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Implicit Bias and Immigration Courts

FATMA E. MAROUF*

ABSTRACT

This Article highlights the importance of implicit bias in immigration adjudication. After tracing the evolution of prejudice in our immigration laws from explicit "old-fashioned" prejudice to more subtle forms of "modern" and "aversive" prejudice, the Article argues that the specific conditions under which immigration judges decide cases render them especially prone to the influence of implicit bias. Specifically, it examines how factors such as immigration judges' lack of independence, limited opportunity for deliberate thinking, low motivation, and the low risk of judicial review all allow implicit bias to drive decisionmaking. The Article then recommends certain reforms, both simple and complex, to help reduce such bias in immigration adjudication.

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INTRODUCTION

During the past two decades there has been a surge of research on implicit bias within the fields of social psychology, cognitive science, and neuroscience.[1] Implicit bias is largely automatic and occurs below the level of conscious awareness.[2] Legal scholars have examined the relevance of implicit bias to areas such as employment discrimination,[3] legislative efforts,[4] and legal decision making.[5] Yet its relevance to immigration law remains largely unexplored. This Article represents an initial step toward examining the role of implicit bias within immigration courts and the Board of Immigration Appeals ("BIA" or "Board"), which comprise the administrative levels of immigration adjudication within the Executive Office for Immigration Review

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[1] For a review of the scientific research on implicit bias, *see generally* B. Keith Payne & Bertram Gawronski, *A History of Implicit Social Cognition: Where Is It Coming From? Where Is It Now? Where Is It Going?*, *in* HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS 1 (Bertram Gawronski & B. Keith Payne eds., 2010) [hereinafter HANDBOOK OF IMPLICIT SOCIAL COGNITION]. For examples of law review articles discussing the implicit bias research, see generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1071-78 (2006); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

[2] Payne & Gawronski, *supra* note 1, at 5.

[3] *See, e.g.*, Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479 (2007) (responding to the critique of implicit bias evidence as scientifically invalid and noting that "the case for using the law to respond to the problem of implicit bias remains strong"); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 972 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1217 (1995); Michael Selmi, *Response to Professor Wax, Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1234 (1999) (maintaining that it is well settled that discrimination law can and should respond to subtle forms of discrimination, including those exposed by implicit bias research). Some legal scholarship refers to "unconscious" bias, rather than "implicit" bias. *See, e.g.*, Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Postal Service Board of Governors v. Aikens, 70 CALIF. L. REV. 1201, 1203 (1982); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331-36 (1987); Ann C. McGinley, *!*Viva la Evolución*!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415, 417-18 (2000).

[4] *See, e.g.*, Kang, *supra* note 1, at 1545-72.

[5] *See, e.g.*, Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345, 347 (2007) ("Judges and jurors may unintentionally and automatically 'misremember' facts in racially biased ways during all facets of the legal decisionmaking process.").

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("EOIR").[6] While all judges have biases by virtue of being human, the specific conditions under which immigration judges ("IJs") decide cases render them especially prone to undue influence by implicit bias. This Article argues that comprehensive immigration reform must address these conditions in order to provide a basic platform for just adjudication of immigration cases. Creating the conditions for careful, conscious examination of complex immigration cases is necessary to improve the quality of immigration decisions at the administrative level, which Judge Posner, in particular has repeatedly excoriated as "arbitrary, unreasoned, irrational, inconsistent, and uninformed."[7]

Part I traces the evolution of prejudice in our immigration laws from explicit "old-fashioned" prejudice to more subtle forms of "modern" and "aversive" prejudice, providing examples of these various attitudes in both immigration policy and adjudication of individual immigration cases. Part II delves deeper into the issue of implicit bias, examining how our current structure for adjudicating immigration cases allows such bias to flourish with few cognitive safeguards. Specifically, it examines how IJs' lack of independence, limited opportunity for deliberate thinking, low motivation, complex caseload, and the low risk of review all allow implicit bias to drive decisionmaking. This section also examines similar factors that promote implicit decisionmaking by the BIA. Part III explores how certain reforms, both simple and complex, may reduce implicit bias by both IJs and the BIA. The Article concludes that implicit bias plays a critical role in shaping administrative immigration adjudication and therefore, EOIR reform should be a fundamental feature of any sound comprehensive immigration reform bill.

I. From "Old-Fashioned" to "Modern" and "Aversive" Prejudice in U.S. Immigration Law

U.S. immigration laws mirror the "dramatic change in the nature of prejudice and discrimination" that characterizes the last century.[8]

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[6] Appeals of BIA decisions in removal cases are filed with the U.S. courts of appeal. 8 U.S.C. § 1252(b)(2) (2006).

[7] Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679-80 (2007) (summarizing Judge Posner's rebukes of immigration court decisions) (internal citations omitted). Judge Posner has famously complained that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." *Id.* at 1679 (quoting Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005)); *accord* Zuh v. Mukasey, 547 F.3d 504, 514 (4th Cir. 2008) (surveying circuit court criticism of BIA and IJs' opinions).

[8] James M. Jones, *Mechanisms for Coping with Victimization: Self-Protection* Plus *Self-Enhancement*, *in* ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT 155, 168 (John F. Dovidio et al., eds., 2005); *see also* Adam R. Pearson et al., *The Nature of Contemporary Prejudice:*

Psychologists use the term "old-fashioned prejudice" to describe "non-egalitarian beliefs, such as the endorsement of negative stereotypes, support for segregation and open discrimination, and belief in the inferiority of particular social groups."[9] The early history of U.S. immigration law is replete with examples of open and blatant old-fashioned racism, such as: the Naturalization Act of 1790, which limited U.S. citizenship to free whites;[10] the exclusion of Chinese immigrants and other "Asians" during the late 19th to mid-20th century;[11] the deportation of hundreds of thousands of Mexicans, many of whom were U.S. citizens, during the 1930s;[12] and the National Quota system, which remained in place until 1965.[13] Indeed, the unflinchingly racist remarks of Supreme Court justices in *Chae Chan Ping v. United States* (the *Chinese Exclusion Case*) shock the modern conscience.[14]

Although old-fashioned prejudice rarely appears in contemporary legal opinions, especially at the appellate level, it occasionally still rears its head in immigration courts. For example, appellate court judges have rebuked IJs for "launch[ing] into a diatribe against Chinese immigrants lying on the witness stand, spanning twelve pages of transcript,"[15] telling an asylum applicant, "the whole world does not revolve around you and the other Indonesians that just want to live here because they enjoy the

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Insights from Aversive Racism, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 315-16 (2009).

[9] Paula M. Brochu et al., *Cognitive Consistency and the Relation Between Implicit and Explicit Prejudice: Reconceptualizing Old-Fashioned, Modern, and Aversive Prejudice*, *in* THE PSYCHOLOGY OF MODERN PREJUDICE 27, 29 (Melanie A. Morrison & Todd G. Morrison eds., 2008).

[10] An Act to Establish an Uniform Rule of Naturalization, ch. 3 § 1, 1 Stat. 103 (1790) (repealed by Act of Jan. 29, 1795, ch. 20 § 1, 1 Stat. 414).

[11] Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600); *see also* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th anniversary ed. 2006) (discussing the historical exclusion of Asians from U.S. citizenship); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 37-40 (2004) (discussing, *inter alia*, the Gentlemen's Agreement of 1907, which prevented the immigration of Japanese laborers, and the 1924 Immigration Act, which excluded aliens ineligible for citizenship, including East Asians and South Asians).

[12] *See* Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1, 4-13 (2005).

[13] Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed).

[14] *See* Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 595-96 (1889). For more thorough discussion of explicit racial discrimination in U.S. immigration history, *see* BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 1-8 (2004) (arguing that anti-immigrant sentiments in the United States are a reaction to Mexican and other non-European immigration); LÓPEZ, *supra* note 11, at 1-2 (describing how "the individuals who petitioned for naturalization forced the courts into a case-by-case struggle to define who was a 'white person,'" because naturalization was initially restricted to free whites).

[15] Huang v. Gonzales, 453 F.3d 142, 149 (2d Cir. 2006).

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United States,"[16] or, without any explanation, labeling asylum applicants "as religious 'zealots' whose exercise of religion was 'offensive to a majority.'"[17] Thankfully, such comments remain the exception rather than the rule.

The type of explicit prejudice more common today is "modern" prejudice, which is much more subtle than the old-fashioned kind, due to changing social norms regarding acceptable beliefs and behaviors.[18] "According to the theory of modern prejudice, negativity is only expressed overtly when it can be justified on non-prejudicial grounds, as this allows for the maintenance of an egalitarian and non-prejudiced self-image."[19] Denying the existence of discrimination is the hallmark of modern prejudice.[20] Individuals with modern prejudice still espouse discriminatory beliefs but consider them "empirical facts" rather than forms of prejudice.[21]

A similar concept to "modern prejudice" is "aversive prejudice." While the term "modern prejudice" is often used to describe those who are politically conservative, the corollary of "aversive prejudice" characterizes "those who are politically liberal and openly endorse non-prejudiced views, but whose unconscious negative feelings and beliefs get expressed

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[16] Sukwanputra v. Gonzales, 434 F.3d 627, 638 (3d Cir. 2006).

[17] Floroiu v. Gonzales, 481 F.3d 970, 974 (7th Cir. 2007); *accord* Todorovic v. U.S. Att'y Gen., 621 F.3d 1318, 1326 (11th Cir. 2010) (finding that "the IJ relied on impermissible stereotypes about gay people as a substitute for substantial evidence"); Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1050 (9th Cir. 2005) (holding that the IJ's personal conjecture about domestic violence was indicative of bias and stereotypical assumption).

[18] Brochu et al., *supra* note 9, at 29. Surprisingly, the concepts of "modern," "aversive," and "implicit" prejudice developed relatively independently, so they have not been well-integrated. The relationship between modern prejudice and aversive prejudice, in particular, remains unclear because it "has rarely been the subject of extensive theoretical or empirical investigations." Bertram Gawronski et al., *Understanding the Relations Between Different Forms of Racial Prejudice: A Cognitive Consistency Perspective*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 648, 649 (2008) (proposing a theoretical framework for integrating several concepts of contemporary research on racial prejudice).

[19] Brochu et al., *supra* note 9, at 29.

[20] *Id.* The concept of modern racism includes four related beliefs:

> (1) Discrimination is a thing of the past because blacks now have the freedom to compete in the marketplace and to enjoy those things they can afford. (2) Black are pushing too hard, too fast and into places where they are not wanted. (3) These tactics and demands are unfair. (4) Therefore, recent gains are undeserved and the prestige granting institutions of society are giving blacks more attention and the concomitant status than they deserve.

John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 91, 92-93 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

[21] Gawronski et al., *supra* note 18, at 649.

in subtle, indirect, and often rationalizable ways."[22] These negative feelings "do not reflect open antipathy, but rather consist of more avoidant reactions of discomfort, anxiety, or fear."[23] Thus, those with aversive prejudice have egalitarian explicit (conscious) attitudes but negative implicit (unconscious) attitudes.[24]

A few examples of modern or aversive prejudice in U.S. immigration law include: the exclusion of all homosexuals from the United States, ostensibly on health-related grounds, until 1990;[25] the ban preventing all HIV-positive aliens from traveling or immigrating to the United States (also ostensibly a public health measure), which was finally lifted in January 2010;[26] and the detention of hundreds of Arabs, Muslims, and South Asians as suspected "terrorists" under the U.S.A. Patriot Act after the events of 9/11.[27] In each of these cases, the measures targeting a particular group could be rationalized in a non-prejudicial way.

Even "positive" reforms that appear to reduce discrimination could have subtle underlying discriminatory motives or implications. For example, when lawmakers eliminated the overtly discriminatory National Quota system in 1965 and replaced it with an immigration system based largely on family relationships, they anticipated that this new system would largely maintain the racial and ethnic composition of the United States.[28] Similarly, per-country ceilings have disparate racial impacts on

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[22] Pearson et al., *supra* note 8, at 317. "Support for the aversive racism framework has been obtained across a broad range of experimental paradigms and participant populations, including emergency and nonemergency helping behavior inside and outside of the laboratory, selection decisions in employment and college admission, interpersonal judgments, and policy and legal decisions." *Id.* at 318.

[23] *Id.* at 317.

[24] *Id.* While the majority of whites in the United States appear non-prejudiced on explicit measures of prejudice, such as a self-reports, a similar percentage reveal racial biases when tested with implicit measures, such as the Implicit Association Test ("IAT"). *Id.*

[25] *Compare* Act of October 3, 1965, Pub. L. No. 89-236, § 18, 79 Stat. 911, 920 (excluding immigrants "afflicted with . . . sexual deviation"), *with* Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (formally removing homosexuality from the list of health-based grounds of exclusion).

[26] Medical Examination of Aliens–Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance, 74 Fed. Reg. 56, 547 (Nov. 2, 2009) (to be codified at 42 C.F.R. pt. 34).

[27] *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 20-21 (2003), *available at* http://www.justice.gov/oig/special/0306/full.pdf.

[28] *See* DAVID REIMERS, STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA 72-73 (2d ed. 1992); *see also* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 93-106 (2004) (arguing that legal interpretation and actual implementation of

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immigration.[29] Race also informs many of the current debates on immigration in somewhat covert ways. "[R]acialized images are clearly engaged in distinguishing the deserving from the undeserving,"[30] and Mexicans need not be specifically named in such discussions, as they are tacitly understood to be the undeserving (and criminal) "illegals."[31] While immigrants to the United States are more diverse today than ever before, this diversity is "masked by discourse that racializes immigration legislation as policy concerned only with Mexican immigration."[32]

In addition to influencing discourse on immigration policy, modern or aversive prejudice influences administrative immigration adjudications, albeit in ways that are harder to pin down than old-fashioned prejudice. Unlike blatant prejudice, which manifests as antipathy and hate, in legal judgments aversive prejudice involves the use of cognitive rationalizing processes.[33] Therefore, as aversive racists embrace egalitarian values, they generally act appropriately in social situations where "discrimination would be obvious to others and to themselves."[34] However:

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immigration laws have involved strong racial bias); EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER xxi-xxii (2002) (challenging the idea that just because "explicitly discriminatory provisions based on race, ethnicity, and sexual orientation have been stricken from immigration law, immigration control is now implemented fairly"); LINA NEWTON, ILLEGAL, ALIEN, OR IMMIGRANT: THE POLITICS OF IMMIGRATION REFORM 145 (2008) ("Since the 1965 Immigration and Nationality Act removed race and nationality as factors for excluding immigrants, the political focus on legal status has obscured how racial ideologies still permeate the crafting of immigration policies."); Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism, in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 13, 34-39 (Juan F. Perea ed., 1997) (arguing that modern immigration policies may be written in a race-neutral manner but still contain elements of past racist/nativist policies).

[29] *See generally* Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319 (1993) (arguing for "both geographic and ethnic neutrality" in immigration selection policies).

[30] NEWTON, *supra* note 28, at 145. "The racialized imagery of immigration restriction assuages: it communicates that the freeloaders, the threats, the people unwilling to conform to standards and values prized in the polity are being denied entry or access on arrival." *Id.* at 153.

[31] *Id.* at 145-46. Newton contends that the criminality associated with crossing the border in violation of the law "when combined with attributes of laziness, welfare usage, and female childbearing, forges an image of the Mexican illegal that is race-based." *Id.* at 145-46. The absence of images of unauthorized immigrants from other countries further affirms that illegal aliens are Mexicans.

[32] *Id.* at 153.

[33] Pearson et al., *supra* note 8, at 318.

[34] *Id.*

> [Their] non-conscious feelings and beliefs . . . will produce discrimination in situations in which normative structure is weak, when the guidelines for appropriate behavior are unclear, when the basis for social judgment is vague, or when one's actions can be justified or rationalized based on some factor other than race.[35]

The informality of immigration court—where the rules of evidence do not apply, forty percent of respondents are unrepresented by counsel, and overloaded, burned out judges are allowed to play an inquisitorial role—creates a setting with weak normative structures and vague guidelines for appropriate behavior, leading to discrimination.[36]

While the Supreme Court has held that "expressions of impatience, dissatisfaction, annoyance, and even anger" do not amount to bias,[37] numerous appellate courts have found bias by immigration judges in precisely these types of situations, suggesting that they sense an underlying prejudice that undermines the fairness of the proceedings.[38] For example, federal judges have found bias where the IJ spoke in an "argumentative, sarcastic, and sometimes arguably insulting manner"[39] engaged in "bullying" until the petitioner was "ground to bits,"[40] appeared "'unseemly,' 'intemperate,' and even 'mocking'"[41] or took on the role of "a prosecutor anxious to pick holes in the petitioner's story."[42] While one may be inclined to dismiss such IJs as just "a few bad seeds," their hostile attitudes reflect an anxiety about immigration and an underlying prejudice toward potential immigrants that is actually quite widespread.[43]

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[35] *Id.*

[36] *See infra* Part II.

[37] Liteky v. United States, 510 U.S. 540, 555-56 (1994). The social psychological studies discussed in this Article regarding modern and implicit forms of prejudice present good reasons to think critically about *Liteky*'s holding.

[38] The way in which implicit bias affects behavior is "complex and, therefore, . . . difficult to study." David M. Amodio & Saaid A. Mendoza, *Implicit Intergroup Bias: Cognitive, Affective and Motivational Underpinnings*, *in* HANDBOOK OF IMPLICIT SOCIAL COGNITION, *supra* note 1, at 353, 361 ("More research is needed to determine the situations in which implicit bias may be expressed as discomfort versus hostility.").

[39] Elias v. Gonzales, 490 F.3d 444, 451 (6th Cir. 2007).

[40] Cham v. Att'y Gen., 445 F.3d 683, 686 (3d Cir. 2006).

[41] Castilho de Oliveira v. Holder, 564 F.3d 892, 900 n.4 (7th Cir. 2009) (quoting Apouviepseakoda v. Gonzales, 475 F.3d 881, 886 (7th Cir. 2007)) (recalling "similar behavior by [Immigration] Judge Brathos in other cases").

[42] Rivera v. Ashcroft, 394 F.3d 1129, 1135 (9th Cir. 2005) (quoting Li v. Ashcroft, 378 F.3d 959, 967 (9th Cir. 2004) (Noonan J., dissenting)).

[43] *Cf.* Margot K. Mendelson, Note, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012, 1015 (2010) (arguing that "immigration courts function as a forum for the production and performance of American identity narratives").

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In the vigorous debates about comprehensive immigration reform, we do not hear many expressions of old-fashioned prejudice, but some of the deepest concerns regarding a legalization program that would potentially grant "amnesty" to millions of undocumented people reflect forms of modern or aversive prejudice.[44] Indeed, the fear of "opening the floodgates" and allowing millions of people, mostly Latinos, to immigrate to the United States echoes the fear noted by the Supreme Court in *Chae Chan Ping* regarding the "great danger that at no distant day [a] portion of our country would be overrun by [Chinese]."[45] While economics is certainly a relevant factor in formulating immigration policy, subtle forms of prejudice often underlie public responses to economic arguments. A recent study shows that "news about the cost of immigration boosts white opposition far more when Latino immigrants, rather than European immigrants, are featured."[46] Thus, the level of support for immigration depends on the racial identity of the prospective immigrants.[47] The study further found that race influences opinions about immigration because racial or ethnic cues trigger intense emotional reactions, especially anxiety

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[44] NEWTON, *supra* note 28, at 2 ("The desire to avoid appearing anti-immigrant and, perhaps inadvertently, appearing racist, reflects the constraints lawmakers feel when embarking on immigration reform in a post-Civil Rights era."). Newton identifies various themes that emerge in congressional discussions around immigration reform, such as keeping out "the unauthorized, the invaders—the bad kinds of immigrants" and contrasting them with the "good immigrants who 'founded this nation,'" which "privileg[es] . . . the European immigrant experience." *Id.*; *see also* LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 6 (2008) ("Debates over immigration reform provide ample opportunities for the Latino Threat Narrative to become invoked. In addition, immigration reform legislation is an exercise in inclusion and exclusion when it comes to defining who is legitimately able to join the community of citizens."). Signs of aversive prejudice also appeared during the 1980s in discussions of the legalization program that was passed under the Immigration Reform and Control Act of 1986 ("IRCA"). *See* HING, *supra* note 14, at 182 ("The ambivalence over amnesty reflected the policy makers' desire to keep out undocumented Mexicans and not demonstrate any sign of approval for those already here."); JOSEPH NEVINS, OPERATION GATEKEEPER AND BEYOND: THE WAR ON "ILLEGALS" AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY 104 (2010) ("The perceived failure of IRCA to address the issue of unauthorized boundary crossing from Mexico sufficiently helped to fuel a resurgence of anti-immigration sentiment (again, with a focus on 'illegal' immigration)."). Nevins describes the construction of the U.S.-Mexico boundary "as a physical divide . . . intermixed with the making of the associated . . . social boundaries that help to define and make distinctions between 'us' and 'them'–social categories heavily imbued with hierarchical concepts and practices vis-à-vis race, class, gender, nation, and geographical origins." *Id.* at 193.

[45] Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889).

[46] Ted Brader et al., *What Triggers Public Opposition to Immigration? Anxiety, Group Cues, and Immigration Threat*, 52 AM. J. POL. SCI. 959, 959 (2008).

[47] *Id.*

related to perceived threats, which in turn trigger changes in opinion that are independent of changes in beliefs about the severity of immigration problems.[48] These results confirm the importance of understanding the role of prejudice, whether subtle or overt, in immigration adjudication.

II. Implicit Bias in Administrative Immigration Adjudications

In today's society, many individuals may hesitate to express even modern forms of prejudice, much less old-fashioned prejudice.[49] While most research on modern and old-fashioned prejudice assessed attitudes using traditional explicit measures, such as self-reports, "[t]he past two decades have seen the development of a new, alternative approach to attitude assessment," using *implicit* measures.[50] These implicit measures not only avoid unwanted influences that muddy explicit measures, like "the desire to appear socially appropriate," but also "reveal unique components of attitudes that lie outside conscious awareness and control."[51]

Consequently, implicit attitudes may diverge from self-reports in revealing ways. For example, a study found that although participants reported that whites and African Americans both have strong ties to American culture, measures of their implicit attitudes revealed that they associated whites more than African Americans, with the concept of "American."[52] Numerous studies show only weak correlations between explicit and implicit bias toward certain social groups, as these are "qualitatively different types of attitudes that are each subject to numerous influences—some shared and some unique."[53] A recent meta-analysis of 122 research studies, involving a total of 14,900 subjects, showed that in the domains of stereotyping and prejudice, implicit bias Implicit Association Test ("IAT") scores actually predict behavior *better* than explicit self-reports.[54] At least one study has specifically confirmed the link between

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[48] *Id.*

[49] John E. Edlund & Jeremy D. Heider, *The Relationship Between Modern and Implicit Prejudice*, *in* THE PSYCHOLOGY OF MODERN PREJUDICE, *supra* note 9, at 77, 79.

[50] *Id.*

[51] *Id.* (citing Mahzarin Banaji, *Implicit Attitudes Can Be Measures*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117, 117-150 (Henry L. Roediger III et al. eds., 2001)).

[52] *See* Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 447 (2005).

[53] Edlund & Heider, *supra* note 49, at 81.

[54] Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 17 (2009).

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implicit bias and behavior (i.e. judgments) among trial judges.[55] Moreover, "evidence is growing that explicit decisions can indeed be shaped by automatic biases."[56] Such evidence underscores the importance of taking implicit bias seriously when analyzing how prejudice influences the way that judges make decisions.

The two primary techniques used to measure implicit bias are evaluative priming and IAT.[57] In an evaluative priming procedure, participants are briefly exposed to a subliminal or supraliminal prime (e.g. photographs of African American or Caucasian faces), and then asked to make decisions about whether certain words are negative or positive.[58] The "response times on the task (i.e., faster responses to negative words after a black prime) can be used as a measure of implicit bias."[59] The second technique involves the IAT, a computer-based test that requires users to categorize rapidly the pairings of concepts, such as "white" and "black," with either positive or negative attributes, such as "hardworking" or "lazy."[60] Stronger, easier mental associations between the concept and the attribute lead to faster response times, while weaker, more difficult associations lead to slower response times.[61] Thus, if it takes longer for a user to categorize the pairing of "black" with "hardworking" than "white" with "hardworking," the slower response time signals the presence of implicit bias against blacks.[62] By measuring response times and error rates related to such pairings, the IAT measures implicit attitudes.

Studies using the IAT have replicated the existence of implicit attitudes towards many marginalized groups, including, but not limited to, racial

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[55] *See, e.g.*, Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1222 (2009) (showing, through a study involving 133 trial judges, that implicit biases can influence judicial decisionmaking but that such biases can also be overcome). For evidence of the link between implicit bias and behavior in the medical context, *see* Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1231, 1235 (2007) (finding that physicians with higher IAT scores were more likely to offer appropriate treatment to white patients than to black patients diagnosed with the same condition but that doctors who were aware of the purpose of the study, and therefore sensitive to the risk of exhibiting biased behavior, could compensate for their implicit biases).

[56] Galen V. Bodenhausen & Andrew R. Todd, *Automatic Aspects of Judgment and Decision Making*, *in* HANDBOOK OF IMPLICIT SOCIAL COGNITION, *supra* note 1, at 278, 281.

[57] Edlund & Heider, *supra* note 49, at 79-80. For an explanation of IAT, see *infra* text accompanying notes 61-62.

[58] Edlund & Heider, *supra* note 49, at 79.

[59] STUART OSKAMP & P. WESLEY SCHULTZ, ATTITUDES AND OPINIONS 396 (3d ed. 2005).

[60] *See* Edlund & Heider, *supra* note 49, at 80.

[61] *See id.*

[62] *See id.*

and ethnic minorities, Muslims, women, and homosexuals.[63] Since such marginalized groups routinely appear before immigration judges, especially in asylum cases, it is surprising that the role of implicit bias in immigration court has not yet been scrutinized. The following sections outline some of the factors that likely contribute to implicit bias by immigration judges and the BIA, providing a basic framework for further exploration.

A. *Factors That Contribute to Implicit Bias in Immigration Court*

There are several reasons why implicit bias is especially likely to influence decisionmaking in the immigration context. The following sections discuss various relevant factors providing a general overview.

1. *Lack of Independence and Inquisitorial Adjudication*

Judges tend to display the same types of implicit bias found in the general American population, despite their professional commitment to fairness and objectivity.[64] Their implicit bias, however, does not necessarily impact their judgments.[65] When judges are highly motivated to avoid making biased judgments, they can compensate for their implicit biases in their decisionmaking, adhering more closely to the norm of impartiality set forth in the Judicial Code of Conduct.[66] Among all judges, however, IJs

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[63] *See, e.g.*, Bethany Albertson, *Religious Appeals and Implicit Attitudes*, 32 POL. PSYCHOL. 109 (2010) (testing a theory that Christian religious appeals made by politicians would impact the implicit attitudes of people who identify as Christian); Bertram Gawronski et al., *Implicit Bias in Impression Formation: Associations Influence the Construal of Individuating Information*, 33 EUR. J. SOC. PSYCHOL. 573 (2003) (studying implicit biases toward German and Turkish individuals); William A. Jellison et al., *Implicit and Explicit Measures of Sexual Orientation Attitudes: Ingroup Preferences and Related Behaviors and Beliefs Among Gay and Straight Men*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 629 (2004) (researching implicit attitudes of related to sexual preferences); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2007) (using a web-based format to study implicit bias related to numerous marginalized groups); Monique L. Lyle, Dueling Consciousness: Elite Influence on Explicit & Implicit Endorsement of Racial Hierarchy (2008) (unpublished doctoral dissertation, Duke University) (on file with Department of Political Science, Duke University) (studying implicit bias toward racial minorities).

[64] *See* Rachlinski et al, *supra* note 55, at 1221-22 ("The proportion of white judges in our study who revealed automatic associations of white with good and black with bad was, if anything, slightly higher than the proportion found in the online surveys of white Americans."). The study also notes that "[w]hite capital defense attorneys, another group which might be expected to have strong professional commitments to the norm of racial equality, exhibit the same automatic preference for whites as the general population." *Id.* (footnotes omitted).

[65] *Id.*

[66] *Id.* at 1222-23; *see also* MODEL CODE OF JUDICIAL CONDUCT CANON 2 (2007) ("A judge shall

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have the weakest structural and professional norms to remain impartial and independent. Unlike federal judges who derive their authority from Article III of the Constitution and have the highest degree of independence through lifetime appointments, IJs are career civil servants within the Department of Justice.[67] They have even less independence than Administrative Law Judges ("ALJs"), who derive their power through congressional legislation and have a substantial degree of judicial independence under the Administrative Procedure Act.[68]

IJs' role as attorneys in the Department of Justice lies at the heart of the critique that they lack true independence.[69] They belong to the same agency that represents the government in removal cases before the federal courts of appeal.[70] Moreover, the majority of IJs previously worked in positions that were adversarial to immigrants, primarily as trial attorneys in the Department of Homeland Security.[71] One study found that IJs who previously worked in positions adversarial to immigrants were significantly less likely to grant asylum than IJs who had not held such positions and that the grant rates dropped even lower for IJs who had held adversarial positions for over a decade.[72] The controversy over political appointments and reassignments of IJs by the Attorney General casts an even darker shadow over their independence as adjudicators.[73]

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perform the duties of judicial office impartially, competently, and diligently.").

[67] 8 U.S.C. § 1101(b)(4) (2006) (stating that an immigration judge is "an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review.").

[68] *See* Administrative Procedure Act of 1946, 5 U.S.C. § 554(d) (2006) (requiring the separation of adjudicatory personnel from investigative and enforcement personnel and prohibiting ALJs from privately consulting anyone on any "fact in issue" in the proceeding); § 557(d)(1) (prohibiting ex parte communications); 5 U.S.C. § 7521(a) (2006) (providing that ALJs can be suspended or removed only for good cause and after a hearing); *see also* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L. J. 1032, 1068 (2011) ("ALJs . . . are fairly independent of the agencies in which they sit.).

[69] *See, e.g.*, Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 471 (2007); Lenni B. Benson, *You Can't Get There From Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 415; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 379 (2006) [hereinafter Legomsky, *Deportation and the War on Independence*]; Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1667-75 (2009) [hereinafter Legomsky, *Restructuring Immigration Adjudication*].

[70] *See* Benson, *supra* note 69, at 415, 422.

[71] *See* Benedetto, *supra* note 69, at 472 (referring to the former office of immigration review as Immigration and Naturalization Service).

[72] Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 345-46 (2007).

[73] *See* Legomsky, *Deportation and the War on Independence*, *supra* note 69, at 379, 389.

IJs' lack of genuine independence becomes even more troubling in light of their inquisitorial role. The Immigration and Nationality Act allows IJs to interrogate, examine, and cross-examine witnesses.[74] Given that roughly 57-65% of respondents in immigration proceedings have been unrepresented during the past five years,[75] the inquisitorial role of IJs can contribute to the appearance of a one-party system and make it even easier for IJs to abuse their authority. These concerns about the neutrality of IJs are particularly striking when one considers that respondents in removal proceedings do not have any of the protections against bias that characterize criminal trials, such as voir dire and peremptory strikes, although deportation is akin to criminal punishment in its severity.[76] The lack of genuine independence of IJs, coupled with their inquisitorial role, creates a situation where "the guidelines for appropriate behavior are unclear," which allows implicit bias to go unchecked and contributes to discrimination in deciding cases.[77]

The absence of structural and professional norms to encourage independence among IJs makes it easier for implicit bias to influence their behavior.[78] Moving EOIR outside the Department of Justice would help ensure a greater separation between adjudication and enforcement, while adopting a judicial code of conduct and annual performance evaluations (by someone outside the Department of Justice) represent basic first steps to promote impartiality and protect against biased decisionmaking.[79]

According to a 2008 report by the Department of Justice Inspector General and Office of Professional Responsibility, the Bush Administration engaged in a systemic campaign to pack the Immigration Courts with "good Republicans" who were "completely on the team," appointing as IJs only individuals who had been "screened for their political or ideological affiliations." U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 110-11, 116 (2008), *available at* http://www.justice.gov/oig/special/s0807/final.pdf. While it is possible that specialization itself may politicize the bench, such explicit political appointments to the immigration courts clearly compromises their independence, especially since those IJs remain on the bench today. *Cf.* Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1230-31 (finding a correlation between bankruptcy judges' political views and the outcome of some of their cases, suggesting that "one potential downside of specialization" is that it "might politicize the bench").

[74] 8 U.S.C. § 1129a(b)(1) (2006).

[75] *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK, at G1 (2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf.

[76] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

[77] Pearson et al., *supra* note 8, at 318.

[78] *Cf.* Rachlinski et al, *supra* note 55, at 1222-23.

[79] *See* Lindsey R. Vaala, Note, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1039-40 (2007) (advocating for vigorous enforcement of the Code of Conduct, if one is adopted).

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2. *Limited Opportunity to Engage in Deliberate Thinking*

In situations where an individual's implicit and explicit attitudes differ, the implicit attitude serves as the "default," and the explicit attitude "only overrides the implicit attitude if the individual has the cognitive capacity available to do so."[80] The conditions under which immigration judges currently operate reduce their cognitive capacity, making it more likely that implicit biases will drive their decisions. Specifically, their extraordinarily high caseload means that they have little time to think before issuing oral decisions into a tape recorder, and they are often overwhelmed and exhausted. Studies have shown that stereotypes have a stronger impact on judgments when they are made under time pressure.[81] Indeed, "systematic changes of cognitive process" occur when people make decisions under time pressure.[82] We tend to consider fewer kinds of information, use the information in a more shallow way, give more weight to negative information, and make more variable, less accurate judgments.[83] Moreover, "when people are tired, distracted, or rushed, they

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[80] Kipling D. Williams & Cassandra L. Govan, *Reacting to Ostracism: Retaliation or Reconciliation?*, *in* THE SOCIAL PSYCHOLOGY OF INCLUSION AND EXCLUSION 47, 56 (Dominic Abrams et al. eds., 2005) (citing Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101 (2000)).

[81] *See, e.g.*, Randall A. Gordon & Kris S. Anderson, *Perceptions of Race-Stereotypic and Race-Nonstereotypic Crimes: The Impact of Response-Time Instructions on Attributions and Judgments*, 16 BASIC & APPLIED SOC. PSYCHOL. 455 (1995) (showing that the race-to-crime stereotype matching effects on punishment and severity indicators emerged only when decisions were made quickly); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001) (finding greater stereotype bias in weapon misidentifications when participants responded under time pressure than when they responded at their own pace); Ad van Knippenberg et al., *Judgement and Memory of a Criminal Act: The Effects of Stereotypes and Cognitive Load*, 29 EUR. J. SOC. PSYCHOL. 191 (1999) (showing a more general effect of negative stereotypes on legal case decisions only when participants were under time pressure); *cf.* Roger Giner-Sorolla et al., *Validity Beliefs and Ideology Can Influence Legal Case Judgments Differently*, 26 LAW & HUM. BEHAV. 507 (2002) (measuring the impact of validity beliefs and feminist ideology in simulated individual juror decisions in a sex-discrimination case, and finding "validity beliefs had a direct, heuristic impact on judgment only under time pressure," while ideology had a more pervasive influence on the decisionmaking process).

[82] Anne Edland & Ola Svenson, *Judgment and Decision Making Under Time Pressure: Studies and Findings*, *in* TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING 27, 37 (Ola Svenson & A. John Maule eds., 1993); *see also* Dan Zakay, *The Impact of Time Perception Processes on Decision Making under Time Stress*, *in* TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING, *supra*, at 59, 67 ("[D]ecision making under time stress is actually decision making with limited resources. The noxious impact of limited resources on cognitive performance in various domains is well documented . . . .").

[83] Edland & Svenson, *supra* note 82, at 28-29, 36.

are more likely to respond based on automatic impulses than when they are energetic, focused, and unhurried."[84] The evidence below shows that IJs are operating under atrocious circumstances for conscious, deliberative decisionmaking.

First, IJs have an enormous caseload, handling an average of 1300 removal cases per year, which far exceeds the volume of cases heard by other types of judges.[85] This actually represents a significant improvement over recent years. According to the Government Accountability Office, the number of immigration judges increased by only 3% while the courts' caseload increased by 39% during the years 2000 to 2005.[86] The average number of cases per IJ increased from 1852 in 2000 to 2505 in 2005, and the number of completed cases increased by 37% during that period.[87] In some locations, the caseload per judge was much higher.[88] Immigration courts nationwide responded to the increasing caseload by setting a series of deadlines for completing cases.[89] Starting in fiscal year 2003, the courts aimed to complete all cases older than three years by December 31, 2005.[90] EOIR has also established target timeframes for various types of cases.[91] Since EOIR and the Office of the Chief Immigration Judge ("OCIJ") evaluate the performance of immigration courts based in part on their success in meeting such case completion goals, the emphasis often remains on quantity rather than quality of decisions.[92] While some recent reforms do aim to improve quality,[93] IJs remain under intense pressure to make

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[84] Payne & Gawronski, *supra* note 1, at 10 (citing Russel H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude-Behavior Processes, in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 97-116 (Shelly Chaiken & Yaacov Trope eds., 1999); *accord* Fritz Strack & Roland Deutsch, *Reflective and Impulsive Determinants of Social Behavior*, 8 PERSONALITY & SOC. PSYCHOL. REV. 220 (2004)).

[85] *See* Legomsky, *Restructuring Immigration Adjudication, supra* note 69, at 1651-52 (articulating that 214 IJs handle roughly 280,000 removal proceedings per year).

[86] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 13 (2006) [hereinafter GAO REPORT], *available at* http://trac.syr.edu/immigration/library/P1067.pdf. The number of immigration judges increased from 206 in 2000 to 212 in 2005. *Id.*

[87] *Id.* at 4.

[88] For example, the immigration courts in Harlington and San Antonio, Texas each had an average of *over 8000 cases per judge* in 2005. *Id.* at 13.

[89] *Id.* at 14.

[90] *Id.* at 4, 14-15. The courts did not meet their ambitious case completion goals. *Id.* at 15.

[91] *See id.* at 21 tbl.3. For example, the target timeframe for an expedited defensive asylum case is 180 days, while the target timeframe for non-detained individuals with other types of applications for relief is 240 days. *Id.*

[92] *See* GAO REPORT, *supra* note 86, at 20-22.

[93] "In January 2006, the Attorney General requested a comprehensive review of the immigration courts, to include the quality of work . . . ." *Id.* at 29. In August 2006, after

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decisions quickly.[94]

Even in complex asylum cases, where testimony can take many hours and is often presented over several hearing dates, spaced months or years apart, IJs generally do not have time to review and analyze the evidence as a whole before rendering a decision.[95] According to another report by the U.S. Government Accountability Office, "[e]ighty-two percent of [IJs surveyed] reported time limitations as 'moderately or very challenging' aspects of asylum adjudications and 77 percent [described] managing their caseload [as] 'moderately or very challenging.'"[96] To make matters worse, IJs generally give their decision *orally* as soon as the testimony is completed.[97] The use of oral decisions in such complex cases itself interferes with a deliberate, individualized, and analytically sophisticated approach, encouraging instead the use of generic and formulaic responses to factually and legally complex claims.[98]

In addition, IJs have very limited support staff, sharing one law clerk for every four judges and lacking adequate administrative support.[99] The lack of support staff means that IJs often do not have time to conduct thorough legal research or stay abreast of rapidly evolving case law. Moreover, since most respondents are unrepresented, IJs usually do not have the benefit of legal briefs in analyzing challenging or novel questions of law. All of these factors present structural impediments to deliberate and thoughtful decisionmaking.

A 2007 survey of stress and burnout among IJs confirms that they feel deprived of the opportunity to think deliberately about the difficult issues before them.[100] The web-based survey conducted by Stuart Lustig, M.D.,

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completion of the review, the Attorney General implemented a number of reforms, including performance evaluations for immigration judges. *Id.*

[94] *See* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 69, at 1654-56.

[95] *See id.* at 1653 (citing *Immigration Litigation Reduction: Hearing Before S. Comm on the Judiciary*, 109th Cong. 184 (2006) (statement of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit)).

[96] UNITED STATES GOV'T ACCOUNTABILITY OFFICE, GAO-08-935, U.S. ASYLUM SYSTEM: AGENCIES HAVE TAKEN ACTIONS TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN 8 (2008) [hereinafter GAO REPORT ON U.S. ASYLUM SYSTEM], *available at* http://www.gao.gov/new.items/d08935.pdf.

[97] *See* Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L. J. 57, 79 (2008).

[98] *See* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 37 (2007) ("[T]he discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions. The process of writing might challenge the judge to assess a decision more carefully, logically, and deductively."(footnotes omitted)).

[99] *See* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 69, at 1652.

[100] Lustig et al., *supra* note 97, at 64-65.

M.P.H., and his colleagues used two measures, the Secondary Traumatic Stress Scale ("STSS") and the Copenhagen Burnout Inventory ("CBI"), to assess levels of stress and burnout among IJs.[101] The most commonly reported issue pertained to "the amount of work and the paucity of time in which to complete it."[102] Typical responses from IJs stressed the lack of time for deliberation before reaching a decision, confirming such factors as the pressure to complete cases, the extemporaneous nature of oral decisions, and denial of access to transcripts that would allow them to review testimony before making a decision.[103] As one IJ aptly stated, "[*t*]*here is not enough time to think*."[104] Under such circumstances, one cannot expect explicit attitudes to override implicit ones.[105] Implicit attitudes surface when individuals are under time pressure and a heavy cognitive load–conditions that clearly apply to IJs.[106] Reducing IJs' caseload and giving them more time to assess each case is therefore critical to creating opportunities for them to control implicit bias through "active, conscious control."[107]

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[101] *Id.* at 59.

[102] *Id.* at 64.

[103] For example, IJs made the following statements:

- "In those cases where I would like more time to consider all the facts and weigh what I have heard I rarely have much time to do so simply because of the pressure to complete cases." *Id.*
- "We are told to keep producing—to get the cases done, without regard to the fact that we have insufficient support staff, insufficient time to deliberate and to complete cases, and outdated equipment." *Id.*
- "The cases require judges . . . to rule promptly at the end of the hearing in the form of a lengthy, detailed and extemporaneous oral decision with little or no time to reflect or to deliberate." *Id.* at 65.
- "We are denied transcripts and must decide complex cases, yet we are expected to render oral decisions on the spot." *Id.*
- "I feel demeaned by being unable to control my own work life as a professional, to be prevented from making the crucial judgment calls on how to decide a case–on the spot or after calm deliberation and research." *Id.* at 72.

[104] *Id.* at 66 (emphasis added).

[105] *See supra* notes 80-84 and accompanying text.

[106] *See* Williams & Govan, *supra* note 80, at 56 (citing Wilson et al., *supra* note 80).

[107] Rachlinski et al., *supra* note 55, at 1225 ("Judges who, due to time pressure or other distractions, do not actively engage in an effort to control the 'bigot in the brain' are apt to behave just as the judges in our study in which we subliminally primed with race-related words").

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3. *Low Motivation Resulting From High Levels of Stress and Burnout*

Low motivation, regardless of the cause, affects the manner in which we make decisions. "When individuals are depleted or under cognitive load, they are likely to set a lower criterion for decision validity; as a result, they may be satisfied with a decision that is largely based on the implications of their automatic reactions rather than more extensive deliberation."[108] Conversely, "[i]f they are internally driven or otherwise motivated to suppress their own biases, people can make judgments free from biases, even implicit ones."[109]

The aforementioned survey of stress and burnout among IJs revealed common feelings of low self-esteem and demoralization (sometimes in response to scathing criticism by appellate judges and the public), as well as widespread psychological issues, such as depression and excessive stress.[110] Roughly half of the judges who responded to the survey reported challenges to esteem, including lack of respect and understanding, criticism, and intense scrutiny by appellate court judges.[111] On the one hand, fear of criticism and judicial scrutiny may help reduce prejudice if it pushes IJs to issue more careful and thoughtful decisions. Studies show that when fear of invalidity is high, judgments are likely to reflect a wider range of considerations than just strong attitudinal associations.[112] On the other hand, if the challenges to esteem are so great that IJs feel personally threatened, as some clearly do,[113] then the judges are likely to show *higher*

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[108] Bodenhausen & Todd, *supra* note 56, at 285-86; *see also* Mario B. Ferreira et al., *Automatic and Controlled Components of Judgment and Decision Making*, 91 J. PERSONALITY & SOC. PSYCHOL. 797, 806 (2006) (showing that decisions made under a load were more likely to be made based on a salient simple heuristic, since cognitive load interfered with propositional reasoning but not automatic reasoning).

[109] Rachlinski et al., *supra* note 55, at 1202 (footnotes ommitted); *see also* Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 170-71 (2008) (finding that individuals who are highly motivated to control prejudice can avoid the "shooter bias," which describes how white targets are more likely to shoot a black target pulling something out of his pocket); Green et al., *supra* note 55 (finding "that implicit bias can be recognized and modulated to counteract its effect on treatment decisions [by physicians]").

[110] *See* Lustig et al., *supra* note 97, at 71-72.

[111] *Id.*

[112] Robert A. Schuette & Russel H. Fazio, *Attitude Accessibility and Motivation As Determinants of Biased Processing: A Test of the MODE Model*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 704, 708-10 (1995).

[113] *See* Lustig et al., *supra* note 97, at 71. For example, one IJ stated, "I am demoralized by being made the 'whipping boy' by the press and public, when it is the system we are forced to follow that contributes so greatly to errors I may make." *Id.* Another IJ noted, "[o]ur last annual meeting spent far too much time telling us how awful we were." *Id.* Yet another

levels of implicit prejudice.[114] Studies also indicate that individuals who feel ostracized, rejected, and excluded—like the IJs who see themselves as targets of circuit court criticism—show more implicit prejudice.[115]

Moreover, low motivation, especially when coupled with a limited opportunity to engage in deliberate thinking, often corresponds to higher levels of implicit bias.[116] Lustig's survey of IJs reveals shockingly high levels of burnout and low motivation. Overall, the responses received from fifty-nine IJs demonstrated "significant symptoms of secondary traumatic stress."[117] Many IJs "reported that the work was emotionally draining,"[118] often leading to dissatisfaction with their jobs.[119] The study linked challenges to self-esteem to higher burnout scores.[120] Burnout "includes a decreased sense of personal and/or professional accomplishment,

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reported feeling "intimidated and humiliated by the federal courts." *Id.*

[114] Studies show higher levels of implicit bias under conditions of personal threat. *See* Bertram Gawronski & Rajees Sritharan, *Formation, Change, and Contextualization of Mental Associations: Determinants and Principles of Variations in Implicit Measures, in* HANDBOOK OF IMPLICIT SOCIAL COGNITION, *supra* note 1, at 216, 231; Cynthia M. Frantz et al., *A Threat in the Computer: The Race Implicit Association Test as a Stereotype Threat Experience,* 30 PERSONALITY & SOC. PSYCHOL. BULL. 1611 (2004) (obtaining higher scores of implicit bias when the task purported to measure racism as opposed to cultural stereotypes); Laurie A. Rudman et al., *Implicit Self-Esteem Compensation: Automatic Threat Defense,* 93 J. PERSONALITY & SOC. PSYCHOL. 798, 798-813 (2007) (finding higher levels of implicit prejudice under conditions of personal threat).

[115] In one study, researchers examined ostracism and included individuals' implicit and explicit attitudes towards Aboriginal and White Australians. While ostracized individuals "were equally prosocial in their responses to the explicit measures (old fashioned and modern prejudice), . . . there was a significant difference in the IAT results, suggesting that ostracised participants were showing more implicit prejudice towards Aboriginals than included participants." Williams & Govan, *supra* note 80, at 58.

[116] Vincent Yzerbyt & Stephanie Demoulin, *Intergroup Relations, in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1024, 1110 (Susan T. Fiske et al. eds., 5th ed. 2010) ("Individuals with the combination of high internal motivation and low external motivation to control prejudice, presumably because their motivations are both highly internalized and autonomous, exhibit generally low levels of implicit bias."); Bodenhausen & Todd, *supra* note 56, at 284 ("Some dual-process models incorporate the idea that automatic reactions are likely to bias subsequent cognitive elaboration and deliberation, particularly when there is limited motivation for accuracy or objectivity."); *see also* John F. Dovidio et al., *The Nature of Contemporary Racial Prejudice: Insight from Implicit and Explicit Measures of Attitudes, in* ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 165, 179-180 (Richard E. Petty et al. eds., 2009) (reviewing the literature on how people's motivation and resources for controlling bias can moderate the relation between implicit and explicit discrimination).

[117] *See* Lustig et al., *supra* note 97, at 57.

[118] *Id.* at 74 (emphasis omitted).

[119] *Id.* at 75.

[120] *Id.* at 79.

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emotional exhaustion, and depersonalization (e.g. distancing oneself from the job, cynicism and loss of compassion) all of which can potentially affect the outcome for applicants whose fates rest in judges' hands."[121] Indeed, "[j]udges reported more burnout than any other group of professionals to whom the CBI had been administered, including prison wardens and physicians in busy hospitals."[122] As further evidence of low motivation, "IJs appear to retire from service at the earliest possible date."[123]

This evidence of high burnout and low motivation adds to the likelihood that implicit attitudes, rather than explicit ones, will drive decisionmaking among IJs. The culture of apathy in immigration court is incompatible with a strong motivation to be egalitarian, which helps control automatic biases.[124] Burnout conflicts with creativity, a trait that reduces the activation of stereotypes,[125] while the struggle to maintain self-esteem can enhance the activation of stereotypes.[126] The combination of these factors, therefore, makes IJs highly susceptible to basing decisions on implicit bias.

4. *Legally and Factually Complex Nature of Cases*

The nature of the cases that IJs adjudicate also increases the likelihood that implicit attitudes will influence their decisions. To begin with, removal and asylum proceedings involve highly complex legal rules that are constantly evolving.[127] The factual inquiries in such cases also tend to be quite complicated.[128] Where the complexity of decisionmaking increases, people tend to rely more on intuitive cognitive shortcuts (known as "heuristics"), adopting strategies that are "likely to ease processing of

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[121] *Id.* at 59.

[122] *Id.* at 60.

[123] Lustig et al., *supra* note 97, at 80.

[124] Pearson et al., *supra* note 8, at 328-29.

[125] *Id.* at 329 (explaining that creativity "conflicts with the energy-saving and simplifying features of stereotyping").

[126] *Id.*

[127] *See, e.g.*, Ardestani v. INS, 502 U.S. 129, 140 (1991) (Blackmun, J., dissenting) ("[T]he legal rules surrounding deportation and asylum proceedings are very complex."); Escobar-Grijalva v. INS, 206 F.3d 1331, 1335 (9th Cir. 2000) (describing immigration laws as "a labyrinth almost as impenetrable as the Internal Revenue Code"); Reyes-Palacios v. INS, 836 F.2d 1154, 1155 (9th Cir. 1988) ("The importance of counsel, particularly in asylum cases where the law is complex and developing, can neither be overemphasized nor ignored.").

[128] *See, e.g.*, Castro v. Holder, 597 F.3d 93, 106 (2d Cir. 2010) (noting that the court has "on several occasions remanded cases in which the agency denied an application for asylum based on its failure to properly engage in the 'complex and contextual factual inquiry' that such claims often require" (quoting Zhang v. Gonzales, 426 F.3d 540, 548 (2d Cir. 2005))).

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complex information."[129] While these shortcuts are often useful, they can also lead to "severe and systematic errors."[130] Even judges make these errors.[131] In fact, "[r]esearchers have consistently found that intuitive judgment and decisionmaking is inferior to formal methods."[132] Not only does reliance on intuitive judgments lead to considering irrelevant information and underemphasizing important information, but "the quality of judgments and decisions decrease as task complexity increases."[133]

Implicit attitudes especially influence one of the most challenging aspects of asylum cases: credibility assessments. Determining the credibility of an asylum applicant is a critical but notoriously difficult task.[134] Credibility assessments include evaluations of nonverbal cues, such as demeanor, which often occur implicitly.[135] For example, studies show

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[129] Dan Milech & Melissa Finucane, *Decision Support and Behavioral Decision Theory*, *in* IMPLICIT AND EXPLICIT MENTAL PROCESSES 291, 293 (Kim Kirsner et al. eds., 1998).

[130] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 2001).

[131] *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) ("[U]nder certain circumstances judges rely on heuristics that can lead to systematically erroneous judgments").

[132] Milech & Finucane, *supra* note 129, at 293.

[133] *Id.*

[134] *See* Solomon v. Gonzales, 454 F.3d 1160, 1164 (10th Cir. 2006) ("The courts of appeals have frequently noted the inherent problems with credibility determinations in asylum cases."). In *Solomon*, the Tenth Circuit explained:

> Asylum applicants rarely speak English, and their testimony is plagued with the uncertainties of translation and cultural misunderstanding. They are generally unfamiliar with American procedures and wary of lawyers and officials; often they are not well served even by their own legal counsel. Their escape from persecution sometimes entailed acts of deceit and prevarication, or even bribery or forgery, which complicates evaluation of their veracity in immigration proceedings. Moreover, because of their troubled relations with their native countries, purported refugees often have difficulty in obtaining documentation to back up their claims.

Id.; *see also* Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations*, 17 GEO. IMMIGR. L.J. 367, 367-68 (2003) (discussing how credibility assessments are "frequently based on personal judgment that is inconsistent from one adjudicator to the next" and proposing a framework for analyzing testimony "to give credibility findings a more reliable, reviewable, and objective basis").

[135] Under the REAL ID Act, an IJ may base a credibility determination on the applicant's demeanor, candor, responsiveness, the inherent plausibility of the story, the consistency of the applicant's statements, and any inaccuracies in those statements. *See* REAL ID Act of 2005 § 101(a)(3), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

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that implicit attitudes lead individuals to read unfriendliness or hostility into the facial expressions of blacks but not whites.[136] Moreover, studies indicate that implicit bias leads to more negative evaluations of ambiguous actions by racial and ethnic minorities.[137] One experiment found that implicit attitudes toward Turks led subjects to rate their behavior more negatively than that of Germans when these groups were portrayed in ambiguous situations.[138] Even the complete absence of details, rather than ambiguous ones, contributes to negative implicit attitudes. A study found that when details are absent, people simply rely on negative stereotypes to fill in the gaps.[139] Such studies clearly raise concerns about how IJs respond to ambiguous actions in evaluating credibility. The huge disparities among IJs in grant rates for asylum cases, which often turn on credibility, may result at least in part from different levels of implicit bias.[140]

The fear of fraud in asylum cases can also lead an IJ to overestimate its prevalence and skew his judgment of credibility of a certain claim. The availability heuristic describes how we estimate the frequency of an event based on how easily we can recall instances of that event occurring in the past.[141] Thus, if an IJ has observed fraud in a number of asylum cases from a particular country, the availability heuristic may lead him or her to believe that fraud is more rampant than it really is, which may then influence assessments of both credibility and the likelihood of future harm in specific cases. Over 80% of IJs surveyed report that fraud and credibility assessments are "moderately or very challenging" aspects of adjudicating asylum cases.[142] These concerns about fraud are not unfounded, as various reports confirm serious issues with fraud in asylum cases, which have caused the United States and other receiving countries to take dramatic actions, such as criminal prosecutions and suspensions of certain benefits

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[136] Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640-42 (2003).

[137] *See* Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 139-47 (2002).

[138] Bertram Gawronski et al., *Implicit Bias in Impression Formation: Associations Influence the Construal of Individuating Information*, 33 EUR. J. SOC. PSYCHOL. 573, 581 (2003); *cf.* Glaser & Knowles, *supra* note 109, at 168-69 (finding that most white adults are more likely to "shoot" a black target who pulls an object out of his pocket, even if the object is his wallet).

[139] Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 564 (2000).

[140] For evidence of such disparities, see Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 325-49 (2007).

[141] Tversky & Kahneman, *supra* note 130, at 11 ("Availability is a useful clue for assessing frequency or probability, because instances of large classes are usually reached better and faster than instances of less frequent classes.").

[142] GAO REPORT ON U.S. ASYLUM SYSTEM, *supra* note 96, at 8.

for those found guilty of fraud.[143] At the same time, however, such fears of fraud may contribute to both explicit and implicit bias by leading IJs to doubt that certain groups actually face any discrimination, a belief that would validate negative affective reactions toward members of those groups and provide the basis for negative evaluative judgments.[144] Rejecting the proposition that a particular group is disadvantaged represents one way that people, including IJs, "can still base their judgments on their negative affective reactions even when they have strong egalitarian-related, non-prejudicial goals," thereby maintaining "cognitive consistency" in their belief systems and avoiding uncomfortable feelings of "cognitive dissonance."[145] In this way, the prevalence of fraud may itself be a factor that contributes to bias in immigration court.

5. *Limited Review by the BIA and Federal Courts of Appeal*

Finally, IJs are especially susceptible to the influence of implicit biases because administrative and judicial review is so limited in immigration cases. In 2010, only 8% of respondents appealed decisions by immigration judges to the BIA,[146] and about 25% of BIA decisions were appealed to the federal court,[147] which means that the chance of an IJ's decision being

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[143] *See, e.g.*, Press Release, U.S. Dep't of Homeland Sec., Joint Task Force Created in 10 Cities to Combat Document and Benefit Fraud (Apr. 5, 2006), *available at* http://www.dhs.gov/xnews/releases/press_release_0884.shtm (describing fraud as a "serious risk" and noting 992 fraud convictions); Michael Brennan, *Two-Thirds of Refugees Claiming to Be Somalian Are Lying*, INDEPENDENT (Dublin) (May 4, 2010), http://www.independent.ie/national-news/twothirds-of-refugees-claiming-to-be-somalian-are-lying-2163180.html (discussing a report by Ireland's Office of the Refugee Applications Commissioner, which found that over half of the asylum seekers claiming to be from Somalia turned out to be from other African countries).

[144] Gawronski et al., *supra* note 18, at 652, 655, 658.

[145] *Id.* at 660.

[146] EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 75, at X1 fig.31.

[147] *Compare* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 69, at 1658 (noting that 8890 petitions for review of BIA decisions were filed with the circuit courts), *with* EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 75, at S1 fig.25 (stating that the BIA completed about 33,102 cases in 2009). The percent of BIA decisions appealed to the federal courts increased from a historical 5% (before 2002) to approximately 30% in 2005, after the Attorney General issued a regulation that expanded the BIA's streamlining procedures. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FACT SHEET: BIA RESTRUCTURING AND STREAMLINING PROCEDURES 2 (2006), *available at* http://www.justice.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf. The change was felt acutely in the Ninth Circuit, where the number of immigration appeals rose from 2670 before implementation of the reform regulation to 6583 in fiscal year 2005. *Id.* The Ninth Circuit reports that the number of BIA appeals has steadily declined since 2005. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 2009 ANNUAL REPORT 40 (2009), *available at* http://www.ce9.uscourts.gov/publications/AnnualReport2009.pdf. BIA appeals to the Ninth Circuit numbered 3280 in 2009, down almost 25%

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reviewed by a federal judge was just 2%. Thus, in the vast majority of cases, what happens in immigration court stays in immigration court, and no one ever sees the transcript. When cases are appealed, the BIA provides notoriously weak review, often issuing a summary "affirmance without opinion" under its "streamlined" procedures.[148] Researchers have shown that a decisionmaker's "degree of deliberation will vary as a function of the individual's desired level of decision confidence."[149] In short, "[w]hen this criterion is low (i.e., when little deliberation is considered necessary), the likelihood of automatic biases dictating the final decision should be greater, compared with when the criterion is high and a wider array of information ends up being considered."[150] Accordingly, if IJs faced a greater prospect of judicial review, they would "set a higher threshold for decision confidence and as a result [would be] more likely to consider a broader range of information, some of which is likely to contradict the judgment implied by their implicit associations."[151] Increasing the prospect of judicial review should therefore lead to implicit associations being less influential in IJs decisionmaking.[152]

B. *Factors That Contribute to Implicit Bias by the Board of Immigration Appeals*

Many of the same factors noted above also apply to the Board of Immigration Appeals. This section, however, emphasizes those factors that are unique to the BIA. To begin with, the BIA has an even higher case load than IJs, as it had thirteen regular members and five temporary members in 2010,[153] who decided over 33,000 appeals (down from over 41,000 in 2006),

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from the year before. *Id.*

[148] 8 C.F.R. § 1003.1(e)(4) (2010); *see* Hassan v. Gonzales, 403 F.3d 429, 433 (6th Cir. 2005); Tsegay v. Ashcroft, 386 F.3d 1347, 1351-52 (10th Cir. 2004).

[149] Bodenhausen & Todd, *supra* note 56, at 285.

[150] *Id.*

[151] *Id.*

[152] *See id.*; *see also* Schuette & Fazio, *supra* note 112 (showing that implicit associations play a greater role when fear of invalidity is low, whereas judgments reflect a wider range of considerations when fear of invalidity is high).

[153] *See Board of Immigration Appeals*, EXEC. OFFICE FOR IMMIGR. REV., http://www.justice.gov/eoir/fs/biabios.htm (last updated Jan. 2011) (listing biographies of the current permanent Board members). The Attorney General appointed a new BIA member, Michael J. Peppy, in February 2011. *See* News Release, Exec. Office for Immigration Review, EOIR Announces the Newest Member of the Board of Immigration Appeals (Feb. 22, 2011), *available at* http://www.aila.org/content/default.aspx?docid=34554. Temporary BIA members cannot vote in en banc cases and have no say as to whether panel decisions become precedential. 8 C.F.R. § 1003.1(a)(4), (g) (2010).

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which is an average of over 1800 cases per BIA member each year.[154] Consequently, the BIA has even more limited time than IJs to devote to deliberation. The streamlined procedure, mentioned above, whereby one member of the BIA simply "affirms without opinions" the decision of the IJ, makes it especially easy for BIA members to avoid conscious deliberation, because they do not need to articulate their reasoning, engage in any explicit legal analysis, or persuade any of their peers.[155] Since studies have long shown that "we have relatively little awareness of *how* we're doing *what* we're doing"[156] and often rely on erroneous intuitive theories that highlight the importance of irrelevant factors,[157] the danger of allowing legal decisions to be made without explanation should not be underrated. This danger is especially acute in immigration cases, where the result may be deportation, a consequence so severe that the Supreme Court has recognized it as "the equivalent of banishment or exile."[158]

The paucity of BIA precedents further contributes to reliance on cognitive shortcuts. If the BIA issued more precedent decisions, individual Board members would have less leeway in deciding individual cases and would be more likely to engage in deliberate analysis, drawing on the legal standards set forth in prior cases and comparing relevant fact patterns. The American Bar Association's proposals for reforming the immigration court system specifically mention that the BIA's remarkable rate of adjudication "has come at a substantial cost, including . . . the lack of precedent guidance coming from the Board."[159]

Last, the range of issues subject to judicial review was greatly limited by Congress through the 1996 reforms and the REAL ID Act of 2005.[160] For

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[154] EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 75, at S1 fig.25; *see also* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 69, at 1654 (citing similar figures from 2008).

[155] *See supra* note 148 and accompanying text.

[156] David L. Hamilton, *Nonconscious and Automatic Processing: Introduction and Preview*, *in* SOCIAL COGNITION: KEY READINGS 203, 204 (David L. Hamilton ed., 2005) discussing a series of studies by Nisbett and Wilson from 1977 showing that people do a poor job of explaining how their judgments are made).

[157] *Id.*

[158] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

[159] ARNOLD & PORTER LLP, AM. BAR ASS'N COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES: EXECUTIVE SUMMARY, at ES-31 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf.

[160] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. No. 104-208, Div. C § 309(c)(4), 110 Stat. 3009-549, 626-27 (codified as amended in 8 U.S.C. (2006)); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 423, 110 Stat. 1214 (codified at 28 U.S.C. § 2244 (2006)); REAL ID Act of 2005 § 106, 8 U.S.C.

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example, federal courts have been stripped of jurisdiction over discretionary determinations and cases involving a removal order based on the commission of an aggravated felony, with the exception of constitutional claims and questions of law.[161] The limited nature of judicial review contributes to the BIA's low-quality decisions with poorly articulated reasons. The doctrine of deference to agency determinations further constrains what the federal courts of appeal are able or willing to do,[162] although certain circuit court judges seem to be compensating for the BIA's shortcomings by applying a less deferential standard of review than one might expect.[163] The combination of all these factors creates a situation that actually discourages detailed deliberation on the part of the BIA and allows implicit biases to flourish unchecked by explicit cognitive processes.

C. *Reforms to Reduce Implicit Bias in Administrative Adjudication*

Immigration reform could ameliorate some of the problems noted above (such as the limited opportunity for deliberate thinking and low motivation) simply by allocating more resources to immigration courts and the BIA, thereby increasing their capacity to engage in more conscious decisionmaking. The Comprehensive Immigration Reform Act of 2010 proposed by Senator Robert Menendez (D-NJ) and Senator Patrick Leahy (D-VT) attempts to do this by increasing the number of IJs and support staff over a five-year period.[164] While commendable, this proposal does not go far enough to remedy the structural barriers to more deliberate decisionmaking. The Act proposes increasing the number of IJs by twenty each year for fiscal years 2011 to 2015 and increasing the support staff for IJs by eighty each year during the same time period.[165] Since there are

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1252 (2006); *see* David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeus Corpus and the Coming of REAL ID (1996-2005)*, 51 N.Y.L. SCH. L. REV. 75, 82-85, 108-09 (2007).

[161] *See* 8 U.S.C. § 1252(a)(2)(B)-(C) (2006).

[162] *See* Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

[163] *See* Cox, *supra* note 7, at 1672 (describing how Judge Posner's immigration opinions "exhibit extremely searching review" and "treat immigration authorities with great skepticism," instead of showing traditional administrative deference). Some scholars have made persuasive legal arguments against kneejerk deference, especially in asylum cases where the definition of a refugee is based on an international treaty. *See*, e.g., Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L. J. 1059 (2011) (arguing that the doctrine of deference should not be applied where the agency opinion is in contrast with international law).

[164] Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. § 107 (a)(2) (2010).

[165] *Id.*

currently 262 immigration judges, including the 23 new hires in 2010,[166] this would bring the total to 362 IJs by the end of 2015. If the number of completed immigration court cases remained roughly the same (around 287,207 in 2010),[167] the increase in IJs would reduce the case load to about 793 cases per year per judge, which would allow more time for deliberation and possibly lead to higher quality decisions.

The proposed reforms, however, not only increase the number of IJs but also substantially increase the number of Immigration and Customs Enforcement ("ICE") and Customs and Border Protection ("CBP") personnel, which will lead to more people being placed in removal proceedings.[168] A 44% increase in newly filed cases occurred between 2000 and 2005, which the Executive Office for Immigration Review attributed to "several factors, including enhanced border and interior enforcement actions and changes in immigration laws and regulations."[169] One can expect a similar surge in removal proceedings to occur again if additional resources are devoted to border enforcement.

While a legalization program might arguably reduce the number of immigration court cases by creating new ways for people to legalize their status through USCIS and terminating certain removal proceedings, this argument has serious weaknesses. To begin with, the majority of individuals removed from the United States are now people with criminal convictions, due to the Obama Administration's policy of focusing on this population.[170] Since all but the most minor convictions will render aliens ineligible for Lawful Prospective Immigrant ("LPI") and Blue Card status, this group would remain in removal proceedings before immigration

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[166] News Release, U.S. Dep't of Justice, Exec. Office of Immigration Review, The Executive Office for Immigration Review Swears in 23 New Immigration Judges, Judge Corps Reaches 262 Serving in 59 Immigration Courts (Nov. 8, 2010), *available at* http://www.justice.gov/eoir/press/2010/ IJInvestiture11052010.pdf.

[167] EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 75, at B7 fig.3.

[168] *See* S. 3932 §§ 101, 102, 106. Specifically, section 101 of the Act requires that ICE have a total force of 6410 agents to investigate violations of criminal law and 185 worksite enforcement officers before any Lawful Prospective Immigrants are allowed to adjust their status, and section 106 would add roughly 800 to 1000 full-time active duty ICE investigators each year for fiscal years 2011-2012. *Id.* §§ 101, 106. Moreover, section 101 provides that CBP must have a total of 21,000 agents trained, hired, and reporting for duty prior to the adjustment of any LPIs, and section 102 requires DHS to hire, train, and assign to duty 5000 additional CBP officers by September 30, 2013. *Id.* §§ 101-02.

[169] GAO REPORT, *supra* note 86, at 4. The number of newly filed cases increased from 252,000 in 2000 to 363,000 in 2005. *Id.* In 2010, the total number of matters received by the immigration courts totaled 392,888. EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 75, at B7 fig.3.

[170] *See* Fawn Johnson, *Deportations Reach All-Time High*, NAT'L J. (Oct. 6, 2010), http://nationaljournal.com/congressdaily/ns_20101006_5083.php.

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judges.[171]

In fiscal year 2010, half of the 392,000 people removed from the United States were convicted criminals.[172] This represents a significant increase from prior years, as approximately 33% of aliens removed in 2009, and 29% of those removed in 2008, had criminal convictions.[173] Indeed, the percentage of convicted criminals removed in 2010 is significantly higher than in any year during the past decade.[174] Moreover, the absolute number of convicted criminals removed from the United States steadily increased from 72,061 in 2000 to 128,345 in 2009, and then jumped dramatically to 195,772 in 2010.[175] Secretary of Homeland Security Janet Napolitano stated that this represented a 70% increase in criminal proceedings since 2008.[176] Since the Obama Administration intends to pursue the policy of focusing its removal efforts on criminals, immigration courts can predictably expect more cases each year involving convicted aliens who will not be eligible for new immigration benefits under the proposed Act. Moreover, the proposed Comprehensive Immigration Reform Act also increases the number of ICE officers focused on criminal investigations, which will compound the number of aliens with convictions placed in removal proceedings.[177] Given these trends, one cannot count on a legalization program to counter the rising tide of removal.

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[171] *See* 8 U.S.C. § 1182(a)(2)(A)(i) (2006); S. 3932 §§ 476(a)(3)-(4), 501(b)(2)(A)(i).

[172] *See* Lourdes Medrano, *Obama as Border Cop: He's Deported Record Numbers of Illegal Immigrants*, CHRISTIAN SCI. MONITOR, Aug. 12, 2010, http://www.csmonitor.com/USA/Justice/2010/0812/Obama-as-border-cop-He-s-deported-record-numbers-of-illegal-immigrants.

[173] In 2009, a total of 393,289 aliens were removed, 128,345 (33%) of whom had criminal convictions. U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS 103 (Aug. 2010), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf. In 2008, a total of 358,886 aliens were removed, 105,103 (29%) of whom had criminal convictions. *Id.*

[174] In 2007, a total of 319,382 aliens were removed, 102,394 (32%) of whom had criminal convictions. *Id.* at 100. In 2006, 280,974 were removed, 98,490 (35%) of whom had criminal convictions. *Id.* In 2005, a total of 246,431 aliens were removed, 92,221 (37%) of whom had criminal convictions. *Id.* In 2004, a total of 240,665 aliens were removed, 92,380 (38%) of whom had criminal convictions. *Id.* In 2003, a total of 211,098 aliens were removed, 83,731 (40%) of whom had criminal convictions. *Id.* at 97. In 2002, a total of 165,168 aliens were removed, 73,429 (44%) of whom had criminal convictions. *Id.* In 2001, 189,026 aliens were removed, 73,298 (39%) of whom had criminal convictions. *Id.* In 2000, a total of 188,467 aliens were removed, 72,061 (38%) of whom had criminal convictions. *Id.*

[175] *See* Raisa Camargo, *Criminal Deportations Reach Record High; Deportations up 70 Percent Since Obama Took Office*, LATIN AM. NEWS DISPATCH, http://latindispatch.com/2010/10/12/criminal-deportations-reach-record-high-deportations-up-70-percent-since-obama-took-office (last visited Apr. 8, 2011).

[176] *Id.*

[177] *See supra* note 168 and accompanying text.

Another weakness in the argument that a legalization program will reduce the caseload of IJs is that it overlooks the ways in which such a program might directly contribute to individuals being placed in removal proceedings. Individuals who apply for legalization and are denied by USCIS may end up in removal proceedings. While the proposed Act, like the 1986 amnesty under IRCA, includes confidentiality provisions designed to alleviate concerns that information provided in the applications would be used to prosecute or deport applicants, there are exceptions to these provisions, including cases involving misrepresentation or fraud.[178]

In light of these issues, the Act's provisions for increasing the number of IJs, BIA staff attorneys, and support staff do not appear adequate to ensure time for conscious, deliberate consideration of cases and to improve motivation and morale among immigration adjudicators.

Even if increasing EOIR's capacity along the proposed lines succeeds in reducing workloads, stress, and burnout, it is not the optimal approach to reducing implicit bias within EOIR, as it would not address the lack of independence or low risk of judicial review. Actually restructuring the immigration court system as an Article I court with a single level of review by an Article III court along the lines proposed by Stephen Legomsky[179] would have a much more profound effect. This proposed structural reform would increase the independence of IJs by removing them from the Department of Justice, improve their sense of esteem and their pride in their place within the judiciary, set a higher standard for decisionmaking, eliminate problems with the BIA, and expand the scope of judicial review, as issues currently reviewed by the BIA would be reviewed by federal judges, all of which would help reduce implicit bias for the reasons discussed above. Thus, *structural* reform of the immigration adjudication process should play an integral role in discussions of comprehensive immigration reform.

If eliminating the BIA proves too problematic, restoring review by three-member panels in all cases, disposing of the "affirmative without opinion" procedure, applying a more searching standard of review to findings of facts (e.g. de novo rather than clearly erroneous), and increasing the BIA's diversity by appointing more female members and people of color could help reduce implicit bias.[180] The gender balance of the BIA, in particular, merits closer examination in exploring ways to reduce

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[178] *See* Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. § 504(d) (2010).

[179] *See generally* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 69, at 1678-87.

[180] *Cf.* Rachlinsky et al, *supra* note 55, at 1231 (exploring how altering courtroom practices could reduce unconscious bias by trial judges).

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implicit bias, since female IJs grant asylum at a rate that is 44% higher than their male colleagues.[181] A balanced, three-member panel that issues written opinions would help check the impact of implicit bias on behavior, encouraging individual panel members to explicitly override their implicit biases by conferring with each other and articulating their reasoning.[182]

While these reforms would not change the complexity of immigration cases or the challenging nature of credibility assessments, they would change the context in which such decisions are made. The strong normative structure and clear guidelines for appropriate conduct associated with an Article I court would help reduce the influence of implicit bias on all types of decisions by IJs, as would review by a balanced, three-member panel of the BIA.[183] The federal courts of appeal, Congress, or the Department of Justice could also establish more clear and consistent rules for making credibility determinations that would help reduce the influence of implicit bias in this area.[184] In addition, IJs should receive trainings about the ways that implicit bias can cloud their judgments, especially their credibility assessments, so that they at least become aware of potential pitfalls, such as biased interpretations of facial expressions or ambiguous behavior. Adopting clear codes of conduct and conducting annual performance evaluations of IJs and the BIA could also help reduce bias.

In sum, increasing the number of IJs and support staff is a necessary first step that would be even more effective when coupled with restructuring the immigration court system, but these reforms alone may not be sufficient to reduce the impact of implicit bias on immigration adjudication. "Even with greater resources, judges will still resort to cognitive shortcuts."[185] Judges must become aware of the impact of implicit bias in order to question the soundness of their decisions and make the effort to render more impartial judgments.[186] Reforms such as "exposing judges to stereotype-incongruent models, providing testing and training, auditing judicial decisions, and altering courtroom practices" could all help

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[181] *See* Ramji-Nogales et al., *supra* note 72, at 342-43.

[182] *See* Guthrie et al., *supra* note 98, at 8-9 (2007) (proposing a "dual-process model of judging" whereby "judges make initial intuitive judgments" that they "might (or might not) override with deliberation").

[183] *See supra* text accompanying notes 34-35.

[184] *See* Kagan, *supra* note 134, at 399-403 (proposing a framework for analyzing credibility in a more objective, reliable and reviewable manner); *cf.* Guthrie et al., *supra* note 131, at 828-29 (recommending judges and legislators to craft legal rules that minimize the adverse effects that cognitive illusions on judgments").

[185] Guthrie et al., *supra* note 131, at 820.

[186] *See id.*

reduce implicit bias.[187] Further exploration of such reforms, specifically in the context of immigration adjudication, is necessary in order to provide individuals facing deportation, potentially to a country where they face persecution, a fair and impartial hearing.

CONCLUSION

This Article examined the role of implicit bias in immigration court and the BIA, highlighting various factors that contribute to its influence over administrative decisionmaking. The discussion sets forth a roadmap for further analysis, raising the importance of implicit bias in a new context that legal scholars have not yet analyzed.

In addition, the Article suggested some ways that immigration reform can help reduce implicit bias. These strategies range from relatively simple measures such as: increasing the number and resources of IJs to allow time for thoughtful deliberation, conducting regular evaluations of their performance, and providing them with trainings to make them more aware of the impact of implicit bias, to more complex reforms, such as: restructuring the entire immigration court system or even just the BIA's procedures and creating rules that make challenging issues such as credibility determinations more objective and reliable. Such reforms can cumulatively have a powerful impact on how implicit attitudes influence immigration adjudication.

While our government no longer uses the colorful language quoted by the Supreme Court in the *Chinese Exclusion Case* regarding how the country "has no room outside of its prisons or almshouses for depraved and incorrigible criminals or hopelessly dependent paupers who may have become a pest or burden, or both, to their own country,"[188] such anti-foreigner sentiments unfortunately still influence how judges make decisions. We cannot, therefore, hope to tackle the complex issue of comprehensive immigration reform without first deepening our understanding of how both explicit and implicit forms of prejudice shape the way that judges respond to immigrants. This Article represents an initial effort to analyze some of these challenging issues from a legal perspective, but further interdisciplinary research would help elucidate the ways that various legal reforms can promote more conscious and egalitarian adjudication.

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[187] Rachlinsky et al., *supra* note 55, at 1226.

[188] Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

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