial officer and the often-unrepresented defendant. As Roach Anleu and Mack have reported, lower courts in Australia are characterised by 'intense time pressure on the presiding magistrate, who is faced, every day, with a large number of matters that appear impossible to complete within the allotted time, and no way of knowing which individual matters will require substantial attention and how long the list will take'.[21] While all judicial decision making is likely to involve a combination of fast thinking (System 1) and slow thinking (System 2), lower courts place more demand on the former. It is precisely when judicial officers work under conditions of enormous pressure that they 'need to be especially on guard against their biases'.[22]

4. Impact of Implicit Biases on Behaviour

Let's assume we accept the claim that everyone has implicit biases of one kind or another. Do they matter? Do they determine our behaviour in the real world, such as by differentially favouring a majority group or disfavouring a minority group?

As it turns out, the relationship between implicit bias and behaviour is not robust. Scholars report that there is only a small to medium correlation between implicit bias scores and explicit (discriminatory) behaviours.[23] However, it is argued that even small experimental effects can have large societal consequences in aggregate.[24] When individual biases are accumulated across countless settings (education, employment, healthcare, the justice system), across a population, and across time, they can produce 'tailwinds and headwinds that profoundly perturb our commitment to giving everyone a fair shot'.[25] For this reason, implicit bias is an important *social* phenomenon even if the impact on an individual's behaviour is modest.

5. Debiasing: Interventions for Individuals

If individuals have implicit biases in their encounters with the world, and if those biases affect their real-world behaviour, it is natural to ask whether interventions are available to mitigate the impact. Once the IAT became widely available in the early 2000s, the corporate world was quick to implement bias testing and anti-bias training for managers, in the optimistic expectation of remediating implicit bias in the workplace. Similar enthusiasm infected researchers who were concerned about implicit bias in the courts, since there is 'no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice'.[26]

In a major study in 2012, Kang et al examined 'concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury'.[27] One suggested approach was to *eliminate or reduce* implicit bias by exposing key actors to counter typical associations. Specifically, the authors recommended encouraging intergroup social contact by diversifying the bench, the courtroom, residential neighbourhoods, and friendship circles.[28] A second approach was to *insulate the biases*—i.e., accept the existence of implicit biases but alter decision making so that biases were less likely to translate into adverse behaviour. The debiasing strategies for judges included doubting one's objectivity; informing oneself about implicit bias; improving decision making conditions to encourage effortful thinking (System 2) rather than intuitive thinking (System 1); and keeping a tally of decisions to assess patterns of behaviour that might otherwise go unnoticed.[29]

A decade later, Kang reprised his assessment of appropriate interventions, outlining 24 actions to address implicit bias, grouped into four broad categories.[30] Many of these actions also appear in Wistrich and Rachlinski's thoughtful discussion of ways to target implicit bias.[31] It is important to observe that these inventories are largely directed to actions judges can take *individually* to eliminate their own biases, or to work around them. However, Kahneman had already argued that errors of intuitive thought are often difficult to overcome because System 1 operates automatically and cannot be turned off at will.[32] The best we can do, he said, is to recognise situations in which mistakes are likely and try harder to avoid them when the stakes are high.

Reviews of the literature reinforce Kahneman's conjecture. A meta-analysis of prejudice reduction strategies by Paluck et al showed little support for the hypothesis that 'mentalising' successfully acts as a salve for implicit bias.[33] According to their analysis, the most important landmark studies showed 'remarkably modest effects' from individual interventions. In another systematic review, Fitzgerald et al found that common interventions such as training were often ineffective in reducing implicit bias, giving participants and organisations false confidence when in fact the training had no ameliorative effect.[34] Moreover, even when implicit biases have been responsive to interventions, Lai et al found that the changes were short-lived (at most a few days), suggesting that biases can be stable over time and resistant to mild interventions.[35] This is probably because implicit bias is not only *generated* but also *maintained* by exposure to the prevailing culture.[36] As Elek and Miller explain, social discrimination is like a virus that can be caught from, and reinforced by, the social environment; and interventions that attempt to change these implicit associations in one's

memory are not consistently effective.[37] None of this is good news for judicial officers who seek agency over their hidden preferences.

6. Debiasing: Searching for Structural Solutions

The preceding empirical findings are not necessarily a cause for despondency. As Fitzgerald et al conclude in their systematic review, 'the fact that there is scarce evidence for particular bias-reducing techniques does not weaken the case for implementing widespread structural and institutional changes that are likely to reduce implicit biases'.[38] The central question for this article is whether greater judicial diversity is one such mechanism for mitigating the impact of implicit bias in resolving legal disputes.

The first point to note here is that diversity is a *structural* issue, and hence may be a suitable candidate for a remedy. Although people sometimes use the term 'diversity appointment' to describe an individual judicial officer from a non-traditional background, this is loose talk. Diversity is not an attribute of a person but of a population.[39] At a point in time, individuals have only one sex, one gender, one religion, one ethnicity (even if mixed), and so on. Some attributes are immutable, while others may change over a person's lifetime. The combinations of attributes that can potentially coexist in a single individual is very large, and they give each person a unique array of characteristics. But this is not what we mean when speaking of diversity. Judicial diversity focusses on single attributes (and occasionally on binary combinations, where intersectionality is in issue) and examines the variability of that attribute *across* the relevant population or subpopulation. Thus we ask, is the Bench largely male, largely Christian, and largely white? Diversity is a structural property of the corpus of judges and magistrates, not a property of any one of them.

7. Judicial Diversity as a Structural Solution for Implicit Bias

To assess whether greater judicial diversity is an effective structural remedy for implicit bias in judicial decision making, it is helpful to revisit Kahneman's two ways of thinking—the rapid, associative process (System 1), and the slower, effortful process (System 2). In principle, the impact of System 1 thinking, with its errors and biases, could be reduced through three different, but cumulative, approaches.

- Accept the existing division between fast and slow thinking for each individual but appoint more judicial officers whose System 1 intuitions (or implicit biases) differ from those of the current Bench.

- Alter the System 1 intuitions (or implicit biases) of everyone by targeting the underlying processes through which biases are generated and maintained.

- Change the balance between System 1 and System 2 thinking so there is less reliance on System 1 when exercising judicial power.

a) Appointing judicial officers with different System 1 intuitions.

The first approach recalls one of the main justifications for judicial diversity, namely, that it will improve the quality of decision making by avoiding the narrowness of experience and knowledge inherent in a collection of homogeneous, even if excellent, judges.[40] This *argument from quality* calls to mind the controversial observation of Judge Sonia Sotomayor, prior to her appointment to the United States Supreme Court, that 'I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life'.[41] Or, as summed up by Justice Michael Kirby with respect to gender in Australian courts, 'women are not just men who wear skirts', they have different life experience and sometimes 'a different way of looking at problems.'[42]

This idea attracted some early Australian adherents. Keith Mason, when President of the NSW Court of Appeal, argued that a more representative judiciary is a key response to 'unconscious judicial prejudice' because it will produce judges with differing predispositions. He claimed that 'the legal system will be better informed, more acceptable and just in its outcomes if the body of its principal guardians has a fair infusion of people who *may* share some less conventional ideas.'[43]

The argument from quality does not claim to eliminate implicit biases, since everyone is susceptible to them. In this sense, it accepts that every judicial officer is a System 1 thinker. However, it seeks to replace the dominant System 1 norm (where biases often point in the same direction, like iron filings in a magnetic field) with a plurality of cross-cutting intuitions so that courts are less systemically biased.[44]

The argument from quality also invites us to consider which aspects of diversity might lead to relevant differences in the intuitions of judicial officers. At a simple level, diversity indicates difference, and almost any characteristic—cultural, social, personal, or biological—can vary among individuals.[45] However, not every difference provides a point of interest: 'there is no argument for the appointment of Leos or those born on Sunday'.[46] Rather, public discourse has focussed on attributes that have been the cause of past discrimination or exclusion from the Bench, of which gender, ethnicity, and Indigeneity are prime examples.[47]

Greater judicial diversity may bring about different user experience in the courtroom, different modes of judicial reasoning, and even different substantive outcomes. But whether it does so in practice is an empirical question on which there is a large and inconsistent literature. Surveying the field, Barry recently observed that the answer depends on the characteristic in question (gender, race, age, religion, and political views) and on whether the case has salience for that characteristic—for example, the impact of a judge's gender in sex discrimination cases, or a judge's race in criminal cases.[48] However, much of the scholarship is focussed on the United States, and its relevance to Australia (with its own institutions and social norms) is unclear.

b) Altering the processes through which biases are formed and maintained.

The second approach is to change the nature of System 1 thinking itself, so that human intuitions in the future differ from those of the past. To the extent that System 1 processes are the product of evolutionary biology, this seems like a tall order. However, for Kahneman, beyond the innate skills we share with other animals, System 1 also includes learned associations between ideas, which have become fast and automatic through prolonged practice (*The capital of France is …?*).[49]

This suggests another pathway by which judicial diversity can catalyse structural change. Many implicit biases are *generated* during childhood and *maintained* throughout adolescence and adulthood by ongoing exposure to societal norms. For example, Baron and Banaji found that pro-White or anti-Black implicit bias was evident as much in 6-year-olds as in 10-year-olds and adults in the United States, suggesting that implicit attitudes favouring the 'ingroup' start early and persist across developmental stages.[50] However, to acknowledge that implicit biases persist if maintained by the social environment does not mean they are immutable. On the contrary, researchers have found that implicit attitudes and beliefs are remarkably malleable—they are 'mirror-like reflections of local environments and communities within which individuals are immersed'.[51] Our physical, social, and virtual spaces send recurrent messages about who belongs, and these have robust effects on our biases and behaviours. Counter-stereotypes have the potential both to debias the advantaged and to expand possibilities for the disadvantaged because they provide 'exemplars in our social environments who buck our biased expectations'.[52]

The literature about the value of counter-stereotypes in reducing implicit bias is redolent of two further rationales for judicial diversity. One is the *argument from symbolism*: because the judiciary is a powerful public institution (for example, it makes decisions about individual liberty), the appointment of judges from diverse backgrounds has symbolic value that can influence public perceptions about the courts.[53] An intertwined rationale is the *argument from legitimacy*, which posits that there is inherent value in having courts that 'look like Australia' because fair representation (some writers prefer 'fair reflection') legitimates the courts in the eyes of the community they serve. For a colonial settler society such as Australia, which has received more than 7.5 million immigrants since the Second World War,[54] this means the judiciary should no longer be 'pale, male, [and] stale'.[55] Justice Michael McHugh made this point forcefully in relation to gender when remarking that nothing breeds social unrest as quickly as a sense of injustice: 'The need to maintain public confidence in the legitimacy and impartiality of the justice system is to me an unanswerable argument for having a judiciary in which men and women are equally represented'.[56]

The potential impact of role models and changing social norms can be seen in statistics on the gender of judicial officers. Until 1965, when Roma Mitchell was appointed to the Supreme Court of South Australia, no woman had ever held judicial office in Australia. Other 'firsts' followed—including the first female magistrate (Margaret Sleeman in 1970) and the first female High Court justice (Mary Gaudron in 1987). In 2000, when the Australasian Institute of Judicial Administration published its initial annual gender statistics, only 17% of judicial officers were women; by 2023 this had risen to 43%.[57] This change has taken a generation to achieve, and parity has not yet been reached, but public perceptions about 'the face' of the

Australian judiciary are vastly different today than in 1965, at least in relation to gender. This has important social repercussions. The normalisation of women on the Bench (and their portrayal in film, television, and media)[58] alters the implicit attitudes generated among children today, as well as affecting how implicit attitudes generated in a previous era are being maintained (or eroded) in the present day.

c) Reducing reliance on System 1 thinking

The final structural approach is to change the balance between System 1 and System 2 thinking so there is less reliance on System 1 when deciding cases. As Kahneman says, 'slow down and let your System 2 take control'.[59]

The point has been made above that 'judges with heavy caseloads might have little choice but to rely on rapid, intuitive judgments to manage their dockets'.[60] There are numerous suggestions for interventions at the *individual* level to address this problem. Kang's inventory of 24 actions includes a few of them—giving oneself ample time to make subjective decisions; delaying making decisions if one is especially stressed or cognitively depleted; reminding oneself to be careful; and using checklists to guide decision making.[61] However, as noted, evidence that individual actions are effective in mitigating implicit bias is not robust.

This leads to the possibility of *structural* reform. For example, Kang's exhortation that individual judges should 'give [themselves] ample time to improve accuracy in making complex, subjective, multifaceted decisions' has a structural counterpart because providing more time for deliberation speaks to institutional issues of resource allocation to, and within, courts.[62] Recognising this, Wistrich and Rachlinski have proposed that the implicit biases of harried judges could be mitigated by expanding the number of judgeships or ensuring that all judges have law clerks, both of which are institutional responses to a systemic problem.[63] The ALRC, too, has stressed the importance of adequate resourcing of the courts to ensure judges can uphold the highest standards of impartiality.[64]

I mention this example because it demonstrates the value of structural solutions to the challenges of implicit bias. However, it says nothing about the specific issue of judicial diversity, and it is hard to think of a compelling reason why greater diversity might help tilt the scales towards slower thinking when judges and magistrates exercise their powers.

Conclusion

This article began by drawing together two strands of overlapping scholarship on the way humans make decisions—Kahneman's Nobel prize-winning insights into behavioural economics, and the psychology literature on implicit basis. Common to both fields is the realisation that humans are often intuitive decision makers, and those intuitions are conditioned by the explicit and implicit norms of the society in which we grow up and live. For judges and magistrates committed to an ethic of impartiality, the existence of unconscious attitudes and preferences is a professional challenge, whether these favour the judicial officer's 'ingroup' or disfavour an 'outgroup'. That challenge is likely to be greatest for those who work in busy lower courts with unremitting caseloads.

Much work has been done to consider how judicial officers might *individually* ameliorate their implicit biases when exercising judicial power, and many courts and judicial education bodies now run programs for that purpose. Yet, there is conflicting evidence about whether these programs are effective, with recent systematic reviews suggesting the impact of personal interventions is often modest and short lived.

Taking an alternative approach, this article has investigated whether implicit bias can be addressed by *structural or institutional* change, and specifically whether greater diversity in the judiciary can mitigate these biases. I suggested two ways this could be done: (a) by appointing more judicial officers whose non-traditional backgrounds enliven different System 1 intuitions from those of past appointees; and (b) by using counter-stereotypes to alter the formation of implicit biases at their inception and their preservation thereafter. A judiciary that looks more like Australian society (at least in respect of personal or social attributes that are considered to matter) may, in the long run, have that effect.

The focus on individual action to counter implicit bias may give organisations the sense of a quick cure, but it can also divert attention from deeper structural, institutional, and historical causes.[65] It needs to be acknowledged that structural change is often challenging. Bringing greater diversity to the Bench is a lengthy process because judicial officers are guaranteed long tenure, and change therefore comes 'one retirement at a time'. Greater diversity may also require reform of existing institutions, such as moving from a model of appointment based on 'virtually unfettered executive discretion'[66] to one that gives a formal role to a judicial appointments commission, with greater transparency about the value of diversity in selection.

On its own, diversity will never be a complete cure for the ills of implicit bias among those who hold office as judges and magistrates. The *quantitative* representation of different groups on the Bench has value, but it does not capture how much each group is heard or how much influence they have.[67] Diversity therefore needs to be supplemented by institutional change to support greater *inclusion*. When greater judicial diversity is administered alongside other structural remedies, it may mitigate the adverse effects of a complex phenomenon so that judicial officers can do their best to 'do right to all manner of people according to law'.

REFERENCES

Australasian Institute of Judicial Administration, 'Judicial Gender Statistics, June 2023', (Web Page) <https://aija.org.au/research/judicial-gender-statistics/>

Australian Government, *Government Response to Australian Law Reform Commission Report 138: Without Fear or Favour: Judicial Impartiality and the Law on Bias* (2022)

Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias, ALRC Report 138* (ALRC, 2021)

Baron, Andrew and Mahzarin Banaji, 'The Development of Implicit Attitudes: Evidence of Race Evaluations From Ages 6 and 10 and Adulthood' (2006) 17(1) *Psychological Science* 53

Barry, Brian, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge, 2020)

Calanchini, Jimmy et al, 'The Contributions of Positive Outgroup and Negative Ingroup Evaluation to Implicit Bias Favoring Outgroups' (2022) 119(40) *Proceedings of the National Academy of Sciences* 1

Crofts, Penny, 'The Good Judge in Australian Popular Television Culture' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 283

Dasgupta, Nilanjana, 'Implicit Attitudes and Beliefs Adapt to Situations: A Decade of Research on the Malleability of Implicit Prejudice, Stereotypes, and the Self-Concept' (2013) 47 *Advances in Experimental Social Psychology* 233

Dunham, Yarrow, Andrew Baron and Mahzarin Banaji, 'The Development of Implicit Gender Attitudes' (2016) 19(5) *Developmental Science* 781

Elek, Jennifer and Andrea Miller, *The Evolving Science on Implicit Bias* (National Center for State Courts, 2021)

Engel, Christoph and Keren Weinshall, 'Manna from Heaven for Judges: Judges' Reaction to a Quasi-Random Reduction in Caseload' (2020) 17(4) *Journal of Empirical Legal Studies* 722

FitzGerald, Chloë et al, 'Interventions Designed to Reduce Implicit Prejudices and Implicit Stereotypes in Real World Contexts: A Systematic Review' (2019) 7(1) *BMC Psychology* 29

Greenwald, Anthony, Mahzarin Banaji and Brian Nosek, 'Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects' (2015) 108(4) *Journal of Personality and Social Psychology* 553

Greenwald, Anthony, Debbie McGhee and Jordan Schwartz, 'Measuring Individual Differences in Implicit Cognition: The Implicit Association Test' (1998) 74(6) *Journal of Personality and Social Psychology* 1464

Greenwald, Anthony and Thomas Pettigrew, 'With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination' (2014) 69(7) *American Psychologist* 669

Hale, Lady, 'Making a Difference: Why We Need a More Diverse Judiciary' (2005) 56(3) *Northern Ireland Legal Quarterly* 281

High Court of Australia Act 1979 (Cth) 1979

Jolls, Christine and Cass Sunstein, 'The Law of Implicit Bias' (2006) 94(4) *California Law Review* 969

JUSTICE, *Increasing Judicial Diversity* (JUSTICE, 2017)

Kahneman, Daniel, *Thinking, Fast and Slow* (Penguin Books, 2011)

Kang, Jerry, 'What Judges Can Do About Implicit Bias' (2021) 57(2) *Court Review* 78

Kang, Jerry et al, 'Implicit Bias in the Courtroom' (2012) 59(5) *UCLA Law Review* 1124

Kirby, Michael, 'Women in the Law: What Next?' (2002) 16(1) *Australian Feminist Law Journal* 148

Korobkin, Russell and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88(4) *California Law Review* 1051

Lai, Calvin et al, 'Reducing Implicit Racial Preferences: II. Intervention Effectiveness Across Time' (2016) 145 *Journal of Experimental Psychology: General* 1001

Lai, Calvin and Megan Wilson, 'Measuring Implicit Intergroup Biases' (2021) 15(1) *Social and Personality Psychology Compass* 1

Madva, Alex, 'Individual and Structural Interventions' in Erin Beeghly and Alex Madva (eds), *An Introduction to Implicit Bias: Knowledge, Justice, and the Social Mind* (Routledge, 2020)
Mason, Keith, 'Unconscious Judicial Prejudice' (2001) 75(11) *Australian Law Journal* 676
McHugh, Michael, 'Women Justices for the High Court' (Speech, Western Australia Law Society, 27 October 2004)
Opeskin, Brian, 'Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 83
Opeskin, Brian and Sharyn Roach Anleu, *Judicial Diversity in Australia: A Roadmap for Data Collection* (Australasian Institute of Judicial Administration, 2023)
Paluck, Elizabeth et al, 'Prejudice Reduction: Progress and Challenges' (2021) 72(1) *Annual Review of Psychology* 533
Phillips, Janet and Joanne Simon-Davies, 'Migration to Australia: A Quick Guide to the Statistics' (Research Paper, Australian Parliamentary Library, Parliament of Australia, 18 January 2017)
Productivity Commission, *Report on Government Services 2023* (Productivity Commission, 2023)
Rachlinski, Jeffrey et al, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84(3) *Notre Dame Law Review* 1195
Rackley, Erika and Charlie Webb, 'Three Models of Diversity' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 283
Remiche, Adélaïde, 'When Judging is Power: A Gender Perspective on the French and American Judiciaries' (2015) 3(1) *Journal of Law and Courts* 95
Roach Anleu, Sharyn and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave Macmillan, 2017)
Roach Anleu, Sharyn and Kathy Mack, 'Impartiality and Emotion in Everyday Judicial Practice' in Roger Patulny et al (eds), *Emotions in Late Modernity* (Routledge, 2019)
Roberson, Quinetta, 'Disentangling the Meanings of Diversity and Inclusion in Organizations' (2006) 31(2) *Group & Organization Management* 212
Sackville, Ronald, 'The Judicial Appointments Process in Australia: Towards Independence and Accountability' (2007) 16(3) *Journal of Judicial Administration* 125
Shleifer, Andrei, 'Psychologists at the Gate: A Review of Daniel Kahneman's *Thinking, Fast and Slow*' (2012) 50(4) *Journal of Economic Literature* 1080
Somerset v Stewart (1772) 98 ER 499
Sotomayor, Sonia, 'A Latina Judge's Voice' (2002) 13 *Berkeley La Raza Law Journal* 87
Walker, Iain and Susie Wang, 'Implicit Bias' in Cristian Tileagă, Kevin Durrheim and Martha Augoustinos (eds), *The Routledge International Handbook of Discrimination, Prejudice and Stereotyping* (Routledge, 2021)
Webb v The Queen (1994) 181 CLR 41
Wistrich, Andrew and Jeffrey Rachlinski, 'Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do about It' in Sarah Redfield (ed), *Enhancing Justice: Reducing Bias* (American Bar Association, 2017)

---

* Professor of Law, University of Technology Sydney. ORCID No: 0000-0002-9393-3592. I wish to thank Sam Moussa for research assistance. Karen O'Connell, Sharyn Roach Anleu, and referees provided valuable comments on a draft.

1 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias, ALRC Report 138* (ALRC, 2021).

2 Australian Government, *Government Response to Australian Law Reform Commission Report 138: Without Fear or Favour: Judicial Impartiality and the Law on Bias* (2022) .

[3] However, since 2000, the Australasian Institute of Judicial Administration has published data on one variable—gender: see Australasian Institute of Judicial Administration, 'Judicial Gender Statistics, June 2023', (Web Page) <https://aija.org.au/research/judicial-gender-statistics/>.

[4] Daniel Kahneman, *Thinking, Fast and Slow* (Penguin Books, 2011) .

[5] For a review, see Andrei Shleifer, 'Psychologists at the Gate: A Review of Daniel Kahneman's *Thinking, Fast and Slow*' (2012) 50(4) *Journal of Economic Literature* 1080.

[6] Kahneman (n 4) 21.

[7] Shleifer (n 5) 1089.

[8] Russell Korobkin and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88(4) *California Law Review* 1051.

[9] Christine Jolls and Cass Sunstein, 'The Law of Implicit Bias' (2006) 94(4) *California Law Review* 969, 973-975.

[10] Iain Walker and Susie Wang, 'Implicit Bias' in Cristian Tileagă, Kevin Durrheim and Martha Augoustinos (eds), *The Routledge International Handbook of Discrimination, Prejudice and Stereotyping* (Routledge, 2021) , 199.

[11] Anthony Greenwald, Debbie McGhee and Jordan Schwartz, 'Measuring Individual Differences in Implicit Cognition: The Implicit Association Test' (1998) 74(6) *Journal of Personality and Social Psychology* 1464.

[12] Anyone can take Harvard University's online IATs to better understand their unconscious preferences <implicit.harvard.edu>. In addition to the IAT, other instruments are also used to measure implicit bias: Calvin Lai and Megan Wilson, 'Measuring Implicit Intergroup Biases' (2021) 15(1) *Social and Personality Psychology Compass* 1.

[13] Jerry Kang, 'What Judges Can Do About Implicit Bias' (2021) 57(2) *Court Review* 78, 79; Jeffrey Rachlinski et al, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84(3) *Notre Dame Law Review* 1195.

[14] Jimmy Calanchini et al, 'The Contributions of Positive Outgroup and Negative Ingroup Evaluation to Implicit Bias Favoring Outgroups' (2022) 119(40) *Proceedings of the National Academy of Sciences* 1.

[15] *High Court of Australia Act 1979 (Cth) 1979* ('*High Court of Australia Act 1979 (Cth)*') s 11, sch .

[16] *Webb v The Queen* (1994) 181 CLR 41 ('*Webb v The Queen*'), 74 (Deane J).

[17] *Somerset v Stewart* (1772) 98 ER 499 ('*Somerset v Stewart*'), 509. The maxim, 'fiat justitia ruat coelum' was quoted when Lord Mansfield controversially held that the air of England did not tolerate slavery.

[18] Sharyn Roach Anleu and Kathy Mack, 'Impartiality and Emotion in Everyday Judicial Practice' in Roger Patulny et al (eds), *Emotions in Late Modernity* (Routledge, 2019) .

[19] Anthony Greenwald and Thomas Pettigrew, 'With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination' (2014) 69(7) *American Psychologist* 669, 670.

[20] In 2021-22, the figure was 93%: Productivity Commission, *Report on Government Services 2023* (Productivity Commission, 2023) Tables 7A.5 and 7A.6

[21] Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave Macmillan, 2017) , 41.

[22] Jerry Kang et al, 'Implicit Bias in the Courtroom' (2012) 59(5) *UCLA Law Review* 1124, 1177.

[23] Walker and Wang (n 10) 203.

[24] Anthony Greenwald, Mahzarin Banaji and Brian Nosek, 'Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects' (2015) 108(4) *Journal of Personality and Social Psychology* 553.

[25] Kang (n 13) 89.

[26] Kang et al (n 22) 1186.

[27] ibid. 1124.

[28] ibid. 1170.

[29] ibid. 1172-1179.

[30] Kang (n 13) 90-91.

[31] Andrew Wistrich and Jeffrey Rachlinski, 'Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do about It' in Sarah Redfield (ed), *Enhancing Justice: Reducing Bias* (American Bar Association, 2017) .

[32] Kahneman (n 4) 28.

[33] Elizabeth Paluck et al, 'Prejudice Reduction: Progress and Challenges' (2021) 72(1) *Annual Review of Psychology* 533.

[34] Chloë FitzGerald et al, 'Interventions Designed to Reduce Implicit Prejudices and Implicit Stereotypes in Real World Contexts: A Systematic Review' (2019) 7(1) *BMC Psychology* 29, 30.

[35] Calvin Lai et al, 'Reducing Implicit Racial Preferences: II. Intervention Effectiveness Across Time' (2016) 145 *Journal of Experimental Psychology: General* 1001.

[36] FitzGerald et al (n 34) 38.
[37] Jennifer Elek and Andrea Miller, *The Evolving Science on Implicit Bias* (National Center for State Courts, 2021) i, 18.
[38] FitzGerald et al (n 34) 39. See also Alex Madva, 'Individual and Structural Interventions' in Erin Beeghly and Alex Madva (eds), *An Introduction to Implicit Bias: Knowledge, Justice, and the Social Mind* (Routledge, 2020) 233.
[39] Brian Opeskin and Sharyn Roach Anleu, *Judicial Diversity in Australia: A Roadmap for Data Collection* (Australasian Institute of Judicial Administration, 2023) 11.
[40] JUSTICE, *Increasing Judicial Diversity* (JUSTICE, 2017) 21.
[41] Sonia Sotomayor, 'A Latina Judge's Voice' (2002) 13 *Berkeley La Raza Law Journal* 87, 92.
[42] Michael Kirby, 'Women in the Law: What Next?' (2002) 16(1) *Australian Feminist Law Journal* 148, 154-155.
[43] Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75(11) *Australian Law Journal* 676, 687.
[44] Brian Opeskin, 'Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 83, 89.
[45] Opeskin and Roach Anleu (n 39) 10.
[46] Erika Rackley and Charlie Webb, 'Three Models of Diversity' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 283, 297.
[47] Opeskin and Roach Anleu (n 39) 31-38.
[48] Brian Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Routledge, 2020) ch 4.
[49] Kahneman (n 4) 21-22.
[50] Andrew Baron and Mahzarin Banaji, 'The Development of Implicit Attitudes: Evidence of Race Evaluations From Ages 6 and 10 and Adulthood' (2006) 17(1) *Psychological Science* 53. Similar results have been reported for gender: Yarrow Dunham, Andrew Baron and Mahzarin Banaji, 'The Development of Implicit Gender Attitudes' (2016) 19(5) *Developmental Science* 781.
[51] Nilanjana Dasgupta, 'Implicit Attitudes and Beliefs Adapt to Situations: A Decade of Research on the Malleability of Implicit Prejudice, Stereotypes, and the Self-Concept' (2013) 47 *Advances in Experimental Social Psychology* 233, 233.
[52] Madva (n 38) 253-254.
[53] Adélaïde Remiche, 'When Judging is Power: A Gender Perspective on the French and American Judiciaries' (2015) 3(1) *Journal of Law and Courts* 95.
[54] Janet Phillips and Joanne Simon-Davies, 'Migration to Australia: A Quick Guide to the Statistics' (Research Paper, Australian Parliamentary Library, Parliament of Australia, 18 January 2017).
[55] These words have been used to describe the United Kingdom judiciary: Lady Hale, 'Making a Difference: Why We Need a More Diverse Judiciary' (2005) 56(3) *Northern Ireland Legal Quarterly* 281, 281.
[56] Michael McHugh, 'Women Justices for the High Court' (Speech, Western Australia Law Society, 27 October 2004).
[57] Opeskin and Roach Anleu (n 39) 7.
[58] Penny Crofts, 'The Good Judge in Australian Popular Television Culture' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 283.
[59] Kahneman (n 4) 30.
[60] Wistrich and Rachlinski (n 31) 116.
[61] Kang (n 13) 90.
[62] In one recent study, reducing a judge's caseload was found to have a measurable impact on decisional outcomes: Christoph Engel and Keren Weinshall, 'Manna from Heaven for Judges: Judges' Reaction to a Quasi-Random Reduction in Caseload' (2020) 17(4) *Journal of Empirical Legal Studies* 722.
[63] Wistrich and Rachlinski (n 31) 117.
[64] Australian Law Reform Commission (n 1) [12.4].
[65] Walker and Wang (n 10) 206.
[66] Ronald Sackville, 'The Judicial Appointments Process in Australia: Towards Independence and Accountability' (2007) 16(3) *Journal of Judicial Administration* 125, 137.
[67] Elek and Miller (n 37) 20. See also Quinetta Roberson, 'Disentangling the Meanings of Diversity and Inclusion in Organizations' (2006) 31(2) *Group & Organization Management* 212.