

# THREE REASONS WHY THE CHALLENGED JUDGE SHOULD NOT RULE ON A JUDICIAL RECUSAL MOTION

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## INTRODUCTION

My remarks as a panelist at the New York University School of Law *Caperton* symposium<sup>1</sup> focused on the need for alternative or additional decision-makers to decide judicial disqualification motions due to the extensively documented phenomenon of unconscious bias, whereby individuals do not always recognize their own biases and prejudices.<sup>2</sup> I previously have written about the significance of unconscious bias in the judicial recusal<sup>3</sup> and other contexts.<sup>4</sup> Taking this opportunity to elaborate on this topic, I would like to offer three rea-

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1. Symposium, “Courts, Campaigns, and Corruption: Judicial Recusal Five Years After *Caperton*,” held at New York University School of Law on November 14, 2014, and sponsored by the Brennan Center for Justice, the American Bar Association’s Center for Professional Responsibility, and the New York University *Journal of Legislation and Public Policy*.

2. See generally *infra* note 15 and accompanying text.

3. See, e.g., Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657 (2005); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002); see also Debra Lyn Bassett & Rex R. Perschbacher, *Perceptions of Justice: An International Perspective on Judges and Ap-*

sons why a challenged judge should not rule on his or her own judicial recusal motion. These three reasons, which have the potential to overlap, include unconscious bias, the bias blind spot, and the impact of publicly stating a position. Due to the automatic nature of these mental processes, the challenged judge typically will not be aware of their effect on his or her decision-making process. Accordingly, the use of additional or substitute decision-makers can bring a more impartial perspective to the recusal motion, ensuring that the challenged judge does not deny the motion for reasons personal to, but unrecognized by, the judge.

## I. UNCONSCIOUS BIAS

Unconscious (sometimes called “implicit” or “automatic”)<sup>5</sup> bias appears to be an unfortunate consequence of the very useful—indeed, necessary—manner in which the human brain sorts through stimuli.<sup>6</sup> To function efficiently, the brain employs automatic, unconscious methods of organizing information, called schemas.<sup>7</sup> Mental shortcuts, called heuristics,<sup>8</sup> and implicit biases are two kinds of schemas that can cause inaccurate decision-making.<sup>9</sup>

In essence, prejudices and stereotypes are schemas—ways of organizing and interpreting information that involve generalizations and

*pearances*, 36 *FORDHAM INT’L L.J.* 136 (2013); Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 *IOWA L. REV.* 181 (2011).

4. *See, e.g.*, Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 *U.C. DAVIS L. REV.* 1563 (2013) [hereinafter Bassett, *Deconstruct and Superstruct*]; Debra Lyn Bassett, *The Rural Venue*, 57 *ALA. L. REV.* 941 (2006); Debra Lyn Bassett, *Distancing Rural Poverty*, 13 *GEO. J. ON POVERTY L. & POL’Y* 3 (2006); Debra Lyn Bassett, *Ruralism*, 88 *IOWA L. REV.* 273 (2003).

5. Bassett, *Deconstruct and Superstruct*, *supra* note 4, at 1564 n.3 (explaining that “[t]he literature has used the synonyms ‘implicit,’ ‘automatic,’ and ‘unconscious’ in describing such bias”). I will use these terms interchangeably.

6. *See generally* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 *CALIF. L. REV.* 969, 975 (2006).

7. *See* DAVID G. MYERS, *PSYCHOLOGY* 143 (7th ed. 2004).

8. *See* RICHARD C. WAITES, *COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY* 52 (2003) (describing heuristics as “a mental shortcut”); *see also* Richard E. Nisbett et al., *The Use of Statistical Heuristics in Everyday Inductive Reasoning* (describing intuitive heuristics as “rapid and more or less automatic judgmental rules of thumb”), in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 510, 510 (Thomas Gilovich et al. eds., 2002).

9. *See, e.g.*, Pamela Casey et al., *Minding the Court: Enhancing the Decision-Making Process*, 49 *CT. REV.* 79, 81–84 (2013) (explaining heuristics and implicit biases in context of a broader discussion on judicial decision-making).

prejudgments.<sup>10</sup> Our brains are continually flooded with stimuli and information,<sup>11</sup> not only from the objects that we are focusing on at any given time, but also from our senses more generally, including what we see, hear, smell, taste, and feel.<sup>12</sup> One summary of the research in this area explains how schemas and heuristics help us to function without continually being overwhelmed by this bombardment of stimuli:

The research indicates that an individual's brain learns over time how to distinguish different objects (e.g., a chair or desk) based on features of the objects that coalesce into patterns. These patterns or schemas help the brain efficiently recognize objects encountered in the environment. What is interesting is that these patterns also operate at the social level. Over time, the brain learns to sort people into certain groups (e.g., male or female, young or old) based on combinations of characteristics as well. The problem is when the brain automatically associates certain characteristics with specific groups that are not accurate for all the individuals in the group . . . .<sup>13</sup>

Because unconscious biases are activated involuntarily and therefore without one's awareness or intentional control, everyone is susceptible to them, even children.<sup>14</sup> Studies of unconscious bias

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10. MYERS, *supra* note 7, at 715 (defining a stereotype as “a generalized (sometimes accurate but often overgeneralized) belief about a group of people”); *see also id.* at 714 (defining prejudice as “prejudgment” and as “an unjustifiable and usually negative attitude toward a group—often a different cultural, ethnic, or gender group,” and explaining that “[l]ike other forms of prejudgment, prejudices are schemas that influence how we notice and interpret events”); *id.* at 715 (“Prejudice generally involves stereotyped beliefs, negative feelings, and a predisposition to discriminatory action.”). *See generally* RUPERT BROWN, *PREJUDICE: ITS SOCIAL PSYCHOLOGY* 4 (2d ed. 2010) (discussing “one essential aspect of the phenomenon of prejudice—that it is a social orientation either towards whole groups of people or towards individuals because of their membership in a particular group” (emphasis omitted)).

11. *See* CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014, at 73 (2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf> (“Our unconscious minds handle a tremendous amount of our cognition, even though we are completely unaware of it . . . . [S]ome data indicates that the brain can process roughly 11 million bits of information every second. The conscious mind handles no more than 40–50 of these information bits, with one estimate as low as a mere 16 bits.” (citations omitted)).

12. *See* Casey et al., *supra* note 9, at 5.

13. Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 64 (2009), <http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1Casey.pdf>; *see also* Casey et al., *supra* note 9, at 5–7.

14. *See* Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53 (2006) (“[D]ata show[ing] an asymmetry in the development of implicit and explicit race attitudes, with explicit attitudes becoming more egalitarian

repeatedly have confirmed the observation that people who claim, and honestly believe, they are not prejudiced may nevertheless harbor unconscious stereotypes and beliefs.<sup>15</sup>

Researchers have extensively studied unconscious bias,<sup>16</sup> but perhaps the best-known studies are those involving the Implicit Association Test (IAT).<sup>17</sup> The IAT, which is taken on a computer, measures

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and implicit attitudes remaining stable and favoring the in-group across development.”); Anna-Kaisa Newheiser & Kristina R. Olson, *White and Black American Children’s Implicit Intergroup Bias*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 264, 264 (2012) (“[A]dults and children from majority groups (e.g., White Americans) often express bias implicitly, as assessed by the Implicit Association Test. In contrast, minority-group (e.g., Black American) adults on average show no bias on the IAT.”).

15. See Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 15 (1995) (“These studies suggest that stereotypes are often expressed implicitly in the behavior of persons who explicitly disavow the stereotype.”); see also Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5–7 (1989) (discussing research suggesting that stereotypes are automatically activated, while activation of beliefs requires conscious attention). See generally sources cited *infra* note 16 (discussing unconscious bias).

16. E.g., Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (1995) (finding unconscious bias “gender stereotyping in fame judgments,” and finding “that explicit expressions of sexism or stereotypes were uncorrelated with the observed [unconscious] gender bias”); Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142 (1996) (concluding “that stereotypes may be automatically activated”); Devine, *supra* note 15, at 5 (finding that stereotypes are “automatically activated in the presence of a member (or some symbolic equivalent) of the stereotyped group and that low-prejudice responses require controlled inhibition of the automatically activated stereotype”); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) (noting that unconscious associations may be disassociated from expressions of personal beliefs); Kerry Kawakami et al., *Racial Prejudice and Stereotype Activation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 407, 407 (1998) (“[H]igh prejudiced participants endorsed cultural stereotypes to a greater extent than low prejudiced participants. Furthermore, for high prejudiced participants, Black category labels facilitated stereotype activation under automatic and controlled processing conditions.”).

17. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998); Karen Kersting, *Not Biased?*, 36 MONITOR ON PSYCHOL. 64, 64 (2005); see also Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1363–64 (2010) (“[The IAT] has been the most widely employed in the ‘hundreds (if not thousands) of studies on implicit bias.’” (quoting John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt*, 29 RES. ORGANIZATIONAL BEHAV. 39, 64 (2009))). See generally Sally Lehrman, *The Implicit Prejudice*, SCI. AM. (May 6, 2006), <http://www.scientificamerican.com/article.cfm?id=the-implicit-prejudice> (discussing Banaji and Greenwald’s IAT research and plans for its future applications). The IAT is found at <https://implicit.harvard.edu/implicit/>, and offers 14 IAT tests, including the Race IAT, Age IAT, Disability IAT, and Gender-Career IAT, among others. After a user completes a test, the website provides a summary of the percent-

reaction time in the pairings of images of target groups (such as white faces and black faces) with words representing attributes (such as good or bad) by having participants press designated computer keys.<sup>18</sup> Participants respond more quickly when they perceive a strong correlation between the target group and the attribute.<sup>19</sup> The repeatedly validated IAT<sup>20</sup> has consistently reflected that most people harbor unconscious biases in a variety of areas, including race, gender, and disability.<sup>21</sup>

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ages of test-takers who have demonstrated implicit bias in that area. See Lehrman, *supra*.

18. See Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18 (2009) (“In an initial block of trials, exemplars of two contrasted concepts (e.g., face images for the races Black and White) appear on a screen and subjects rapidly classify them by pressing one of two keys (for example, an *e* key for Black and *i* for White). Next, exemplars of another pair of contrasted concepts (for example, words representing positive and negative valence) are also classified using the same two keys. In a first combined task, exemplars of all four categories are classified, with each assigned to the same key as in the initial two blocks (e.g., *e* for Black or positive and *i* for White or negative). In a second combined task, a complementary pairing is used (i.e., *e* for White or positive and *i* for Black or negative).” (emphasis omitted)); see also Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review* (“The IAT is a method for indirectly measuring the strengths of associations among concepts. The task requires sorting of stimulus exemplars from four concepts using just two response options, each of which is assigned to two of the four concepts. The logic of the IAT is that this sorting task should be easier when the two concepts that share a response are strongly associated than when they are weakly associated.”), in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265, 267 (John A. Bargh ed., 2007).

19. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001) (“When highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty.”).

20. See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1250 (2002) (describing the IAT as “extensively validated”); Anthony G. Greenwald et al., *supra* note 18, at 17 (assessing IAT research reports); Nosek et al., *supra* note 18, at 286 (“[The IAT has] a solid base of evidence for its internal, construct, and predictive validity.”); see also Anthony G. Greenwald, *Implicit Association Test: Validity Debates*, UNIV. WASH., [http://faculty.washington.edu/agg/iat\\_validity.htm](http://faculty.washington.edu/agg/iat_validity.htm) (last updated June 9, 2008) (providing links to studies of the IAT’s validity). But see Hart Blanton et al., *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 J. APPLIED PSYCHOL. 567, 580 (2009) (criticizing psychological studies of the IAT as having results “likely to be conditional and fragile and [that] do not permit broad conclusions about the prevalence of discriminatory tendencies in American society”).

21. See *supra* notes 16–17.

This psychological research has not gone unnoticed in the legal arena—the American Bar Association’s Section on Litigation has initiated programs and provided resources to increase the judiciary’s self-awareness of unconscious bias<sup>22</sup>—and there have been pilot judicial education programs addressing unconscious bias in California, Minnesota, and North Dakota.<sup>23</sup> Although it is no small task to create new programs that can function effectively on a nationwide scale, especially when some individuals may be skeptical of psychological research generally, or resistant to the specific idea of unconscious biases, these pilot programs have received highly positive responses from participants.<sup>24</sup> But while awareness of unconscious bias is important,<sup>25</sup> it is not the same as actually eliminating unconscious bias.<sup>26</sup>

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22. See Mark A. Drummond, *Section of Litigation Tackles Implicit Bias*, 36 LITIG. NEWS 20, 20–21 (2011) (reporting on the ABA’s creation of a program addressing implicit bias in the judiciary); see also *Implicit Bias Initiative*, A.B.A. SEC. LITIG., <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last visited June 27, 2015) [hereinafter A.B.A. SEC. LITIG.] (providing a summary of the initiative and links to videos about implicit bias). Some states, such as California, require one hour of “Elimination of Bias in the Legal Profession” as part of attorney continuing legal education. See *MCLE Requirements*, ST. B. CAL., <http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx> (last visited June 27, 2015). Training in unconscious bias sometimes is incorporated into these CLE programs. See, e.g., *Quickly and Easily Satisfy Your Attorneys’ Elimination of Bias MCLE Requirements*, RAINMAKING FOR LAW., <http://rainmakingforlawyers.com/speeches/elimination-of-bias-in-the-legal-hiring-process> (last visited June 27, 2015) (advertising programming that includes discussion of unconscious bias).

23. See PAMELA M. CASEY ET AL., NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION 6 (2012), <http://www.ncsc.org/IBReport> (describing California, Minnesota, and North Dakota’s participation “in a national project to provide information on implicit bias to judges and court staff”); A.B.A. SEC. LITIG., *supra* note 22 (providing a hyperlink labeled “Videos” to a webpage discussing and linking to two videos developed by the Education Division of the Administrative Office of the Courts for California about the psychology behind decision-making).

24. CASEY ET AL., *supra* note 23, at 21 (“[A]t least 80% of participants who responded to assessment questions in [the pilot judicial education programs in California, Minnesota, and North Dakota] expressed satisfaction with the implicit bias program and saw its applicability to their work. Their comments used adjectives such as excellent, valuable, important, relevant, informative, worthwhile, and eye-opening to describe their reactions to the programs.”).

25. Blasi, *supra* note 20, at 1275 (“Whatever our motivations, none of us can do much about prejudices of which we are completely unaware.”).

26. See Justin D. Levinson, *Biased Corporate Decision-Making?* (stating that the “temporary nature of de-biasing underscores the continuing need to focus on longer term remedies to implicit bias”), in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 146, 162 n.46 (Justin D. Levinson & Robert J. Smith eds., 2012).

And unfortunately, raising awareness of unconscious bias offers only a temporary remedy, not a permanent one.<sup>27</sup>

There is an extensive body of psychological literature suggesting that unconscious biases can be overridden through an array of approaches, including mental imagery of counter-stereotypes,<sup>28</sup> exposure to actual admired exemplars who are counter-stereotypical,<sup>29</sup> diversity within the operating environment,<sup>30</sup> exposure to multicultural viewpoints or diversity education programs,<sup>31</sup> educating individuals about unconscious bias,<sup>32</sup> and appealing to individuals' beliefs in equality and fairness.<sup>33</sup> However, psychological research suggests that these methods achieve only temporary results,<sup>34</sup> and moreover, even these

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27. See Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 438 (2007) (“Conscious exertion to be unbiased may—at least temporarily—reduce implicit bias.”); see also *infra* notes 34–46.

28. Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 837 (2001) (“Five experiments provided compelling evidence for the moderating influence of mental imagery on implicit stereotypes.”).

29. Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counter-stereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 645 (2004) (providing an overview of two studies designed to assess “whether exposure to famous women in counterstereotypic leadership positions can undermine women’s automatic stereotypes about their ingroup”); Dasgupta & Greenwald, *supra* note 19, at 806 (“Two experiments that demonstrated that implicit evaluations of historically stigmatized groups may be modified, at least temporarily, by repeatedly reminding people of admired members of those groups and of disliked members of high-status reference groups.”).

30. Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 844–47 (2001) (reporting on experiments that examined “automatic racial prejudice in the context of actual interethnic contact”); Jennifer A. Richeson & Nalini Ambady, *Effects of Situational Power on Automatic Racial Prejudice*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 177, 178–81 (2003) (presenting a study that examined “the influence of situational power-discrepant roles on implicit racial attitudes”).

31. Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417, 419–20 (2004); Laurie A. Rudman et al., “*Unlearning*” *Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 856 (2001) (presenting research suggesting “that automatic and controlled intergroup biases can be modified through diversity education”).

32. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1020–22 (2007); Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1223 (2009).

33. Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 270 (2006).

34. See Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190, 194 (2013), <http://aja.ncsc.dni.us/publications/courtrv/cr49-4/CR49-4Elek.pdf> (noting

temporary results appear to require multiple interventions and/or extensive training.<sup>35</sup> Accordingly, even for those who are particularly inclined to be receptive to the goal of combating unconscious bias, the trainings may be unable to achieve meaningful, long-term change.<sup>36</sup>

In one prominent psychological study, volunteers attended a seminar aimed at educating them about prejudice and diversity.<sup>37</sup> The seminar lasted for *fourteen weeks*.<sup>38</sup> Volunteers showed decreased unconscious bias and stereotyping (as measured by the IAT) over the course of the seminar,<sup>39</sup> but the researchers nevertheless concluded that future research was needed to determine whether the decreases in biases were temporary or stable.<sup>40</sup> The authors specifically noted that they did not assess the potential for long-term effects.<sup>41</sup>

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that “educational efforts” have “helped to at least temporarily reduce individuals’ expressions of implicit and explicit racial biases”); Levinson, *supra* note 26, at 162 n.46; Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 411 (2007) [hereinafter Levinson, *Forgotten Racial Equality*] (“A significant amount of research has focused on whether implicit biases can be temporarily eliminated or modified. These efforts have achieved mixed levels of success, and indicate that exposure to diversity or viewing minority exemplars, for example, can sometimes temporarily reduce people’s implicit biases.”); *see also* Levinson, *Forgotten Racial Equality*, *supra*, at 417 (“Implicit racial biases are elicited quickly and easily, and can only be temporarily reduced through interventional approaches.”).

35. *See, e.g.*, Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCHOL. 871, 871, 876 (2000) (study participants demonstrated reduced stereotype activation after receiving “an extensive amount of training related to a specific category [stereotype]” that amounted to 480 trials); *see also* Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 137 (2010) (observing that “[m]ultiple interventions effectively shift implicit racial biases, at least temporarily”); Kawakami et al., *supra*, at 872 (“Practice, which is a fundamental process in developing automaticity . . . may also be a critical factor for reducing it.”); Rudman et al., *supra* note 31, at 858, 861 (discussing the fact that experimental participants in a fourteen-week diversity education program showed less bias at the end of the program, compared with the beginning).

36. Levinson, *supra* note 26, at 162 (“People who are internally motivated to be egalitarian—those who embrace equality and fairness as part of their personal values—are more likely to show training benefits and would stand to benefit most from well-designed, professional implicit bias reduction training. Even with the right program . . . however, it is unclear how long the bias reduction effects of short-term intervention last; it is possible that they may only last for seconds or minutes.”).

37. Rudman et al., *supra* note 31, at 858.

38. *Id.*

39. *Id.* at 860.

40. *Id.* at 866.

41. *Id.*



Indeed, research suggests that unconscious bias may be less malleable than originally thought.<sup>42</sup> The effects of “debiasing” interventions “may only last for seconds or minutes.”<sup>43</sup> Although some studies have seen a twenty-four hour reduction in unconscious bias,<sup>44</sup> and the study discussed above saw a fourteen-week reduction,<sup>45</sup> such an acutely short-term duration makes it clear that a one-hour implicit bias workshop will not truly eradicate one’s biases. While a workshop may raise awareness, its effect will quickly fade.<sup>46</sup>

The short-lived results of educational efforts to reduce unconscious biases should not be surprising. Implicit bias is a response that is automatically activated, without awareness,<sup>47</sup> and, as such, is difficult to surmount. In fact, the automatic nature of unconscious bias led

42. Joy-Gaba & Nosek, *supra* note 35, at 144 (“[T]he published literature may have overestimated the extent to which implicit social cognitions are malleable. Some other research also suggests that malleability of implicit cognition may be weaker than implied by the accumulated malleability literature.” (first citing Robert J. Rydell & Allen R. McConnell, *Understanding Implicit and Explicit Attitude Change: A Systems of Reasoning Analysis*, 91 J. PERSONALITY & SOC. PSYCHOL. 995 (2006); and then citing Robert J. Rydell et al., *Implicit and Explicit Attitudes Respond Differently to Increasing Amounts of Counterattitudinal Information*, 38 EUR. J. SOC. PSYCHOL. 867 (2007))).

43. Levinson, *supra* note 26, at 162.

44. *See, e.g.*, Dasgupta & Greenwald, *supra* note 19, at 801, 807 (noting that their study “sought to test whether automatic negative attitudes can be temporarily modified,” and finding that they achieved a temporary decrement in racial bias that lasted 24 hours); Kawakami et al., *supra* note 35, at 879 (study in negating stereotypic associations, as measured over a twenty-four-hour time frame); *see also* Levinson, *Forgotten Racial Equality*, *supra* note 34, at 411–13, 415, 417 (repeatedly asserting that the reductions in implicit bias achieved in psychological studies have been only temporary); Blair et al., *supra* note 28, at 838 (acknowledging that their “current data cannot address the long-term consequences” of counterstereotypic mental imagery designed to reduce stereotyping).

45. Rudman et al., *supra* note 31.

46. CASEY ET AL., *supra* note 23, at B-9 (noting that “debiasing strategies seem to only temporarily reduce or shift” implicit bias, and that “[l]onger-term change might be possible only through substantial and persistent effort”).

47. *See* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 243 (2002) (“[T]here is impressive evidence for the automatic operation of stereotypes and prejudice.”); Blair et al., *supra* note 28, at 828 (“Implicit stereotypes are social category associations that become activated without the perceiver’s intention or awareness when he or she is presented with a category cue.”); Devine, *supra* note 15, at 6 (“[A]nalysis suggests that . . . stereotypes are automatically activated.”); Dovidio et al., *supra* note 16, at 511 (“Implicit attitudes . . . operate in an unconscious fashion.”); Kawakami et al., *supra* note 35, at 871 (“Recent studies have demonstrated that stereotyping related to such categories as race, sex, and age is largely automatic.” (citations omitted)); *see also* Antony Page, Batson’s *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 181–82 (2005) (“Motivation, intent, purpose, and most importantly, conscious awareness . . . are not necessary pre-requisites for stereotyping and any resulting discrimination.”).

researchers initially to conclude that such bias was inevitable and could not be overcome.<sup>48</sup> One subsequent researcher has analogized attempts to overcome implicit bias to the breaking of a bad habit:

Inhibiting stereotype-congruent or prejudice-like responses and intentionally replacing them with nonprejudiced responses can be likened to the breaking of a bad habit. That is, automatic stereotype activation functions in much the same way as a bad habit. Its consequences are spontaneous and undesirable, at least for the low-prejudice person . . . . [Another study has] argued that elimination of a bad habit requires essentially the same steps as the formation of a habit. The individual must (a) initially decide to stop the old behavior, (b) remember the resolution, and (c) try repeatedly and decide repeatedly to eliminate the habit before the habit can be eliminated.<sup>49</sup>

Accordingly, the necessity of extended training and multiple interventions is consistent with what we know about psychological processes. Indeed, as one recent psychological study concluded, “it would be quite stunning if a [five- to ten-minute intervention would be] sufficient to alter (be it temporarily or permanently) pre-existing associations accumulated over a lifetime.”<sup>50</sup>

The question of how to overcome unconscious bias takes on particular urgency in the context of a judicial recusal motion. Most judges consider themselves to be “objective and especially talented at fair decisionmaking.”<sup>51</sup> Paradoxically, however, that very belief in their own objectivity “puts [judges] at particular risk for behaving in ways that belie [their] self-conception.”<sup>52</sup> As explained in a report by the National Center for State Courts, the existence of unconscious bias suggests that judges cannot necessarily trust their subjective belief that they are approaching a matter impartially:

The [unconscious bias] problem is compounded by judges and other court professionals who, because they have worked hard to eliminate explicit bias in their own decisions and behaviors, assume

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48. See, e.g., Devine, *supra* note 15, at 5 (noting that “many classic and contemporary theorists have suggested that prejudice is an inevitable consequence of ordinary categorization (stereotyping) processes”); Joy-Gaba & Nosek, *supra* note 35, at 137 (“Early notions of automaticity suggested that the processes were difficult to modify because of the well-learned patterns that were relatively insensitive to the immediate context.”).

49. Devine, *supra* note 15, at 15.

50. Joy-Gaba & Nosek, *supra* note 35, at 145 (“Real associate change may require persistent, even ‘permanent,’ [interventions] . . .”).

51. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1172 (2012).

52. *Id.* at 1173.

that they do not allow racial prejudice to color their judgments. . . . [E]ducational programs that do not discuss implicit biases may lead participants to conclude that they are better at understanding and controlling for bias in their decisions and actions than they really are. . . . Research shows, however, that [judges] tend to overestimate their ability to avoid bias.<sup>53</sup>

And because unconscious biases manifest themselves when people “categorize information, remember facts, and make decisions,”<sup>54</sup> judges’ unconscious biases may play a role in, among other areas, voir dire questioning, rulings on peremptory challenges, assessing the credibility of witnesses, and imposing sentences (in criminal cases) or damages (in civil cases).<sup>55</sup>

One hallmark of fairness is impartiality,<sup>56</sup> and implicit bias can potentially impair judges’ ability to be impartial.<sup>57</sup> Although all judges are likely to harbor unconscious biases,<sup>58</sup> a recusal motion seeks the disqualification of a specific judge for a reason specific to—and personal to—that judge, thus requiring the judge to engage in self-exami-

53. CASEY ET AL., *supra* note 23, at 2, 21 (citations omitted); *see also* W. Bradley Wendel, *The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 McGEORGE L. REV. 35, 41 (2010) (noting that “a judge with the best of intentions may believe herself to be making her best efforts to put aside feelings of partiality or loyalty, but may be unable to override the influence of unconscious biases”).

54. Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 600–01 (2009).

55. *See, e.g.*, United States v. Clemmons, 892 F.2d 1153, 1162 (3d Cir. 1989) (“[T]he prosecutor’s prejudice may be subtle, unconscious, and shared by the judge . . . .” (quoting *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1581 (1988))); Sherri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 67–68 (1993) (“[W]hat if the judge is racially biased too? The *Batson* majority’s answer—that we should trust trial judges to obey the law—is only satisfactory if bias is conscious. If bias were sometimes unconscious, then a judge might in good faith believe she was executing the law, but in fact be approving the racially biased action of attorneys.”); *see also* Darrell A.H. Miller, *Iqbal and Empathy*, 78 UMKC L. REV. 999, 1008 (2010) (stating researchers have speculated that judicial implicit bias may “result from repeated exposure to minorities in the justice system”).

56. *See* NEW OXFORD AMERICAN DICTIONARY, s.v. “impartiality” (3d ed. 2010) (defining impartiality as “[e]qual treatment of all rivals or disputants; fairness”).

57. *See* John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 McGEORGE L. REV. 1, 7 (2010) (“Judges naturally strive to reach decisions that are both correct on the merits and correct from an ethical perspective. Implicit biases can potentially impair the ability of judges to reach correct decisions from either perspective.”); Geoff Ward et al., *Does Racial Balance in Workforce Representation Yield Equal Justice? Race Relations of Sentencing in Federal Court Organizations*, 43 L. & SOC’Y REV. 757, 772 (2009) (“[J]udges harbor implicit biases much like others in the population, and these biases may have some bearing upon judgment.” (citation omitted)).

58. *See supra* note 14 and accompanying text.

nation. Unfortunately, unconscious bias may prevent a judge from being able to see prejudice in him- or herself that appears obvious to someone else. Accordingly, unconscious bias offers one reason for employing alternate or additional decision-makers in the review of judicial recusal motions. The issues posed by unconscious bias in the context of a judicial recusal motion are magnified by the bias blind spot, which lends further support to the need for alternate or additional decision-makers.

## II.

### THE BIAS BLIND SPOT

Unconscious bias is exacerbated by the bias blind spot, whereby “individuals see the existence and operation of cognitive and motivational biases much more in others than in themselves.”<sup>59</sup> As one research study has explained, “Bias turns out to be relatively easy to recognize in the decisions of others, but often difficult to detect in one’s own judgments.”<sup>60</sup>

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59. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 J. PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002) [hereinafter Pronin et al., *Bias Blind Spot*] (presenting three studies that suggest evidence of the bias blind spot); see also Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 690 (2005) (“Past research has shown that people are more apt to detect bias in the judgments of others than in their own judgments.”); Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 565 (2007) (“People see themselves as less susceptible to bias than others.”); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 781 (2004) [hereinafter Pronin et al., *Eye of the Beholder*] (“‘And why beholdest thou the mote that is in thy brother’s eye but considerest not the beam that is in thine own eye?’ . . . This familiar biblical quotation describes an age-old double standard in the way people perceive themselves versus their peers. . . . [W]e argue that people readily detect or infer a wide variety of biases in others while denying such biases in themselves.” (quoting *Matthew 7:3* (King James))).

60. Richard F. West et al., *Cognitive Sophistication Does Not Attenuate the Bias Blind Spot*, 103 J. PERSONALITY & SOC. PSYCHOL. 506, 507 (2012); see also Justin Kruger & Thomas Gilovich, “Naïve Cynicism” in *Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 743, 743–44 (1999) (noting the tendency to see bias in others more readily than in ourselves); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 65–66 (2000) (noting that “biases are easier to spot in others than in oneself”).

Although judges may believe themselves free of bias,<sup>61</sup> the bias blind spot, like unconscious bias, is simply a human phenomenon,<sup>62</sup> and therefore, again, one from which judges are not immune.<sup>63</sup> One study, in which judges attending a conference were the subjects, found that ninety-seven percent of participating judges ranked themselves in the top fifty percent of those in attendance in their ability to “avoid racial prejudice in decisionmaking.”<sup>64</sup> A survey of administrative agency judges yielded similar results—more than ninety-seven percent of those surveyed ranked themselves in the top fifty percent for avoiding bias.<sup>65</sup> These results are consistent with the bias blind spot assessment, in which “[p]eople tend to believe that their own judgments are less prone to bias than those of others.”<sup>66</sup>

The bias blind spot is not merely an issue of arrogance or overconfidence in one’s abilities. Rather, research suggests that the bias blind spot may be the result of a form of cognitive distortion.<sup>67</sup> Partic-

61. Michael B. Hyman, *What the Blindfold Hides*, 48 JUDGES’ J. 32, 32 (2009) (“Most judges, if asked, consider themselves free of bias, even-handed, and open-minded . . .”).

62. Pronin et al., *Bias Blind Spot*, *supra* note 59, at 379 (“Displays of cognitive and motivational bias are inevitable products of the way we all see and understand the world. Perceptions and accusations of bias in others, coupled with denial of bias in self, are similarly inevitable.”).

63. See Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. L. REV. 235, 250 (2013) (“[W]e are all—including judges—subject to the Bias Blind Spot.”); see also Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1517 (1997) (“Of course judges, being human, are prone to the same prejudices as the rest of us. They too hear stories through a skewed cognitive filter . . .”); Jennifer K. Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 MONITOR ON PSYCHOL. 24, 24 (2010) (“People believe they are objective, see themselves as more ethical and fair than others, and experience a ‘bias blind spot,’ the tendency to see bias in others but not in themselves. . . . These tendencies make it difficult for judges to identify their own biases.” (citations omitted)). Indeed, Professor Stempel has suggested that judges may be more susceptible to unconscious biases. Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation and Perceptual Realities*, 30 REV. LITIG. 733, 741 (2011) (suggesting that “one can make a persuasive argument” that unconscious biases “become exacerbated, rather than reduced, because of the isolation in which judges work and the pedestal upon which they are placed”).

64. Rachlinski et al., *supra* note 32, at 1225–26.

65. See Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

66. Ehrlinger et al., *supra* note 59, at 680.

67. See Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37, 37 (2007) (“Human judgment and decision making is distorted by an array of cognitive, perceptual and motivational biases. Recent evi-

ularly troubling for the judicial recusal context is the documented tendency of individuals to rely on introspective information (meaning thoughts, feelings, and intentions) when assessing bias, to the point of essentially disregarding their actual behavior—but only when assessing bias in themselves, not when assessing bias in others.<sup>68</sup>

[B]lindness to bias in the self is . . . produced and maintained by people’s willingness to take their introspections about the sources of their judgments and decisions at face value—that is, to treat the lack of introspective awareness of having been biased as evidence that one is innocent of such bias.<sup>69</sup>

As one study has explained, when one attempts to scrutinize one’s own behavior or decisions for the potential existence of bias, the unconscious nature of most biases will tend to deceive the individual into believing that bias is not present:

Because many biases work below the surface and leave no trace of their operation, an introspective search for evidence of bias often turns up empty. Having conducted an internal search that produced little evidence of bias, people feel justified in believing their own judgments to be untainted by bias.<sup>70</sup>

Moreover, research suggests that when individuals believe that they are objective, this self-perceived objectivity can have the ironic consequence of actually rendering the individual *more* susceptible to bias.<sup>71</sup> In light of these effects of the bias blind spot, is there an effective method for ameliorating this bias?

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dence suggests that people tend to recognize (and even overestimate) the operation of bias in human judgment—except when that bias is their own.”).

68. See, e.g., Pronin & Kugler, *supra* note 59, at 575–76; see also West et al., *supra* note 60, at 515 (“[W]hen we introspect we will largely fail to detect the unconscious processes that are the sources of our own biases.”).

69. Pronin et al., *Eye of the Beholder*, *supra* note 59, at 793.

70. Ehrlinger et al., *supra* note 59, at 690; see also Pronin et al., *Bias Blind Spot*, *supra* note 59, at 374 (“[I]ndividuals generally are unaware of biasing influences that are being exerted on them when they are in the process of making judgments or inferences.”); Pronin, *supra* note 67, at 39 (“When people are influenced by bias, this influence typically occurs nonconsciously.”); Jennifer K. Robbenault & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1117 (2013) (“These views of self can lead to an *ethical blind spot* that impedes our ability to perceive and thoughtfully consider the ethical tensions we inevitably face. If we are objective, fair, and unbiased, then we need not be concerned that we might take unfair advantage of another or unfairly privilege one person or position over another.”).

71. See Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*”: *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 208 (2007) (“[A]n important disinhibitor of discrimination is decision-makers’ sense of personal objectivity. When people believe that they are objective, they feel licensed to act on biases whose influence they may have otherwise suppressed . . .”).

Unfortunately, one research study suggests that the bias blind spot may be even more resistant to intervention than unconscious bias.<sup>72</sup> In that study, students at Stanford University continued to reflect the bias blind spot in comparing themselves on six personality dimensions to other Stanford students generally, even after (1) their responses reflected the bias, (2) the bias blind spot phenomenon was described to them, and (3) they were expressly invited to reconsider their original responses in light of this new information about the bias blind spot.<sup>73</sup> The results of this particular study therefore suggest that educating individuals about the bias blind spot might not, on its own, be sufficient to have any ameliorative impact.

Melinda Marbes has observed that the bias blind spot has particular applicability to judicial recusal because it is only in that context that judges “[are] asked to assess themselves. It is this difference in the subject of the evaluation that gives rise to the Bias Blind Spot and causes judges to misapply the law.”<sup>74</sup> Indeed, the bias blind spot is aptly named, because judges genuinely cannot see potential biases due to the unconscious nature of those biases. As Marbes has explained, “The problem is that when a jurist is asked to be unbiased about his own biases, most judges simply are not able to do it—they cannot see their minds fooling them.”<sup>75</sup>

In sum, the unconscious nature of both implicit bias and the bias blind spot impairs judges’ ability to recognize their biases. When a

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72. Pronin et al., *Bias Blind Spot*, *supra* note 59.

73. *Id.* at 374–75. The researchers reported:

Clearly, some participants had both succumbed to the relevant bias and then denied having done so, even after hearing an explicit description of it and being invited to acknowledge its influence.

These data suggest that even the immediate experience of having displayed a particular bias, and then being given an explicit description of it (one which presents the bias as a common human tendency), was insufficient to prompt confessions of susceptibility equal to that of one’s peers. Neither the subjective experience associated with the occurrence of the bias, nor the description of the bias as common (and therefore presumably a forgivable foible . . .), nor an explicit invitation and context that further would have made it easy and socially desirable to acknowledge one’s frailty, was sufficient to prompt a *mea culpa* from the majority of our participants.

*Id.*

74. Marbes, *supra* note 63, at 251.

75. *Id.* at 300; *see also* Daniel Gilbert, Opinion, *I’m O.K., You’re Biased*, N.Y. TIMES (Apr. 16, 2006), [http://www.nytimes.com/2006/04/16/opinion/16gilbert.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/04/16/opinion/16gilbert.html?pagewanted=all&_r=0) (“In short . . . 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, the only reliable method for avoiding bias is to avoid the situations that produce it.”).

recusal motion is decided only by the challenged judge, no avenue exists to compensate for that impairment. An additional or alternate decision-maker inserts cognitive distance, potentially permitting the moving party's concerns to be seen more clearly.

### III.

#### THE "PUBLIC POSITION" EFFECT

Finally, I would like to venture into another area that also is rooted in interdisciplinary studies and portends potential repercussions for rulings on recusal motions: the impact of publicly articulating a position on an issue, which I am calling the "public position" effect. This phenomenon has an unconscious component similar to those involved in implicit bias and the bias blind spot, and it serves as an additional illustration of the need for additional or alternative decision-makers.

Judicial candidates routinely are asked, both publicly and privately, about their opinions regarding various issues.<sup>76</sup> Why would members of Congress, a state governor, a reporter, or any other individual ask a judicial candidate such questions? We all know why. The questions are not inquiring about the candidate's favorite color or pastime. The questions are ideological ones, whereby the questioner hopes to gain insight into how the judicial candidate would be inclined to rule if faced with the issue as a judge.<sup>77</sup>

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76. See, e.g., William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119, 119 (2001) ("The U.S. Senate's growing recognition of the political significance of lower federal judges is reflected in its increasing scrutiny of nominations to the U.S. district courts and courts of appeals. In addition to studying information about the nominee provided by the White House, the FBI, the ABA, and various other sources, the Senate Judiciary Committee directly interacts with each nominee through oral and written questions. . . . [S]ome hearings . . . probe various subjects that may concern senators, including a nominee's political predilections . . ."); see also DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., R41300, QUESTIONING SUPREME COURT NOMINEES ABOUT THEIR VIEWS ON LEGAL OR CONSTITUTIONAL ISSUES: A RECURRING ISSUE I (2010), <https://www.fas.org/spp/crs/misc/R41300.pdf> ("In recent decades a recurring Senate issue has been what kinds of questions are appropriate for Senators to pose to a Supreme Court nominee appearing at hearings before the Senate Judiciary Committee. Particularly at issue has been whether, or to what extent, questions by committee members should seek out a nominee's personal views on current legal or constitutional issues or on past Supreme Court decisions that have involved those issues."); Rebecca Mae Salokar, *Endorsements in Judicial Campaigns: The Ethics of Messaging*, 28 JUST. SYS. J. 342, 350 (2007) ("There is little reason to doubt that endorsing organizations have always tried to ask judicial candidates questions that would require the candidates to reveal personal views on issues salient to the organization.")

77. See, e.g., RUTKUS, *supra* note 76, at 3 ("Senators who are undecided may seek to glean from the nominee's responses signs of how the nominee, if confirmed as a



The American Bar Association's Model Code of Judicial Conduct anticipates this practice in Rule 4.1, which prohibits judges or judicial candidates from making "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office"<sup>78</sup> or "any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court."<sup>79</sup> However, these provisions do not bar a judge from publicly articulating a position on a particular issue so long as the judge has not made a promise to rule accordingly or has not made a statement that would have an effect on a pending case,<sup>80</sup> such as when no such pending case exists, the pending case is outside the judge's jurisdiction, or the pending case is before a higher-level court and therefore any statement by the judge would be unlikely to have an effect.

Judges certainly have—and are entitled to—opinions on ideological issues.<sup>81</sup> But are there grounds for concern when a judge or judicial candidate states such opinions publicly, particularly when the judge is subsequently the subject of a recusal motion based on that publicly stated opinion? Research studies suggest yes, for several reasons.

Social science research suggests that "[t]he more publicly one states [one's] attitude, the more one is committed and locked into that

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Justice, might be expected to rule on particular issues or affect the ideological balance of the Court."); Jack Jenkins, *South Carolina Lawmaker Asks Prospective Judges if They Believe in God*, THINKPROGRESS (Feb. 2, 2015, 11:03 AM), <http://think-progress.org/justice/2015/02/02/3618058/south-carolina-lawmaker-questions-judicial-candidates-personal-relationship-god/> (reporting that South Carolina Republican state representative Jonathon Hill sent a questionnaire to state judicial candidates "asking their legal opinions on controversial topics and the nature of their relationship to God"); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 800 (2002) (Stevens, J., dissenting) ("[W]e . . . know that a judicial candidate, who announces his views in the context of a campaign, is effectively telling the electorate: 'Vote for me because I believe X, and I will judge cases accordingly.'").

78. MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(13) (AM. BAR ASS'N 2011).

79. *Id.* at r. 4.1(A)(12).

80. See *White*, 536 U.S. at 770, 778 (majority opinion) (striking down Minnesota's former, more restrictive, version of Rule 4.1, which prohibited a judge from "announc[ing] his or her views on disputed legal or political issues," and stating that this so-called "announce" clause was separate from, and broader than, "*promising* to decide an issue in a particular way").

81. MODEL CODE OF JUDICIAL CONDUCT r. 2.2 cmt. 2 (AM. BAR ASS'N 2011) (noting that "each judge comes to the bench with a unique background and personal philosophy"); see also *White*, 536 U.S. at 788 (holding that Minnesota's "announce" clause, which prohibited judicial candidates from announcing their views on disputed legal and political issues, violated the First Amendment).

position.”<sup>82</sup> We are all familiar with the power of public comments to bind, which is one reason for the distinction between comments that are “on” and “off” record.<sup>83</sup> Publicly endorsing (or condemning) a particular position makes it difficult to retreat from the opinion articulated.<sup>84</sup> Attitude consistency is valued in Western culture;<sup>85</sup> individuals who retreat from a previously expressed opinion or position tend to

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82. Mahesh Gopinath & Prashanth U. Nyer, *The Effect of Public Commitment on Resistance to Persuasion: The Influence of Attitude Certainty, Issue Importance, Susceptibility to Normative Influence, Preference for Consistency and Source Proximity*, 26 INT’L J. RES. MARKETING 60, 61 (2009) (citing John R. Hollenbeck et al., *An Empirical Investigation of the Antecedents of Commitment to Difficult Goals*, 74 J. APPLIED PSYCHOL. 18 (1989)); see also Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance* (articulating the idea that commitments made publicly are more persistent than those made privately), in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 169, 177 (Daniel T. Gilbert et al. eds., 4th ed. 1998); Michael S. Pallack & William Cummings, *Commitment and Voluntary Energy Conservation*, 2 PERSONALITY & SOC. PSYCHOL. BULL. 27 (1976) (finding that homeowners who had publicly been identified as agreeing to reduce their energy consumption reduced their consumption more than homeowners who had privately—but not publicly—expressed the same commitment); Frederick J. Pauling & Robert E. Lana, *The Effects of Pretest Commitment and Information upon Opinion Change*, 29 EDUC. & PSYCHOL. MEASUREMENT 653, 660 (1969) (finding that a subject’s commitment, “as measured by degree of public statement of opinion,” inhibited opinion change).

83. See NEW YORK UNIVERSITY, DEP’T OF JOURNALISM, NYU JOURNALISM HANDBOOK FOR STUDENTS: ETHICS, LAW & GOOD PRACTICE (2007), <http://journalism.nyu.edu/publishing/ethics-handbook/human-sources> (“‘On the record’ means anything the source says can be reported, published, or aired. . . . ‘Off the record’ restricts the reporter from using the information the source is about to deliver.”). The same binding nature of “on the record” statements is regularly seen in the legal arena. See, e.g., *MedPointe Healthcare, Inc. v. Kozachuk*, 373 F. App’x 62 (Fed. Cir. 2010) (enforcing settlement agreement where parties had assented to its terms on the record); see also Molly Mosley-Goren, *Intellectual Property Law Decisions of the Seventh Circuit*, 36 J. MARSHALL L. REV. 857, 905 (2003) (“An issue in civil copyright cases is whether settlement talks are binding on the parties. The risk of on-the-record settlement talks is intuitive . . . .”); Alfred M. Wolin, *Comment*, 31 SETON HALL L. REV. 907, 908 (2001) (noting “the binding effect of a conference held on the record”).

84. See Ann Landi, *Split Decisions: When Critics Change Their Minds*, ARTNEWS (Feb. 19, 2013), <http://www.artnews.com/2013/02/19/when-critics-change-their-mind> (“When a politician flip-flops on a position, the public and press alike are quick to cry foul, hurling accusations of bad faith or pandering.”).

85. See, e.g., Eunok M. Suh, *Culture, Identity, Consistency, and Subjective Well-Being*, 83 J. PERSONALITY & SOC. PSYCHOL. 1378 (2002) (questioning the premise in psychology that identity consistency is a prerequisite for mental health through a comparison among surveys conducted on Americans and Koreans to suggest that identity consistency is more highly prized in Western cultures); see also Abraham Tesser, *On the Confluence of Self-Esteem Maintenance Mechanisms*, 4 J. PERSONALITY & SOC. PSYCHOL. REV. 290, 291–92 (2000) (describing the cognitive dissonance that occurs when behavior conflicts with closely held beliefs as a threat to self-esteem).

be criticized for doing so.<sup>86</sup> Highly visible examples of this phenomenon occur in the political context, in which individuals who change their minds on an issue often are negatively characterized as “waffling.”<sup>87</sup>

The “public position” effect poses dangers for judges in the recusal context. Studies suggest that the power of the public position effect actually causes individuals to engage in selective cognitive processing, whereby they are more receptive to information and arguments that are consistent with their publicly articulated positions, and correspondingly are resistant to information and arguments that are inconsistent with their publicly stated positions.<sup>88</sup>

Of course, this is not to suggest that judges should be prohibited from expressing opinions on various issues in a public forum, or that judges who do so should be subject to professional discipline. Rather, the implication of these studies in the judicial recusal context is that, because judges who have expressed such public opinions could be resistant to contrary information, they might genuinely be unable to

86. See, e.g., HILARY PUTNAM, REPRESENTATION AND REALITY, at xi (2001) (“I am . . . as I have done on more than one occasion, criticizing a view I myself earlier advanced . . . . [T]here are philosophers who criticize me for doing this. The fact that I changed my mind . . . has been viewed as a character defect.”); Grant Woods, *Changing Your Mind*, 48 ARIZ. ATT’Y 92, 92 (2012) (“If [elected officials] ever change their views or evolve in their thinking to a different conclusion, they are accused of flip-flopping or opportunism.”).

87. See, e.g., Tom Raum, *The Waffle: White House No Longer Amused by Cartoon*, IREM (Sumter, S.C.), Aug. 24, 1994, at 3A, <http://news.google.com/newspapers?id=CJEiAAAAIBAJ&pg=1138%2C5151329> (describing a *Doonesbury* comic strip that portrayed President Bill Clinton unflatteringly as a “floating waffle,” as a commentary on the President changing his mind on several issues); see also Rachel L. Holloway, *Political Conventions of 2004: A Study in Character and Contrast* (stating that John Kerry was characterized as “waffling” during the 2004 presidential campaign), in THE 2004 PRESIDENTIAL CAMPAIGN: A COMMUNICATION PERSPECTIVE 29, 69 (Robert E. Denton, Jr. ed., 2005).

88. Charles A. Kiesler & Lee H. Corbin, *Commitment, Attraction, and Conformity*, 2 J. PERSONALITY & SOC. PSYCHOL. 890 (1965) (presenting a study that found the more committed an individual is to a group, the more that group can influence him); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990); Eva M. Pomerantz et al., *Attitude Strength and Resistance Processes*, 69 J. PERSONALITY & SOC. PSYCHOL. 408 (1995); see also Gopinath & Nyer, *supra* note 82, at 63–64 (discussing an empirical study and stating that “[t]he analyses show that public commitment causes participants to become more resistant to persuasion . . . . We have confirmed that making a commitment in public causes individuals to be more resistant to information that could change their attitudes.”). References to public “commitment” encompass more than “promises” made publicly, as demonstrated by this last study, which involved participants providing consent to having their evaluations of a billboard advertisement for an Italian fast-food restaurant made public on a website. Gopinath & Nyer, *supra* note 82, at 62. I would suggest that posting an online review is an “opinion” rather than a “promise.”

evaluate a recusal motion objectively.<sup>89</sup> Additionally, due to the bias blind spot, the judge may firmly believe that he or she can be fair despite having articulated an opinion on the issue publicly, when in fact the judge may not be able to do so.<sup>90</sup>

As Professor Geyh has observed, judicial recusal procedures rely on “two implicit assumptions: that judges are able to assess the extent of their own bias; and that judges are able to assess how others reasonably perceive their conduct.”<sup>91</sup> Professor Geyh has concluded that “[n]either assumption is safe,” citing to studies suggesting that judges are vulnerable to unconscious influences, including not only implicit bias but also “egocentric” bias, which is “the propensity to overestimate one’s own abilities.”<sup>92</sup> Similarly, the “public position” effect has an unconscious component that can have an impact on a judge’s decision-making processes—an impact of which the judge is unaware. This potential for bias or prejudice in the administration of justice undermines judicial impartiality<sup>93</sup> and thus suggests the need for alternate or additional decision-makers in the judicial recusal context.

#### IV.

##### THE CHALLENGED JUDGE AS DECISION-MAKER

All three of the concerns discussed above—unconscious bias, the bias blind spot, and the public position effect—raise particular concerns in the judicial recusal context because, in most courts, judicial disqualification motions are filed with, and ruled upon by, the very judge whose impartiality is being challenged.<sup>94</sup> A minority of courts

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89. See *supra* notes 82–88 and accompanying text.

90. See Pronin & Kugler, *supra* note 59, at 565 (noting that “[i]n a recent news story, a federal judge defended his ability to be objective in handling a case involving a long-time friend,” and observing that “the [judge was] convinced of [his] own objectivity, while outside observers were quick to accuse [him] of bias”).

91. Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 708 (2011).

92. *Id.* at 708–09 (citations omitted).

93. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 5.4.1 (1996) (“Judicial decisions rendered under circumstances suggesting bias or favoritism tend to breed skepticism, undermine the integrity of the courts, and generally thwart the principles upon which our jurisprudential system is based.”).

94. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873–75 (2009) (explaining that Caperton had unsuccessfully moved three times to disqualify Justice Benjamin); see also *United States v. Morris*, 988 F.2d 1335, 1337 (4th Cir. 1993) (noting that it is the challenged judge who rules on a disqualification motion pursuant to section 455(a) of title 28 of the U.S. Code); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 536 (2005) (“[The [recusal] decision itself is almost always made in the first instance by the very judge being asked to disqualify himself . . .”); John Leubsdorf, *Theories of*

offer alternative approaches: eighteen state judiciaries, including California, Texas, and Indiana, employ a peremptory-disqualification procedure,<sup>95</sup> some federal case law has recognized a discretionary transfer of a judicial disqualification motion to another judge,<sup>96</sup> and some state courts require the transfer of such motions.<sup>97</sup> Nevertheless, in the vast majority of circumstances, the challenged judge decides the disqualification motion<sup>98</sup>—despite the fact that (1) bias is notoriously difficult to recognize in oneself;<sup>99</sup> (2) most people, including judges, harbor unconscious biases, prejudices, stereotypes, and beliefs;<sup>100</sup> (3) people are not always aware of the analytical distortions that can result from implicit bias, the bias blind spot, and the “public position” effect;<sup>101</sup> and (4) having the challenged judge rule on the recusal motion

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*Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 242 (1987) (deeming “bizarre” the rule requiring “the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias”); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 633 (1987) (noting that “the recusal motion is ruled upon by the district judge whose ability to decide fairly is the very subject of the motion”).

95. See RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* 789–822 (2d ed. 2007) (detailing the peremptory challenge procedures of each state); see also *id.* at 753 (noting that “a substantial minority of states have adopted statutes or court rules that permit a party to seek judicial disqualification on a peremptory basis”).

96. See, e.g., *In re United States*, 158 F.3d 26, 37 n.10 (1st Cir. 1998) (Torruella, C.J., dissenting); *Doddy v. Oxy USA*, 101 F.3d 448, 458 n.7 (5th Cir. 1996); *United States v. Feldman*, 983 F.2d 144, 144 (9th Cir. 1992); *Rademacher v. City of Phoenix*, 442 F. Supp. 27, 27–28 (D. Ariz. 1977); *Bradley v. Milliken*, 426 F. Supp. 929, 943–44 (E.D. Mich. 1977); *United States v. Zagari*, 419 F. Supp. 494 (N.D. Cal. 1976).

97. See, e.g., 725 ILL. COMP. STAT. ANN. 5/114-5 (West 2015), construed in *People v. Mercado*, 614 N.E.2d 284, 287–89 (Ill. App. Ct. 1993); LA. CODE CRIM. PROC. ANN. art. 674 (2015), construed in *State v. Thompson*, 544 So. 2d 421, 428 (La. Ct. App. 1989); TEX. GOV’T CODE ANN. § 74.059(c)(3) (West 2015); UTAH R. CIV. P. 63(b), construed in *Anderson v. Anderson*, 368 P.2d 264, 265 (Utah 1962).

98. See Marbes, *supra* note 63, at 302 (stating that “the practice of allowing one to be a judge, in his own disqualification case, still prevails in the majority of federal and state courts”); see also FLAMM, *supra* note 93, at 499–500 (offering the same observation).

99. See Rachlinski, *supra* note 60, at 65–66 (noting that “biases are easier to spot in others than in oneself”); see also Kruger & Gilovich, *supra* note 60, at 743–44 (noting the tendency to see bias in others more readily than in ourselves).

100. See Rachlinski et al., *supra* note 32, at 1195 (finding “that judges harbor the same kinds of implicit biases as others”); see also Rachlinski, *supra* note 60, at 99–100 (“Courts identify cognitive illusions that might affect juries and adapt to them, but fail to identify cognitive illusions that affect judges and fall prey to them . . . . [R]esearch indicates that judges, like everyone else, are susceptible to illusions of judgment.”). See generally *supra* note 16 (citing psychological studies on unconscious bias).

101. See Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from “Big Judge Davis,”* 99 KY. L.J. 259,

runs contrary to the axiom that “[n]o man is allowed to be a judge in his own cause.”<sup>102</sup> Are there circumstances in which a judge will not have any relevant unconscious bias, will not have any applicable bias blind spot, and will not have made any public statement regarding his or her position on a pertinent issue? Absolutely. But these psychological studies suggest that there is a sufficient risk of danger to warrant the preventive approach of using an alternate or additional decision-maker for judicial recusal motions.<sup>103</sup> As stated by one research team, “The best way to remove the tendency to favor oneself and one’s in-group in a decision is to remove oneself from the conflict . . . .”<sup>104</sup>

#### CONCLUSION

The current majority approach to judicial recusal, whereby the challenged judge alone reviews and decides the motion, is fraught with potential dangers that can lead to perceived, or actual, unfairness. This Article briefly reviewed three of these potential dangers—unconscious bias, the bias blind spot, and the “public position” effect. In light of the fact that the vast majority of courts have more than one judge, perhaps the challenged judge need not, and should not, be the sole arbiter of a judicial recusal motion’s outcome.

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306 (2011) (“Few judges understand the complicated mental processes involved in receiving and evaluating information during the decision-making process. Judges are simply unaware of how heuristics and other subconscious biases and stereotypes influence outcomes.”); *see also supra* notes 82–88 (discussing the ramifications of the public position effect for judicial decision-making).

102. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (alteration in original) (quoting *THE FEDERALIST* NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961)); *see also In re Murchison*, 349 U.S. 133, 136 (1955) (stating that “no man can be a judge in his own case”).

103. *See supra* notes 82–88.

104. Dolly Chugh, Max H. Bazerman & Mahzarin R. Banaji, *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in *CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY* 74, 91 (Don A. Moore et al. eds., 2005).