

JUDICIAL RECUSAL: COGNITIVE BIASES AND RACIAL STEREOTYPING

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INTRODUCTION

For generations, there had been strenuous resistance to the notion that judges are purely rational beings in their legal decision-making. For example, in 1881, jurist Oliver Wendell Holmes, Jr. minimized the role of logic and underscored the role of experience in judicial decision-making:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics¹

In 1921, U.S. Supreme Court Justice Benjamin Cardozo—who at the time was a judge on the New York Court of Appeals—agreed.²

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1. OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (1881).

2. Justice (then-Judge) Cardozo wrote:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its set-

Then, in 1930, legal realist Jerome Frank speculated that judicial decisions could reflect such mundane influences as what the judge ate for breakfast.³ A decade later, when Frank sat on the federal bench, he continued with this line of reasoning.⁴ Contemporary judges and legal scholars have underscored the same sentiment.⁵

In recent decades, social scientists have demonstrated that people's cognitive resources are limited. Accordingly, people often use mental shortcuts—heuristics—to solve complex problems.⁶ While useful for approximating solutions to problems that would otherwise prove too difficult if tackled directly, these shortcuts sometimes result

ting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12–13 (1921).

3. See Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 24 (1931).

4. In one opinion written during his time on the U.S. Court of Appeals for the Second Circuit, Judge Frank observed:

Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will.

In re Linahan, 138 F.2d 650, 651 (2d Cir. 1943).

5. See *Jenkins v. Bellsouth Corp.*, No. Civ.A.CV–02–1057–S, 2002 WL 32818728, at *5 (N.D. Ala. Sept. 13, 2002) ("Judges, being human, unavoidably bring the accumulated experiences of their lives to the position, and those imponderable variables inevitably work subtle effects upon their demeanor and disposition."); see also Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1071 (2006) ("If judges just applied the law in a formalistic way, then results would be a product not of the human beings in the robes, but of the laws themselves. The identity of the judges would have little effect, so long as the individuals on the bench had the intelligence and honesty to faithfully carry out their duties.").

6. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 669 (1996); Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 374–85 (2005) (summarizing research on bounded rationality); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

in erroneous cognitive biases.⁷ Research suggests that these errors may influence judicial decision-making.⁸ For example, these types of shortcuts may lead to racial stereotypes such as associating race and crime.⁹ In turn, such automatic associations may lead to sentencing disparities.¹⁰

In this Article I explore implicit, subconscious race bias in judicial decision-making and its implications for judicial recusal. In Part I, I describe an unmistakable instance of racial stereotyping and prejudice demonstrated by a federal judge, in order to exemplify that judges harbor such attitudes. In Part II, I explore examples of white judges being racially biased against black litigants and what this may mean for judicial recusal. In Parts III and IV, I explore the extent to which black judges can be racially biased against white and black litigants, respectively. Overall, I contend that in light of the complex nature of subconscious race bias, different recusal standards should be used for black and white judges depending upon other contextual considerations.

I.

THE REALITIES OF JUDICIAL RACE BIAS

Judge Richard Cebull was a federal district court judge for the U.S. District Court for the District of Montana. In February of 2012, Judge Cebull used his court email account to forward six acquaintances a message titled, “A Mom’s Memory.”¹¹ The message read:

Normally I don’t send or forward a lot of these, but even by my standards, it was a bit touching. Hope it touches your heart like it did mine. A little boy said to his mother, Mommy, how come I’m black and you’re white? His mother replied, “Don’t even go there Barack! From what I can remember about that party, you’re lucky you don’t bark!”¹²

7. See Langevoort, *supra* note 6, at 1501.

8. See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

9. See, e.g., Jennifer Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 889–91 (2004) (citing and discussing several studies that “underscore the strong associational links between Black Americans and crime”).

10. See, e.g., Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendant Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006) (examining black criminal defendants’ perceived stereotypicality and the effects that this variable may have on sentencing decisions).

11. See *In re* Complaint of Judicial Misconduct, 751 F.3d 611, 613 (9th Cir. 2014).

12. *Id.*

The offensive email was subsequently forwarded by one of the original six recipients and was widely reported in the local and national media.¹³ After this story was released, there was considerable hue and cry from all quarters.¹⁴ Upon the release of the media reports, Judge Cebull wrote an apology to the President and, himself, filed a complaint asking the Ninth Circuit Chief Judge Alex Kozinski to investigate the incident.¹⁵ Third Circuit Chief Judge Theodore McKee filed another complaint against Judge Cebull for the same incident.¹⁶ Pursuant to Rule 11(f) of the *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (“JCD”), both complaints were referred to a five-judge, special-investigation committee to review relevant materials (e.g., emails, documents).¹⁷

On March 15, 2013, the Special Committee released its report in an order detailing the Committee’s findings to Judges Cebull and McKee pursuant to JCD Rule 20(f).¹⁸ The Committee issued a public reprimand and ordered that Judge Cebull not be given new cases for 180 days and that he undergo training racial awareness, judicial ethics, and the elimination of bias in order to reassure the public that

13. *Id.*

14. Members of Congress, governmental organizations, and the public called for Judge Cebull’s resignation. *Id.* The Montana Human Rights Network created a petition for Judge Cebull’s resignation and obtained over 2,800 signatures. *Id.* The Crow Tribal Legislature passed a resolution asking Montana’s Congressional representatives to impeach and remove Judge Cebull. *Id.* Additionally, as the Ninth Circuit noted during the subsequent disciplinary proceeding, “Six professors at the University of Montana Law School published an editorial on March 14, 2012, writing that litigants before Judge Cebull ‘now have clear reason to question his ability to be fair and impartial when they appear in his court.’” *Id.*

15. *Id.* at 614.

16. *Id.*

17. *See* RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS r. 11(f) (JUDICIAL CONFERENCE OF THE U.S. 2008) (“If some or all of the complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge’s discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.”).

18. *In re* Complaint of Judicial Misconduct, 751 F.3d at 614. The Committee found that: (1) the conduct in question was “prejudicial to the effective administration of the business of the courts”; (2) Judge Cebull had violated Canons 2 and 5 of the Code of Conduct for United States Judges, which require judges to “avoid impropriety and the appearance of impropriety” and refrain from engaging in political activity, respectively; and (3) “that [t]he strength and breadth of the public reaction to the publication of the February 2012 email illustrates the severity of the violation.” *Id.*

prejudice would not affect his future decision-making.¹⁹ This order reported in detail on the hundreds of similar emails previously sent by Judge Cebull, highlighting the extent of their disrespectful comments about political leaders, women, certain minorities, and sexual orientations, and noting that some had “related to pending legislation.”²⁰ The Committee also condemned Judge Cebull’s initial public apology and called for a second apology, approved by the Judicial Council, to acknowledge the breadth of his inappropriate actions and disregard for ethical concerns in his email correspondence.²¹ Two of the five judges concurred in the March 15 opinion and also called for Judge Cebull’s voluntary retirement under 28 U.S.C. § 371(a)²² because of the severity of his violation.²³

Although the March 15 order was to be published publicly on May 17, pursuant to JCD Rule 19(f), on April 2 the Judicial Council announced Judge Cebull’s retirement effective May 3.²⁴ On May 13, the Council announced that they vacated the March 15 order in light of Judge Cebull’s retirement and that they would create an appropriate revision to the March 15 order at their meeting on June 28.²⁵

These decisions ultimately resulted in Judge Theodore McKee, a black judge on the U.S. Court of Appeals for the Third Circuit, filing a petition to protest the May 13 vacatur of the March 15 order.²⁶ Maybe Judge McKee was onto something: that the breadth and depth of Judge Cebull’s conduct needed to see the light of day. After all, almost a century ago, U.S. Supreme Court Justice Louis Brandeis noted, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”²⁷ But what was Judge McKee exposing? Arguably, it was that judges, even federal judges, harbor racial biases.²⁸

19. *Id.*

20. *Id.* at 620–21.

21. *Id.* at 625.

22. *See* 28 U.S.C. § 371(a) (2013) (providing for the voluntary retirement of federal judges).

23. *In re* Complaint of Judicial Misconduct, 751 F.3d at 614–15.

24. *Id.* at 615.

25. *Id.*

26. *Id.*

27. LOUIS D. BRANDEIS, *What Publicity Can Do*, HARPER’S WKLY., Dec. 20, 1913, reprinted in LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT* 92 (1914).

28. Judge McKee had expressly sought to prevent the U.S. Court of Appeals for the Ninth Circuit from concealing Chief Judge Cebull’s conduct. *See* Saba Hamedy, *Montana Federal Judge Sent Hundreds of Biased Emails, Panel Finds*, L.A. TIMES (Jan.

II. WHITE-ON-BLACK BIAS

What may often undergird cognitive biases is what scholars refer to as “implicit social cognition”: automatic judgments and decision-making. Legal scholars and psychologists Gregory Parks and Jeffrey Rachlinski describe implicit social cognition in the following manner:

[P]sychologists now argue that people rely on two distinct cognitive systems of judgment: one that is rapid, intuitive, and unconscious; another that is slow, deductive, and deliberative. The intuitive system can often dictate choice, while the deductive system lags behind, struggling to produce reasons for a choice that comports with the accessible parts of memory.²⁹

As measured in the context of race, whites generally show much more of an explicit preference for whites (40.7% favor) than blacks (3.4% favor), especially when compared to other racial groups.³⁰ More than half of whites (56.0%) show no preference for either group.³¹ At the implicit level, however, whites show a robust preference for whites (71.5% favor) over blacks (6.8% favor), with only 21.7% showing no preference.³² In fact, whites express more in-group favoritism on implicit measures (78.4%) than on explicit measures (51.1%).³³

18, 2014), <http://articles.latimes.com/2014/jan/18/nation/la-na-nn-montana-judge-racist-emails-20140118>.

29. Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 689 (2010).

30. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 958 (2006).

31. *Id.*

32. *Id.*

33. *Id.* One popular way in which implicit race biases are measured is the Implicit Association Test (IAT). The IAT has become the dominant attitude measure employed to circumvent strategic responding or responding that merely reflects a lack of insight on the part of respondents. See Dana R. Carney et al., *Implicit Association Test*, ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY (2007). The IAT assesses the ease, reported in reaction times, with which individuals associate various categories. Accordingly, IAT permits an inference about attitudes, because it is generally easier to respond quickly to items from two categories that are cognitively associated with each other. The most widely used IAT, assesses implicit attitudes toward blacks vis-à-vis whites. See, e.g., Adam Hahn et al., *Awareness of Implicit Attitudes*, 143 J. EXPERIMENTAL PSYCHOL. 1369 (2014).

In the “Race IAT,” for example, study participants first practice distinguishing black and white faces by responding to images of faces by pressing a computer key on the left side of the keyboard for one racial category and on the right side of the keyboard for the other racial category. See *Race IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/user/agg/blindspot/indexrk.htm> (last visited Sept. 1, 2015). Participants next practice distinguishing pleasant-meaning words and unpleasant-meaning words in a manner similar to that used for distinguishing black and white

In one study of the implicit racial attitudes of trial court judges, Jeffrey Rachlinski and his colleagues administered the Implicit Association Test (“IAT”) and three vignettes to judges.³⁴ On the IAT, 87.1% of white judges and 44.2% of black judges demonstrated white preference.³⁵ An analysis of the judges’ responses to the vignettes demonstrated that only when race was an explicit factor in the scenarios (i.e., a black defendant assaulting a white victim or vice versa) were white judges equally willing to convict black and white defendants.³⁶ While this is one of relatively few implicit race bias and judicial decision-making studies to date, other studies underscore that legal decision-makers, generally, are not free from such biases.³⁷ All of these studies raise questions about how bias, often subconscious and often regarding race, may influence the judgment and decision-making of judges during trials, underscoring the need for recusal.

For instance, in the Missouri case *State v. Dodd*, the trial judge allegedly had a history of making racist comments and jokes,³⁸ which arguably is indicative of racial bias.³⁹ In this case, Dwayne Dodd, the appellant, was convicted as a persistent offender of robbery in the sec-

faces. The next two tasks, given in a randomly determined order, use all four categories (black faces, white faces, pleasant-meaning words, and unpleasant-meaning words). One task requires one response (e.g., pressing a left-side key) when the respondent sees black faces or pleasant words, whereas white faces and unpleasant words call for the other response (right-side key). In the remaining task, white faces share a response with pleasant words and black faces with unpleasant words.

For American respondents who take the Race IAT, response speeds are often faster when white faces, rather than black faces, are paired with pleasant words. See, e.g., Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316 (2000) (exploring this data’s significance). This finding supports the interpretation that white-pleasant is a stronger association than black-pleasant (and conversely, white-negative is weaker than black-negative). See *id.* In the context of racial bias, these results suggest an implicit attitudinal preference for whites vis-à-vis blacks. See *id.*; Greenwald & Krieger, *supra* note 30, at 952–53.

34. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1205–06 (2009).

35. *Id.* at 1210.

36. *Id.* at 1214–19.

37. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004); Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010) (implicating the perceptions of jurors).

38. *State v. Dodd*, 944 S.W.2d 584 (Mo. Ct. App. 1997).

39. See Gregory S. Parks, *Judging Racism*, 1 CARDOZO L. REV. DE NOVO 238, 244 (2012); see also Stacy A. Harwood et al., *Racial Microaggressions in the Residence Halls: Experiences of Students of Color at a Predominantly White University*, 5 J. DIVERSITY HIGHER EDUC. 159 (2012); Melissa K. Hughes, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437 (2003).

ond degree, a class B felony, and sentenced to fifteen years' imprisonment.⁴⁰ Mr. Dodd filed a motion for post-conviction relief, which was denied after an evidentiary hearing.⁴¹ Judge Thomas K. McGuire, Jr. convicted the appellant of robbery in the second degree in the circuit court in Greene County.⁴² Mr. Dodd then filed a motion for post-conviction relief under Rule 29.15 of the Missouri Rules of Criminal Procedure, which was denied by Judge Cody A. Hanna. Mr. Dodd appealed both his conviction and the denial of his motion for post-conviction relief, claiming that the trial judge should have been disqualified for his bias against blacks.⁴³

Mr. Dodd's attorney argued on appeal that "the record [demonstrated] that Judge McGuire exhibited bias and prejudice against blacks by using racial slurs and telling racial jokes."⁴⁴ Mr. Dodd's attorney presented two of Judge McGuire's former bailiffs to provide testimony about the judge's bias against blacks. One of them testified "that he heard Judge McGuire make racist comments and tell racist jokes, off the bench, in an "offhand" manner, but that he never saw him treat blacks who came before him in court differently than he treated people of other racial backgrounds."⁴⁵

Mr. Dodd's conviction was affirmed.⁴⁶ The appeals court looked to two prior Missouri court opinions to determine what sort of conduct would "warrant disqualification of a trial judge generally and with respect to racial bias."⁴⁷ The court reasoned that there is a presumption that judges will act with honesty and integrity to be impartial in their decisions pursuant to Rules of Judicial Conduct.⁴⁸ If a reasonable person would doubt the impartiality of the court, the presumption of judicial impartiality is overcome and the judge must be disqualified.⁴⁹ However, in its effort to situate this case within the framework created by two prior cases, *State v. Kinder* and *State v. Smulls*, the appeals court observed that "[t]he trial judge did not demonstrate a general bias against African Americans nor a bias against defendant person-

40. *Dodd*, 944 S.W.2d at 584.

41. *Id.*

42. *Id.*

43. *Id.* at 587.

44. *See id.* at 585–86 (internal quotation marks omitted).

45. *Id.* (quoting Dodd's Rule 29.15 motion).

46. *Id.* at 587; *see also* *State v. Kinder*, 942 S.W.2d 313 (Mo. 1996).

47. *Dodd*, 944 S.W.2d. at 586 (citing *Kinder*, 942 S.W.2d at 586; and then citing *State v. Smulls*, 935 S.W.2d 9 (Mo. 1996)).

48. *Id.*

49. *Id.*

ally.”⁵⁰ In the court’s estimation, Dodd could not succeed in his appeal under that framework because Judge McGuire “made no statement that could be perceived in any respect as a threat to ignore the law in favor of a personal bias or policy, as would be required in order to create sufficient appearance of bias to rebut the presumption.”⁵¹

The appeals court, however, in its armchair theorizing and lay psychology, was completely wrong in its assessment. It may have been correct to reject the approach endorsed by the dissent in *Kinder*, which would have read *Smulls* to mean that judges must be disqualified whenever they make statements, whether inside or outside of court, that minorities could find offensive.⁵² The majority’s opinion in *Kinder* showed that the *Smulls* case should not be interpreted so broadly.⁵³ The appeals court in *Dodd* thus correctly articulated the relevant legal rules, but it erred in its implicit reasoning about the relationship between judicial statements—or as the court put it, the judge’s own policy preferences—and judicial decision-making. As has been demonstrated, legal decision-makers—including judges—harbor implicit racial biases, and these biases can influence judgment and decision-making.⁵⁴

III.

BLACK-ON-WHITE BIAS

Despite contemporary concerns about reverse racism,⁵⁵ whether blacks discriminate against whites is largely an empirical question.

50. *Id.* at 587. In *Kinder*, the court held that if a reasonable person would doubt the court’s impartiality, then the presumption of judicial impartiality is overcome and the judge must be disqualified. 942 S.W.2d at 321. In *Smulls*, on the other hand, the court stated that the relevant inquiry was “whether a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court.” 935 S.W.2d at 17 (citing *State v. Nunley*, 923 S.W.2d 911, 918 (Mo. 1996)). *Kinder* was decided after *Smulls*, and after examining the two cases, the *Dodd* court quoted the majority opinion in *Kinder* for its conclusion that “*Smulls* should be read no more broadly than for the proposition that a judicial statement—on the record or off—that raises a genuine doubt as to the judge’s willingness to follow the law, provides a basis for recusal or, if the judge refuses to recuse, reversal on appeal.” *Dodd*, 944 S.W.2d at 587 (quoting *Kinder*, 942 S.W.2d at 322).

51. *Dodd*, 944 S.W.2d at 587.

52. See *Kinder*, 942 S.W.2d at 341–42 (White, J., dissenting); see also *id.* at 322 (majority opinion) (“According to the dissent, *Smulls* requires disqualification of the judge whenever the judge has made any statement, in court or out of court, that might be considered offensive to minorities.”).

53. *Kinder*, 942 S.W.2d at 322 (majority opinion).

54. See *supra* notes 34–36 and accompanying text.

55. See Jack Encarnação & Antonio Planas, *New Boston University Professor’s Tweets Spark Racial Furor*, BOS. HERALD (May 11, 2015), http://www.bostonherald.com/news_opinion/local_coverage/2015/05/new_boston_university_professors_

Ironically, research suggests that many racial minorities hold implicit preferences for whites over blacks.⁵⁶ Latinos demonstrate a limited explicit preference for whites (25.3% favor) over blacks (15.0% favor), with most showing no preference (59.7%).⁵⁷ At the implicit level, Latinos show a substantial preference for whites (60.5% favor) over blacks (10.2% favor), with far fewer showing preferential neutrality (29.2%) in comparison to their explicit preferences.⁵⁸ In comparison to Latinos, Asians and Pacific Islanders show more of an explicit preference for whites (32.9% favor) over blacks (9.6% favor), with a significant percentage showing preferential neutrality (57.5%).⁵⁹ At the implicit level, however, Asians and Pacific Islanders demonstrate a substantial preference for whites (67.5% favor) over blacks (7.7% favor), with far fewer showing preferential neutrality (24.8%) in comparison to their explicit preferences.⁶⁰

Moreover, blacks, at the explicit level, either have a preference for blacks (58.9%) or no preference (36.2%); few have a preference for whites (4.8%).⁶¹ However, at the implicit level, blacks lack a strong in-group preference like whites. Research indicates that only 34.1% demonstrate black over white preference, 33.6% demonstrate no preference, and 32.4% demonstrate a white over black preference.⁶² Accordingly, it is not inconceivable that a black judge may be biased in favor of blacks and against white litigants. However, by the looks of these data, the case is not as strong for in-group bias among black judges.⁶³

Take for example the case of *In re Chevron*, in which an appeal arose out of a mass tort claim filed by then-current and former residents of Kennedy Heights, a predominantly black subdivision of Houston, Texas.⁶⁴ The plaintiffs filed a mass tort action against several defendants, including Chevron, “for personal injuries, wrongful

tweets_spark_racial_furor; accord Lindy West, *If Even Michelle Obama Can't Speak About Race Without Being Told to 'Quit Whining' then Who Can?*, GUARDIAN (May 12, 2015), <http://www.theguardian.com/commentisfree/2015/may/12/michelle-obama-reverse-racist-speech>.

56. For a review of what explicit measures of racial attitudes have been employed in studies of implicit and explicit racial bias, see Greenwald & Krieger, *supra* note 30, at 953 n.28.

57. *Id.* at 958.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See *supra* notes 30–33 and accompanying text.

64. *In re Chevron U.S.A.*, 121 F.3d 163, 164 (1997).

death, and property damage, with overtones or implications of alleged race discrimination.”⁶⁵

During the course of the trial, Chevron sought to disqualify the trial judge, Judge Kenneth M. Hoyt (who is black), pursuant to 28 U.S.C. §455,⁶⁶ for several statements the judge made “which Chevron viewed as demonstrating the judge’s personal bias or prejudice against [Chevron] or which created the appearance thereof.”⁶⁷ After Judge Hoyt denied the motion and the chief district judge declined to review it,⁶⁸ Chevron filed a petition for a writ of mandamus with the Fifth Circuit.⁶⁹ In a supplemental order of denial, Judge Hoyt called the motion “frivolous, speculative, and lacking virtue.”⁷⁰

Chevron specifically challenged the judge’s remarks as to why Chinese people tend to be short and blacks tend to be tall based on the stereotypical geographic and climate features of Asia and Africa.⁷¹ Chevron made two arguments on appeal. First, Chevron argued that the judge should have been subject to disqualification “for expressing personal views about race, based on an extrajudicial source, reflecting a pronounced bias against Chevron.”⁷² Alternatively, Chevron argued that even if the judge was not actually biased against the company, he made statements that created this appearance of prejudice or bias such that public confidence in the judiciary and the outcome of the case would be impaired if he were not disqualified.⁷³ Although plaintiff’s counsel asserted that the comments were made in a joking manner, the Fifth Circuit found this irrelevant to the appeal.⁷⁴

The Fifth Circuit rejected Chevron’s first argument on appeal.⁷⁵ The court denied mandamus on the claim alleging personal bias or prejudice based on a lack of strong showing on the merits, but this decision was not intended to bind subsequent panels.⁷⁶ Secondly, the Fifth Circuit found that “a reasonable perception of bias or prejudice exist[ed],” but nonetheless exercised its discretion not to issue the writ of mandamus.⁷⁷ Moreover, the Fifth Circuit found that Chevron did

65. *Id.* at 165.

66. *See* 28 U.S.C. § 455 (2013).

67. *In re* Chevron U.S.A., 121 F.3d at 165.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 166 n.12.

72. *Id.* at 165.

73. *Id.* at 165–66.

74. *Id.* at 166 n.14.

75. *Id.* at 166.

76. *Id.*

77. *Id.*

not meet its burden of showing that the judge displayed favoritism toward the plaintiff or formed actual opinions on extrajudicial sources that disadvantaged Chevron.⁷⁸

The Fifth Circuit did, however, conclude that Chevron presented sufficient evidence that a reasonable and objective person, knowing all of the facts, would have doubts as to the judge's impartiality.⁷⁹ The court noted, "Regardless of intent, it is totally unacceptable for a federal judge—irrespective of the judge's color—to make racially insensitive statements or even casual comments of same during the course of judicial proceedings."⁸⁰ The court further indicated that in racially charged cases, such as *In re Chevron*, these types of statements might create a public perception that the judge is biased or prejudiced.⁸¹ Therefore, a reasonable person may indeed have harbored doubts about the trial judge's impartiality and recusal would be appropriate under the terms of section 455(a).⁸²

However, the Fifth Circuit acknowledged that the late stage of the trial made recusal logistically difficult.⁸³ In its reasoning, the court indicated that a writ of mandamus was an appropriate remedy for challenging the denial of a judicial disqualification motion, but that this relief is only to be granted in exceptional circumstances.⁸⁴ It is generally recognized that the decision to recuse a judge is left to the discretion of the district court.⁸⁵ Since section 455(a) seeks to protect even

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 167.

82. *Id.*

83. *Id.* By the time this motion was brought, the jury had been selected, the parties had already participated in at least nine pretrial conferences, and the trial had already involved the testimony of fifty-eight witnesses over thirty-one days. *Id.* As the court noted, disqualifying a trial judge at that point in the litigation would have been "unprecedented." *Id.* Additionally, the plaintiffs were very close to the end of the presentation of their case, and the defense had yet to begin their arguments. *Id.* The continuation of this trial thus would not be pointless. After the lower court issued a final judgment, another panel might be called to review the entire record of the trial and decide whether the proscribed bias required the judgment to be vacated, because that panel would have more information pertaining to the consequences of the proscribed bias. *Id.*

84. *See id.* at 165; *see also, e.g., In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984) ("The question of disqualification [under section 455] is reviewable on a petition for writ of mandamus, but a writ will not lie in the absence of exceptional circumstances.").

85. *See In re Chevron U.S.A.*, 121 F.3d at 165 ("Although section 455 speaks in mandatory language, in actual application we have recognized that the decision to recuse is committed to the sound discretion of the district court and typically is reviewed for an abuse thereof.").

the appearance of impropriety in judicial proceedings, the circuit court must determine “whether a reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge’s impartiality.”⁸⁶

The Fifth Circuit held that judicial comments alone rarely suffice to disqualify judges, even if they are critical of, or even hostile toward, one party or that party’s case.⁸⁷ The court also observed, however, that “[s]uch remarks will require disqualification . . . ‘if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.’”⁸⁸ While it may seem unequal or unfair, social science suggests that a different standard should be applied to black and white judges. It is not to say that a black judge cannot be biased in favor of black litigants just as white judges may be biased in favor of white litigants. However, given how implicit racial biases work—with research indicating that about a third to two-thirds of blacks and more than three-quarters of whites harbor implicit, in-group biases—both racial groups seem prone toward automatic bias for whites.

IV.

BLACK-ON-BLACK BIAS

In some instances, implicit biases may influence intra-racial bias among African Americans. Research has demonstrated that, at least at the federal level, the party of the President who nominates a judge is a predictor of that judge’s decisions.⁸⁹ In the context of political ideology, at the explicit level, conservatives, when compared to liberals, generally favor higher-status groups to lower-status groups (e.g., whites to blacks, light-skinned to dark-skinned people, and white to black children).⁹⁰ The same pattern occurs with implicit bias. Impor-

86. *Id.* at 165 (quoting *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995)).

87. *Id.* (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

88. *Id.* (quoting *Liteky*, 510 U.S. at 555).

89. See, e.g., Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 261–62 (1995); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 769–70 (2005); Gregory C. Sisk & Michael Heise, *Ideology “All the Way Down”? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1216 (2012); Robert Steinbuch, *An Empirical Analysis of Conservative, Liberal, and Other “Biases” in the United States Courts of Appeals for the Eighth and Ninth Circuits*, 11 SEATTLE J. SOC. JUST. 217, 226–27 (2012) (quoting CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 3 (2006)).

90. Brian A. Nosek et al., *The Politics of Intergroup Attitudes* (citing Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 38–88 (2007)), in *SOCIAL AND PSYCHOLOGICAL BASES*

tantly, for whites and blacks both, the more conservative that individuals are, the more they prefer whites over blacks.⁹¹ This may be precisely the issue that has percolated up to the Tenth Circuit in *Jones v. State*, which involved a judicial nominee nominated by a Republican President.⁹²

On July 28, 1999, a white man named Paul Howell was fatally carjacked and shot in the driveway of his parents' Oklahoma City home.⁹³ After an investigation, the Oklahoma City police found a .25-caliber handgun wrapped in a red bandana in the bedroom ceiling of Julius Jones, a black man.⁹⁴ Additionally, police found a loaded .25-caliber magazine inside the casing of the home's doorbell.⁹⁵ Ballistics testing later showed that the gun and the magazine were used in Howell's murder.⁹⁶ Based on this and other evidence gathered by the police, Jones and another individual named Christopher Jordan—both of whom were previously convicted felons—were arrested and charged “with conspiracy to commit a felony [robbery with firearms], and with the murder of Howell.”⁹⁷ Jones was also charged with possession of a firearm by a convicted felon.⁹⁸ Because of their prior convictions, both men potentially faced the death penalty upon conviction for the murder charge.⁹⁹

In September 2002, Jordan pleaded guilty to his charges in a plea agreement that required him to serve thirty years in prison for the murder and ten years for the conspiracy, contingent upon his testimony against Jones.¹⁰⁰ At Jones's trial, Jordan and Ladell King, another convicted felon, were the key witnesses for the prosecution. Jordan testified that he and Jones plotted to steal Howell's car together. Additionally, Jordan stated that he remained in their car while Jones approached Howell and accidentally shot Howell during the robbery.¹⁰¹ Following this testimony and the presentation of other convincing evi-

OF IDEOLOGY AND SYSTEM JUSTIFICATION 481–83, 485–86 (John T. Jost et al. eds., 2009).

91. John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 *POL. PSYCHOL.* 881, 902 (2004).

92. *Jones v. Trammell*, 773 F.3d 68, 76 (10th Cir. 2014), *aff'g* No. CIV-07-1290-D, 2013 WL 2257106 (W.D. Okla. May 22, 2013).

93. *Jones v. State*, 128 P.3d 521, 533 (Okla. Crim. App. 2006).

94. *Id.*

95. *Id.*

96. *Trammell*, No. CIV-07-1290-D, 2013 WL 2257106, at *2.

97. *Jones*, 128 P.3d at 533.

98. *Id.* at 538.

99. *Cf. Jones v. State*, 132 P.3d 1, 2 (Okla. Crim. App. 2006).

100. *Jones*, 128 P.3d at 533.

101. *Id.*

dence, Jones was sentenced to death for his felony-murder conviction.¹⁰²

However, this was far from the end of the road for Jones's case. After the trial, Jones's lawyer, David McKenzie, decried the racial component of the trial, claiming that there was no way his client could have received a fair trial free from bias or prejudice in the county in which the trial was held. Coming to the defense of the trial judge and of the conviction was Jerome A. Holmes, who was then the deputy criminal chief in the U.S. Attorney's Office for the Western District of Oklahoma. Holmes, who also is black, wrote an opinion piece in the *Daily Oklahoman*, the state's largest newspaper, mocking McKenzie's claims of racial bias in Jones's trial.¹⁰³ "[T]here was ample evidence for a rational jury to find that [Jones] gunned down an innocent stranger," Holmes wrote, "and that Jones deserved to die for his acts."¹⁰⁴ Holmes then called out McKenzie for making "factually unsupported claims of racial bias."¹⁰⁵ As one author noted, it was odd that Holmes, a federal prosecutor, wrote such a pointed piece and was allowed to do so by his bosses.¹⁰⁶

The U.S. Court of Appeals for the Tenth Circuit granted Jones an appeal on the narrow, unrelated question of "[w]hether trial counsel provided ineffective assistance by failing to investigate witness Emmanuel Littlejohn's claim that Jordan confessed to see if it could be corroborated."¹⁰⁷ When the Tenth Circuit scheduled oral arguments for the case, the randomly assigned three-judge review panel included now-Judge Jerome A. Holmes, who had originally written the scathing newspaper opinion with regard to Jones's conviction. The attorneys present at the oral argument stated that Judge Holmes "dominated" the proceeding, and on December 5, 2014, the court released its unanimous opinion upholding the lower court's decision and Jones's conviction.¹⁰⁸

102. *Id.* at 532.

103. Andrew Cohen, *Judge Can't Be Trusted with a Man's Life*, DAILY BEAST (Jan. 28, 2015), <http://www.thedailybeast.com/articles/2015/01/28/judge-can-t-be-trusted-with-this-man-s-life.html> (also under the name "A Man Mocked and Ruled Guilty by a Judge in the Newspaper Will Now Face That Judge in Court").

104. *Id.*

105. *Id.*

106. *Id.*

107. *Jones v. Trammell*, 773 F.3d 68, 76 (10th Cir. 2014).

108. *Id.* It was after the release of this opinion that McKenzie noticed the connection between Judge Holmes and the case. See Appellant's Petition for Rehearing and Suggestion for Rehearing *en Banc* at 5, *Jones v. Trammell*, 777 F.3d 1099 (10th Cir. 2015) (No. 13-6141) (describing McKenzie's revelation about Judge Holmes's role in the litigation).

Jones filed another motion with the Tenth Circuit asking for a rehearing with a new panel of judges excluding Judge Holmes because of his potential bias.¹⁰⁹ The Tenth Circuit's rules governing judicial misconduct state that "[a]ny judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification."¹¹⁰ Ultimately, Judge Holmes recused himself.¹¹¹ Who knows what his rationale was, but in such contexts—even where there is a black judge/black litigant dynamic—the judge should consider the possibility of his or her own subconscious bias in deciding whether to recuse him- or herself.

CONCLUSION

Judges are human. They suffer from the same frailties, flaws, and foibles that the rest of us do. That includes being subject to a whole host of cognitive biases. Given the extent to which the valuation of whiteness and devaluation of blackness permeates American society, it is no surprise that all racial groups tend to automatically or subconsciously preference whiteness over blackness. Such preferences create a fairly simple narrative about white judges—that if there is some explicit indicia that they are racially biased (e.g., jokes, comments, emails), there may be a strong likelihood that they may discriminate, even in some small way, against a black litigant.¹¹²

As for black judges, given the diffuse nature of their implicit racial attitudes, even in the context of having made explicitly pro-black and/or anti-white statements, what they actually mean is harder to discern. For instance, a black judge may be explicitly pro-black but implicitly pro-white, which may influence his or her judgments and behaviors to an even greater degree. In short, while they may appear likely to engage in so-called reverse discrimination, they may or may not actually be likely to do so given their implicit biases. With all that said, political ideology may undergird and amplify implicit racial atti-

109. *Jones*, 777 F.3d at 1099.

110. TENTH CIR. MISCONDUCT R. 25(a) (JUDICIAL COUNCIL OF THE 10TH CIR. 2009), <https://www.ca10.uscourts.gov/sites/default/files/ce/2015%20JCD%20and%20Tenth%20Circuit%20Rules.pdf>.

111. *Jones*, 777 F.3d at 1100.

112. See John T. Jost et al., *The Existence of Implicit Prejudice Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 49–52 (2009) (finding that implicit biases predict the use of racial slurs even where individuals fail to score high on measures of explicit bias). As discussed *supra* Part II, extensive research has demonstrated that even when race is not an overt factor in litigation, judges' judgments are susceptible to their implicit race biases See generally Rachlinski et al., *supra* note 34; *supra* notes 29–37 and accompanying text.

tudes, including among black judges, making it more likely that they may exhibit bias against black litigants—especially where these judges' statements or actions provide some explicit indicia of bias.

All of these considerations underscore the fact that recusal in the context of race is not a simple and straightforward matter, but rather one that must be considered in light of contemporary social science. Even more, it highlights the need for judges to acknowledge that they may have subconscious biases, that these biases may influence their judgment and decision-making, and that they should recuse themselves under such circumstances or—as a preventative measure—work to achieve impartiality at a subconscious level.

