



THE NATIONAL JUDICIAL COLLEGE

*Making the world a more just place
by educating and inspiring its judiciary*



THE BRAIN, DECISION MAKING, AND IDENTITY: A LEADER'S PERSPECTIVE

DIVIDER 3

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OBJECTIVES:

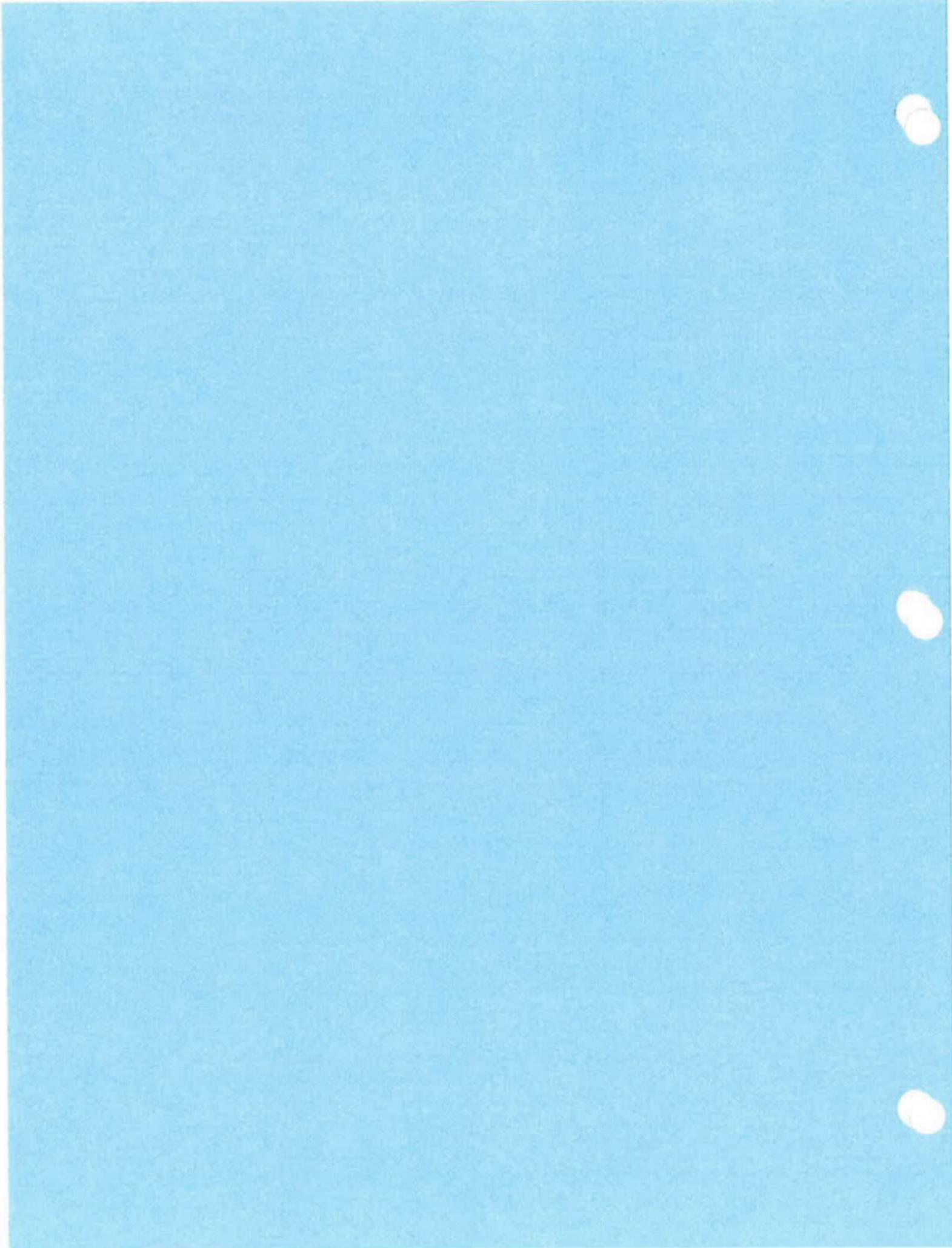
After this session, you will be able to:

1. Recognize the way the human brain processes give meaning to identity;
2. Define implicit bias and implicit association;
3. Explain the impact of implicit bias in decision making; and
4. Apply strategies to mitigate implicit bias.

REQUIRED READING:

PAGE

Jerry Kang, *Implicit Bias Bench Card* (Spring 2021), located at
<http://jerrykang.net/research/2021-what-judges-can-do-about-implicit-bias> 1



WHAT JUDGES CAN DO ABOUT IMPLICIT BIAS

EVIDENCE-BASED RECOMMENDATIONS AND PRACTICES

I. DEFLATE (YOUR EGO) AND EMBRACE FALLIBILITY

1. Recognize that **you are fallible**.
2. **Avoid “moral credentialing”** simply because you have studied implicit bias.
3. Don't fret over *external* motivations for political correctness. Instead, **cultivate your internal motivation** to be fair.
4. Continue to **learn more** about all kinds of biases and decision-making errors not because education directly decreases those errors but because deeper awareness will support your internal motivation to improve continuously both individually and institutionally.

II. DEBIAS (WITH SHORT-TERM “SPOT CLEANING” AND LONG-TERM INTERACTIONS)

A. SHORT-TERM TACTICS

5. **Change the built environment** (e.g., photographs, art, posters, statues, books) to include regular, consistent exposure to admired figures from diverse groups and countertypical exemplars (“debiasing agents”).

B. LONG-TERM TACTICS

6. **Expand social contact** with other, less familiar social groups directly and vicariously. In so doing, always **curate complexity, not caricature**.
7. **Leverage your market power** to nudge others to be mindful of whom they feature as speakers or experts because “we are what we see.”

III. DEFEND (AGAINST THE BIAS THAT PERSISTS)

A. CAREFULLY CONSIDER BLINDING, DIMMING, OR TEMPORARY CLOAKING SOCIAL CATEGORY INFORMATION

8. **Consider** whether **blinding** may improve fairness and not simply pass through prior acts of discrimination by the judicial system and others.
9. **Consider dimming** by decreasing the intensity, salience, or completeness of social category information. For example, you can keep the race field in documents but remove the photograph.
10. **Consider** using the two-stage process of **temporary cloaking** to first cloak identity and make a tentative decision, then uncloak to check for unintended consequences.

B. GIVE YOURSELF AMPLE TIME, EMOTIONAL CALM, AND MENTAL ENERGY

11. **Give yourself ample time** to improve accuracy in making complex, subjective, multifaceted decisions.
12. If you are in an especially high or low emotional state or feel especially stressed or cognitively depleted, try to delay making complex, subjective, multifaceted decisions until you **return closer to your baseline**.

C. REMIND YOURSELF TO DELIBERATE CAREFULLY

13. **Remind yourself to be careful** instead of jumping to conclusions or relying on intuitions or gut feelings.

D. CABIN DISCRETION BY USING CHECKLISTS AND RUBRICS

14. For important subjective decisions you regularly make, **use a checklist, rubric, or algorithm** to help guide your decision making.
15. If no such checklist or rubric exists, work with your institution to **develop collaboratively** the substantive content of such **decision aids**. In doing so, watch out for algorithms that bake in biases or pass through prior acts of discrimination.

E. GIVE YOURSELF SPECIFIC COUNTERSTEERING INSTRUCTIONS

16. Identify the social categories that might trigger either explicit or implicit bias in any interaction or matter. Consciously **surface such dangers instead of trying to suppress** them.
17. Go beyond a general reminder to take care and **give yourself specific countersteering instructions** about the specific relevant bias.
18. Because implicit bias can influence how we read body language, countersteer and explicitly **signal respect and warmth to people who are members of an outgroup** or have marginalized status.

F. ENGAGE IN PERSPECTIVE SHIFTING AND CATEGORY SWITCHING

19. Before exercising discretion or making a judgment call against an outgroup member or a target of implicit bias, briefly **put yourself in the shoes of that person**.
20. Also, **try switching categories counterfactually** (for example, from Black to White) and see if your judgment changes.

G. PREFER DIVERSE DECISION-MAKING TEAMS

21. **Assemble diverse** decision-making **teams** so that one member's implicit biases might dampen out another's.

IV. DATA (TO CREATE EARLY WARNING SYSTEMS)

22. **Count your** own exercises of **discretion**, such as the clerks you've hired or the families you've had over for dinner. See if the data reveal a pattern that concerns you.
23. **Encourage institutional-level counting** of highly discretionary decision making to look for disparities by race and other social categories that cannot be explained away by confounding variables. Plant a red flag wherever you spot troubling disparities.
24. Call for teams and task forces to **examine those red flags** and study whether any of the tactics above, including cabining discretion, might improve accuracy and decrease bias.

WHAT JUDGES CAN DO ABOUT IMPLICIT BIAS

EVIDENCE-BASED RECOMMENDATIONS AND PRACTICES

WHAT IS IMPLICIT BIAS? An **implicit bias** is an **attitude** or **stereotype** about a social category that is **not easily subject to direct introspection**. In other words, we cannot easily ascertain our implicit biases simply by asking ourselves for an honest answer.

WHY DO WE CARE? Even if we reject **explicit** biases, we are likely to have **implicit** biases. They are pervasive and **correlate to a small degree with worse treatment**. Unfortunately, even small cognitive effects can **compound over time and across populations** to create large societal impacts.

WHAT CAN WE DO? The four basic strategies are **deflate**, **debias**, **defend**, and **data**. Brief explanations appear on the flip side but here's a visual checklist.



DEFLATE

- ✓ Recognize that you are fallible
- ✓ Avoid moral credentialing
- ✓ Cultivate internal motivation to be fair
- ✓ Keep learning to increase awareness



DEBIAS

- ✓ Change the built environment to display **countertypical** exemplars
- ✓ Expand social **contact**, and curate complexity not **caricature**
- ✓ Leverage your market power to **feature** diversity of talent



DATA

- ✓ Count your own exercise of discretion
- ✓ Encourage institutional level counting
- ✓ Examine all red flags



DEFEND



Blind, dim, or temporarily cloak

- ✓ Consider **blinding** but watch out for "pass through" **discrimination**
- ✓ Consider **dimming** the intensity of social categories, by removing e.g., salient photographs
- ✓ Consider **temporary cloaking** (cloak identity, make tentative decision, then lift cloak to check for unintended consequences)



Check your time, calm, energy

- ✓ Give yourself ample time
- ✓ Return to **emotional and mental baseline** before making **hard decisions**



✓ Deliberate carefully



Cabin discretion

- ✓ Use checklists, rubrics, algorithms
- ✓ Develop decision aids collaboratively



Countersteer

- ✓ **Surface** dangers of implicit bias **instead of trying** to suppress them
- ✓ Countersteer against the specific bias
- ✓ Signal **respect and warmth** to **outgroup members**



Shift perspectives and switch categories

- ✓ Put yourself in the shoes of the other
- ✓ **Switch categories** counterfactually and **test your judgment**



✓ Assemble **diverse** decision-making teams so that **biases counter biases**



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