IT MAKES A DIFFERENCE

Theodore Roosevelt Inn of Court
Nassau County Bar Association
Tuesday, October 23, 2018
5:30 p.m.

Hon. Randall T. Eng
Hon. Tricia Ferrell
Sarika Kapoor, Esq.
Edward Lobello, Esq.
Joseph Milizio, Esq.
Omid Zareh, Esq.

...

Domenick Pesce, 3L, Hofstra Law School
Sean Romeo, 2L, Hofstra Law School

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Tuesday, October 23, 2018

Program Outline

Introduction	Sarika Kapoor	3 minutes
Diversity and Inclusion: Attorney Admissions	Judge Eng	25 minutes
Implicit Bias: Criminal Jury Selection	Judge Ferell Omid Zareh	25 minutes
Diversity as a Requirement of Clients	Ed LoBello	25 minutes
Transgender Clients	Joseph Milizio	25 minutes
Conclusion	Sarika Kapoor	3 minutes

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CLE Credits:
1.0 hour of Diversity, Inclusion and Elimination of Bias
1.0 hour of Ethics and Professionalism

Biographies

HON. RANDALL T. ENG

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Justice Randall T. Eng is Of Counsel to Meyer, Suozzi, English & Klein, P.C., and a member of the Litigation Department, including the Appellate Practice and

In 2018, Justice Eng received the Career Public Service Award at The Fund for Modern Courts. He was also honored at The Asian American Bar Association of New York's Annual Judges' Reception. Justice Eng also received The Queens District Attorney Office Public Service Excellence Award at The Annual Asian American Pacific Islander Heritage Celebration.

Immediately prior to joining Meyer Suozzi, Justice Eng served as the Presiding Justice of the Appellate Division, Second Department – the busiest and largest Judicial Department in the State of New York, covering Queens, Brooklyn, Staten Island, the counties of Nassau, Suffolk, Dutchess, Orange, Putnam, Rockland and Westchester, handling over 9,000 appeals per year. The presiding justice is the highest-ranking judge in the appellate division, in charge of all of its operations, as well as a sitting practicing judge on panels of appeal.

Born in Guangzhou, China, Justice Eng was raised in New York City. He earned his undergraduate degree from State University of New York at Buffalo and his juris doctor degree from St. John's University School of Law in 1972.

Following law school, Justice Eng began his esteemed legal career in public service as an assistant district attorney in Queens County. At the time, he became the first Asian American appointed as an assistant prosecutor in New York State history, and served in this role from 1973-1980. He then served as the Deputy Inspector General of the New York City Correction Department from 1980 to 1981, and later became the Inspector General, a role in which he served from 1981 to 1983.

In 1983, Justice Eng became the first Asian American to become a judge in New York State, when he was appointed to the Criminal Court of the City of New York by Mayor Edward I. Koch. He sat in the Criminal Court until 1988 when he was designated an Acting Justice of the New York State Supreme Court. In 1990 and 2004, Justice Eng was elected and reelected to full 14-year terms on that bench.

Following these terms, he was appointed Administrative Judge of the Criminal Term of Queens County Supreme Court in 2007, and served in that role until 2008. In 2012, Governor Cuomo appointed Justice Eng to lead the Second Department, where he became the first Asian American to serve as Presiding Justice in New York State's history.

Justice Eng served as President of the Association of Supreme Court Justices of the City of New York and as a member of the Advisory Committee on Judicial Ethics. He is currently a member of the Permanent Sentencing Commission for New York State and the New York State Judicial Institute on Professionalism in the Law. He has also served as an adjunct professor at St. John's University School of Law.

In addition to his prolific legal career, Justice Eng proudly served his country as a member of the New York Army National Guard from 1970 until 2004, when he retired as State Judge Advocate holding the rank of Colonel.

BIOGRAPHICAL-JUDGE TRICIA M. FERRELL

Tricia M. Ferrell was appointed as a Judge of the Nassau County District Court in March 2008. She was subsequently elected that same year to serve a six-year term and re-elected in 2014. The Judge adjudicates criminal matters and previously presided over the Driving While Intoxicated Court as well as the Domestic Violence Court. Presently, Judge Ferrell handles cases assigned to a criminal court part designated for defendants with privately retained counsel.

Prior to sitting on the bench, Judge Ferrell was employed in 2006, as the Director of Compliance for Nassau County, where she managed the internal controls for various departments countywide. The Judge also formerly held the position of Deputy Village Attorney, where she prosecuted cases for the Incorporated Village of Hempstead. Judge Ferrell's legal career began as an eager Nassau County Assistant District Attorney in 1998, under the Honorable Denis Dillon, where she prosecuted both misdemeanor and felony cases.

Judge Ferrell is actively involved in the legal arena and holds membership in the Nassau County Criminal Courts Bar Association where she was awarded the Norman F. Lent Memorial Award for Distinguished Jurist in March of this year. She's also a member of the Women's Bar Association of the State of New York and the Nassau County Women's Bar Association, where she recently presented for its *Chamber Chat Series.* As a Nassau County Bar Association member, she is a longtime and energetic youth mentor, serving the Uniondale middle school population and she was a Co-Chair of the Bar Association's Judicial Section. She is also a member of the Theodore Roosevelt Inn of Court, the Amistad Long Island Black Bar Association, the New York State Bar Association, the New York State District Court Judges Association and the Nassau County District Court Judges Association, where she formerly held the office of secretary.

Sarika Kapoor

Sarika Kapoor is an Associate Court Attorney in the Nassau County Supreme Court Law Department. She was hired at the Law Department as a "Court Attorney – Pending Admission" in August 2004. Following her admission to the Second Judicial Department in January 2005, she assumed the position of Court Attorney. She served as a Court Attorney from 2005 through 2009, as a Senior Court Attorney from 2009 through 2011, and has been serving as an Associate Court Attorney since 2011.

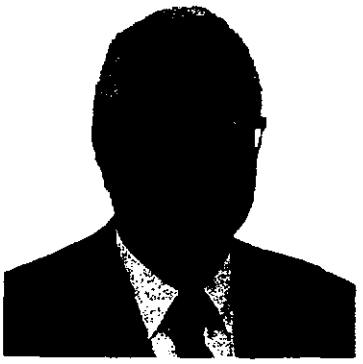
Ms. Kapoor has also served an interim law clerk to the Hon. William R. LaMarca (deceased), Justice of the Supreme Court, Nassau County and the Hon. Jerome C. Murphy, Justice of the Supreme Court, Nassau County.

In 2005, Ms. Kapoor was appointed by the former Chief Administrative Judge of the New York State Courts, Jonathan Lippman, to serve as a Small Claims Assessment Review (SCAR) Hearing Officer. In 2015, Ms. Kapoor was appointed by the Nassau County Administrative Judge, Thomas A. Adams, to serve as a Special Election Law Referee. She continues to serve as both a SCAR Hearing Officer and Special Election Law Referee to date.

Ms. Kapoor received her Bachelor of Arts, Political Science, *magna cum laude*, *Phi Beta Kappa*, from Queens College in 2001. She received her Juris Doctorate from the Maurice A. Deane School of Law at Hofstra University in 2004. At Hofstra Law, she was a recipient of the Walter Sackur Scholarship, the Senior Notes and Comments Editor for the *Hofstra Journal of International Business & Law*, a member of the Hofstra Moot Court Association, the sole recipient of the Best Brief Award at the Hofstra Moot Court Competition (2003-2004) and, more recently, on various occasions, a guest lecturer at Hofstra Law School and a diversity program panelist.

Ms. Kapoor's professional accomplishments include her being appointed to the Committee on Character and Fitness in the Second Judicial Department, a former member of the Hofstra Law School Alumni Association Board, a former member of the Nassau County Bar Association's Board of Directors, former co-chair of the WE CARE Advisory Board (the charitable arm of the Nassau County Bar Association) as well as a member of almost a dozen committees at the Bar Association.

In addition, she currently serves as a member of the Board of the Theodore Roosevelt Inn of Court, a member of the Nassau County Judicial Committee on Women in the Courts and a member of the Nassau County Women's Bar Association.



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Practice Areas

Bankruptcy & Business Reorganization Law

Corporate Finance

Litigation & Dispute Resolution

Education

Hofstra University School of Law
J.D., 1981

State University of New York Albany
B. A., *magna cum laude*, 1978

Memberships

Association of the Bar of the City of New York, Committee on Bankruptcy Reorganization

Theodore Roosevelt American Inn of Court

Admissions

New York State

U.S. District Court, Southern District of New York

U.S. District Court, Eastern District of New York

U.S. District Court, Northern District of New York

U.S. Court of Appeals, Second Circuit

Edward J. LoBello is a Member of Meyer, Suozzi, English & Klein, P.C., where he practices in the firm's Bankruptcy & Business Reorganization, Corporate Finance and Litigation & Dispute Resolution groups located in Garden City, NY and in New York, NY. Mr. LoBello concentrates his practice on business restructuring, bankruptcy reorganizations, work-outs, corporate finance, creditors' rights and related litigation.

For 15 consecutive years, Mr. LoBello is rated "AV Preeminent" by Martindale-Hubbell, the highest level of professional excellence. From 2012-2018, he was recognized by *New York Super Lawyers*.

Notable experience includes:

- Receiver and Estate Fiduciary for National Events of America, Inc. and New World Events Group, Inc.
- Conflicts counsel to Chapter 15 Foreign Representative in Mexicana Airlines
- Counsel to Chapter 15 Foreign Representative in Berau Capital Resources PTE Ltd. and CFG Investment S.A.C.
- Counsel to Debtor in Possession in China Fishery Group Limited and US Gen New England, Inc.
- Counsel to Liquidation Trustee in Movida Communications
- Counsel to Committee Chair in Hipcricket, Inc., DeWitt Rehabilitation and Nursing Center, Inc., Metro/Atlantic Express, and Tana Seybert, LLC
- Counsel to Committee member in Delta Air Lines, Inc.
- Counsel to Committee in JJT Energy, LLC
- Counsel to Non-Debtor Affiliate in Inner City Media Corporation
- Co-counsel to Union Retirees in Chrysler and GM
- Counsel to Prepetition Receiver and Chief Restructuring Officer in HRH - Atlantic, LLC

Edward J. LoBello

- Counsel to Indenture Trustee in Innovative Stone, LLC
- Counsel to Defendants in preference and other avoidance actions in numerous bankruptcy cases including Circuit City Stores, Eastman Kodak, Steve & Barry's, Visteon, American Home Mortgage, Lyondell Chemical, Value City, North General Hospital, Innovest Holdings, LLC , and The Standard Register Corporation
- Counsel to Landlords in numerous bankruptcy cases including Blockbuster, Champion Motor Group, Inc., Getty Petroleum Marketing, Inc., Betsey Johnson LLC, Ziff Davis Inc., American Medical Utilization Management Corporation and Federation Employment and Guidance Service, Inc.
- Counsel to Union and Pension Fund in The Great Atlantic & Pacific Tea Company, Inc. (I)
- Counsel to Key Suppliers in Lehman Brothers Holdings Inc., The Standard Register Corporation, Solutia, Inc., Global Crossing, Ltd., and Toys R Us
- Counsel to Prepetition Lender in Cape May Nursing Home, Café CNN and Pine Tree House
- Counsel to Insurance Company in A.P. Green Industries, Inc.
- Counsel to Mortgagee of commercial property in various cases
- Counsel to Municipality in The Great Atlantic & Pacific Tea Company, Inc. (II) and Allegria Hotel
- Counsel to Asset Purchaser in 19 Mad Park, LLC d/b/a SD26 Restaurant & Wine Bar, and A.L. Eastmond & Sons, Inc.
- Counsel to Lenders, Purchasers and Debtors in numerous Manhattan restaurant/hospitality cases

In 2018, Mr. LoBello authored the Local Bankruptcy Rules Toolkit (Eastern District of New York) published by Thomson Reuters' Practical Law. The online publication compiles key resources for attorneys in the practice of bankruptcy law in the Eastern District of New York, including applicable statutes, rules, court procedures, and practice notes.

Prior to joining the firm, Mr. LoBello was a Partner in the New York City office of a national law firm where he represented all major constituents in bankruptcy cases including debtors in possession, creditors' committees, committee members, institutional lenders, trade creditors, landlords, insurance companies, equipment lessors, asset purchasers, and preference defendants, among others. Mr. LoBello has represented clients in numerous large and significant Chapter 11 cases, including Chrysler LLC, General Motors Corp., Lehman Brothers Holdings Inc., Compania Mexicana de Aviacion, S.A. de C.V., Delta Air Lines, Inc., Solutia, Inc., A.P. Green Industries, Inc., US Gen New England, Inc. and Global Crossing, Ltd., to name but a few.

VISHNICK MCGOVERN MILIZIO LLP
ATTORNEYS AT LAW

Joseph G. Milizio, Esq., Managing Partner
Professional Profile

Managing Partner Joseph G. Milizio leads the firm's Business and Transactional Law, Exit Planning for Business Owners and LGBT Representation Practice Groups. He is a key member of the VMM Family Institute℠.

Mr. Milizio has significant experience in all areas of transactional law, with an emphasis in general business transactions including acquisitions, sales, entity and owner representation, franchising, leasing and transactional real estate matters. He represents a wide range of businesses, including retailers, manufacturers, real estate entities, healthcare providers and other professional practices.

His diverse corporate and real estate finance experience includes the representation of both borrowers and lenders. He regularly advises clients on corporate governance matters, dispute resolution and estate planning for business owners. Under the auspices of the firm's Exit Planning for Business Owners Practice Group, he works with business owners and other advisors as a consultant and legal advisor in planning for and implementing exit strategies. Mr. Milizio is a founding vice president of the Long Island Chapter of the International Exit Planning Institute, a forum where local professional advisors can collaborate; develop educational programs for business owners and professional advisors to build awareness and better prepare an owner for the successful exit of their business; encourage and foster the adoption of best practices for the exit planning profession; and promote the common business interests of those business advisors engaged in the profession of exit planning.

Mr. Milizio founded the firm's groundbreaking LGBT Representation Practice Group over 15 years ago. He leads VMM in advocating for the legal rights of lesbian, gay, bisexual and transgender individuals, offering legal counsel and representation on key issues in the LGBT community. These include estate planning, health care proxies/living wills, employment law/discrimination, pre- and post- nuptial agreements, domestic partnership agreements, co-owner agreements, spousal rights and obligations, and adoptions. Mr. Milizio is a longtime member of the New York Steering Committee of the Human Rights Campaign (HRC), America's largest civil rights organization. He is co-chair of the recently launched Nassau County Bar Association LGBTQ committee, working with committee members to address equality and inclusion for all minorities. In recognition of his longtime support of Long Island Crisis Center, particularly its Pride for Youth initiative, Mr. Milizio was named Person of the Year in 2017.

Mr. Milizio has been quoted extensively in *Newsday* and *Long Island Business News* and is a frequent contributor to VMM's quarterly newsletter, *The SideBar*. He received his Juris Doctor degree from Brooklyn Law School and graduated magna cum laude from St. John's University. He is admitted to practice law in the State of New York and is a member of the New York State Bar Association and the Nassau County Bar Association, where he serves on the Lawyer Referral Committee, as well as the Corporation Law and Real Estate Committees.

A former chairperson of the board of trustees and former chair of the governance committee of the Long Island Chapter of the National Multiple Sclerosis Society, Mr. Milizio served as captain of Vishnick McGovern Milizio's "Walk MS" team; the firm's annual participation consistently stood out as one of Long Island's top fundraising groups at the event. He is also an MS Society Leadership Award recipient, which recognizes Long Island's business leaders.

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Weinberg Zareh Malkin Price LLP

Omid Zareh

Mr. Zareh is a founding partner of Weinberg Zareh Malkin Price LLP.

He focuses on the needs of executives and their companies in corporate planning and all phases of complex, commercial arbitration and litigation.

He has experience in trial and appellate advocacy, state and federal courts, multidistrict litigation, alternate dispute resolution, hostile business divorces, and complex business and scientific disputes. He advises in varied areas of law, including attorney ethics and professional responsibility. His clients range from law firms, entrepreneurs, start-up companies, established financial companies, and seasoned investors.

Mr. Zareh is a member of the bars of New York State and New Jersey, as well as the Federal Circuit. He is an active member of the NYU Law Alumni Association (a former Vice President), the Long Island Entrepreneurs Group where he serves as General Counsel currently, and the Nassau County Bar Association (former Chair of the Ethics Committee and former Co-Chair of the Intellectual Property Committee). He also has participated in a number of community and professional organizations, and often lectures about attorney ethics and the law. Mr. Zareh also serves as an officer of real estate holding companies.

While attending New York University Law School, Mr. Zareh was the Legal Theory Editor of the Review of Law and Social Change. Prior to starting his own law firm, Mr. Zareh practiced at Coudert Brothers LLP, Simpson Thatcher & Bartlett LLP, and Schulte Roth & Zabel LLP.

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My name is Mirdalie Charles. I am a second-year student at the Maurice A. Deane School of Law at Hofstra University.

In 2011, I earned a Bachelor's Degree in Political Science from Providence College. In 2014, I earned a Master's Degree in Criminal Justice (with a concentration in Criminology and Deviance) from The John Jay College of Criminal Justice.

During my academic years, I have been able to gain substantial experience in the legal field. With an eye towards ultimately becoming a lawyer, I have been interning and gaining hands-on legal experience during my summers for approximately the last nine years. I have been a Certified Court interpreter for the last several years. In addition, I have worked at several law firms in Nassau and Queens County. Areas of law which I have been able to gain experience in include: Immigration, Real-Estate, Bankruptcy and Criminal Law.

More specifically, in 2011, I had the privilege of working at the Kings County District Attorney's Office in Brooklyn. While at the Kings County District Attorney's Office I worked in the Early Case Assessment Bureau assisting prosecutors with screening cases brought by the New York City Police Department. I was directly responsible for analyzing police reports, conducting interviews with witnesses, and utilizing the criminal procedure code to determine the viability of a potential case.

I have skills that will serve me well. I have excellent research and writing skills developed while completing my Master's degree. I received an A- in my first semester Legal Writing class, where I was able to present arguments from both the plaintiff and defendant perspectives and research and analyze legal cases in depth.

All of these accomplishments are helping to shape my legal career. I aspire to continue to master my ability to synthesize and integrate a higher volume of knowledge – a valuable skill as the field becomes more and more expansive.

Domenick J. Pesce - Bio

Domenick graduated from Hofstra University, Honors College, where he majored in Political Science with minors in Philosophy of Law, Rhetorical Studies, and Italian. He currently is a 3L at the Maurice A. Deane School of Law at Hofstra University. At Hofstra Law, Domenick is the Editor-in-Chief of the Hofstra Labor & Employment Law Journal and President of the Federal Bar Association – Hofstra Law Division. He is also a researcher at the Hofstra Research Laboratory for Law, Logic and Technology (LLT Lab) and a student member of the Theodore Roosevelt American Inn of Court. Domenick also has nearly five years of experience working for Apple Inc. as a certified technician and trainer.

During the summer of 2017, Domenick was a judicial intern for the Honorable Helene F. Gugerty in Nassau County Court. This past summer he worked as a legal intern in the Public Corruption Bureau of the Nassau County District Attorney's Office. He is interested in criminal, intellectual property, technology, and cybersecurity law.

In the summer of 2019, Domenick will join the Nassau County District Attorney's Office as an Assistant District Attorney.

Sean Romeo

Sean Romeo. I'm 24 years old and I'm from Sag Harbor, NY. I went to SUNY Oneonta for undergrad where I studied Philosophy and political science and graduated with honors. Time not spent on law school is spent watching sports or playing golf. I plan to pursue a career in litigation or representation.

Diversity, Inclusion and Elimination of Bias – CLE Requirement, General Information

Analysis (/newyorklawjournal/analysis/)

Changes to State CLE Requirements Now Include Diversity, Inclusion and Elimination of Bias

Beginning Jan. 1, 2018, New York's mandatory CLE requirements includes a Diversity and Inclusion component. Attorneys due to re-register on or after July 1, 2018 must meet the new CLE requirements.

By **Betty Weinberg Ellerin, Deborah A. Scalise and Gina Bucciero** | March 23, 2018 at 02:30 PM

Issues of race and discrimination are in the forefront of problems confronting today's society. Lawyers and the legal profession must take the lead in how to address and overcome inequities emanating from bias in these areas. On the one hand, it is crucial for the legal profession to celebrate and encourage diversity at all levels, while, on the other, it must lead in combatting bias on the basis of race, gender, ethnicity, religion, sexual orientation or other differences. These principles should guide lawyers in fulfilling their professional responsibilities as members of the bar generally, as well as in their representation of clients. One way in which the legal profession can sensitize itself to the scope and extent of these problems and potential avenues for remediation is through continuing legal

education (CLE). Two states, California and Minnesota, already require attorneys to meet diversity and inclusion requirements. Beginning Jan. 1, 2018, New York's mandatory CLE requirements includes a Diversity and Inclusion component. Attorneys due to re-register on or after July 1, 2018 must meet the new CLE requirements.

Background

In February 2016, the American Bar Association's House of Delegates unanimously adopted a resolution entreating those regulating authorities that have a mandatory or minimum CLE requirement to also include a diversity and inclusion component. **ABA Resolution 107 (http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html)**. In New York state, the resolution gained overwhelming support from a number of local and specialty bar associations.

In July 2016, Chief Judge Janet DiFiore received a letter signed by 13 bar associations urging New York state to mandate that diversity and inclusion be included as a CLE requirement. The bar associations that signed the letter were: the New York City Bar Association, the Amistad Long Island Black Bar Association, Association of Black Women Attorneys, Association of Law Firm Diversity Professionals, Dominican Bar Association, Hispanic National Bar Association, Jewish Lawyers Guild, LGBT Bar Association of Greater New York (LeGaL), Long Island Hispanic Bar Association, Metropolitan Black Bar Association, Muslim Bar Association of New York, Puerto Rican Bar Association, and South Asian Bar Association of New York.

In response to the letter, OCA CLE Board Chair Betty Weinberg Ellerin and the New York State OCA CLE Board met to discuss the proposed mandatory diversity and inclusion CLE. During their meetings, the Board examined a survey supplied by the New York City Bar Association, outlining CLE program offerings that would meet the diversity and inclusion requirement. The Board also reviewed the diversity and inclusion programming being implemented by California and Minnesota.

There was also a perception that the large law firms were the only CLE providers that were offering such programs. Such was a misapprehension given the fact that WBASNY and the other affinity bar associations mission statements are dedicated to diversity and the diversity requirement, which at the time had yet to be defined. "Diversity" CLE programing was regularly offered under different rubrics or headings. For instance, discrimination in employment settings; lack of civility as part of ethics programs; "Breaking the Glass Ceiling," "Tips for Women on Running for Office" and the "Pink Bench." Moreover, the three largest Bar Associations, WBASNY, NYSBA and NYSTLA, as well as other bar associations, lawyers and law firms had not had an opportunity to comment on the proposal.

In trying to define the new CLE Diversity Rule, the OCA CLE Board discussed whether it should follow the New York Rules of Professional Conducts RPC 8.4, which provides in pertinent part: "A lawyer or law firm shall not ... (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age,

race, creed, color, national origin, sex, disability, marital status or sexual orientation." 22 NYCRR 1200 RPC 8.4(g). However, after discussion, it was decided that the definition would be more expansive to enable the CLE Providers and attendees more options for programming which would meet the new Diversity and Inclusion requirement. Thus, the new diversity and inclusion programming must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel.

In addition to discussing the definition of the new "Diversity Rule," the Board considered compliance issues as well as whether the new requirement would mean that we would need to add one or two additional CLE credits. Judge Ellerin felt and most of the OCA CLE BOARD agreed that lawyers should not be burdened with additional credit requirements. So, it was agreed that the new requirement could be a new category among the 24 and 32 credits that are already required for attorneys and newly admitted attorneys.

In December 2016, the OCA CLE Board proposed an amendment of the New York MCLE Rules for New York attorneys recommending that there by a one-credit CLE requirement in Diversity and Inclusion. The Board also issued a memorandum, calling for public comment on the proposed amendment, which received overwhelming support from bar associations, lawyers and law firms throughout New York state.

The New Rule was presented to Chief Judge Janet DiFiore and the Courts Administrative Board, which includes the Presiding Justices of the Four Appellate Divisions. The Administrative Board approved the proposal creating a new diversity and inclusion category for New York's mandatory CLE requirements.

New Diversity and Inclusion Requirement

The new rule can be found at 22 NYCRR 1500.2(g); it now states: "a) Credit Hours. Each attorney shall complete a minimum of 24 credit hours of accredited continuing legal education each biennial reporting cycle in ethics and professionalism, skills, law practice management, areas of professional practice, or diversity, inclusion and elimination of bias, at least four (4) credit hours of which shall be in ethics and professionalism and at least one (1) credit hour of which shall be in diversity, inclusion and elimination of bias. Ethics and professionalism, skills, law practice management, areas of professional practice, and diversity, inclusion and elimination of bias are defined in §1500.2. The ethics and professionalism and diversity, inclusion and elimination of bias components may be intertwined with other courses." 22 NYRR 1500.22(a).

As a result, New York attorneys will have to complete one credit in the topic area of Diversity, Inclusion and Elimination of Bias as part of their mandatory continuing legal education requirements. The change will take effect beginning with attorneys due to re-register on or after July 1, 2018.

With the implementation of the Diversity and Inclusion requirement, the 24 required credits for experienced attorneys will stay the same, but the categories of credit requirements will slightly change. Experienced attorneys will still be required to complete four credit hours in ethics and professionalism and will be required to complete one credit hour in diversity, inclusion, and elimination of bias. Newly-admitted attorneys (less than two years) are required to complete 32 CLE credits in their first two years of admission, broken down into 16 credits each year with defined categories and credits in Ethics in Professionalism (6); Skills (12) and Law Practice Management and/or Areas of Professional Practice (14).

The CLE Board members who worked with Justice Ellerin and her staff to adopt the changes are Prof. Melissa L. Breger, Vincent T. Chang, Hon. Leland G. DeGrasse, Hon. Timothy S. Driscoll, David L. Edmunds, Jr., Cynthia Feathers, Hon. Helen E. Freedman, Nicholas A. Gravante Jr., Linda S. Lin, Hon. William E. McCarthy, Timothy P. Murphy, Deborah A. Scalise, Hon. Bernice D. Siegal, and Hon. Charles J. Thomas.

Conclusion

With the addition of the diversity and inclusion CLE requirement, the CLE Board has helped to educate New York attorneys to take steps to overcome the challenges of diversity in the legal profession. Diversity training will help New York attorneys to become better lawyers by facilitating improved attorney-client relationships, increasing attorney awareness and understanding diverse client needs. All of which will not only enhance legal services but will inure to the benefit of the legal profession, by opening the legal system as well as the profession to all people, regardless of race, gender, ethnicity, religion, or orientation.

Betty Weinberg Ellerin is the chair of the NYS OCA CLE Board and senior counsel at Alston & Bird. She served more than 20 years as an Appellate Division jurist. Deborah A. Scalise was appointed to the OCA CLE Board by Chief Judge Janet DiFiore in 2016. She is a partner in the firm Scalise & Hamilton. Gina Bucciero works as a legal assistant at Scalise & Hamilton.

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THE AMERICAN LAWYER (/AMERICANLAWYER/)

The New York Times

OP-ED CONTRIBUTORS

Diversity Makes You Brighter

By Sheen S. Levine and David Stark

Dec. 9, 2015

AFFIRMATIVE ACTION is back before the Supreme Court today. The court has agreed to hear, for the second time, the case of Abigail Fisher, a white applicant who claims that she was rejected by the University of Texas at Austin because of her race. Ms. Fisher invokes the promise of equal protection contained in the 14th Amendment, reminding us that judging people by their ancestry, rather than by their merits, risks demeaning their dignity.

Upholding affirmative action in 2003, in Grutter v. Bollinger, Justice Sandra Day O'Connor argued that it served the intellectual purpose of a university. Writing for the majority, she described how the University of Michigan aspired to enhance diversity not only to improve the prospects of certain groups of students, but also to enrich everyone's education.

Ms. Fisher argues that diversity may be achieved in other ways, without considering race. Before resorting to the use of race or ethnicity in admissions, the University of Texas must offer "actual evidence, rather than overbroad generalizations about the value of favored or disfavored groups" to show that "the alleged interest was substantial enough to justify the use of race."

Our research provides such evidence. Diversity improves the way people think. By disrupting conformity, racial and ethnic diversity prompts people to scrutinize facts, think more deeply and develop their own opinions. Our findings show that such diversity actually benefits everyone, minorities and majority alike.

To study the effects of ethnic and racial diversity, we conducted a series of experiments in which participants competed in groups to find accurate answers to problems. In a situation much like a classroom, we started by presenting each participant individually with information and a task: to calculate accurate prices for simulated stocks. First, we collected individual answers, and then (to see how committed participants were to their answers), we let them buy and sell those stocks to the others, using real money. Participants got to keep any profit they made.

When trading, participants could observe the behavior of their counterparts and decide what to make of it. Think of yourself in similar situations: Interacting with others can bring new ideas into view, but it can also cause you to adopt popular but wrong ones.

It depends how deeply you contemplate what you observe. So if you think that something is worth $100, but others are bidding $120 for it, you may defer to their judgment and up the ante (perhaps contributing to a price bubble) or you might dismiss them and stand your ground.

We assigned each participant to a group that was either homogeneous or diverse (meaning that it included at least one participant of another ethnicity or race). To ascertain that we were measuring the effects of diversity, not culture or history, we examined a variety of ethnic and racial groups. In Texas, we included the expected mix of whites, Latinos and African-Americans. In Singapore, we studied people who were Chinese, Indian and Malay. (The results were published with our co-authors, Evan P. Apfelbaum, Mark Bernard, Valerie L. Bartelt and Edward J. Zajac.)

The findings were striking. When participants were in diverse company, their answers were 58 percent more accurate. The prices they chose were much closer to the true values of the stocks. As they spent time interacting in diverse groups, their performance improved.

In homogeneous groups, whether in the United States or in Asia, the opposite happened. When surrounded by others of the same ethnicity or race, participants were more likely to copy others, in the wrong direction. Mistakes spread as participants seemingly put undue trust in others' answers, mindlessly imitating them. In the diverse groups, across ethnicities and locales, participants were more likely to distinguish between wrong and accurate answers. Diversity brought cognitive friction that enhanced deliberation.

For our study, we intentionally chose a situation that required analytical thinking, seemingly unaffected by ethnicity or race. We wanted to understand whether the benefits of diversity stem, as the common thinking has it, from some special perspectives or skills of minorities.

What we actually found is that these benefits can arise merely from the very presence of minorities. In the initial responses, which were made before participants interacted, there were no statistically significant differences between participants in the homogeneous or diverse groups. Minority members did not bring some special knowledge.

The differences emerged only when participants began interacting with one another. When surrounded by people "like ourselves," we are easily influenced, more likely to fall for wrong ideas. Diversity prompts better, critical thinking. It contributes to error detection. It keeps us from drifting toward miscalculation.

Our findings suggest that racial and ethnic diversity matter for learning, the core purpose of a university. Increasing diversity is not only a way to let the historically disadvantaged into college, but also to promote sharper thinking for everyone.

When it comes to diversity in the lecture halls themselves, universities can do much better. A commendable internal study by the University of Texas at Austin showed zero or just one African-American student in 90 percent of its typical undergraduate classrooms. Imagine how much students might be getting wrong, how much they are conforming to comfortable ideas and ultimately how much they could be underperforming because of this.

Ethnic diversity is like fresh air: It benefits everybody who experiences it. By disrupting conformity it produces a public good. To step back from the goal of diverse classrooms would deprive all students, regardless of their racial or ethnic background, of the opportunity to benefit from the improved cognitive performance that diversity promotes.

Sheen S. Levine is a professor at the Jindal School of Management at the University of Texas at Dallas; David Stark is a professor of sociology at Columbia.

A version of this article appears in print on Dec. 9, 2015, on Page A35 of the New York edition with the headline: Diversity Makes You Brighter

Diversity and Inclusion: Attorney Admissions

Pro Bono Scholars Program ☐

APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY AND COUNSELOR-AT-LAW IN THE STATE OF NEW YORK

APPLICATION FOR ADMISSION QUESTIONNAIRE

(Please see the General Instructions for guidance on filing complete applications)

APPLICATION FOR *(check one)*:	☐ **Admission on Examination** *or* ☐ **Admission on Motion without Examination.**
APPELLATE DIVISION *(check one)*:	☐ **1ST DEPT.** ☐ **2ND DEPT.** ☐ **3RD DEPT.** ☐ **4TH DEPT.**

TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK:

The undersigned hereby applies for admission to practice as an attorney and counselor-at-law in all courts of the State of New York, and in support of such application submits the following sworn statement and the accompanying affidavits and other papers.

A. PERSONAL INFORMATION

1. State name in full:

FIRST ▾ | MIDDLE ▾

LAST ▾ | SUFFIX (JR., III) ▾

2. Have you ever used or been known by any other name? ..... ☐ **No** ☐ **Yes**

If **YES**, state in full each name (other than the name given above) which you have used or by which you have at any time been known, the period of, and the reason for, the use of each such name; if change of name is by marriage, so state; if change of name was by court order, so state.

3. Social Security Number: .....

4. BOLE ID# (NYS Board of Law Examiners Identification Number): . . .

5. State the following: Age: _____ Date of birth *(mm/dd/yyyy)*: _____

Place of birth:

CITY / TOWN / VILLAGE ▾ | STATE ▾ | COUNTRY ▾

6. Are you a citizen of the United States? ..... ☐ **No** ☐ **Yes**

If **NO**, state your immigration status: _____

7. Present residence:

STREET ADDRESS ▾ | CITY / TOWN / VILLAGE ▾

STATE ▾ | ZIP ▾ | COUNTRY *(if not USA)* ▾

TELEPHONE ▾ | E-MAIL *(if any)* ▾

8. Prior residence:

Provide the last permanent residence where you resided before the address in question 7.

PERIOD FROM (Month / Year): **To (Month / Year):**

STREET ADDRESS ▾ CITY / TOWN / VILLAGE ▾

STATE ▾ ZIP ▾ COUNTRY *(If not USA)* ▾

9. Office address (if applicable):

NAME OF OFFICE ▾

STREET ADDRESS ▾ CITY / TOWN / VILLAGE ▾

STATE ▾ ZIP ▾ COUNTRY *(If not USA)* ▾

TELEPHONE ▾ E-MAIL *(if any)* ▾

B. EDUCATION

10. List all colleges, universities and professional schools (other than law schools) attended.

Provide a chronological listing (from earliest to latest). If you did not receive a degree, state the reason.

DATES OF ATTENDANCE from (Month / Year): ____________ **To (Month / Year):**

NAME OF COLLEGE / UNIVERSITY / OTHER ▾ DEGREE ▾

STREET ADDRESS ▾ CITY / TOWN / VILLAGE ▾

STATE ▾ ZIP ▾ COUNTRY *(If not USA)* ▾

REASON FOR NOT RECEIVING A DEGREE *(If applicable)* ▾

DATES OF ATTENDANCE from (Month / Year): **To (Month / Year):**

NAME OF COLLEGE / UNIVERSITY / OTHER ▾ DEGREE ▾

STREET ADDRESS ▾ CITY / TOWN / VILLAGE ▾

STATE ▾ ZIP ▾ COUNTRY *(If not USA)* ▾

REASON FOR NOT RECEIVING A DEGREE *(If applicable)* ▾

DATES OF ATTENDANCE from (Month / Year): **To (Month / Year):** ____________

NAME OF COLLEGE / UNIVERSITY / OTHER ▾ DEGREE ▾

STREET ADDRESS ▾ CITY / TOWN / VILLAGE ▾

STATE ▾ ZIP ▾ COUNTRY *(If not USA)* ▾

REASON FOR NOT RECEIVING A DEGREE *(If applicable)* ▾

11. **List all law schools attended.**
Provide a chronological listing (from earliest to latest). If you did not receive a degree, state the reason.

FORM LAW SCHOOL CERTIFICATES: You must send the Form Law School Certificate to each law school listed below. Each law school should return the form directly to the Appellate Division.

DATES OF ATTENDANCE from (Month / Year): _____ **To (Month / Year):**

NAME OF LAW SCHOOL ▾ DEGREE ▾

STREET ADDRESS ▾ CITY / TOWN / VILLAGE ▾

STATE ▾ ZIP ▾ COUNTRY *(if not USA)* ▾

REASON FOR NOT RECEIVING A DEGREE *(if applicable)* ▾

DATES OF ATTENDANCE from (Month / Year): **To (Month / Year):**

NAME OF LAW SCHOOL ▾ DEGREE ▾

STREET ADDRESS ▾ CITY / TOWN / VILLAGE ▾

STATE ▾ ZIP ▾ COUNTRY *(if not USA)* ▾

REASON FOR NOT RECEIVING A DEGREE *(if applicable)* ▾

NOTE: If you answer* Yes *to question 12, 13 or 14, give the name of the institution, and state fully the circumstances and date of each such occurrence.

12. **Have you ever been denied admission** to any school, college, law school, or other similar institution for stated cause which might reflect upon your character? . . . . . ☐ **No** ☐ **Yes: If 'YES' answer below**

NAME OF INSTITUTION ▾ DATE ▾

REASON AND CIRCUMSTANCES ▾

13. **Have you ever been placed on probation, dropped, suspended, expelled** or otherwise been subjected to discipline by any institution of learning above elementary school level for conduct which might reflect upon your character? . . . . . ☐ **No** ☐ **Yes: If 'YES' answer below**

NAME OF INSTITUTION ▾ DATE ▾

REASON AND CIRCUMSTANCES ▾

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

Rule 8.1. Candor in the Bar Admission Process

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

Rule 8.2. Judicial Officers and Candidates

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

Gordon v. Committee on Character and Fitness
48 N.Y.2d 266

State has a constitutionally permissible interest to assure that those admitted to the bar possess knowledge of the law as well as character and fitness requisite for an attorney

APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY AND COUNSELOR-AT-LAW IN THE STATE OF NEW YORK

FORM LAW SCHOOL CERTIFICATE

INSTRUCTIONS

Applicant must complete the first portion of this form certificate, sign the form and send it to each law school listed by the applicant on his or her application for admission questionnaire (see question number 11).

The law school should complete the remainder of the form and return it directly to the Appellate Division Department designated below by the applicant.

Completion and submission of this form is a prerequisite to applicant's admission to the New York State Bar.

To Be Completed By Applicant:

NAME OF APPLICANT ▾ **BOLE ID #** ▾ [NYS Board of Law Examiners Identification Number]:

CURRENT STREET ADDRESS *(office or home)* ▾ CITY / TOWN / VILLAGE ▾

STATE ▾ ZIP ▾ COUNTRY *(if not USA)* ▾

PHONE ▾ E-MAIL *(if available)* ▾

SOCIAL SECURITY NUMBER ▾

NAME OF LAW SCHOOL ▾

ADDRESS OF LAW SCHOOL ▾

STATE ▾ ZIP ▾ COUNTRY *(if not USA)* ▾

To Be Completed By Law School Only:

DATES OF ATTENDANCE at law school: From (mm / yyyy): _____ To (mm / yyyy): _____

DATE GRADUATED from law school: (mm / yyyy): _____

DEGREE CONFERRED by law school: _____

AUTHORIZATION BY APPLICANT: I *(name of applicant)*, _____, hereby authorize *(name of law school)* _____ and persons issuing this certificate to release to the Appellate Division of the New York State Supreme Court all information, files or records requested by it or its Committees on Character and Fitness in connection with the processing of my application for admission to the Bar of the State of New York.

_____
Signature of Applicant

_____
Date *mm/dd/yyyy*

To Be Completed By Law School:

Please confirm whether or not the law school **information provided by applicant above is accurate:**

☐ **Yes** ☐ **No** If **No**, please explain:

Was applicant charged with any misconduct, or disciplined, suspended, or dropped for any misconduct?

☐ **Yes** ☐ **No** If **Yes**, please state fully:

Is there any other discreditable information in the personnel or other records of the law school regarding the applicant's conduct or activities or bearing upon applicant's character not otherwise set forth in this form certificate?

☐ **Yes** ☐ **No** **If Yes**, please state fully:

If applicant filed a questionnaire or written application containing data about himself or herself, please supply a copy thereof, if available.

OFFICIAL SEAL OF LAW SCHOOL:

Dated _____, 20_____.

_____
Official Signature

_____
Title

IF FORM IS NOT IN ENGLISH, IT MUST BE ACCOMPANIED BY A DULY AUTHENTICATED ENGLISH TRANSLATION.

48 N.Y.2d 266 (1979)

In the Matter of Harry G. Gordon for Admission to the Bar, Appellant. Committee on Character and Fitness, Respondent.

Court of Appeals of the State of New York.

Argued October 15, 1979.
Decided November 13, 1979.

John Cary Sims, Alan B. Morrison, of the Bar of the District of Columbia, admitted on motion pro hac vice and *Daniel Riesel* for appellant.

Robert Abrams, Attorney-General (*Daniel M. Cohen* of counsel), in his statutory capacity under section 71 of the Executive Law and CPLR 1012 (subd [b]).

Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER concur.

269 *269Chief Judge COOKE.

Appellant, a resident of North Carolina, mounts this challenge to the constitutionality of CPLR 9406 (subd 2). That rule provides that a person may not be admitted as a member of the Bar of this State unless he furnishes proof "that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice".[1] Among other infirmities, it is claimed that the rule is violative of the privileges and immunities clause of article IV of the Federal Constitution.[2] We agree with that contention.

A graduate of the University of Virginia Law School and member of the Bars of Virginia and North Carolina, appellant was employed as in-house counsel to Western Electric Company in New York City. After working in New York for over two years, appellant qualified for, took and passed the New York State Bar Examination in July, 1977.[3] Before he was notified of the results of the examination, however,
270 appellant *270 was unexpectedly transferred to North Carolina by his employer, where he presently resides.

Apparently under the dual impression that his prior New York residence qualified him for admission to the Bar[4] and that, by virtue of his employment, he was engaged in the practice of law in New York, appellant filed an application for admission to practice with the Committee on Character and Fitness of the First Department (Judiciary Law, § 90, subd 1; CPLR 9402; 22 NYCRR 520.9).[5] In view of appellant's North Carolina residence, the committee deferred action on his application. Appellant thereupon challenged the residency requirement by petitioning the Appellate Division for admission without certification of the Committee on Character and Fitness (CPLR 9404). The Appellate Division denied the application, holding CPLR 9406 (subd 2) constitutional (67 AD2d 215). Although appellant relies upon a number of constitutional provisions in support of his claim that the residence requirement for admission to the Bar is unconstitutional,[6] it is necessary only to address the claim that the rule denies nonresidents the same privileges and immunities accorded residents.

The principal purpose of the privileges and immunities clause, like the commerce clause,[7] is to eliminate protectionist burdens placed
271 upon individuals engaged in trade or commerce *271 by confining the power of a State to apply its laws exclusively to nonresidents (*Paul v Virginia*, 8 Wall [75 US] 168, 180; Tribe, American Constitutional Law, § 6-32, p 406). In essence, the clause prevents a State from discriminating against nonresidents merely to further its own parochial interests or those of its residents[8] (*Hicklin v Orbeck*, 437 US 518; *Mullaney v Anderson*, 342 US 415; *Toomer v Witsell*, 334 US 385). While the precise reach of the clause must await further clarification, it is settled that a State may not premise an individual's right to engage in his chosen occupation within its borders solely on residence. Thus, the clause has been consistently interpreted to prevent a State from imposing discriminatory burdens on nonresidents, whether by means of artificial trade barriers in the form of unequal licensing fees (*Toomer v Witsell, supra*), taxes imposed on out-of-State vendors (*Ward v Maryland*, 12 Wall [79 US] 418), or employment preferences granted only to residents (*Hicklin v Orbeck, supra*).

This is not to say, of course, that the privileges and immunities clause forbids a State from ever differentiating between residents and nonresidents. Matters which directly implicate its sovereignty, such as voting (*Dunn v Blumstein*, 405 US 330) or entitlement to public office (*Chimento v Stark*, 414 US 802), furnish ready examples of areas in which a State may constitutionally condition eligibility upon residence. Moreover, where the disparate treatment does not implicate "those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity", there is no requirement that the State treat resident and nonresident alike[9] (*Baldwin v Montana Fish & Game Comm.*, 436
272 US 371, 383). *272 But those areas exempt from privileges and immunities protection are narrow and do not embrace the grant of a license to practice law.

No extended discussion is necessary to demonstrate that the right to pursue one's chosen occupation free from discriminatory interference is the very essence of the personal freedom that the privileges and immunities clause was intended to secure (*Hicklin v Orbeck*, 437 US 518, 524-525, *supra*; *Ward v Maryland*, 12 Wall [79 US] 418, 430, *supra*). It is now beyond dispute that the practice of law, despite its historical antecedents as a learned profession somehow above that of the common trades, is but a species of those commercial activities

within the ambit of the clause (cf. *Bates v State Bar of Ariz.*, 433 US 350, 371-372; *Goldfarb v Virginia State Bar*, 421 US 773, 788). From the standpoint of both the public and the legal profession itself, the practice of law is analogous to any other occupation in which an independent agent acts on behalf of a principal.

Nor can it be maintained that CPLR 9406 (subd 2) works no invidious discrimination against nonresidents. An attorney admitted to practice in one State who desires to practice in New York must often give up an established practice and residence, move to New York and forfeit the right to engage in his or her chosen occupation for at least six months and often appreciably longer. One who desires to engage in a multistate practice, concentrating on a particular area of expertise, is effectively foreclosed from doing so by the requirements of CPLR 9406 (subd 2). Those attorneys now employed by large corporations, currently comprising more than 10% of the legal profession (Yovovich, The Tense Marriage Between Business and Lawyers, Barrister, Spring 1979, p 43), whose duties entail frequent interstate
273 relocation are similarly penalized by the operation of the rule.[10] The disparity *273 of treatment between residents of the State and nonresidents is manifest: given two equally qualified candidates who have passed the Bar examination (or, for that matter, meet the other requirements for admission on motion) and possess the requisite character and fitness, the rule would deny one admission based solely upon residence.

Where the State imposes a wide-ranging restriction which significantly impairs the efforts of nonresidents to earn a livelihood, the discriminatory action must surmount two distinct hurdles. First the governmental interest claimed to justify the discrimination must be carefully examined to determine whether that interest is substantial, that is, whether "non-citizens constitute a peculiar source of the evil at which the statute is aimed" (*Toomer v Witsell* 334 US 385, 398, *supra*). Assuming that nonresidents do indeed present a problem with which the State may legitimately address, the inquiry then focuses upon whether the means adopted to achieve that goal are narrowly drawn and are the least restrictive alternatives available (*Hicklin v Orbeck*, 437 US 518, 528, *supra*).

It is undisputed that New York has a constitutionally permissible interest to assure that those admitted to the Bar possess knowledge of the law as well as the character and fitness requisite for an attorney (Judiciary Law, § 90; *Law Students Research Council v Wadmond*, 401 US 154, 159; *Schware v Board of Bar Examiners*, 353 US 232, 239). But appellant has not been excluded from membership in the Bar due to any challenge to his knowledge of the law of this State or to his good character. Rather, the exclusion is based solely upon his residence in North Carolina — a criterion which serves no purpose other than to deny persons the right to pursue their professional career objectives because of parochial interests.

There is nothing in the record to indicate that an influx of nonresident practitioners would create, or even threaten to create, a particular evil [within the competence of the State] to address. No valid reason is proffered as to why admission to practice law before the courts of this
274 State must be made dependent upon residency. Indeed, aside from an oblique *274 reference to the purported "dangers" said to be inherent in the licensing of nonresident lawyers, the State is at a complete loss to justify the blanket discrimination against nonresidents arising from the operation of CPLR 9406 (subd 2). Nevertheless, some have attempted to identify reasons supporting residency requirements for admission to the Bar (see Note, 92 Harv L Rev 1461, 1480). On the whole, however, these justifications serve only administrative convenience and thus are not closely tailored to serve a legitimate State interest (cf. *Sosna v Iowa*, 419 US 393, 406).

The rationale most often used to uphold residency requirements is the need of Bar admission authorities to observe and evaluate the applicant's character (cf., e.g., *Lipman v Van Zant*, 329 F Supp 391, 402; *Webster v Wofford*, 321 F Supp 1259, 1262; Note, 71 Mich L Rev 838, 850-852). But in this State, the applicant himself, in submitting his application for admission, is available to the Committee on Character and Fitness and is personally interviewed by one of its members. In some cases, nonresidents are permitted to furnish affidavits attesting to the applicant's character and fitness to practice law. Nor may the discrimination visited upon nonresidents be justified upon the ground that only resident attorneys will be amenable to the supervision of our courts (67 AD2d 215, 217; *Matter of Tang*, 39 AD2d 357, 360, app dsmd 35 N.Y.2d 851). To be sure, the State has a legitimate interest in controlling the attorneys who appear in its courts. Again, however, there are alternatives which are less restrictive than denial of admission to practice which would further this interest. For example, nothing prevents the State from enacting legislation requiring nonresident attorneys to appoint an agent for the service of process within the State (cf. *Hess v Pawloski*, 274 US 352; *Doherty & Co. v Goodman*, 294 US 623). Moreover, remedies currently available to safeguard against abuses by resident attorneys — contempt, disciplinary proceedings and malpractice actions — could be applied with equal force against miscreant nonresident attorneys.

That the State has an obligation to ensure the competency and rectitude of its counselor at law is a proposition with which none may quarrel (*Matter of Griffiths*, 413 US 717). This obligation, however, may not be fulfilled at the expense of constitutionally protected rights (see *Konigsberg v State Bar*, 366 US 36). By denying otherwise qualified applicants their right to practice their chosen occupation based
275 solely on *275 their State of residence, CPLR 9406 (subd 2) works an unconstitutional discrimination against nonresidents. Any interest the State may have in regulating nonresident attorneys is ill served by the onerous burden imposed by the rule. A number of less drastic, and constitutionally permissible, alternatives are readily available to protect the interest of the State in supervising those who practice in its courts (see, e.g., Note, 92 Harv L Rev 1461, 1487-1489).

Accordingly, the order of the Appellate Division should be reversed, without costs, and the matter remitted to the Appellate Division, First Department, for further proceedings on petitioner's application for admission to the Bar.

Order reversed, without costs, and matter remitted to the Appellate Division, First Department, for further proceedings in accordance with the opinion herein.

[1] In addition to those who are actual residents of New York, section 464 of the Judiciary Law provides that a person otherwise eligible for certification by the Board of Law Examiners for admission to the Bar shall be considered to be an actual resident and citizen of the State during any period of time in which he is employed full time within the State of New York.

[2] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" (US Const, art IV, § 2, cl 1).

[3] At the time this controversy arose, eligibility to take the Bar examination, like eligibility for admission to Bar, was premised, at least in part, upon the residency of the applicant (22 NYCRR 520.2 [a] [3]).

[4] Actually, appellant was required to satisfy two six-month durational residency requirements: one to take the Bar examination (22 NYCRR 520.2 [a] [3]; the other to satisfy the admission requirements of CPLR 9406 (subd 2).

[5] In addition to meeting two durational residency requirements (n 4, *supra*), three other conditions must be satisfied. Unless waived, the applicant must pass an examination conducted, semiannually, by the State Board of Law Examiners. Second, the applicant must possess the requisite character and fitness consistent with that required of an attorney. To assist in this evaluation, the applicant must furnish the Committee on Character and Fitness with affidavits attesting to his good moral character, fill out a detailed questionnaire and undergo a personal interview with a committee member. Finally, the applicant must swear that he will support the Federal and State Constitutions (see, generally, *Law Students Research Council v Wadmond*, 401 US 154, 156-157).

[6] It is asserted that CPLR 9406 (subd 2) denies appellant equal protection and due process of law (US Const, 14th Amdt). Although unnecessary to pass upon these claims, we note that similar challenges to six-month durational residency requirements have been rejected in the past (*Matter of Tang*, 39 AD2d 357, app dsmd 35 N.Y.2d 851; *Tang v Appellate Div. of N. Y. Supreme Ct., First Dept.*, 373 F Supp 800, affd 487 F 2d 138, cert den 416 US 906; *Wilson v Wilson*, 416 F Supp 984, affd 430 US 925; *Suffling v Bondurant*, 339 F Supp 257, affd *sub nom. Rose v Bondurant*, 409 US 1020).

[7] Many have recognized the "mutually reinforcing relationship" between the privileges and immunities and the commerce clauses (*Hicklin v Orbeck*, 437 US 518, 531, *supra*; *Toomer v Witsell*, 334 US 385, 407-409 [FRANKFURTER, J., concurring], *supra*; Tribe, American Constitutional Law, § 6-32, at p 404). The manifest distinction between the two is that the privileges and immunities clause is an affirmative grant of rights to individuals whereas the commerce clause has been read to limit the power of the individual States to restrict the free flow of goods and services across State lines (see *Philadelphia v New Jersey*, 437 US 617, 621-622).

[8] At one time, the privileges and immunities clause was thought to recognize what, within the philosphical terminology of the day, were termed "natural rights" (see *Corfield v Coryell*, 6 Fed Cas 546 [No. 3230]). Under this earlier theory, the purpose of the clause was to guarantee every citizen a group of fundamental rights which no State could transgress (see *Calder v Bull*, 3 Dallas [3 US] 386, 388). With the passage of time, however, it has become settled that the clause does not import that a citizen carries with him a set of well-defined privileges and immunities no matter where he may travel. Rather, the clause is meant "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy" (*Toomer v Witsell*, 334 US 385, 395, *supra*).

[9] As noted, the breadth of the privileges and immunities clause is presently unclear. In any event, there are certain rights deemed fundamental for privileges and immunities purposes which severely limit the power of the State to discriminate against nonresidents. In addition to the right to engage in one's chosen occupation, these fundamental rights include the right to own and alienate property within the State (*Blake v McClung*, 172 US 239), the right to equal treatment in the courts (*Canadian Northern Ry. Co. v Eggen*, 252 US 553) and the right to seek services available in the State (*Doe v Bolton*, 410 US 179). A nonresident wishing to exercise at least these rights in a foreign State is entitled to the same privileges and immunities a resident of that State receives.

[10] These considerations, together with an often unstated feeling that durational residency requirements constitute protectionist trade barriers for the economic protection of local interests, have given rise to numerous calls to nationalize admission to the Bar (e.g., Smith, Time for a National Practice of Law Act, 64 ABAJ 557; Brakel & Loh, Regulating the Multistate Practice of Law, 50 Wash L Rev 699; Note, 56 Cornell L Rev 831).

New York Statutes Annotated - 2017

§ 90. Admission to and removal from practice by appellate division; character committees
NY JUD § 90 [illegible] (Approximately pages)

Judiciary Law (Refs & Annos)
Chapter 30. Of the Consolidated Laws
Article 4. Appellate Division (Refs & Annos)

Effective: July 31, 2013

McKinney's Judiciary Law § 90

§ 90. Admission to and removal from practice by appellate division; character committees

Currentness

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law and has satisfied the requirements of section 3-503 of the general obligations law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court, if it shall be satisfied that such person is currently admitted to the bar in such other jurisdiction or jurisdictions, that at least one such jurisdiction in which he is so admitted would similarly admit an attorney or counsellor-at-law admitted to practice in New York state to its bar without examination and that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law and has satisfied the requirements of section 3-503 of the general obligations law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys. Such application, which shall conform to the requirements of section 3-503 of the general obligations law, shall be submitted to the appellate division of the supreme court in the department specified in the rules of the court of appeals.

c. The members of the committee appointed by the appellate division in each department to investigate the character and fitness of applicants for admission to the bar, shall be entitled to their necessary traveling, hotel and other expenses, incurred in the performance of their duties, payable by the state out of moneys appropriated therefor, upon certificate of the presiding justice of the appellate division by which such committee is appointed.

d. The committee on character and fitness appointed by the appellate division of the supreme court in the first judicial department and the committee on character and fitness appointed by the appellate division of the supreme court of the second judicial department, may each, with the written consent of the justices of each of such appellate divisions or a majority of such justices, acting for their respective appellate divisions, from time to time, appoint and remove a secretary, stenographers and assistants, and procure a suitable office

Implicit Bias: Criminal Jury Selection

JUROR QUESTIONNAIRE

UCS 140-4-13-05

Please answer all questions. Your answers will be used to assist in selecting a jury. If there is anything you prefer to discuss in private, please ask to speak with the judge out of the hearing of other jurors by answering yes to Question 18. THE QUESTIONNAIRE IS IN FOUR PARTS. PLEASE PRINT FIRMLY.

1. Name _____
2. Juror # _____
3. Age _____
4. ☐ Male ☐ Female
5. Town/village or geographical area (neighborhood) where you live?

   _____
6. Number of years
   a. living at current address? _____
   b. living in this county? _____
7. Where were you born? _____

   _____
8. Are you currently:
   ☐ Single ☐ Married ☐ Other
9. What is the highest level of education you completed?
   ☐ Less than high school
   ☐ High school graduate
   ☐ More than high school
      a. number of years _____
      b. course of study _____

   _____
10. Are you currently employed? ☐ No
    ☐ Yes — If yes:
    a. who is your employer? _____

    _____

    b. what is your occupation? _____

    _____

    _____
11. Occupations and relationship to you of other adults in your household:

    _____

    _____

    _____

    _____
12. Gender and age of your children:

    _____

    _____

    _____

    _____
13. Did you ever sit on a jury before? ☐ No
    ☐ Yes — If yes:
    a. When? _____
    b. Where? _____
    c. Type of jury:
       ☐ Grand jury ☐ Trial Jury ☐ Both
    d. Type of case(s):
       ☐ Criminal ☐ Civil ☐ Both
    e. Did the jury reach a verdict?
       ☐ Yes ☐ No ☐ Both
14. Have you or someone close to you ever: *(check all that apply)*
    ☐ Been the victim of a crime
    ☐ Been accused of a crime
    ☐ Been convicted of a crime
    ☐ Been a witness to a crime
    ☐ Testified in court
    ☐ Sued someone else
    ☐ Been sued by someone else.
15. Have you or someone close to you (relative or close friend) ever been employed by: *(check all that apply)*
    ☐ Law Office
    ☐ Medical profession
    ☐ Law enforcement or criminal justice agency
    ☐ Insurance industry
    ☐ Local municipality (city/county worker)
16. Are you actively involved in any civic, social, union, professional or other organizations? ☐ No
    ☐ Yes: _____

    _____
17. What are your hobbies or recreational activities?

    _____

    _____

    _____
18. Is there anything relevant to your jury service that you prefer to discuss in private?
    ☐ Yes ☐ No

I affirm that the statements made on this Questionnaire are true and understand that any false statement in this questionnaire are punishable under the Penal Law.

_____ / /

Signature of Prospective Juror — Date

RETAIN COPY AS FOLLOWS: WHITE - JUDGE, YELLOW - ATTORNEY, PINK - ATTORNEY, GOLD - JUROR

Overview

People don't always say what's on their minds. One reason is that they are unwilling. For example, someone might report smoking a pack of cigarettes per day because they are embarrassed to admit that they smoke two. Another reason is that they are unable. A smoker might truly believe that she smokes a pack a day, or might not keep track at all. The difference between being unwilling and unable is the difference between purposely hiding something from someone and unknowingly hiding something from yourself.

The Implicit Association Test (IAT) measures attitudes and beliefs that people may be unwilling or unable to report. The IAT may be especially interesting if it shows that you have an implicit attitude that you did not know about. For example, you may believe that women and men should be equally associated with science, but your automatic associations could show that you (like many others) associate men with science more than you associate women with science.

We hope you have been able to take something of value from the experience of taking one or more of these tests. The links above will provide more information about the IAT and implicit attitudes; we will periodically update the information to reflect our current understanding of the unconscious roots of thought and feeling.

About Us

Project Implicit is a non-profit organization and international collaboration between researchers who are interested in implicit social cognition - thoughts and feelings outside of conscious awareness and control. The goal of the organization is to educate the public about hidden biases and to provide a "virtual laboratory" for collecting data on the Internet.

Project Implicit was founded in 1998 by three scientists – Tony Greenwald (http://faculty.washington.edu/agg/) (University of Washington), Mahzarin Banaji (http://www.people.fas.harvard.edu/%7Ebanaji/) (Harvard University), and Brian Nosek (https://www.projectimplicit.net/nosek/) (University of Virginia). Project Implicit Mental Health launched in 2011, led by Bethany Teachman (https://www.projectimplicit.net/bethany/) (University of Virginia) and Matt Nock (http://nocklab.fas.harvard.edu/people/matthew-k-nock-phd) (Harvard University). Project Implicit also provides consulting services, lectures, and workshops on implicit bias, diversity and inclusion, leadership, applying science to practice, and innovation. If you are interested in finding out more about these services, visit https://www.projectimplicit.net (https://www.projectimplicit.net).

The Project Implicit Executive Committee consists of the following individuals:

· Kate Ratliff (http://kateratliff.com), Executive Director, University of Florida
· Yoav Bar-Anan (http://www.bgu.ac.il/~baranany/), Director of Technology, Ben Gurion University
· Calvin Lai (http://calvinklai.wordpress.com), Director of Research, Washington University in St. Louis
· Colin Tucker Smith (https://people.clas.ufl.edu/colinsmith/), Director of Education, University of Florida
· Brian Nosek (https://www.projectimplicit.net/nosek/), Board of Directors,

University of Virginia
· Tony Greenwald (http://faculty.washington.edu/agg/), Board of Directors, University of Washington

For more information about the Project Implicit research group, see https://www.projectimplicit.net (https://www.projectimplicit.net).

About the IAT

The IAT measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key.

When doing an IAT you are asked to quickly sort words into categories that are on the left and right hand side of the computer screen by pressing the "e" key if the word belongs to the category on the left and the "i" key if the word belongs to the category on the right. The IAT has five main parts.

In the first part of the IAT you sort words relating to the concepts (e.g., fat people, thin people) into categories. So if the category "Fat People" was on the left, and a picture of a heavy person appeared on the screen, you would press the "e" key.

In the second part of the IAT you sort words relating to the evaluation (e.g., good, bad). So if the category "good" was on the left, and a pleasant word appeared on the screen, you would press the "e" key.

In the third part of the IAT the categories are combined and you are asked to sort both concept and evaluation words. So the categories on the left hand side would be Fat People/Good and the categories on the right hand side would be Thin People/Bad. It is important to note that the order in which the blocks are presented varies across participants, so some people will do the Fat People/Good, Thin People/Bad part first and other people will do the Fat People/Bad, Thin People/Good part first.

In the fourth part of the IAT the placement of the concepts switches. If the category "Fat People" was previously on the left, now it would be on the right. Importantly, the number of trials in this part of the IAT is increased in order to minimize the effects of practice.

In the final part of the IAT the categories are combined in a way that is opposite what they were before. If the category on the left was previously Fat People/Good, it would now be Fat People/Bad.

The IAT score is based on how long it takes a person, on average, to sort the words in the third part of the IAT versus the fifth part of the IAT. We would say that one has an implicit preference for thin people relative to fat people if they are faster to categorize words when Thin People and Good share a response key and Fat People and Bad share a response key, relative to the reverse.

See the Frequently Asked Questions (faqs.html) for information about other explanations for IAT effects.

Link for video and jury instructions - United States District Court, Western District of Washington

Honorable Ricardo S. Martinez, Chief District Judge
William M. McCool, District Court Executive/Clerk of Court

http://www.wawd.uscourts.gov/jury/unconscious-bias

The Western District of Washington's bench and bar have long-standing commitments to a fair and unbiased judicial process. As a result, the emerging social and neuroscience research regarding unconscious bias prompted the Court to create a bench-bar-academic committee to explore the issue in the context of the jury system and to develop and offer tools to address it.

One tool the committee developed was a set of jury instructions that address the issue of unconscious bias. Research regarding the efficacy of jury instructions is still young and some of the literature has raised questions whether highlighting the notion of unconscious bias would do more harm than good.[1] However, the body of research supports that, as a general matter, awareness and mindfulness about one's own unconscious associations are important and thus a decision-maker's ability to avoid these associations, however that is achieved, will likely result in fairer decisions.[2]

Accordingly, the proposed instructions are intended to alert the jury to the concept of unconscious bias and then to instruct the jury in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making. The instructions thus serve the purposes of raising awareness to the associations jurors may be making without express knowledge and directing the jurors to avoid using these associations.

The committee has incorporated unconscious bias language into a preliminary instruction, into the witness credibility instruction, and into a closing instruction.[3] In addition, the committee has developed an instruction that can be given before jury selection if the parties are going to ask questions during *voir dire* regarding bias, including unconscious bias.

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[1] See, e.g., Irene V. Blair, The Malleability of Automatic Stereotypes and Prejudice, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (cumulating research on value of instruction to suppress stereotype and finding it mixed); Jennifer K. Elek & Paula Hannaford-Agor, First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making, 49 CT. REV. 190, 193 195, 198 (2013), available at http://aja.ncsc.dni.us/publications/courtrv/cr49-4/CR49-4Elek.pdf; Jennifer A. Richeson & J. Nicole Shelton, Negotiating Interracial Interactions: Costs, Consequences, and Possibilities, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316 (2007); Jacquie D. Vorauer, Completing the Implicit Association Test Reduces Positive Intergroup Interaction Behavior, 23 PSYCHOL. SCI. 1168 (2012) (finding that White participants' taking race-based IAT led to their non-White (Aboriginal) partners feeling less well regarded than after interactions after a non-race-based IAT); Jennifer K. Elek & Paula Hannaford-Agor, Can Explicit Instructions Reduce Expressions of Implicit Bias?: New Questions Following a Test of a Specialized Jury Instruction, NAT'L CENTER FOR STATE CTS. (Apr. 2014), available at http://ncsc.contentdm.oclc.org/cdm/ref/collection/juries/id/273 (finding "no significant effects of the instruction on judgments of guilt, confidence, strength of prosecution's evidence, or sentence length"; but the study's authors also reported that they were unable to identify the more traditionally-expected baseline bias, "which prevented a complete test of the value of the instructional intervention.").

[2] See Adam Benforado & John Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 EMORY L.J. 311, 325–26 (2007).

[3] The committee suggests introducing the topic as part of the preliminary instructions as there is research that suggests priming jurors may be more effective than waiting until the end of a case. See, e.g., Lisa Kern Griffin, Narrative, Truth, and Trial, 101 GEO. L.J. 281, 232 (2013); Kurt Hugenberg, Jennifer Miller & Heather M. Claypool, Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem, 43 J. EXPERIMENTAL SOC. PSYCH. 334 (2007) (finding that warnings given ahead of time about likely misperceptions of other race faces may be effective).

PRELIMINARY INSTRUCTION TO BE GIVEN
TO THE ENTIRE PANEL BEFORE JURY SELECTION

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.

PRELIMINARY INSTRUCTIONS TO BE GIVEN BEFORE OPENING STATEMENTS

DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]

In addition, please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is similar to Model Civil Instruction 1.1B.

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[1] Definitions modified by combining writings and comments by Harvard Professor Mahzarin Banaji.

[2] http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;
(2) the witness's memory;
(3) the witness's manner while testifying;
(4) the witness's interest in the outcome of the case, if any;
(5) the witness's bias or prejudice, if any;
(6) whether other evidence contradicted the witness's testimony;
(7) the reasonableness of the witness's testimony in light of all the evidence; and
(8) any other factors that bear on believability.

You must avoid bias, conscious or unconscious, based on the witness's race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Model Ninth Circuit Criminal Instruction 1.7 (modified)

INSTRUCTION TO BE GIVEN
DURING CLOSING INSTRUCTIONS
(perhaps before 7.5 – Verdict Form)

DUTY OF JURY

I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]

Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is similar to Model Civil Instruction 1.1B.

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[1] Definitions modified by combining writings and comments by Harvard Professor Mahzarin Banaji.

[2] http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf

Strategies for Confronting Unconscious Bias

by Kathleen Nalty

So—what's in a name? Apparently, a lot. If you are named John, you will have a significant advantage over Jennifer when applying for a position, even if you both have the exact same credentials.[1] If your name is José, you will get more callbacks if you change it to Joe.[2] And if you're named Emily or Greg, you will receive 50% more callbacks for job interviews than equally qualified applicants named Lakisha or Jamal.[3]

A three-part dialogue published in *The Colorado Lawyer* earlier this year raised awareness about the prevalence of conscious and unconscious biases in the legal profession.[4] While we *may* be aware of our conscious attitudes toward others, we are typically clueless when it comes to our unconscious (or implicit) biases. This article will help you recognize your unconscious biases and provides research-based strategies for addressing them.

Why Does It Matter?

Research studies reveal just how much bias impacts decisions—not just on a conscious basis, but to a much greater extent, on an unconscious basis. Experts believe that the mind's unconscious is responsible for 80% or more of thought processes.[5] Yet the conscious mind is simply not capable of perceiving what the unconscious is thinking.[6] You can be two people at the same time: a conscious self who firmly believes you do not have any bias against others because of their social identities, and an unconscious self who harbors stereotypes or biased attitudes that unknowingly leak into decision-making and behaviors.[7] The good news is that we can work to redirect and reeducate our unconscious mind to break down stereotypes and biases we don't agree with by engaging in the research-based activities outlined in this article.

This process is critical to making better decisions in general, and is particularly important as the legal industry struggles to play catch-up with respect to inclusiveness. In addition to eliminating the hidden barriers that keep the legal profession from being more diverse, recognizing and dealing with unconscious biases actually helps individuals become smarter, more effective lawyers. After all, this is a service industry, and our ability to interact with a diverse community and serve a wide variety of clients depends on making decisions free from fundamental errors. Finding the pitfalls in our thinking, taking them into account, and working to eliminate them leads to better decision-making. Individuals who make better decisions also help their organizations perform better.

So there is a lot at stake in terms of whether you will invest the time to be more inclusive and become a more effective lawyer by attending to your unconscious biases.

Types of Unconscious Cognitive Biases

We all have unconscious cognitive biases that can, and often do, interfere with good decision-making. There are too many to address in this article, but it is worthwhile to learn about a few that are particularly important with respect to diversity and inclusion.

Confirmation Bias

Confirmation bias is a type of unconscious bias that causes people to pay more attention to information that confirms their existing belief system and disregard that which is contradictory. Clearly this can harm good decision-making. You can probably think of at least one instance when you advised a client or reached a decision and later realized you dismissed or unintentionally ignored critical information that would have led to a different and perhaps better outcome.

Confirmation bias can also skew your evaluations of others' work and potentially disrupt their careers. In *The Colorado Lawyer*'s three-part dialogue, Professor Eli Wald briefly mentioned a research study on confirmation bias in the legal industry that I feel bears further elaboration here.[8] In 2014, Dr. Arin Reeves released results of a study she conducted to probe whether practicing attorneys make workplace decisions based on confirmation bias.[9] This study tested whether attorneys unconsciouly believe African Americans produce inferior written work and that Caucasians are better writers.

With the help of other practicing attorneys, Reeves created a research memo that contained 22 errors (spelling, grammar, technical writing, factual, and analytical). The memo was distributed to 60 partners working in nearly two dozen law firms who thought they were participating in a "writing analysis study" to help young lawyers with their writing skills. All of the participants were told the memo was written by a (fictitious) third-year associate named

About the Author

Kathleen Nalty is a lawyer/consultant who specializes in diversity and inclusion. She has assisted dozens of legal organizations in their implementation of inclusiveness initiatives—kathleen@kathleennaltyconsulting.com. Previously, she co-founded the Center for Legal Inclusiveness in Denver and led the organization as its executive director. Early in her legal career, she worked as a federal civil rights prosecutor for the U.S. Department of Justice, where she prosecuted hate crimes, slavery, and police brutality cases. Much of the content of this article is taken from Nalty's book *Going All In on Diversity and Inclusion: The Law Firm Leader's Playbook* (Kathleen Nalty Consulting LLC, 2015).

Thomas Meyer who graduated from New York University Law School. Half of the participants were told Thomas Meyer was Caucasian and the other half were told Thomas Meyer was African American. The law firm partners participating in the study were asked to give the memo an overall rating from 1 (poorly written) to 5 (extremely well written). They were also asked to edit the memo for any mistakes.

The results indicated strong confirmation bias on the part of the evaluators. African American Thomas Meyer's memo was given an average overall rating of 3.2 out of 5.0, while the exact same memo garnered an average rating of 4.1 out of 5.0 for Caucasian Thomas Meyer. The evaluators found twice as many spelling and grammatical errors for African American Thomas Meyer (5.8 out of 7.0) compared to Caucasian Thomas Meyer (2.9 out of 7.0). They also found more technical and factual errors and made more critical comments with respect to African American Thomas Meyer's memo. Even more significantly, Dr. Reeves found that the female and racially/ethnically diverse partners who participated in the study *were just as likely* as white male participants to be more rigorous in examining African American Thomas Meyer's memo (and finding more mistakes), while basically giving Caucasian Thomas Meyer a pass.[10]

The attorneys who participated in this study were probably shocked by the results. That is the *insidious* nature of *unconscious* bias—people are completely unaware of implicit biases they may harbor and how those biases leak into their decision-making and behaviors.

Attribution Bias

Another type of unconscious cognitive bias—attribution bias—causes people to make more favorable assessments of behaviors and circumstances for those in their "in groups" (by giving second chances and the benefit of the doubt) and to judge people in their "out groups" by less favorable group stereotypes.

Availability Bias

Availability bias interferes with good decision-making because it causes people to default to "top of mind" information. So, for instance, if you automatically picture a man when asked to think of a "leader" and a woman when prompted to think of a "support person," you may be more uncomfortable when interacting with a female leader or a man in a support position, particularly at an unconscious level.

Affinity Bias

The adverse effects of many of these cognitive biases can be compounded by affinity bias, which is the tendency to gravitate toward and develop relationships with people who are more like ourselves and share similar interests and backgrounds. This leads people to invest more energy and resources in those who are in their affinity group while *unintentionally* leaving others out. Due to the prevalence of affinity bias, the legal profession can best be described as a "mirrortocracy"—not a meritocracy. A genuine meritocracy can never exist until individual lawyers and legal organizations come to terms with unconscious biases through training and focused work to interrupt biases.

How Unconscious Bias Plays Out in the Legal Profession

Traditional diversity efforts have never translated into sustained diversity at all levels. Year after year, legal organizations experience disp*roportionately* higher attrition rates for attorneys in already underrepresented groups—female, racially/ethnically diverse, LGBTQ, and those with disabilities.[11] Before 2006 and the first of eight national research studies,[12] no one was sure what was causing higher attrition rates for attorneys in these groups. Now the answer is clear: every legal organization has hidden barriers that disproportionately impact and disrupt the career paths of many female, LGBTQ, *racially/ethnically diverse*, and disabled lawyers.

According to the research studies, critical career-enhancing opportunities are shared unevenly by people in positions of power and influence, often without realizing that certain groups are disproportionately excluded. Hard work and technical skill are the foundation of career progress, but without some access to these opportunities, attorneys are less likely to advance in their organizations. Specifically, female, LGBTQ, disabled, and racially/ethnically diverse attorneys have disproportionately less access to the following:

- networking opportunities—informal and formal
- insider information
- decision-makers
- mentors and sponsors
- *meaningful* work assignments
- candid and frequent feedback
- social integration

- training and development
- client contact
- promotions.

The studies all point to bias as the major cause of these hidden barriers. Certainly, overt discrimination still exists and contributes to this dynamic. But it turns out that a specific kind of unconscious (and thus unintentional) bias plays the biggest role. Affinity bias, which causes people to develop deeper work and trust relationships with those who have similar identities, interests, and backgrounds, is the unseen and unacknowledged culprit. When senior attorneys—the vast majority of whom are white and male—gravitate toward and share opportunities with others who are like themselves, they unintentionally tend to leave out female, LGBTQ, disabled, and racially/ethnically diverse attorneys.

Strategies for Identifying and Interrupting Unconscious Bias

Having unconscious bias does not make us bad people; it is part of being human. We have all been exposed to thousands of instances of stereotypes that have become embedded in our unconscious minds. It is a bit unsettling, however, to think that good, well-intentioned people are actually contributing—unwittingly—to the inequities that make the legal profession one of the least diverse. The good news is that once you learn more about cognitive biases and work to disrupt the stereotypes and biased attitudes you harbor on an unconscious level, you can become a better decision-maker and help limit the negative impacts that are keeping our industry from being more diverse and inclusive.

The obvious place to start is with affinity bias; learning and reminding yourself about affinity bias should help you lessen the effect on people in your "out groups." Affinity bias has been well-documented in major league sports. A series of research studies analyzing foul calls in NBA games demonstrates the powerful impact of simply being aware of affinity bias. In the first of three studies examining data from 13 seasons (1991–2004), researchers discovered that referees called more fouls against players who were not the same race as the referee, and these disparities were large enough to affect the outcomes in some games.[13] Based on a number of studies documenting the existence of "in group" or affinity bias in other realms, the researchers inferred that the differential in called fouls was mostly happening on an unconscious level.

The findings of the first study, released in 2007, were criticized by the NBA, resulting in extensive media coverage. The researchers subsequently conducted two additional studies—one using data from basketball seasons before the media coverage (2003–06) and the other focusing on the seasons after the publicity (2007–10). The results were striking. In the seasons before referees became aware they were calling fouls disparately, the researchers replicated the findings from the initial study. Yet after the widespread publicity, there were no appreciable disparities in foul-calling.

The lesson to be learned from this research is that paying attention to your own affinity bias and auditing your behaviors can help you interrupt and perhaps even eliminate this type of implicit bias. Ask yourself the following questions:

- How did I benefit from affinity bias in my own career? Did someone in my affinity group give me a key opportunity that contributed to my success? Many lawyers insist they "pulled themselves up by their own bootstraps" but upon reflection have to acknowledge they were given key opportunities—especially from mentors and sponsors. Barry Switzer famously highlighted this tendency when he observed that "some people are born on third base and go through life thinking they hit a triple."[14]
- Who are my usual favorites or "go to" lawyers in the office or practice group?
- With whom am I more inclined to spend discretionary time, go to lunch, and participate in activities outside of work?
- Do I hold back on assigning work to attorneys from underrepresented groups until others vouch for their abilities?
- When I go on client pitches, do I always take the same people?
- Who makes me feel uncomfortable and why?
- Who do I avoid interacting with or giving candid feedback to because I just don't know how to relate to them or because I'm afraid I'll make mistakes?
- To whom do I give second chances and the benefit of the doubt (e.g., the people in my "in group") and who do I judge by group stereotypes and, therefore, fail to give second chances?

It is easy for skeptics to dismiss inequities described by attorneys in underrepresented groups (or even the research studies documenting the disparate impact of hidden barriers) until they are presented with concrete evidence that some people simply have more access to opportunities that play a critical, but mostly unacknowledged, role in any attorney's success. Thus, when implementing inclusiveness initiatives, it is important to actually count who has access to work-related opportunities, such as going on client pitches or participating in meaningful assignments, to counteract skeptics' tendency to not believe what they don't (or won't) see.

Research scientists are learning more about how implicit biases operate, including methods for uncovering and interrupting them.[15] While it is not yet clear whether implicit biases can be completely eliminated, certain techniques have been shown to lessen bias and disrupt its impact. To rescript your unconscious thoughts and interrupt implicit biases, you have to work your "ABS": first, develop *Awareness* of those biases, and then make the *Behavior* and *Structural* changes required to disrupt them.

Awareness

If you make conscious negative judgments about groups that are based on stereotypes, you can challenge your thinking by asking yourself why: Why am I bothered by people in that group? Why do I or why should I care about that? Why do I persist in thinking all members of that group engage in that stereotyped behavior? Then actively challenge those beliefs every time they are activated. Overriding stereotypes takes a conscious act of will, whereas the activation of stereotypes does not, because they are often embedded in your unconscious mind.

Two easy ways to develop awareness of your unconscious biases are:

1. Keep track of your surprises (i.e., instances when something you expected turned out to be quite different).[16] Those surprises offer a window into your unconscious. For example, when you pass a slow-moving car impeding the flow of traffic, do you expect to see a very elderly driver behind the wheel? When you see that the driver is actually younger, does that surprise you? You may truly believe you are not consciously

biased against the elderly, but you reflexively presumed that the slower driver was *elderly*. That is a product of *unconscious* bias. How could that attitude influence decision-making in other areas, such as in interactions with more senior colleagues, witnesses, jurors, or clients?

2. Take a free, anonymous implicit association test (IAT) online at implicit.harvard.edu/implicit/selectatest.html. This series of tests, sponsored by Harvard University and taken by millions of people since the late 1990s, can reveal areas where you unknowingly harbor unconscious biases. There are over a dozen different tests, measuring unconscious bias with respect to disability, race, age, gender, gender roles, mental health, weight, sexual orientation, religion, and more. The tests measure how quickly or slowly you associate positive or negative words with different concepts. Your unconscious, immediate assumptions reveal themselves in the delayed responses measured by the computer when you struggle to connect words and concepts that are not as readily associated. You might not like, or be in denial with respect to, some of the test results, but they can be useful in revealing often uncomfortable truths about what your *unconscious* mind is up to.

While awareness is necessary, it is not sufficient, by itself, to interrupt unconscious bias. Behavior changes are also essential.

Behavior Changes

Like correcting a bad habit, you can retrain yourself to think in less biased and stereotyped ways.[17] Motivation is key; research shows that people who seek to be fair and *unbiased* are more likely to be successful in purging their biases.[18]

Researchers have identified strategies people can use to change their behaviors to overcome bias. They include the following:

Retrain your brain. "The 'holy grail' of overcoming implicit bias is to change the underlying associations that form the basis of implicit bias."[19] To do so, you need to develop the ability to be self-observant. Pay attention to your thinking, assumptions, and behaviors and then acknowledge, dissect, and alter automatic responses to break the underlying associations.

Actively doubt your objectivity. Take the time to review your decisions (especially those related to people and their careers) and search for indicia of bias; audit your decisions to ensure they don't disparately impact people in other groups. Pause before you make a final decision. Question your assumptions and first impressions. Ask others for feedback to check your thought processes. Ask yourself if your decision would be different if it involved a person from a different social identity group. Finally, justify your decision by writing down the reasons for it. This will promote accountability, which can help make *unconscious* attitudes more visible.

Be mindful of snap judgments. Take notice every time you jump to conclusions about a person belonging to a different social identity group (like the slow driver). Have a conversation with yourself about why you are making judgments or resorting to stereotypes. Then resolve to change your attitudes.

Oppose your stereotyped thinking. One of the best techniques seems odd but has been shown to have a lasting effect: think of a stereotype and say the word "no" and then think of a counter-stereotype and say "yes." People who do this have greater long-term success in interrupting their unconscious bias with respect to that stereotype.[20] To decrease your implicit biases, you might also want to limit your exposure to stereotyped images; for instance, consider changing the channel if the TV show or song features *stereotypes*.

Deliberately expose yourself to counter-stereotypical models and images. For example, if it is easier for you to think of leaders as male, study successful female leaders to retrain your unconscious to make the connection between leaders and both women and men. Research has shown that simply viewing photos of women leaders helps reduce implicit gender bias.[21] Even the Harvard professor who invented the IAT—Dr. Mahzarin Banaji—has acknowledged she has some gender bias. To interrupt it, she put rotating photographs on her computer screensaver that are counter-stereotypical, including one depicting a female construction worker feeding her baby during a work break.

Look for counter-stereotypes. *Similarly*, pay more *attention* and be more consciously aware of individuals in counter-stereotypic roles (e.g., male nurses, female airline pilots, athletes with disabilities, and stay-at-home dads).

Remind yourself that you have unconscious bias. Research shows that people who think they are unbiased are actually more biased than those who acknowledge they have biases.[22] There is a Skill Pill mobile app on *managing unconscious* bias available for enterprise usage (skillpill.com). If you play this short app before engaging in hiring, evaluation, and promotion decisions, it could help you interrupt any unconscious biases. But you don't need an app to prompt yourself to be mindful of implicit bias and its impact. You could create a one-page reminder sheet that accompanies every evaluation form or candidate's résumé, for instance.

Engage in *mindfulness exercises* on a *regular* basis, or at least before participating in an activity that might trigger stereotypes (e.g., interviewing a job candidate).[23] Research shows that mindfulness breaks the link between past experience and impulsive responses, which can reduce implicit bias.[24]

Engage in cross-difference relationships. Cultivate work relationships (or personal relationships outside of work) that involve people with different social identities.[25] This forces you out of your comfort zone and allows your unconscious to become more comfortable with people who are different. Those new relationships will also force you to dismantle stereotypes and create new types of thinking—both conscious and unconscious. So find ways to mentor junior colleagues who are different from you in one or more dimensions (gender, race, age, religion, parental status, etc.), and ask them how they view things. This will open you up to new ways of perceiving and thinking.

Mix it up. Actively seek out cultural and social situations that are challenging for you—where you are in the distinct minority or are forced to see or do things differently. For example, go to a play put on by *PHAMILY* (an acting troupe of people with mental and physical disabilities) or attend a cultural celebration that involves customs and people you have never been exposed to. The more uncomfortable you are in these situations, the more you will grow and learn.

Shift perspectives. Walk in others' shoes; look through their lenses to see how they view and experience the world. Join a group that is different (e.g., be the male ally in the women's affinity group). This will help you develop empathy and see people as individuals instead of lumping them into a group and applying stereotypes.[26] And if you're really serious about reducing implicit racial bias, research shows that picturing yourself as having a different race results in lower scores on the race IAT.[27]

Find commonalities. It is also useful to look for and find commonalities with colleagues who have different social identities from yourself.[28] Do they have pets? Are their children attending the same school as your children? Do they also like to cook, golf, or volunteer in the community? You will be surprised to discover how many things you have in common. Research shows that when you deliberately seek out areas of commonality with others, you will behave differently toward them and exhibit less implicit bias.[29]

Reduce stress, fatigue, cognitive overload, and time crunches. We are all more prone to revert to unconscious bias when we are stressed, fatigued, or under severe cognitive load or time constraints.[30] Relax and slow down decision-making so that your conscious mind drives your behavior with respect to all people and groups.[31]

Give up being color/gender/age blind. Don't buy into the popular notion that you should be blind to differences; it is impossible and backfires anyway. Your unconscious mind sees and reacts to visible differences, even if you consciously believe you don't. Research demonstrates that believing you are blind to people's differences actually makes you more biased.[32] The better course is to acknowledge these differences and work to ensure they aren't impairing your decision-making—consciously or unconsciously. The world has changed. In the 20th century, we were taught to avoid differences and there was an emphasis on assimilation (the "melting pot"). In the 21st century, we know that being "difference-seeking" and inclusive actually causes people to work harder cognitively,[33] which leads to better organizational performance and a healthier bottom line. Today's mantra should be: "I need your differences to be a better thinker and decision-maker, and you need mine too."

Awareness of implicit bias is not enough. Self-monitoring is also insufficient. Individual behavior changes often have to be supported and encouraged by structural changes to have the greatest impact on interrupting implicit biases.

Structural Changes

Highly skilled, inclusive leaders make concerted efforts to ensure that hidden barriers are not thriving on their watch. Because bias flourishes in unstructured, subjective practices, leaders should put structured, objective practices and procedures in place to help people interrupt their unconscious biases. Just knowing there is accountability and that you could be called on to justify your decisions with respect to others can decrease the influence of implicit bias.[34]

Leaders, in conjunction with a diversity and inclusiveness (D+I) committee, can examine all systems, structures, procedures, and policies for hidden structural inequities and design action plans to make structural components inclusive of everyone. Structural changes should be designed to address the hidden barriers first, because research shows that these are the most common impediments.

To make the invisible visible with respect to mentorship and sponsorship, one firm simply added the following question to its partners' end-of-year evaluation form: "Who are you sponsoring?"

This simple but profoundly illuminating question allowed firm leaders determine who was falling through the cracks. The firm then created a D+I Action Plan with a focus on mentorship and sponsorship. The firm is currently implementing a "Culture of Mentorship" to ensure that all attorneys receive equitable development opportunities so they can do their best work for the firm. After all, a business model where some attorneys are cultivated and others are not makes no sense; the organization could accomplish so much more if every one of its human capital assets operated at the highest level possible. Imagine the enhancement to the bottom line for organizations that are inclusive and have eliminated hidden barriers to success for everyone.

There are dozens of structural changes that can be made, ranging from small to large. But the structural change with the most potential for lasting change is a D+I competencies framework. Recently, a two-year study of more than 450 companies by Deloitte determined that the talent management practices that predicted the highest performing companies all centered on inclusiveness.[35] Many companies that have instituted D+I competencies and hold employees accountable for inclusive behaviors in their job duties and responsibilities are making real progress with respect to diversity. For example, at Sodexho, implementation of D+I competencies has resulted in "double digit growth in representation of women and minorities."[36]

This type of framework is critical in any legal organization. Many people would do more with respect to inclusiveness if they just knew what to do. Competencies define behaviors along an easily understandable scale—are you unskilled, skilled, or highly skilled in inclusiveness (and, therefore, contributing to the organization's success in more meaningful ways)? This key component was lacking in the legal industry, so I wrote and published a book in 2015: *Going All In on Diversity and Inclusion: The Law Firm Leader's Playbook*. This book contains individual and organizational competencies frameworks, as well as the tools and strategies law firm leaders need to address the hidden barriers, identify the unconscious biases that allow those barriers to thrive, and make genuine progress on diversity and inclusion.

Examples of Bias-Breaking Activities: Stories from the Front Lines

Implementing the de-biasing strategies outlined above is not a "one and done" proposition. It is an ongoing process and must become second-nature to be most effective. Once you start implementing these strategies, the lessons learned will be impactful.

I teach a class at the University of Denver Sturm College of Law on "Advancing Diversity and Inclusion," which includes a session on unconscious biases. As part of their learning experience, I ask my students to engage in some of the activities outlined above and write short essays on what they discovered or learned. They have had some eye-opening experiences that will help them interrupt their own implicit biases and make them better decision-makers as practicing lawyers.

For instance, one student who is not very religious visited a local mosque to learn more about Muslim people and their faith. The student attended a presentation on Islam during an open house and observed the members during prayer. His experience gave him more familiarity and comfort with a group of people that is currently widely disparaged and stereotyped.

After taking an IAT that revealed an unconscious bias against older people and consciously acknowledging he avoids his older colleagues at work, another student decided to confront this tendency by finding commonalities with them. Specifically, the student knew that he shared an interest in gardening with an older colleague with whom he would be working on an upcoming project. So he deliberately struck up a conversation with this coworker about gardening and found it was then easier to work with him on the project.

Another student decided to consciously observe his reflexive thought processes by noticing what he was thinking or how he reacted to different people and then opposing any stereotyped thoughts. While attending a basketball game, he saw a black man dressed in medical scrubs enter the gym. Immediately, the student observed that he was trying to figure out what the man did for a living. The student noticed that he assumed the man worked as an x-ray technician or medical assistant. At that point, he realized that the man's race and gender might be triggering these assumptions and the student then visualized the man as a nurse, a home health-aid worker, or a physician. This student wrote that the exercise made him aware of how often he jumps to conclusions about others based on visible cues and makes assumptions that might be completely wrong.

A female student decided to doubt her own objectivity with respect to how she viewed the support staff at her company. She believes she's a gender champion but was surprised to realize that she really doesn't view the support staff (mostly women) as favor-

ably as the sales staff (mostly men). She decided to picture women in sales positions and men in support positions to try to retrain her unconscious mind and the assumptions she was used to making.

Another student, who is white and grew up in an all-white community, chose to observe the "Black Lives Matter" demonstration and participate in the Martin Luther King Day parade. She also later attended a Sunday service at an all-black church and wrote this about the experience:

> Overall it was a good experience because I think being uncomfortable can be good for a person. Looking back, I really had no reason to be uncomfortable because everyone was very nice and welcoming; my uneasiness was made up in my head based on assumptions I feared people would make about me.

Putting yourself in situations that are uncomfortable and observing your own attitudes, judgments, and behaviors can flip a switch in your brain and help you learn new ways of thinking and interacting with others. The real-world impact of this is illustrated by a story told to me by an in-house attorney who reassessed a biased assumption before it had an impact on someone else's career. The attorney met with a group of people at her company to discuss staffing a challenging position that would require a lot of travel. The name of a qualified female employee candidate was proposed. The lawyer knew the candidate was a single mother of a toddler and immediately suggested to the group that it might be very difficult for a single mother to handle the extensive travel required. Effectively, this comment removed the woman from consideration. Later, the lawyer attended a workshop on unconscious bias. She realized that she'd made assumptions that might not be true. The lawyer met with the female employee and asked her if she was able to travel for business. The female employee said that travel wasn't an impediment because she had several family members nearby who could help care for her child while she was out of town. The lawyer immediately went back to the group and explained her mistake, asking that the female employee's name be included for consideration for the position.

Conclusion

Many attorneys, judges, and other law professionals in the Colorado legal community are pioneers when it comes to diversity and, particularly, inclusion. Ten years ago, with the establishment of the Deans' Diversity Council, this legal community was the first in the country to focus on the new paradigm of inclusiveness and how it must be added to traditional diversity efforts to make diversity sustainable. The three-part dialogue on unconscious bias featured in *The Colorado Lawyer* was truly ground-breaking because it addressed challenges not often discussed openly.

The next step is to take action, on an individual and organizational basis, to eliminate hidden barriers and interrupt the unconscious biases that fuel those barriers. It should be deeply concerning to everyone that good, well-meaning people are doing more to foster inequities in the legal workplace—unintentionally and unknowingly—just by investing more in members of their affinity or "in groups" than the harm caused by outright bigotry. This unfortunate dynamic will change only when we come to terms with the fact that we all have biases—conscious and unconscious—and begin to address those biases. Good intentions are not enough; if you are not intentionally including everyone by interrupting bias, you are unintentionally excluding some.

So now, ask yourself, are you up to this challenge?

Notes

1. In a randomized, double-blind study, science faculty rated John, the male applicant for a lab manager position, as significantly more competent than Jennifer, the female candidate, awarding him an average starting salary more than 10% higher and volunteering to mentor him more often than Jennifer, even though she had the exact same credentials and qualifications. The insidious role of unconscious bias was revealed in the finding that the female evaluators were equally as likely as their male colleagues to exhibit bias for John and against Jennifer. Moss-Racusin et al., "Science faculty's subtle gender biases favor male students," *Proceedings of the National Academy of Sciences* (Sept. 2012), www.pnas.org/content/109/41/16474.abstract.

2. Matthews, "He Dropped One Letter in His Name While Applying for Jobs, and the Responses Rolled In," *Huffington Post* (Sept. 2, 2014), www.huffingtonpost.com/2014/09/02/jose-joe-job-discrimination_n_5753880.html.

3. Bertrand and Mullainathan, "Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination," *The National Bureau of Economic Research* (July 2003), www.nber.org/papers/w9873.

4. Sandgrund, "Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part I—Implicit Bias," 45 *The Colorado Lawyer* 49 (Jan. 2016), www.cobar.org/tcl/tcl_articles.cfm?articleid=9166; Sandgrund, "Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part II—Diversity," 45 *The Colorado Lawyer* 49 (Feb. 2016), www.cobar.org/tcl/tcl_articles.cfm?articleid=9155; Sandgrund, "Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part III—Inclusiveness," 45 *The Colorado Lawyer* 67 (Mar. 2016), www.cobar.org/tcl/tcl_articles.cfm?articleid=9179.

5. Banaji and Greenwald, *Blindspot: Hidden Biases of Good People* 61 (Delacorte Press, 2013).

6. *Id.* at 55.

7. *Id.* at 20.

8. Sandgrund, Part I, *supra* note 4 at 48.

9. Reeves, "Yellow Paper Series: Written in Black & White—Exploring Confirmation Bias in Racialized Perceptions of Writing Skills" (Nextions Original Research, 2014), www.nextions.com/wp-content/files_mf/1446822647201404011 4WritteninBlackandWhiteYPS.pdf.

10. *Id.* at 5.

11. *See* New York City Bar Association, "2014 Diversity Benchmarking Report" (2015), www.nycbar.org/images/stories/pdfs/diversity/benchmarking2014.pdf.

12. American Bar Association (ABA), "Visible Invisibility: Women of Color in Law Firms" (2006), http://bit.ly/1DNJRza; ABA, "From Visible Invisibility to Visibly Successful: Success Strategies for Law Firms and Women of Color in Law Firms" (2009), www.americanbar.org/content/dam/aba/administrative/diversity/Convocation_2013/CWP/VisiblySuc-

cessful-entire-final.authcheckdam.pdf; ABA, "Visible Invisibility: Women of Color in Fortune 500 Legal Departments" (2013), http://bit.ly/1bZFxWQ; Bagati, "Women of Color in U.S. Law Firms," Catalyst, Inc. (2009), http://bit.ly/1EvTogK; Cruz and Molina, "Few and Far Between: The Reality of Latina Lawyers," Hispanic National Bar Association (Sept. 2009), http://bit.ly/1dxLPxh; Women's Bar Association of the District of Columbia, "Creating Pathways for Success for All: Advancing and Retaining Women of Color in Today's Law Firms" (May 2008), http://bit.ly/1DZYgYs; Minority Corporate Counsel Association, "Sustaining Pathways to Diversity: The Next Steps in Understanding and Increasing Diversity and Inclusion in Large Law Firms" (2009), http://bit.ly/1biQdyh; Corporate Counsel Women of Color, "The Perspectives of Women of Color Attorneys in Corporate Legal Departments: Research Report" (2011).

13. Pope et al., "Awareness Reduces Racial Bias," Economic Studies at Brookings (Feb. 2014), www.brookings.edu/~/media/research/files/papers/2014/02/awareness-reduces-racial-bias/awareness_reduces_racial_bias_wolfers.pdf.

14. *See* Shatel, "The Unknown Barry Switzer: Poverty, Tragedy Built Oklahoma Coach Into a Winner," *The Chicago Tribune* (Dec. 14, 1986), http://articles.chicagotribune.com/1986-12-14/sports/8604030680_1_big-eight-coach-aren-t-many-coaches-oklahoma.

15. One of the best resources for information on bias is an annual review by the Kirwan Institute for the Study of Race and Ethnicity at The Ohio State University: Staats et al., "State of the Science: Implicit Bias Review 2015" (Kirwan Institute, 2015), http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf; Staats, "State of the Science: Implicit Bias Review 2014" (Kirwan Institute, 2014), http://bit.ly/Sabh1y; Staats and Patton, "State of the Science: Implicit Bias Review 2013" (Kirwan Institute, 2013), http://bit.ly/1KynIcC.

16. Reeves, *The Next IQ: The Next Level of Intelligence for 21st Century Leaders* (ABA, 2012). *See also* Lieberman and Berardo, "Interview Bias: Overcoming the Silent Forces Working against You," *Experience*, http://bit.ly/1GLnTD1.

17. "Implicit biases are malleable; therefore, the implicit associations that we have formed can be gradually unlearned and replaced with new mental associations." Staats et al., *supra* note 15 (citing Blair, 2002; Blair et al., 2001; Dasgupta, 2013; Dasgupta and Greenwald, 2001; Devine, 1989; Kang, 2009; Kang and Lane, 2010; Roos et al., 2013).

18. Rachlinski et al., "Does Unconscious Racial Bias Affect Trial Judges?" 84 *Notre Dame L. Rev.* 1195 (Mar. 2009).

19. Staats and Patton, *supra* note 15.

20. Kawakami et al., "Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation," 78 *J. of Personality and Social Psychology* 871 (May 2000).

21. *See* Jolls and Sunstein, "The Law of Implicit Bias," 94 *California L. Rev.* 969–96 (2006). *See also* Blair and Lenton, "Imaging Stereotypes Away: The Moderation of Implicit Stereotypes through Mental Imagery," 8 *J. of Personality and Social Psychology* 828 (May 2001).

22. Uhlmann and Cohen, "'I Think It, Therefore It's True': Effects of Self-Perceived Objectivity on Hiring Discrimination," 104 *Organizational Behavior and Human Decision Processes* 207 (2007).

23. Mindfulness helps you be more aware; to identify, tolerate, and reduce unproductive thoughts and feelings; to resist having your attention pulled away from what is happening in the moment; to have some mastery over your thought processes; and to reduce stress. For examples of mindfulness exercises, visit the Living Well website at www.livingwell.org.au/mindfulness-exercises-3. Also recommended is Stanford Professor Shirzad Chamine's book, *Positive Intelligence: Why Only 20% of Teams and Individuals Achieve Their True Potential and How You can Achieve Yours* (Greenleaf Group Book Press, 2012) and website, www.positiveintelligence.com.

24. Suttie, "Can Mindfulness Help Reduce Racism?" *Greater Good: The Science of a Meaningful Life* (Dec. 9, 2014), http://bit.ly/1zL2oLf; Torres, "Mindfulness Mitigates Biases You May Not Know You Have," *Harvard Business Rev.* (Dec. 24, 2014).

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28. Guertner, *Reducing Intergroup Bias: The Common In-group Identity Model* (Psychology Press, 2000) (When we re-categorize others according to features or characteristics we share, we are more likely to see them as part of us and are less likely to discriminate against them as an out group).

29. Gaertner and Dovidio, "Common Ingroup Identity Model," *The Encyclopedia of Peace Psychology* (2011).

30. Stepanikova, "Racial-Ethnic Biases, Time Pressure, and Medical Decisions," 53(3) *J. of Health and Social Behavior* 329 (July 2012).

31. Kang, "Communications Law: Bits of Bias," in Levinson and Smith, eds., *Implicit Racial Bias across the Law* 132 (Cambridge University Press, 2012).

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35. Bersin, "Why Diversity and Inclusion Will Be a Top Priority for 2016," *Forbes* (Dec. 6, 2015), www.forbes.com/sites/joshbersin/2015/12/06/why-diversity-and-inclusion-will-be-a-top-priority-for-2016/#aca220f4bd40.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Chapter 30. Of the Consolidated Laws
Article 16. Selection of Jurors (Refs & Annos)

McKinney's Judiciary Law § 509

§ 509. Qualification of jurors

Currentness

(a) The commissioner of jurors shall determine the qualifications of a prospective juror on the basis of information provided on the juror's qualification questionnaire. The commissioner of jurors may also consider other information including information obtained from public agencies concerning previous criminal convictions. The commissioner may require the fingerprinting of all persons drawn for grand jury service. A record of the persons who are found not qualified or who are excused, and the reasons therefor, shall be maintained by the commissioner of jurors. The county jury board shall have the power to review any determination of the commissioner as to qualifications and excuses. Such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division.

(b) The commissioner may mail to each prospective juror the juror qualification questionnaire. The person to whom the questionnaire is mailed shall complete and sign it and return it to the commissioner within ten days of mailing. If the questionnaire has not been returned or properly completed, or if the commissioner otherwise determines that a personal interview is required, the commissioner may summon the prospective juror to appear before him or her for the purpose of filling out the questionnaire or being examined as to his or her competence, qualifications, eligibility and liability to serve as a juror. Such person shall not be entitled to any fee or mileage when responding for such purpose. The summons may be served personally or by leaving it at the person's residence or place of business with a person of suitable age and discretion, or by mail. If served personally or by substitution the summons shall require the person summoned to attend not less than five days after service. If served by mail the summons shall require the person summoned to attend not less than eight days after mailing.

Credits
(Added L.1977, c. 316, § 2. Amended L.1995, c. 86, § 2; L.1998, c. 520, § 2, eff. July 29, 1998.)

Notes of Decisions (15)

McKinney's Judiciary Law § 509, NY JUD § 509
Current through L.2018, chapters 1 to 277.

End of Document

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Chapter 30. Of the Consolidated Laws
Article 16. Selection of Jurors (Refs & Annos)

McKinney's Judiciary Law § 510

§ 510. Qualifications

Currentness

In order to qualify as a juror a person must:

1. Be a citizen of the United States, and a resident of the county.

2. Be not less than eighteen years of age.

3. Not have been convicted of a felony.

4. Be able to understand and communicate in the English language.

5. Renumbered 4.

Credits
(Added L.1977, c. 316, § 2. Amended L.1981, c. 176, § 1; L.1983, c. 474, § 1; L.1987, c. 3, § 1; L.1995, c. 86, § 3.)

Notes of Decisions (52)

McKinney's Judiciary Law § 510, NY JUD § 510
Current through L.2018, chapters 1 to 277.

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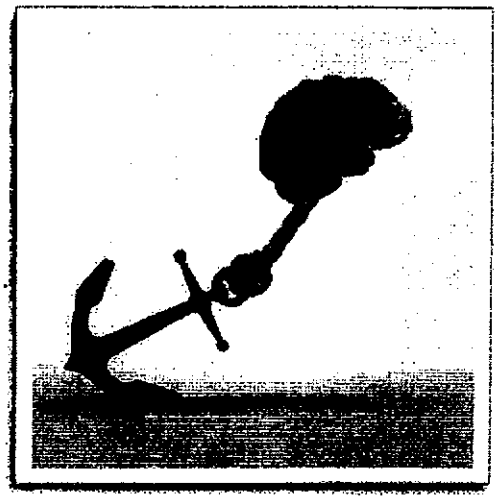
When Smart Ain't So Smart - Cognitive Bias, Experts and Jurors



by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

Ever been told you were too smart for your own good? I never thought it was possible. I might be too smart for someone *else's* good, but not my own.

When it comes to jurors and experts, it could be true. Two reasons are cognitive, decision-making biases that are of special interest because they can seriously impair your case. Both follow the lines of "Really? You don't think like me?!"

Specifically, these biases are:

- The "Curse of Knowledge Bias" in which well-informed people find it hard to think about problems from the perspective of others who are less informed, and
- The "False-Consensus Bias", whereby people tend to overestimate how much other people will share their beliefs or opinions. Assuming that their own values and beliefs are normal and typical, they hold the false belief that there will be a consensus between others' opinions and their own. In fact, when they discover that others do not share the same expected opinion, this bias leads them to believe that there must be something wrong with those people who think differently.

What Makes Very Smart Jurors a Risk?

Individual jurors, who have abided by the court's instruction not to discuss the case prior to deliberating, often enter deliberations believing that others see the case as they do. Learning that others see it differently initially comes as a surprise based on their false expectation.

If a juror is better informed and suffers from the "Curse of Knowledge" bias, and a reason some jurors disagree is due to a poorer understanding of the case, a lack of background experience or knowledge, or an intellectual deficit, very smart jurors may have a hard time bridging the gap to reach a consensus with these fellow jurors. The "Curse of Knowledge Bias" may cause them to have a tough time seeing the case from the perspective of less-informed people. If so, they will fail to take the perspective of others and fail to find common ground with which to forge a true consensus to reach a verdict.

Depending on your position, that is either good or bad news.

What Makes Very Smart Experts a Risk?

Not only are jurors subject to these biases, but so are experts. Someone who is at the top of his or her field of expertise may be very knowledgeable -- but may also be challenged in other types of intelligence, whether emotionally, socially, or as a teacher, persuader or communicator.

Experts who are less experienced in testifying in court may be used to sharing knowledge with peers or students who are highly motivated to learn, but may be vulnerable to these two biases, to the peril of the litigator and client who hired them.

In order to successfully teach and persuade, at a minimum, one must be able to retrace the steps from ignorance to knowledge and pave the way to get there. Otherwise, the expert may really be too smart for their own – and your – good, because they cannot imagine other ways to see an issue and what is needed to understand their position. Assuming too much knowledge or understanding on the part of the recipient (student or juror) is a good way to alienate them.

Implications for Jury Selection: Is Your Goal to Reach or Prevent Consensus?

<u>If your goal is reach consensus on a jury, e.g., the plaintiff(s) or prosecutor</u>

In selecting jurors, many factors must be considered in whom to strike or keep, but open-mindedness and social skill, diplomacy and the ability to be somewhat flexible and less egocentric may be traits to consider, rather than just how smart or well-informed a juror may be. Selecting a juror who is smart but rigid can backfire.

<u>If your goal, on the other hand, is to prevent a consensus on the jury, e.g., the defense</u>

It isn't as simple as getting a contrasting mix of well-informed and poorly-informed jurors to do the trick of avoiding consensus, but it's a start.

However, if one camp is meek, inarticulate, lacking in passion and unable to stand its ground, they will reach consensus by merely following the lead – whether of the better-informed or more passionate. Hence, one must consider:

Getting jurors who are:

1. well-informed mixed with ones who are not well-informed;

2. passionate for you to win or the opponent to lose;

3. smart, but somewhat cognitively rigid (i.e., have difficulty changing their way of thinking), fail to reflect upon hearing information in voir dire, show an inability to shift if asked to consider something different in voir dire. Are they open-minded and flexible, showing some transition (bad) or do they freeze/repeat their initial response or fail to respond (better)?

Implications for Expert Selection: Is Your Goal to Dazzle or Teach?

If your goal is to dazzle

Your expert may never be able to teach the subject at issue because it is simply ridiculously complicated and all you hope for is for jurors to a) see them as an expert, b) trust their credentials, and c) trust them and their opinion. If so, someone who displays both forms of bias is the man or woman for you.

If your goal is to teach

Don't just consider whether your expert is smart. Also ask whether the expert is effective at teaching and persuading others because he or she does not suffer from these cognitive biases. How do you do this?

Assess the expert's ability to assess and understand the mindset of the uninformed lay person. Can they speak their language? Do they voluntarily offer to translate lingo into lay terms? Do they provide useful analogies for the common person? Can they appreciate the complexity of their subject area for the uninformed or why it might not be interesting to outsiders? Can they make it interesting and relevant?

Whatever you do, *be* too smart for your own good.

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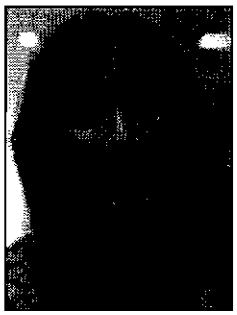
How To Handle The Jury-Law Disconnect In Employment Cases


Dawn Reddy Solowey


Laurie Kuslansky

Law360, New York (February 1, 2016, 1:38 PM ET) -- A good trial lawyer defending an employment litigation case arrives at the courthouse with a firm sense of what the law says about the claims at hand. By the time of trial, counsel has lived with the case for years and filed numerous briefs and jury instructions on the relevant law.

But the jurors arrive to the courthouse with an equally firm set of convictions — not from law school, but the school of hard knocks — about what "rules" apply in the workplace. Nearly every jury member has been an employee and/or employer at some point. That experience and common sense (not the law or evidence) often dictate the standards that govern for lay jurors.

For this reason, it is critical for trial counsel to understand the workplace rules jurors are likely to impose and to build a defense strategy that deals with those perceptions directly.

In this article, we discuss the top five disconnects between legal reality and jury perception that we have encountered over decades of experience in employment cases, as a trial lawyer and expert jury consultant, respectively.

1. Firing an "At-Will" Employee

Legal Reality: *An employer can fire an "at-will" employee without cause at any time.*

Jurors' Perception: *No, it can't!*

It is black letter law that an employer can fire an "at-will" employee for any lawful reason, with or without notice. But many jurors instinctively reject this basic legal rule. Jurors may instead feel that the reason for termination, and notice period, must be fair. Jurors who feel that the employer has acted unfairly may be inclined to rule against the employer, even absent a showing that the termination reason is discriminatory, retaliatory or otherwise unlawful.

Employment counsel must therefore keep fairness as a touchstone throughout the trial. That means emphasizing not only why the employer's actions were lawful, but why they were just. Counsel will do well to highlight where the employer took extra steps to help the employee, to offer the employee chances to correct behavior, or to lessen the impact of the termination. If there was little or no notice, explain why the employer needed to take swift action, and why it was fair to do so (e.g., to protect other employees or another

reason that appeals to the employee's end of the bargain — not only to management).

Employment counsel should also educate jurors early in the trial about "at-will" employment. Counsel should emphasize the potential for mutual benefit to both employee and employer. The jury instructions should highlight the meaning of the at-will employment rule, given jurors' likely predisposition against it. Those instructions should be in plain English and work toward dislodging the jury's misperceptions. Those instructions should also draw a clear distinction as to what is unfair and what is unlawful in regular language that any lay juror, of any background, can understand, and guard against the jury imposing its own standard.

2. Lawful Termination

Legal Reality: *An employer can lawfully terminate an employee, even if the employee had good performance reviews, just received a raise, or was a long-time employee.*

Jurors' Perception: *No, it can't!*

Trial counsel may take for granted that an employee's past good performance reviews, or recent raise, or long-time employment at the company does not mean that a later termination of that employee was unlawful. It is well-established law that, as long as the employer's business decisions were not unlawful, it is not for the court or jury to second-guess those decisions. Moreover, the rule that an employer can lawfully terminate an employee, despite good reviews or a recent raise, is also logical from a legal perspective: the employee may be competent at certain tasks, but not others; a different manager may have written the review or issued the raise; the raise may not have been merit-driven; the employee's performance may have gone downhill since the last review or raise; or the employee may have engaged in misconduct that did not occur, or was not discovered, until after the most recent review or raise.

But jurors often interpret positive reviews, the fact of a raise, or long-term employment, as necessarily meaning that later termination must be pretextual, and be inclined to look for an ulterior motive from an employer who terminates such a "good" employee. To a juror, the syllogism may seem simple: a good review or raise or long-time employee equals a good employee. And the juror may think, egged on by the plaintiff's counsel, "Why would an employer fire a good employee, if not for a discriminatory or retaliatory reason?" Many jurors tend to blame management rather than the employee.

The best way to confront this disconnect is head-on. Employment counsel should take extra pains to explain the performance reviews, rather than try to sweep them under the rug. Are there threads of discontent in the reviews that presage a later performance-based termination? If so, make that link explicit, and use technology to highlight those portions of the reviews. Are there repeated recommendations for improvement that go unheeded? Did a new manager come onto the scene, with higher standards than the former manager who wrote the positive reviews? Highlight that transition, and show how the new manager enforced the new order equitably and why it was necessary in order for the operation to move forward to make improvements for everyone's benefit. Did a single event that occurred post-review — whether a serious incident of poor performance or misconduct — necessitate the firing?

Similarly, when a recent raise is at issue, make sure the witnesses clearly explain why the employee received the raise. Was it a department-wide adjustment that did not reflect on any individual? Was it the lowest available raise within a particular band of possible raises? Was the raise decision made or announced before the employer became aware of a performance incident or misconduct?

Especially if the amount or timing of the raise sends up red flags, counsel should consider

the jurors' predisposition right from the opening statement — as well as in discovery — and attack it directly: "Now you may wonder why Peter lost his job only a few months after receiving a raise. The evidence will show ... " Similarly, counsel can ask a management witness: "Now there's been some evidence that Peter got a raise shortly before his termination. Can you explain that?" Counsel can gain credibility by showing that he or she understands and is not afraid of the issue.

3. Suing a Supervisor

Legal Reality: *An employee can't sue a supervisor just for being nasty.*

Jurors' Perception: *Yes, the employee can!*

At trial, employment counsel is naturally focused on dismantling the elements of the plaintiff's case and establishing the employer's defenses from a legal standpoint, but the jury is often focused on a more instinctive question: "Whom do I like?" No matter how much the court and defense counsel try to focus the jury on whether the employer's actions were unlawful, the jury instead often wonders if they were merely unlikeable, and if so, will root against the employer.

As such, trial counsel must devote particular attention to humanizing the company's witnesses. Look for ways to draw out the core of the person testifying. For example, in one case in which a supervisor was accused of making a discriminatory remark about an employee's heritage, the supervisor was able to tell a gripping story about the discrimination he himself had endured as an immigrant to the United States, and why he would never disparage someone's ethnicity. The authentic and emotional story not only compellingly dispelled the alleged comment, but made the supervisor a living, breathing person with whom the jurors could identify rather than just a talking suit.

When a supervisory employee is struggling to present well in trial preparation, consider working directly with the witness on presentation skills, with a coach if necessary and if the trial budget allows. Sometimes videotaping and playing back practice testimony will help the witness see that his or her testimony is coming across as overly caustic or lacking empathy. Everyone should keep in mind and elicit an affirmative answer to the question: "Would a juror want to work with you?"

4. Progressive Discipline Policies

Legal Reality: *An employer does not have to follow a progressive discipline policy.*

Jurors' Perception: *Yes, it does!*

Employment counsel will often request a jury instruction along the lines that the employer is not required to follow a progressive discipline policy. As discussed above, the at-will employee may be terminated for any reason that is not unlawful, or for no reason at all. A well-drafted employee handbook will not constitute a contract and, within such a handbook, a progressive discipline policy itself will often expressly give the employer discretion to skip steps or proceed straight to termination, as circumstances warrant.

But jurors may see a progressive discipline policy as a binding contract, requiring the employer to follow each step literally, regardless of what the law says. After all, jurors may think, employees are bound by the handbook, so why not the employer? As such, they may view with suspicion any employer who has not followed the policy literally, who has skipped steps in the outlined policy, or who has bypassed the policy altogether with an immediate termination, absent obviously egregious or dangerous conduct by the employee, such as workplace theft or violence.

Again, trial counsel should return to the touchstone of fairness. Why was the outcome fundamentally fair? In what way did the employee get due process, even if not strictly in line with the progressive discipline policy? If steps were skipped in progressive discipline, why? If the misconduct was too serious or urgent to follow an incremental policy, clearly explain the severity or urgency. And if the policy permits escalation or case-by-case determinations, highlight that — literally, on an easy-to-follow trial graphic — for the jurors. Jurors seek the notion that someone got a warning of some sort and had an opportunity for a second chance, unless something way over-the-line occurred.

5. Corporations Versus Individuals

Legal Reality: *Corporations and individuals must be treated as the same.*

Jurors' Perception: *No, they don't!*

It is common for the court to give a jury instruction (or in voir dire or as a pre-instruction) that says that the jurors should decide an employment case as a dispute between parties of equal standing, and that a corporation (big or small) is entitled to the same fair trial as a private person.

But it's very easy for jurors to bypass that instruction and follow their gut, which may tell them instead that an individual plaintiff is an underdog and that the company has big pockets. They may figure, if the employee brought the case and it has gotten this far, there must be something to it. They may believe that, all else being equal, they should side with the plaintiff. Of course, effective voir dire can help screen out those jurors who feel this bias most acutely, but at least some of the sitting jurors on any given case may still be inclined to think this way.

The antidote to this bias is for the employer's counsel to make the company's case about people too. After all, the company's witnesses are people. Humanize the witnesses who were decision-makers; tell the story of who they are. Explain how they tried to work with the plaintiff, why they felt certain decisions were necessary, and how they felt about those decisions. Bring forward the stories of the plaintiff's coworkers; perhaps the plaintiff's poor performance created extra work for them or negatively impacted them in other ways. Instead of fighting the bias, consider how to use it affirmatively, such as by showing how the unlawful conduct the plaintiff claims would go against, rather than further, the company's goals and bottom line.

Employment counsel can also help explain how the company takes pains to create an ethical and nondiscriminatory work environment. This involves more than just introducing evidence of policies and training programs, but demonstrating how those policies worked in action, and how this employer and these managers worked hard to ensure a fair and equal work culture.

Jurors may also have a disconnect when it comes to the perceived objectivity and authority of the Equal Employment Opportunity Commission as a party or as an administrative agency. If a plaintiff has a right-to-sue letter, or a probable cause finding by the agency, and either comes into evidence, jurors are likely to believe that it is a verdict confirming the credibility of the plaintiff's claims. Counsel must educate jurors as to why that is not the case. Counsel should craft motions in limine and jury instructions thoughtfully to try to control what the jurors see and hear about the agency's involvement, and counter-balance the jurors' preconceptions about the agency.

Conclusion

Given the potential for disconnect between the law and jurors' perceptions, trial counsel should take care to frame the employer's trial narrative and the requested jury instructions

specifically, in a way that is simple, clear and authentic. In doing so, trial counsel can help the jury focus on what the law actually is and how to apply it to the facts before them in order to reach the desired verdict. Trial counsel is also wise to step back from the case well in advance of jury selection, ideally with a jury consultant. Together the team should think through what biases the jury is likely to bring into the courtroom and deliberations, how to reveal them in jury selection, how to eliminate the most adversely affected jurors, and how to dispel those biases in the presentation of the case for those who remain on the jury.

—By Dawn Reddy Solowey, Seyfarth Shaw LLP, and Dr. Laurie Kuslansky, Laurie Kuslansky & Associates LLC

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Jury Selection: The Dumbest Jurors Don't Know They Are Dumb

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

Ignorance, the gift that keeps taking

Ever talk to someone who dismissed valid information as if they were swatting a mosquito? Ever seen an uninformed person hear a fact, not skip a beat, and dig further into their original, ridiculous position? Do you know any bad drivers who think they're great or subpar workers who always think they deserve a promotion and a raise? Of course you do. No names, please – but you know what I mean.

This phenomenon has been studied as a cognitive error called the Dunning-Kruger Effect. It shows that "less competent people rate their competence higher than it actually is, while more competent people humbly rate theirs lower."

There really is no justice.

Incompetent people overestimate their own skill, while competent people overestimate the skill of other people. Most people overestimate their social judgment and mind-reading skill especially narcissists.

The more you know, the better you can identify gaps in your knowledge and perhaps, fill them in or seek to do so. It takes intelligence to realize (1) there are things that you know that you don't know, and (2) that there are things you don't even know that you don't know. Talented, competent people tend to think it's just normal and underestimate themselves. This is especially true for difficult tasks and is known as the "Worse-Than-Average Effect."

Why ignorance is bliss, but hell for the rest of us.

Here is the painfully precise description by David Dunning, psychologist and named investigator of the Dunning-Kruger phenomenon:

"What's curious is that, in many cases, incompetence does not leave people disoriented, perplexed, or cautious. Instead, the incompetent are often blessed with an

inappropriate confidence, buoyed by something that feels to them like knowledge...ignorance carries with it the inability to accurately assess one's own ignorance."

Ugh.

The Dunning-Kruger Effect describes the gap between one's self-assessment and actual ability. Those with the least ability inflate their self-ratings the most. It isn't that they haven't been told of their failures – they just cannot recognize their incompetence or incorporate the feedback. In fact, the beauty of this bias is that the more one knows, the less confident one becomes, and vice versa. You need to know something to realize how little you know. But, for the uninformed, the sky's the limit. You've met them at cocktail parties, the office, and elsewhere.

Ignorance and Jury Trials

At a cocktail party, it is annoying, but you can turn away, redirect attention to the bar or go to the restroom, but what can you do if someone experiencing the Dunning-Kruger effect is a potential juror during jury selection? When that is the case, you may hope that your evidence, the law and your persuasive skills hold some sway, when for such jurors, they don't. Pseudo-evidence, false beliefs and unfounded opinions are their "facts." Maybe this comes as good news to you, but for most, it does not. (More bad news? In varying subject areas, *everyone* at some time is subject to this flaw in thinking. Sad but true.)

What can you do about it?

Accept that they are not going to change. It is a closed circuit that is not open to feedback. Low performers fail to see the relevance of explicit, concrete feedback critical of their performance and instead disparage the accuracy or relevance of it.

Unless nonsense helps your case -- which is unlikely, but possible -- assess prospective jurors' education and whether they are data-seekers and information gatherers or not. For example, even based only on their jury summons information, you can consider their occupation and whether it is or is not fact-based. If you have the luxury of attaining more information through *voir dire*, ask: How often and where do they get news? What is the last book they read (if they read)? What programs do they watch (if any)? Would they ever consider continuing their education? Why or why not? Does their education or occupation involve fluffy stuff or "STEM" (science, technology, engineering or math) subjects? Are they more cognitive or emotional deciders? Do they think big picture or focus on critical details? What do they do in an argument when someone disagrees?

If you're reading this, you're an information seeker. You are definitely not ignorant and are probably a lot smarter than you think you are. You might even seek to learn more. If so, see and enjoy "The Dunning-Kruger Effect: On Being Ignorant of One's Own Ignorance."

UCLA LAW REVIEW

Implicit Bias in the Courtroom

Jerry Kang
Judge Mark Bennett
Devon Carbado
Pam Casey
Nilanjana Dasgupta
David Faigman
Rachel Godsil
Anthony G. Greenwald
Justin Levinson
Jennifer Mnookin

ABSTRACT

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* The author team comprises legal academics, scientists, researchers, and even a sitting federal judge who seek to answer this question in accordance with behavioral realism. The Article first provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications that distinguish between explicit, implicit, and structural forms of bias. Next, the Article applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. This application involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed. Finally, the Article examines various concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury.

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For their research assistance, we thank Jonathan Feingold and Joshua Neiman.

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INTRODUCTION

The problems of overt discrimination have received enormous attention from lawyers, judges, academics, and policymakers. While explicit sexism, racism, and other forms of bias persist, they have become less prominent and public over the past century. But explicit bias and overt discrimination are only part of the problem. Also important, and likely more pervasive, are questions surrounding implicit bias—attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.

How prevalent and significant are these implicit, unintentional biases? To answer these questions, people have historically relied on their gut instincts and personal experiences, which did not produce much consensus. Over the past two decades, however, social cognitive psychologists have discovered novel ways to measure the existence and impact of implicit biases—without relying on mere common sense. Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects. These fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law's fundamental understandings of discrimination and fairness.

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls? In what circumstances are these risks most acute? Are there practical ways to reduce the effects of implicit biases? To what extent can awareness of these biases mitigate their impact? What other debiasing strategies might work? In other words, in what way—if at all—should the courts respond to a better model of human decisionmaking that the mind sciences are providing?

We are a team of legal academics, scientists, researchers, and a sitting federal judge[1] who seek to answer these difficult questions in accordance with behavioral realism.[2] Our general goal is to educate those in the legal profession who are

1. Judge Mark W. Bennett, a coauthor of this article, is a United States District Court Judge in the Northern District of Iowa.

2. Behavioral realism is a school of thought that asks the law to account for more accurate models of human cognition and behavior. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit*

unfamiliar with implicit bias and its consequences. To do so, we provide a current summary of the underlying science, contextualized to criminal and civil litigation processes that lead up to and crescendo in the courtroom. This involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms. We seek to be useful to legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it. While we aim to provide useful and realistic strategies for those judges already persuaded that implicit bias is a legitimate concern, we also hope to provoke those who know less about it, or are more skeptical of its relevance, to consider these issues thoughtfully.

We are obviously not a random sample of researchers and practitioners; thus, we cannot claim any representative status. That said, the author team represents a broad array of experience, expertise, methodology, and viewpoints. In authoring this paper, the team engaged in careful deliberations across topics of both consensus and dissensus.[3] We did not entirely agree on how to frame questions in this field or how to answer them. That said, we stand collectively behind what we have written. We also believe the final work product reveals the benefits of such cross-disciplinary and cross-professional collaboration.

Part I provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications. Often the science can seem too abstract, especially to nonprofessional scientists. As a corrective, Part II applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. Part III

Bias and the Law, 58 UCLA L. REV. 465, 490 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 997–1008 (2006). Jon Hanson and his coauthors have advanced similar approaches under the names of "critical realism," "situationism," and the "law and mind sciences." *See* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1339 n.28 (2010) (listing papers).

3. This paper arose out of the second symposium of PULSE: Program on Understanding Law, Science, and Evidence at UCLA School of Law, on March 3–4, 2011. We brought together leading scientists (including Anthony Greenwald, the inventor of the Implicit Association Test), federal and state judges, applied researchers, and legal academics to explore the state of the science regarding implicit bias research and to examine the various institutional responses to date. The Symposium also raised possibilities and complications, ranging from the theoretical to practical, from the legal to the scientific. After a day of public presentations, the author team met in a full-day closed session to craft the outlines of this paper. Judge Michael Linfield of the Los Angeles Superior Court and Jeff Rachlinski, Professor of Law at Cornell Law School, participated in the symposium but could not join the author team. Their absence should not be viewed as either agreement or disagreement with the contents of the Article.

examines different intervention strategies to counter the implicit biases of key players in the justice system, such as the judge and jury.

I. IMPLICIT BIASES

A. Empirical Introduction

Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational. We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race. For example, we have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments—even if those anchors are objectively wrong.[4] We exhibit an endowment effect, with irrational attachments to arbitrary initial distributions of property, rights, and grants of other entitlements.[5] We suffer from hindsight bias and believe that what turns out to be the case today should have been easily foreseen yesterday.[6] The list of empirically revealed biases goes on and on. Indeed, many legal academics have become so familiar with such heuristics and biases that they refer to them in their analyses as casually as they refer to economic concepts such as transaction costs.[7]

One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races. An *attitude* is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative.[8] A *stereotype* is an association between a concept (again, in this case a social group) and a trait.[9] Although interconnected, attitudes and stereotypes

4. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 667 (1999) (describing anchoring).

5. *See generally* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).

6. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

7. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CALIF. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

8. In both common and expert usage, sometimes the word "prejudice" is used to describe a negative attitude, especially when it is strong in magnitude.

9. If the association is nearly perfect, in that almost every member of the social group has that trait, then we think of the trait less as a stereotype and more as a defining attribute. Typically, when we use the word "stereotype," the correlation between social group and trait is far from perfect. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.

The conventional wisdom has been that these social cognitions—attitudes and stereotypes about social groups—are explicit, in the sense that they are both consciously accessible through introspection *and* endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC),[10] have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

How have mind scientists discovered such findings on matters so latent or implicit? They have done so by innovating new techniques that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported. Some of these measures involve subliminal priming and other treatments that are not consciously detected within an experimental setting. Other instruments use reaction time differences between two types of tasks—one that seems consistent with some bias, the other inconsistent—as in the Implicit Association Test (IAT).[11]

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10. Implicit social cognition (ISC) is a field of psychology that examines the mental processes that affect social judgments but operate without conscious awareness or conscious control. *See generally* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007). The term was first used and defined by Anthony Greenwald and Mahzarin Banaji. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

11. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998) (introducing the Implicit Association Test (IAT)). For more information on the IAT, see Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265 (John A. Bargh ed., 2007).

The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit one response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that the same key is used for *both* White and harmless item; a different key is used for *both* African American and weapon. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly.[12] Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people's responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.[13]

Through the IAT, social psychologists from hundreds of laboratories have collected enormous amounts of data[14] on reaction-time measures of "implicit biases," a term we use to denote implicit attitudes and implicit stereotypes. According to these measures, implicit bias is pervasive (widely held),[15] large in magnitude (as compared to standardized measures of explicit bias),[16] dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are

12. *See* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 17 (2007).

13. This D score, which ranges from −2.0 to 2.0, is a standardized score, which is computed by dividing the IAT effect as measured in milliseconds by the standard deviations of the participants' latencies pooled across schema-consistent and -inconsistent conditions. *See, e.g.*, Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003). If an individual's IAT D score is divided by its standard deviation of the population that has taken the test, the result is interpretable as the commonly used effect size measure, Cohen's *d*.

14. The most prominent dataset is collected at PROJECT IMPLICIT, http://projectimplicit.org (last visited Mar. 22, 2012) (providing free online tests of automatic associations). For a broad analysis of this dataset, see Nosek et al., *supra* note 12.

15. Lane, Kang & Banaji, *supra* note 10, at 437.

16. Cohen's d is a standardized unit of the size of a statistical effect. By convention, social scientists mark 0.20, 0.50, and 0.80 as small, medium, and large effect sizes. The IAT effect, as measured in Cohen's d, on various stereotypes and attitudes range from medium to large. *See* Kang & Lane, *supra* note 2, at 474 n.35 (discussing data from Project Implicit). Moreover, the effect sizes of implicit bias against social groups are frequently larger than the effect sizes produced by explicit bias measures. *See id.* at 474–75 tbl.1.

separate mental constructs),[17] and predicts certain kinds of real-world behavior.[18] What policymakers are now keen to understand are the size and scope of these behavioral effects and how to counter them—by altering the implicit biases themselves and by implementing strategies to attenuate their effects.

Useful and current summaries of the scientific evidence can be found in both the legal and psychological literatures. For example, in the last volume of this law review, Jerry Kang and Kristin Lane provided a summary of the evidence demonstrating that we are not perceptually, cognitively, or behaviorally colorblind.[19] Justin Levinson and Danielle Young have summarized studies focusing on jury decisionmaking.[20] In the psychology journals, John Jost and colleagues responded to sharp criticism[21] that the IAT studies lacked real-world consequences by providing a qualitative review of the literature, including ten studies that no manager should ignore.[22] Further, they explained how the findings are entirely consistent with the major tenets of twentieth century social cognitive psychology.[23] In a quantitative review, Anthony Greenwald conducted a meta-analysis of IAT studies—which synthesizes all the relevant scientific findings—and found that implicit attitudes as measured by the IAT predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, substantially better than explicit bias measures.[24]

Instead of duplicating these summaries, we offer research findings that are specific to implicit bias leading up to and in the courtroom. To do so, we chart

17. *See* Anthony G. Greenwald & Brian A. Nosek, *Attitudinal Dissociation: What Does It Mean?*, *in* ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 65 (Richard E. Petty, Russell E. Fazio & Pablo Briñol eds., 2008).

18. *See* Kang & Lane, *supra* note 2, at 481–90 (discussing evidence of biased behavior in perceiving smiles, responding to threats, screening resumes, and body language).

19. *See* Kang & Lane, *supra* note 2, at 473–90; *see also* David L. Faigman, Nilanjana Dasgupta & Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008).

20. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319–26 (2010).

21. *See, e.g.*, Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1108–10 (2006).

22. *See, e.g.*, John T. Jost et al., *The Existence of Implicit Prejudice Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 41 (2009).

23. *See id.*

24. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20 (2009). Implicit attitude scores predicted behavior in this domain at an average correlation of r=0.24, whereas explicit attitude scores had correlations at an average of r=0.12. *See id.* at 24 tbl.3.

out two case trajectories—one criminal, the other civil. That synthesis appears in Part II.

B. Theoretical Clarification

But before we leave our introduction to implicit bias, we seek to make some theoretical clarifications on the relationships between explicit biases, implicit biases, and structural processes that are all involved in producing unfairness in the courtroom. We do so because the legal literature has flagged this as an important issue.[25] In addition, a competent diagnosis of unfairness in the courtroom requires disentangling these various processes. For instance, if the end is to counter discrimination caused by, say, *explicit* bias, it may be ineffective to adopt means that are better tailored to respond to *implicit* bias, and vice versa.

We start by clarifying terms. To repeat, explicit biases are attitudes and stereotypes that are consciously accessible through introspection *and* endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate.

Above, we used the labels "explicit" and "implicit" as adjectives to describe mental constructs—attitudes and stereotypes. Readers should recognize that these adjectives can also apply to research procedures or instruments. An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. No instrument perfectly measures a mental construct. In fact, one can often easily conceal one's explicit bias as measured through an explicit instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not to be candid about the beliefs or attitudes at issue.

By contrast, an implicit instrument does not depend on the respondent's conscious knowledge of the mental constructs that the researcher is inferring from the measure. An example is a reaction-time measure, such as the IAT. This does not necessarily mean that the respondent is unaware that the IAT is measuring bias.

25. *See generally* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1 (2011).

It also does not mean that the respondent is actually unaware that he or she has implicit biases, for example because she has taken an IAT before or is generally aware of the research literature. To repeat, no instrument perfectly measures any mental construct, and this remains true for implicit instruments. One might, for instance, try to conceal implicit bias measured through an implicit instrument, but such faking is often much harder than faking explicit bias measured by an explicit instrument.[26]

Finally, besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called "structural." Other names include "institutional" or "societal." These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.[27] In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Because thinking through biases with respect to human beings evokes so much potential emotional resistance, sometimes it is easier to apply them to something less fraught than gender, race, religion, and the like. So, consider a vegetarian's biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are *explicit* biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of *concealed* bias (explicit bias that is hidden to manage impressions).

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26. *See, e.g.*, Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83, 95–96 (2003).

27. *See, e.g.*, Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1117–22 (2002) (applying lock-in theory to explain the inequalities between Blacks and Whites in education, housing, and employment); john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795–800 (2008) (adopting a systems approach to describe structured racialization); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 743–48 (2000) (describing lock-in theory, drawing on antitrust law and concepts).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an *implicit* bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for $10 or a cheeseburger for $3. Unfortunately, she has only $5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of *structural* bias in favor of meat.

We disentangle these various mechanisms—explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces—because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms—explicit bias, implicit bias, and structural forces—are not mutually exclusive.[28] To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest

28. *See, e.g.*, GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 23–30 (2002) (discussing self-reinforcing stereotypes); john powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, POVERTY & RACE, Sept./Oct. 2011, at 3, 6 (explaining why "implicit bias insights are crucial to addressing the substantive inequalities that result from structural racialization").

that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.[29]

II. TWO TRAJECTORIES

A. The Criminal Path

Consider, for example, some of the crucial milestones in a criminal case flowing to trial. First, on the basis of a crime report, the police investigate particular neighborhoods and persons of interest and ultimately arrest a suspect. Second, the prosecutor decides to charge the suspect with a particular crime. Third, the judge makes decisions about bail and pretrial detention. Fourth, the defendant decides whether to accept a plea bargain after consulting his defense attorney, often a public defender or court-appointed private counsel. Fifth, if the case goes to trial, the judge manages the proceedings while the jury decides whether the defendant is guilty. Finally, if convicted, the defendant must be sentenced. At each of these stages,[30] implicit biases can have an important impact. To maintain a manageable scope of analysis, we focus on the police encounter, charge and plea bargain, trial, and sentencing.

1. Police Encounter

Blackness and criminality. If we implicitly associate certain groups, such as African Americans, with certain attributes, such as criminality, then it should not be surprising that police may behave in a manner consistent with those implicit stereotypes. In other words, biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning.[31] These biases could contribute to the substantial racial disparities that have been widely documented in policing.[32]

29. *See* Jerry Kang, *Implicit Bias and the Pushback From the Left*, 54 ST. LOUIS U. L.J. 1139, 1146–48 (2010) (specifically rejecting complaint that implicit bias analysis must engage in reductionism).

30. The number of stages is somewhat arbitrary. We could have listed more stages in a finer-grained timeline or vice versa.

31. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976–77 (2002).

32. *See, e.g.*, Dianna Hunt, *Ticket to Trouble/Wheels of Injustice/Certain Areas Are Ticket Traps for Minorities*, HOUS. CHRON., May 14, 1995, at A1 (analyzing sixteen million Texas driving records and finding that minority drivers straying into White neighborhoods in Texas's major urban areas were twice as likely as Whites to get traffic violations); Sam Vincent Meddis & Mike Snider, *Drug War 'Focused' on Blacks*, USA TODAY, Dec. 20, 1990, at 1A (reporting findings from a 1989 *USA*

Since the mid–twentieth century, social scientists have uncovered empirical evidence of negative attitudes toward African Americans as well as stereotypes about their being violent and criminal.[33] Those biases persist today, as measured by not only explicit but also implicit instruments.[34]

For example, Jennifer Eberhardt, Philip Goff, Valerie Purdie, and Paul Davies have demonstrated a bidirectional activation between Blackness and criminality.[35] When participants are subliminally primed[36] with a Black male face (as opposed to a White male face, or no prime at all), they are quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static.[37] In other words, by implicitly thinking *Black*, they more quickly saw a weapon.

Interestingly, the phenomenon also happens in reverse. When subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces.[38] Researchers found this result not only in a student population, which is often criticized for being unrepresentative of the real world, but also among police officers.[39] The research suggests both that

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Today study that 41 percent of those arrested on drug charges were African American whereas 15 percent of the drug-using population is African American); Billy Porterfield, *Data Raise Question: Is the Drug War Racist?*, AUSTIN AM. STATESMAN, Dec. 4, 1994, at A1 (citing study showing that African Americans were over seven times more likely than Whites to be arrested on drug charges in Travis County in 1993).

33. *See generally* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995).

34. In a seminal paper, Patricia Devine demonstrated that being subliminally primed with stereotypically "Black" words prompted participants to evaluate ambiguous behavior as more hostile. *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). The priming words included "Negroes, lazy, Blacks, blues, rhythm, Africa, stereotype, ghetto, welfare, basketball, unemployed, and plantation." *Id.* at 10. Those who received a heavy dose of priming (80 percent stereotypical words) interpreted a person's actions as more hostile than those who received a milder dose (20 percent). *Id.* at 11–12; *see also* John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996).

35. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

36. The photograph flashed for only thirty milliseconds. *Id.* at 879.

37. *See id.* at 879–80. There was a 21 percent drop in perceptual threshold between White face primes and Black face primes. This was measured by counting the number of frames (out of a total of 41) that were required before the participant recognized the outlines of the weapon in both conditions. There was a 8.8 frame difference between the two conditions. *Id.* at 881.

38. Visual attendance was measured via a dot-probe paradigm, which requires participants to indicate on which side of the screen a dot flashes. The idea is that if a respondent is already looking at one face (for example, the Black photograph), he or she will see a dot flash near the Black photograph faster. *See id.* at 881 (describing dot-paradigm as the gold standard in visual attention measures).

39. *See id.* at 885–87 (describing methods, procedures, and results of Study 4, which involved sixty-one police officers who were 76 percent White, 86 percent male, and who had an average age of forty-two).

the idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness. How these findings translate into actual police work is, of course, still speculative. At a minimum, however, they suggest the possibility that officers have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention.

Even if this is the case, one might respond that extra visual attention by the police is not too burdensome. But who among us enjoys driving with a police cruiser on his or her tail?[40] Moreover, the increased visual attention did not promote accuracy; instead, it warped the officers' perceptual memories. The subliminal prime of weapons led police officers not only to look more at Black faces but also to remember them in a biased way, as having more stereotypically African American features. Thus, they "were more likely to falsely identify a face that was more stereotypically Black than the target when they were primed with crime than when they were not primed."[41]

We underscore a point that is so obvious that it is easy to miss. The primes in these studies were all flashed *subliminally*. Thus, the behavioral differences in visually attending to Black faces and in remembering them more stereotypically were all triggered implicitly, without the participants' conscious awareness.

Shooter bias. The implicit association between Blackness and weapons has also been found through other instruments, including other priming tasks[42] and the IAT. One of the tests available on Project Implicit specifically examines the implicit stereotype between African Americans (as compared to European Americans) and weapons (as compared to harmless items). That association has been found to be strong, widespread, and dissociated from explicit self-reports.[43]

Skeptics can reasonably ask why we should care about minor differentials between schema-consistent and -inconsistent pairings that are often no more than a half second. But it is worth remembering that a half second may be all

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In this study, the crime primes were not pictures but words: "violent, crime, stop, investigate, arrest, report, shoot, capture, chase, and apprehend." *Id.* at 886.

40. *See* Carbado, *supra* note 31, at 966–67 (describing existential burdens of heightened police surveillance).

41. Eberhardt et al., *supra* note 35, at 887.

42. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). The study deployed a priming paradigm, in which a photograph of a Black or White face was flashed to participants for two hundred milliseconds. Immediately thereafter, participants were shown pictures of guns or tools. *Id.* at 184. When primed by the Black face, participants identified guns faster. *Id.* at 185.

43. For N=85,742 participants, the average IAT D score was 0.37; Cohen's d=1.00. By contrast, the self-reported association (that is, the explicit stereotype measure) was Cohen's d=0.31. *See* Nosek et al., *supra* note 12, at 11 tbl.2.

the time a police officer has to decide whether to shoot. In the policing context, that half second might mean the difference between life and death.

Joshua Correll developed a shooter paradigm video game in which participants are confronted with photographs of individuals (targets) holding an object, superimposed on various city landscapes.[44] If the object is a weapon, the participant is instructed to press a key to shoot. If the object is harmless (for example, a wallet), the participant must press a different key to holster the weapon. Correll found that participants were quicker to shoot when the target was Black as compared to White.[45] Also, under time pressure, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets, and failed to shoot more armed White targets (misses) than armed Black targets.[46] Interestingly, the shooter bias effect was not correlated with measures of explicit personal stereotypes.[47] Correll also found comparable amounts of shooter bias in African American participants.[48] This suggests that negative attitudes toward African Americans are not what drive the phenomenon.[49]

The shooter bias experiments have also been run on actual police officers, with mixed results. In one study, police officers showed the same bias in favor of shooting unarmed Blacks more often than unarmed Whites that student and civilian populations demonstrated.[50] In another study, however, although police officers showed a similar speed bias, they did not show any racial bias in the

44. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002) (describing the procedure).

45. *Id.* at 1317.

46. *Id.* at 1319. For qualifications about how the researchers discarded outliers, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 n.16 (2005). Subsequent studies have confirmed Correll's general findings. *See, e.g.*, Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (finding similar results).

47. Correll et al., *supra* note 44, at 1323. The scales used were the Modern Racism Scale, the Discrimination and Diversity Scale, the Motivation to Control Prejudiced Responding Scale, and some questions from the Right-Wing Authoritarianism Scale and the Personal Need for Structure Scale for good measure. *Id.* at 1321. These are survey instruments that are commonly used in social psychological research. Shooter bias was, however, correlated with measures of societal stereotypes—the stereotypes that other people supposedly held. *Id.* at 1323.

48. *See id.* at 1324.

49. On explicit attitude instruments, African Americans show on average substantial in-group preference (over Whites). On implicit attitude instruments, such as the IAT, African Americans bell curve around zero, which means that they show no preference on average. *See* Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY RES. & PRACTICE 101, 105–06 (2002).

50. *See* E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181 (2005).

most important criterion of accuracy. In other words, there was no higher error rate of shooting unarmed Blacks as compared to Whites.[51]

Finally, in a study that directly linked implicit stereotypes (with weapons) as measured by the IAT and shooter bias, Jack Glaser and Eric Knowles found that "[i]ndividuals possessing a relatively strong stereotype linking Blacks and weapons [one standard deviation above the mean IAT] clearly show the Shooter Bias."[52] By contrast, recall that Correll found no such correlation with explicit stereotypes. These findings are consistent with the implicit stereotype story. Of course, it may also be true that participants were simply downplaying or concealing their explicit bias, which could help explain why no correlation was found.

In sum, we have evidence that suggests that implicit biases could well influence various aspects of policing. A fairly broad set of research findings shows that implicit biases (as measured by implicit instruments) alter and affect numerous behaviors that police regularly engage in—visual surveillance, recall, and even armed response.[53] It should go without saying that explicit biases, which often undergird unspoken policies of racial profiling, also play an enormous role in the differential policing of people of color. It also should go without saying that various structural forces that produce racially segregated, predominantly minority neighborhoods that have higher poverty and crime rates also have a huge impact on racialized policing. Nevertheless, we repeat these points so that readers internalize the idea that implicit, explicit, and structural processes should not be deemed mutually exclusive.

2. Charge and Plea Bargain

Journalistic investigations have uncovered some statistical evidence that racial minorities are treated worse than Whites in prosecutors' charging decisions.[54]

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51. *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010–13, 1016–17 (2007) (describing the results from two studies).

52. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 169 (2008).

53. For discussions in the law reviews, with some treatment of implicit biases, see Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 667–73 (2007) (providing a cognitive model based on automatic categorization in accordance with behavioral realism).

54. For example, in San Jose, a newspaper investigation concluded that out of the almost seven hundred thousand criminal cases reported, "at virtually every stage of pre-trial negotiation, whites are more successful than non-whites." Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4. San Francisco Public Defender Jeff Brown commented on racial stereotyping: "It's a feeling, 'You've got a nice

Of course, there might be some legitimate reason for those disparities if, for example, minorities and Whites are not similarly situated on average. One way to examine whether the merits drive the disparate results is to control for everything except some irrelevant attribute, such as race. In several studies, researchers used regression analyses to conclude that race was indeed independently correlated with the severity of the prosecutor's charge.

For example, in a 1985 study of charging decisions by prosecutors in Los Angeles, researchers found prosecutors more likely to press charges against Black than White defendants, and determined that these charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge, or use of a weapon.[55] Two studies also in the late 1980s, one in Florida and the other in Indiana, found charging discrepancies based on the race of the victim.[56] At the federal level, a U.S. Sentencing Commission report found that prosecutors were more apt to offer White defendants generous plea bargains with sentences below the prescribed guidelines than to offer them to Black or Latino defendants.[57]

While these studies are suggestive, other studies find no disparate treatment.[58] Moreover, this kind of statistical evidence does not definitively tell us that biases

person screwing up,' as opposed to feeling that 'this minority is on a track and eventually they're going to end up in state prison.'" Christopher H. Schmitt, *Why Plea Bargains Reflect Bias*, SAN JOSE MERCURY NEWS, Dec. 9, 1991, at 1A; *see also* Christopher Johns, *The Color of Justice: More and More, Research Shows Minorities Aren't Treated the Same as Anglos by the Criminal Justice System*, ARIZ. REPUBLIC, July 4, 1993, at C1 (citing several reports showing disparate treatment of Blacks in the criminal justice system).

55. *See* Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615–19 (1985).

56. *See* Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1493 (2000) (citing Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 441–47 (1979)); Radelet & Pierce, *supra* note 55, at 615–19.

57. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 12 n.41 (2000), *available at* http://www.protectcivilrights.org/pdf/reports/justice.pdf (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995)); *see also* Kevin McNally, *Race and Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004) (compiling studies on the death penalty).

58. *See, e.g.*, Jeremy D. Ball, *Is It a Prosecutor's World? Determinants of Count Bargaining Decisions*, 22 J. CONTEMP. CRIM. JUST. 241 (2006) (finding no correlation between race and the willingness of prosecutors to reduce charges in order to obtain guilty pleas but acknowledging that the study did not include evaluation of the original arrest report); Cyndy Caravelis et al., *Race, Ethnicity, Threat, and the Designation of Career Offenders*, 2011 JUST. Q. 1 (showing that in some counties, Blacks and Latinos are more likely than Whites with similar profiles to be prosecuted as career offenders, but in other counties with different demographics, Blacks and Latinos have a lesser likelihood of such prosecution).

generally or implicit biases specifically produce discriminatory charging decisions or plea offers by prosecutors, or a discriminatory willingness to accept worse plea bargains on the part of defense attorneys. The best way to get evidence on such hypotheses would be to measure the implicit biases of prosecutors and defense attorneys and investigate the extent to which those biases predict different treatment of cases otherwise identical on the merits.

Unfortunately, we have very little data on this front. Indeed, we have no studies, as of yet, that look at prosecutors' and defense attorneys' implicit biases and attempt to correlate them with those individuals' charging practices or plea bargains. Nor do we know as much as we would like about their implicit biases more generally. But on that score, we do know something. Start with defense attorneys. One might think that defense attorneys, repeatedly put into the role of interacting with what is often a disproportionately minority clientele, and often ideologically committed to racial equality,[59] might have materially different implicit biases from the general population. But Ted Eisenberg and Sheri Lynn Johnson found evidence to the contrary: Even capital punishment defense attorneys show negative implicit attitudes toward African Americans.[60] Their implicit attitudes toward Blacks roughly mirrored those of the population at large.

What about prosecutors? To our knowledge, no one has measured specifically the implicit biases held by prosecutors.[61] That said, there is no reason to

59. *See* Gordon B. Moskowitz, Amanda R. Salomon & Constance M. Taylor, *Preconciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes*, 18 SOC. COGNITION 151, 155–56 (2000) (showing that "chronic egalitarians" who are personally committed to removing bias in themselves do not exhibit implicit attitudinal preference for Whites over Blacks).

60. *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004). The researchers used a paper-pencil IAT that measured attitudes about Blacks and Whites. *Id.* at 1543–45. The defense attorneys displayed biases that were comparable to the rest of the population. *Id.* at 1553. The findings by Moskowitz and colleagues, *supra* note 59, sit in some tension with findings by Eisenberg and Johnson. It is possible that defense attorneys are not chronic egalitarians and/or that the specific practice of criminal defense work exacerbates implicit biases even among chronic egalitarians.

61. In some contexts, prosecutors have resisted revealing information potentially related to their biases. For example, in *United States v. Armstrong*, 517 U.S. 456 (1996), defendants filed a motion to dismiss the indictment for selective prosecution, arguing that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses. *Id.* at 460–61. The claim foundered when the U.S. Attorney's Office resisted the defendants' discovery motion concerning criteria for prosecutorial decisions and the U.S. Supreme Court upheld the U.S. Attorney's Office's refusal to provide discovery. *Id.* at 459–62. The Court held that, prior to being entitled even to discovery, defendants claiming selective prosecution cases based on race must produce credible evidence that "similarly situated individuals of a different race were not prosecuted." *Id.* at 465.

presume attorney exceptionalism in terms of implicit biases.[62] And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune. If this is right, there is plenty of reason to be concerned about how these biases might play out in practice.

As we explain in greater detail below, the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments.[63] They exercise tremendous discretion to decide whether, against whom, and at what level of severity to charge a particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence—all with little judicial oversight. Other psychological theories—such as confirmation bias, social judgeability theory, and shifting standards, which we discuss below[64]—reinforce our hypothesis that prosecutorial decisionmaking indeed risks being influenced by implicit bias.

3. Trial

a. Jury

If the case goes to the jury, what do we know about how implicit biases might influence the factfinder's decisionmaking? There is a long line of research on racial discrimination by jurors, mostly in the criminal context. Notwithstanding some mixed findings, the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race ("racial outgroups"). For example, White jurors will treat Black defendants worse than they treat comparable White defendants. The best and most recent meta-analysis of laboratory juror studies was performed by Tara Mitchell and colleagues, who found that the fact that a juror was of a different race than the defendant influenced

62. Several of the authors have conducted training sessions with attorneys in which we run the IAT in the days leading up to the training. The results of these IATs have shown that attorneys harbor biases that are similar to those harbored by the rest of the population. One recent study of a related population, law students, confirmed that they too harbor implicit gender biases. *See* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 28–31 (2010).

63. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE L. REV. 795 (2012) (undertaking a step-by-step consideration of how prosecutorial discretion may be fraught with implicit bias).

64. *See infra* Part II.B.

both verdicts and sentencing.[65] The magnitude of the effect sizes were measured conservatively[66] and found to be small (Cohen's d=0.092 for verdicts, d=0.185 for sentencing).[67]

But effects deemed "small" by social scientists may nonetheless have huge consequences for the individual, the social category he belongs to, and the entire society. For example, if White juries rendered guilty verdicts in exactly 80 percent of their decisions,[68] then an effect size of Cohen's d=0.095 would mean that the rate of conviction for Black defendants will be 83.8 percent, compared to 76.2 percent for White defendants. Put another way, in one hundred otherwise identical trials, eight more Black than White defendants would be found guilty.[69]

One might assume that juror bias against racial outgroups would be greater when the case is somehow racially charged or inflamed, as opposed to those instances when race does not explicitly figure in the crime. Interestingly, many experiments have demonstrated just the opposite.[70] Sam Sommers and Phoebe Ellsworth explain the counterintuitive phenomenon in this way: When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their

65. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005). The meta-analysis processed thirty-four juror verdict studies (with 7397 participants) and sixteen juror sentencing studies (with 3141 participants). *Id.* at 625. All studies involved experimental manipulation of the defendant's race. Multirace participant samples were separated out in order to maintain the study's definition of racial bias as a juror's differential treatment of a defendant who belonged to a racial outgroup. *See id.*

66. Studies that reported nonsignificant results ($p>0.05$) for which effect sizes could not be calculated were given effect sizes of 0.00. *Id.*

67. *Id.* at 629.

68. *See* TRACY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 221152, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1, 3 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf ("Seventy-nine percent of trials resulted in a guilty verdict or judgment, including 82% of bench trials and 76% of jury trials."); *see also* THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting the "typical" outcome as three out of four trials resulting in convictions).

69. This translation between effect size *d* values and outcomes was described by Robert Rosenthal & Donald B. Rubin, *A Simple, General Purpose Display of Magnitude of Experimental Effect*, 74 J. EDUC. PSYCHOL. 166 (1982).

70. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).

decisionmaking. These findings are more consistent with an implicit bias than a concealed explicit bias explanation.[71]

So far, we know that race effects have been demonstrated in juror studies (sometimes in counterintuitive ways), but admittedly little is known about "the precise psychological processes through which the influence of race occurs in the legal context."[72] Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors. Leading scholars from the juror bias field have expressly raised the possibility that the psychological mechanisms might be "unintentional and even non-conscious processes."[73]

Some recent juror studies by Justin Levinson and Danielle Young have tried to disentangle the psychological mechanisms of juror bias by using the IAT and other methods. In one mock juror study, Levinson and Young had participants view five photographs of a crime scene, including a surveillance camera photo that featured a masked gunman whose hand and forearm were visible. For half the participants, that arm was dark skinned; for the other half, that arm was lighter skinned.[74] The participants were then provided twenty different pieces of trial evidence. The evidence was designed to produce an ambiguous case regarding whether the defendant was indeed the culprit. Participants were asked to rate how much the presented evidence tended to indicate the defendant's guilt or innocence and to decide whether the defendant was guilty or not, using both a scale of guilty or not guilty and a likelihood scale of zero to one hundred.[75]

The study found that the subtle manipulation of the skin color altered how jurors evaluated the evidence presented and also how they answered the crucial question "How guilty is the defendant?" The guilt mean score was M=66.97 for

71. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 255 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000). That said, one could still hold to an explicit bias story in the following way: The juror has a negative attitude or stereotype that he is consciously aware of and endorses. But he knows it is not socially acceptable so he conceals it. When a case is racially charged, racial bias is more salient, so other jurors will be on the lookout for bias. Accordingly, the juror conceals it even more, all the way up to making sure that his behavior is completely race neutral. This explicit bias story is not mutually exclusive with the implicit bias story we are telling.

72. Samuel R. Sommers, *Race and the Decision-Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 172 (2007).

73. *Id.* at 175.

74. Levinson & Young, *supra* note 20, at 332–33 (describing experimental procedures).

75. *Id.* at 334.

dark skin and M=56.37 for light skin, with 100 being "definitely guilty."[76] Measures of explicit bias, including the Modern Racism Scale and feeling thermometers, showed no statistically significant correlation with the participants' weighing of the evidence or assessment of guilt.[77] More revealing, participants were asked to recall the race of the masked robber (which was a proxy for the light or dark skin), but many could not recall it.[78] Moreover, their recollections did not correlate with their judgments of guilt.[79] Taken together, these findings suggest that implicit bias—not explicit, concealed bias, or even any degree of conscious focus on race—was influencing how jurors assessed the evidence in the case.

In fact, there is even clearer evidence that implicit bias was at work. Levinson, Huajian Cai, and Young also constructed a new IAT, the Guilty–Not Guilty IAT, to test implicit stereotypes of African Americans as guilty (not innocent).[80] They gave the participants this new IAT and the general race attitude IAT. They found that participants showed an implicit negative attitude toward Blacks as well as a small implicit stereotype between Black and guilty.[81] More important than the bias itself is whether it predicts judgment. On the one hand, regression analysis demonstrated that a measure of *evidence evaluation* was a function of both the implicit attitude and the implicit stereotype.[82] On the other hand, the IAT scores did not predict what is arguably more important: guilty verdicts or judgments of guilt on a more granular scale (from zero to one hundred).[83] In sum, a subtle change

76. *See id.* at 337 (confirming that the difference was statistically significant, F=4.40, p=0.034, *d=0.52*).
77. *Id.* at 338.
78. This finding built upon Levinson's previous experimental study of implicit memory bias in legal decisionmaking. *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–406 (2007) (finding that study participants misremembered trial-relevant facts in racially biased ways).
79. Levinson & Young, *supra* note 20, at 338.
80. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Bias: The Guilty–Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010).
81. *Id.* at 204. For the attitude IAT, D=0.21 ($p<0.01$). *Id.* at 204 n.87. For the Guilty–Not Guilty IAT, D=0.18 ($p<0.01$). *Id.* at 204 n.83.
82. Participants rated each of the twenty pieces of information (evidence) in terms of its probity regarding guilt or innocence on a 1–7 scale. This produced a total "evidence evaluation" score that could range between 20 (least amount of evidence of guilt) to 140 (greatest). *Id.* at 202 n.70 (citation omitted). The greater the Black = guilty stereotype or the greater the negative attitude toward Blacks, the higher the guilty evidence evaluation. The ultimate regression equation was: Evidence = 88.58 + 5.74 x BW + 6.61 x GI + 9.11 x AI + e (where BW stands for Black or White suspect; GI stands for guilty stereotype IAT score; AI stands for race attitude IAT score; *e* stands for error). *Id.* at 206. In normalized units, the implicit stereotype $\beta=0.25$ ($p<0.05$); the implicit attitude $\beta=0.34$ ($p<0.01$); adjusted $R^2=0.24$. *See id.* at 206 nn.93–95.
83. *Id.* at 206 n.95.

in skin color changed judgments of evidence and guilt; implicit biases measured by the IAT predicted how respondents evaluated identical pieces of information.

We have a long line of juror research, as synthesized through a meta-analysis, revealing that jurors of one race treat defendants of another race worse with respect to verdict and sentencing. According to some experiments, that difference might take place *more* often in experimental settings when the case is *not* racially charged, which suggests that participants who seek to be fair will endeavor to correct for potential bias when the threat of potential race bias is obvious. Finally, some recent work reveals that certain IATs can predict racial discrimination in the evaluation of evidence by mock jurors. Unfortunately, because of the incredible difficulties in research design, we do not have studies that evaluate implicit bias in real criminal trials. Accordingly, the existing body of research, while strongly suggestive, provides inferential rather than direct support that implicit bias accounts for some of the race effects on conviction and sentencing.

b. Judge

Obviously, the judge plays a crucial role in various aspects of the trial, exercising important discretion in setting bail,[84] deciding motions, conducting and deciding what can be asked during jury selection, ruling on the admissibility of evidence, presiding over the trial, and rendering verdicts in some cases. Again, as with the lawyers, there is no inherent reason to think that judges are immune from implicit biases. The extant empirical evidence supports this assumption.[85] Jeff Rachlinski and his coauthors are the only researchers who have measured the implicit biases of actual trial court judges. They have given the race attitude IAT to judges from three different judicial districts. Consistent with the general population, the White judges showed strong implicit attitudes favoring Whites over Blacks.[86]

84. *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).

85. Judge Bennett, a former civil rights lawyer, shares his unnerving discovery of his own disappointing IAT results in Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

86. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009). White judges (N=85) showed an IAT effect M=216 ms (with a standard deviation of 201 ms). 87.1 percent of them were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. Black judges (N=43) showed a small bias M=26 ms (with a standard deviation of 208 ms). Only 44.2 percent of Black judges were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. *See id.*

Rachlinski and colleagues investigated whether these biases predicted behavioral differences by giving judges three different vignettes and asking for their views on various questions, ranging from the likelihood of defendant recidivism to the recommended verdict and confidence level. Two of these vignettes revealed nothing about race, although some of the judges were subliminally primed with words designed to trigger the social category African American. The third vignette explicitly identified the defendant (and victim) as White or Black and did not use subliminal primes. After collecting the responses, Rachlinski et al. analyzed whether judges treated White or Black defendants differently and whether the IAT could predict any such difference.

They found mixed results. In the two subliminal priming vignettes, judges did not respond differently on average as a function of the primes. In other words, the primes did not prompt them to be harsher on defendants across the board as prior priming studies with nonjudge populations had found.[87] That said, the researchers found a *marginally* statistically significant interaction with IAT scores: Judges who had a greater degree of implicit bias against Blacks (and relative preference for Whites) were harsher on defendants (who were never racially identified) when they had been primed (with the Black words). By contrast, those judges who had implicit attitudes in favor of Blacks were less harsh on defendants when they received the prime.[88]

In the third vignette, a battery case that explicitly identified the defendant as one race and the victim as the other,[89] the White judges showed equal likelihood of convicting the defendant, whether identified as White or Black. By contrast, Black judges were much more likely to convict the defendant if he was identified as White as compared to Black. When the researchers probed more deeply to see what, if anything, the IAT could predict, they did not find the sort of interaction that they found in the other two vignettes—in other words, judges with strong implicit biases in favor of Whites did not treat the Black defendant more harshly.[90]

Noticing the difference between White and Black judge responses in the third vignette study, the researchers probed still deeper and found a three-way interaction between a judge's race, a judge's IAT score, and a defendant's race. No effect was found for White judges; the core finding concerned, instead, Black

87. *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

88. *See* Rachlinski et al., *supra* note 86, at 1215. An ordered logit regression was performed between the judge's disposition against the priming condition, IAT score, and their interaction. The interaction term was marginally significant at p=0.07. *See id.* at 1214–15 n.94.

89. This third vignette did not use any subliminal primes.

90. *See id.* at 1202 n.41.

judges. Those Black judges with a stronger Black preference on the IAT were less likely to convict the Black defendant (as compared to the White defendant); correlatively, those Black judges with a White preference on the IAT were more likely to convict the Black defendant.[91]

It is hard to make simple sense of such complex findings, which may have been caused in part by the fact that the judges quickly sniffed out the purpose of the study—to detect racial discrimination.[92] Given the high motivation not to perform race discrimination under research scrutiny, one could imagine that White judges might make sure to correct for any potential unfairness. By contrast, Black judges may have felt less need to signal racial fairness, which might explain why Black judges showed different behaviors as a function of implicit bias whereas White judges did not.

Put another way, data show that when the race of the defendant is explicitly identified to judges in the context of a psychology study (that is, the third vignette), judges are strongly motivated to be fair, which prompts a different response from White judges (who may think to themselves "whatever else, make sure not to treat the Black defendants worse") than Black judges (who may think "give the benefit of the doubt to Black defendants"). However, when race is not explicitly identified but implicitly primed (vignettes one and two), perhaps the judges' motivation to be accurate and fair is not on full alert. Notwithstanding all the complexity, this study provides some suggestive evidence that implicit attitudes may be influencing judges' behavior.

4. Sentencing

There is evidence that African Americans are treated worse than similarly situated Whites in sentencing. For example, federal Black defendants were sentenced to 12 percent longer sentences under the Sentencing Reform Act of 1984,[93] and Black defendants are subject disproportionately to the death penalty.[94]

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91. *Id.* at 1220 n.114.

92. *See id.* at 1223.

93. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (examining federal judge sentencing under the Sentencing Reform Act of 1984).

94. *See* U.S. GEN. ACCOUNTING OFFICE, GAO GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding killers of White victims receive the death penalty more often than killers of Black victims); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview,*

Of course, it is possible that there is some good reason for that difference, based on the merits. One way to check is to run experimental studies holding everything constant except for race.

Probation officers. In one study, Sandra Graham and Brian Lowery subliminally primed police officers and juvenile probation officers with words related to African Americans, such as "Harlem" or "dreadlocks." This subliminal priming led the officers to recommend harsher sentencing decisions.[95] As we noted above, Rachlinski et al. found no such effect on the judges they tested using a similar but not identical method.[96] But, at least in this study, an effect was found with police and probation officers. Given that this was a subliminal prime, the merits could not have justified the different evaluations.

Afrocentric features. Irene Blair, Charles Judd, and Kristine Chapleau took photographs from a database of criminals convicted in Florida[97] and asked participants to judge how Afrocentric both White and Black inmates looked on a scale of one to nine.[98] The goal was to see if race, facial features, or both correlated with actual sentencing. Using multiple regression analysis, the researchers found that after controlling for the seriousness of the primary and additional offenses, the race of the defendant showed no statistical significance.[99] In other words, White and Black defendants were sentenced without discrimination based on race. According to the

With Recent Findings From Philadelphia, 83 CORNELL L. REV. 1638, 1710–24 (1998) (finding mixed evidence that Black defendants are more likely to receive the death sentence).

95. *See* Graham & Lowery, *supra* note 87.

96. Priming studies are quite sensitive to details. For example, the more subliminal a prime is (in time duration and in frequency), the less the prime tends to stick (the smaller the effects and the faster it dissipates). Rachlinski et al. identified some differences between their experimental procedure and that of Graham and Lowery's. *See* Rachlinski et al., *supra* note 86, at 1213 n.88. Interestingly, in the Rachlinski study, for judges from the eastern conference (seventy judges), a programming error made their subliminal primes last only sixty-four milliseconds. By contrast, for the western conference (forty-five judges), the prime lasted 153 milliseconds, which was close to the duration used by Graham and Lowery (150 milliseconds). *See id.* at 1206 (providing numerical count of judges' prime); *id.* at 1213 n.84 (identifying the programming error). Graham and Lowery wrote that they selected the priming durations through extensive pilot testing "to arrive at a presentation time that would allow the primes to be detectable but not identifiable." Graham & Lowery, *supra* note 87, at 489. It is possible that the truncated priming duration for the eastern conference judges contributed to the different findings between Rachlinski et al. and Graham and Lowery.

97. *See* Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 675 (2004) (selecting a sample of 100 Black inmates and 116 White inmates).

98. *Id.* at 676. Afrocentric meant full lips, broad nose, relatively darker skin color, and curly hair. It is what participants socially understood to look African without any explicit instruction or definition. *See id.* at 674 n.1.

99. *Id.* at 676.

researchers, this is a success story based on various sentencing reforms specifically adopted by Florida mostly to decrease sentencing discretion.[100]

However, when the researchers added Afrocentricity of facial features into their regressions, they found a curious correlation. Within each race, either Black or White, the more Afrocentric the defendant looked, the harsher his punishment.[101] How much so? If you picked a defendant who was one standard deviation above the mean in Afrocentric features and compared him to another defendant of the same race who was one standard deviation below the mean, there would be a sentence difference of seven to eight months between them, holding constant any difference in their actual crime.[102]

Again, if the research provides complex findings, we must grapple with a complex story. On the one hand, we have good news: Black and White defendants were, overall, sentenced comparably. On the other hand, we have bad news: Within each race, the more stereotypically Black the defendant looked, the harsher the punishment. What might make sense of such results? According to the researchers, perhaps implicit bias was responsible.[103] If judges are motivated to avoid racial discrimination, they may be on guard regarding the dangers of treating similarly situated Blacks worse than Whites. On alert to this potential bias, the judges prevent it from causing any discriminatory behavior. By contrast, judges have no conscious awareness that Afrocentric features might be triggering stereotypes of criminality and violence that could influence their judgment. Without such awareness, they could not explicitly control or correct for the potential bias.[104] If this explanation is correct, we have further evidence that discrimination is being driven in part by implicit biases and not solely by explicit-but-concealed biases.

* * *

Where does this whirlwind tour of psychological research findings leave us? In each of the stages of the criminal trial process discussed, the empirical research

100. *Id.* at 677.

101. *Id.* at 676–77. Jennifer Eberhardt and her colleagues reached consistent findings when she used the same Florida photograph dataset to examine how Black defendants were sentenced to death. After performing a median split on how stereotypical the defendant looked, the top half were sentenced to death 57.5 percent of the time compared to the bottom half, which were sentenced to death only 24.4 percent of the time. *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006). Interestingly, this effect was not observed when the victim was Black. *See id.* at 385.

102. *See* Blair et al., *supra* note 97, at 677–78.

103. *See id.* at 678 (hypothesizing that "perhaps an equally pernicious and less controllable process [is] at work").

104. *See id.* at 677.

gives us reason to think that implicit biases—attitudes and beliefs that we are not directly aware of and may not endorse—could influence how defendants are treated and judged. Wherever possible, in our description of the studies, we have tried to provide the magnitude of these effects. But knowing precisely how much work they really do is difficult. If we seek an estimate, reflective of an entire body of research and not any single study, one answer comes from the Greenwald meta-analysis, which found that the IAT (the most widely used, but not the only measure of implicit bias) could predict 5.6 percent of the variation of the behavior in Black–White behavioral domains.[105]

Should that be deemed a lot or a little? In answering this question, we should be mindful of the collective impact of such biases, integrated over time (per person) and over persons (across all defendants).[106] For a single defendant, these biases may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect.

To get a more concrete sense, Anthony Greenwald has produced a simulation that models cumulating racial disparities through five sequential stages of criminal justice—arrest, arraignment, plea bargain, trial, and sentence. It supposes that the probability of arrest having committed the offense is 0.50, that the probability of conviction at trial is 0.75, and that the effect size of implicit bias is r=0.1 at each stage. Under this simulation, for a crime with a mean sentence of 5 years, and with a standard deviation of 2 years, Black criminals can expect a sentence of 2.44 years whereas White criminals can expect just 1.40 years.[107] To appreciate the full social impact, we must next aggregate this sort of disparity a second time over all defendants subject to racial bias, out of an approximate annual

105. *See* Greenwald et al., *supra* note 24, at 24 tbl.3 (showing that correlation between race attitude IAT (Black/White) and behavior in the meta-analysis is 0.236, which when squared equals 0.056, the percentage of variance explained).

106. *See* Rachlinski et al., *supra* note 86, at 1202; Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of 'Affirmative Action,'* 94 CALIF. L. REV. 1063, 1073 (2006).

107. The simulation is available at *Simulation: Cumulating Racial Disparities Through 5 Sequential Stages of Criminal Justice*, http://faculty.washington.edu/agg/UCLA_PULSE.simulation.xlsx (last visited May 15, 2012). If in the simulation the effect size of race discrimination at each step is increased from r=0.1 to r=0.2, which is less than the average effect size of race discrimination effects found in the 2009 meta-analysis, *see supra* note 105, the ratio of expected years of sentence would increase to 3.11 years (Black) to 1.01 years (White).

total of 20.7 million state criminal cases[108] and 70 thousand federal criminal cases.[109] And, as Robert Abelson has demonstrated, even small percentages of variance explained might amount to huge impacts.[110]

B. The Civil Path

Now, we switch from the criminal to the civil path and focus on the trajectory of an individual[111] bringing suit in a federal employment discrimination case—and on how implicit bias might affect this process. First, the plaintiff, who is a member of a protected class, believes that her employer has discriminated against her in some legally cognizable way.[112] Second, after exhausting necessary administrative remedies,[113] the plaintiff sues in federal court. Third, the defendant tries to terminate the case before trial via a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6). Fourth, should that fail, the defendant moves for summary judgment under FRCP 56. Finally, should that motion also fail, the jury renders a verdict after trial. Again, at each of these

108. *See* ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011), *available at* http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf.

109. *See* Rachlinski et al., *supra* note 86, at 1202.

110. *See* Robert P. Abelson, *A Variance Explanation Paradox: When a Little Is a Lot*, 97 PSYCHOL. BULL. 129, 132 (1985) (explaining that the batting average of a 0.320 hitter or a 0.220 hitter predicts only 1.4 percent of the variance explained for a single at-bat producing either a hit or no-hit). Some discussion of this appears in Kang & Lane, *supra* note 2, at 489.

111. We acknowledge that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), made it much more difficult to certify large classes in employment discrimination cases. *See id.* at 2553–54 (holding that statistical evidence of gender disparities combined with a sociologist's analysis that Wal-Mart's corporate culture made it vulnerable to gender bias was inadequate to show that members of the putative class had a common claim for purposes of class certification under FED. R. CIV. P. 23(b)).

112. For example, in a Title VII cause of action for disparate *treatment*, the plaintiff must demonstrate an adverse employment action "because of" the plaintiff's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). By contrast, in a Title VII cause of action for disparate *impact*, the plaintiff challenges facially neutral policies that produce a disparate impact on protected populations. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). We recognize that employment discrimination law is far more complex than presented here, with different elements for different state and federal causes of action.

113. The U.S. Equal Employment Opportunity Commission (EEOC) process is critical in practical terms because the failure to file a claim with the EEOC within the quite short statute of limitations (either 180 or 300 days depending on whether the jurisdiction has a state or local fair employment agency) or to timely file suit after resorting to the EEOC results in an automatic dismissal of the claim. However, neither EEOC inaction nor an adverse determination preclude private suit. *See* 2 CHARLES SULLIVAN & LAUREN WALTER, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 12.03[B], at 672 (4th ed. 2012).

stages,[114] implicit biases could potentially influence the outcome. To maintain a manageable scope of analysis, we focus on employer discrimination, pretrial adjudication, and jury verdict.

1. Employer Discrimination

For many, the most interesting question is whether implicit bias helped cause the employer to discriminate against the plaintiff. There are good reasons to think that some negative employment actions are indeed caused by implicit biases in what tort scholars call a "but-for" sense. This but-for causation may be legally sufficient since Title VII and most state antidiscrimination statutes require only a showing that the plaintiff was treated less favorably "because of" a protected characteristic, such as race or sex.[115] But our objective here is not to engage the doctrinal[116] and philosophical questions[117] of whether existing antidiscrimination laws do or should recognize implicit bias-actuated discrimination. We also do not address what sorts of evidence should be deemed admissible when plaintiffs attempt to make such a case at trial.[118] Although those questions are critically important, our

114. As explained when we introduced the Criminal Path, the number of stages identified is somewhat arbitrary. We could have listed more or fewer stages.

115. Section 703(a) of Title VII of the 1964 Civil Rights Act states that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

116. For discussion of legal implications, see Faigman, Dasgupta & Ridgeway, *supra* note 19; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Krieger & Fiske, *supra* note 2.

117. For a philosophical analysis, see Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010).

118. For example, there is considerable disagreement on whether an expert should be allowed to testify that a particular case is an instance of implicit bias. This issue is part of a much larger debate regarding scientists' ability to make reasonable inferences about an individual case from group data. John Monahan and Laurens Walker first pointed out that scientific evidence often comes to court at two different levels of generality, one general and one specific. *See* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). For instance, in a case involving the accuracy of an eyewitness identification, the general question might concern whether eyewitness identifications that are cross-racial are less reliable than same-race identifications; the specific question in the case would involve whether the cross-racial identification in this case was accurate. Interested in social science evidence, Monahan and Walker referred to this as "social framework" evidence, though their fundamental insight regarding frameworks applies to all scientific evidence. In the context of implicit biases, then, general research amply demonstrates the phenomenon in the population. However, in the courtroom, the issue typically concerns whether a particular decision or action was a product of implicit bias.

As a scientific matter, knowing that a phenomenon exists in a population does not necessarily mean that a scientist can reliably say that it was manifest in a particular case. This has led to a debate as to

task is more limited—to give an empirical account of how implicit bias may potentially influence a civil litigation trajectory.

Our belief that implicit bias causes some employment discrimination is based on the following evidence. First, tester studies in the field—which involve sending identical applicants or applications except for some trait, such as race or gender—have generally uncovered discrimination. According to a summary by Mark Bendick and Ana Nunes, there have been "several dozen testing studies" in the past two decades, in multiple countries, focusing on discrimination against various demographic groups (including women, the elderly, and racial minorities).[119] These studies consistently reveal typical "net rates of discrimination" that range from 20–40 percent.[120] In other words, in 20–40 percent of cases, employers treat subordinated groups (for example, racial minorities) worse than privileged groups (for example, Whites) even though the testers were carefully controlled to be identically qualified.

Second, although tester studies do not distinguish between explicit versus implicit bias, various laboratory experiments have found implicit bias correlations with discriminatory evaluations. For example, Laurie Rudman and Peter Glick demonstrated that in certain job conditions, participants treated a self-promoting and competent woman, whom the researchers termed "agentic," worse than an

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whether experts should be limited to testifying only to the general phenomenon or should be allowed to opine on whether a particular case is an instance of the general phenomenon. This is a complicated issue and scholars have weighed in on both sides. For opposition to the use of expert testimony that a specific case is an instance of implicit bias, see Faigman, Dasgupta & Ridgeway, *supra* note 19, at 1394 ("The research . . . does not demonstrate that an expert can validly determine whether implicit bias caused a specific employment decision."); and John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1719 (2008) ("[Testimony] in which the expert witness explicitly linked general research findings on gender discrimination to specific factual conclusions . . . exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by both the original and revised proposal of what constitutes 'social framework' evidence."). For advancement of allowing expert testimony that a particular case is an instance of some general phenomenon, see Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Proceedings*, 83 TEMPLE L. REV. 867, 876 (2011) ("Qualified social scientists who provide general, relevant knowledge and apply ordinary scientific reasoning may offer informal opinion about the individual case, but probabilistically.").

In the end, lawyers may be able to work around this dispute by using an expert to provide social framework evidence that identifies particular attributes that exacerbate biased decisionmaking, then immediately calling up another witness who is personally familiar with the defendant's work environment and asking that witness whether each of those particular attributes exists.

119. *See* Marc Bendick, Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. SOC. ISSUES (forthcoming 2012), *available at* http://www.bendickegan.com/pdf/Sent_to_JSI_Feb_27_2010.pdf.

120. *Id.* (manuscript at 15).

equally agentic man.[121] When the job description explicitly required the employee to be cooperative and to work well with others, participants rated the agentic female less hirable than the equally agentic male.[122] Probing deeper, the researchers identified that the participants penalized the female candidate for lack of social skills, not incompetence.[123] Explicit bias measures did not correlate with the rankings; however, an implicit gender stereotype (associating women as more communal than agentic)[124] did correlate negatively with the ratings for social skills. In other words, the higher the implicit gender stereotype, the lower the social skills evaluation.[125]

Third, field experiments have provided further confirmation under real-world conditions. The studies by Marianne Bertrand and Sendhil Mullainathan demonstrating discrimination in callbacks because of the names on comparable resumes have received substantial attention in the popular press as well as in law reviews.[126] These studies found that for equally qualified—indeed, otherwise identical candidates, firms called back "Emily" more often than "Lakisha."[127] Less attention has been paid to Dan-Olof Rooth's extensions of this work, which found similar callback discrimination but also found correlations between implicit stereotypes and the discriminatory behavior.[128] Rooth has found these correlations

121. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757 (2001). Agentic qualities were signaled by a life philosophy essay and canned answers to a videotaped interview that emphasized self-promotion and competence. *See id.* at 748. Agentic candidates were contrasted with candidates whom the researchers labeled "androgynous"—they also demonstrated the characteristics of interdependence and cooperation. *Id.*

122. The difference was $M=2.84$ versus $M=3.52$ on a 5 point scale ($p<0.05$). *See id.* at 753. No gender bias was shown when the job description was ostensibly masculine and did not call for cooperative behavior. Also, job candidates that were engineered to be androgynous—in other words, to show both agentic and cooperative traits—were treated the same regardless of gender. *See id.*

123. *See id.* at 753–54.

124. The agentic stereotype was captured by word stimuli such as "independent," "autonomous," and "competitive." The communal stereotype was captured by words such as "communal," "cooperative," and "kinship." *See id.* at 750.

125. *See id.* at 756 ($r=-0.49$, $p<0.001$). For further description of the study in the law reviews, see Kang, *supra* note 46, at 1517–18.

126. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004). A search of the TP-ALL database in Westlaw on December 10, 2011 revealed ninety-six hits.

127. *Id.* at 992.

128. Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECON. 523 (2010) (finding that implicit stereotypes, as measured by the IAT, predicted differential callbacks of Swedish-named versus Arab-Muslim-named resumes). An increase of one standard deviation in implicit stereotype produced almost a 12 percent decrease in the probability that an Arab/Muslim candidate received an interview. *See id.*

with not only implicit stereotypes about ethnic groups (Swedes versus Arab-Muslims) but also implicit stereotypes about the obese.[129]

Because implicit bias in the *courtroom* is our focus, we will not attempt to offer a comprehensive summary of the scientific research as applied to the implicit bias in the *workplace*.[130] We do, however, wish briefly to highlight lines of research—variously called "constructed criteria," "shifting standards," or "casuistry"—that emphasize the *malleability of merit*. We focus on this work because it has received relatively little coverage in the legal literature and may help explain how complex decisionmaking with multiple motivations occurs in the real world.[131] Moreover, this phenomenon may influence not only the defendant (accused of discrimination) but also the jurors who are tasked to judge the merits of the plaintiff's case.

Broadly speaking, this research demonstrates that people frequently engage in motivated reasoning[132] in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like—a decision that may well be influenced by implicit factors—and then justify that choice by molding our merit standards accordingly.

We can make this point more concrete. In one experiment, Eric Luis Uhlmann and Geoffrey Cohen asked participants to evaluate two finalists for police chief—one male, the other female.[133] One candidate's profile signaled *book smart*, the other's profile signaled *streetwise*, and the experimental design varied which profile attached to the woman and which to the man. Regardless of which attributes the male candidate featured, participants favored the male candidate and articulated their hiring criteria accordingly. For example, education (book

129. Jens Agerström & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790 (2011) (finding that hiring managers (N=153) holding more negative IAT-measured automatic stereotypes about the obese were less likely to invite an obese applicant for an interview).

130. Thankfully, many of these studies have already been imported into the legal literature. For a review of the science, see Kang & Lane, *supra* note 2, at 484–85 (discussing evidence of racial bias in how actual managers sort resumes and of correlations between implicit biases, as measured by the IAT, and differential callback rates).

131. One recent exception is Rich, *supra* note 25.

132. For discussion of motivated reasoning in organizational contexts, see Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1029–34 (2005). Motivated reasoning is "the process through which we assimilate information in a self-serving manner." *Id.* at 1029.

133. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005).

smarts) was considered more important when the man had it.[134] Surprisingly, even the attribute of being family oriented and having children was deemed more important when the man had it.[135]

Michael Norton, Joseph Vandello, and John Darley have made similar findings, again in the domain of gender.[136] Participants were put in the role of manager of a construction company who had to hire a high-level employee. One candidate's profile signaled more education; the other's profile signaled more experience. Participants ranked these candidates (and three other filler candidates), and then explained their decisionmaking by writing down "what was most important in determining [their] decision."[137]

In the control condition, the profiles were given with just initials (not full names) and thus the test subjects could not assess their gender. In this condition, participants preferred the higher educated candidate 76 percent of the time.[138] In the two experimental conditions, the profiles were given names that signaled gender, with the man having higher education in one condition and the woman having higher education in the other. When the man had higher education, the participants preferred him 75 percent of the time. In sharp contrast, when the woman had higher education, only 43 percent of the participants preferred her.[139]

The discrimination itself is not as interesting as *how* the discrimination was justified. In the control condition and the man-has-more-education condition, the participants ranked education as more important than experience about half the time (48 percent and 50 percent).[140] By contrast, in the woman-has-more-education condition, only 22 percent ranked education as more important than experience.[141] In other words, what counted as merit was redefined, in real time, to justify hiring the man.

Was this weighting done consciously, as part of a strategy to manipulate merit in order to provide a cover story for decisionmaking caused and motivated by explicit bias? Or, was merit refactored in a more automatic, unconscious, dissonance-reducing rationalization, which would be more consistent with an implicit bias story? Norton and colleagues probed this causation question in another series of

134. *See id.* (M=8.27 with education versus M=7.07 without education, on a 11 point scale; p=0.006; d=1.02).
135. *See id.* (M=6.21 with family traits versus 5.08 without family traits; p=0.05; d=0.86).
136. Michael I. Norton et al., *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004).
137. *Id.* at 820.
138. *Id.* at 821.
139. *Id.*
140. *Id.*
141. *Id.*

experiments, in the context of race and college admissions.[142] In a prior study, they had found that Princeton undergraduate students shifted merit criteria—the relative importance of GPA versus the number of AP classes taken—to select the Black applicant over the White applicant who shared the same cumulative SAT score.[143] To see whether this casuistry was explicit and strategic or implicit and automatic, they ran another experiment in which participants merely rated admissions criteria in the abstract without selecting a candidate for admission.

Participants were simply told that they were participating in a study examining the criteria most important to college admissions decisions. They were given two sample resumes to familiarize themselves with potential criteria. Both resumes had equivalent cumulative SAT scores, but differed on GPA (4.0 versus 3.6) versus number of AP classes taken (9 versus 6). Both resumes also disclosed the applicant's race. In one condition, the White candidate had the higher GPA (and fewer AP classes); in the other condition, the African American candidate had the higher GPA (and fewer AP classes).[144] After reviewing the samples, the participants had to rank order eight criteria in importance, including GPA, number of AP classes, SAT scores, athletic participation, and so forth.

In the condition with the Black candidate having the higher GPA, 77 percent of the participants ranked GPA higher in importance than number of AP classes taken. By contrast, when the White candidate had the higher GPA, only 63 percent of the participants ranked GPA higher than AP classes. This change in the weighting happened even though the participants did not expect that they were going to make an admissions choice or to justify that choice. Thus, these differences could not be readily explained in purely strategic terms, as methods for justifying a subsequent decision. According to the authors,

> [t]hese results suggest not only that it is possible for people to reweight criteria deliberately to justify choices but also that decisions made under such social constraints can impact information processing even prior to making a choice. This suggests that the bias we observed is not simply post hoc and strategic but occurs as an organic part of making decisions when social category information is present.[145]

142. Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 42 (2006).

143. *Id.* at 44.

144. *See id.*

145. *Id.* at 46–47. This does not, however, fully establish that these differences were the result of implicit views rather than explicit ones. Even if test subjects did not expect to have to make admissions determinations, they might consciously select criteria that they believed favored one group over another.

The ways that human decisionmakers may subtly adjust criteria in real time to modify their judgments of merit has significance for thinking about the ways that implicit bias may potentially influence employment decisions. In effect, bias can influence decisions in ways contrary to the standard and seemingly commonsensical model. The conventional legal model describes behavior as a product of discrete and identifiable motives. This research suggests, however, that implicit motivations might influence behavior and that we then rationalize those decisions after the fact. Hence, some employment decisions might be motivated by implicit bias but rationalized post hoc based on nonbiased criteria. This process of reasoning from behavior to motives, as opposed to the folk-psychology assumption that the arrow of direction is from motives to behavior, is, in fact, consistent with a large body of contemporary psychological research.[146]

2. Pretrial Adjudication: 12(b)(6)

As soon as a plaintiff files the complaint, the defendant will try to dismiss as many of the claims in the complaint as possible. Before recent changes in pleading, a motion to dismiss a complaint under FRCP 8 and FRCP 12(b)(6) was decided under the relatively lax standard of *Conley v. Gibson*.[147] Under *Conley*, all factual allegations made in the complaint were assumed to be true. As such, the court's task was simply to ask whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."[148]

Starting with *Bell Atlantic Corp. v. Twombly*,[149] which addressed complex antitrust claims of parallel conduct, and further developed in *Ashcroft v. Iqbal*,[150] which addressed civil rights actions based on racial and religious discrimination post-9/11, the U.S. Supreme Court abandoned the *Conley* standard. First, district courts must now throw out factual allegations made in the complaint if they are merely conclusory.[151] Second, courts must decide on the plausibility of the claim based on the information before them.[152] In *Iqbal*, the Supreme Court held that

146. *See generally* TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).
147. 355 U.S. 41 (1957).
148. *Id.* at 45–46.
149. 550 U.S. 544 (2007).
150. 129 S. Ct. 1937 (2009).
151. *Id.* at 1951.
152. *Id.* at 1950–52.

because of an "obvious alternative explanation"[153] of earnest national security response, purposeful racial or religious "discrimination is not a plausible conclusion."[154]

How are courts supposed to decide what is "Twom-bal"[155] plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information? According to the Court, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[156]

And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.[157]

Moreover, consider what the directive to rely on common sense means in light of social judgeability theory.[158] According to this theory, there are social rules that tell us when it is appropriate to judge someone. For example, suppose your fourth grade child told you that a new kid, Hannah, has enrolled in school and that she receives free lunches. Your child then asks you whether you think she is smart. You will probably decline to answer since you do not feel entitled to make that judgment. Without more probative information, you feel that you would only be crudely stereotyping her abilities based on her socioeconomic status. But what if the next day you volunteered in the classroom and spent twelve minutes observing

153. *Id.* (quoting *Twombly*, 550 U.S. 544) (internal quotation marks omitted).
154. *Id.* at 1952.
155. *See In re* Iowa Ready-Mix Concrete Antitrust Litig., No. C 10-4038-MWB, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (referring to a *Twombly-Iqbal* motion as "Twom-bal").
156. *Iqbal*, 129 S. Ct. at 1940.
157. These schemas also reflect cultural cognitions. *See generally* Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).
158. *See* Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCHOL. 48 (1994).

Hannah interacting with a teacher trying to solve problems? Would you then feel that you had enough individuating information to come to some judgment?

This is precisely what John Darley and Paget Gross tested in a seminal experiment in 1983.[159] When participants only received economic status information, they declined to evaluate Hannah's intelligence as a function of her economic class. However, when they saw a twelve-minute videotape of the child answering a battery of questions, participants felt credentialed to judge the girl, and they did so in a way that was consistent with stereotypes. What they did not realize was that the individuating information in the videotape was purposefully designed to be ambiguous. So participants who were told that Hannah was rich interpreted the video as confirmation that she was smart. By contrast, participants who were told that Hannah was poor interpreted the same video as confirmation that she was not so bright.[160]

Vincent Yzerbyt and colleagues, who call this phenomenon "social judgeability," have produced further evidence of this effect.[161] If researchers told you that a person is either an archivist or a comedian and then asked you twenty questions about this person regarding their degree of extroversion with the options of "True," "False," or "I don't know," how might you answer? What if, in addition, they manufactured an illusion that you were given individuating information—information about the specific individual and not just the category he or she belongs to—even though you actually did not receive any such information?[162] This is precisely what Yzerbyt and colleagues did in the lab.

They found that those operating under the illusion of individuating information were more confident in their answers in that they marked fewer questions with "I don't know."[163] They also found that those operating under the illusion gave more stereotype-consistent answers.[164] In other words, the illusion of being informed made the target judgeable. Because the participants, in fact, had received no such individuating information, they tended to judge the person in accordance with their schemas about archivists and comedians. Interestingly, "in the debriefings,

159. *See* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 22–23 (1983).

160. *See id.* at 24–25, 27–29.

161. *See* Yzerbyt et al., *supra* note 158.

162. This illusion was created by having participants go through a listening exercise, in which they were told to focus only on one speaker (coming through one ear of a headset) and ignore the other (coming through the other). They were later told that the speaker that they were told to ignore had in fact provided relevant individuating information. The truth was, however, that no such information had been given. *See id.* at 50.

163. *See id.* at 51 (M=5.07 versus 10.13; p<0.003).

164. *See id.* (M=9.97 versus 6.30, out of 1 to 20 point range; p<0.006).

subjects reported that they did not judge the target on the basis of a stereotype; they were persuaded that they had described a real person qua person."[165] Again, it is possible that they were concealing their explicitly embraced bias about archivists and comedians from probing researchers, but we think that it is more probable that implicit bias explains these results.

Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas. Just as Yzerbyt's illusion of individuating information entitled participants to judge in the laboratory, the express command of the Supreme Court may entitle judges to judge in the courtroom when they lack any well-developed basis to do so.

There are no field studies to test whether biases, explicit or implicit, influence how actual judges decide motions to dismiss actual cases. It is not clear that researchers could ever collect such information. All that we have are some preliminary data about dismissal rates before and after *Iqbal* that are consistent with our analysis. Again, since *Iqbal* made dismissals easier, we should see an increase in dismissal rates across the board.[166] More relevant to our hypothesis is whether certain types of cases experienced differential changes in dismissal rates. For instance, we would expect *Iqbal* to generate greater increases in dismissal rates for race discrimination claims than, say, contract claims. There are a number of potential reasons for this: One reason is that judges are likely to have stronger biases that plaintiffs in the former type of case have less valid claims than those in the latter. Another reason is that we might expect some kinds of cases

165. *Id.*

166. In the first empirical study of *Iqbal*, Hatamyar sampled 444 cases under *Conley* (from May 2005 to May 2007) and 173 cases under *Iqbal* (from May 2009 to August 2009). *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 597 (2010). She found that the general rate of complaint dismissal rose from 46 percent to 56 percent. *See id.* at 602 tbl.2. However, this finding was not statistically significant under a Pearson chi-squared distribution test examining the different dismissal rates for *Conley*, *Twombly*, and *Iqbal* for three results: grant, mixed, and deny.

to raise more significant concerns about asymmetric information than do others. In contracts disputes, both parties may have good information about most of the relevant facts even prior to discovery. In employment discrimination cases, plaintiffs may have good hunches about how they have been discriminated against, but prior to discovery they may not have access to the broad array of information in the employer's possession that may be necessary to turn the hunch into something a judge finds plausible. Moreover, these two reasons potentially interact: the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge's assessment in the absence of a well-developed evidentiary record.

Notwithstanding the lack of field studies on these issues, there is some evidentiary support for these differential changes in dismissal rates. For example, Patricia Hatamayr sorted a sample of cases before and after *Iqbal* into six major categories: contracts, torts, civil rights, labor, intellectual property, and all other statutory cases.[167] She found that in contract cases, the rate of dismissal did not change much from *Conley* (32 percent) to *Iqbal* (32 percent).[168] By contrast, for Title VII cases, the rate of dismissal increased from 42 percent to 53 percent.[169] Victor Quintanilla has collected more granular data by counting not Title VII cases generally but federal employment discrimination cases filed specifically by Black plaintiffs both before and after *Iqbal*.[170] He found an even larger jump. Under the *Conley* regime, courts granted only 20.5 percent of the motions to dismiss such cases. By contrast, under the *Iqbal* regime, courts granted 54.6 percent of them.[171] These data lend themselves to multiple interpretations and suffer from various confounds. So at this point, we can make only modest claims. We merely suggest that the dismissal rate data are consistent with our hypothesis that *Iqbal*'s plausibility standard poses a risk of increasing the impact of implicit biases at the 12(b)(6) stage.

If, notwithstanding the plausibility-based pleading requirements, the case gets past the motion to dismiss, then discovery will take place, after which defendants will seek summary judgment under FRCP 56. On the one hand, this procedural posture is less subject to implicit biases than the motion to dismiss because more individuating information will have surfaced through discovery. On the

167. *See id.* at 591–93.
168. *See id.* at 630 tbl.D.
169. *See id.*
170. *See* Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal's *Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011). Quintanilla counted both Title VII and 42 U.S.C. § 1981 cases.
171. *See id.* at 36 tbl.1 ($p<0.000$).

other hand, the judge still has to make a judgment call on whether any "genuine dispute as to any material fact"[172] remains. Similar decisionmaking dynamics are likely to be in play as we saw in the pleading stage, for a significant quantum of discretion remains. Certainly the empirical evidence that demonstrates how poorly employment discrimination claims fare on summary judgment is not inconsistent with this view, though, to be sure, myriad other explanations of these differences are possible (including, for example, doctrinal obstacles to reaching a jury).[173]

3. Jury Verdict

If the case gets to trial, the parties will introduce evidence on the merits of the claim. Sometimes the evidence will be physical objects, such as documents, emails, photographs, voice recordings, evaluation forms, and the like. The rest of it will be witness or expert testimony, teased out and challenged by lawyers on both sides. Is there any reason to think that jurors might interpret the evidence in line with their biases? In the criminal trajectory, we already learned of juror bias via meta-analyses as well as correlations with implicit biases. Unfortunately, we lack comparable studies in the civil context. What we offer are two sets of related arguments and evidence that speak to the issue: motivation to shift standards and performer preference.

a. Motivation to Shift Standards

Above, we discussed the potential malleability of merit determinations when judgments permit discretion and reviewed how employer defendants might shift standards and reweight criteria when evaluating applicants and employees. Here, we want to recognize that a parallel phenomenon may affect juror decisionmaking. Suppose that a particular juror is White and that he identifies strongly with his Whiteness. Suppose further that the defendant is White and is being sued by a racial minority. The accusation of illegal and immoral behavior threatens the

172. FED R. CIV. P. 56(a).

173. *See, e.g.*, Charlotte L. Lanvers, *Different Federal Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & POL'Y 381, 395 (2007); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch. Research Paper No. 08-022, 2008), *available at* http://ssrn.com/abstract=1138373 (finding that civil rights cases, and particularly employment discrimination cases, have a consistently higher summary judgment rate than non–civil rights cases).

status of the juror's racial ingroup. Anca Miron, Nyla Branscombe, and Monica Biernat have demonstrated that this threat to the ingroup can motivate people to shift standards in a direction that shields the ingroup from ethical responsibility.[174]

Miron and colleagues asked White undergraduates at the University of Kansas to state how strongly they identified with America.[175] Then they were asked various questions about America's relationship to slavery and its aftermath. These questions clumped into three categories (or constructs): judgments of harm done to Blacks,[176] standards of injustice,[177] and collective guilt.[178] Having measured these various constructs, the researchers looked for relationships among them. Their hypothesis was that the greater the self-identification with America, the higher the standards would be before being willing to call America racist or otherwise morally blameworthy (that is, the participants would set higher confirmatory standards). They found that White students who strongly identified as American set higher standards for injustice (that is, they wanted more evidence before calling America unjust);[179] they thought less harm was done by slavery;[180] and, as a result, they felt less collective guilt compared to other White students who identified less with America.[181] In other words, their attitudes toward America were correlated with the quantum of evidence they required to reach a judgment that America had been unjust.

In a subsequent study, Miron et al. tried to find evidence of causation, not merely correlation. They did so by experimentally manipulating national identification by asking participants to recount situations in which they felt similar to other Americans (evoking greater identification with fellow Americans) or different from other Americans (evoking less identification with fellow Americans).[182]

174. Anca M. Miron, Nyla R. Branscombe & Monica Biernat, *Motivated Shifting of Justice Standards*, 36 PERSONALITY SOC. PSYCHOL. BULL. 768, 769 (2010).

175. The participants were all American citizens. The question asked was, "I feel strong ties with other Americans." *Id.* at 771.

176. A representative question was, "How much damage did Americans cause to Africans?" on a "very little" (1) to "very much" (7) Likert scale. *Id.* at 770.

177. "Please indicate what percentage of Americans would have had to be involved in causing harm to Africans for you to consider the past United States a racist nation" on a scale of 0–10 percent, 10–25 percent, up to 90–100 percent. *Id.* at 771.

178. "I feel guilty for my nation's harmful past actions toward African Americans" on a "strongly disagree" (1) to "strongly agree" (9) Likert scale. *Id.*

179. *See id.* at 772 tbl.1 (r=0.26, p<0.05).

180. *See id.* (r=–0.23, p<0.05).

181. *See id.* (r=–0.21, p<0.05). Using structural equation modeling, the researchers found that standards of injustice fully mediated the relationship between group identification and judgments of harm; also, judgments of harm fully mediated the effect of standards on collective guilt. *See id.* at 772–73.

182. The manipulation was successful. *See id.* at 773 (p<0.05, d=0.54.).

Those who were experimentally made to feel *less* identification with America subsequently reported very different standards of justice and collective guilt compared to others made to feel *more* identification with America. Specifically, participants in the low identification condition set lower standards for calling something unjust, they evaluated slavery's harms as higher, and they felt more collective guilt. By contrast, participants in the high identification condition set higher standards for calling something unjust (that is, they required more evidence), they evaluated slavery's harms as less severe, and they felt less guilt.[183] In other words, by experimentally manipulating how much people identified with their ingroup (in this case, American), researchers could shift the justice standard that participants deployed to judge their own ingroup for harming the outgroup.

Evidentiary standards for jurors are specifically articulated (for example, "preponderance of the evidence") but substantively vague. The question is how a juror operationalizes that standard—just how much evidence does she require for believing that this standard has been met? These studies show how our assessments of evidence—of how much is enough—are themselves potentially malleable. One potential source of malleability is, according to this research, a desire (most likely implicit) to protect one's ingroup status. If a juror strongly identifies with the defendant employer as part of the same ingroup—racially or otherwise—the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff. In other words, jurors who implicitly perceive an ingroup threat may require more evidence to be convinced of the defendant's harmful behavior than they would in an otherwise identical case that did not relate to their own ingroup. Ingroup threat is simply an example of this phenomenon; the point is that implicit biases may influence jurors by affecting how they implement ambiguous decision criteria regarding both the quantum of proof and how they make inferences from ambiguous pieces of information.

b. Performer Preference

Jurors will often receive evidence and interpretive cues from performers at trial, by which we mean the cast of characters in the courtroom who jurors see, such as the judge, lawyers, parties, and witnesses. These various performers are playing roles of one sort or another. And, it turns out that people tend to have stereotypes about the ideal employee or worker that vary depending on the segment of the labor

183. In standards for injustice, M=2.60 versus 3.39; on judgments of harm, M=5.82 versus 5.42; on collective guilt, M=6.33 versus 4.60. All differences were statistically significant at p=0.05 or less. *See id.*

market. For example, in high-level professional jobs and leadership roles, the supposedly ideal employee is often a White man.[184] When the actual performer does not fit the ideal type, people may evaluate the performance more negatively.

One study by Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran, and Gary Blasi found just such performer preference with respect to lawyers, as a function of race.[185] Kang and colleagues measured the explicit and implicit beliefs about the ideal lawyer held by jury-eligible participants from Los Angeles. The researchers were especially curious whether participants had implicit stereotypes linking the ideal litigator with particular racial groups (White versus Asian American). In addition to measuring their biases, the researchers had participants evaluate two depositions, which they heard via headphones and simultaneously read on screen. At the beginning of each deposition, participants were shown for five seconds a picture of the litigator conducting the deposition on a computer screen accompanied by his name. The race of the litigator was varied by name and photograph. Also, the deposition transcript identified who was speaking, which meant that participants repeatedly saw the attorneys' last names.[186]

The study discovered the existence of a moderately strong implicit stereotype associating litigators with Whiteness (IAT D=0.45);[187] this stereotype correlated with more favorable evaluations of the White lawyer (ingroup favoritism since 91% of the participants were White) in terms of his competence ($r=0.32$, $p<0.01$), likeability ($r=0.31$, $p<0.01$), and hireability ($r=0.26$, $p<0.05$).[188] These results were confirmed through hierarchical regressions. To appreciate the magnitude of the effect sizes, imagine a juror who has no explicit stereotype but a large implicit stereotype (IAT D=1) that the ideal litigator is White. On a 7-point scale, this juror would favor a White lawyer over an identical Asian American

184. *See, e.g.*, Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573 (2002); Alice H. Eagly, Steven J. Karau & Mona G. Makhijani, *Gender and the Effectiveness of Leaders: A Meta-Analysis*, 117 PSYCHOL. BULL. 125 (1995); *see also* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 213–17 (2000) (discussing how conceptions of merit are designed around masculine norms); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007).

185. *See* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

186. *See id.* at 892–99 (describing method and procedure, and identifying attorney names as "William Cole" or "Sung Chang").

187. *See id.* at 900. They also found strong negative implicit attitudes against Asian Americans (IAT D=0.62). *See id.*

188. *Id.* at 901 tbl.3.

lawyer 6.01 to 5.65 in terms of competence, 5.57 to 5.27 in terms of likability, and 5.65 to 4.92 in terms of hireability.[189]

This study provides some evidence that potential jurors' implicit stereotypes cause racial discrimination in judging attorney performance of basic depositions. What does this have to do with how juries might decide employment discrimination cases? Of course, minority defendants do not necessarily hire minority attorneys. That said, it is possible that minorities do hire minority attorneys at somewhat higher rates than nonminorities. But even more important, we hypothesize that similar processes might take place with how jurors evaluate not only attorneys but also both parties and witnesses, as they perform their various roles at trial. To be sure, this study does not speak directly to credibility assessments, likely to be of special import at trial, but it does at least suggest that implicit stereotypes may affect judgment of performances in the courtroom.

We concede that our claims about implicit bias influencing jury decisionmaking in civil cases are somewhat speculative and not well quantified. Moreover, in the real world, certain institutional processes may make both explicit and implicit biases less likely to translate into behavior. For example, jurors must deliberate with other jurors, and sometimes the jury features significant demographic diversity, which seems to deepen certain types of deliberation.[190] Jurors also feel accountable[191] to the judge, who reminds them to adhere to the law and the merits. That said, for reasons already discussed, it seems implausible to think that current practices within the courtroom somehow magically burn away all jury biases, especially implicit biases of which jurors and judges are unaware. That is why we seek improvements based on the best understanding of how people actually behave.

Thus far, we have canvassed much of the available evidence describing how implicit bias may influence decisionmaking processes in both criminal and civil cases. On the one hand, the research findings are substantial and robust. On the other hand, they provide only imperfect knowledge, especially about what is actually happening in the real world. Notwithstanding this provisional and limited knowledge, we strongly believe that these studies, in aggregate, suggest that implicit bias in the trial process is a problem worth worrying about. What, then, can be done? Based on what we know, how might we intervene to improve the trial process and potentially vaccinate decisionmakers against, or at least reduce, the influence of implicit bias?

189. These figures were calculated using the regression equations in *id.* at 902 n.25, 904 n.27.

190. *See infra* text accompanying notes 241–245.

191. *See, e.g.*, Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 267–70 (1999).

III. INTERVENTIONS

Before we turn explicitly to interventions, we reiterate that there are many causes of unfairness in the courtroom, and our focus on implicit bias is not meant to deny other causes. In Part II, we laid out the empirical case for why we believe that implicit biases influence both criminal and civil case trajectories. We now identify interventions that build on an overlapping scientific and political consensus. If there are cost-effective interventions that are likely to decrease the impact of implicit bias in the courtroom, we believe they should be adopted at least as forms of experimentation.

We are mindful of potential costs, including implementation and even overcorrection costs. But we are hopeful that these costs can be safely minimized. Moreover, the potential benefits of these improvements are both substantive and expressive. Substantively, the improvements may increase actual fairness by decreasing the impact of implicit biases; expressively, they may increase the appearance of fairness by signaling the judiciary's thoughtful attempts to go beyond cosmetic compliance.[192] Effort is not always sufficient, but it ought to count for something.

A. Decrease the Implicit Bias

If implicit bias causes unfairness, one intervention strategy is to decrease the implicit bias itself. It would be delightful if explicit refutation would suffice. But abstract, global self-commands to "Be fair!" do not much change implicit social cognitions. How then might we alter implicit attitudes or stereotypes about various social groups?[193] One potentially effective strategy is to expose ourselves to countertypical associations. In rough terms, if we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.

192. In a 1999 survey by the National Center for State Courts, 47 percent of the American people doubted that African Americans and Latinos receive equal treatment in state courts; 55 percent doubted that non–English speaking people receive equal treatment. The appearance of fairness is a serious problem. *See* NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 37 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf. The term "cosmetic compliance" comes from Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

193. For analysis of the nature versus nurture debate regarding implicit biases, see Jerry Kang, *Bits of Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 132 (Justin D. Levinson & Robert J. Smith eds., 2012).

These exposures can come through direct contact with countertypical people. For example, Nilanjana Dasgupta and Shaki Asgari tracked the implicit gender stereotypes held by female subjects both before and after a year of attending college.[194] One group of women attended a year of coed college; the other group attended a single-sex college. At the start of their college careers, the two groups had comparable amounts of implicit stereotypes against women. However, one year later, those who attended the women's college on average expressed no gender bias, whereas the average bias of those who attended the coed school increased.[195] By carefully examining differences in the two universities' environments, the researchers learned that it was exposure to countertypical women in the role of professors and university administrators that altered the implicit gender stereotypes of female college students.[196]

Nilanjana Dasgupta and Luis Rivera also found correlations between participants' self-reported numbers of gay friends and their negative implicit attitudes toward gays.[197] Such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom (staff and law clerks), our residential neighborhoods, and friendship circles. That said, any serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political. Moreover, these interventions might produce only modest results. For instance, Rachlinski et al. found that judges from an eastern district that featured approximately half White judges and half Black judges had "only slightly smaller" implicit biases than the judges of a western jurisdiction, which contained only two Black judges (out of forty-five total district court judges, thirty-six of them being White).[198] In addition, debiasing exposures would have to compete against the other daily real-life exposures in the courtroom that rebias. For instance, Joshua Correll found that police officers who worked in areas with high minority demographics and violent crime showed more shooter bias.[199]

If increasing direct contact with a diverse but countertypical population is not readily feasible, what about vicarious contact, which is mediated by images,

194. *See* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649–54 (2004).

195. *See id.* at 651.

196. *See id.* at 651–53.

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

198. *See* Rachlinski et al., *supra* note 86, at 1227.

199. *See* Correll et al., *supra* note 51, at 1014 ("We tentatively suggest that these environments may reinforce cultural stereotypes, linking Black people to the concept of violence.").

videos, simulations, or even imagination and which does not require direct face-to-face contact?[200] Actually, the earliest studies on the malleability of implicit bias pursued just these strategies. For instance, Nilanjana Dasgupta and Anthony Greenwald showed that participants who were exposed vicariously to countertypical exemplars in a history questionnaire (for example, Black figures to whom we tend to have positive attitudes, such as Martin Luther King Jr., and White figures to whom we tend to have negative attitudes, such as Charles Manson) showed a substantial decrease in negative implicit attitudes toward African Americans.[201] These findings are consistent with work done by Irene Blair, who has demonstrated that brief mental visualization exercises can also change scores on the IAT.[202]

In addition to exposing people to famous countertypical exemplars, implicit biases may be decreased by juxtaposing ordinary people with countertypical settings. For instance, Bernard Wittenbrink, Charles Judd, and Bernadette Park examined the effects of watching videos of African Americans situated either at a convivial outdoor barbecue or at a gang-related incident.[203] Situating African Americans in a positive setting produced lower implicit bias scores.[204]

There are, to be sure, questions about whether this evidence directly translates into possible improvements for the courtroom.[205] But even granting numerous caveats, might it not be valuable to engage in some experimentation? In chambers and the courtroom buildings, photographs, posters, screen savers, pamphlets, and decorations ought to be used that bring to mind countertypical exemplars or associations for participants in the trial process. Since judges and jurors are differently situated, we can expect both different effects and implementation strategies. For example, judges would be exposed to such vicarious displays regularly as a feature of their workplace environment. By contrast, jurors would be exposed only

200. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1166–67 (2000) (comparing vicarious with direct experiences).

201. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001). The IAT effect changed nearly 50 percent as compared to the control (IAT effect M=78ms versus 174ms, p=0.01) and remained for over twenty-four hours.

202. Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001). *See generally* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (literature review).

203. *See* Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815, 818–19 (2001).

204. *Id.* at 819.

205. How long does the intervention last? How immediate does it have to be? How much were the studies able to ensure focus on the positive countertypical stimulus as opposed to in a courtroom where these positives would be amidst the myriad distractions of trial?

during their typically brief visit to the court.[206] Especially for jurors, then, the goal is not anything as ambitious as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.[207]

To repeat, we recognize the limitations of our recommendation. Recent research has found much smaller debiasing effects from vicarious exposure than originally estimated.[208] Moreover, such exposures must compete against the flood of typical, schema-consistent exposures we are bombarded with from mass media. That said, we see little costs to these strategies even if they appear cosmetic. There is no evidence, for example, that these exposures will be so powerful that they will overcorrect and produce net bias against Whites.

B. Break the Link Between Bias and Behavior

Even if we cannot remove the bias, perhaps we can alter decisionmaking processes so that these biases are less likely to translate into behavior. In order to keep this Article's scope manageable, we focus on the two key players in the courtroom: judges and jurors.[209]

1. Judges

a. Doubt One's Objectivity

Most judges view themselves as objective and especially talented at fair decisionmaking. For instance, Rachlinski et al. found in one survey that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in "avoid[ing] racial prejudice in decisionmaking"[210] relative to other judges attending the same conference. That is, obviously, mathematically impossible.

206. *See* Kang, *supra* note 46, at 1537 (raising the possibility of "debiasing booths" in lobbies for waiting jurors).

207. Rajees Sritharan & Bertram Gawronski, *Changing Implicit and Explicit Prejudice: Insights From the Associative-Propositional Evaluation Model*, 41 SOC. PSYCHOL. 113, 118 (2010).

208. *See* Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 141 (2010) (finding an effect size that was approximately 70 percent smaller than the original Dasgupta and Greenwald findings, *see supra* note 201).

209. Other important players obviously include staff, lawyers, and police. For a discussion of the training literature on the police and shooter bias, see Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 46–48 (2010).

210. *See* Rachlinski et al., *supra* note 86, at 1225.

(One is reminded of Lake Wobegon, where all of the children are above average.) In another survey, 97.2 percent of those administrative agency judges surveyed put themselves in the top half in terms of avoiding bias, again impossible.[211] Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases. In one study, they had participants choose either the candidate profile labeled "Gary" or the candidate profile labeled "Lisa" for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organization skills but weak interpersonal skills.[212] Half the participants were primed to view themselves as objective.[213] The other half were left alone as control.

Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations.[214] But those who were manipulated to think of themselves as objective evaluated the male candidate higher (M=5.06 versus 3.75, p=0.039, d=0.76).[215] Interestingly, this was not due to a malleability of merit effect, in which the participants reweighted the importance of either organizational skills or interpersonal skills in order to favor the man. Instead, the discrimination was caused by straight-out disparate evaluation, in which the Gary profile was rated as more interpersonally skilled than the Lisa profile by those primed to think themselves objective (M=3.12 versus 1.94, p=0.023, d=0.86).[216] In short, thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe.

But is such a suggestion based on wishful thinking? Is there any evidence that education and reminders can actually help? There is some suggestive evidence from Emily Pronin, who has carefully studied the bias blindspot—the belief

211. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

212. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007).

213. This was done simply by asking participants to rate their own objectivity. Over 88 percent of the participants rated themselves as above average on objectivity. *See id.* at 209. The participants were drawn from a lay sample (not just college students).

214. *See id.* at 210–11 (M=3.24 for male candidate versus 4.05 for female candidate, p=0.21).

215. *See id.* at 211.

216. *See id.* Interestingly, the gender of the participants mattered. Female participants did not show the objectivity priming effect. *See id.*

that others are biased but we ourselves are not.[217] In one study, Emily Pronin and Matthew Kugler had a control group of Princeton students read an article from *Nature* about environmental pollution. By contrast, the treatment group read an article allegedly published in *Science* that described various nonconscious influences on attitudes and behaviors.[218] After reading an article, the participants were asked about their own objectivity as compared to their university peers. Those in the control group revealed the predictable bias blindspot and thought that they suffered from less bias than their peers.[219] By contrast, those in the treatment group did not believe that they were more objective than their peers; moreover, their more modest self-assessments differed from those of the more confident control group.[220] These results suggest that learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.

b. Increase Motivation

Tightly connected to doubting one's objectivity is the strategy of increasing one's motivation to be fair.[221] Social psychologists generally agree that motivation is an important determinant of checking biased behavior.[222] Specific to implicit bias, Nilanjana Dasgupta and Luis Rivera found that participants who were consciously motivated to be egalitarian did not allow their antigay implicit attitudes to translate into biased behavior toward a gay person. By contrast, for those lacking such motivation, strong antigay implicit attitudes predicted more biased behavior.[223]

A powerful way to increase judicial motivation is for judges to gain actual scientific knowledge about implicit social cognitions. In other words, judges should be internally persuaded that a genuine problem exists. This education and

217. *See generally* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007).

218. *See* Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 574 (2007). The intervention article was 1643 words long, excluding references. *See id.* at 575.

219. *See id.* at 575 (M=5.29 where 6 represented the same amount of bias as peers).

220. *See id.* For the treatment group, their self-evaluation of objectivity was M=5.88, not statistically significantly different from the score of 6, which, as noted previously, meant having the same amount of bias as peers. Also, the self-reported objectivity of the treatment group (M=5.88) differed from the control group (M=5.29) in a statistically significant way, p=0.01. *See id.*

221. For a review, see Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009).

222. *See* Russell H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude–Behavior Processes*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 97 (Shelly Chaiken & Yaacov Trope eds., 1999).

223. *See* Dasgupta & Rivera, *supra* note 197, at 275.

awareness can be done through self-study as well as more official judicial education. Such education is already taking place, although mostly in an ad hoc fashion.[224] The most organized intervention has come through the National Center for State Courts (NCSC). The NCSC organized a three-state pilot project in California, Minnesota, and North Dakota to teach judges and court staff about implicit bias.[225] It used a combination of written materials, videos, resource websites, Implicit Association Tests, and online lectures from subject-matter experts to provide the knowledge. Questionnaires completed before and after each educational intervention provided an indication of program effectiveness.

Although increased knowledge of the underlying science is a basic objective of an implicit bias program, the goal is not to send judges back to college for a crash course in Implicit Psychology 101. Rather, it is to persuade judges, on the merits, to recognize implicit bias as a potential problem, which in turn should increase motivation to adopt sensible countermeasures. Did the NCSC projects increase recognition of the problem and encourage the right sorts of behavioral changes? The only evidence we have is limited: voluntary self-reports subject to obvious selection biases.

For example, in California, judicial training emphasized a documentary on the neuroscience of bias.[226] Before and after watching the documentary, participants were asked to what extent they thought "a judge's decisions and court staff's interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups."[227] Before viewing the documentary, approximately 16 percent chose "rarely-never," 55 percent chose "occasionally," and 30 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 20 percent chose "occasionally," and 79 percent chose "most-all."[228]

Relatedly, participants were asked whether they thought implicit bias could have an impact on behavior even if a person lacked explicit bias. Before viewing the documentary, approximately 9 percent chose "rarely-never," 45 percent chose "occasionally," and 45 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 14 percent chose "occasionally," and 84 percent

224. Several of the authors of this Article have spoken to judges on the topic of implicit bias.

225. *See* PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), *available at* http://www.ncsc.org/IBReport.

226. The program was broadcast on the Judicial Branch's cable TV station and made available streaming on the Internet. *See The Neuroscience and Psychology of Decisionmaking*, ADMIN. OFF. COURTS EDUC. DIV. (Mar. 29, 2011), http://www2.courtinfo.ca.gov/cjer/aoctv/dialogue/neuro/index.htm.

227. *See* CASEY ET AL., *supra* note 225, at 12 fig.2.

228. *See id.*

chose "most-all."[229] These statistics provide some evidence that the California documentary increased awareness of the problem of implicit bias. The qualitative data, in the form of write-in comments[230] support this interpretation.

What about the adoption of behavioral countermeasures? Because no specific reforms were recommended at the time of training, there was no attempt to measure behavioral changes. All that we have are self-reports that speak to the issue. For instance, participants were asked to agree or disagree with the statement, "I will apply the course content to my work." In California, 90 percent (N=60) reported that they agreed or strongly agreed.[231] In North Dakota (N=32), 97 percent reported that they agreed or strongly agreed.[232] Three months later, there was a follow-up survey given to the North Dakota participants, but only fourteen participants replied. In that survey, 77 percent of those who responded stated that they had made efforts to reduce the potential impact of implicit bias.[233] In sum, the findings across all three pilot programs suggest that education programs can increase motivation and encourage judges to engage in some behavioral modifications. Given the limitations of the data (for example, pilot projects with small numbers of participants, self-reports, self-selection, and limited follow-up results), additional research is needed to confirm these promising but preliminary results.

From our collective experience, we also recommend the following tactics. First, training should commence early, starting with new-judge orientation when individuals are likely to be most receptive. Second, training should not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias. Instead, trainers can start the conversation with other types of decisionmaking errors and cognitive biases, such as anchoring, or less-threatening biases, such as the widespread preference for the youth over the elderly that IATs reveal. Third, judges should be encouraged to take the IAT or other measures of implicit

229. *Id.* at 12 fig.3.

230. Comments included: "raising my awareness of prevalence of implicit bias," "enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same," and "greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested." *See* CASEY ET AL., *supra* note 225, at 11.

231. *See id.* at 10.

232. *See id.* at 18. Minnesota answered a slightly different question: 81 percent gave the program's applicability a medium high to high rating.

233. *See id.* at 20. The strategies that were identified included: "concerted effort to be aware of bias," "I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination," "Simply trying to think things through more thoroughly," "Reading and learning more about other cultures," and "I have made mental notes to myself on the bench to be more aware of the implicit bias and I've re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part."

bias. Numerous personal accounts have reported how the discomfiting act of taking the IAT alone motivates action. And researchers are currently studying the specific behavioral and social cognitive changes that take place through such self-discovery. That said, we do not recommend that such tests be mandatory because the feeling of resentment and coercion is likely to counter the benefits of increased self-knowledge. Moreover, judges should never be expected to disclose their personal results.

c. Improve Conditions of Decisionmaking

Implicit biases function automatically. One way to counter them is to engage in effortful, deliberative processing.[234] But when decisionmakers are short on time or under cognitive load, they lack the resources necessary to engage in such deliberation. Accordingly, we encourage judges to take special care when they must respond quickly and to try to avoid making snap judgments whenever possible. We recognize that judges are under enormous pressures to clear ever-growing dockets. That said, it is precisely under such work conditions that judges need to be especially on guard against their biases.

There is also evidence that certain elevated emotional states, either positive or negative, can prompt more biased decisionmaking. For example, a state of happiness seems to increase stereotypic thinking,[235] which can be countered when individuals are held accountable for their judgments. Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases.[236]

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234. There are also ways to deploy more automatic countermeasures. In other words, one can teach one's mind to respond not reflectively but reflexively, by automatically triggering goal-directed behavior through internalization of certain if-then responses. These countermeasures function implicitly and even under conditions of cognitive load. *See generally* Saaid A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 514–15, 520 (2010); Monteith et al., *supra* note 221, at 218–21 (discussing bottom-up correction versus top-down).

235. *See* Galen V. Bodenhausen et al., *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 621 (1994).

236. *See* Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009). The researchers found that implicit bias against gays and lesbians could be increased more by making participants feel disgust than by making participants feel anger. *See id.* at 588. Conversely, they found that implicit bias against Arabs could be increased more by making participants feel angry rather than disgusted. *See id.* at 589; *see also* David DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOL. SCI. 319 (2004).

In sum, judges should try to achieve the conditions of decisionmaking that allow them to be mindful and deliberative and thus avoid huge emotional swings.

d. Count

Finally, we encourage judges and judicial institutions to count. Increasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias. But, how can the behavior of trial court judges be held accountable if biased decisionmaking is itself difficult to detect? If judges do not seek out the information that could help them see their own potential biases, those biases become more difficult to correct. Just as trying to lose or gain weight without a scale is challenging, judges should engage in more quantified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions. Judges need to count.

The comparison we want to draw is with professional umpires and referees. Statistical analyses by behavioral economists have discovered various biases, including ingroup racial biases, in the decisionmaking of professional sports judges. Joseph Price and Justin Wolfers found racial ingroup biases in National Basketball Association (NBA) referees' foul calling;[237] Christopher Parsons and colleagues found ingroup racial bias in Major League Baseball (MLB) umpires' strike calling.[238] These discoveries were only possible because professional sports leagues count performance, including referee performance, in a remarkably granular and comprehensive manner.

Although NBA referees and MLB umpires make more instantaneous calls than judges, judges do regularly make quick judgments on motions, objections, and the like. In these contexts, judges often cannot slow down. So, it makes sense

237. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. ECON. 1859, 1885 (2010) ("We find that players have up to 4% fewer fouls called against them and score up to 2½% more points on nights in which their race matches that of the refereeing crew. Player statistics that one might think are unaffected by referee behavior [for example, free throw shooting] are uncorrelated with referee race. The bias in foul-calling is large enough so that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew assigned to the game.").

238. Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1433 (2011) ("Pitches are slightly more likely to be called strikes when the umpire shares the race/ethnicity of the starting pitcher, an effect that is observable only when umpires' behavior is not well monitored. The evidence also suggests that this bias has substantial effects on pitchers' measured performance and games' outcomes. The link between the small and large effects arises, at least in part, because pitchers alter their behavior in potentially discriminatory situations in ways that ordinarily would disadvantage themselves (such as throwing pitches directly over the plate).").

to count their performances in domains such as bail, probable cause, and preliminary hearings.

We recognize that such counting may be difficult for individual judges who lack both the quantitative training and the resources to track their own performance statistics. That said, even amateur, basic counting, with data collection methods never intended to make it into a peer-reviewed journal, might reveal surprising outcomes. Of course, the most useful information will require an institutional commitment to counting across multiple judges and will make use of appropriately sophisticated methodologies. The basic objective is to create a negative feedback loop in which individual judges and the judiciary writ large are given the corrective information necessary to know how they are doing and to be motivated to make changes if they find evidence of biased performances. It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.

2. Jurors

a. Jury Selection and Composition

Individual screen. One obvious way to break the link between bias and unfair decisions is to keep biased persons off the jury. Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand. This is, of course, precisely one of the purposes of voir dire, although the interrogation process was designed to ferret out concealed explicit bias, not implicit bias.

One might reasonably ask whether potential jurors should be individually screened for implicit bias via some instrument such as the IAT. But the leading scientists in implicit social cognition recommend against using the test as an individually diagnostic measure. One reason is that although the IAT has enough test-retest reliability to provide useful research information about human beings generally, its reliability is sometimes below what we would like for individual assessments.[239] Moreover, real-word diagnosticity for individuals raises many more issues than just test-retest reliability. Finally, those with implicit biases need not

239. The test-retest reliability between a person's IAT scores at two different times has been found to be 0.50. For further discussion, see Kang & Lane, *supra* note 2, at 477–78. Readers should understand that "the IAT's properties approximately resemble those of sphygmomanometer blood pressure (BP) measures that are used to assess hypertension." *See* Anthony G. Greenwald & N. Sriram, *No Measure Is Perfect, but Some Measures Can Be Quite Useful: Response to Two Comments on the Brief Implicit Association Test*, 57 EXPERIMENTAL PSYCHOL. 238, 240 (2010).

be regarded as incapable of breaking the causal chain from implicit bias to judgment. Accordingly, we maintain this scientifically conservative approach and recommend against using the IAT for individual juror selection.[240]

Jury diversity. Consider what a White juror wrote to Judge Janet Bond Arterton about jury deliberations during a civil rights complaint filed by Black plaintiffs:

> During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about "those people" rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). *Had just one African-American been sitting in that room, the content of discussion would have been quite different.* And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.
>
> I pass these thoughts onto you in the hope that the jury system can some day be improved.[241]

This anecdote suggests that a second-best strategy to striking potential jurors with high implicit bias is to increase the demographic diversity of juries[242] to get a broader distribution of biases, some of which might cancel each other out. This is akin to a diversification strategy for an investment portfolio. Moreover, in a more diverse jury, people's willingness to express explicit biases might be muted, and the very existence of diversity might even affect the operation of implicit biases as well.

In support of this approach, Sam Sommers has confirmed that racial diversity in the jury alters deliberations. In a mock jury experiment, he compared the deliberation content of all-White juries with that of racially diverse juries.[243] Racially diverse juries processed information in a way that most judges and lawyers would consider desirable: They had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer

240. For legal commentary in agreement, see, for example, Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 856–57 (2012). Roberts suggests using the IAT during orientation as an educational tool for jurors instead. *Id.* at 863–66.

241. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting letter from anonymous juror) (emphasis added).

242. For a structural analysis of why juries lack racial diversity, see Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 68–71 (2008).

243. The juries labeled "diverse" featured four White and two Black jurors.

uncorrected statements, and greater discussion of race-related topics.[244] In addition to these information-based benefits, Sommers found interesting predeliberation effects: Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.[245]

Given these benefits,[246] we are skeptical about peremptory challenges, which private parties deploy to decrease racial diversity in precisely those cases in which diversity is likely to matter most.[247] Accordingly, we agree with the recommendation by various commentators, including Judge Mark Bennett, to curtail substantially the use of peremptory challenges.[248] In addition, we encourage consideration of restoring a 12-member jury size as "the most effective approach" to maintain juror representativeness.[249]

b. Jury Education About Implicit Bias

In our discussion of judge bias, we recommended that judges become skeptical of their own objectivity and learn about implicit social cognition to become motivated to check against implicit bias. The same principle applies to jurors, who must be educated and instructed to do the same in the course of their jury service. This education should take place early and often. For example, Judge

244. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

245. *See* Sommers, *supra* note 242, at 87.

246. Other benefits include promoting public confidence in the judicial system. *See id.* at 82–88 (summarizing theoretical and empirical literature).

247. *See* Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAV. DECISION MAKING 467 (2007); Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527 (2008) (reviewing literature); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007) (finding that race influences the exercise of peremptory challenges in participant populations that include college students, law students, and practicing attorneys and that participants effectively justified their use of challenges in race-neutral terms).

248. *See, e.g.*, Bennett, *supra* note 85, at 168–69 (recommending the tandem solution of increased lawyer participation in voir dire and the banning of peremptory challenges); Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

249. Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 427 (2009).

Bennett spends approximately twenty-five minutes discussing implicit bias during jury selection.[250]

At the conclusion of jury selection, Judge Bennett asks each potential juror to take a pledge, which covers various matters including a pledge against bias:

> I pledge ___:
>
> I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.[251]

He also gives a specific jury instruction on implicit biases before opening statements:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common

250. Judge Bennett starts with a clip from *What Would You Do?*, an ABC show that uses hidden cameras to capture bystanders' reactions to a variety of staged situations. This episode—a brilliant demonstration of bias—opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear. *What Would You Do?* (ABC television broadcast May 7, 2010), *available at* http://www.youtube.com/watch?v=ge7i60GuNRg.

251. Mark W. Bennett, Jury Pledge Against Implicit Bias (2012) (unpublished manuscript) (on file with authors). In addition, Judge Bennett has a framed poster prominently displayed in the jury room that repeats the language in the pledge.

> sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.[252]

Juror research suggests that jurors respond differently to instructions depending on the persuasiveness of each instruction's rationale. For example, jurors seem to comply more with an instruction to ignore inadmissible evidence when the *reason* for inadmissibility is potential unreliability, not procedural irregularity.[253] Accordingly, the implicit bias instructions to jurors should be couched in accurate, evidence-based, and scientific terms. As with the judges, the juror's education and instruction should not put them on the defensive, which might make them less receptive. Notice how Judge Bennett's instruction emphasizes the near universality of implicit biases, including in the judge himself, which decreases the likelihood of insult, resentment, or backlash from the jurors.

To date, no empirical investigation has tested a system like Judge Bennett's—although we believe there are good reasons to hypothesize about its benefits. For instance, Regina Schuller, Veronica Kazoleas, and Kerry Kawakami demonstrated that a particular type of reflective voir dire, which required individuals to answer an open-ended question about the possibility of racial bias,

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252. *Id.* In all criminal cases, Judge Bennett also instructs on explicit biases using an instruction that is borrowed from a statutory requirement in federal death penalty cases:

> You must follow certain rules while conducting your deliberations and returning your verdict:
>
> * * *
>
> Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read that statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

The certification statement, contained in a final section labeled "Certification" on the Verdict Form, states the following:

> By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of the race, color, religious beliefs, national origin, or sex of the defendant.

This certification is also shown to all potential jurors in jury selection, and each is asked if they will be able to sign it.

253. *See, e.g.*, Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997) (finding evidence that mock jurors responded differently to wiretap evidence that was ruled inadmissible either because it was illegally obtained or unreliable).

appeared successful at removing juror racial bias in assessments of guilt.[254] That said, no experiment has yet been done on whether jury instructions specifically targeted at implicit bias are effective in real-world settings. Research on this specific question is in development.

We also recognize the possibility that such instructions could lead to juror complacency or moral credentialing, in which jurors believe themselves to be properly immunized or educated about bias and thus think themselves to be more objective than they really are. And, as we have learned, believing oneself to be objective is a prime threat to objectivity. Despite these limitations, we believe that implicit bias education and instruction of the jury is likely to do more good than harm, though we look forward to further research that can help us assess this hypothesis.

c. Encourage Category-Conscious Strategies

Foreground social categories. Many jurors reasonably believe that in order to be fair, they should be as colorblind (or gender-blind, and so forth.) as possible. In other words, they should try to avoid seeing race, thinking about race, or talking about race whenever possible. But the juror research by Sam Sommers demonstrated that White jurors showed race bias in adjudicating the merits of a battery case (between White and Black people) unless they perceived the case to be somehow racially charged. In other words, until and unless White jurors felt there was a specific threat to racial fairness, they showed racial bias.[255]

What this seems to suggest is that whenever a social category bias might be at issue, judges should recommend that jurors feel free to expressly raise and foreground any such biases in their discussions. Instead of thinking it appropriate to repress race, gender, or sexual orientation as irrelevant to understanding the case, judges should make jurors comfortable with the legitimacy of raising such issues. This may produce greater confrontation among the jurors within deliberation, and evidence suggests that it is precisely this greater degree of discussion, and even confrontation, that can potentially decrease the amount of biased decisionmaking.[256]

This recommendation—to be conscious of race, gender, and other social categories—may seem to contradict some of the jury instructions that we noted

254. Regina A. Schuller, Veronica Kazoleas & Kerry Kawakami, *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009).

255. *See supra* notes 70–71.

256. *See* Alexander M. Czopp, Margo J. Monteith & Aimee Y. Mark, *Standing Up for a Change: Reducing Bias Through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCHOL. 784, 791 (2006).

above approvingly.[257] But a command that the race (and other social categories) of the defendant should not influence the juror's verdict is entirely consistent with instructions to recognize explicitly that race can have just this impact—unless countermeasures are taken. In other words, in order to make jurors behave in a colorblind manner, we can explicitly foreground the possibility of racial bias.[258]

Engage in perspective shifting. Another strategy is to recommend that jurors try shifting perspectives into the position of the outgroup party, either plaintiff or defendant.[259] Andrew Todd, Galen Bohenhausen, Jennifer Richardson, and Adam Galinsky have recently demonstrated that actively contemplating others' psychological experiences weakens the automatic expression of racial biases.[260] In a series of experiments, the researchers used various interventions to make participants engage in more perspective shifting. For instance, in one experiment, before seeing a five-minute video of a Black man being treated worse than an identically situated White man, participants were asked to imagine "what they might be thinking, feeling, and experiencing if they were Glen [the Black man], looking at the world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary."[261] By contrast, the control group was told to remain objective and emotionally detached. In other variations, perspective taking was triggered by requiring participants to write an essay imagining a day in the life of a young Black male.

These perspective-taking interventions substantially decreased implicit bias in the form of negative attitudes, as measured by both a variant of the standard IAT (the personalized IAT) and the standard race attitude IAT.[262] More important, these changes in implicit bias, as measured by reaction time instruments,

257. *See* Bennett, *supra* note 252 ("[Y]ou must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.").

258. Although said in a different context, Justice Blackmun's insight seems appropriate here: "In order to get beyond racism we must first take account of race." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

259. For a thoughtful discussion of jury instructions on "gender-, race-, and/or sexual orientation-switching," see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 252–55 (2003); *see also id.* at 257–58 (quoting actual race-switching instruction given in a criminal trial based on Prof. Lee's work).

260. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011).

261. *See id.* at 1030.

262. Experiment one involved the five-minute video. Those in the perspective-shifting condition showed a bias of M=0.43, whereas those in the control showed a bias of M=0.80. Experiment two involved the essay, in which participants in the perspective-taking condition showed M=0.01 versus M=0.49. *See id.* at 1031. Experiment three used the standard IAT. *See id.* at 1033.

also correlated with behavioral changes. For example, the researchers found that those in the perspective-taking condition chose to sit closer to a Black interviewer,[263] and physical closeness has long been understood as positive body language, which is reciprocated. Moreover, Black experimenters rated their interaction with White participants who were put in the perspective-taking condition more positively.[264]

CONCLUSION

Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

Confronted with a robust research basis suggesting the widespread effects of bias on decisionmaking, we are therefore forced to choose. Should we seek to be behaviorally realistic, recognize our all-too-human frailties, and design procedures and systems to decrease the impact of bias in the courtroom? Or should we ignore inconvenient facts, stick our heads in the sand, and hope they somehow go away? Even with imperfect information and tentative understandings, we choose the first option. We recognize that our suggestions are starting points, that they may not all work, and that, even as a whole, they may not be sufficient. But we do think they are worth a try. We hope that judges and other stakeholders in the justice system agree.

263. *See id.* at 1035.
264. *See id.* at 1037.

STATE OF THE SCIENCE

Implicit Bias Review

Race and Ethnicity:
Views from Inside the Unconscious Mind

INCLUDING LINKS TO **ADDITIONAL BIAS-RELATED ARTICLES AND DOWNLOADABLE RESOURCES**

FEATURING:

- 01 [illegible]
- SCHOLARSHIP RELATED TO CHILDREN
- IMPLICIT BIAS MITIGATION STRATEGIES

THE OHIO STATE UNIVERSITY
KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY

As a university-wide, interdisciplinary research institute, the **Kirwan Institute for the Study of Race and Ethnicity** works to deepen understanding of the causes of—and solutions to—racial and ethnic disparities worldwide, and to bring about a society that is fair and just for all people.

Our research is designed to be used to solve problems in society. Research and staff expertise are shared through an extensive network of colleagues and partners—ranging from other researchers, grassroots social justice advocates, policymakers, and community leaders—who can quickly put ideas into action.

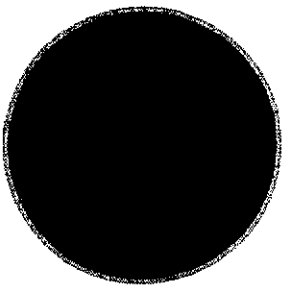
STATE OF THE SCIENCE:

IMPLICIT BIAS REVIEW

2017 Edition

By Cheryl Staats,
Kelly Capatosto, Lena Tenney,
and Sarah Mamo

With funding from the W. K. Kellogg Foundation



WE WOULD LIKE TO EXTEND A SPECIAL ACKNOWLEDGMENT to **Cheryl Staats** for her exceptional dedication and commitment to the *State of the Science: Implicit Bias Review.*

Cheryl's leadership and execution from the beginning made this publication possible, and she continued to provide vision and leadership for all five years of its existence.

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Reader Guideposts

Given the size and scope of this publication, we recognize that readers with interests in particular subthemes may find the task of identifying their area(s) of interest a bit daunting. In response to this concern, we have identified a few notable subthemes and assigned them a visual marker for easier identification; these icons appear wherever each subtheme arises in this document, regardless of chapter.

Generally speaking, this year's academic literature continued to extend beyond the Black/White binary to be more inclusive of other racial and ethnic groups. This icon identifies these articles.

While certainly present in the education chapter, thematic scholarship related to children permeate other areas as well, as denoted by this icon.

One of the latter chapters of this document focuses on general bias mitigation strategies; however, some domain-specific interventions appear in other chapters. This icon will identify this literature wherever it appears.

Denotes a link to a **downloadable resource**

About this Review

With the release of this edition of the *State of the Science: Implicit Bias Review*, the Kirwan Institute celebrates the five-year anniversary of this signature annual publication. As part of our commitment to illuminating the multifaceted ways in which unconscious associations can create unintended outcomes, this publication highlights key selections from the academic literature published in 2016 as it pertains to the domains of criminal justice, health and health care, employment, education, and housing. In addition to these focus areas, this publication also uplifts implicit bias mitigation strategies and other major contributions to the field.

WHILE IMPLICIT BIAS HAS increasingly become a buzzword in both written and verbal discourse, our team established some parameters to reasonably limit the scope of this review. Notably, given the Kirwan Institute's focus on race and ethnicity, we continue to favor articles that directly focus on these topics as they intersect with other forms of identity. This narrows the scope of this publication but also allows us to provide a richer dialogue within this focus area. Moreover, in perhaps the most significant deviation from previous editions of the *State of the Science: Implicit Bias Review*, this year's publication does not attempt to be exhaustive. While in previous years our team had sought to include nearly all implicit bias articles and chapters that were published through formal channels (e.g., academic journals, but not theses or dissertations) during a given year, the substantial increase in implicit bias scholarship warranted a new approach. As such, this 2017 publication neither is nor attempts to be comprehensive. Rather, in an attempt to maximize the impact of the content, we assessed each potential article for possible inclusion. This approach admittedly involved subjectivity; however, given our intensive engagement with the literature over the past five years, we have done our best to emphasize those that we believe reflected the greatest contributions to advancing the field.

The vast majority of this document reflects literature published in 2016; however, we acknowledge that some late 2015 articles and early 2017 publications are interspersed, particularly if the latter were available online before print.

Finally, a note about language: this document tends to use the term "implicit bias" over "unconscious bias," though the two terms are often used interchangeably in the literature.

About the Authors

KELLY CAPATOSTO is a Senior Research Associate working to expand the Kirwan Institute's race and cognition work. Kelly focuses on applying research on implicit racial bias to inform education policy and practice. Much of her work addresses issues of school discipline, disability, and racialized trauma. Beyond education, Kelly has written several interdisciplinary reports linking implicit bias insights to other domains, including housing and criminal justice. Her research interests include exploring how humans' conceptualization of race influences outcomes in the following areas: social and emotional cognition, education, housing and lending, and predictive analytics and other Big Data applications.

SARAH MAMO is a Student Research Assistant and graduate of The Ohio State University with B.A.s in African-American & African Studies and Women's, Gender, and Sexuality Studies. Her interests are in the histories and current manifestations of oppression, of which implicit bias is an iteration.

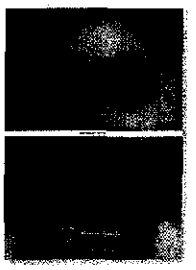
CHERYL STAATS is a Senior Researcher at the Kirwan Institute who leads a robust portfolio of race and cognition research. Broadly speaking, these projects consider how cognitive forces that shape individual behavior outside of conscious awareness can contribute to societal inequities. Cheryl received her Bachelor's degree from the University of Dayton and earned a Master's degree from The Ohio State University.

LENA TENNEY is a Coordinator of Public Engagement at the Kirwan Institute. They direct the engagement portfolio of the Race & Cognition Program, which includes facilitating presentations, workshops, and webinars about implicit bias and structural racism for audiences across the country. A trained intergroup dialogue facilitator, Lena has a background in inclusive education and coalitional activism work. Their research interests include Whiteness, LGBTQ identities, inclusive language, higher education, and public policy. Lena earned a Master's of Education and a Masters of Public Administration from the University of Oklahoma.

Previous Editions

Given that this is the fifth edition of the *State of the Science*, this document assumes that readers have a general understanding of implicit bias and its operation. For those who would like greater detail on the foundational ideas of this concept, please see our previous publications.

2013 Edition
The first several chapters of this edition provide an extensive overview of the concept, its operation, and its measurement.

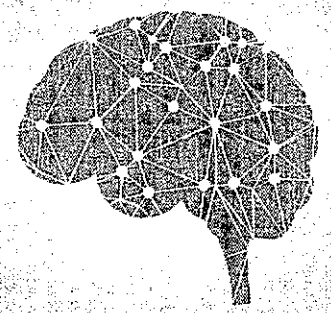


2014 Edition
For a primer on implicit bias, see Chapter One of the 2014 edition. This edition also has a quick facts sheet in Appendix B.

2015 Edition
A small "Mythbusters" feature in the first chapter of this edition exposes the myths associated with implicit bias.

2016 Edition
An early chapter of the 2016 edition has a brief infographic that helps readers visualize some key concepts of implicit bias.

Download previous editions at: **kirwaninstitute.osu.edu/implicit-bias-review**



im•plic•it bi•as /im ˈplisit ˈbīəs/ : The attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Activated involuntarily, without awareness or intentional control. Can be either positive or negative. Everyone is susceptible.

Key Characteristics

1. **Unconscious and automatic:** They are activated without an individuals' intention or control. [1, 2]

2. **Pervasive:** Everyone possesses them, even those avowing commitments to impartiality. [3–7]

3. **Do not always align with explicit beliefs:** Implicit and explicit biases are generally regarded as related but distinct mental constructs. [8–11]

4. **Have real-world effects on behavior:** As discussed in this publication and other editions of the State of the Science: Implicit Bias Review, significant research has documented real-world effects of implicit bias across domains such as employment, education, and criminal justice, among others.

5. **Are malleable:** The biases and associations we have formed can be "unlearned" and replaced with new mental associations. [1, 5, 12–16]

Dear Reader,

As the interim Executive Director for the Kirwan Institute for the Study of Race and Ethnicity, it is my great pleasure to announce the release our 2017 issue of the *State of the Science: Implicit Bias Review*—marking the fifth-year anniversary of our flagship publication.

If you have used this resource and have feedback, or just want to learn more about the Kirwan Institute, please do not hesitate to reach out. We look forward to hearing from you.

This release comes at a very important time. More than ever, Kirwan and our partners in equity work can see the importance of how we shape the narrative of race and equity in this country. For the last five years, the *State of the Science* has been one of the ways that we have been able to add depth to this often one-sided narrative, by pointing to the complex underpinnings of how peoples' conception of race influences our perceptions, thoughts, and relationships.

This edition of the *State of the Science: Implicit Bias Review* was originally conceived as a way for Kirwan to get a better understanding on what was still an emerging topic. Five years ago, we could not have imagined how many of our partners would also be interested in this resource as a way to help broaden the national discussion on racial equity. Kirwan is delighted to be able to share this work with legal professionals, non-profit leaders, civil rights activists, doctors, teachers, and everyone in between.

This release is a shining example of the tremendous effort and dedication of our Race and Cognition Program to living out Kirwan's mission. The positive acclaim for this publication and its impact on addressing real world inequities continues to make the Kirwan Institute proud.

At such an important milestone, it is not only important to celebrate the impact of our work, but we must also look to the future to ensure that the implicit bias research will continue to help us all build a more equitable and inclusive world. For example, we have some exciting plans to make our research even more accessible and responsive to the needs of our communities and partners. We look forward to sharing our vision for the future of the *State of the Science* with you in 2018—stay tuned!

Sincerely,

ARTHUR R. JAMES, M.P.

"In addition to urgent conversations about race and criminal justice, and employment and gender, discussions about implicit bias have spread to Hollywood, the sciences, and the presidential election."

JESSICA NORDELL, 2017 [17]

1 Introduction

As in prior years, the sense that the concept of implicit bias continually gained momentum in both public discourse and academic communities was hard to deny. Even individuals who maybe had never previously heard the term likely were exposed to it at some point in 2016. As discussed in this chapter, the venues facilitating this exposure perhaps may have been unexpected or unlikely.

Public Discourse

In terms of the general public's exposure to and efforts to grapple with the concept, one of the memorable moments that shaped early 2016 was the controversy that emerged surrounding the Academy Awards. Indeed, long before the iconic gold Oscar statuettes were distributed on February 29th, the 2016 Academy of Motion Picture Arts and Sciences' 88th annual ceremony celebrating the year's achievements in film had generated tremendous attention and "buzz." Under different circumstances, this likely would have been a boon to the Academy, holding the promise of high television viewer ratings and publicity. The 2016 hype and attention, however, took a decidedly different tone when the announcement of the 20 contenders for Best Actor and Actress (for both leading and supporting roles) generated a racially monolithic pool of exclusively White nominees for the second year in a row. Even those who do not follow the Oscars at all inevitably heard of the controversy, as it garnered news attention and quickly spread through various social media platforms, ultimately yielding the popular Twitter hashtag #OscarsSoWhite.

Among several explanations that surfaced in this dialogue, one that gained particular attention was implicit bias. Scholars, commentators, and even the actors themselves called attention to this unconscious phenomenon as a way of understanding how the uniformly White nomination pool for Best Actor/Actress could persist yet another year. For example, 2014 Best Supporting Actress winner, Lupita Nyong'o, shared her sentiments on the lack of diversity and possible influence of implicit bias when she wrote,

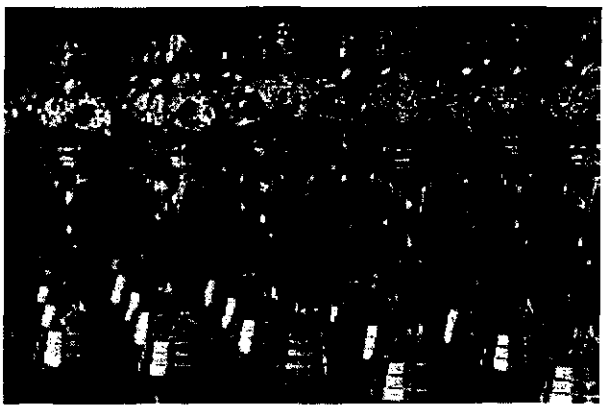
> I am disappointed by the lack of inclusion in this year's Academy Awards nominations. It has me thinking about unconscious prejudice and what merits prestige in our culture. The Awards should not dictate the terms of art in our modern society, but rather be a diverse reflection of the best of what our art has to offer today. I stand with my peers

who are calling for change in expanding the stories that are told and recognition of the people who tell them. [18]

BOOKENDING THIS DIALOGUE in the latter months of 2016 was perhaps an even more visible platform on which implicit bias emerged as a conversation topic: the 2016 Presidential and Vice-Presidential debates. First, during the September 26th Presidential debate between Democratic nominee Hillary Clinton and her Republican counterpart Donald Trump, NBC news moderator Lester Holt addressed Clinton with an inquiry regarding whether she believed police are implicitly biased against Black people. Her response articulated the idea that implicit bias is not just a challenge for individuals in that specific occupation; everyone is susceptible to these unconscious cognitive dynamics. [For more on the pervasiveness of implicit attitudes and stereotypes, see 21.] Moreover, in her response, Secretary Clinton also acknowledged the often weighty implications of implicit bias by asserting, "it can have literally fatal consequences." [22] Supporting this latter statement is a considerable body of research (appropriately dubbed "shooter bias" research) that examines how law enforcement officers' implicit biases can influence decisions regarding how quickly weapons are discharged, and, quite significantly, at whom. [see, e.g., 23, 24, 25]

Similarly, the term resurfaced in the October 4th Vice-Presidential debate featuring Democratic nominee, Senator Tim Kaine, and the Republican contender, Governor Mike Pence. Pence's handling of the concept, however, garnered some criticism, as portions of response failed to align with research-based understandings. [26, 27] Notably, Governor Pence's quote implying that an individual could not have an implicit bias against his or her own ingroup: "Senator, when African American police officers involved in a police action shooting involving an African American, why would Hillary Clinton accuse that African American police officer of implicit bias?" [28] does not reflect the reality that implicit anti-ingroup bias has been documented in the scholarly literature. [29–33]

Finally, another notable moment from 2016 that provoked implicit bias conversations in the public sphere included an October incident on Delta airlines in which Dr. Tamika Cross, a Black OB/GYN doctor from Houston, was hindered from assisting a fellow passenger who was suffering a medical emergency because the flight attendants questioned whether she was actually a medical professional. This situation led to commentaries surrounding how implicit



#OscarsSoWhite: The 2016 Academy Awards created controversy when the 20 nominees for Best Actor and Actress were announced and, for the second year in a row, all were White.

biases, notably those involving race, can shape who is (or, in this case, who is not) perceived to be a doctor. [34]

Trends in the Field

Looking at the academic literature from 2016, several trends emerged. First, while children have long been an aspect of this field of research [see, e.g., 35, 36–41], several studies this year sought to examine not just the presence of implicit bias in children, but more specifically how implicit biases may operate differently for this population compared to adults. [42–45]

Also notable this year was substantial discourse surrounding the notion of the "Obama effect"—that is, the effect that former President Barack Obama may have had on implicit racial attitudes, such as from being a highly-visible counter-stereotypical exemplar. As discussed in a later chapter and highlighted in a special issue of *Social Cognition*, the research findings on this subject remain mixed.

Finally, while police-related literature on implicit bias has traditionally been common, this year's work in that realm trended specifically toward discussions regarding use of force. [46–49] ■

During the 2016 Presidential debate, Hillary Clinton articulated the idea that implicit bias is not just a challenge for individuals, but that everyone is susceptible to these unconscious cognitive dynamics. She also acknowledged the weighty implications of implicit bias by asserting, "it can have literally fatal consequences."

Deepinder Singh Mayell

Applying Implicit Bias Scholarship to Real-World Issues: An Immigration Toolkit

Sarah Mamo, a student research assistant at the Kirwan Institute, interviewed **Deepinder Singh Mayell**, the Director of Education and Outreach at the James H. Binger Center for New Americans on the Center's recent work on an immigration toolkit specifically geared toward Somali immigrants.

SARAH MAMO: TELL ME A LITTLE ABOUT YOURSELF AND YOUR RESEARCH.

Deepinder Singh Mayell: I am the Director of Education and Outreach at the James H. Binger Center for New Americans, which is a relatively new clinical education program that was recently endowed with a gift from the Robina Foundation. The Center hosts one of the most robust immigration clinical programs in the country; it's a unique and powerful kind of place.

> "Many refugees are fleeing terrible conditions, then go through a harrowing journey to get here and a long court process, then are introduced to American poverty and racism, which is incredibly difficult to overcome, due in part to implicit bias"

One project we're currently working on is a collaboration between the Binger Center for New Americans, The Advocates for Human Rights, and Robins Kaplan, LLP, a law firm. The impetus for this project came to us in 2013, when deportations of Somali immigrants in the U.S. started to pick up. For years, individuals weren't being deported to Somalia because the country was suffering from years of warfare and lacked infrastructure as well as proper diplomatic relations with the U.S. Only recently have these individuals been deported to Somalia.

We started by exploring the barriers a Somali client faces as they go through the system. We conducted interviews with immigration attorneys and local advocates and held a community roundtable. During the process, it became clear that, in addition to the formal legal complexities of immigration cases, there were potential significant issues with implicit bias throughout the process that operated as a barrier to potential favorable outcomes for Somali immigrants in proceedings.

The toolkit looks mostly at Somali immigrant populations in the U.S. We take a closer look at the failure of refugee integration and the layers of obstacles that face Somali immigrants living in low-opportunity neighborhoods, including lack of employment opportunities, disparate educational outcomes, Islamophobia, and anti-immigrant sentiment. Thanks to the Kirwan Institute, our team was able to utilize opportunity mapping to better illustrate the multitude of challenges that face Somali immigrants. People that reside in these communities are also subjected to racial profiling and over-policing by local law enforcement. Somalis are subjected to an additional layer of federal profiling as a Muslim community. Criminal charges or minor infractions can easily lead to deportation proceedings where a Somali immigrant will face legal obstacles to maintain refugee or resident status, including substantial credibility and corroboration standards. Somali immigrants may also be subjected to added screenings, prolonged detention, and aggressive questioning during proceedings as potentially having links to terrorism.

SM: WHAT IS THE PURPOSE AND FUNCTION OF THE TOOLKIT?
DSM: This Toolkit applies findings from a growing body of cognitive research on implicit bias to immigration law practice specifically for lawyers who represent Somali immigrants in immigration proceedings. To be successful, immigrants must overcome the implicit biases that players within the system harbor, including judges, police officers, prosecutors, and federal officials, as well as criminal defense and immigration attorneys. Biases held by these actors may impact the effectiveness and fairness of the immigration system, and understanding the power and scope of bias is integral to successful legal representation.

First, we came up with list of established techniques to counter implicit bias: intergroup contact, perspective-taking, cultural competence-building, counter-stereotypical exemplars, self-analysis, and framing.

The first part of the toolkit is unpacking attorney-client relationship, getting them to consider things they wouldn't normally consider: trauma, gender roles, language styles, racial anxiety, lack of their client's familiarity with U.S. legal system, and misinformation in the community, all of which need to be worked on by an attorney. The second part of the toolkit is designed to build cultural competency and provides a digest of Somali cultural information, including a Somali clan chart and descriptions about communication styles, gender-based issues, and complications in names.

Next, the toolkit examines conditions in immigration court and in immigration law, such as discretionary standards, that may contribute to an environment where implicit bias can affect fair outcomes. The toolkit offers guidance based on recognized methods to combat and mitigate the negative effects of implicit bias and provides examples of how to frame cases to avoid common pitfalls. This includes an exploration of the expanding definition of "terrorism" over the last few decades and how its application can cause significant issues for clients.

SM: WHO DO YOU THINK MOST BENEFITS FROM THE TOOLKIT?
DSM: Anyone representing Somalis or other refugee groups in the immigration system: immigrants, refugees, and those studying and practicing immigration law. It's a helpful tool to have on lawyers' desks when they encounter these issues.

SM: WHAT LED TO THE FORMATION OF THE TOOLKIT? DID ANY EVENTS IN PARTICULAR SPUR MOVEMENTS TO ESTABLISH THE TOOLKIT?
DSM: The resumption of the deportations led to its formation. In 2012, there were 157 deportations of Somali immigrants, in 2013 there were 166, then 243, 326, and last year, there were 438. The numbers are picking up and will likely continue to do so. Between 2012-2013, the deportations were initially occurring, and community members were looking for something to help navigate the process. Once they started looking into the process, they realized it was a deep issue, but they were nevertheless committed to doing something which had the most impact.

SM: HOW DO YOU FORESEE THE TOOLKIT BEING USED ON A GEOGRAPHICAL LEVEL? IF THE TOOLKIT IS U.S.-SPECIFIC, DO YOU THINK IT HOLDS ANY INTERNATIONAL RELEVANCE?
DSM: Regionally, it relates to individuals representing Somalis and populations who have been in the U.S. for a number of years across the country.

The global implications of the toolkit are more broad. Internationally, all countries are bound by international law that protects refugees. The toolkit shines a light on the process of integration and the obstacles that refugee populations have to securing a stable life. Many refugees are fleeing terrible conditions, then go through a harrowing journey to get here and a long court process, then are introduced to American poverty and racism, which is incredibly difficult to overcome, due in part to implicit bias.

The question of integrating populations fairly, with dignity, and consideration of human rights is one of the tantamount challenges that the planet is facing, unless you want a world of walls that are militarized.

SM: DOES THE TOOLKIT DRAW FROM ANY EXISTING LITERATURE ON IMPLICIT BIAS?
DSM: It draws from Fatma Marouf's "Implicit Bias and Immigration Courts," Jerry Kang et al.'s "Implicit Bias in the Courtroom," Nicole E. Negowetti's "Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators," the Kirwan Institute's work, especially that of opportunity mapping, and Susan Bryant's "The Five Habits: Building Cross-Cultural Competence in Lawyers."

SM: DOES THE TOOLKIT MAKE ANY NEW CONTRIBUTIONS TO IMPLICIT BIAS?
DSM: The toolkit takes implicit bias and cognitive research and applies it more deeply to immigration courts, looking at the actual practice of attorneys as they work with immigrants.

SM: IF YOU HAD TO DESCRIBE THE TOOLKIT AND IMPLICIT BIAS TO SOMEONE AND ITS SIGNIFICANCE IN A FEW SENTENCES, WHAT WOULD YOU SAY IF THEY KNEW NOTHING ABOUT IMMIGRATION LAW OR IMPLICIT BIAS?
DM: The toolkit is trying to help protect people who have valid right to stay in the U.S. overcome a myriad of challenges that may prevent them from being successful.

For more on the James H. Binger Center for New Americans, please visit: **https://www.law.umn.edu/james-h-binger-center-new-americans**

"But implicit bias also presents unique challenges to effective law enforcement, because it can alter where investigators and prosecutors look for evidence and how they analyze it without their awareness or ability to compensate."

SALLY Q. YATES, FORMER UNITED STATES DEPUTY ATTORNEY GENERAL, 2016 [20]

2 Criminal Justice

As a typically robust area of implicit bias scholarship, given its range of potentially life-altering consequences, the criminal justice domain remains an area of rich dialogue, ranging from policing to assorted courtroom dynamics.

Police: Use of Force

Influenced by recent events, researchers Lorie Fridell and Hyeyoung Lim studied the connection between laboratory research developments and actual field data on police use of force on Black subjects. [46] Using police reports, Fridell and Lim examined two competing empirical perspectives related to use of force with Black subjects: 1) the implicit bias perspective, and 2) the counter-bias perspective. The implicit bias perspective asserts that police exhibit implicit associations between Blackness and crime, which would result in more use of force with Black subjects than White subjects. In contrast, the counter-bias perspective posits that external consequences for use of force with Black subjects (e.g., prosecution or negative media attention) would result in police officers overcoming racial biases and using less force with Blacks compared to Whites. The data from a police station in a large Texas city encompassed 1,846 incident reports over three years involving Black and White males. The analysis studied instances where police used intermediate uses of force (e.g., hard empty hand control, pepper spray, and electronic control devices) versus lower-level uses of force (e.g., soft empty hand control). Moreover, the study included a measure of neighborhood crime rate as a second independent variable influencing the use of force. Situational and demographic variables controlled for included, but were not limited to, level of subjects' resistance, officers' race, officers' education level, and the precipitating incident type.

Consistent with the implicit bias perspective, the results indicated that police were more likely to use one form of intermediate force—electronic control devices—compared to a lower-level use of force on Black subjects compared to White subjects. [46] No racial differences were found where officers used other types of intermediate force. Moreover, racial differences in use of force were only present in neighborhoods with moderate or low crime rates. Affirming other research on the topic, Fridell and Lim posited the disappearing presence of racial differences in areas of high crime was consistent with the

implicit bias perspective demonstrated by the notion that a negative bias toward a neighborhood can supersede a racial bias. [46]

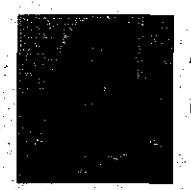
Moving beyond a purely intergroup bias (e.g., Black versus White) perspective, Kahn and colleagues conducted a regression analysis to examine whether intragroup (within race) biases shared a relationship with use of force data at a large, urban police department. [48] As a measure of intragroup differences, sample raters coded the phenotypic stereotypicality (i.e., how representative one's physical appearance is of their racial category) of subjects' faces from 177 police case files, which were randomly selected from one year of service records. [For a review of this scale, see 50.] Use of force was measured on a 1–8 scale according to severity, where 1 included control holds and 8 included deadly force. The researchers controlled for factors such as gender, signs of a chemical influence, mental health, and the type of crime. Results revealed that the more stereotypically White the suspect was, the less likely police were to use force in general or use severe force; however, possessing more White phenotypic traits did not indicate less use of force for non-Whites. [48] This finding indicated that intragroup bias can serve as a protective factor for Whites, but not non-Whites who possess phenotypically-White traits. This work is reminiscent of prior scholarship on the influence of Afrocentric features in criminal justice proceedings. [51, 52]

"many individuals implicitly associate Black males with characteristics such as criminality, sub-humanness, or being capable of superhuman behavior."

Continuing the inquiry into police use of force, a 2016 article by Hall, Hall, and Perry provided a review of both implicit racial biases and the unique characteristics of police work as a framework for understanding excessive use of force during police encounters with Black male civilians. [49] As the basis of the review, the researchers uplifted studies that showed police officers are more likely to hold implicitly positive attitudes toward Whites and negative attitudes toward Blacks. [23, 50, 53] In addition to this general implicit bias, many individuals implicitly associate Black males with characteristics such as criminality, sub-humanness, or being capable of superhuman behavior. [50, 54–56] In conjunction with these implicit processes, officers may possess unique characteristics compared to those in other professions, such as need for high intergroup connectivity, valuing order, and appreciating hierarchy. Thus, the researchers suggested that the interaction between these psychological factors and the nature of police work may elicit intergroup threat and suspicion in both parties, thereby making these encounters especially risky for excessive force. Based on this framework, the researchers offered a list of solutions for reducing excessive force during encounters with police and Black males, many of which are based on the research related to implicit bias: 1) addressing prejudice at a young age, 2) promoting intergroup contact, 3) supporting community police efforts, 4) diversifying the police force, 5) rotating police assignments, 6) making diversity training mandatory, 7) requiring buy-in from police leadership, and 8) increasing accountability within the force. [49]

Judges

Clair and Winter conducted interviews to examine judges' perceptions of racial disparities in the courts and what they determined was the best way to address them. [57] Focusing on the processes of arraignment, plea hearings, jury selection, and sentencing, the researchers interviewed 59 judges in the upper and lower courts in a northeast state where Black and Latinos were disproportionately incarcerated to examine the situational factors where disparities may be more likely occur. When discussing racial disparities, judges pointed to the presence of disparate treatment (e.g., a court official's implicit and explicit biases) or disparate impact (e.g., the differential impact of seemingly neutral laws, or how poverty affects offense rates). Most judges believed that a combination of these two sources explained racial disparities, while some judges (24%) believed the latter alone was the source of disparities. [57] As part of the discussions on disparate impact, many judges report-



AUTHOR REFLECTION

Cheryl Staats

AS SOMEONE WHO NATURALLY prefers practicality, it is unsurprising that I favor applied research over traditional academic scholarship. I appreciate taking scholarly ideas and seeing them yield positive impacts in "real life" situations. As such, I also enjoy seeing others bridge this divide to bring esoteric academic concepts to bear in fields that can meaningfully learn and benefit from that knowledge.

A great example of applying implicit bias scholarship to "real world" circumstances is Dr. Lorie A. Fridell's 2017 book, *Producing Bias-Free Policing: A Science-Based Approach.* Beyond summarizing the implicit bias literature as it pertains to police, Fridell offers clear strategies and tools that agencies may use in their pursuit of fair and impartial policing. This approach recognizes that past interventions to address bias have not always yielded success; by illuminating the latest social psychological research on implicit bias, readers are able to understand the merits of taking a bias-informed approach to police work.

With an eye toward providing concrete and useful guidance, this text broadly focuses on how police professionals can apply the science of implicit bias to numerous aspects of their operations, ranging from decision-making in the field to messaging, policies, hiring practices, and other agency dynamics. Fridell equips readers with specific next steps for implementing what she refers to as a "new paradigm" of policing (i.e., one that recognizes implicit biases rather than solely explicit) throughout the entirety of an agency.

While the intended audience for this book is police professionals, Fridell acknowledges that bias is in no way a problem specific to that occupation. Rather, she articulates that it is our unconscious cognition—regardless of one's profession—that provokes the need to be bias-aware. Emphasizing this cognitive dynamic as shared across humanity, she writes, "Because police are human, they have biases; because they have biases, every agency needs to be proactive in producing bias-free policing." (p. 5)

SCHOLARSHIP MENTIONED: Fridell, L.A., *Producing Bias-Free Policing: A Science-Based Approach*. Springer Briefs in Criminology: Translational Criminology. 2017: Springer.

ed the contribution of their own implicit biases. Several noted their familiarity with research on implicit bias in sentencing either through the media or conferences; this knowledge led many to reflect on their biases and consider how these biases influenced their decision-making.

The researchers grouped the strategies the judges supported to address disparities into two categories: non-interventionist and interventionist. The non-interventionist approach defers to the prosecutors' and defenders' judgments during arraignment, plea hearing, and jury selection. In contrast, the interventionist approach includes proactive strategies to address disparities such as rejecting plea deals that seem racially motivated or striving to have a diverse jury. The majority of judges held non-interventionist values. [57] Thus, this study demonstrated that even if judges acknowledged the impact of implicit biases from court actors, they may still allow disparities to occur by not engaging in interventions to address them.

Juries

Previous research on court proceedings has indicated that implicit biases can impact juror decisions. [58-63] Morrison et al. add to this body of knowledge by exploring whether legal professionals are capable of identifying jurors' implicit biases through the *voir dire* process and if it is possible to use this information to exclude potential jury members in a way that is favorable to their case. [64]

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FEATURED RESOURCE

TWO LENSES... ONE GOAL

Understanding the **Psychological** and **Structural Barriers** People of Color Face in the Criminal Justice System

BY KELLY CAPATOSTO

An immense body of research has demonstrated the adverse experiences and outcomes related to criminal justice system involvement for marginalized groups. Expanding this conversation, we highlight how these adverse experiences can be the result of (1) unconscious discrimination; and/or (2) historic policies and related structural dynamics.

As a first step to understanding how the criminal justice system perpetuates racial inequities in incarceration, we must consider both the psychological and structural barriers along this pathway. These barriers to justice for communities of color can manifest both preceding contact and during interactions within the criminal justice system, thereby influencing the likelihood of conviction, incarceration, and sentencing.

The following examples highlight key points of contact between people of color and the criminal justice system where racialized barriers are likely to be present.

Internal Factors

Research affirms that the experience of a person of color while in the custody of the criminal justice system is often distinct from the experience of a similarly situated White individual.

PLEA BARGAINING
During the plea bargaining process the defendant has the opportunity to plead guilty to a charge, often in exchange for a reduced sentence. Although not much research has been conducted on this topic, some evidence suggests Black and Hispanic defendants are more adversely impacted by this process than Whites. [17]

JUDGE AND JURY VERDICTS AND SENTENCING
Whether the ruling is determined by a judge or a jury, there are implicit and historical racial biases that can influence the decision-making process.

External Factors

Our understanding of how communities of color experience the criminal justice system does not begin in a police station or a courthouse. Rather, the external or contextual factors leading up to the initial contact with the criminal justice system must be considered.

CRIMINALIZATION OF RACIAL MINORITIES
The criminalization of individuals based on their racial identity has a long and sordid history in the United States. This trend is fueled by individuals' implicit and explicit attitudes, as well as laws, policies and major events; for example, there was a major shift in negative stereotypes and attitudes toward Arabs following 9/11. [4]

TRAFFIC STOPS
Traffic stops and searches are stressful experiences, which can also be accompanied by racial animus or anxiety. This is particularly true for Blacks who experience a disproportionate likelihood of being stopped and searched, leading to the creation of phrases such as "driving while Black" used to convey the perceived additional risk. [12]

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The study took place in three stages. During the first stage, a group of legal professionals responded to an online quiz by indicating what questions they would typically ask during a preemptory challenge (i.e., the process for removing a proposed juror). During the second stage, 285 participants responded to an online form that included the most popular questions from stage one. In addition to answering the questions, participants responded to an Implicit Association Test (IAT) and an explicit bias questionnaire, and they provided their racial demographic. In the final stage, 143 legal professionals were randomly assigned to act as a prosecutor or defender role in an online simulation of the *voir dire* process. The simulated trial either depicted a White defendant and a Black victim or Black defendant and a White victim. Participants were matched with a random pool of the respondents from stage two as the simulated jury. They could ask any of the questions gathered from stage one and could choose to exclude potential jurors based on their response. Results indicated that when the defendant was Black and the victim was White, the prosecutors' juror selection included individuals with higher implicit pro-White biases compared to the jurors selected by the defense lawyer. [64] This result indicated that when a Black defendant is on trial, both prosecutors and defenders were able to select jurors whose biases aligned more with their proposed goal; however, this effect was not significant if the defendant was White and the victim was Black. Additionally, the race of the juror accounted for some of this relationship between jurors' implicit biases and the role of the lawyer making the selection.

"many individuals implicitly associate Black males with characteristics such as criminality, sub-humanness, or being capable of superhuman behavior."

Other Courtroom Dynamics

Applying implicit bias insights to court proceedings, Roberts argued against the practice of impeaching (i.e., discrediting) a defendant's testimony due to a prior arrest. [65] Roberts noted that by silencing the defendant's testimony, court actors are more likely to rely on implicit biases associated with the defendant's identity during the fact-finding process. Moreover, Roberts highlighted how the implicit association between African Americans and criminality is especially detrimental to the presumption of innocence. To counter these negative effects, she made the case that this testimony can help to individuate a defendant—meaning the judge and jury are more likely to see him/her, and the circumstances of his/her case, as unique. As such, a testimony has the potential to counter court actors' implicit biases associated with a defendant's identity, particularly if the defendant is African American or of another racial minority group. Roberts' suggestion broadly connects to other scholarship that encourages individuation as a way of addressing implicit biases. [see, e.g., 66, 67]

In a theoretical piece, Lacey argued that knowledge of implicit bias and other cognitive forces should fundamentally alter how the legal system conceptualizes criminal responsibility. [68] This perspective is juxtaposed against the current understanding of criminality, which relies on both cognitive and contextual factors to jointly determine an individual's responsibility for their criminal conduct. In contrast, Lacey asserted that an understanding of implicit biases raises questions regarding justice actors' perceptions of a subject's level of responsibility. Moreover, there may be implications related to the individual's actual level of culpability (i.e., to what extent can individuals be responsible for the impact of their implicit biases?). [For other research on implicit bias and perceptions of culpability, see 56.] As such, Lacey recommended an expanded theory of criminalization that accounts for the effects of socialization, rather than viewing the typical subject of law as a rational agent.

Legal Education

Intersecting other social science work, Russell A. McClain analyzed the relationship between implicit bias and stereotype threat on the law school experience. [69] Stereotype threat occurs when "members of a group perform at levels

lower than that at which they are capable" as a result of awareness of existing stereotypes against a group identity or through feeling they do not belong in a given setting [69]. The authors noted the compounding effects that implicit bias and stereotype threat can have on students' academic achievement and relationship building. For example, if professors or other members of the law school hold negative implicit biases toward minority students, their actions may limit opportunities for students to engage, which in turn can exacerbate the likelihood of stereotype threat. Moreover, the underrepresentation of minorities in faculty positions due to implicit biases can also activate students' stereotype threat. The authors noted the implicit biases of White students in law school can have a similar impact. For example, if White students are less likely to engage with minority students when forming study groups, this could make minority students feel isolated and disconnected. These examples illustrate what the authors describe as a feedback loop between stereotype threat and performance, which ultimately has the potential to affirm the implicit biases held by others in the law school setting.

GENERAL MITIGATION STRATEGIES

Interventions and Recommendations

As part of a comprehensive guidance document for reducing community gun violence, the Urban Institute—in collaboration with the Joint Center for Political and Economic Studies and the Joyce Foundation—provided recommendations related to implicit bias mitigation as a means to improve relationships between police and communities of color. [70] First, enforcement agencies should require institutional adoption of practices that are informed by implicit bias. This could entail applying implicit bias knowledge to hiring and enforcement decisions or offering trainings designed to mitigate the impact of implicit bias. Second, officer training should focus on practices that are "procedurally just." [70] By directing officers back to processes that underlie just policing, officers may be less likely to rely on biases related to individuals' identity during enforcement interactions. Finally, enforcement agencies should ensure that officers reflect the diversity of the neighborhoods they patrol. By doing so, officers will have the opportunity to work in a variety of neighborhoods and contexts, thereby broadening their perceptions of community interactions. [70]

Building on prior research demonstrating the effect of implicit racial bias on policing and decisions to shoot [see, for example, 23, 24, 25, 71], Lee proposed two interventions that police departments can implement to reduce shooting fatalities. [72] The first intervention—increased training on shooting exercises—stems from implicit bias research that suggests officers are less biased and more accurate in their decisions to shoot than are civilians. [23, 24] This line of research suggests that the use of training scenarios, where race is not related to the possession of a weapon, may mitigate bias and improve accuracy in decisions to shoot. [For related research, see 71, 73.] Lee's second suggested intervention involves a paradigm shift, which decreases officers' reliance on weapons to successfully perform their job. As such, Lee proposed martial arts training as a way to prepare officers to address confrontational situations in the field without having to use deadly force. Moreover, the research suggested that the benefits of martial arts training cascades into other dimension of officers' wellbeing. For example, martial arts and mindfulness exercises that are often associated with the practice may help buffer the chronic stress of the job and further reduce reliance on bias during high-stress situations. ■

"...ideally, school districts should make reducing implicit bias a priority backed up with money, policy, and training."

JILL SUTTIE, 2016 [74]

3 Education

While education is not always a strong area of implicit bias literature, this year's contributions to the field spanned a considerable range of topics, with a particular emphasis on bias mitigation.

Perceptions of (Mis)Behavior

A Yale University Child Study Center study included two separate tasks to examine how implicit biases of teachers may contribute to discipline disparities evidenced in early childhood education. [75] The study took place at a large early education conference, with teachers and student teachers comprising the majority of the 132 participants. During the first task, the participants identified instances of challenging behaviors during a short video screening of preschoolers, including clips with a Black boy, a White boy, a Black girl, and a White girl. Although participants were primed to attend to challenging behaviors, the children only engaged in typical activities and did not misbehave. During the screening, an eye tracker measured participants' gazes. In general, participants looked longer at Black children compared to White children; this finding was most pronounced for Black boys. [75]

During the second task, participants read a vignette about a preschooler's behavior in which the child's race (Black or White), gender (boy or girl), and background information on the student's family environment (included or not included) were randomized. After the task, participants rated how severe the behavior was

"this research reinforces how implicit biases can influence how student behavior is perceived"

and the degree of hopelessness they felt toward improving the child's behavior. Finally, participants indicated whether they would suspend or expel the child, and if so, what the proposed the duration of the consequence should be. In general, participants rated White students' behavior as more severe than Black students' behavior; however, a complex relationship emerged when considering the race of the participants and the presence of background information. Results showed that when the race of the participant and the student in the vignette was the same,

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Race Matters... And So Does Gender

BY ROBIN A. WRIGHT

In her latest report *Race Matters... And So Does Gender*, Kirwan researcher Robin A. Wright conducted an intersectional examination of implicit bias in Ohio school discipline disparities across ten academic years (2005-06 to 2014-15). Here are some key findings.

Black girls need our attention too

Given that the bulk of public conversation regarding school discipline centers around the Black male experience, it is important to note that Black girls experienced a greater level of over-representation within the same-sex disciplined population vs. their same-sex enrolled population than any other demographic group—including their Black male counterparts. Black girls were approximately 3.16 times more represented among the disciplined female population than they were among the total female population. In comparison, Black males—the only other group to experience meaningful over-representation—were 2.65 times more represented among disciplined male student population than the enrolled male student population.

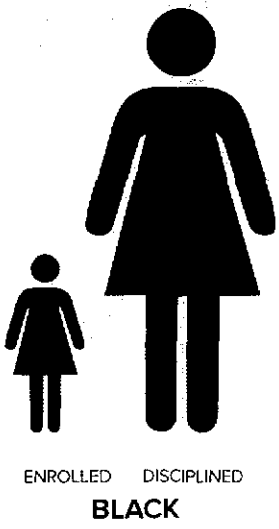
While implicit bias may disadvantage some students, it advantages others

While Black students tended to experience over-disciplining, Asian and White students experienced a composition among same-sex disciplined students that was only a fraction of their composition among enrolled same-sex students. This may be due to a dynamic known as unconscious confirmation bias: the tendency to unconsciously seek out things that align with one's unconscious beliefs while "over-looking" those things that don't [1]. An analysis of qualitative research produced several anecdotal examples in which students recalled this dynamic happening across racial lines:

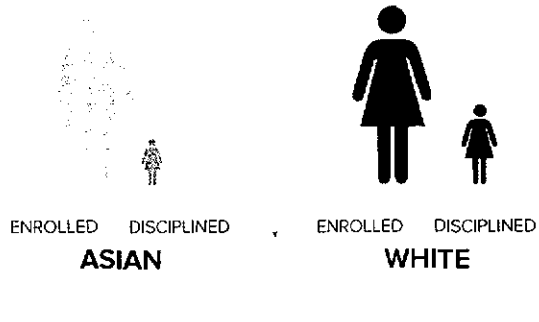
> I think security guards, just like, I think they like point out African Americans a lot more than like White... Like I'll walk down the hall without a pass, and they'll just let you go. But then they'll find someone else and say, 'You have a Saturday detention [2].'

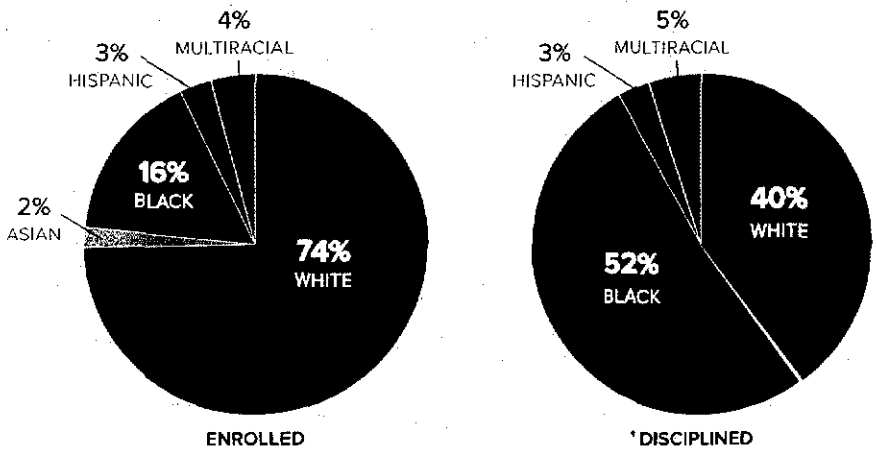
A gender-variant analysis of racial school discipline disparities is imperative: The interplay of race and gender produces unique educational experiences for Black boys and Black girls. Specifically, research suggests that for Black boys, primary drivers of over-disciplining,are related to perceptions of behaviors that may be distorted based on cultural misunderstandings [3], and racialized perceptions of criminality [4, 5]. Alternatively,

Comparison of Racial Representation Among Enrolled vs. Disciplined Females
Averaged, 2005–15 Academic Years



Black Female Disciplined composition is **3.15 times** that of their total composition, whereas Asian and White compositions are 0.15 times and 0.54 times, respectively.





research indicates that Black girls' inability to embody "traditional" White, middle-class expectations of femininity leaves them vulnerable to assertions of disruptiveness and disobedience—the leading category of disciplinary action for all students [6, 7].

Wright's report concluded with a list of individual and institutional level recommendations schools and school districts can enact to move beyond the unwanted affects of implicit bias and promote a safe and equitable learning environment.

1. Ross, H., Everyday Bias: Identifying and Navigating Unconscious Judgments in Our Daily Lives. 2014, Lanham, MD: Rowman & Littlefield.
2. Lewis, A.E. and J.B. Diamond, Despite the Best Intentions: How Racial Inequality Thrives in Good Schools. Transgressing Boundaries: Studies in Black Politics and Black Communities, ed. C. Cohen and F. Harris. 2015, 198 Madison Avenue, New York, NY 10016: Oxford University Press.
3. Weinstein, C.S., S. Tomlinson-Clarke, and M. Curran, Toward a Conception of Culturally Responsive Classroom Management. Journal of Teacher Education, 2004. 55(1): p. 25-38.
4. Goff, P.A., et al., The Essence of Innocence: Consequences of Dehumanizing Black Children. Journal of Personality and Social Psychology, 2014. 106(4): p. 526-545
5. Todd, A.R., K.C. Thiem, and R. Neel, Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli? Psychological Science, 2016. 27(3): p. 384-393.
6. Blake, J., et al., Unmasking the inequitable discipline experiences of urban Black girls: Implications for urban educational stakeholders. Urban Review: Issues and Ideas in Public Education, 2011. 43(1): p. 90-106.
7. Blake, J., B.R. Butler, and D. Smith, Challenging middle-class notions of femininity: The cause of Black female's disproportionate suspension rates, in Closing the School Discipline Gap: Equitable Remedies for Excessive Exclusion, D.J. Losen, Editor. 2015, Teachers College Press: New York, NY.

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the participant would rate the behavior as less severe when the background information was included and more severe with no information present. The opposite was true when the participant's race did not match the race of the student; in that context, participants rated student's behavior as more severe when the background information was present. Only participant effects influenced the decision to suspend or expel, where Black participants were more likely to call for disciplinary action than White participants. Together, this research reinforces how implicit biases can influence how student behavior is perceived.

Exploring the sources of racial disparities in school discipline, Wright (2015) analyzed longitudinal data to see whether a teacher's race influenced perceptions of students' behaviors. Wright's analysis utilized data from the Early Child Longitudinal Study (ECLS), which began

"findings showed that Black students were much more likely to have externalizing behaviors recorded than White, Hispanic, or Asian students were"

in 1998 and tracked approximately 20,000 students from kindergarten to fifth grade. As part of the ECLS, teachers identified the degree that students engaged in disruptive behaviors such as arguing, fighting, acting impulsively, etc.—what the questionnaire described as "externalizing problem behaviors." [76]

Wright examined whether teachers' rating of disruptive behavior differed if they belonged to the same racial group as the student (matched-race) versus if they were a different race. When looking at these differences, Wright controlled for teachers who may be more strict or lenient by looking at the teacher's average ratings of the whole class as well as the average ratings that each student received from other teachers. In general, the findings showed that Black students were much more likely to have externalizing behaviors recorded than White, Hispanic, or Asian students. [76] More importantly, the data showed that if Black students were matched with a teacher of the same race, this disparity in externalizing behavior decreased. [For more on the effect of same-race teachers, see 77.] In fact, roughly half of the White-Black disparity was reduced when Black students moved to matched-race classrooms; this same-race protective factor was not present for Hispanic or White students. However, if the student was subsequently moved to a classroom where there was a race mismatch with the teacher, the improvement in externalizing behavior did not continue in the new setting. As such, the authors attributed this data to differences in teachers' perceptions of student behavior rather than changes in the behaviors themselves.

Academic Achievement

Seeking to establish a stronger link between teachers' implicit biases and students' academic performance, Jacoby-Senghor and colleagues examined how instructors' implicit biases can impact their teaching performance. [78] They grouped over 200 Black and White participants into cross-race or same-race dyads. From each dyad, one White participant would be selected to serve as an instructor while the other dyad member (either Black or White) would be assigned to the role of learner. Instructors' implicit racial attitudes were measured through the subliminal priming task [for more on this task, see 79], as well as their explicit attitudes and behaviors. Focusing on the learners' performance on a subsequent test of the material, results showed that teachers' implicit pro-White biases predicted lower test scores for Black but not White learners. [78] A closer look at the data related to teachers' behavior suggested that teachers' anxiety might mediate this relationship. Thus, to examine whether teachers' anxiety or Black students' perception or fear of discrimination (i.e., stereotype threat) predicted the lower test scores, the researchers conducted a second study with non-Black participants who watched videos of the instruction given during the first study. Jacoby-Senghor et al. found that teachers' implicit biases still mediated learning outcomes when the students were non-Black. Thus, the authors proposed that both anxiety

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FEATURED RESOURCE

Implicit Bias Strategies

Addressing Implicit Bias in Early Childhood Education

BY KELLY CAPATOSTO

Early interventions have often been heralded as a critical leverage point for ensuring that students' educational opportunities are maximized. The value of education for youth goes far beyond content knowledge as it fosters artistic, emotional, and relational growth. Nevertheless, a student's brilliance, creativity, and hard work fail to serve a function if the opportunity to utilize those gifts is absent. Thus, we must strive to break any barriers to success as early as possible in order for youth to reach their full potential.

FRAMEWORK: ORGANIZATIONAL AND INDIVIDUAL RECOMMENDATIONS TO ADDRESS IMPLICIT BIAS IN EARLY CHILDHOOD EDUCATION

As one of these potential barriers, this document draws from research on the concept of implicit bias and offers practical solutions to counter its effects on an organizational and individual level.

Pulling examples from the full report, below is a short list of recommendations to mitigate implicit bias in early childhood education:

School Wide and Organizational Strategies:

a.) Decision-Making Practices
- *Data-based decision making*

b.) Staff Culture & Development
- *Using professional development time to provide opportunities for education on implicit bias and other types of cultural competency-focused training*
- *Creating an atmosphere where staff can identify, discuss, and find solutions for instances of bias*

Student Level Strategies:

a.) Classroom Dynamics
- *Facilitating intergroup contact between peers*
- *Utilizing interventions focused on stress reduction*

b.) Decrease Ambiguity in Behavior Management & Discipline
- *Provide examples of behavior expectations in measurable terms, and ensure they are highly visible throughout the school*

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FEATURED RESOURCE

Ohio Discipline Data

An Analysis of Ability and Race

Building on research documenting the negative trajectories for students who are chronically suspended or receive similar consequences, Kelly Capatosto from the Kirwan Institute explored the landscape of discipline outcomes for Ohio students through an analysis of statewide discipline trends spanning the 2005–2013 academic years.

BY KELLY CAPATOSTO

The national educational landscape, as well as our previous work, has placed special emphasis on acknowledging the existence of racial disparities in school discipline. As a way to expand the discipline literature to be more inclusive of multiple identities, this report provides a framework for how these discipline trends also affect students with disabilities.

KEY FINDINGS OF THIS ANALYSIS INCLUDE:
School Discipline Outcomes Vary Between Students With and Without Disabilities, and Within Disability Category

In general, students with disabilities received more disciplinary actions than their non-disabled peers in Ohio from 2005–2013. Additionally, consistent patterns emerged between the amount and type of discipline used by each disability category across time, and the rates of discipline varied greatly between disability categories.

"students with disabilities received more disciplinary actions than their non-disabled peers in Ohio from 2005–2013"

THE INTERSECTIONALITY BETWEEN DISABILITY STATUS AND RACE AFFECTS DISCIPLINE OUTCOMES
A complex relationship emerges when considering both race and ability status on trends in school discipline. To illustrate, the greatest discipline disparity between disabled and non-disabled peers existed for White students. White

MEAN OF ALL DISCIPLINE ACTIONS FOR DISABILITY AND RACIAL GROUP (PER 100 STUDENTS)

Disability Category	Asian	White	Black	Hispanic	Multi-Racial
Cognitive Disabilities	98	35.1	99	44.5	51.1
Emotional Disturbance	17.1	98.7	167.8	116.7	139.1
Other Health Impaired - Minor	14.1	40.4	117.2	49	65.8
Specific Learning Disabilities	21.1	32.1	97.9	41.5	53.6
Traumatic Brain Injury	5.7	24.3	66	26.9	27.1
Disability: Average	**31.2**	**46.1**	**109.6**	**55.7**	**67.3**
No Disability: Average	**5.6**	**13.1**	**65.1**	**22.1**	**28**

students with disabilities received 3.1 times more disciplinary actions than Whites in the general education population. However, when comparing across racial groups, it is clear that ability status alone is only a small piece of the puzzle. Though Black students with disabilities were disciplined at rates relatively similar to the non-disabled population of Black students (1.6 times more), Black students without disabilities were disciplined nearly 40 percent more than White student with disabilities, on average. The intricate relationship between race and ability yields a wide continuum of discipline outcomes. In fact, when examining outcomes across the various intersections of both race and ability status, discipline occurrences for every 100 Ohio students range from 5.7 to a startling 167.8 incidents.

This disproportionate discipline of students with disabilities and students of color is a fundamental barrier to educational opportunity access, and one cannot dismiss the challenge of ensuring equitable discipline and academic benefit for all minority youth. As such, confronting the implicit and structural biases that perpetuate inequality can contribute to meaningful progress in the field and increase the presence of opportunity for future generations.

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and the decreased lesson quality that resulted from teachers' implicit biases predicted worse test performance.

Higher Education

Affirmative action policies have remained controversial in the public sphere for applying specifically to race as opposed to economic status. Those in opposition to Affirmative Action often view the policy as a form of "reverse discrimination" against poor Whites. Amidst these criticisms, an article in the UCLA Law Review Discourse uplifted the role of implicit racial bias as part of their supporting argument that, regardless of economic class, Black students face unique barriers to success in higher education. [80] Thus, this analysis focused on admissions for middle-class Black students and included several ways in which the research demonstrates how education professionals' implicit biases negatively impact the educational experiences of Black students, such as assessments of academic performance, writing evaluations, letters of reference, and résumé reviews. [80]

Other Contributions

Drawing from a series of town hall meetings across the country, the American Bar Association Joint Task Force on Reversing the School-to-Prison Pipeline issued a preliminary report and recommendations [81]. In each of these meetings, a primary focus was addressing the role of implicit bias in maintaining the school-to-prison pipeline. Among other factors contributing to the school-to-prison pipeline, the authors implicated implicit bias for inhibiting students' academic performance, influencing disciplinary outcomes, predicting perceptions that students are threatening, and influencing the warmth of interactions with students who are from a different cultural group. Thus, the report recommended training for various actors along the school-to-prison pipeline (e.g., educators, resource officers, juvenile judges) on ways to mitigate bias.

01 BEYOND THE BLACK/WHITE BINARY

In a short newsletter article, Alex Madva examined implicit anti-Latina/o bias in the context of philosophy. [82] He outlined the dearth of knowledge about implicit anti-Latina/o bias and cautioned against the tendency to assume that knowledge about anti-Black/pro-White implicit biases are transferable to Latina/os. Madva also discussed how implicit biases may contribute to the marginalization of Latin American philosophy, philosophers, and students, which ranged from teachers' implicit biases in student interactions to curriculum-related decisions. After reflecting on approaches for addressing implicit biases, Madva's discussion concluded by considering the notion of *mestizaje* as a way to emphasize commonalities and differences (i.e., various aspects of dual identities) as part of an intergroup contact intervention to mitigate implicit biases. [82]

GENERAL MITIGATION STRATEGIES

Implicit Bias Mitigation

To equip early childhood and elementary teacher candidates with the skills to teach a diverse classroom, a 2016 report shared a series of educational activities designed to bolster candidates' cultural humility. [83] As a critical component of this education experience, implicit bias was addressed through these activities as a way for teaching candidates to have a greater awareness of diversity issues. For example, the first activity asked the teacher candidates to self-assess their own biases and expectations and to consider how these may play a role in their classroom. Following these assessments, candidates read a case study of a student's educational experiences and discussed recommendations for assisting the student with their colleagues. During this discussion, participants were asked to identify implicit biases or assumptions that they hold. Among other ideas, the authors uplifted strategies for developing cultural competence vis-à-vis cultural humility

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FEATURED RESOURCE

From Punitive To Restorative

Advantages of Using Trauma-Informed Practices In Schools

BY KELLY CAPATOSTO

WHAT IS TRAUMA?

According to the American Psychological Association, trauma is broadly defined as "an emotional response to a terrible event..." characterized by short-term emotions, such as "shock" or "denial," as well as a range of long-term responses, such as volatile emotions, recurrent flashbacks, and relationship strain. However, Kirwan seeks to expand this definition to acknowledge the individual and interpersonal variation in how we all process, experience, respond to, and treat trauma. This report focuses on the relationship between race and three interrelated components: 1) the experience of a traumatic event (or series of events), 2) the brain's response to trauma, and 3) the manifestation of trauma.

OUR FRAMEWORK: INTERSECTION BETWEEN INDIVIDUAL AND SYSTEMIC TRAUMA FOR RACIAL MINORITY YOUTH

Youth of color are disproportionately at risk for experiencing traumatizing events due to race-based inequity. In examining the root of this disproportionality, this report acknowledges the intersection between individual and systemic trauma. Structural racial inequities are a key reason why minorities have a heightened risk for traumatic experiences, which—on the surface—can appear race-neutral. The most salient example of this added risk is the frequent subjugation of people of color to lower socioeconomic status (SES) compared to their White counterparts through a history of perpetual denial of opportunity. For example, the current racial divide in neighborhood wealth and home equity can be traced back to discriminatory housing and lending practices such as redlining, which limited the ability of Blacks and other racial minorities to purchase housing and restricted housing options to segregated neighborhoods. Minority youth are overrepresented in economically depressed areas; thus, they are more likely to encounter neighborhood-level social and physical environmental stress than Whites. Latino and Black youth are significantly more likely to have someone close to them murdered than are their White peers. Community-level trauma may also emerge from the collective experience shared in response to instances of racism. As a general example, neighborhood violence that is associated with racial tension broadly affects individuals who identify as that racial group, not just those who were immediate victims.

For more information related to the definition and experience of racialized trauma, and how schools can engage in bias-conscious practices to heal trauma and improve student opportunity, see the full report at go.osu.edu/B3h5.

Download full report at **http://go.osu.edu/B86X**

AUTHOR REFLECTION

Sarah Mamo

KIMBERLY BARSAMIAN KAHN, PHILLIP ATIBA GOFF, AND JACK GLASER EXPLORED how "psychological identity-related threats and subtle forms of racial bias may affect authority figures' interactions with adolescents" (p. 190), described as impediments to students' success in the classroom and in society at-large. The researchers implemented an intervention to reduce the biases of authority figures, masculinity threat especially. In their findings, the authority figures learned of the negative impact of implicit biases on students' lives, thus concluding with the success of scenario-based training in combating both implicit bias and masculinity threat.

What I really appreciated about this article was its extension beyond the personal aspects of implicit bias and into structural aspects. Recognizing that implicit bias originates from the top of social hierarchies to disseminate through the social world is of utmost importance. The pervasiveness of implicit bias throughout a society where most people do not strive to be of malicious intent inevitably brushstrokes personal experience with implicit bias, but lacking a structural perspective of implicit bias makes it impossible to eliminate implicit bias from our society once and for all.

I think that understanding the origins of an issue is key to eradicating society of that issue. Granted, societal issues such as racism and implicit bias have grown in complexity and magnitude from their origins, but origins provide insight to the purpose of the issue and allow us to track its development over time. Who does it benefit? Who does it not? How? Why? Plainly said, by starting to answer these seemingly simple questions we can have better perspective for producing solutions for social inequities, particularly within institutions that value authority and a high degree of hierarchical power.

By exploring the effects of implicit biases through top-down interpersonal relationships between authority figures and students, the researchers provided a rigorous intersectional analysis of the utilization of race and gender in the production and propagation of stereotypes and prejudice. In the article, the researchers paired their analysis of implicit bias with masculinity threat—how the perception of a challenge to one's masculinity may cause defensiveness, and can ultimately lead individuals to behave in ways that endorse stereotypes and biases. (For more on masculinity threat, see Smith (2016).)

To combat implicit biases effectively, we must do so on the individual level, but we cannot overlook their origins. Looking only to individual solutions simply re-paints the canvas of implicit bias, missing the fact that someone had to place the canvas there in the first place. Simply put, individual solutions improve our personal interactions, but they do not absolve the need to find absolute solutions. As a major takeaway from this article, we should seek out the origins of implicit bias and produce solutions that go beyond bettering lives in the here and now: we need to find solutions that will make major inroads to eradicate the structural forces that form our implicit biases in the first place.

ARTICLES MENTIONED: Kahn, K. B., Goff, P. A., & Glaser, J. (2016). Research and Training to Mitigate the Effects of Implicit Stereotypes and Masculinity Threat on Authority Figures' Interactions with Adolescents and Non-Whites. In R. J. Skiba (Ed.), Inequality in School Discipline: Research and Practice to Reduce Disparities (pp. 189-205). New York, NY: Palgrave Macmillan US.
Smith, R. J. (2015). Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer? University of Hawaii Law Review, 37(295).

in teacher candidates by uncovering their implicit biases and reflecting on observations of differing cultural and familial backgrounds." [83]

Building on prior work addressing the intersection of implicit bias and masculinity threat in criminal justice and school discipline, Kahn, Goff, and Glaser investigated how these concepts may negatively affect authority figures' interactions with adolescents. [84] The researchers applied their analysis to students' interactions with teachers, administrators, and police officers, and they highlighted examples where perceived identity threat and implicit

bias may contribute to punitive outcomes that disproportionately affect students of color. As part of their national pilot project to combat the effects of masculinity threat and implicit bias, the researchers developed a multi-stage intervention aimed at addressing authority figures' perceptions of and interactions with students. For the baseline phase, participants' implicit attitudes were measured with an IAT, and their explicit attitudes on race and masculinity also were assessed. The intervention phase included both trainings and interactive scenarios to help increase participants' awareness and engagement around these issues. As part of the intervention's content, authority figures learned the negative impact of implicit biases and masculinity threat on students' expectations, learning supports, and punitive discipline outcomes. Though the pilot is ongoing, the authors uplifted these strategies as a template for other educational and justice settings that are engaged in equity work. This study also connects to prior work examining masculinity threat in the context of implicit bias research. [85]

"faculty can highlight the work of marginalized students to normalize their presence in the field, combat stereotype threat, and use a relevant shared positive social identity to set a tone of inclusivity"

Turning to higher education, with the goal of combating implicit biases on college campuses, Gieg completed a literature review of ten neurological studies about how individuals unconsciously process information about people from racial outgroups. [86] Based on this review, she proposed three specific ways to confront implicit racism in the student body: facilitating intergroup contact, using the contact hypothesis, and directing students to cognitive behavioral therapy (CBT) resources. The first recommendation focused on students "relearning" the associations they have toward outgroup members, while the second promoted expanding ingroup membership; both of these can be achieved by designing campus activities to facilitate collaboration and positive interaction between students of various races and ethnicities. The final recommendation involved the use of CBT to help students acknowledge and work through the implicit biases they possess, with an ultimate goal of cultivating allyship against racism.

In an article addressed to faculty in the science, technology, engineering, and mathematics (STEM) fields, Killpack and Melón presented a perspective for making STEM classrooms more inclusive in a threefold approach of confronting privilege, implicit biases, and stereotype threat. [87] To combat the danger that unchecked biases pose to the institutional culture of STEM programs, Killpack and Melón argued that the professional development of faculty should expand discussions of diversity. Generally, this approach should confront and acknowledge implicit bias by recognizing its role in preventing diverse STEM students' success, both in the classroom and in the process of seeking employment. Included in the researchers' recommendations to mitigate implicit bias was recognizing the importance of taking the Implicit Association Test (IAT) as a way to raise awareness of the biases that impact women and minorities in STEM fields. Also in their recommendations was engaging in diversity-focused education practices and focusing on data-driven approaches to academic decision-making. Furthermore, the researchers provided prompts as part of a pedagogical approach to guide reflection on implicit bias. For example, they prompted instructors to consider how the design of their coursework and teaching practices may be impacted by implicit bias. Finally, they recommended that faculty can highlight the work of marginalized students to normalize their presence in the field, combat stereotype threat, and use a relevant shared positive social identity to set a tone of inclusivity. Killpack and Melón's work relates to previous scholarship that considered implicit bias, STEM, and, in the case of these articles, gender. [see, e.g., 88, 89] ■

"...the patient has his or her own moral, ethical, and legal right to expect compassionate care that is not compromised, consciously or unconsciously, by harmful human biases on the part of the clinician."

AUGUSTUS A. WHITE III AND BEAUREGARD STUBBLEFIELD-TAVE, 2016 [90]

4 Health

As characterized by the Hippocratic Oath, medical professionals wholly embrace altruistic principles. As detailed in this chapter, however, these noble aspirations may be challenged by implicit biases, regardless of espoused egalitarian intentions.

Doctor-Patient Communication

Research from 2016 continued to acknowledge and examine the ways in which physician implicit racial biases may impact communication between doctors and patients, with a particular emphasis on racially discordant medical interactions.

Focusing on interactions between non-Black oncologists and their Black patients with an eye toward patient responses to physician treatment recommendations, Penner and colleagues had a small sample of Detroit-based oncologists take the race IAT and also videotaped the oncologists' interactions with 112 Black cancer patients. Research staff rated the oncologists' interactions, and patients shared their experiences with their oncologist via measures of perceived patient-centeredness. Results indicated that oncologists had small to moderate but statistically significant levels of implicit racial bias. Notably, patients of oncologists with higher levels of implicit bias found their medical providers less patient-centered, which negatively affected the patients' confidence in treatment recommendations. [91] This research furthers existing narratives around how doctor-patient interactions can be negatively impacted by implicit racial biases, particularly prior work by Hagiwara that also considered racially discordant communication in health care contexts. [92–96]

While previous literature has shown how non-Black physicians' implicit biases can affect their communication with Black patients [95], little was known about the precise nuances of communication that yielded these effects. Responding to this gap in the literature, Hagiwara and colleagues studied how non-Black physicians' implicit racial bias related to their word choice when interacting with Black patients. Researchers identified two main predictions based on previous scholarship. First, they predicted that physicians with higher implicit racial bias would tend to use first-person plural pronouns (e.g., we, us, our) more often than first-person singular pronouns (e.g., I, me, my) in comparison to their professional counterparts with lower levels of implicit racial bias. Second, Hagiwara et al. predicted that anxiety-related words (e.g.,

worry, nervous) would be used more often by physicians with higher implicit racial bias than those with low during these racially discordant conversations.

Using a sample of 14 physicians from a primary care clinic in a large Midwestern city and their video-recorded interactions with 117 Black patients, the researchers used Linguistic Inquiry and Word Count (LIWC) software to analyze conversation transcripts. Physicians also completed a race IAT, as well as two measures of explicit racial bias. Consistent with the researchers' predictions, findings indicated that physicians with higher implicit racial bias were not only more likely to use first-person plural pronouns but also anxiety-related words. [97] Although the study authors acknowledge some limitations (e.g., a physician sample of largely self-identified Asians), this article expands our understanding of racially discordant doctor-patient interactions by shedding light on some of the verbal nuances that, influenced by implicit racial bias, affect these medical encounters. [97]

"physicians who fit the profile of aversive racists (high implicit bias in combination with low explicit bias) were perceived to display less positive affect and more negative affect than their counterparts of other implicit/explicit bias combinations"

Following the same thematic interest as Hagiwara and colleagues' work on how physicians' racial bias can affect racially discordant medical interactions, another 2016 article by Hagiwara et al. examined physicians' implicit and explicit racial bias, as well as patients' perceived discrimination on their own and each others' behaviors. Researchers used a "thin slice method" in which observers assessed individuals' behavior via brief video excerpts from larger interactions between 113 Black patients and 13 non-Black primary care providers. Physicians also completed a race IAT and two explicit racial bias measures; patients completed assessments on past perceived discrimination. Finally, external raters used various rating scales to measure affect and engagement seen in the thin slice video excerpts. Findings indicated that both physicians' affect and engagement were impacted by their implicit and explicit racial biases when they interacted with patients reporting prior discrimination, but not if the patient did not note prior discrimination. [98] Notably, physicians who fit the profile of aversive racists (high implicit bias in combination with low explicit bias) were perceived to display less positive affect and more negative affect than their counterparts of other implicit/explicit bias combinations, which aligns with prior findings by Penner and colleagues. [92] In terms of patient behavior, perceived discrimination was found to influence patient affect. [98] As a whole, this study adds to our understanding of implicit bias in the context of doctor-patient interactions by finding that physician bias and patient perceptions of discrimination affect racially discordant medical interactions both individually and jointly. [98]

SCHOLARSHIP RELATED TO CHILDREN

Implicit Bias and Health Care Involving Youth

Recognizing that health care settings can often be hectic environments featuring stress, fatigue, time pressures, and other factors that can increase cognitive load, previous research has considered the notion that this environment may be conducive to biases. [99] A 2016 article by Johnson et al. sought to determine whether physician implicit racial biases changed after working a shift in a pediatric emergency department and to understand better how cognitive stressors encountered during a shift affect these outcomes. Cognitive stressors included measures of fatigue, number of patients cared for during the shift, shifts worked in the last week, department busyness/overcrowding, and other measures. The largely non-Hispanic White participants were resident physicians at an academic pediatric emergency department who completed assessments of implicit and explicit racial bias before and after working a shift. Findings indicated that, contrary to the researchers' hypotheses, levels of implicit racial bias remained consistent pre- and post-shift; there was no significant difference in IAT scores before or after a shift of work. [100] In terms of cognitive stressors, however, sub-analysis

results suggested that emergency department overcrowding and a higher patient load were associated with an increase in implicit racial bias post-shift, thus lending further support to the notion that cognitive stressors may affect implicit bias. More generally, this article also adds to the growing body of studies indicating that health care providers hold implicit racial biases [93, 101–106], which, in this study were found to be more than three times greater than the residents' explicit biases. [100]

Using the data gathered in the study discussed immediately above this paragraph, Johnson and colleagues performed a secondary analysis of their data from residents at a pediatric emergency department to examine any differences in their implicit racial attitudes toward children versus adults, as well as whether various demographic characteristics were associated with these attitudes. The foundation of previous literature had already established that, like the general population, health care providers tend to hold pro-White/anti-Black implicit biases [93, 94, 101–103, 106–108], with pediatricians also being susceptible to this same trend [100, 109], though perhaps at a slightly lower level than other populations. [109] Using both the adult and child race IATs, Johnson and colleagues revealed no significant differences in levels of implicit bias between these two IATs among participants, and none of the resident demographic characteristics was associated with scores on either IAT. [110] Recognizing the implications of their findings, the authors note that children are thus vulnerable to their health care providers' implicit racial biases, and that this finding may have an effect on inequities in pediatric health care.

"implicit bias that can harm outcomes for pediatric patients, including racialized health disparities, stereotype threat, racial microaggressions, and language use"

In a reflective piece on pediatric ethics, Lang et al. uplifted implicit racial bias as a contributor to the "historical, institutional, and social harms already being experienced by children and their

Continued on pg. 43

FEATURED RESOURCE

Unconscious Bias in Academic Medicine

Proceedings of the Diversity and Inclusion Innovation Forum

With mutual interests in unconscious bias, the Association of American Medical Colleges (AAMC) partnered with the Kirwan Institute in 2014 to host a Diversity and Inclusion Innovation Forum on unconscious bias in academic medicine. The goal was to discuss the impact of implicit bias in academic medicine and share interventions to mitigate unconscious bias in academic medicine institutions.

KEY FINDINGS AND ANALYSIS

Each forum discussion focused on a particular aspect of unconscious bias and medicine. The seven topic areas were: medical school admissions; undergraduate medical education; resident recruitment and selection; faculty recruitment, selection, and hiring; faculty mentoring; faculty advancement, promotion, and tenure; and patient care.

Part of each discussion was dedicated to how the unconscious affected the topic of conversation, and the latter portion of the day was dedicated to assessing existing efforts to promote diversity and inclusion and mitigate bias. Across all of the conversations, several common themes emerged: the nebulous notion of who does or does not "fit" into an institution; the operation of confirmation bias; unconscious bias as a two-way dynamic; the lack of diversity in academic medicine; the unconscious "othering" of minorities; diversity being unconsciously underappreciated; and the undervaluing and overburdening minority faculty.

Forum attendees recommended particular interventions with the intention of creating a reflective climate that acknowledges bias and the effect it can play in institutional climate, policies, and decision-making.

"Participants stressed that bias can be mitigated through education and training of individuals and teams"

Participants stressed that bias can be mitigated through education and training of individuals and teams; the Implicit Association Test, role-playing, and blinded studies were identified as useful aides in this process. Lastly, forum attendees recommended that diversity be reflected at every institutional level of high-stakes decision-making, such as admissions, appointments, and tenure. Each committee or team involved in these decisions should be diverse in composition and identify clear requirements and interview questions prior to any selection process.

The full proceedings of the forum are compiled in the monograph, Proceedings of the Diversity and Inclusion Innovation Forum: Unconscious Bias in Academic Medicine, for application throughout academic medicine today.

Download full report at **http://go.osu.edu/B86X**

families in the United States." [111] Recognizing that pediatric healthcare professionals embrace the principle of beneficence while still being susceptible to implicit biases, the authors discussed four possible manifestations of implicit bias that can harm outcomes for pediatric patients, including racialized health disparities, stereotype threat, racial microaggressions, and language use. Lang and colleagues also noted how recipients of negative implicit bias can experience chronic psychological stress and an increased allostatic load, both of which can contribute to poor health outcomes later in life. The authors closed with a powerful message compelling health care professionals to examine their role in the operation of implicit racial bias and reiterate the obligation to work to eliminate these biases. They movingly contextualized this "duty," asserting:

> Additionally, weighing the potential gravity of harm to children against the negligible burden on pediatric healthcare professionals to address implicit racial bias, it seems to us that we ought to readily accept this responsibility. There is no corresponding harm to pediatric healthcare professionals in identifying and taking action to resolve the implicit racial biases we hold, other than to our individual consciences—and egos. [111]

Medical School

Recognizing that implicit racial biases can affect medical school admissions committee members, Capers and colleagues studied the presence and extent of implicit bias among these individuals at The Ohio State University College of Medicine. Results from committee members taking the race IAT as well as reporting on their explicit racial preferences showed that while self-reported explicit preferences were minimal, IAT scores revealed significant implicit White preferences among committee members. [112] After surveying committee members on the value of IAT experience and the extent to which they were mindful of their results during admissions processes, the authors connected these insights to admissions decisions. They found that the class that matriculated immediately following these activities was the most diverse in the College's history to date, with survey comments supporting the notion that the IAT experience may have yielded committee member behavior modifications. [112]

"taking the IAT during medical school was a statistically significant predictor of decreased implicit bias, whereas having heard negative comments about African American patients from attending physicians or residents during the students' time in medical school predicted increased implicit bias"

In terms of student experiences in medical school, a late 2015 article by van Ryn and colleagues employed a longitudinal study of more than 3,500 medical school students who matriculated into 49 U.S. medical schools in autumn 2010. Medical student participants took the Black-White IAT both during their first semester of medical school in 2010, as well as during their last semester in 2014, to examine any changes in implicit racial attitudes. Findings indicated that taking the IAT during medical school was a statistically significant predictor of decreased implicit bias, whereas having heard negative comments about African American patients from attending physicians or residents during the students' time in medical school predicted increased implicit bias. [113] Similarly, unfavorable contact with African American physicians also increased implicit bias, though the authors noted that the few reported experiences of this unfavorable contact made this finding more tenuous. Together these results support the potential benefit of including implicit bias knowledge in formal medical school curricula while also acknowledging that interracial contact and aspects of the medical school experience beyond the formal curricula (e.g., the "hidden curricula") also shape student experiences.

Mental Health

In the mental health realm, Shin and colleagues sought to understand whether racial bias may be playing a role in the initiation of a mental

health counseling patient-provider relationship. Recognizing that prior research has shed light on the existence of anti-Black implicit biases among counseling graduate students [114] and professionals [115], the authors used an audit study to assess racial bias when prospective clients inquire about a provider's service availability. Researchers used a recording to leave voicemails with mental health professionals in an East Coast, Mid-Atlantic state in which the caller identified herself on a voicemail as either Allison (i.e., suggesting a non-Latina White prospective client) or Lakisha (i.e., suggesting a non-Latina Black perspective client), expressed an interest in counseling services, and provided a call-back phone number. Shin et al. analyzed both the association between the name of the caller (i.e., White-sounding vs. Black-sounding) and call-backs received, as

"the caller's name was not related to the likelihood of receiving a call-back; however, 'Allison' was significantly more likely than 'Lakisha' to receive a response that invited the potential for services."

well whether the caller's name seemed to affect whether the therapists who called back would promote the potential for counseling services. Results suggested that the caller's name was not related to the likelihood of receiving a call-back; however, "Allison" was significantly more likely than "Lakisha" to receive a response that invited the potential for services. [116] More specifically, "the fictitious client with a stereotypically White-sounding name had a 12% greater chance of having a therapist open the door to potential mental health services by returning her phone call and offering the opportunity to have a conversation, rather than closing the door by failing to return her phone call or leaving a message that declined services." [116] While the researchers caution against extrapolating this finding too far given the small effect size, they reflect that "implicit racial bias among counselors and psychologists should continue to be investigated as a possible factor contributing to the persistent inequitable patterns of mental health service delivery for Black consumers." [116]

BEYOND THE BLACK/WHITE BINARY

Cheng et al. utilized several instruments that are often used in implicit bias research to study how the model minority stereotype relates to perceptions of mental health for Asian Americans. [117] The myth that "Asian Americans are more academically, economically, and socially successful than any other racial minority group associated with their supposedly stronger values emphasizing hard work, perseverance, and belief in the American meritocracy" is known as the model minority stereotype. [117] The authors suggested that this pervasive stereotype may be linked to issues in the field of mental health, such as Asian Americans' mental health needs being misdiagnosed or under-diagnosed, as practitioners may associate Asian Americans with elements of the model minority stereotype (such as not having or needing help managing mental health issues). Participants in this study read either: "1) a clinical vignette describing a White college student suffering from adjustment disorder; 2) the same clinical vignette describing an Asian American college student; 3) a newspaper article describing a success story of Whites and the White clinical vignette; [or] 4) the same newspaper article and clinical vignette describing an Asian American." [117] They also took several assessments to measure attitudes toward Asian Americans, racial attitudes/colorblindness generally, and perceptions of the vignette character's mental health. Finally, a memory recall task of the twelve symptoms associated with adjustment disorder—the mental health diagnosis that matched the symptoms displayed by the vignette character—was used to measure how accurately the participant recalled aspects of the vignette. Cheng et al. found that although there was no significant difference between evaluations of the vignettes based upon whether the character was Asian American or White, participants did perceive the vignette character as possessing higher mental health functioning when primed with the model minority stereotype embodied by the newspaper article. [117] Furthermore, irrespective of the

vignette character's race, participants correctly recalled more symptoms of adjustment disorder in the memory recall task when they were primed than when they were not primed. In other words, being primed with a version of the model minority myth was associated with participants less accurately assessing the mental health of a fictional person.

Clinical Decision-Making

Understanding that surgical disparities can take the form of long-term disparate outcomes, not just immediate, recognizable effects, Torain and colleagues embraced the need to extend surgical disparity discourse through a narrative review. [118] The researchers used PubMed to search for quantitative and mixed methods analyses on racial disparities in surgical outcomes. Following the narrative review, the researchers reviewed and categorized the results into a series of five key themes. As one of these five themes, the authors identified health care providers' unconscious biases as a source for surgical disparities. Of primary importance in the review was the role of health care providers' implicit biases and their perceived effect on clinical decision-making. As noted in the study, providers may rely on biases and stereotypes to understand and simplify complex situations; therefore, their biases are associated with clinical decision-making and have long-term implications. Moving forward, the authors acknowledged the need for further research on the relationship between providers' clinical care, implicit biases, and surgical outcomes.

GENERAL MITIGATION STRATEGIES

Addressing Implicit Bias

As part of a narrative overview of implicit bias in health care literature, Zestcott, Blair, and Stone discussed how provider implicit biases may affect health care disparities and considered the status of current training-related efforts to address these biases. The authors recognized two elements for success in training health care providers to reduce implicit bias: "(a) instructors need to translate the abstract, theoretical concepts and processes that support the effectiveness of the strategies into practical, concrete clinical skills, and (b) instructors need to develop active learning exercises that allow students the opportunity to practice the skills before they use them in the clinic." [119]

In an advice-driven article, White and Stubblefield-Tave reviewed factors other than socioeconomics that can contribute to health care disparities for marginalized groups, including unconscious bias. [90] Over the course of 18 guidelines for improving clinician-patient collaborations, the authors recommended that clinicians seek feedback from trusted colleagues regarding any conscious or unconscious biases they may be manifesting during patient interactions.

Acknowledging the significant body of literature that explores how mindfulness may be used to address biases, [120–125] a short article by Burgess, Beach, and Saha proposed mindfulness meditation as an approach to addressing the implicit biases that may be contributing to health care disparities. The authors overviewed the benefits of mindfulness meditation, including how it can: 1) decrease implicit bias, such as by changing brain structures in ways that reduce prejudice; 2) raise awareness of one's biases so that the opportunity for self-regulation occurs; 3) reduce stress and cognitive load; 4) foster empathy and compassion; and 5) improve patient-centered communication. [126] Burgess et al. concluded by considering how mindfulness practices may be taught to health care providers and noted remaining research gaps at this intersection of mindfulness and implicit bias reduction in the context of health disparities.

Other Scholarship

Looking at the intersection of race and gender identity, Jiang et al. sought to explore the implicit biases, explicit biases, and behavioral intentions of Asian females in relation to anti-fat bias. [127] While anti-fat bias has been explored in a Western context to some extent, little is known about anti-fat biases within Asian populations, and even less is known about the possible connection between attitudes and behavioral intentions in relation to this bias. To address

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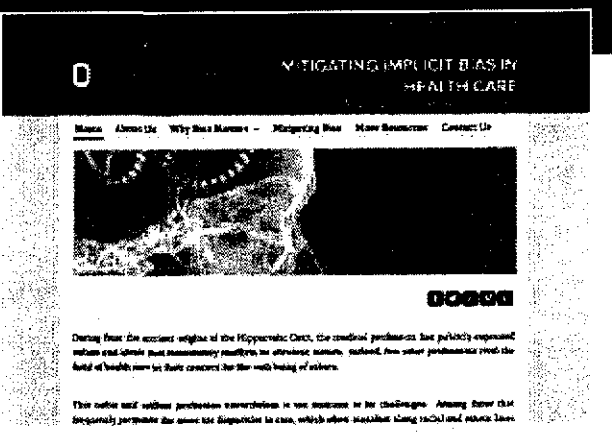
FEATURED RESOURCE

Aligning Outcomes with Intentions

Mitigating Implicit Bias in Health Care



A new website, http://u.osu.edu/breakingbias, offers strategies for bias mitigation.

As part of the Kirwan Institute's work on implicit bias, we occasionally aggregate important contributions to a topic to make one of our own, informed by our perspective on implicit bias and its mitigation. One example of this applied work has been in the health care realm. Given the significance of this field, it is notable that a contrast exists between a profession devoted to others' well-being and the reality that racial and ethnic disparities persist in this field, yielding unequal treatment. While many interrelated issues contribute to these disparities, implicit bias is also a consideration.

While the challenges of these unconscious dynamics are not specific to any particular profession, there are attributes of the health care system and interactions within it that make clinicians particularly susceptible to implicit bias. That said, effectively mitigating implicit bias in health care is possible. Two methods that can aid in mitigation are taking the Implicit Association Test and regularly reflecting on one's bias. The former brings unconscious associations to conscious awareness, which is crucial in making an individual self-aware of their biases, and the latter, which can be done individually or in group settings, is an exercise in personal development.

This new website devoted to implicit bias in the health care field offers strategies for bias mitigation (http://u.osu.edu/breakingbias), such as fostering and increasing motivation toward egalitarian goals, perspective taking and empathy building, mindfulness, and building new associations. Each strategy plays an important role in the overall process of bias mitigation, and the content is specifically tailored to the field of health care, although the general guidance and strategies can be generalized to other occupations, as well.

"there are attributes of the health care system and interactions within it that make clinicians particularly susceptible to implicit bias"

For more information, including reflective tools to foster a self-evaluation of bias mitigation, please visit: http://u.osu.edu/breakingbias

Download full report at **http://go.osu.edu/B86X**

this existing gap in the literature, the authors had 104 Asian females in Singapore complete three assessments of bias. Participants first answered a scenario-based questionnaire that measured behavioral intentions toward overweight and obese individuals. One example of a scenario that was presented to participants was to imagine that they were a university student and the professor was giving back grades on students' assignments. The participants viewed images of two women who had nearly identical appearances and background information but different BMIs. The participants were asked to indicate how likely they thought it was that each woman had done well on the graded assignment. After completing the scenarios, the participants then took an Implicit Association Test (IAT), as well as the Attitudes Toward Obese Persons (ATOP) scale, which measures explicit anti-fat bias via self-report.

The researchers' findings largely aligned with results from previous studies on implicit bias. Specifically, the analysis illustrated that anti-fat bias exists, that it is strong, and that implicit bias is a better predictor of behavioral intentions than self-reported explicit bias. [127] In an unprecedented result, however, the researchers observed that "...on average, participants explicitly expressed positive attitudes toward overweight and obese individuals which is in contrast to previous findings" (emphasis added). [127] Jiang et al. suggested that this reported pro-fat bias could be due to collectivist social norms in Asia that starkly contrast with individualist social norms in Western countries. The authors indicated that such social norms could have "prevented [the participants] from disclosing anti-fat bias explicitly instead expressing positive attitudes to convey empathy and sensitivity toward an overweight and obese population." [127] Although more research is needed to explore this possibility, the study raised important questions regarding how race and cultural norms may influence the expression of explicit attitudes (including the relativity of social desirability effects) even as unwanted implicit biases continue to influence spontaneous behaviors.

In a largely conceptual contribution, Hall and Carlson expanded a prior definition of marginalization in the realm of nursing by incorporating scholarship on globalization, intersectionality, privilege, microaggressions, and implicit biases. [128] They noted that implicit biases and microaggressions represent "fertile ground for individual nurses and nurse scientists to address" and recommend long-term reflective practices (e.g., journaling) as ways to change automatic associations.

Finally, a 2016 article in *Social Science and Medicine* used data from Project Implicit® to analyze county-level estimates of the explicit and implicit biases that Blacks and Whites hold toward each other. The authors then used that data in combination with county-level death rates for circulatory-related causes of death to examine the extent to which these biases predicted ingroup deaths from this particular cause. Recognizing that the existence of a relationship does not imply causality, Leitner and colleagues found that in counties where Blacks held higher levels of anti-White implicit bias, Blacks passed away at a higher rate from circulatory-related ailments, and this was independent of various county-level socio-demographic factors and Whites' implicit or explicit biases. [129] In contrast, for Whites, explicit biases and ingroup death rates had a more robust relationship than implicit biases did. [129] Thus, while racial bias was associated with negative health outcomes, it appears that implicit dynamics were at the fore for Blacks, whereas explicit bias drove this relationship for Whites. ■

By introducing implicit bias into understandings of housing market and credit systems, we open up new points of intervention."

JILLIAN OLINGER, KELLY CAPATOSTO, AND MARY ANA MCKAY, 2016 [130]

5 Housing and Neighborhood Dynamics

In 2016, the Kirwan Institute re-emerged as a voice on implicit bias and housing with a report that investigated the implications of implicit racial bias and structural racism on three specific topics directly related to housing: lending practices, not-in-my-backyard (NIMBY) attitudes, and Moving-to-Opportunity (MTO) programs [130]. The researchers considered how structural and cognitive forces interact to perpetuate the false association between race and risk as a way to explain "rational" discrimination. [130] For example, in the area of lending, seemingly race-neutral measures of creditworthiness (e.g., credit score or financial history) can produce racially disparate access to prime lending opportunities. This association between race and risk is maintained through both a long history of discrimination pertaining to credit access and economic mobility for racial minorities and the biases of lending professionals. As a remedy to the influence of implicit bias on disparate housing outcomes, the report presented a host of individual and institutional interventions, such as advocacy for race-conscious housing finance reform and challenging the notion of rationality within the field.

As discussed below, work from other scholars in this realm in 2016 focused on mortgage lending and neighborhood dynamics.

Mortgage Lending

Hanson and colleagues examined the presence of racial discrimination in mortgage lending by sending over 5,000 matched email inquiries to Mortgage Loan Originators (MLOs) across the United States. [131] MLOs exist as a critical part of the loan process, as they have the ability to assist customers and negotiate the terms of the mortgage. The emails varied on three dimensions: credit score (high credit, low credit, or no score indicated), race associated with applicant's name (Black or White), and the greeting used (Hello, Hi, Dear, etc.). The results suggested several ways that MLOs biased their responses in favor of inquiries from those with White-sounding names. First, MLOs were more likely to respond to emails with White sounding names than Black sounding names. In general, MLOs were more likely to respond to emails with a higher credit score regardless of race, but racial differences persisted; MLOs preferred Whites with high credit scores to Blacks with low or no credit score to a much greater extent than they preferred Blacks with a high credit

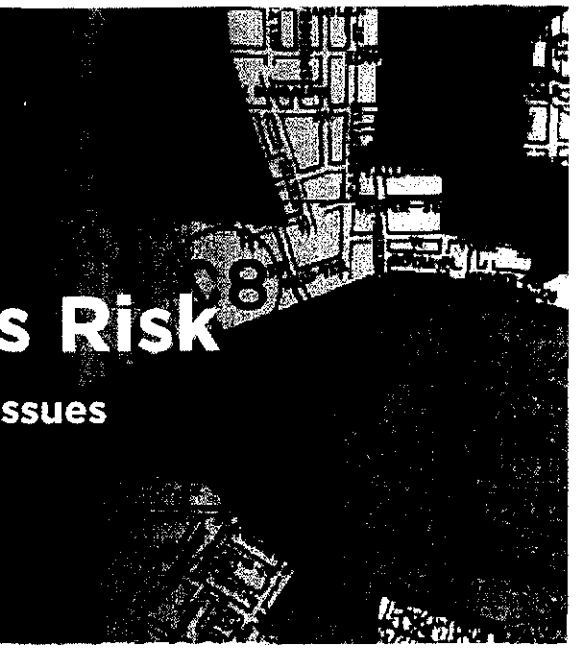
"...having a Black-sounding name was the equivalent of having a credit score that is lower by roughly 71 points"

score compared to Whites with low or no credit score. [131] This preference meant that having a Black-sounding name was the equivalent of having a credit score that is lower by roughly 71 points. Additionally, MLOs were more likely to send follow up emails to inquiries from Whites than they were for Blacks. The authors concluded that these disparities were more likely to result from implicit biases rather than MLO's explicit intent to discriminate.

Neighborhood Dynamics

Responding to the wave of controversy around neighborhood watch efforts, Godsil and MacFarlane suggested that the interaction between implicit bias and racial anxiety may undermine efforts to promote neighborhood safety. [132] According to Godsil and MacFarlane, this interaction can manifest when neighbors implicitly profile racial minorities as being more dangerous than other individuals. They included several examples of residents calling the police on Black and Latino individuals who were behaving in ordinary ways; for example, losing one's keys was perceived as a break-in and walking around with a cell phone was seen as suspicious behavior. Because of implicit biases, the White residents may feel they are doing a positive service by calling the police. Conversely, minority residents may feel an increased sense of divisiveness or danger. [132] Compounded with racial anxiety, racial divides may occur when implicit biases are operating in this fashion. Notably, the anxiety associated with uniting to solve these biases may further inhibit neighborhood cohesion. ■

FEATURED RESOURCE



Challenging Race as Risk

Connecting Implicit Bias to Structural Issues

The ability to live in a neighborhood with good schools, safe spaces, and access to the services and supports needed to thrive requires countless individual decisions across institutions, time, and space. In the U.S., these decisions are deeply wrapped up in race—whether you are seen as deserving, a good investment, a safe risk, a worthwhile neighbor. Through a century of law-making, policy-making, and decision-making, we have so thoroughly ingrained an association between race and risk, that this access has decidedly and consistently been withheld from people of color for generations.

The association between race and risk is no accident. Its roots lie in the restrictive covenants and racial zoning of the early 1900s; redlining and White flight of the '30s through the '60s; deregulation and rise of subprime lending in the '70s through the '90s; and reverse redlining and foreclosure crisis of the early 2000s. Every generation, it would appear, has had its own interpretation and manifestation of the race:risk association. Race as risk has infiltrated every aspect of the real estate industry, including government (the FHA and public housing policy); appraisers and real estate agents (blockbusting and devaluations of Black neighborhoods); brokers and banks (predatory lending and reverse redlining); and individuals (deciding who can or cannot be a neighbor or which neighborhood to call home).

We have done a remarkable job of upholding the racial boundary—in our markets, in our neighborhoods, and in our minds. When it comes to housing (and the credit that supports it), there appears something off-limits about it. One study finds that 28% of Whites support an individual homeowner's right to discriminate on the basis of race when selling a home. It seems we don't have to dig too deep to tap into our biases when it comes to our homes.

In 1968, the Douglas Commission called the struggle for freedom of choice and equal opportunity in housing and balanced neighborhoods the "struggle for the soul of America." That struggle remains with us today.

PROGRESS CAN BE MADE

To unwind the race:risk association is no small feat. We have over a century of explicit and deeply disparaging language and policy in the housing market—such negative associations will thus require dedicated and sustained work to undo. Implicit bias research tells us that even merely being exposed to the concept of implicit bias and its impacts produces subtle changes in our perceptions and attitudes, which can impact outcomes. Addressing the structures alone without also taking on the underlying assumptions and attitudes that motivate behaviors and decisions limits our ability to finally, fully deliver on the American Dream.

Download full report at **http://go.osu.edu/B86X**

"gaining awareness of implicit biases one holds demands active work."

JOANNE M. HALL AND KELLY CARLSON, 2016 [128]

6 Guarding Against Bias

As the research documenting the effects of implicit biases across multiple domains has grown, so too have inquiries related to mitigating unwanted biases. The academic literature from 2016 extends several previously-established themes in this realm, including intergroup contact and mindfulness.

Intergroup Contact

Previous work by Turner and Crisp demonstrated that imaginary intergroup contact (i.e., visualizing interactions with a member of a social outgroup) can be an effective intervention to address negative implicit attitudes against Muslims and the elderly. [133] As the next step in studying the potential benefit of imaginary intergroup contact, Meleady and Seger examined its effect on pro-social behavior toward outgroup members using three online studies. [134]

01 BEYOND THE BLACK/WHITE BINARY

In the first study, American participants imagined interacting with a person from India or were asked to imagine an interaction with an unspecified person for the control condition. Following the imaginary contact, participants were told they were matched with a partner from India to participate in a prisoner's dilemma exercise in which they had to choose either to cooperate or compete for financial gain. [For more on the prisoner's dilemma game, see 135.] The results showed that participants who imagined contact with an Indian person were more likely to cooperate in the game, whereas those in the control condition were more likely to compete. [134] The second study repeated the same procedure as study one but instead asked Indian participants to imagine contact with an American person for the experimental condition. The results showed that both groups were more likely to compete in the game; however, those who were asked to imagine contact with an American exhibited a greater tendency to cooperate than those in the control condition. [134] The final study was identical to study one except participants had to indicate how much they trusted their partner following the game. Again, the results indicated that those in the imagined outgroup contact condition had a higher proportion of those willing to cooperate than the control condition did. [134] Moreover, the level of trust the participant indicated toward their partner mediated the relationship between imaginary contact and the choice to

cooperate. These findings further bolster the idea that imagining intergroup contact not only affects implicit attitudes, but may also serve as an intervention against discrimination.

Schellhaas and Dovidio overviewed the psychological processes behind intergroup relations with an emphasis on the strengths and limitations of three methods for reducing implicit bias and improving cross-group relationships: decategorization, recategorization, and intergroup contact. [136]

Decategorization and recategorization both refer to practices to alter one's "us vs. them" mentality [136]. Decategorization involves individuation (i.e., seeing individuals on an interpersonal level rather than on a group level), whereas recategorization promotes framing subgroups as part of a larger shared identity, thereby expanding the scope of ingroup affiliation. While shared group membership can reduce negative implicit attitudes toward outgroup members [137, 138], decategorization may prove especially difficult because it goes against humans' automatic tendency to classify or label others. Moreover, by focusing on improving relationships on an individual level, the positive effects may be difficult to generalize toward the larger group identity. Similarly, the limitations of recategorization include the tension that manifests when integrating aspects of subgroups' identities. In a worst-case scenario, certain subgroups may be seen as a deviation or exception from a group ideal, which will further elicit biases between groups.

Third, intergroup contact's ability to reduce implicit and explicit outgroup bias is well-documented [for examples of work in this realm, see 139, 140–142]; however, existing structures of segregation can make it difficult to bridge the very gap intergroup contact needs to address. Moreover, there are differences in how groups perceive the benefits of intergroup contact based on whether they hold an advantaged or disadvantaged identity. Advantaged groups are more likely to develop increased positive attitudes as the result of intergroup contact than disadvantaged groups are. This asymmetrical benefit is due to the different goals that these

Continued on pg. 56

AUTHOR REFLECTION

Lena Tenney

WHAT WILL IT TAKE for White people to truly commit to remedying racial injustice? For some time now, I have been wondering what it will take for White people to move from being largely passive about race and racism to being active, committed, and willing to make sacrifices in order to bring about racial justice. Most White people indicate that they have no racial bias, that they treat everyone equally, that they "don't see race," and even that they are better than average at not being racially biased.[1] While many people believe the United States of America is a place of true equal opportunity—a place where you will succeed regardless of your identity if you simply try hard enough—we also know that this is not reality: the society we live in is far from racially just. We continue to see massive disparities between racial groups in almost every domain of public and private life. What will it take for a critical mass of White people to move from being *passively not racist* to being *actively anti-racist*? What will it take for White people to move from *self-identifying as an ally* but not necessarily taking action to *acting as a co-conspirator in dismantling White supremacy*? How do we persuade well-meaning White people to take the huge step from being *well-meaning* to being *well-doing*?

As someone who uses research to inform the ways in which I educate myself and other White people about racism, I wonder how we can use seminal and emerging research to strategically shape messaging aimed at persuading well-meaning White people to become active participants in the fight for racial justice. As racial justice educators, how do we use our knowledge (both of academic research and lived experiences) in order to

effectively inform our pedagogy when engaging with well-meaning White people? How can we draw insight from research around White fragility, White rage, and other concepts of Whiteness in order to inform our approaches to racial justice education while at the same time not pander to those very dynamics we are seeking to challenge? How can we effectively reach "moderate Whites" who value order above justice (in the words of Martin Luther King, Jr.) in discussions of race and racism—much less true liberation for all?

Reading Cole's article titled "Thinking through race: White racial identity, motivated cognition and the unconscious maintenance of White supremacy" sparked a number of thoughts for me in regards to this question.[2] For example, I wonder if the differentiation between "White identity goals" and "antipathy for non-White people" might have value in terms of navigating White fragility and defensiveness around racism when attempting to engage well-meaning White people in discussions about race and racism. When we shift our focus away from determining whether the intentions of individual White people are "good" or "bad" to instead focusing on the negative effects of White supremacy, we can focus on what matters most in the fight against racism. The pursuit of White identity goals and antipathy for non-White people are not necessarily different in their impact of perpetuating racial injustice. However, one seems more likely to effectively engage White folks in learning and listening. In other words, is it possible for the mostly semantic difference between 1) the "desire for self-enhancement" and 2) "racism" to be intentionally employed by racial justice educators in order to better engage well-meaning White people?

This is especially pertinent considering the 2016 U.S. presidential election, in which Whites overwhelmingly voted for Donald Trump while maintaining that they are not racist (despite his articulation of racist rhetoric and proposed policies). Clearly many of these voters—who would likely indicate that they believe in egalitarian values—were influenced by their White racial identity and motivated cognitions in their choice to maintain the system of White supremacy. Yet, these same voters would likely agree that they are pursuing self-interest (such as economic security) rather than racism against people of color. So can we employ the idea of White identity goals to open the door for discussions about race that would otherwise be shut down immediately by the mere mention of the words "racism" and "racists?" This is one example of the questions we can ask as we seek to do racial justice work in intentional ways.

In sum, the research contained in the *State of the Science* and various other outlets—as well sources outside of traditional academia—can provide insight into how we might craft informed strategies for motivating well-meaning White people to take meaningful action to bring about racial justice. We can be thoughtful and intentional as we do the following:

- We can utilize insights from studies, op-eds, blogs, etc. to frame educational conversation in maximally productive ways without watering down content by seeking to make it palatable to White people at the expense of People of Color.

- We can use research and lived experience in strategic ways rather than relying upon the false assumption that empirical facts, data, and graphs will change hearts and minds in isolation.

- We can use storytelling, authenticity, data, intentional pedagogy, and other tools to reach White people and motivate them to take an active role in dismantling White supremacy.

- Recognizing how challenging all of this is to do, we can still recommit ourselves to ensuring our facilitations and everyday conversations are effective, critical, and not upholding White supremacy even as we seek to dismantle it. As Dr. Dafina-Lazarus Stewart asks in zir work, "Whose safety is being sacrificed and minimized to allow others to be comfortable maintaining dehumanizing views?"[3]

We can continually ask these critical questions and employ these thoughtful strategies in order to do better in our work of envisioning and co-creating more equitable, just, and liberatory realities. In challenging times, let us recommit to doing this work—and to doing this work with intentionality.

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1. Howell and Ratliff 2017
2. Cole 2016
3. https://www.insidehighered.com/views/2017/03/30/colleges-need-language-shift-not-one-you-think-essay

groups have for engaging in intergroup contact. In general, disadvantaged groups often desire empowerment and respect for their identities from these interactions, whereas advantaged groups seek validation from disadvantaged groups to appease moral discomfort. The different goals between groups may hinder both from forming positive attitudes.

Finally, the authors noted that changing individuals' attitudes may never manifest as real action to improve societal equity. In fact, positive intergroup interactions may hinder efforts to combat systemic inequities and implicit biases, because they offer a false sense of security and detract from a focus on disparities.

Ingroup and Outgroup Membership

Exploring the notion that group membership may affect implicit biases, Scroggins et al. utilized three experiments to consider how implicit biases toward outgroup individuals may lessen if those outgroup members were recategorized as ingroup members. Using samples of undergraduates, the researchers studied whether the categorization of Black males as members of a shared group (i.e., one's ingroup) would decrease implicit biases toward them. Findings from the first experiment in which Black targets were presented as members of a shared social category—in this case, University of California, Santa Barbara (UCSB) students—indicated that making this ingroup membership salient reduced implicit biases toward Black targets. [137] Further, this decline in implicit bias was found to reflect increased positive attitudes toward Black ingroup targets moreso than a decrease in positivity toward the contrasting group (Whites). Results from a second experiment suggested that a social category reflecting a positive, non-shared identity (i.e., firefighters, in a sample of non-firefighters) was insufficient to reduce implicit biases. In order for this reduction to occur, the social category must represent a shared group (e.g., UCSB students). Finally, a third experiment revealed that this categorization of Black faces as ingroup members implicitly increased the perceived boundaries of what the ingroup constituted. Given that previous literature has examined how social (re)categorization can influence implicit biases [143, 144], this article concluded that shared ingroup membership is "a particularly appealing practical approach to reducing bias, as positive associations seemed to be conferred as part of ingroup membership." [137]

Counter-stereotypic Training

Another approach for implicit bias mitigation in the scholarly literature is negation, meaning individuals are trained to explicitly reject stereotypical associations, such as by verbally responding "no" when presented with a stereotypic group-trait pairing. A 2000 study by Kawakami and colleagues found this approach to be an effective means of reducing automatic prejudice, with the effect holding for 24 hours post-training. [145] Subsequent research, however, called into question the effectiveness of this technique, with Gawronski et al. (2008) finding that negation training was ineffective and could possibly even increase automatic prejudices. [146] Seeking to clarify these contradictory findings, Johnson, Kopp, and Petty conducted two studies that examined both the meaningfulness of the negation (i.e., a simple "No" versus a more meaningful "That's wrong!") and whether participants' motivation affected bias mitigation. Using samples of undergraduate students, Johnson et al. found that meaningful negation was more effective at changing automatic racial prejudice than the simple negation of "no." [147] In addition to the quality of the negation mattering, this effect was moderated by participants' motivation to control for prejudiced reactions, as measured by Dunton and Fazio's Motivation to Control Prejudiced Reactions (MCPR) scale. [148] As summarized by the researchers, "Taken together, these studies provide the first evidence that negation training can serve as a useful tool to alter individuals' automatic racial prejudice—if the negations are meaningful and one is motivated to avoid being prejudiced." [147]

SCHOLARSHIP RELATED TO CHILDREN

Exemplars

Continuing the inquiry into whether positive exemplars can mitigate implicit biases [14, 149–154], Gonzalez, Steele, and Baron examined

whether positive outgroup exemplars would work as a successful implicit bias intervention with children. [155] Their study involved over 350 White and Asian children from ages five to 12. Participants in the test condition were either given a vignette depicting the positive characteristics and accomplishments of a White character or a Black character, while children in the control condition read facts about flowers. Following the vignettes, the children took a modified race IAT. Gonzalez et al. found that older children (those age seven to 12) who were exposed to a positive outgroup exemplar exhibited lower pro-White biases than those who were exposed to ingroup exemplars or flowers. [155] However, younger children did not show lower implicit bias scores when presented with the same exemplar. Thus, this study contributed to dialogue on the impact that age may have on the malleability of implicit attitudes.

Motivation

As reflected in the Johnson, Kopp, and Petty study discussed earlier in this chapter and other scholarship, prior research has shown how individual motivation can contribute to one's implicit bias proclivities. [147, 148, 156–158] A December 2015 article by van Nunspeet, Ellemers, and Derks extended this line of inquiry by considering an approach to enhancing individuals' motivation. The authors discussed how making people aware of the moral implications of one's own behavior can reduce implicit biases. [159] Across their review, van Nunspeet and colleagues suggested that "moral motivation and related bias reduction may be enhanced by reminding people that their behavior displays their moral intentions and values." [159] They also reflected on how utilizing this form of motivation may be helpful for companies that are trying to mitigate bias, because it does not rely on individual people being willing to learn and implement bias reduction strategies.

Mindfulness

Building on prior work demonstrating mindfulness as a promising implicit bias intervention [122–124], Lueke and Gibson sought to use mindfulness as a way to reduce racial discrimination. [121] Their study randomly assigned a group of White undergraduates to listen to a ten-minute audio recording: either a mindfulness recording, a control recording, or a control recording that instructed the participant to attend to specific details of the recording. Following the listening exercise, the participants played a trust game, which involved a computer game with a mock partner who was either White, Black, or of Arab descent. Participants decided how much money to entrust their partner in hopes they would return it for a gain [for more on the trust game, see 160]. Results indicated that, in general, participants gave more money to White partners than Black or Arab partners. However, those who listened to the mindfulness recording exhibited significantly less bias in this exercise than the individuals in the other two conditions. [121] These findings demonstrated that even brief mindfulness interventions can create real-world differences in the operation of implicit discrimination.

Duration of Implicit Association Changes

While extensive research has examined interventions to change implicit associations, very little is known about whether short-term malleability ultimately yields a long-term persistence of these changes. As a follow-up to an extensive 2014 article that experimentally compared 17 interventions that sought to reduce implicit racial preferences [150], Lai et al. conducted two large experiments that focused on the durability of implicit racial bias reductions from the nine interventions that were successful in the 2014 research. Both experiments featured a delay of several hours to several days in between the intervention and follow-up assessment of implicit biases. Across the two studies and more than 6,300 participants, results indicated that while all nine of the interventions reduced implicit

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FEATURED RESOURCE

Parallel Student Experiences:

BY LENA TENNEY

SCENARIO PART I: STUDENT EXPERIENCE IN A WELL-INTENDED SCHOOL

Maria is a junior at Middlebury High School. Her family moved into the school district at the beginning of the academic year. Her family is one of few Latinx families in town, all of which moved to Middlebury in the past few years. Maria is frequently late to or absent from first period so her teacher, Mr. Jacobs, is worried about her. She misses important material when she is absent. When she walks in 15 minutes late, it causes a disruption for the entire class since the lesson has to be paused and other students become distracted. Mr. Jacobs asks Maria why she is so often late or absent and she says that she just cannot seem to wake up on time because she is always tired. Mr. Jacobs believes in fairness and treating students equally, so he takes this excuse—which he has heard many times in his career—at face value and tells Maria that all high school students are tired but that the other students still manage to make it to class on time. He encourages her to stop staying up so late at night so that she can come to school well rested and invites her to talk to him any time about how she can become more motivated in school. He thinks she is a bright student with a promising future, so he is glad that he was able to talk to her about how to learn more in class by reducing her absences.

Little does Mr. Jacobs know that Maria is exhausted because she works two part-time jobs in order to save money for college. She knows that she is not eligible for most scholarships and financial aid because she is undocumented, so she has to make sure she saves money to follow her dream of attending a university. Maria is disheartened by the conversation. She feels that Mr. Jacobs—like many other teachers she has had before—does not understand what it is like to work two jobs on top of doing homework. She feels that Mr. Jacobs would not take her seriously even if he knew she was working two jobs and she does not dare explain further for fear of anyone finding out that she is an undocumented person.

Maria tries hard to get to school on time after the conversation with Mr. Jacobs but eventually she has missed enough school that the counselor's office sends a letter to her parents warning about the possible consequences of truancy. Usually the counselor's office tries to call parents before sending these types of letters, but no one speaks Spanish well enough to feel comfortable calling Maria's parents. The staff does not want to embarrass Maria's family by trying to have an awkward one-sided conversation and they figure that Maria can translate the letter for her parents.

Maria starts to feel unwelcome at school. When she is short with a fellow student one morning as a result, Mr. Jacobs verbally reprimands her to "stop being so dramatic and so loud." Mr. Jacobs wants Maria to know that it is not appropriate to be rude to peers when you are frustrated. After all, that kind of behavior is not only disruptive to the class but will not lead to success in the "real world." Mr. Jacobs does not realize, however, that since he has had very little in-person interaction with Latinas he has an implicit association connecting Latina women and stereotypes often portrayed by media (such as emotionality and loudness). That implicit association influenced his perception of Maria's behavior and his word choice. Because of Mr. Jacobs' phrasing, Maria feels stereotyped and walks out of the class in frustration.

Maria becomes increasingly frustrated with Mr. Jacobs and the school. When Maria expresses this frustration to the few other Latinx students at Middlebury, they all say that they feel similarly. One student even says that another Latinx student was suspended twice for disrupting classes by being too loud and acting defiant toward a teacher. The student also says that a White student who is always loud in the exact same class has only been sent to the office to calm down and asked to write an apology letter to the teacher for being rude. Maria had not heard about this situation before but it seemed like proof that the teachers at Middlebury treat her and the other Latinx students differently than the White students.

SCENARIO PART II: STUDENT EXPERIENCE IN A BIAS-CONSCIOUS SCHOOL

Maria is a junior at Middlebury High School. Her family moved into the school district at the beginning of the academic year. Her family is one of few Latinx families in town, all of which moved to Middlebury in the past few years. Maria is frequently late to or absent from first period so her teacher, Mr. Jacobs, is worried about her. She misses important material when she is absent. When she walks in 15 minutes late, it causes a disruption for the entire class since the lesson has to be paused and other students become distracted. Mr. Jacobs asks Maria why she is so often late or absent and she says that she just cannot seem to wake up on time because she is always tired.

Mr. Jacobs has heard this excuse many times in his career, as it is a common experience for teenagers. However, he knows that incomplete or ambiguous information can lead to making decisions based on implicit biases so he decides to ask some clarifying questions. He tells Maria that he is sorry to hear that she is not getting enough sleep and asks why that is the case. She informs him that she is working two jobs to save up money for college. Mr. Jacobs thinks Maria is a bright student with a promising future, so he tells her so and encourages her decision to pursue higher education. Mr. Jacobs then asks if there is anything he can do to help (even though he knows he cannot change the overall circumstances of her life). Maria tells Mr. Jacobs that she appreciates his understanding and encouragement. She feels affirmed that her teacher took the time to listen to her. Mr. Jacobs then asks Maria if he can give her a responsibility in the class as the class greeter. She would just need to greet students at the door in the morning and sometimes hand out class materials. Maria is surprised by his question but agrees because she is glad he trusts her with a responsibility.

Maria tries hard to get to school on time after the conversation with Mr. Jacobs, especially with her new responsibility as class greeter, but eventually she has missed enough school that the counselor's office sends a letter to her parents warning about the possible consequences of truancy. The counselor's office tries to call parents before sending these types of letters. Although no one speaks Spanish well enough to feel comfortable calling Maria's parents, they decide to do so anyway because it is worth any potential confusion or awkwardness in order to treat all students equitably. During the call—although more cumbersome than most calls—the counselor is able to connect with Maria's parents and better understand Maria's situation. The counselor asks if it would be beneficial to schedule an elective class for Maria's first period during the next semester so that she is not missing content for a core class when she is absent/tardy. Even though Maria's personal circumstances have not changed, she hopes that she will be able to learn more and miss less essential material the following semester due to the counselor's understanding and creative strategizing.

One morning, Maria is short with a fellow student and Mr. Jacobs' first instinct is to reprimand her verbally for being dramatic and loud. Mr. Jacobs wants Maria to know that it is not appropriate to be rude to peers when you are frustrated. After all, that kind of behavior is not only disruptive to the class but will not lead to success in the "real world." Mr. Jacobs realizes, however, that since he has had very little in-person interaction with Latinas he has an implicit association connecting Latina women and stereotypes often portrayed by media (such as emotionality and loudness). Mr. Jacobs realizes that this implicit association may influence his perception of Maria's behavior and he is intentional about his word choice as a result. Mr. Jacobs decides to pause for a moment before responding to Maria by saying, "I understand that you might feel frustrated right now. Can you help me understand why that might be the case, if so, and how we can resolve it and move forward with class?" Maria is glad that Mr. Jacobs was patient and asked why she was short with another student instead of making any assumptions or invoking stereotypes about Latinas as some other teachers had in the past. She tells him that she overslept and missed breakfast as a result, so Mr. Jacobs asks if she would like a cereal bar. Mr. Jacobs keeps snacks in a desk drawer because the school knows some students come to school hungry so they give all teachers some cereal bars each month in case students need food.

Maria begins to appreciate Mr. Jacobs and the school. She feels that they are valuing her as a person with their supportive actions. When Maria mentions her conversations with Mr. Jacobs and the counselor to the few other Latinx students at Middlebury, they all say that they feel similarly. One student says that another Latinx student and a White student had both disrupted a class by being too loud and acting defiant toward a teacher. Instead of punishing them, however, the teacher decided to ask both students to take some quiet time in the counselor's office to calm down. The students apologized to the teacher later after realizing that they had disrupted the class. Maria had not heard about this situation before but it seemed like proof that the teachers at Middlebury treat students fairly. She is pleasantly surprised to hear this story because at other schools she had attended in the past Latinx students often felt that they were perceived as troublemakers and treated differently than their White peers.

preferences immediately following the intervention, these effects failed to persist over a delay. The authors offered several possible explanations for their findings, but ultimately reflected that "these findings provide new insight into the durability of implicit bias change, establishing a new frontier for understanding the conditions under which shifts in implicit preferences reflect short-term malleability or longer-term change." [161]

Other Scholarship

In a largely theoretical piece about implicit bias and Whiteness, Cole proposed several research-supported strategies that may help well-meaning White people to develop an anti-racist White identity and to practice identifying instances of implicit bias. [162] These strategies are ultimately intended to combat what the author terms "White racial reasoning," which is a process through which "Whites think through their racial identity, usually without conscious intention or awareness." [162] It hinges upon the dual identity goals of: 1) self-enhancement, and 2) the avoidance of appearing to be prejudiced. Cole summarized research related to how Whites pursue these two identity goals to inform the following proposed principles of predicting when and how even well-meaning Whites will rely upon White racial reasoning:

> (1) Whites' goals of self-enhancement and egalitarian appearance are likely to be activated and pursued when racial issues are discussed or in the presence of non-White others.
>
> (2) If possible, Whites will seek to pursue these goals concurrently. That is, they will try to maintain a positive sense of self while simultaneously avoiding the appearance of prejudice. (a.) Whites motivated to maintain a positive sense of self will attempt to legitimate their social position, either through promoting a preferred sense of self (e.g., hard workers who have earned what we have), or by deflecting messages that threaten a preferred sense of self (e.g., rejecting social and political explanations that explain White success as a function of White supremacy). (b.) If self-enhancement cannot be achieved—if the ego threat is too great to allow a self-enhancement strategy – then, Whites will activate and apply negative racial stereotypes (i.e., learned, implicit biases) in order to denigrate the threatening group(s) and legitimate White social advantage." [162]

Cole suggested that within this framework, Whites' cognition is driven not solely by "antipathy for non-White people" but rather by White identity goals. [162] Thus, even well-intentioned White individuals who believe in egalitarianism may unconsciously uphold White supremacy. The ways in which White racial identity informs motivated cognition—and ultimately, the unconscious preservation of White supremacy—led the author to propose the aforementioned strategies for the creation of anti-racist White identities and the ability to recognize occurrences of implicit bias.

According to Cole, the development of an anti-racist White identity might be achieved through educating White people about the history of anti-racist White activists in affinity groups (essentially, White spaces) while also "provid[ing] the space for Whites to articulate their views about what an oppositional, antiracist White identity would mean and the practices associated with living into that identity." [162] Such spaces could lead to the creation of and commitment to anti-racist identity goals that could—after practice by the individual—transform into intrinsic identity goals that direct their implicit cognition. The practice of identifying instances of implicit biases might also be achieved through educating White people in affinity groups. Discussion of stereotypes, how they are activated, and their role in the use of coded racial language may help Whites better identify when implicit biases are invoked in media and political content. Cole also suggested calling out the implicit racial bias that is embedded in such messaging. Explicitly exposing implicit racism as racism is likely to motivate Whites to reject the messaging since it goes against Whites' desire to appear non-biased. Furthermore, Cole indicated that social media platforms are a promising venue for recognizing and calling out implicit bias. ■

FEATURED RESOURCE

Being an Active Bystander

BY LENA TENNEY

It can be difficult to know what to say when a family member, friend, colleague, or acquaintance makes problematic comments. However, we will only be able to dismantle racism in its overt forms if we are brave enough to challenge racism in even its most common forms. The Kirwan Institute invites you to utilize the strategies highlighted in this resource in order to empower yourself to speak out in response to biased comments. In the words of Audre Lorde, *"When we speak we are afraid our words will not be heard or welcomed. But when we are silent, we are still afraid. So it is better to speak."*

STEPS TO BEING AN ACTIVE BYSTANDER

- Identify the emergence of bias.
- Decide to address the situation.
- Take action.
- Continue the conversation.

STRATEGIES FOR SPEAKING OUT

- Use Humor
  - *"What are you?" "Human! How about you?"*
  - *"Your English is so good!" "I hope so. it's the language I've been speaking my entire life!"*
- Be literal/refuse to rely on the assumption being made.
  - *"That's so gay!" "I didn't know that ____ could have a sexual orientation. How does that work?"*
  - *"That stereotype gets me every time! I don't understand why so many people think that stereotyping an entire group makes any sense."*
  - *"I don't get the joke. Can you explain it to me?" If they say that "it was just a joke" or that "you can't take a joke" you can say, "I know that you think it's just a joke. But I don't find it funny."*
- Ask questions that invite discussion.
  - *"What do you mean when you say that?"*
  - *"Do you know what that phrase actually means and where it came from?" Most people have no idea that it actually has an offensive meaning.*
- State that you are uncomfortable.
  - *"That phrase makes me uncomfortable. Could you please not use it around me?"*
  - *"Assumptions about an entire group of people make me uncomfortable. I don't think that we can take that assumption for granted or make our decisions based off of it."*
- Use direct communication.
  - *Speak honestly and from the heart, using "I" statements to communicate how you are feeling, why, and what could be done.*
  - *"I know that you aren't intending to stereotype anyone, but as your friend I wanted to let you know that what you said could easily be interpreted that way. Since I know you're a good person who cares about others, I would hate for you to accidentally say it again without realizing how it can come across."*

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Full report and related videos at **http://go.osu.edu/B86X**

"The point is that some of these new measures are of interest simply because they allow one to firmly get away from verbal self-report measures and as such they expand the horizon of what can be learned about attitudes. In so doing, they offer a window into a mental world to which the conscious mind is not privy."

MAHZARIN R. BANAJI, 2001 [163]

7 Assessments / Measurements

Scholars have identified several strategies for assessing implicit biases. While this chapter is not an exhaustive discussion, we highlight the latest findings as they pertain to a few specific measurement techniques.

Responses to the Implicit Association Test (IAT)

A few studies have analyzed individuals' responses to IAT results. [see, e.g., 33, 164] Adding to this line of inquiry, in an early 2017 article, Howell and Ratliff examined whether the belief that one is better-than-average would predict increased defensiveness when receiving IAT feedback. [165] The first study examined data of participants who took the weight IAT, recorded their explicit weight-related preferences, and indicated the degree to which they thought others held pro-thin biases. Participants' explicit pro-thin bias was subtracted from their perceptions of others' pro-thin biases as the measure of the degree to which they held better-than-average beliefs. Following feedback on their IAT results, participants' defensiveness was measured by indicating how reflective of their implicit attitudes they perceived the scores to be. The results showed that participants generally held the belief that they were better-than-average, and they were somewhat defensive to IAT results overall. However, those who held a high level of better-than-average beliefs were more likely to be defensive for holding a pro-thin bias than those who held low better-than-average beliefs. [165] The second study sought to replicate their earlier finding, but it expanded the analysis to include nine randomly assigned IATs, including the race-weapons IAT, the gender-career IAT, and the abled-disabled IAT. Similar to study one, participants generally demonstrated better-than-average beliefs. Also evidenced in this study was an increased defensive response from participants with better-than-average beliefs, which is crucial when understanding how to combat implicit biases held by people who do not regard themselves as harboring implicit biases.

"...those who held a high level of better-than-average beliefs were more likely to be defensive for holding a pro-thin bias than those who held low better-than-average beliefs"

Conceptually related to Howell and Ratliff's work is the research of Nadan and Stark that is focused on pedagogical perspectives of social work educators by conducting a qualitative study on students' ungraded reflections after taking the IAT. [166] By performing a thematic analysis on student reflection papers, the researchers found that using the IAT as an educational tool created an experience of discomfort for the students. This discomfort manifested in students identifying ways to cope with the anxiety of receiving feedback that they were biased, which typically involved rejecting the IAT's reliability or validity. Students also noted wanting to look into their personal background to explain the results or even wanting to "outsmart" the test so they would receive feedback that they were not biased. [166] These responses to IAT results echo portions of Clark and Zygmunt's typology, notably discomfort, inclinations to disregard the validity of the test, and acceptance that individuals' beliefs and experiences may contribute to their harboring implicit biases. [164]

Perhaps the most important insight for educators from Howell and Ratliff was the tendency for students to believe their biases reflected a static personality trait rather than social influence, despite this being a core element of how the class was framed. In a world where social oppression is increasingly exacerbated, increased recognition and discomfort regarding implicit biases will become inevitable. Educators, therefore, must strike a delicate balance between creating a safe environment for engaging with this discomfort while encouraging students to leave their comfort zones and grapple with these results.

Affect Misattribution Procedure (AMP)

Through two studies, Cooley and Payne offered an improved method for measuring implicit attitudes toward an entire social group. [167] The studies examined whether using images of groups rather than of individuals would improve the validity and reliability of implicit attitude assessments. In the first study, participants were asked to rate how representative images of Black individuals, Black groups, White individuals, and White groups were of their overall social category. Although each category was rated as representative of the overall social category, groups rather than individuals were rated as most representative. In the second study, participants took an Affect Misattribution Procedure (AMP) that used images of groups or individuals to assess their implicit racial attitudes. As such, Cooley and Payne were interested in whether using individual or group stimuli on a racial AMP would be a better predictor of participants' explicit attitudes. Findings indicated that participants' AMP scores using both individual and group stimuli were significantly related to their explicit biases; however, the scores on group AMPs predicted explicit bias above and beyond the individual AMPs. [167] Moreover, in terms of the test-retest reliability of these measures, the group AMP demonstrated stronger test-retest reliability than the individual AMP. Finally, participants returned another time to determine whether the individual or group AMP would better predict racially biased behavior. The participants rated a series of mock application materials that measured racial bias through differences in participants' rating of applicants based on whether the application had a traditionally Black or White name. Similar to prior results, both AMPs predicted racial bias on the hiring exercise, but the group AMP was a better predictor than the individual AMP.

Taken together, Cooley and Payne's studies illustrated that using group stimuli on implicit attitude assessments can lead to greater construct validity and reliability, and may serve as a better predictor of behavior than assessments using individuals' images. Thus, this study provides new insights on how we assess implicit attitudes toward broad social categories.

Faking

While one of the recognized benefits of indirect (i.e., implicit) measures of attitudes is the notion that they are not as easily manipulated by social desirability concerns as are direct measures, implicit measures nevertheless are not immune to these concerns. Indeed, previous work has examined whether participants can successfully generate invalid results by "faking out" tests like the Implicit Association Test (IAT) [150, 168–172] or Affect Misattribution Procedure (AMP) [173]. Building on this foundation, a 2016 article by Hughes and colleagues used four experiments to study whether the Implicit Relational Assessment Procedure (IRAP) is also susceptible to faking. A 2007 article by McKenna et al. suggested that the IRAP is not easily amenable to manipulation in the absence of giving participants a concrete strategy for doing so [174]; however, Hughes and colleagues found that giving participants varying degrees of instruction on how to fake out the IRAP led to participants being able to eliminate or even reverse the direction of their effects. [175] As such, the authors concluded that "IRAP performance can be strategically manipulated." [175] ■

"Neuroscience does not provide an excuse to continue to have and act on our biases. Instead, it reveals those biases and removes our ability to deny the tendencies of our unconscious mind."

KIMBERLY PAPILLON, 2012 [176]

8 Neuroscience

Insights from neuroscience continue to augment the foundation of implicit bias scholarship, with themes that carry implications for other disciplines, such as perceptions of pain and others addressed in this chapter.

BEYOND THE BLACK/WHITE BINARY

Attention and Perception

Working outside the Black-White dichotomy that pervades much of the implicit bias research, Guillermo and Correll considered attentional biases (i.e., whether a face captures and maintains someone's attention) toward Latino faces in two studies using White participants. [177] In the first study, participants viewed a selection of White and Latino faces. On "valid" trials, a dot appeared on the same side of the screen as the face. On the "invalid" trials, the dot appeared on the opposite side of the screen as the face; thus, reaction times are generally quicker for valid trials compared to invalid trials. [177] In this study, an attentional bias toward Latinos could be measured by shorter reaction times on valid trials and longer reaction times on invalid trials for Latino versus White faces. The findings showed that Latino faces held participants' attention more than White faces; however, there were no differences in how faces captured attention. The second study replicated all aspects of the first while incorporating Black faces via the inclusion of a separate task. The findings in the Latino-White task replicated the first study. On the Latino-White-Black task, both Latino and Black faces held participants' attention longer than White faces, but there was no difference between the two. These results suggest an attentional bias to racial outgroup members in general, rather than toward a specific racial identity.

"the recognition of a social category then goes on to elicit other higher level cognitive processes such as stereotypes and attitudes."

Synthesizing a wealth of new information in the fields of neuroscience, social cognition, and vision, Cassidy and Krendl reviewed the literature on humans' implicit perception of social categories. [178] Of greatest significance is the evidence that social perception is an interactive

process. This conclusion stands in juxtaposition to the notion that visual cues (e.g., skin tone or facial features) activate the recognition of a social category (e.g., racial identity) in the perceiver's mind. From this perspective, the recognition of a social category then goes on to elicit other higher level cognitive processes such as stereotypes and attitudes.

Instead, the authors cited research that demonstrated the opposite—that social cues or primes can bias our initial perceptions. Moreover, they highlighted the complexity of how social categories are activated in our minds. For example, activation of one social category may simultaneously activate other social categories (e.g., race and gender) if both identities elicit similar stereotypes. Specifically, "Black" and "male" categories may be simultaneously activated, as well as "Asian" and "female." The article also implicated three cognitive structures for maintaining this complex relationship: the fusiform gyrus, the orbitofrontal cortex, and the anterior temporal lobe. Each is involved with the integration of information related to social categories during facial perception.

Perceptions of Pain

Berlingeri et al. evaluated two neurological phenomena related to pain perceptions of outgroup members. [179] The first was a neurological response associated with less empathy for racial outgroup members. This response, referred to as the differential empathetic activation for race (i.e., the "DEAR" effect), correlates with one's implicit biases. [179] The second occurs when participants explicitly rate the level of pain experienced by outgroup members. Respondents appear to be able to control their ratings in a politically correct fashion and attribute equal pain ratings to Black and White actors. The current study analyzed the neurological underpinnings of these seemingly incongruent effects using 25 White participants who took part in a functional magnetic resonance imaging (fMRI) scan. [For other examples of fMRI use in implicit bias research, see 180, 181–185, 186.] During the scan, participants viewed videos of a target actor being touched by a White hand with either a rubber eraser or a needle. These images were counterbalanced by race and gender. To measure what brain regions were active, participants' blood oxygenation level dependent (BOLD) signals were measured when they viewed the painful stimuli as well as when they rated the pain severity. The participants also took an IAT to measure their implicit racial biases. In addition to IAT results that indicated a general pro-White implicit bias, participants took longer to judge the pain of Black actors. However, there were no differences in the explicit ratings of the pain perception of White and Black actors. During the stimulus phase, the DEAR response registered in the left supramarginal gyrus was stronger for White than Black actors; during the response phase, the DEAR effect in the dorsal prefrontal cortex (DPFC) was stronger for Black actors. The racial differences in the location of DEAR responses suggested top-down control processes were involved when making the politically correct answers during the pain rating, while participants' automatic tendency was to perceive less pain for the Black actor than the White actor. [179]

Other Scholarship

Building on their study showing noradrenaline (NA) activity in the fusiform gyrus related to implicit bias [185] and their psychopharmacological study that reduced implicit but not explicit bias [187], Terbeck and colleagues continued their work on the role of noradrenaline (NA) in social cognition. [188] As part of this discussion, the researchers reviewed how this chemical, which is related to both cognitive and physiological stress responses, affects implicit ingroup bias. Their review explored how NA is connected to basic emotions such as anger, fear, and happiness rather than more complex social emotions such as guilt or empathy. Thus, the authors posited that NA activity can help us understand how basic emotions influence complex social judgments and may directly influence implicit social attitudes. [188]

Freeman and Johnson studied whether implicit bias or other neural mechanisms predicted racial disparities in ratings of perceived trust toward others' faces. [189] To test this question, thirty White adults underwent an fMRI task during which they sorted a series of Black and White faces by a non-racial category—age. For each photo, they indicated whether they thought the individual was above or below the age of 24. Among other measures of explicit bias, Implicit Association Test responses were recorded before the fMRI. After the fMRI task, participants rated each image on their level of trustworthiness on a 1–7 scale; these rating were used as a measure of trust disparity between Black and White faces. Results from this task demonstrated that individuals with higher levels of implicit bias exhibited higher degrees of racial trust disparity. [189] Additionally, other neural processes related to differentiating faces of outgroup members affected participants' trustworthiness ratings independent of their levels of implicit bias. For example, more orbitofrontal cortex (OFC) activation and fusiform gyrus-OFC connectivity when perceiving Black compared to White faces predicted less trust disparity. The role of these two locations demonstrated the importance of both race perception and cognitive control processes on perceived trust.

Finally, continuing scholarship regarding the Implicit Association Test attempted to understand the neuroscience aspects of why people are more easily able to respond to congruent IAT trials than incongruent ones (e.g., pairing "flower" with "pleasant" more easily compared to "insect" and "pleasant," to borrow an example from the 1998 debut article of the IAT [190]). To understand these differences, Schiller and colleagues examined whether longer response times indicated more mental processes were taking place or whether it reveals that the same processes were taking longer. [191] By using an EEG (electroencephalogram) while participants took an IAT, they recorded event related potentials (ERPs) and analyzed the data according to where in the brain activity occurred and when. The findings revealed that participants engaged in the same seven processes during both congruent and incongruent trials. Moreover, they found two specific processes that took longer on incongruent trials; these processes were related to the perceptual processing of the stimuli and cognitive control of their motor responses. ■

"The bad news from the science is that even well-intentioned individuals have biases that can impact their perceptions and behavior—producing discriminatory behavior. The good news from the science is that individuals, once educated on the science of implicit bias, can impact those biases."

DR. LORIE A. FRIDELL, 2017 [192]

9 General Contributions

This final chapter captures significant scholarly contributions that extend beyond the domains already addressed in this publication. While expansive, we reiterate our objective to focus on notable works rather than an exhaustive listing.

SCHOLARSHIP RELATED TO CHILDREN

BEYOND THE BLACK/WHITE BINARY

Children

While previous research has recognized the existence of implicit biases in children [35, 38, 39, 193, 194], a new article examined whether adults' implicit racial bias toward children differed from this bias toward adults. Conducted in the UK, Wolf et al. used White European participants, thus creating a White European ingroup to contrast with a South Asian outgroup. Across three studies that considered both age and ingroup/outgroup status, the researchers found that White European participants consistently displayed an implicit preference for their own ingroup, even when the targets were infants and toddlers. [44] Other factors such as participants' spontaneous liking of children or perceived attractiveness of the children failed to account for this finding. As a whole, this research found that "spontaneous racial bias is more attributable to robust in-group favoritism than to out-group derogation" and it "challenge[d] the notion that prejudice against children is lower than prejudice against adults." [44]

In another article considering differences in adult-child dynamics, Todd et al. continued a line of inquiry related to implicit stereotypes of Black men as violent and criminal to consider whether these stereotypes apply to young Black children. Across four experiments that used both words and images to study race-based threat associations, the authors found that youth does not attenuate these associations; that is, Black faces—regardless of age—facilitated the detection of threatening objects and terms. [43] Further analyses determined that these biases were driven by automatic cognitive processes. Todd and colleagues concluded that

their evidence suggested "that the perceived threat commonly associated with Black men may generalize even to young Black boys." [43]

BEYOND THE BLACK/WHITE BINARY

Interested in how the racial attitudes of preschoolers differed from those of adults, Qian and colleagues employed two studies to examine the implicit and explicit attitudes of preschoolers within racially homogeneous societies in Asian and Africa. [42] The first study measured these attitudes for over 200 Chinese preschoolers (age 3 to 5) and adults; these measurements included stimuli of same-race (Asian) and other-race (Black and White) faces. To ensure that the way the researchers measured implicit attitudes was developmentally appropriate for preschoolers, they developed a modified IAT, the Implicit Racial Bias Test (IRBT). The IRBT differed from the IAT in that it replaced text stimuli with images, and it used smiling and frowning faces for response buttons.

"...referencing the historical importance and framing the election of President Obama as a racial milestone increases implicit anti-Black bias among Whites"

The results showed that preschoolers exhibited implicit own-race biases as early as the age of three. [42] Even though all Chinese participants implicitly preferred Chinese faces to other race faces, both children and adults showed more positive implicit attitudes toward White faces than Black faces, though this difference was more pronounced for adults. Moreover, children, but not adults, expressed explicit pro-Chinese biases. A second study included the same stimuli and procedure as the first but studied Black preschoolers and adults from Cameroon. The results showed that 3 to 5 year olds had an implicit preference for own-race faces; however, adults preferred other race faces and showed an implicit bias toward both Chinese and White faces compared to Black faces. Again, children but not adults expressed explicit pro-Black biases.

In tandem, both studies provide evidence that social status influences people's implicit and explicit biases over time.

While previous work has considered the malleability of implicit biases in adults [see, e.g., 1, 13, 14, 152, 195, 196], less scholarship has considered how implicit association changes may operate in youth. A 2016 study by Gonzalez, Dunlop, and Barron used a sample of children ages 5–12 years old to study age-related differences in the formation of and changes to novel implicit associations. Participants were presented a story describing a novel (i.e., non-existent) group and then a second story in which the novel group was associated with a behavior that contrasted the initial story. Participants completed the Child Implicit Association Test (IAT) after hearing each story. Results indicated that the ability to form and change implicit associations does not seem to differ across childhood, "suggesting that the mechanism(s) governing implicit associative learning may be fully intact by age 5." [45] The researchers reflected that this reinforces the notion that first impressions—regardless of the age of first exposure—are particularly influential. In terms of association change, Gonzalez et al. found that novel implicit associations can be reversed and are "particularly sensitive to additional reinforcement." [45]

The Obama Presidency

Skinner and Cheadle used priming related to the election of President Obama as a way to further understand implicit racial bias among White Americans. With more than 200 participants, the researchers considered how group threat theory (i.e., the idea that "members of the societally dominant group will respond with prejudice when they feel that members of a subordinate group are threatening their position") may lead to an increase in implicit racial bias as a result of increased outgroup power or size. [197] The experiment had three conditions: 1) priming power threat by reading a *New York Times* article on the historic significance of Obama's election; 2) priming majority threat by reading a *New York Times* article on projected demographic shifts in the U.S. toward "minority-majority;" 3) a control. After their experience in a condition, participants took assessments

to determine their internal and external motivations to respond without prejudice, as well as the Black-White IAT. Results showed that Whites' implicit racial bias increased when primed with the piece on Obama's racial milestone vs. the control, and participants had greater implicit bias against Blacks in the demographic shift prime condition than in the control. [197] Notably, motivation to avoid prejudice also mattered, as "only those with lower internal motivation to respond without prejudice showed an increase in implicit bias" in the first condition. In sum, the implications of this work "show that referencing the historical importance and framing the election of President Obama as a racial milestone increases implicit anti-Black bias among Whites, especially those who are lower in internal motivation to respond without prejudice." [197]

In light of contrasting research on whether President Obama had a positive impact on implicit attitudes early in his presidency [16, 149, 198–200], Columb and Plant were interested in revisiting this notion of the "Obama Effect" near the end of Obama's tenure in office. Across two studies, the researchers found that following exposure to negative Black exemplars (e.g., O.J. Simpson and Michael Vick), exposure to President Obama led to a decrease in implicit anti-Black evaluative bias and also decreased implicit racial stereotyping, both relative to a control. [154] These effects were not moderated by explicit views of Obama, political affiliation, or other related variables. A second experiment considered a different exemplar, Kobe Bryant, who was pre-assessed to be positive like Obama but more stereotypic of Black people than Obama. Findings suggested that despite differences in perceived stereotypicality, both men had a similar effect on reducing both implicit anti-Black evaluative bias and racial stereotyping relative to a control condition. [154] Taken together, the authors reflected that the valence of exemplar may be more significant than the individual's counter-stereotypicality in changing implicit attitudes and stereotyping.

In contrast to Columb and Plant's findings, work by Schmidt and Axt found no substantive evidence of implicit attitude change (toward Blacks in general, or toward Obama himself) over the first seven years of Obama's presidency after accounting for sample demographic shifts. [201] The researchers examined cross-sectional data from more than 2.2 million individuals who completed the Race or Presidents IATs on Project Implicit.® Noting how Obama's presidency can be perceived as a naturalistic study of sustained exposure to a counterstereotypical exemplar, his effect on implicit cognition seemed minimal. [201] The authors stated that these findings may reflect the notion that implicit anti-Black attitudes had already been changing prior to his election; thus, "Obama's election may be remembered less as a catalyst and more as a byproduct of changes in attitudes toward Black people." [201]

Given the aforementioned divergent research on whether an "Obama effect" existed, March and colleagues considered how the valence of Obama's portrayal may contribute to these mixed findings. Using content from two popular news websites (CNN.com and FoxNews.com) with a focus on the contextual elements surrounding Obama's image, the researchers examined 1) whether FoxNews.com portrayed Obama more negatively than CNN.com, and if so, 2) what effect this may have on automatically activated attitudes. The first study revealed that undergraduate participants found the news websites' images of Obama varied systematically, as images from FoxNews.com – regardless of whether text accompanied the image—yielded more negative portrayal ratings than CNN.com. [202] A second study used a Single Category IAT (SC-IAT) to assess undergraduate participants' automatic attitudes toward Obama, as well as other measures. Results indicated that participants with weaker attitudes developed more negative associations with Obama when repeatedly exposed to his portrayal in a negative manner. [202] Broadly speaking, this work aligns with Columb and Plant (2016) in concluding that while attitude change may be the result of counterstereotypical exemplars, it appeared that "exemplar valence may be the primary cause of the effect." [202]

Implicit Attitude Formation

Studying the processes behind how individuals form implicit attitudes, Hu, Gawronski, and Balas evaluated two competing theories on the process of evaluative conditioning. [203] The

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Foretelling the Future

A Critical Perspective on the Use of Predictive Analytics in Child Welfare

BY KELLY CAPATOSTO

While there has been a lot of enthusiasm surrounding predictive analytics and their possible benefit in the area of child welfare, others have begun to voice concerns regarding their use. As discussed in this white paper, there are reasons to be wary of the widespread use of predictive analytics. The risk of perpetuating cognitive and structural biases is among them. This paper does not to condemn the use of predictive analytics. However, it does hope to promote a critical assessment of these tools and the emergence of other Big Data applications.

THEORETICAL FRAMEWORK

In this report, the Kirwan Institute applies a framework for analyzing racial inequity that considers both 1) cognitive and 2) structural barriers. In tandem, the operation of these barriers explains how inequity can persist in various institutions.

Cognitive Barriers: The role of individual-level thoughts and actions in maintaining structures of inequity. Rather than focusing on explicit, intentional discrimination, the Kirwan Institute highlights the importance of implicit bias and other unconscious psychological processes.

Structural Barriers: The influence of history on policies, practices, and values that perpetuate inequity.

APPLYING THESE BARRIERS TO PREDICTIVE ANALYTICS USE

Models of predictive analytics proceed in three stages. First, data goes into the model. Second, the model, with algorithms and/or statistical analyses, creates an output. Finally, individuals apply the model's outputs to decision-making at the field level. The following analysis critically examines concerns with both the inputs & outputs regarding cognitive and structural factors that could be at play.

	Cognitive	Structural
Inputs	*Humans Encode Biases into Machines*	*Previous Marginalization as a Predictor for Future Risk*
Outputs	*Overconfidence in the Objectivity of Outputs*	*Perpetuating Existing Structural Disparities*

By examining the interaction between the cognitive and structural barriers within both the inputs and outputs, we uplift four potential pitfalls of predictive analytics: 1) Humans Encode Biases into Machines, 2) Previous Marginalization as a Predictor for Future Risk, 3) Overconfidence in the Objectivity of Outputs, and 4) Perpetuating Existing Structural Disparities, described in more detail below.

HUMANS ENCODE BIASES INTO MACHINES

Human beings encode our values, beliefs, and biases into these analytic tools by determining what data is used and for what purpose. The data that institutions choose to use reveal what variables and reporting mechanism are valued most. As indicated by the implicit bias research literature, these unintentional biases can have huge ramifications for our ability to safeguard opportunities for individuals of various genders, races, and ability statuses. To illustrate, one study demonstrated that resumes with White sounding names were nearly 50% more likely to get a call back than resumes with Black sounding names, despite controlling for all other factors, including work experience.

PREVIOUS MARGINALIZATION AS A PREDICTOR FOR FUTURE RISK

Because of past discrimination and historical inequities, subtle biases can emerge when seemingly "race neutral" data acts as a proxy for social categories. For example, data related to neighborhood characteristics, such as zip code are profoundly connected to historic practices of racial exclusion and discrimination. Thus, data that is ostensibly used to rate risk to child well-being can serve as a proxy for race or other past oppression, thereby over-representing those who have suffered from past marginalization as more risky. Even more troubling is the omission of information for youth who do not enter the child welfare system as a counterbalance for these predictions of risk. It is impossible to know how many children who are never maltreated and whom would not properly be assessed as "high-risk" for maltreatment under these factors.

OVERCONFIDENCE IN THE OBJECTIVITY OF OUTPUTS

The allure of predictive analytics is their potential for identifying and correcting for human biases that may arise during important child welfare decisions by lessening reliance on individual judgments. However, algorithms alone are no panacea to subjectivity. Instead, these models can unintentionally encode the same biases reflected in our society. Moreover, it can be very difficult to retroactively identify or correct instances where bias has already occurred. Thus, one of the most serious dangers of predictive analytics is our overconfidence in the objectivity of their outputs.

PERPETUATING EXISTING STRUCTURAL DISPARITIES

One of the potential uses of predictive analytics is the ability to classify individuals and families based on individual risk profiles for maltreatment. To illustrate, one predictive analytic tool utilized data from youth self-reports to determine the variables most related to youth resiliency. Even though the identification of these risk factors is empirically valid, research has yet to show the link between these resiliency scores and treatment outcomes. Thus, this type of scoring may have the potential to impose a punitive system of gatekeeping on less-resilient youth who are denied opportunities more resilient youth are routinely offered. This is just one example of predictive analytics efforts, though research-based, that may not generalize into effective field use. Moreover, if tools such as these do get utilized in the field, their application may actually perpetuate existing structural disparities by restricting necessary services to certain families or neighborhoods.

Full report and related videos at **http://go.osu.edu/B86X**

first is the dual-process account, which is guided by the assumption that distinct processes are involved in implicit and explicit attitudes. In contrast, the propositional perspective posits that individuals form non-automatic propositions related to the nature of a relationship between stimuli that informs both explicit and implicit attitudes. The main difference explored in this article is whether information about the relationship between a Conditioned Stimulus (CS) and an Unconditioned Stimulus (US) affects only explicit attitudes (the dual-process account) or implicit attitudes too (the propositional account). Although results were not entirely consistent across three experiments, the culmination of these findings generally upheld the idea that relationship information can influence implicit attitudes under the correct circumstances, thereby lending greater support to the propositional theory of evaluative conditioning than the dual-process account. [203]

Technological Applications and Innovations

As an innovative application of implicit bias research, scholars are exploring the potential for automated discrimination; that is, where algorithms and other machine learning processes perpetuate bias without being explicitly programmed to do so. Providing a comprehensive overview on the subject, Staab, Stalla-Bourdillon, and Carmichael explored the best possible way to ensure that algorithms do not discriminate by race. [204] The report focused on "black box" algorithms that are ambiguous or difficult to understand. With black box algorithms, the inputs and outputs are observable but the internal processes are unclear. [204] As part of this overview, the report outlined examples of how algorithms can perpetuate the same biases that humans do. The report provided examples of how algorithms that use seemingly neutral proxies for inputs, such as ZIP code, have the potential to discriminate against marginalized groups. Among several suggestions to mitigate the operation of bias in the application of machine learning, the authors offered supporting interdisciplinary collaboration and being conscious of bias in the data mining processes.

Exploring the concern that artificial intelligence (AI) may exhibit the same biases as humans, Caliskan-Islam, Bryson, and Narayanan used an algorithm to analyze how language itself can reveal biases. [205] This AI learns word meanings based on their context with other words; words that frequently appear together in similar contexts often are more closely related. As a practical example of how this works, the researchers stated, "if we find that programmer is closer to man than to woman, it suggests (but is far from conclusive of) a gender stereotype." [205] Based on this operation, the researchers posited that this technique is analogous to the way an IAT measures implicit bias, but instead of using reaction time, it relies on distance between associated words. As such, the study used this linguistic AI to replicate seminal studies related to implicit bias, two of which focused on race.

"... the report outlined examples of how algorithms can perpetuate the same biases that humans do."

One study replicated foundational implicit bias research that established the IAT as an implicit bias assessment. [190] The language analysis included the same words as the original study, which included names associated with either Black or White individuals (e.g., "Lakisha" vs. "Amanda") and words depicting positive or negative bias (e.g., "love" or "family" vs. "abuse" or "filth," etc.). [205] The second study explored the associations between a similar set of racially coded names and a list of words conveying pleasantness (e.g., "joy") vs. unpleasantness (e.g., "agony") in order to replicate a classic 2004 article by Bertrand and Mullainathan. [206] In both examples, the AIs replicated the same biases revealed by implicit association studies; words associated with Whiteness were more closely associated with positive or pleasant words than words associated with Blackness were. [205] The same was true of the inverse. These results are the first of its kind to demonstrate that a commonly used language analytic tool can exhibit the same biases as humans.

AUTHOR REFLECTION

Kelly Capatosto

SINCE I STARTING WORKING on the State of the Science, this is perhaps the first year that the concept of implicit bias has reached a national audience. With this growing spotlight on implicit bias, we have reached an exciting benchmark in the public's perception of the issue. This new level of awareness creates some interesting opportunities to explore the application of implicit bias in a variety of domains. The intersection of implicit bias, big data, and technology is something I perceive will be critical for the field's future direction. As the wave of automation looms over us in the U.S., it is of paramount importance that we ensure our data and analytics are able to account for and control bias (both implicit and structural).

As part of this future direction, a 2016 article by Caliskan-Islam, Bryson, and Narayanan is one of the most innovative applications of implicit bias research I have seen this year. By demonstrating that a language-based artificial intelligence (AI) tool can internalize biases, this piece turns our current understanding of discrimination on its head.

Ultimately, I feel like the goal of implicit bias research has always been to remove the need to prove intent to demonstrate the severity of racially disparate outcomes in our society. Artificial intelligence tools are unbiased by nature—they are a proverbial blank slate—thus any bias they learn reveals the unconscious biases and associations inherent in how humans learn and interact with each other. Thus, I believe this study is the first of many that will ultimately reshape how our society defines culpability in producing racially disparate outcomes. Finally, I hope to see much of this new work in using technological advancements usher in a new era of bias-prevention efforts.

ARTICLES MENTIONED: Caliskan-Islam, A., Bryson, J. J., & Narayanan, A. (2016). Semantics Derived Automatically from Language Corpora Necessarily Contain Human Biases. arXiv preprint arXiv:1608.07187.

These findings have enormous implications for the field of technology. First, the authors asserted that any AIs that rely on language to learn will inevitability internalize the biases present in our culture. Thus, if bias is inherent our language, even a completely neutral machine will eventually learn enough of our language to have biased associations. As such, scientists in other research domains may be pushed to consider that presence of these types of biases and prejudice in humans as the new "null hypothesis," rather than the exception. [205]

Interracial Dynamics

As part of a series of studies that examined the neurological "disgust" response associated with participant perceptions of interracial couples, Skinner and Hudac examined whether this phenomenon was related to the implicit dehumanization of interracial couples. [207] Moreover, the study sought to determine whether this bias was higher if participants were primed with images eliciting disgust. To test this effect, 100 mostly White participants took a modified IAT with stimuli showing same-race and interracial couples. Prior to the IAT, participants were either primed with neutral images or images eliciting disgust (e.g., a dirty toilet). Findings showed an overall tendency to implicitly dehumanize pictures of interracial couples compared to same-race couples, and this implicit bias was more pronounced if participants were primed to feel disgust. [207]

BEYOND THE BLACK/WHITE BINARY

Political Activity

Linking their research to the Charlie Hebdo attack, Zerhouni et al. studied whether implicit prejudice at the city-level predicted participation rates in subsequent mass demonstrations. [208] Responding to criticisms that the demonstrations were motivated by implicit anti-Arab attitudes, the researchers utilized public data from the French/Arab IAT from participants

in French territories from 2007–2014. They created a measure of the relative cultural level of implicit prejudice by averaging the IAT scores from French cities with the largest participation in the rallies, which were then compared with the participation rates documented by authorities during the 2015 rally. In their analysis, Zerhouni and colleagues identified a significant negative relationship between city's implicit prejudice level toward Arabs and participation in the Charlie Hebdo rallies. However, this pattern contrasted with the idea that the rally resulted from the public's implicit anti-Arab attitudes. Instead, they found that less implicit prejudice toward Arabs was related to a greater amount of participation in the rallies. Although conclusions of causation cannot be drawn from this study, it does advance the future exploration of using implicit attitudes collected at the city-level to understand social behavior. As such, a city's relative level of implicit bias may provide insight on how inhabitants might react to a particular social phenomenon. ■

MORE TO EXPLORE

IMPLICIT BIAS AND INCLUSIVE LANGUAGE
Even well intentioned people can possess bias. Though studies have shown explicit expressions of biased beliefs and attitudes have declined significantly over the past few decades, measures of implicit bias remain persistently high.

On this episode of *Student Affairs Live*, host Tony Doody speaks with Zaneta Rago-Craft, Yoshiko Harden, and Lena Tenney to better understand where, how and when we develop our bias. Other topics explored on this episode include micro-aggressions and inclusive language, strategies for ameliorating bias, and tactical self-presentation.

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WATCH "IMPLICIT BIAS AND INCLUSIVE LANGUAGE" HERE:
- http://go.osu.edu/B9ax
- https://www.youtube.com/watch?v=FEtDWCCUq4k&t=199s

CONCLUSION

Authors' Note on Five Years of the State of the Science

Over the past five years, the Kirwan Institute for the Study of Race and Ethnicity has invested significant time and energy into diligently following the scholarly implicit bias literature as it gained enormous traction in academic circles while simultaneously permeating public discourse to previously unseen degrees.

The warm and enthusiastic reception of the *State of the Science: Implicit Bias Review*—even as early as its inaugural year—has consistently encouraged our team as we hear of the publication fostering meaningful conversations, and most importantly, change across time, geography, and circumstance.

While the Kirwan Institute remains committed to maintaining the pulse of the *State of the Science*, we have begun discussing new approaches for making this product increasingly accessible and more responsive to current events. Our team has dreamed some big dreams for the future possibilities of this work, and we look forward to sharing them with you in 2018.

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5. ***You agree that you will advise Keevin Woods, Director, Commission for Racial and Ethnic Diversity in the Profession at the American Bar Association, keevin.woods@americanbar.org, and Alan Bryan, Senior Associate General Counsel - Legal Operations and Outside Counsel Management for Wal-Mart Stores, Inc. at alan.bryan@walmartlegal.com, that you support the above four principles, such that they can work together to maintain and publish an ongoing list of those of us that have committed to them.***

Sincerely,

Susan H. Alexander
Executive Vice President, Chief Legal Officer
Biogen Inc.

David P. Bergers
General Counsel, Managing Director, Legal and Government Relations
LPL Financial

Peter Beshar
Executive Vice President and General Counsel
Marsh & McLennan Companies, Inc.

Paul T. Dacier
Executive Vice President and General Counsel
EMC

Sheila Kearney Davidson
Executive Vice President, Chief Legal Officer & General Counsel
New York Life Insurance Company

Brett J. Hart
Executive Vice President and General Counsel
United Airlines

Marie Oh Huber
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Trish Walsh
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Tony West
Executive Vice President, Government Affairs, General Counsel & Corporate Secretary
PepsiCo, Inc.

AMERICAN BAR ASSOCIATION

DIVERSITY & INCLUSION 360 COMMISSION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and

FURTHER RESOLVED, That the American Bar Association urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys; and

FURTHER RESOLVED, That for purposes of this resolution, "diverse attorneys" means attorneys who are included within the ambit of Goal III of the American Bar Association.

REPORT

I. Introduction

The American Bar Association ("ABA") has four Goals. When the Goals were established, it was determined that no one goal is more important or carries more weight than the others. Goal III is to eliminate bias and enhance diversity,[1] and was borne as an extension of former Goal IX. As amended, Goal IX was "to promote the full and equal participation in the profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities." It is well established that when organizations are diverse and inclusive at every level, clients and the public are better served, which favorably impacts the ABA's Goal II, to improve our profession. Moreover, the well-established business case for diversity and inclusion demonstrates that clients, the legal profession and society are best served when the makeup of lawyers reflects the community in which legal services are provided.[2] Against this backdrop, the ABA President created the Diversity & Inclusion 360 Commission (the "DI360 Commission") to examine the many facets of diversity and inclusion in the profession, and to formulate methods, policy, standards and practices to best advance diversity and inclusion over the next ten years.

The underlying sense of urgency for the DI360 Commission's work and its one-year timeframe stem from the crisis in confidence that many Americans – particularly young Americans – feel about the fairness of our justice system. The ABA has the responsibility to do what only a national association of nearly 400,000 attorneys and judges can do: help restore confidence in our justice system. The ABA strives to uphold the principles of fairness, equality and inclusion, yet the legal profession lags behind other professions in reflecting the diversity of our nation.[3]

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[1] Goal III: Eliminate Bias and Enhance Diversity. Objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system. American Bar Association. "ABA Mission and Goals." Americanbar.org.

http://www.americanbar.org/about_the_aba/aba-mission-goals.html (accessed April 14, 2016). Within the ambit of Goal III, diverse attorneys include lawyers who are racial and ethnic minorities, women, LGBT, and have disabilities.

[2] *See, e.g.,*

Diaz, Luis and Meade, Richard, "What Gets Measured Gets Done: The Case for Uniform D&I Metrics in The Legal Procurement Process." *New Jersey State Bar Association Diversity Committee Newsletter*, September 2015

Roellig, Mark, DeGraffenreidt Jr., James, and Minehan Cathy. "Fixing What's Broken: Strategies for Increasing Diversity in Law Firms." *ACC Docket*, March 2015

Roellig, Mark, "'WHY' Diversity and Inclusion Are Critical to the Success of Your Law Department" (paper presented at the PLI Corporate Counsel Institute, New York, New York, October 2012).

[3] Deborah L. Rhode, *Law is the least diverse profession in the nation. And lawyers aren't doing enough to change that,* THE WASHINGTON POST, May 27, 2015, https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse- profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/.

To fulfill its mission, the DI360 Commission is developing sustainable action plans, producing practical tools, and recommending specific action items to move the needle on diversity and inclusion in an impactful way. The DI360 Commission has conducted its 360-degree review through four working groups, one of which is the Economic Case working group, which seeks to identify specific ways to expand economic opportunities for diverse attorneys.[4]

The economic well-being and success of diverse attorneys makes a difference and is crucial to moving the needle on diversity and inclusion. Diverse attorneys need meaningful opportunities to compete for and attain the best client work. Their success would positively impact other aspects of diversity and inclusion. The economic success of diverse attorneys would attract others into the profession, thereby building the pipeline; upend the implicit bias that stifles opportunities now; and result in the full and unhindered participation of diverse attorneys in the profession, thereby making the profession more representative of the populations it serves. Undoubtedly, a win for diversity and inclusion and the realization of Goal III is a win for our entire profession and the society we serve. As explained below in Section II of this report, the resolution is consistent with Goal III and would take diversity and inclusion to the next level by calling for specific and measurable action by entities that employ lawyers and by clients.

II. Justification for Expanding Economic Opportunities for Diverse Attorneys

A. Survey Data

Despite significant efforts, the legal profession lags behind other professions when it comes to diversity and inclusion. Members of racial and ethnic groups, women, members of LGBT groups and lawyers with disabilities continue to be vastly underrepresented in the legal profession. [5] According to the Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms,[6] the nation's largest law firms have made virtually no progress since the first survey conducted by the National Association of Women Lawyers (NAWL) in 2006 in promoting women into the highest ranks, whether measured by the percentage of equity partners, compensation, representation on the firm's highest governance committees, or rainmaking credit. While focusing its attention on the status of women lawyers in law firms, the NAWL survey reveals that the data are just as challenging for other diverse groups, including lawyers of color and LGBT lawyers.

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[4] For an explanation of the term "diverse attorneys," *see* note 1, *supra*.

[5] For example, 88 percent of lawyers are white – women (although 47 percent of law students and more than one-third of the profession) account for only about one-fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans, and people of color make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. See http://www.nalp.org/lawfirmdiversity_feb2015 for statistics on under-representation of lawyers with disabilities (based on lawyers with disabilities in 740 law offices, covering 73,081 lawyers). See http://www.nalp.org/1215research for statistics on LGBT representation among lawyers (for openly LGBT lawyers based in 943 offices/firms reporting counts.)

[6] Rikleen, Lauren Stiller, *Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms*. Chicago: National Association of Women Lawyers, 2015. Accessed April 14, 2016. http://www.nawl.org/2015nawlsurvey.

The demographics of large law firms have not kept pace with an increasingly diverse pool of talent. The percentage of law school graduates of color has almost doubled in the past two decades to just over 25 percent.[7] And the percentage of associates who are of color increased to
21.63 in 2014 from 8.36 percent in 1993.[8] Yet, lawyers of color accounted for only 7.33 percent of partners in the nation's top 200 law firms in 2014.[9] According to the latest Vault/MCCA Law Firm Diversity Survey Report, "[a] higher proportion of minority partners are salaried than hold equity in their firms. Attorneys of color represent 10.21% of non-equity partners, compared to 7.53% of equity partners. Among women of color specifically, the contrast between equity and non-equity status is even greater: just 2.27% of equity partners are minority women, compared to 4.35% of non-equity partners."[10]

B. The Role of Law Firms

Many law firms have diversity and inclusion programs. Despite valiant and commendable efforts, however, our profession has been unable to move the needle in a meaningful way. This resolution urges law firms to expand and increase opportunities at all levels of responsibility for diverse attorneys.[11] Due to the increasing numbers of diverse law school graduates, the partnership pipeline is richer today more than ever. Yet women comprise just 18 percent of the equity partners in firms responding to the Ninth Annual NAWL Survey.[12] Attorneys of color comprise a mere 8 percent of equity partners, of whom few are women, and at firms reporting data for partners who identify as LGBT, only 2 percent of female and 1 percent of male equity partners are LGBT.[13] Information about lawyers with disabilities is difficult to come by in reported surveys. According to a press release issued in February 2015 by the National Association for Law Placement, "the information that is available suggests that partners with disabilities (of any race or gender) are scarce, with about one-third of 1 percent of partners reported as having a disability in the three most recent years."[14]

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[7] American Bar Association Section of Legal Education and Admissions to the Bar, *ABA Approved Total JD and Minority Degrees Awarded: Fall 2013 (Data from the 2013 Annual Questionnaire)*, 2013. Accessed April 26, 2016. http://www.americanbar.org/groups/legal_education/resources/statistics.html.

[8] NALP, *"Diversity Numbers at Law Firms Eke Out Small Gains – Numbers for Women Associates Edge Up After Four Years of Decline,"* February 17, 2015. *http://www.nalp.org/lawfirmdiversity_feb2015.*

[9] *Id.*

[10] *Vault/MCCA Law Firm Diversity Survey Report.* http://www.mcca.com/_data/global/downloads/research/reports/VaultMCCA_Survey-2015-_v03.pdf, at 5.

[11] While the resolution focuses on the ability of clients to impact economic opportunities for diverse attorneys in the law firms with which they do business, it also urges all providers of legal services to increase opportunities at all levels of responsibility for diverse attorneys. This could include entities that employ attorneys in both the public and private sectors.

[12] Rikleen, Lauren Stiller, *Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms.* Chicago: National Association of Women Lawyers, 2015. Accessed April 14, 2016. http://www.nawl.org/2015nawlsurvey, at 2.

[13] *Id.*

[14] NALP, *"Diversity Numbers at Law Firms Eke Out Small Gains – Numbers for Women Associates Edge Up After Four Years of Decline,"* February 17, 2015. *http://www.nalp.org/lawfirmdiversity_feb2015.* The NALP report did not differentiate between equity and non-equity partners.

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Equity partnership is but one measure of economic success for diverse attorneys in law firms. The ABA must urge law firms to provide opportunities for diverse attorneys to develop and advance to meaningful levels and positions of responsibility within their firms, including:

- Firm chair, managing partner, or co-managing partner
- Senior leadership (Executive/Management Committee or equivalent)
- Regional office managing partner
- Practice group or department leader
- Committee chair
- Partner Review Committee (or equivalent) member
- Compensation Committee member
- Hiring partner or equivalent
- Relationship partner receiving origination credit
- Lead partner for significant matters
- Equity partner

C. The Role of Clients

Corporate clients are frustrated. Despite the business imperative for diversity, law firm demographics have not kept pace with the demand by clients for meaningfully diverse teams to handle their matters. In order for clients to understand and properly demand results, clients must collect specific data on the diversity and inclusion practices of firms they engage or are considering engaging; set clear expectations with law firms; and include diversity and inclusion performance as a criterion in their decisions on which firms they retain. To assist in these efforts and to provide efficiency and uniformity in the collection of data, the DI360 Commission has developed a Model Diversity Survey, as described and explained below in Section II.D of this report.

Specifically, this resolution urges clients to assist in the facilitation of opportunities for diverse attorneys and to direct a greater percentage of the legal services they purchase to diverse attorneys (whether practicing as solo practitioners, in firms whose majority ownership is by diverse attorneys, or in majority-owned firms).

Many corporations have supported diversity within their approved law firms for years, if not over a decade, and more companies join this quest each year. These corporations have collectively spent hundreds of millions of dollars in support of legal diversity through sponsorship, legal spend, and otherwise. Yet, data reveal that little has changed in our nation's law firms and, for some, it is getting worse.

Corporations want to see a return on their investment and they want to know that they are using law firms that reflect the diversity of their employees, customers, other stakeholders, and society as a whole. Corporations as clients need a resource to help ensure that they are engaging law

firms that embrace these laudable goals. Law firms that are truly reflective of our diverse society at all levels need a uniform way to demonstrate their dedication. More importantly, corporations that are new to, but interested in, this effort need guidance and uniform information on the metrics that are most important to fulfilling our shared goals. Law firms that are not currently part of these efforts need inspiration and a uniform tool to help them move forward.

The business case for diversity applies equally to other clients, including municipal corporations, state and federal agencies, and other governmental entities. In their procurement of legal services, they, too, would benefit from the ability to understand the diversity and inclusion practices of law firms with which they do business.

D. The Role of the ABA

To serve these needs, the DI360 Commission is creating a means for all stakeholders to understand and improve diversity and inclusion through use of a model survey and accompanying guidance on best practices for its effective use. No organization but the ABA has the breadth and diversity of membership to take on this task and fulfill our collective goal of increasing diversity and inclusion in our profession.

Specifically, the DI360 Commission has developed a Model Diversity Survey ("ABA Model Survey")[15] that will enable clients to measure the effectiveness of diversity and inclusion in the legal teams that they engage. The ABA Model Survey will allow clients to gather diversity data from law firms that are uniform and consistent, and not based just on anecdotal brochures. Uniformity of data will allow for: (1) uniform measurement and comparison; (2) better business decisions by clients and law firms; and (3) reduction in the time; cost and burden for legal professionals to respond to myriad and voluminous requests for diversity data.[16]

Although other organizations conduct surveys on law firm diversity, these surveys have significant limitations. Many are directed to large law firms only, to the exclusion of mid-to-small firms and, significantly, to women-owned and minority-owned firms, which often fall in the small-firm category. Some surveys focus on only a subset of Goal III attorneys, so they fail to capture comprehensive data on all diverse attorneys. The results of some surveys are available only for a fee, and yet another survey charges a fee to law firms in order to complete the survey.

The ABA Model Survey will overcome these limitations by capturing key data from law firms of all sizes on their diversity and inclusion practices as they apply to all attorneys considered diverse under Goal III. The ABA Model Survey will be available at no cost and its accompanying toolkit will provide guidance to corporate clients on how best to use the tool in

[15] The current version of the ABA Model Survey is available by clicking on this hyperlink: http://www.americanbar.org/content/dam/aba/images/office_president/presidents_diversity_inclusion_model_survey.pdf.

[16] According to a law firm diversity professional who is a member of the DI360 Commission, a firm typically receives more than 50 diversity surveys per year from existing or prospective clients.

making decisions about which law firms to retain and in evaluating their performance and progress in the diversity and inclusion arena. In addition, the ABA Model Survey will relieve law firms of the burden of completing many different, well-intentioned surveys, developed by various clients and groups. It will become the "gold standard" and will continue to evolve and improve over time.

The ABA is uniquely qualified to take the lead in spearheading a much-needed model tool in the diversity arena. The ABA will provide law firms and clients the means to accomplish the objective of the resolution by introducing the ABA Model Survey and providing instruction and guidance to corporate clients on its most effective use. Further, the work of the DI360 Commission lays the foundation for the collection and aggregation of law firm data gathered by the uniform survey. Through publication of the aggregate data on the ABA website, the profession and the public we serve will be able to assess annual changes in diversity metrics and gain an understanding of the legal providers that are making the most progress on diversity. In addition, a buyer of legal services will be able to compare responses from the firms they use to the aggregated data. This will enable clients to determine how focused – or not – their providers are on improving diversity.

The DI360 Commission anticipates that the ABA Model Survey will be the most utilized survey of its kind due to the fact that it will be made available, unlike similar surveys, for free and to the widest selection of law firms and corporations in the legal world. The survey and resulting data should become the standard-bearer for measuring our profession's progress in this imperative, yet slow-moving, charge. While we create uniformity, simplicity, and education in this space, we also believe that collection and aggregation of this data will facilitate the addition of newcomers to this effort.

III. Why the ABA Should Take Action Now

A. Why is the House of Delegates Being Asked to Adopt this Resolution?

The ABA serves as the national representative of the legal profession, and also is the world's largest organization of lawyers and judges. Leadership by the ABA can stir the conscience of the legal profession and inspire individual and collective commitments and, most importantly, *action and results*. Consistent with its status as the world's leading organization of lawyers and judges, the Association must take a leadership position. Adoption of this resolution would provide an example for other organizations and the profession to follow. By urging action, this resolution would increase economic opportunities for diverse lawyers and thereby help realize the objective of Goal III.

B. The ABA Plays a Unique Role in the Legal Profession

No segment of society is so strategically positioned to address the issues of diversity as the legal profession. No other profession has a higher duty to do so. That duty arises out of the unique

offices that lawyers hold as ministers of the law and guardians of its conscience. The legal profession has a long and proud heritage as champions of individual rights and freedoms. The Association is uniquely qualified for the task. If adopted by the House of Delegates, this resolution would allow the ABA to play a crucial role in leading the legal profession to embrace and promote diversity at a higher level in law firms and corporations. Adoption of this Resolution would proclaim the Association's unwavering commitment to equality for all lawyers.

C. The ABA's Historical Stances on Diversity in the Legal Profession

The ABA has a long and proud history of demanding equality for lawyers of color and women. With the passage of Goal IX, "to achieve the full and equal participation of minorities and women within the profession," and the creation of the Commission on Opportunities For Minorities in the Profession (currently known as the Commission on Racial & Ethnic Diversity in the Profession) in 1986, the ABA took bold steps to create its first and now the oldest entity to deal with facilitating racial and ethnic change in the ABA and the legal profession. The ABA's creation of the Commission demonstrates one of the most successful, decisive and comprehensive actions taken by the legal profession to achieve the goal of equal opportunities for diverse lawyers.

Among the recommendations from the 1986 Report that created the Commission on Racial & Ethnic Diversity, Recommendation 3.4 directed the ABA to "take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers."[17] In fact, the 1986 Report laid the foundation for the issues that this resolution addresses. Then, in 2008, the ABA adopted Goal III to eliminate bias and enhance diversity. Goal III replaced original Goal IX and demonstrated to the legal profession and the greater public that the ABA embraced diversity and inclusion as a core value. As a testament to the ABA's leadership and influence, we witnessed an increase in the adoption of goals similar to Goal III by bar associations, law firms, corporations, and other legal entities throughout the country.

This resolution provides continuity with the 1986 Report and fulfills its mandate for "concrete actions." This resolution also goes beyond the mandate of the 1986 Report by applying to all Goal III attorneys.

IV. Conclusion

The ABA represents the earliest coalescence of the legal profession. It is the seminal foundation for myriad legal organizations around the world and is, without question, the most diverse and influential of all voluntary legal organizations. The stated mission of the ABA includes serving equally its members, our profession, and the public, by defending liberty and delivering justice as the national representative of the legal profession. In order to achieve that mission, our

[17] ABA Task Force on Minorities in the Legal Profession, Report with Recommendations (January, 1986).

profession must be truly diverse at all levels, in all areas, and in all occupations. We must relentlessly pursue Goal III by promoting full and equal participation in the ABA, the profession, and the justice system. In order to do so, all areas of the profession must be wholly reflective of the diversity we find in our society. While we have work to do in all areas of the profession, we have great work to do in law firms.

As the buyers of legal services, corporations and other types of clients may have the greatest impact in increasing diversity in the legal profession. They can use their power to drive change through the buying choices they make in their retention of legal services and their decisions regarding the continued use of certain legal providers, all based on the diversity of the firms and their progress toward improvement. Corporate America is well aware of the value of embracing diversity and inclusion and the correlation between its support and corporate results, employee engagement, and the need to focus on the broad customer base. With more consistent data available, corporates boards, chief executive officers, and general counsels can rationally and consistently measure and be held accountable for how they are doing.

This resolution calls for a two-pronged approach by urging law firms to focus on their diversity and inclusion practices in a meaningful way, and clients to use their purchasing power to increase economic opportunities for diverse attorneys. Working together, law firms and clients can have tangible impact in moving the needle on diversity and inclusion in the legal profession.

The Diversity and Inclusion 360 Commission respectfully urges the House of Delegates to adopt this resolution.

Respectfully submitted,

Eileen M. Letts, Co-Chair David B. Wolfe, Co-Chair
Diversity & Inclusion 360 Commission

September 7, 2016

Re: Requesting Your Assistance in Implementing ABA Resolution 113 to Help Promote Diversity in the Legal Profession

We are writing to you as the chief legal officers of the Fortune 1000 companies to ask you to join in an extremely important initiative that we believe will assist significantly in improving the diversity within the legal profession and within many of the law firms with which we interact.

On August 8 the American Bar Association (ABA) House of Delegates passed the attached Resolution 113 that urges all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibility for diverse attorneys. It further urges us to assist in facilitating the creation of opportunities for diverse attorneys and direct a greater percentage of the legal services we purchase, both currently and in the future, to diverse attorneys.

This resolution was supported by the Report, also attached, which highlights that the legal profession remains the least diverse of comparable professions despite the fact that many of us have worked tirelessly to enhance diversity and inclusion in our noble profession. In addition, the Report outlines the well-established business case for diversity and inclusion, which demonstrates that our businesses, the legal profession and society are best served with diverse teams that reflect the community in which legal services are provided.

We believe that as buyers of legal resources, we are in the best position to drive the changes necessary to dramatically improve diversity at all levels in the law firms that provide us with legal services. However, as many of you are aware, it is extremely difficult to determine which firms to use, or not use, based upon their performance in developing diverse teams at all levels within their firm. We can and do obtain data on the actual service we buy and request organization-wide data from the firms we use. However, without comparable law firm statistics we are unable to conduct a meaningful assessment. With this in mind, the Report includes a link on the ABA website to a standard Model Survey (also attached) which all companies can use. This will allow us to easily compare the diversity of the firms with which we currently work or those we may choose to retain.

We assume that you currently request diversity data from many of the law firms you retain. And we also know that our teams have all worked hard to develop these requests and each of us prefers our forms to any standard form. However, what we may lose in using a standardized approach should be greatly outweighed by the benefits of both making it much easier for law firms to respond (they will not need to fill out multiple, and oftentimes, very different requests) and, more importantly, by allowing us to more easily compare firm performance to make smarter buying decisions. Simply put - performance transparency will make for more rational and better buying decisions. As Justice Brandeis said, "Sunlight is the best disinfectant." But this transparency of data will only be valuable if a significant portion of the Fortune 1000 companies request it.

So, what are we asking? ***We ask you to join us and support the commitment to the following five items:***

1. ***You agree that you support ABA resolution 113;***
2. ***You agree that you will ask the firms that provide a significant portion of your legal services to complete the Model Survey*** *(of course you may continue to ask these firms additional questions specific to your business and the actual attorneys that serve you);*
3. ***You agree that firms you currently do not retain and that are competing to handle a significant matter for your company will complete the Model Survey;***
4. ***You agree that the information obtained through the Model Survey will be used as a factor in determining what firms to retain or terminate in providing legal service to your company; and***

American Bar Association
Model Diversity Survey Resolution 113 Signatories

1. Abbvie
2. Abercrombie & Fitch
3. ABM Industries
4. Adobe
5. American Express Company
6. Aon Global Law
7. Archer Daniels Midland Company
8. Astra Zeneca
9. BASF Corp.
10. Biogen
11. Bloomberg LP
12. Boise Cascade
13. Booz Allen Hamilton
14. Bristol-Myers Squibb
15. Capital One Financial
16. CBRE, Inc.
17. CBS Corporation
18. CenterPoint Energy, Inc.
19. Cerner Corporation
20. Cigna
21. Citizen Financial Group
22. The Clorox Company
23. Comcast Corporation
24. CVS Health Company
25. Dana Incorporated
26. Eaton
27. eBay
28. Echo Star
29. Edison International
30. Eli Lilly and Company
31. EMC
32. EnerSys
33. Exelon Corp.
34. Facebook
35. Guardian Life Insurance
36. The Hartford
37. Hess Corporation
38. Honeywell
39. HP Inc.
40. Interpublic Group
41. John Hancock Financial
42. JP Morgan Chase & Co.
43. Kimberly-Clark Corporation
44. Kodak
45. Lincoln Financial Group
46. Lockheed Martin
47. LPL Financial
48. Macy's
49. Marsh & McLennan
50. MassMutual
51. MasterCard
52. Mattel
53. McDonald's
54. McKesson Corporation
55. Meritor
56. MetLife
57. Microsoft
58. Molson Coors Brewing Company
59. Nasdaq, Inc.
60. New York Life Insurance Company
61. Northrop Grumman
62. Northwestern Mutual
63. ON Semiconductor
64. One America
65. ORIX Corporation USA
66. Panda Restaurant Group, Inc.
67. Pearson
68. PepsiCo
69. Pitney Bowes
70. The Principal Financial Group
71. Prudential
72. Public Service Enterprise Group PSEG
73. Quest Diagnostics
74. Royal Bank of Canada
75. Regional Transportation District (Denver)
76. Rockwell Automation
77. Sanofi US
78. Securian Financial Group
79. Statefarm
80. Thrivent
81. TIAA
82. Travelzoo
83. U.S. Bancorp
84. United Airlines
85. Unum Group
86. Varian Medical Systems
87. Verizon Communications
88. Vertex Pharmaceuticals
89. Viacom
90. Visa
91. Voya Financial
92. Walmart, Inc
93. The Williams Companies, Inc.

2018 ABA Model Diversity Survey

PLEASE NOTE: You will not be able to save your entries. Please see the pdf version of the survey on the homepage and plan accordingly.

PURPOSE: The American Bar Association ("ABA") has designed this Model Diversity Survey to assist law firms and clients in analyzing the role of minorities, women, LGBT, and disabled lawyers in law firms and on client matters. As firms and clients track information over time, the Model Diversity Survey can become a vehicle for benchmarking the diversity of lawyers providing legal services as well as regular discussions between clients and their outside counsel on the topic of diversity.

To provide the broadest possible base of information about diverse lawyers at all levels of practice, we have included firms of all sizes in this survey.

The information you provide will be used for two purposes. First, the ABA will share your law firm's responses with companies who are interested in evaluating law firms for purposes of hiring or retaining them as outside counsel. Second, the ABA will use your law firm's responses to analyze the state of diversity and inclusion in the legal profession.

Participating companies will receive your responses to the survey in a manner that will allow them to identity your law firm's name, your law firm's CEO/Managing Partner names, and your law firm's survey respondent's name and email. While the names of firms participating in the survey will be listed, all response information will be aggregated and released in a statistical or summary form. In addition, ABA will not report results in categories small enough to allow the identity of any participating law firm or individuals to be inferred. Thus, the ABA's research findings will not identify the names of individual attorneys.

Your submission of a complete questionnaire will be taken by the ABA and an identified research firm engaged by the ABA as consent by you to participate in this process.

For additional information, please review the ABA's Privacy Policy, which you can find at: https://www.americanbar.org/utility/privacy.html

FAQs

Instructions:

1. Only numerical data may be entered in charts. When completing charts, please enter "0" where the number is zero. Please enter "N/A" if the question is not applicable to your firm.

2. Unless otherwise stated, all answers should reflect **full-time U.S. lawyers only**. Do not include temporary or contract attorneys in your responses.

3. The information you provide should be correct as of **December 31, 2017**.

4. Where a lawyer fits more than one diversity category, that lawyer may be counted in all applicable categories (e.g., an African-American female, disabled lawyer may be counted as a minority lawyer, a female lawyer and a disabled lawyer).

5. **All questions are mandatory**, and you will be unable to submit without completing the survey. If your survey data is incomplete, we will be unable to share your submission with the requesting corporation.

6. **Each firm may submit only <u>one</u> survey annually.** There will not be an opportunity to fill out an additional survey or to amend your submission. Should you not have certain data asked for in the survey, there is an option of filling in "N/A." At the end of the survey, you have the option of filling in a "comments box" where you may provide any information you'd like clients to know <u>generally</u> about your firm. Keep in mind, your client(s) may request more specific team data, and you will likely need to provide the client(s) with a further explanation outside of the Model Diversity Survey. **You will not be able to upload any documents to supplement your responses to the Model Diversity Survey.**

PLEASE USE THE FOLLOWING DEFINITIONS TO ANSWER ALL QUESTIONS:

1. For purposes of this survey, diversity is limited to ABA Goal III categories and is defined as "minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities." If you would like more information about Goal III categories, please see http://www.americanbar.org/groups/diversity/DiversityCommission/goal3.html.

2. For purposes of this survey, "minorities" are defined as: those whose race is other than White/Caucasian and include the following categories designated by the Equal Employment Opportunity Commission: "African-American/Black (not Hispanic/Latino); Hispanic/Latino; Alaska Native/American Indian; Asian; Native Hawaiian/Other Pacific Islander; and Multiracial (those who identify with two or more of the above races)." **PLEASE NOTE: no attorney can be counted in more than one minority category.**

3. **"Equity partner"/ "Shareholder"/"Principal"** is a lawyer who owns a fraction of their law firm. **"Non-equity partner"** is a lawyer whose law firm identifies that lawyer as such for marketing or other purposes but does not own any portion of said law firm.

4. **"Counsel"** means a lawyer known as of counsel, senior counsel, or special counsel, or senior attorney, and is neither an associate, nor a partner. That lawyer is a permanent salaried employee of the firm and not a temporary or contract attorney.

5. **"Other lawyer"** means a lawyer who is not a counsel, associate, or partner. That lawyer is a permanent salaried employee of the firm and not a temporary or contract attorney.

6. **"Lead lawyer"** means having the primary role and responsibility for directing the firm's work for the client on a particular matter or matters.

7. **"Reduced Hours Schedule"** means the schedule of a lawyer who works less than full-time hours and remains eligible for partnership, including equity partnership.

8. **"Minority-owned firm"** means a firm that is at least 51 percent owned, operated and controlled by minority group members, as described in the above definition of "minorities."

9. **"LGBT-owned firm"** means a firm that at least 51 percent owned, operated and controlled by individuals who are self-identified as LGBT.

10. **"Women-owned firm"** means a firm that is at least 51 percent owned, operated and controlled by women.

11. **"Disabled-owned firm"** means a firm that at least 51 percent owned, operated and controlled by one or more individuals with disabilities.

12. **"Homegrown Partner"** means an individual whose career began at the firm as an associate and who became a partner in the firm.

QUESTIONNAIRE:

Firm Name:

_____

Head of Firm/CEO/Firm-wide Managing Partner:

_____

Date of Survey Completion:

_____

Survey Respondent Contact Name:

_____

_____

_____

_____

_____

Survey Respondent Contact Title:

_____

Survey Respondent Contact Email:

_____

Total number of lawyers firm-wide, as of December 31, 2017:

_____

_____

_____

_____

Total number of U.S. lawyers, as of December 31, 2017:

Based on your answer to the previous question, please check the size category that fits your firm:

- 1 attorney
- 2-20 attorneys
- 21 to 100 attorneys
- 101-300 attorneys
- 301+ attorneys

Is your firm women-owned, minority-owned, disabled-owned or LGBT-owned?

- Yes
- No

If yes, what is the categor(ies) of ownership?

If yes, is the firm certified?

Please name the certifying entit(ies) and date of certification(s):

Please provide your firm's demographic profile for all U.S. offices as of December 31, 2017. Please provide a response for each box with a number or "N/A" (if you do not have an attorney applicable in a category).

Overall Firm Demographics

	Equity Partners	Non-Equity Partners	Associates	Counsel	Other Lawyers	Totals
African-American/ Black (not Hispanic/ Latino)						
Hispanic/Latino						
Alaska Native/ American Indian						
Asian						
Native Hawaiian/ Other Pacific Islander						
Multiracial						
White						
LGBT						
Disabled						
Women						
Men						

Please provide your firm's demographic profile for lawyers in leadership positions in 2017. Please provide a response for each box with a number or "N/A" (if you do not have an attorney applicable in a category).

Firm Leadership/Management Demographic Profile

	Total	Minority Female	Minority Male	White Female	White Male	LGBT	Disabled
Number of attorneys who serve on the highest governance committee of the firm							
Number of lawyers who lead offices							
Number of lawyers who lead firm-wide practice groups or departments							
Number of lawyers who lead local office practice groups or departments.							
Number of lawyers who lead firm-wide committees							
Number of attorneys on the Partner Review Committee or the equivalent							
Number of lawyers who serve on the firm-wide compensation committee							
Number of hiring partners or equivalent							

Please provide your firm's demographic profile of "Homegrown Partners" (as defined in instructions) in 2017. Please provide a response for each box with a number or "N/A" (if you do not have an attorney applicable in a category).

2017-- Number of Promotions from Associate to Partner

	Equity Partners	Non-Equity Partners	Associates	Counsel	Other Lawyers	Totals
African-American/Black (not Hispanic/ Latino)						
Hispanic/Latino						
Alaska Native/ American Indian						
Asian						
Native Hawaiian/ Other Pacific Islander						
Multiracial						
White						
LGBT						
Disabled						
Women						
Men						

Please provide the number of lawyers who left the firm in 2017. Please provide a response for each box with a number or "N/A" (if you do not have an attorney applicable in a category).

2017 Attrition -- Lawyers who left the firm (Include voluntary and involuntary)

	Equity Partners	Non-Equity Partners	Associates	Counsel	Other Lawyers	Totals
African-American/Black (not Hispanic/ Latino)						
Hispanic/Latino						
Alaska Native/ American Indian						
Asian						
Native Hawaiian/ Other Pacific Islander						
Multiracial						
White						
LGBT						
Disabled						
Women						
Men						

Please provide the number of lawyers who joined the firm in 2017. Please provide a response for each box with a number or "N/A" (if you do not have an attorney applicable in a category).

2017 Hires

	Equity Partners	Non-Equity Partners	Associates	Counsel	Other Lawyers	Totals
African-American/Black (not Hispanic/ Latino)						
Hispanic/Latino						
Alaska Native/ American Indian						
Asian						
Native Hawaiian/ Other Pacific Islander						
Multiracial						
White						
LGBT						
Disabled						
Women						
Men						

The number of lawyers who worked a reduced hours schedule in 2017. Please provide a response for each box with a number or "N/A" (if you do not have an attorney applicable in a category).

2017 Lawyers Working Reduced Hours Schedule

	Equity Partners	Non-Equity Partners	Associates	Counsel	Other Lawyers	Totals
African-American/Black (not Hispanic/ Latino)						
Hispanic/Latino						
Alaska Native/ American Indian						
Asian						
Native Hawaiian/ Other Pacific Islander						
Multiracial						
White						
LGBT						
Disabled						
Women						
Men						

Please provide your firm's demographic profile for the top 10% highest compensated partners in the firm in 2017. Please provide a response for each box with a number or "N/A" (if you do not have an attorney applicable in a category).

	Men	Women
African-American/Black (not Hispanic/Latino)		
Hispanic/Latino		
Alaska Native/American Indian		
Asian		
Native Hawaiian/Other Pacific Islander		
Multiracial		
White		

Please provide your firm's demographic profile for the top 10% highest compensated partners in the firm in 2017. Please provide a response for each box with a number or "N/A" (if you do not have an attorney applicable in a category).

	Men	Women
LGBT		
Disabled		

Please identify whether your firm has undertaken the following initiatives or actions by clicking the check box if your response is "yes." If your response is "no," please write N/A in the comment box below each statement. You may also use the comment box to provide additional explanation as needed.

A. Firm has a written diversity strategy that has been communicated to all firm attorneys.

B. Firm gives billable credit for work that is directly related to diversity efforts (but is not pro bono work).

C. Firm ties a component of partner compensation to diversity efforts.

D. Firm has a diversity committee that includes senior partners and that reports to the firm's highest governing body.

E. Firm has a full or part-time diversity professional who performs diversity-related tasks.

F. Firm has affinity or employee resource groups for its diverse/minority (as defined in instructions) attorneys, which meet at least quarterly.

G. Firm has a succession plan that specifically emphasizes greater inclusion of diverse/minority (as defined in instructions) lawyers.

H. Firm mandates and monitors that minority and women attorneys have equal access to clients, quality work assignments, committee appointments, marketing efforts and firm events.

I. Firm requires inclusion of at least one diverse/minority (as defined in instructions) candidate in all hiring decisions.

J. Firm policy specifically prohibits discrimination based on disability, sexual orientation, gender identity, and gender expression.

K. Firm provides opportunity for attorneys to voluntarily disclose their disability and sexual orientation, gender identity, and gender expression through Firm data collection procedures.

L. Firm policy specifically provides for paid maternity leave.

M. Firm policy specifically provides for paid paternity leave.

N. Firm has a formal, written part-time policy that permits partners to be part-time.

O. Firm has a flex-time policy.

P. Firm provides for or mandates diversity training for all lawyers and staff.

Q. Firm has a supplier diversity program.

Comments:

PLEASE NOTE: Once you click submit, you will not be able to revise your response. Please ensure your entries reflect your final responses.

ABA Model Diversity Survey - Non-mandatory "Client Matters" Supplement - Download Microsoft Word Document

CLIENT MATTERS: *This template is intended to be a model for your firm to use to provide client-specific demographic information to your client. It is not to be uploaded on the ABA portal or shared with the ABA in any way.*

[redacted]

OUTSIDE COUNSEL

BILLING GUIDELINES & INSTRUCTIONS

Effective January 1, 2017

[redacted] [redacted]

XIII. COMPLIANCE AND DIVERSITY

Your firm is expected to comply with the Sarbanes-Oxley Act requirements on professional conduct and reporting and to adhere to [redacted] Supplier Code of Conduct attached hereto [redacted] which can be found at www[redacted]

Non-US firms are expected to comply with the Foreign Corrupt Practices Act and any other applicable anti-bribery and anti-corruption regulations.

We seek to engage lawyers and support staff from diverse backgrounds that reflect the diversity of the business, the legal department and our customers. The pursuit and recognition of diversity goals will be a factor in your firm's continued engagement.

[redacted] supports the promotion of diversity in the legal profession. Specifically, [redacted] supports Resolution 113 to Help Promote Diversity in the Legal Profession passed by the American Bar Association ("ABA"). [redacted] requires the law firms it retains to complete the ABA Model Diversity Survey (attached [redacted] as a condition of the engagement.

XIV. INSURANCE

Firms must carry any insurance required by local, state or other regulatory authorities at limits no less than what is required by law. [redacted] reserves the right to request a Certificate of Insurance at any time from your firm, and your firm must provide the Certificate within 10 days of the request.

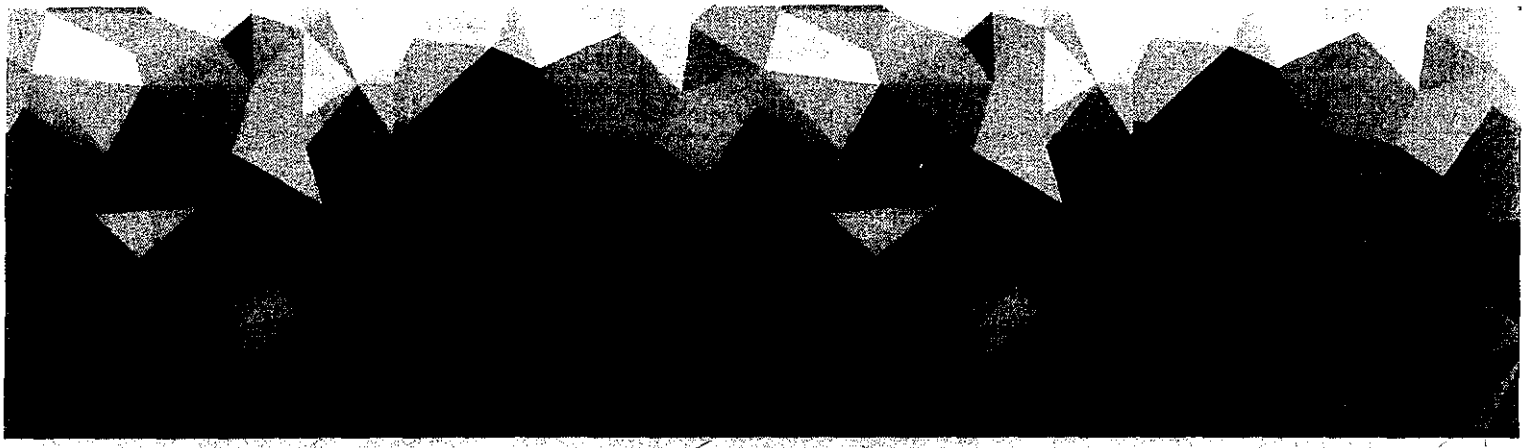
XV. TERMINATION

[redacted] may at any time, terminate its retention of your firm, and your firm shall be entitled to payment for any fees earned by your firm for performance of services and reimbursement of eligible expenses through the date of termination. Any performance based incentives or fees shall only be payable if the agreed upon outcome has been reached prior to the termination date, as set forth in the engagement letter. The terms of this, or any then applicable, Outside Counsel Billing Guidelines and Instructions shall remain in effect and survive any terminated Engagement Letter indefinitely.

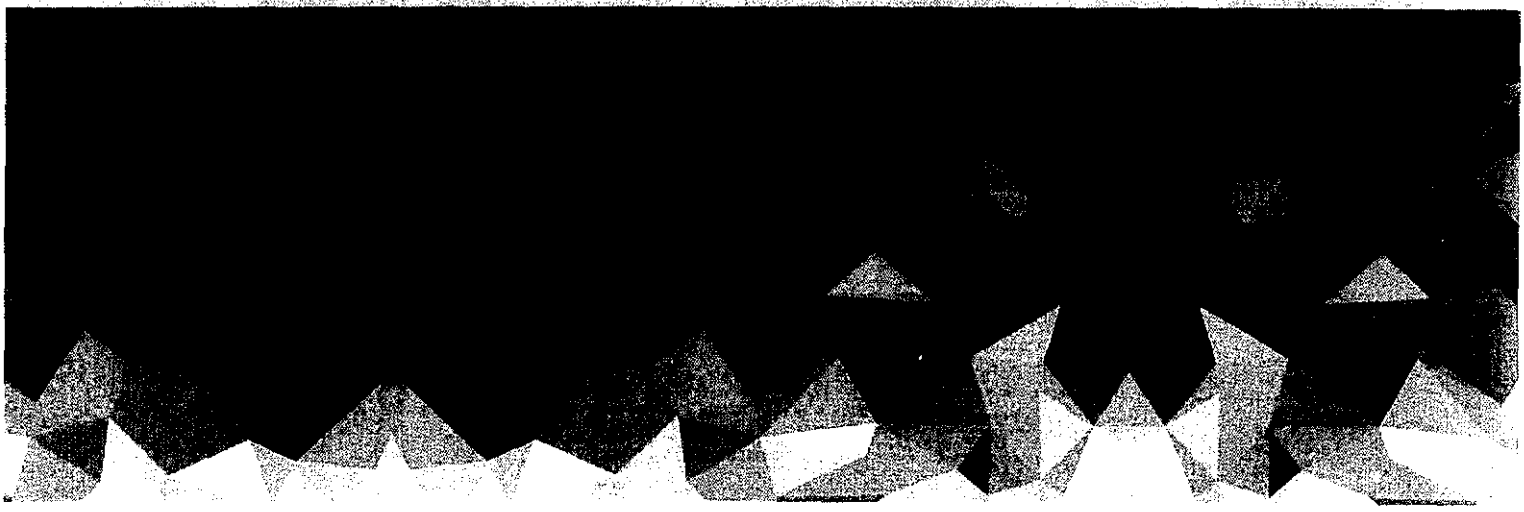
[redacted] expects that your firm will cooperate with [redacted] and/or another firm that it has retained in the transition of documents, material and any other property pertaining to any matter on which your firm was engaged.

[redacted]

nalp



2017 Report on Diversity In U.S. Law Firms



National Association for Law Placement, Inc. (NALP)
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Contents

Introduction

Women and Black/African-Americans made small gains in representation at major U.S. law firms in 2017 compared with 2016, according to the latest law firm demographic findings from the **National Association for Law Placement** (NALP). However, representation of both these groups remains below 2009 levels. NALP's recent analyses of the 2017-2018 NALP Directory of Legal Employers (NDLE) — the annual compendium of legal employer data published by NALP — shows that although women and minorities continue to make small gains in their representation among law firm partners in 2017, the overall percentage of women associates has decreased as often as not since 2009, and the percentage of Black/African-American associates has declined most years since 2009, with small increases only in 2016 and 2017.

NALP Executive Director James Leipold commented on the new findings noting, "The latest NALP diversity and inclusion findings mirror recent findings by other national organizations, including the Minority Corporate Counsel Association and the National Association of Women Lawyers in showing that women and minority partners remain fairly dramatically under-represented at US law firms. The good news is that since the set-backs measured in the associate ranks in the aftermath of the Great Recession, the data show that incremental net positive changes continue to be measured year-over-year for most groups. Women and minorities are better represented among the partnership and associate ranks than they were in 2016, though only incrementally so. Nevertheless, at the associate level, women and African-Americans remain less well-represented than they were before the recession, a finding that is both discouraging and significant."

Leipold continued, "The other important piece of these findings is that the national aggregate numbers tell only part of the story. There are significant differences by law firm size and geography, and there are many jurisdictions where the disparities in representation are stark. Consider, for instance, that in Miami 33% of partners are minority while in Boston the figure stands at just 5%, or that in New York City 27% of associates are minority while in the racially diverse city of Charlotte minorities make up just 14% of associates, and that in Northern Virginia there were no minority men in the 2017 summer associate class."

Highlights

Women & Minorities

Associates

Representation of women, minorities, and minority women among associates saw small gains in 2017, but representation of women is still below pre-recession levels.

Partners

In 2017, representation of women, minorities, and minority women among partners in law firms across the nation all increased a small amount over 2016.

Lawyers Overall

Overall, representation of women lawyers as a whole was up, has more than recouped losses in 2010, 2011, and 2015, and has exceeded the 2009 level since 2014.

Summer Associates

The representation of women and minorities in the summer associate ranks compares much more favorably to the population of recent law school graduates, though representation of minorities as a whole was unchanged from 2016.

Lawyers with Disabilities

Lawyers with disabilities (of any race or gender) are scarce, both at the associate and partner levels.

Openly LGBT Lawyers

The percentage of LGBT lawyers has generally been trending upward over the period since 2002 when NALP first began compiling these figures, and small increases from 2016 to 2017 occurred across all lawyer types.

Significant Findings

ASSOCIATES:

Representation of women, minorities, and minority women among associates saw small gains in 2017, but representation of women is still below pre-recession levels.

NALP's analysis found that representation of minority associates has continued to increase since 2010 (from 19.53% to 23.32%) following widespread layoffs in 2009. Over the same period of time, however, representation of women has seen a net decrease, despite small upticks in 2014 and again in 2016 and 2017. The representation of women increased steadily from 38.99% in 1993 to its peak of 45.66% in 2009. In 2017, the percentage of representation sits at 45.48%, compared with 45% in 2016, and below the 2009 figure by not quite 0.2 percentage points.

In contrast to the pattern for women as a whole, representation of minority women among associates has increased from about 11% (2009-2012) to 12.86% in 2017, though some backsliding in 2010 is noted. (See Table 1.)

Much of the increase in minority representation since 2011 can be attributed to increased representation of Asians among associates. While overall minority representation fell in 2010, this was not the case for Asian associates. Asian associates now make up 11.4% of all associates, with representation having risen over two percentage points, from 9.28% in 2009 to 11.40% in 2017. Hispanic associate representation has also risen. After fluctuating between 3.81% and 3.95% of associates between 2009 and 2014, Hispanics have slightly outnumbered Black/African-Americans among associates since 2015. In 2017, Hispanics accounted for 4.57% of associates. In contrast to trends among Asian associates and even Hispanic associates, representation of Black/African-Americans among associates fell every year from 2010 to 2015. **Despite small increases in both 2016 and 2017, representation of Black/African-American associates remains below its 2009 level of 4.66% and is now 4.28%.** (See Table 2.)

PARTNERS:

In 2017, representation of women, minorities, and minority women among partners in law firms across the nation all increased a small amount over 2016.

During the 25 years that NALP has been compiling this information, law firms have made steady, though very slow, incremental progress in increasing the presence of women and minorities in the partner ranks. In 2017, that slow upward trend continued, with minorities accounting for 8.42% of partners in the nation's major firms, and women accounting for 22.70% of the partners in these firms, up from 8.05% and 22.13%, respectively, in 2016.

Nonetheless, over this period, the total change has been marginal at best. In 1993 minorities accounted for 2.55% of partners and women accounted for 12.27% of partners. At just 2.90% of partners in 2017, **minority women continue to be the most dramatically underrepresented group at the partnership level**, a pattern that holds across all firm sizes and most jurisdictions. The representation of minority women partners is

somewhat higher (3.31%) at the largest firms with more than 700 lawyers. Minority men, meanwhile, account for just 5.52% of partners this year, compared with 5.29% in 2016. This means that the increase in minorities among partners was somewhat more than one-tenth of one percent for women and somewhat more than two-tenths of one percent for men.

However, most of the increase in minority representation among partners since 2009 can be attributed to an increase of Asian and Hispanic male partners in particular. **Representation of Black/ African-Americans among partners has barely budged over the period** and was 1.83% in 2017, almost flat compared with 2016, and not much higher than the 1.71% figure in 2009. (See Table 2.)

LAWYERS OVERALL:

Overall, representation of women lawyers as a whole was up, has more than recouped losses in 2010, 2011, and 2015, and has exceeded the 2009 level since 2014.

This increase reflects both the increase among partners and associates noted above and also among lawyers other than partners and associates such as "of counsel" and staff attorneys who, in 2017, accounted for almost 15% of attorneys at these firms. For example, women accounted for 40% of these other attorneys in 2017, compared with 39.7% in 2016. Although the overall figure for women fell in 2010 and 2011, and again in 2015, the overall percentage for women (34.54% in 2017) has exceeded the 2009 figure of 32.97% since 2014.

The representation of minorities among lawyers as a whole rose some in 2017, to 15.18%. Consistent with findings for minority women among partners and associates, representation of minority women as a whole also increased slightly from 7.23% in 2016 and minority women now make up 7.54% of lawyers at these law firms. (See Table 1.)

SUMMER ASSOCIATES:

The representation of women and minorities in the summer associate ranks compares much more favorably to the population of recent law school graduates, though representation of minorities as a whole was unchanged from 2016.

According to the American Bar Association (ABA), since 2000, the percentage of minority law school graduates has ranged from 20% to 29%, while women have accounted for 46% to 49% of graduates with the high point coming in the mid-2000s. In 2017, women comprised 49.87% of summer associates, minorities accounted for 32.33%, and 18.23% of summer associates were minority women. Although measures for women have improved steadily since 2013, when representation of women as a whole and minority women specifically edged down, the percentage for minorities as a whole remained unchanged in 2017 compared with 2016. Whether this represents the start of a stable percentage remains to be seen. It also should be kept in mind that these percentages are in the context of far fewer summer associates overall, with the number of summer associates off by about 25% compared with 2009, despite increases in the numbers after they bottomed out in 2010 and 2011. The number of summer associates accounted for in the Directory held essentially steady in 2017 compared with 2016, at about 7,100.

LAWYERS WITH DISABILITIES:

Lawyers with disabilities (of any race or gender) are scarce, both at the associate and partner levels.

The *NALP Directory of Legal Employers* also collects information about lawyers with disabilities, though this information is much less widely reported than information on race/ethnicity and gender, making it much harder to conclude anything definitive about the representation of lawyers with disabilities. About four-tenths of one percent of partners self-reported as having a disability in 2017, compared with about one-third of one percent from 2012-2016. Similarly, representation of associates with disabilities also went up, from 0.33% in 2016 to 0.60% in 2017. However, these figures are still tiny, and it is not known whether the increases will continue at this slightly accelerated pace going forward. Although the presence of individuals with disabilities among law school graduates is not precisely known, other NALP research suggests that between 1 and 2% of graduates self-identify as having a disability. Disability figures for partners, associates, and all attorneys with disabilities are reported in Table 7.

LGBT LAWYERS:

The percentage of LGBT lawyers has generally been trending upward over the period since 2002 when NALP first began compiling these figures, and small increases from 2016 to 2017 occurred across all lawyer types.

The overall percentage of openly lesbian, gay, bisexual, and transgender (LGBT) lawyers reported in 2017 increased to 2.64% compared with 2.48% in 2016. Increases were seen across all lawyer types and ranged from not quite 0.1 percentage point for partners to about 0.2 percentage points for associates, counsel, and non-traditional track attorneys. Over 40% of offices reported at least one LGBT lawyer among partners and associates. The percentage of offices reporting LGBT counts has been relatively stable at about 88-90% of offices since 2008.

The overall count in 2017 of 2,664 LGBT lawyers is up by almost 10% from 2016. **Over a longer span of time, the number now is almost 2.5 times larger than 15 years ago.** In the 2002-2003 NDLE, the number of openly gay lawyers reported was just over 1,100 — less than 1% of the total lawyers represented. It took until 2012 for the overall percentage to exceed 2%.

The presence of LGBT lawyers continues to be highest among associates, at 3.45% (see Table 8), and is up from the figure of 3.24% reported in 2016. Openly LGBT associates are also better represented at large law firms — with firms of 701+ lawyers reporting 3.96% openly LGBT associates. In 2017, openly LGBT partners are best represented at the smallest firms, at 2.34%. It should be noted, however, that percentages in this category are subject to larger fluctuations because of the relatively small number of lawyers accounted for. In particular, the overall number of lawyers in this firm size declined from 2016 to 2017, but the number of LGBT lawyers did not, and in fact increased, so the overall percentages increased from 1.98% to 2.97%; the figures for partners increased from 1.88% to 2.34%. Firms of 701+ lawyers reported 2.19% openly LGBT partners, very close to the 2.15% figure for 2016. Before 2016 this figure had hovered at about 2% since 2011.

There are wide geographic disparities in these numbers, and in fact about 56% of the reported openly LGBT lawyers are accounted for by just four cities: New York City, Washington, DC, Los Angeles, and San Francisco.

These same four cities accounted for about 39% of the not quite 101,000 lawyers included in these analyses. Thus, the percentage of openly LGBT lawyers in these cities is correspondingly higher — about 3.8% overall (and highest in San Francisco specifically at 5.9%) compared with the 2.64% nationwide figure. In these same four cities, the percentage of openly LGBT summer associates is also higher — about 5.7% compared with 4.66% nationwide.

However, the percentage of openly LGBT summer associates declined by about 0.2 percentage points, with declines coming in firms of 251-500 and 501-700 lawyers. Though whether or not the 2017 figures suggest a longer term leveling in these figures is not known, they nonetheless continue to suggest that there is still potential for some growth of the presence of LGBT associates at these firms. The overall figure for summer associates was 4.66%, compared with 4.86% in 2016. In firms of more than 700 lawyers, it has exceeded 5% in the four most recent years.

BREADTH OF LAWYER REPRESENTATION IN THE NALP DIRECTORY

The ***2017-2018 NALP Directory of Legal Employers*** (NDLE), which provides the individual firm listings on which these aggregate analyses are based, includes attorney race/ethnicity and gender information for over 112,000 partners, associates, and other lawyers in 1,064 offices, and for over 7,000 summer associates in 778 offices nationwide. The NDLE is available online at www.nalpdirectory.com.

Tables

Table 1. Women and Minorities at Law Firms — 2009-2017

	Partners			Associates			Total Lawyers			Summer Associates		
	% Women	% Minority	% Minority Women	% Women	% Minority	% Minority Women	% Women	% Minority	% Minority Women	% Women	% Minority	% Minority Women
2009	19.21%	6.05%	1.88%	45.66%	19.67%	11.02%	32.97%	12.59%	6.33%	46.62%	24.04%	12.90%
2010	19.43	6.16	1.95	45.41	19.53	10.90	32.69	12.40	6.20	47.35	26.99	14.92
2011	19.54	6.56	2.04	45.35	19.90	10.96	32.61	12.70	6.23	47.71	27.11	15.19
2012	19.91	6.71	2.16	45.05	20.32	11.08	32.67	12.91	6.32	46.26	29.55	16.26
2013	20.22	7.10	2.26	44.79	20.93	11.29	32.78	13.36	6.49	45.32	29.51	15.78
2014	21.05	7.33	2.45	44.94	21.63	11.51	33.48	13.83	6.74	46.33	30.27	16.63
2015	21.46	7.52	2.55	44.68	22.00	11.78	33.38	13.97	6.81	47.78	31.16	16.99
2016	22.13	8.05	2.76	45.00	22.72	12.42	33.89	14.62	7.23	48.71	32.33	18.05
2017	22.70	8.42	2.90	45.48	23.32	12.86	34.54	15.18	7.54	49.87	32.33	18.23

Source: *The NALP Directory of Legal Employers.*

Table 2. Partner and Associate Demographics at Law Firms — 2009-2017

	Partners						Associates					
	Asian		Black/African-American		Hispanic		Asian		Black/African-American		Hispanic	
	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women	Total %	% Women
2009	2.20%	0.76%	1.71%	0.57%	1.65%	0.41%	9.28%	5.12%	4.66%	2.93%	3.89%	2.00%
2010	2.30	0.81	1.70	0.56	1.70	0.44	9.39	5.15	4.36	2.75	3.81	1.94
2011	2.36	0.82	1.71	0.58	1.92	0.48	9.65	5.31	4.29	2.61	3.83	1.92
2012	2.48	0.89	1.73	0.60	1.91	0.48	10.01	5.40	4.19	2.55	3.90	1.95
2013	2.67	0.91	1.78	0.60	1.99	0.54	10.48	5.64	4.10	2.43	3.82	1.89
2014	2.74	0.99	1.72	0.63	2.16	0.60	10.80	5.81	4.01	2.31	3.95	1.89
2015	2.89	1.07	1.77	0.64	2.19	0.63	10.93	6.00	3.95	2.25	4.28	2.03
2016	3.13	1.17	1.81	0.64	2.31	0.68	11.25	6.35	4.11	2.32	4.42	2.15
2017	3.31	1.23	1.83	0.66	2.40	0.73	11.40	6.52	4.28	2.42	4.57	2.23

Source: *The NALP Directory of Legal Employers.*

For purposes of the figures in Tables 1-6, minority attorneys include those whose race or ethnicity is Black, Hispanic, American Indian/Alaskan Native, Asian, Native Hawaiian or other Pacific Islander, and those of multi-racial heritage, as reported by the law firms in the NDLE. The partner numbers include both equity and non-equity partners.

Table 3. Women and Minorities at Law Firms — Partners and Associates — 2017

	Partners				Associates				
	Total #	% Women	% Minority	% Minority Women	Total #	% Women	% Minority	% Minority Women	# of Offices
Total	49,885	22.70	8.42	2.90	45,786	45.48	23.32	12.86	1,064
By # of Lawyers Firm-wide:									
100 or fewer	2,655	22.37	7.61	2.86	1,482	40.69	17.95	9.04	88
101-250	9,552	23.29	6.50	2.36	5,273	45.29	17.22	9.73	151
251-500	10,665	22.73	7.71	2.73	7,193	45.21	22.37	12.22	213
501-700	6,385	22.32	8.11	2.73	6,075	44.94	22.72	12.33	111
701+	20,628	22.57	9.87	3.31	25,763	46.00	25.29	14.02	501
Offices In:									
Atlanta	1,233	20.60	7.54	2.19	969	46.03	19.40	11.15	25
Austin	340	23.24	10.29	4.12	239	43.93	22.59	11.72	19
Boston	1,526	23.72	5.05	2.03	1,769	46.98	18.49	10.97	35
Charlotte	488	17.01	6.15	1.64	349	40.11	14.04	6.30	16
Chicago	3,313	22.34	7.30	2.51	2,585	44.06	21.28	11.30	53
Cincinnati	302	24.50	3.31	0.99	143	39.86	13.99	6.29	6
Cleveland	410	19.02	2.93	0.73	288	41.32	6.94	4.51	6
Columbus	289	20.42	6.57	2.42	155	45.81	14.84	7.74	9
Dallas	1,030	20.10	8.54	2.91	955	41.05	21.36	9.53	32
Denver	645	27.91	6.20	2.02	477	45.70	14.05	7.97	25
Detroit area	543	25.23	7.00	2.58	195	47.18	15.90	8.72	9
Ft. Lauderdale/W. Palm Beach	159	23.90	5.66	3.14	85	41.18	16.47	8.24	8
Grand Rapids	283	19.08	3.53	1.06	82	41.46	15.85	6.10	5
Houston	1,251	19.02	11.27	3.68	1,324	40.71	23.94	12.24	43
Indianapolis	330	23.33	2.73	0.91	145	44.83	12.41	7.59	6
Kansas City, MO	491	23.63	3.67	0.81	260	44.23	17.69	10.00	7
Los Angeles	2,075	23.37	14.55	5.49	2,340	48.68	32.39	18.55	75
Miami	466	25.54	32.83	10.30	320	45.63	43.75	22.50	15
Milwaukee	618	25.24	3.88	1.78	298	40.27	9.73	4.70	7

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continued

	Partners				Associates				
	Total #	% Women	% Minority	% Minority Women	Total #	% Women	% Minority	% Minority Women	# of Offices
Minneapolis	1,092	28.75	3.75	1.65	568	43.84	11.97	6.16	19
New York City	6,534	19.34	8.97	2.89	12,172	45.28	27.28	15.52	102
Northern NJ/Newark area	500	19.40	5.00	1.60	367	48.50	18.80	8.99	10
Northern Virginia	164	15.24	7.93	3.05	146	45.21	19.18	6.85	9
Orange Co., CA	491	16.70	12.02	3.67	464	40.73	30.82	15.09	17
Philadelphia	684	19.88	5.56	2.05	659	48.86	15.33	8.19	12
Phoenix	534	22.85	5.81	2.06	226	43.81	13.27	5.31	12
Pittsburgh	333	21.92	4.20	1.50	233	41.63	9.01	3.86	6
Portland, OR	444	25.68	6.53	2.93	194	46.91	13.92	6.70	11
Salt Lake City	177	12.99	6.21	1.69	126	24.60	8.73	3.17	8
San Diego	243	19.34	11.11	3.29	324	41.98	26.85	13.27	14
San Francisco	1,355	26.94	14.32	5.02	1,626	50.80	31.06	17.84	52
San Jose area	744	21.37	18.68	5.11	1,247	45.87	41.86	22.05	39
Seattle area	921	27.69	10.10	3.69	559	45.44	21.47	12.16	25
St. Louis	749	23.63	4.41	1.20	371	46.90	15.90	8.63	11
Tampa	206	17.48	6.31	1.94	105	46.67	11.43	7.62	9
Washington, D.C.	4,689	22.82	9.58	3.60	5,011	46.06	22.75	12.73	101
Wilmington	267	21.72	4.12	1.50	273	42.49	12.09	7.69	12
States:									
Other areas in Connecticut	410	26.59	4.63	2.93	257	50.19	17.51	13.23	7
Other areas in Florida	277	22.02	4.69	0.72	132	46.21	12.88	4.55	13
Kentucky	362	25.97	2.21	0.55	127	48.82	7.87	3.94	6
Other areas in New York State	605	21.82	3.97	0.83	345	46.09	11.01	5.22	9

Source: The ***2017-2018 NALP Directory of Legal Employers***. Some city information includes one or more offices in adjacent suburbs. Orange County includes offices in Costa Mesa, Irvine, and Newport Beach. The San Jose area includes offices in Menlo Park, Mountain View, Palo Alto and E. Palo Alto, Redwood Shores/Redwood City, and San Jose. The Los Angeles area includes offices in Santa Monica and Long Beach. The Northern New Jersey/Newark area includes offices in Newark, Roseland, Florham Park, Hackensack, Morristown, Westfield, and Woodbridge. Northern Virginia includes offices in McLean/Tyson's Corner, and Reston. State figures exclude cities reported separately. For multi-office firms that reported only firm-wide figures, the information was attributed to the reporting city if at least 60% of the firms lawyers are in that city.

Table continues on next page

Table 4. Women and Minorities at Law Firms — Total Lawyers and Summer Associates — 2017

	Total Lawyers					Summer Associates			
	Total #	% Women	% Minority	% Minority Women	# of Offices	Total #	% Women	% Minority	% Minority Women
Total	112,090	34.54%	15.18%	7.54%	1,064	7,086	49.87%	32.23%	18.23%
By # of Lawyers Firm-wide:									
100 or fewer	4,773	29.21	10.92	4.86	88	240	42.50	22.92	9.58
101-250	17,133	31.56	9.99	4.86	151	648	52.93	32.56	19.44
251-500	21,120	33.12	13.29	6.46	213	977	48.72	27.43	15.35
501-700	14,612	34.38	14.86	7.25	111	1,008	53.77	31.05	17.66
701+	54,452	36.53	18.02	9.12	501	4,213	49.16	34.11	19.34
Offices In:									
Atlanta	2,675	34.21	12.90	6.58	25	132	50.00	30.30	17.42
Austin	683	32.36	15.67	7.61	19	55	38.18	14.55	5.45
Boston	3,780	37.22	12.01	6.48	35	258	47.29	25.97	12.79
Charlotte	990	29.29	9.49	3.94	16	49	46.94	26.53	14.29
Chicago	6,749	32.66	13.05	6.22	53	415	47.23	30.12	16.14
Cincinnati	493	30.83	6.29	2.43	6	25	44.00	32.00	16.00
Cleveland	825	30.18	4.73	2.42	6	42	52.38	11.90	7.14
Columbus	531	28.25	8.85	3.95	9	31	54.84	41.94	29.03
Dallas	2,297	31.26	14.98	6.14	32	209	47.85	21.53	11.96
Denver	1,405	36.80	9.25	4.56	25	54	53.70	29.63	18.52
Detroit area	865	31.91	8.90	4.39	9	49	55.10	30.61	22.45
Ft. Lauderdale/W. Palm Beach	271	31.00	9.59	5.17	8	—	—	—	—
Grand Rapids	520	24.04	5.38	2.12	5	—	—	—	—
Houston	2,941	31.55	17.44	8.02	43	329	49.24	28.57	17.33
Indianapolis	539	31.73	6.49	3.34	6	29	48.28	31.03	17.24
Kansas City, MO	927	34.20	7.98	3.99	7	41	46.34	19.51	9.76
Los Angeles	5,042	37.23	23.56	12.16	75	298	53.69	37.25	22.82
Miami	892	35.09	38.34	15.92	15	47	59.57	55.32	40.43
Milwaukee	1,052	30.42	5.51	2.57	7	34	52.94	29.41	14.71
Minneapolis	1,884	34.08	6.63	3.34	19	83	59.04	39.76	18.07
New York City	21,738	36.62	20.25	10.74	102	2,222	49.91	36.27	21.11
Northern NJ/Newark area	1,056	32.95	10.51	4.45	10	46	58.70	23.91	13.04

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continued

	Total Lawyers					Summer Associates			
	Total #	% Women	% Minority	% Minority Women	# of Offices	Total #	% Women	% Minority	% Minority Women
Northern Virginia	356	30.34	13.20	4.49	9	20	55.00	5.00	5.00
Orange Co., CA	1,027	29.50	21.52	9.44	17	74	43.24	44.59	18.92
Philadelphia	1,589	35.49	9.69	4.72	12	71	42.25	28.17	14.08
Phoenix	851	29.14	8.34	3.17	12	43	48.84	20.93	11.63
Pittsburgh	604	30.46	6.13	2.65	6	.	.	.	.
Portland, OR	726	33.33	8.40	4.13	11	27	37.04	40.74	14.81
Salt Lake City	345	19.42	7.83	2.03	8	16	37.50	6.25	0.00
San Diego	656	34.15	19.21	8.84	14	42	54.76	33.33	26.19
San Francisco	3,409	40.10	22.50	11.70	52	213	54.93	41.78	22.07
San Jose area	2,218	37.65	32.28	15.33	39	245	42.04	47.76	20.82
Seattle area	1,670	35.21	14.37	7.01	25	77	51.95	42.86	20.78
St. Louis	1,315	32.47	7.98	3.73	11	62	64.52	22.58	16.13
Tampa	352	28.13	8.81	4.55	9	14	50.00	21.43	14.29
Washington, D.C.	11,855	35.39	16.20	8.22	101	829	49.46	29.55	16.41
Wilmington	594	33.16	8.08	4.21	12	60	43.33	18.33	10.00
States:									
Other areas in Connecticut	801	36.33	9.24	6.37	7	25	64.00	40.00	24.00
Other areas in Florida	478	31.59	6.90	2.09	13	23	39.13	26.09	8.70
Kentucky	581	33.22	3.61	1.55	6	34	58.82	11.76	8.82
Other areas in New York State	1,110	30.54	6.22	2.16	9	33	63.64	15.15	12.12

Source: The ***2017-2018 NALP Directory of Legal Employers.*** Some city information includes one or more offices in adjacent suburbs. Orange County includes offices in Costa Mesa, Irvine, and Newport Beach. The San Jose area includes offices in Menlo Park, Mountain View, Palo Alto and E. Palo Alto, Redwood Shores/Redwood City, and San Jose. The Los Angeles area includes offices in Santa Monica and Long Beach. The Northern New Jersey/Newark area includes offices in Newark, Roseland, Florham Park, Hackensack, Morristown, Westfield, and Woodbridge. Northern Virginia includes offices in McLean/Tyson's Corner, and Reston. State figures exclude cities reported separately. For multi-office firms that reported only firm-wide figures, the information was attributed to the reporting city if at least 60% of the firms lawyers are in that city.

Note: The number of offices reporting one or more summer associates, including demographic information, was 778. Dashes in the summer associates columns indicate that fewer than five offices in that city reported summer associates, or the total number of summer associates reported was less than 10.

Table 5. Partner Demographics at Law Firms — 2017

	All Partners			Partners by Race or Ethnicity						
				Asian		Black/African-American		Hispanic		
	Total #	% Minority	% Minority Women	Total %	% Women	Total %	% Women	Total %	% Women	# of Offices
Total	49,885	8.42%	2.90%	3.31%	1.23%	1.83%	0.66%	2.40%	0.73%	1,064
By # of Lawyers Firm-wide:										
100 or fewer lawyers	2,655	7.61	2.86	3.58	1.51	1.24	0.41	1.28	0.49	88
101-250 lawyers	9,552	6.50	2.36	2.47	0.96	1.47	0.57	1.81	0.61	151
251-500 lawyers	10,665	7.71	2.73	2.72	1.08	1.75	0.68	2.34	0.69	213
501-700 lawyers	6,385	8.11	2.73	2.87	0.99	1.96	0.58	2.44	0.78	111
701+ lawyers	20,628	9.87	3.31	4.11	1.46	2.08	0.74	2.82	0.81	501
Offices In:										
Atlanta	1,233	7.54	2.19	1.78	0.41	3.73	0.97	1.14	0.41	25
Austin	340	10.29	4.12	1.47	0.59	2.35	1.18	5.29	2.06	19
Boston	1,526	5.05	2.03	2.36	1.25	0.98	0.33	1.11	0.26	35
Charlotte	488	6.15	1.64	1.23	0.20	2.66	1.02	1.84	0.41	16
Chicago	3,313	7.30	2.51	3.35	1.27	1.78	0.69	1.66	0.30	53
Cincinnati	302	3.31	0.99	0.99	0.00	0.66	0.00	0.99	0.99	6
Cleveland	410	2.93	0.73	1.22	0.24	1.22	0.49	0.24	0.00	6
Columbus	289	6.57	2.42	1.73	1.38	2.77	0.69	0.69	0.00	9
Dallas	1,030	8.54	2.91	1.75	0.68	1.75	0.68	3.50	0.97	32
Denver	645	6.20	2.02	1.71	0.78	0.62	0.00	2.33	0.31	25
Detroit area	543	7.00	2.58	1.66	0.55	3.50	1.84	1.10	0.00	9
Ft. Lauderdale/W. Palm Beach	159	5.66	3.14	0.00	0.00	2.52	1.89	3.14	1.26	8
Grand Rapids	283	3.53	1.06	1.41	0.71	0.71	0.00	1.41	0.35	5
Houston	1,251	11.27	3.68	3.28	1.36	2.56	1.12	4.56	1.04	43
Indianapolis	330	2.73	0.91	0.61	0.30	0.91	0.00	0.91	0.30	6
Kansas City	491	3.67	0.81	0.81	0.41	1.83	0.00	0.41	0.00	7
Los Angeles	2,075	14.55	5.49	7.86	3.23	2.07	0.82	3.37	1.11	75
Miami	466	32.83	10.30	0.86	0.64	2.58	1.07	28.33	8.15	15
Milwaukee	618	3.88	1.78	0.81	0.49	0.49	0.00	2.10	0.97	7
Minneapolis	1,092	3.75	1.65	1.28	0.92	0.37	0.18	0.92	0.09	19
New York City	6,534	8.97	2.89	4.24	1.41	1.50	0.49	2.48	0.67	102
Northern NJ/Newark area	500	5.00	1.60	1.80	0.60	1.00	0.20	1.40	0.40	10

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continued

	All Partners			Partners by Race or Ethnicity						
				Asian		Black/African-American		Hispanic		
	Total #	% Minority	% Minority Women	Total %	% Women	Total %	% Women	Total %	% Women	# of Offices
Northern Virginia	164	7.93	3.05	4.27	1.22	0.61	0.00	2.44	1.83	9
Orange Co., CA	491	12.02	3.67	6.92	2.65	0.81	0.20	2.85	0.41	17
Philadelphia	684	5.56	2.05	2.05	0.73	1.32	0.44	1.17	0.44	12
Phoenix	534	5.81	2.06	1.69	0.94	0.19	0.00	1.87	0.75	12
Pittsburgh	333	4.20	1.50	1.80	0.60	0.90	0.30	1.20	0.60	6
Portland, OR	444	6.53	2.93	1.35	0.90	1.35	0.68	2.48	0.90	11
Salt Lake City	177	6.21	1.69	1.13	0.00	0.00	0.00	3.95	1.69	8
San Diego	243	11.11	3.29	4.94	2.47	0.41	0.00	4.12	0.82	14
San Francisco	1,355	14.32	5.02	8.63	3.17	2.07	0.44	2.36	1.03	52
San Jose area	744	18.68	5.11	13.31	3.49	1.08	0.40	3.09	0.81	39
Seattle area	921	10.10	3.69	5.54	2.06	1.52	0.54	1.74	0.76	25
St. Louis	749	4.41	1.20	0.53	0.00	2.27	0.67	1.20	0.53	11
Tampa	206	6.31	1.94	0.97	0.49	0.00	0.00	5.34	1.46	9
Washington, D.C.	4,689	9.58	3.60	4.09	1.30	2.77	1.28	2.00	0.70	101
Wilmington	267	4.12	1.50	1.50	0.75	1.50	0.75	0.75	0.00	12

Source: The ***2017-2018 NALP Directory of Legal Employers***. The few Native American, Native Hawaiian and multi-racial lawyers reported are included in the overall minority percentages but are not reported separately. Some city information includes one or more offices in adjacent suburbs. Orange County includes offices in Costa Mesa, Irvine, and Newport Beach. The San Jose area includes offices in Menlo Park, Mountain View, Palo Alto and E. Palo Alto, Redwood Shores/Redwood City, and San Jose. The Los Angeles area includes offices in Santa Monica and Long Beach. The Northern New Jersey/Newark area includes offices in Newark, Roseland, Florham Park, Hackensack, Morristown, Westfield, and Woodbridge. Northern Virginia includes offices in McLean/Tyson's Corner, and Reston.

Table 6. Associate Demographics at Law Firms — 2017

	All Associates			Associates by Race or Ethnicity						
				Asian		Black/African-American		Hispanic		
	Total #	% Minority	% Minority Women	Total %	% Women	Total %	% Women	Total %	% Women	# of Offices
Total	45,786	23.32%	12.86%	11.40%	6.52%	4.28%	2.42%	4.57%	2.23%	1,064
By # of Lawyers Firm-wide:										
100 or fewer lawyers	1,462	17.95	9.04	10.32	5.60	3.24	1.35	2.36	1.15	88
101-250 lawyers	5,273	17.22	9.73	7.55	4.67	3.91	2.11	3.70	1.73	151
251-500 lawyers	7,193	22.37	12.22	10.15	5.76	4.74	2.74	4.71	2.41	213
501-700 lawyers	6,075	22.72	12.33	9.84	5.53	4.77	2.65	4.76	2.35	111
701+ lawyers	25,763	25.29	14.02	12.96	7.39	4.17	2.40	4.79	2.32	501
Offices In:										
Atlanta	969	19.40	11.15	7.22	3.72	7.95	4.85	2.68	1.75	25
Austin	239	22.59	11.72	6.69	2.51	2.93	1.67	6.28	2.93	19
Boston	1,769	18.49	10.97	9.55	5.77	3.22	1.92	3.90	2.26	35
Charlotte	349	14.04	6.30	3.44	1.43	4.30	2.58	3.44	1.15	16
Chicago	2,585	21.28	11.30	10.10	5.26	4.80	2.21	3.98	2.36	53
Cincinnati	143	13.99	6.29	2.80	0.70	6.29	2.80	2.80	2.10	6
Cleveland	288	6.94	4.51	2.78	2.08	2.43	1.04	0.69	0.69	6
Columbus	155	14.84	7.74	3.23	1.94	4.52	0.65	3.87	2.58	9
Dallas	955	21.36	9.53	7.85	2.93	4.08	2.62	5.76	2.41	32
Denver	477	14.05	7.97	3.14	2.31	1.68	1.05	5.24	2.52	25
Detroit area	195	15.90	8.72	2.56	0.51	7.69	4.62	3.08	2.05	9
Ft. Lauderdale/W. Palm Beach	85	16.47	8.24	4.71	2.35	4.71	1.18	5.88	3.53	8
Grand Rapids	82	15.85	6.10	1.22	1.22	10.98	3.66	2.44	0.00	5
Houston	1,324	23.94	12.24	9.44	4.46	4.15	2.72	6.80	2.95	43
Indianapolis	145	12.41	7.59	3.45	1.38	5.52	4.83	2.76	1.38	6
Kansas City	260	17.69	10.00	3.85	2.69	5.00	2.69	4.62	2.69	7
Los Angeles	2,340	32.39	18.55	18.85	11.32	3.21	1.71	5.85	3.03	75
Miami	320	43.75	22.50	2.50	1.56	4.69	2.19	33.44	17.19	15
Milwaukee	298	9.73	4.70	3.69	2.35	1.68	0.34	2.35	0.67	7
Minneapolis	568	11.97	6.16	4.23	2.46	2.99	1.94	1.23	0.70	19
New York City	12,172	27.28	15.52	14.62	8.78	4.49	2.52	5.14	2.46	102
Northern NJ/Newark area	367	18.80	8.99	10.08	5.45	2.72	1.36	3.54	1.36	10
Northern Virginia	146	19.18	6.85	12.33	4.11	2.05	1.37	3.42	0.68	9

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continued

	All Associates			Associates by Race or Ethnicity						
				Asian		Black/African-American		Hispanic		
	Total #	% Minority	% Minority Women	Total %	% Women	Total %	% Women	Total %	% Women	# of Offices
Orange Co., CA	464	30.82	15.09	20.69	10.34	1.51	0.86	4.31	1.72	17
Philadelphia	659	15.33	8.19	6.53	3.79	3.79	1.97	2.73	1.06	12
Phoenix	226	13.27	5.31	4.42	1.77	2.21	0.44	4.42	1.77	12
Pittsburgh	233	9.01	3.86	2.58	1.29	2.58	0.86	1.72	0.86	6
Portland, OR	194	13.92	6.70	4.12	3.09	2.06	1.03	3.09	0.52	11
Salt Lake City	126	8.73	3.17	2.38	1.59	0.79	0.79	3.17	0.79	8
San Diego	324	26.85	13.27	14.81	6.79	1.54	1.23	4.94	1.85	14
San Francisco	1,626	31.06	17.84	19.07	11.56	2.77	1.54	5.29	2.28	52
San Jose area	1,247	41.86	22.05	31.60	16.76	2.09	0.88	3.53	1.84	39
Seattle area	559	21.47	12.16	12.16	8.05	1.79	0.89	2.86	1.07	25
St. Louis	371	15.90	8.63	4.58	2.96	6.20	3.77	2.16	1.08	11
Tampa	105	11.43	7.62	2.86	1.90	2.86	2.86	5.71	2.86	9
Washington, D.C.	5,011	22.75	12.73	10.52	5.87	5.67	3.49	3.71	1.96	101
Wilmington	273	12.09	7.69	5.13	4.03	2.20	1.10	2.93	1.47	12

Source: The ***2017-2018 NALP Directory of Legal Employers***. The few Native American, Native Hawaiian and multi-racial lawyers reported are included in the overall minority percentages but are not reported separately. Some city information includes one or more offices in adjacent suburbs. Orange County includes offices in Costa Mesa, Irvine, and Newport Beach. The San Jose area includes offices in Menlo Park, Mountain View, Palo Alto and E. Palo Alto, Redwood Shores/Redwood City, and San Jose. The Los Angeles area includes offices in Santa Monica and Long Beach. The Northern New Jersey/Newark area includes offices in Newark, Roseland, Florham Park, Hackensack, Morristown, Westfield, and Woodbridge. Northern Virginia includes offices in McLean/Tyson's Corner, and Reston.

Table 7. Lawyers with Disabilities — 2017

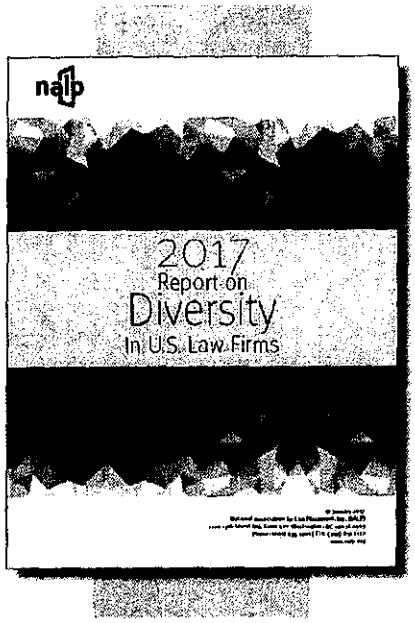
	All Firms		Firms of 250 or Fewer Lawyers		Firms of 251-500 Lawyers		Firms of 501-700 Lawyers		Firms of 701+ Lawyers	
	# Reported	% of Total	# Reported	% of Total	# Reported	% of Total	# Reported	% of Reported	# Reported	% of Total
Partners	143	0.43%	23	0.23%	27	0.44%	17	0.37%	76	0.62%
Associates	169	0.60	12	0.22	26	0.60	13	0.30	118	0.84
All lawyers	385	0.54	43	0.24	69	0.56	39	0.38	234	0.76

Note: Figures for lawyers with disabilities are based on 736 offices/firms reporting counts, including zero, in all lawyer categories. Counts of individuals with disabilities, including zero, cover 75,079 lawyers. Because so few summer associates with disabilities were reported (18 total), they are not included in the table.

Table 8. Openly LGBT Lawyers — 2017

	All Firms		Firms of 100 or Fewer Lawyers		Firms of 101-250 Lawyers		Firms of 251-500 Lawyers		Firms of 501-700 Lawyers		Firms of 701 + Lawyers	
	# Reported	% of Total	# Reported	% of Total	# Reported	% of Total	# Reported	% of Reported	# Reported	% of Total	# Reported	% of Total
Partners	880	1.99%	51	2.34%	150	1.90%	154	1.72%	106	1.75%	419	2.19%
Associates	1,438	3.45	28	2.28	89	2.04	163	2.57	201	3.60	957	3.96
Other lawyers	346	2.32	11	1.48	46	2.35	63	2.30	32	1.59	197	2.56
All lawyers	2,664	2.64	117	2.97	285	2.01	380	2.11	339	2.48	1,573	3.08
Summer Associates	287	4.66	6	2.84	16	2.94	30	3.65	39	4.30	196	5.33

Note: Figures for openly LGBT lawyers are based on 936 offices/firms reporting counts, including zero, in all lawyer categories; figures for openly LGBT summer associates are based on 662 offices/firms with a summer program and reporting counts, including zero. Overall, LGBT counts, including zero, cover 98,093 lawyers and 5,990 summer associates.



2017 Report on Diversity in U.S. Law Firms

"Representation of women, minorities, and minority women among associates saw small gains in 2017."

Press inquiries can be directed to Sarah Ramirez (sramirez@nalp.org). For additional information about NALP research, contact Judith Collins (jcollins@nalp.org), Director of Research, or James G. Leipold (jleipold@nalp.org), Executive Director, at (202) 835-1001. Mailing address: National Association for Law Placement, 1220 19th Street NW, Suite 401, Washington, DC 20036-2405.

Transgender Clients

McKinney's Consolidated Laws of New York Annotated
Civil Rights Law (Refs & Annos)
Chapter 6. Of the Consolidated Laws
Article 6. Change of Name

McKinney's Civil Rights Law § 60

§ 60. Petition for change of name

Currentness

A petition for leave to assume another name may be made by a resident of the state to the county court of the county or the supreme court in the county in which he resides, or, if he resides in the city of New York, either to the supreme court or to any branch of the civil court of the city of New York, in any county of the city of New York. The petition to change the name of an infant may be made by the infant through his next friend, or by either of his parents, or by his general guardian, or by the guardian of his person.

Credits

(Added L.1920, c. 924, § 2. Amended L.1939, c. 26, § 1; L.1944, c. 759, § 1; L.1952, c. 426, § 1; L.1953, c. 690, § 1; L.1962, c. 695, § 28.)

McKinney's Civil Rights Law § 60, NY CIV RTS § 60
Current through L.2018, chapters 1 to 321.

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170 A.D. 870
Supreme Court, Appellate Division,
First Department, New York.

WALTER et al.
v.
WALTER.

December 30, 1915.

Synopsis
Appeal from Special Term, New York County.

Action by Moritz Walter and others, individually and as committee of the person and property of Herman N. Walter, an incompetent person, against Anna Kuethe Walter. From judgment dismissing the complaint, and from an order upon which the judgment was entered, plaintiffs appeal. Affirmed.

Scott, J., dissenting.

**715 *871 The following is the opinion of Page, J., in the court below:

This motion was made upon an order for plaintiff to show cause, based upon the pleadings and an affidavit, why judgment should not be entered herein in favor of the defendant and against Moritz Walter, Clarence J. Walter, and Edwin Walter, as committee of the person and property of Herman N. Walter, an incompetent, upon the ground that the said persons, as committee, 'have no legal capacity to sue to annul the marriage of said Herman N. Walter upon the ground that the said Herman N. Walter was at the time of said alleged marriage a lunatic, and was incapable of entering into a marriage contract, or that the said marriage was caused by force and duress of the defendant because the said Herman N. Walter was a lunatic and incapable of consenting to the marriage for want of understanding, and for such other and further relief as the defendant may be entitled to.' The inartificial use of language unnecessarily complicates the consideration of the motion. Lack of legal capacity to sue has reference to some legal disability of the plaintiff, such as *872 infancy, idiocy, adjudged insanity, or want of title in the plaintiff to the character in which he sues which prevents his bringing any action in the courts in his own behalf, and not a fact that the complaint fails to show a right of action in the plaintiff. Ward v. Petrie, 157 N. Y. 301, 311, 51 N. E. 1002, 68 Am. St. Rep. 790; Ullman v. Cameron, 186 N. Y. 339, 343, 78 N. E. 1074, 116 Am. St. Rep. 553. The objection that the plaintiff has not legal capacity to sue must be taken by demurrer or answer (Code Civil Proc. § 488, subd. 3 and section 498), and, if not so taken, is deemed to have been waived (Id. § 499). If, therefore, the purpose of this motion is to urge the objection that the plaintiff has not legal capacity to sue, the objection, even if sound, has been waived by the defendant not having demurred on that ground.

Legal capacity in a committee of an incompetent person to sue has been expressly conferred by statute, and there is no claim that the appointment was not regular and vested them with the title in which the suit was brought. Code Civil Proc. § 2340. This would require a denial of the motion. The motion has, however, been fully argued and briefed as a motion for judgment on the pleadings. I shall ignore the words in the order 'have no legal capacity to sue,' and treat it as a motion for judgment upon the pleadings on the ground that the complaint fails to state facts sufficient to show a right of action in the plaintiffs as committee, which may properly be done under the request for general relief. This was probably the motion that defendant's attorney had in mind, but inadequately expressed.

The question to be determined is: May the committee of the person and property of an incompetent, as such, bring an action to annul a marriage contracted by the incompetent before the adjudication of incompetency upon the ground that the incompetent was a lunatic at the time of the alleged marriage and was incapable of entering into a marriage contract? This question, so far as I have been able to discern, has never been determined. The court has no inherent or common-law jurisdiction in matrimonial actions. The Legislature has conferred power on the court to annul marriages, grant divorces or legal separations in certain specified cases, and has prescribed the persons who may invoke these powers. In the instant case the law applicable is to be found in sections 1747 and 1748 *873 of the Code of Civil Procedure: 'An action to annul a marriage, on the ground that one of the parties thereto was a lunatic, may be maintained, at any time during the continuance of the lunacy, or, after the death of the lunatic, in that condition, and during the life of the other party to the marriage by any relative of the lunatic, who has an interest to avoid the marriage. Such an action may also be maintained by the lunatic, at any time after

restoration to a sound mind. * * * Where no relative of the * * * lunatic brings an action to annul the marriage, as prescribed in * * * the last * * * sections, the court may allow an action to be maintained for that purpose at any time during the lifetime of both the parties to the marriage, by any person as the next friend of the * * * lunatic. But this section does not apply, where the marriage might **716 have been annulled, at the suit of the lunatic, as prescribed in the last section.' It will be seen that the right to bring an action is limited to any relative who has an interest to avoid the marriage, a next friend or the lunatic after restoration to a sound mind. There is no mention in these sections of the committee of the incompetent. If the Legislature had intended that the committee should have that power it could very easily have incorporated a few words in the section apt to express such intent. The failure to mention the committee is significant of the legislative intent to exclude him from the right to bring such an action. The expression 'next friend' has a definite and well-established meaning; i. e., 'one who, without being regularly appointed guardian, acts for the benefit of an infant, married woman, or other person not sui juris.' Bouvier Law Dict. Without express statutory authority an action cannot be prosecuted by a guardian ad litem or next friend where a committee has been appointed. Rankert v. Rankert, 105 App. Div. 37, 39, 93 N. Y. Supp. 399. The Code provides for the appointment of a committee for the incompetent, and gives him the right to prosecute actions on behalf of his ward. There being a well known and recognized distinction between a next friend of and a committee of a lunatic, the Legislature must have had this distinction in view when the Code was enacted. The fact that the husband or wife of the incompetent is frequently appointed the committee *874 may have been in the minds of the legislators, but, whatever their reason, it seems clear to me that, having given the power to bring such an action to the next friend, and having failed to mention the committee, the maxim, 'Expressio unius exclusio alterius,' applies, and shows the legislative intent to exclude the committee of the lunatic from the provisions of this section of the Code. See Mackey v. Peters, 22 App. D. C. 341.

The learned counsel for the plaintiff argues that the power to bring such an action arises by implication from the provisions of section 2340 of the Code of Civil Procedure, which reads as follows: 'A committee of the property, appointed as prescribed in this title, may maintain, in his own name, adding his official title, any action or special proceeding, which the person, with respect to whom he is appointed might have maintained, if the appointment had not been made.' The marriage with a lunatic is not void, but voidable. Domestic Relations Law (Consol. Laws, c. 14) § 7, subd. 2. As we have seen, the right to elect to avoid the marriage vests in the lunatic only after restoration to a sound mind, i. e., if he has been judicially declared incompetent after he shall be judicially declared competent, in which event his committee would be discharged. Code Civ. Proc. § 2343. Unless the lunatic on recovery of his reason elects to bring an action to annul the marriage, it would continue in full force and effect. Thus it can only be annulled by an affirmative act on his part. The right to make this election does not vest in the committee. While it may be said that the provision of section 1748 for the maintenance of such an action by a next friend shows a right of action in the incompetent, for a next friend can only bring an action in the right of the person non sui juris, nevertheless, the special provision in section 1748, it seems to me, limits the general language of section 2340, and excludes the committee from the prosecution of an action of this character.

Nor do I think that the plaintiffs' argument is sound that, as the committee would be a necessary party defendant, he may become a plaintiff. The incompetent is a necessary party. Coddington v. Larner, 75 App. Div. 532, 78 N. Y. Supp. 276; Anderson v. Hicks, 150 App. Div. 289, 134 N. Y. Supp. 1018. He has been made a party in this action by order of the court. It is well *875 settled that the representative and the person whom he represents are not both necessary parties. As the same persons are the plaintiffs and the committee, if it should appear that their interest was inimical to the incompetent, the court would appoint other persons to represent him; if not, they, having been served with process, will be charged with the duty of protecting his rights. The motion will be granted, and the action, in so far as it purports to be brought by plaintiffs as committee of the incompetent, is dismissed, with $10 costs. I would suggest that there is no necessity of serving an amended complaint. The order may provide that the words 'individually and as committee of the person and property of Herman N. Walter, an incompetent person,' be stricken from the title, and that paragraphs 1 and 2 of the **717 complaint be stricken out. This leaves sufficient allegations in the complaint to sustain the cause of action of the plaintiffs, as relatives of the incompetent having an interest to avoid the marriage, and does not in any way prejudice the rights

of the defendant under her answer already served. Settle order on notice.

Attorneys and Law Firms

Emil Goldmark, of New York City, for appellants.

James A. Gray, of New York City, for respondent.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and DOWLING, JJ.

Opinion

PER CURIAM.

Judgment and order affirmed, with costs, on the opinion of Page, J., at Special Term. Order filed.

SCOTT, J.

I am unable to concur in the affirmance of this order, because I think that it rests upon too technical a construction of section 2340 of the Code of Civil Procedure.

It is clear that from the earliest times courts of equity have entertained actions to annul marriages upon the ground of lunacy of one of the parties when the marriage was entered into, or on the ground of fraud, and this in pursuance of their general equity powers, and not in consequence of any statute. Griffin v. Griffin, 47 N. Y. 134. The fundamental error of the court below, as I view it, is the assumption that, as to this class of cases, the court has no inherent jurisdiction. While that is true of most matrimonial actions, it is not true of an action to annul for lunacy. Sections 1747 and 1748 of the Code of Civil Procedure did not confer upon the Supreme Court jurisdiction to annul a marriage for such cases, but merely provided that certain persons, other than the lunatic, might sue for such an annulment. The sections did not touch the right of the lunatic himself to bring such an action, which he could *876 do only through a committee. These sections were imported into the Code from the Revised Statutes. Some years after the reenactment of those sections in the Code section 2340 was adopted, which provides:

'A committee of the property' of an incompetent 'appointed as prescribed in this title may maintain in his own name, adding his official title, any action or special proceeding which the person with respect to whom he is appointed might have maintained if the appointment had not been made.'

We have the authority of Mr. Throop, one of the revisers, for the proposition that the purpose of this latter section was, 'to embrace all cases where a remedy is pursued.' Throop's Annotated Code 1880, note to section 2340. And obviously I think it should be so construed as to carry out that purpose. It cannot be confined to actions which a lunatic could himself have brought after office found, but before the appointment of a committee; for that would have deprived it of all meaning and effect, since by the fact of his adjudication as a lunatic he ceased to enjoy capacity to sue. The true meaning of the section is, as I think, that the committee of a lunatic may bring any action or proceeding which his ward might have brought if he had not been adjudicated a lunatic. I therefore think that an action like the present may be maintained by the persons mentioned in sections 1747 and **718 1748, and also by a committee under section 2340. If this view is correct, section 7 of the Domestic Relations Law, to the effect that 'actions to annul a void or voidable marriage may be brought only as provided in the Code of Civil Procedure,' offers no obstacle to an action by the committee of a lunatic.

I think that the order should be reversed, and the motion denied.

All Citations

170 A.D. 870, 156 N.Y.S. 713

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