AB-242 Courts: attorneys: implicit bias: training. (2019-2020)

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Assembly Bill No. 242

CHAPTER 418

An act to add Section 6070.5 to the Business and Professions Code, and to amend Section 68088 of the Government Code, relating to implicit bias.

[Approved by Governor October 02, 2019. Filed with Secretary of State October 02, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 242, Kamlager-Dove. Courts: attorneys: implicit bias: training.

(1) Existing law authorizes the Judicial Council to provide by rule of court for racial, ethnic, and gender bias, and sexual harassment training and training for any other bias based on sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation for judges, commissioners, and referees.

This bill would authorize the Judicial Council to develop training on implicit bias with respect to these characteristics. The bill would require all court staff who interact with the public to complete 2 hours of any training developed by the Judicial Council pursuant to this authorization every 2 years. The bill would authorize the Judicial Council to adopt a rule of court, effective January 1, 2021, to implement these requirements.

(2) Existing law requires the State Bar to request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer a mandatory continuing legal education (MCLE) program.

This bill would require the State Bar to adopt regulations to require the mandatory continuing legal education curriculum to include training on implicit bias and the promotion of bias-reducing strategies, as specified. The bill would require a licensee of the State Bar to meet the requirements for each MCLE compliance period ending after January 31, 2023.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) All persons possess implicit biases, defined as positive or negative associations that affect their beliefs, attitudes, and actions towards other people.

(2) Those biases develop during the course of a lifetime, beginning at an early age, through exposure to messages about groups of people that are socially advantaged or disadvantaged.

(3) In the United States, studies show that most people have an implicit bias that disfavors African Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent.

(4) People also have negative biases toward members of other socially stigmatized groups, such as Native Americans, immigrants, women, people with disabilities, Muslims, and members of the LGBTQ community.

(5) Judges and lawyers harbor the same kinds of implicit biases as others. Studies have shown that, in California, Black defendants are held in pretrial custody 62 percent longer than White defendants and that Black defendants receive 28 percent longer sentences than White defendants convicted of the same crimes.

(6) Research shows individuals can reduce the negative impact of their implicit biases by becoming aware of the biases they hold and taking affirmative steps to alter behavioral responses and override biases.

(b) It is the intent of the Legislature to ameliorate bias-based injustice in the courtroom.

SEC. 2. Section 6070.5 is added to the Business and Professions Code, to read:

6070.5. (a) The State Bar shall adopt regulations to require, as of January 1, 2022, that the mandatory continuing legal education (MCLE) curriculum for all licensees under this chapter includes training on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system. A licensee shall meet the requirements of this section for each MCLE compliance period ending after January 31, 2023.

(b) When approving MCLE providers to offer the training required by subdivision (a), the State Bar shall require that the MCLE provider meets, at a minimum, all of the following requirements:

(1) The MCLE provider shall make reasonable efforts to recruit and hire trainers who are representative of the diversity of persons that California's legal system serves.

(2) The trainers shall have either academic training in implicit bias or experience educating legal professionals about implicit bias and its effects on people accessing and interacting with the legal system.

(3) The training shall include a component regarding the impact of implicit bias, explicit bias, and systemic bias on the legal system and the effect this can have on people accessing and interacting with the legal system.

(4) The training shall include actionable steps licensees can take to recognize and address their own implicit biases.

(c) As part of the certification, approval, or renewal process for MCLE-approved provider status, or more frequently if required by the State Bar, the MCLE provider shall attest to its compliance with the requirements of subdivision (b) and shall confirm that it will continue to comply with those requirements for the duration of the provider's approval period.

SEC. 3. Section 68088 of the Government Code is amended to read:

68088. (a) The Judicial Council may provide by rule of court for racial, ethnic, and gender bias, and sexual harassment training and training for any other bias based on any characteristic listed or defined in Section 11135 for judges and subordinate judicial officers.

(b) (1) The Judicial Council may also develop training on implicit bias with respect to the characteristics listed or defined in Section 11135. The course shall include, but not be limited to, all of the following:

(A) A survey of the social science on implicit bias, unconscious bias, and systemic implicit bias, including the ways that bias affects institutional policies and practices.

(B) A discussion of the historical reasons for, and the present consequences of, the implicit biases that people hold based on the characteristics listed in Section 11135.

(C) Examples of how implicit bias affects the perceptions, judgments, and actions of judges, subordinate judicial officers, and other court staff, and how those perceptions, judgments, and actions result in unacceptable disparities in access to justice.

(D) The administration of implicit association tests to increase awareness of one's unconscious biases based on the characteristics listed in Section 11135.

(E) Strategies for how to reduce the impact of implicit bias on parties before the court, members of the public, and court staff.

(F) Inquiry into how judges and subordinate judicial officers can counteract the effects of juror implicit bias on the outcome of cases.

(2) As of January 1, 2022, all court staff who are required, as part of their regular job duties, to interact with the public on matters before the court, shall complete two hours of any training program developed by the Judicial Council pursuant to this subdivision every two years.

(3) The Judicial Council may adopt a rule of court, effective January 1, 2021, to implement this subdivision.

IMPLICIT BIAS: HOW TO RECOGNIZE AND ADDRESS IT—AND NEW MODEL RULE 8.4(G)

Presented by the
American Bar Association
Section of Litigation,
Criminal Justice Section,
Young Lawyers Division,
Section of State and Local Government Law,
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This publication accompanies the audio program entitled "Implicit Bias: How to Recognize and Address It—and New Model Rule 8.4(g)" broadcast on October 6, 2016 (event code: CE1610IMP).

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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 unconsciously 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 disproportionately 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/1DZYgYa; 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).

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

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33. Phillips, "How Diversity Makes Us Smarter: Being Around People Who Are Different From Us Makes Us More Creative, More Diligent and Harder-Working," *Scientific American* (Oct. 1, 2014), www.scientificamerican.com/article/how-diversity-makes-us-smarter.

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Going "All-In" on Diversity and Inclusion

BY KATHLEEN NALTY

"Kathleen Nalty's article about leadership buy-in as a requisite to move beyond cosmetic diversity and inclusion in the legal profession is a must-read. Kathleen presented critical information reflecting this theme and shared action steps during the CMBA Diversity and Inclusion Committee's workshop in March 2014 held at the Aloft Hotel. This article will be a blueprint for all legal leadership and those interested in action steps necessary to affect measurable change in this area."

Sonali B. Wilson, *CMBA Vice President for Diversity and Inclusion* and Diane Citrino, *Co-Chair, CMBA 2014 Diversity and Inclusion Workshop*

For years, law firms invested in traditional diversity programs and many have recently added inclusiveness to the mix. Yet law firms consistently experience higher attrition rates for attorneys in underrepresented groups. Lack of results has caused a great deal of frustration, especially since leaders believe their firms have been doing all of the "right things" (and some are winning awards for their programs).

The missing piece, it turns out, is leaders themselves. Law firms may have added inclusiveness to their diversity efforts but leaders continue to do what they have always done — treated the diversity and inclusion initiative as a separate, stand-alone program to be managed by others in the firm. Leaders have not understood that inclusion underlies every aspect of the firm and, as with any other change initiative, active leadership is required to achieve meaningful results.

Forward-thinking leaders now know that a focus on recruiting and hiring is only half of the equation; law firms must also work to retain, develop, and advance attorneys in underrepresented groups in order to produce sustainable diversity. Since retention, development, and advancement efforts implicate all systems and procedures in the organization, active involvement by leaders is essential and responsibility can't be delegated.

Knowledgeable law firm leaders are also changing their view of diversity — from a "problem" to be managed to an *opportunity* that can be leveraged for better business outcomes and client service. Maximizing human capital assets to make the firm more financially productive is only one optimal outcome. Leveraging everyone's strengths to be more innovative — not only in solving serious post-recession business challenges, but also to provide better client service — can be a deciding factor in gaining a competitive advantage in today's economy.

Uncovering the reasons for higher attrition among underrepresented groups is at the core of any inclusiveness initiative. According to several national research studies,[1] there are hidden barriers to success for female, LGBTQ, disabled, and racially/ethnically diverse attorneys in most legal organizations. These groups are disproportionately excluded from opportunities that are often intangible but critically important in any lawyer's career development. Hard work and technical skill are the foundation of career progress, but without these intangible opportunities, attorneys simply cannot advance in their firms.

According to the research studies, these opportunities are shared unevenly by people in positions of power and influence, often without realizing that certain groups are disproportionately excluded, which causes them to remain on the margins in the firm. Specifically, the research reveals that female, LGBTQ, disabled, and racially/ethnically diverse attorneys have less access to:

- Networking — informal and formal
- Internal information or intelligence
- Access to 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, discrimination still exists and contributes to this dynamic. But it turns out that a specific kind of unconscious bias plays the biggest role. Affinity bias, which is a bias for others who are more like you, causes people to develop deeper work relationships with those who have similar identities, interests, and backgrounds. When senior attorneys gravitate toward and share opportunities with others who are like themselves, they (mostly unwittingly) leave female, LGBTQ, disabled, and racially/ethnically diverse attorneys out.

Unlike traditional diversity efforts, inclusiveness initiatives require firm leaders to go "All-In," meaning a full commitment plus action to examine and address all aspects of the firm to uncover hidden barriers to success for attorneys, especially those in underrepresented groups.

The process begins with leadership taking personal responsibility for leading the firm on D+I. If leaders (including firm/office management and practice group leaders) are not fully committed to making the necessary structural, cultural, and behavioral changes, an inclusiveness initiative will never have any meaningful impact.

Once leaders understand and invest in the change initiative ("My-In"), they can foster buy-in throughout the firm by modeling inclusive behaviors, adopting diversity- and inclusiveness-related competencies, and empowering individuals, departments, and teams to address hidden barriers through D+I action plans ("Buy-In").

The ultimate goal is to make systemic, organizational changes that embed diversity and inclusion throughout every aspect of the firm ("Tie-In") and make it part of the DNA of the organization.

Leader commitment and verbal support of change efforts is not enough. As with any change initiative, law firms need the full engagement of senior leaders to shape and execute diversity and inclusion strategies. While all leaders must be actively involved, since white men still hold a majority of senior leadership positions in law firms, it is particularly important for white male leaders to step up as allies and champions to create inclusive work environments.

Inclusive behaviors, endorsed and modeled by law firm leaders, "unlock" the diversity in the organization, allowing the full potential of the firm and its diverse composition to be brought to bear on driving greater levels of organizational performance. Going "all-in" is the only way to achieve genuine success in diversity and inclusion efforts.

Kathleen Nalty is an expert in diversity and inclusiveness in the legal industry, speaking across the country. Kathleen presented workshops on diversity and inclusion for the Cleveland Metropolitan Bar Association in 2012 and 2014. She is currently writing a book entitled "Going All-In on Diversity & Inclusion: The Law Firm Leader's Playbook." She is President of her own consulting group — Kathleen Nalty Consulting — and can be reached at kathleen@kathleennaltyconsulting.com or (303) 770-2563.

Kathleen Nalty Consulting

Resource List for Unconscious/Conscious Bias

Online Tests/Exercises:

- Project Implicit: http://bit.ly/1b9JX9x - test your own unconscious bias with this free online test sponsored by Harvard University and taken by millions of people in the past 15 years.
- Mind Lab: http://bit.ly/1NqcXKW – discover the surprising limitations of your brain's ability to perceive through online interactive demonstrations.

Other Resource Lists:

- American Bar Association, Section of Litigation, Task Force on Implicit Bias, http://bit.ly/1LD4wh9.
- "Helping Courts Address Implicit Bias: Resources for Education," National Center for State Courts (2012), http://bit.ly/1fZyI9e.
- "State of the Science: Implicit Bias Review," Kirwan Institute for the Study of Race and Ethnicity, Ohio State University (2015), http://bit.ly/1LQM6Xr.

Educational Videos:

- "Continuing the Dialogue – The Neuroscience and Psychology of Decision-making, Part 1 - A New Way of Learning," Judicial Council of California (October 28, 2009), http://bit.ly/1Noskne.
- "Continuing the Dialogue – The Neuroscience and Psychology of Decision-making: A New Way of Learning, Part 2 – The Media, the Brain, and the Courtroom," Judicial Council of California (March 30, 2010), http://bit.ly/1LwEV8P.
- "Continuing the Dialogue – The Neuroscience and Psychology of Decision-making, Part 3 – Dismantling and Overriding Bias," Judicial Council of California (October 28, 2009), http://bit.ly/1Nrbsvt
- "Managing Unconscious Bias," Facebook employee training video (2015), http://managingbias.fb.com/.

Articles/White Papers/Blog Posts:

- Nalty, K. "Strategies for Confronting Unconscious Bias." The Colorado Lawyer (May 2016), http://bit.ly/1Njkxf2.
- Negowetti, N. "Implicit Bias and the Legal Profession's 'Diversity Crisis': A Call for Self-Reflection." Boyd School of Law Journal, University of Nevada Las Vegas, Vol. 15, No. 2 (2015), http://bit.ly/1ZlmFI6.
- Soll, J.B., Milkman, K.L. & Payne, J.W. "Outsmart Your Own Biases." Harvard Business Review (May 2015), http://bit.ly/1OaA6zG.
- Porter, Jane. "You're More Biased Than You Think," Fast Company, http://bit.ly/1LD5gD1 (Includes a link to a video – "Making the unconscious conscious – Google's efforts to educate employees about implicit bias).

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- Ross, Howard. "3 Ways to Make Less Biased Decisions." Harvard Business Review (April 16, 2015), http://bit.ly/1FRxAdk.
- Bailey, S. "Can You Overcome Inbuilt Bias?" Forbes Blog Post (August 14, 2014), http://onforb.es/XnGzEF.
- Papillon, Kimberly. "The Neuroscience of Decision-Making Curriculum: Twelve Steps and Strategies for Increasing Fairness and Eliminating Unconscious/Implicit Association in Decision-Making," National Center for State Courts, http://bit.ly/1NtZq4n.
- Lee, Samantha & Baer, Drake. "20 Cognitive Biases That Screw Up Your Decisions," Business Insider (August 27, 2015), http://www.businessinsider.com.au/cognitive-biases-that-affect-decisions-2015-8.

Books:

- Banaji, M.R. & Greenwald, A.G. Blind Spot: Hidden Biases of Good People (2013).
- Kahneman, D. Thinking, Fast and Slow (2012).
- Reeves, A.N. The Next IQ: The Next Level of Intelligence for 21st Century Leaders (2012).
- Gladwell, M. Blink: The Power of Thinking Without Thinking (2005).
- Fine, C. A Mind of Its Own: How Your Brain Distorts and Deceives (2006).
- Vedantam, V. The Hidden Brain: How Our Unconscious Minds Elect Presidents, Control Markets, Wage Wars, and Save Our Lives (2010).
- Ross, H. Everyday Bias: Identifying and Navigating Unconscious Judgments in Our Daily Lives (2014).
- Steele, Claude M. Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do (2010).

Television Productions

- "The Brain with David Eagleman" – PBS Series – http://www.pbs.org/the-brain-with-david-eagleman/home/.
- ""Brains on Trial" - PBS Series hosted by Alan Alda, http://brainsontrial.com/.
- "Born good? Babies help unlock the origins of morality." 60 Minutes (November 18, 2012), http://cbsn.ws/1LPmPwG.
- "Brain Games" – series hosted by National Geographic Channel, http://bit.ly/1l3nBb2.

The State Bar
of California

OFFICE OF ACCESS & INCLUSION

Title of Report: Diversity & Inclusion Plan: 2019 – 2020 Biennial Report to the Legislature

Statutory Citation: Business and Professions Code section 6001.3

Date of Report: March 15, 2019

The State Bar of California submits this report to the Legislature in accordance with Business and Professions Code section 6001.3, which directs that the State Bar develop and implement a plan demonstrating its ongoing "commitment to and support of effective policies and activities to enhance access, fairness, and diversity in the legal profession and the elimination of bias in the practice of law." The plan is intended to support the following tenets:

- That the justice system is equally accessible and free of bias should be a core value of the legal profession;
- Diversity and inclusion are an integral part of the State Bar's public protection mission to build, retain, and maintain a diverse legal profession to provide quality and culturally sensitive services; and
- The State Bar should continue to increase diversity and inclusion in the legal profession.

This is the first report to be submitted under this statutory requirement, so it summarizes some of the activities the State Bar has advanced in the past to combat implicit bias and increase diversity and inclusion in the legal profession. More importantly, the report identifies on-going activities as well as the State Bar's planned initiatives moving forward. In January 2019, the Board of Trustees added nine concrete objectives to the State Bar's Strategic Plan on this critically important topic, focusing on priorities where the State Bar is uniquely situated to have the greatest impact by collecting data, making systematic changes as a regulator, and incubating innovative programs that can be scaled to increase diversity and inclusion throughout the California legal profession.

This summary of the report and the report are submitted in compliance with Government Code section 9795.

The full report and attachments are available for download on the State Bar website at: http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Reports.

A printed copy may be obtained by calling 415-538-2252.

The State Bar *of California*

Diversity & Inclusion Plan: 2019 – 2020

Biennial Report to the Legislature
Pursuant to Business and Professions Code section 6001.3

March 15, 2019

EXECUTIVE SUMMARY

The State Bar of California submits this report to the Legislature in accordance with Business and Professions Code section 6001.3, which directs that the State Bar develop and implement a plan demonstrating its ongoing "commitment to and support of effective policies and activities to enhance access, fairness, and diversity in the legal profession and the elimination of bias in the practice of law." The plan is intended to support the following tenets:

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- The State Bar should continue to increase diversity and inclusion in the legal profession.

The State Bar has been committed to increasing the diversity of the profession and eliminating bias for many years. This work has included outreach, summits, trainings on the elimination of bias, workshops, and incubating innovative programs.

In May 2017, the State Bar Board of Trustees adopted a new mission statement, proclaiming that:

> The State Bar of California's mission is to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and support for greater access to, and inclusion in, the legal system.

In January 2019, the Board of Trustees adopted amendments to the State Bar's 2017–2022 Strategic Plan to include concrete objectives advancing the diversity and inclusion components of this mission. Based on input from leaders in the field and a variety of stakeholders, the objectives focus the work where the State Bar is uniquely situated to make the most impact. Many organizations and entities provide direct programming to improve diversity (through education, mentorship and other specific forms of expertise). However, few if any have the statewide reach and unique role of the State Bar. The State Bar's focus accordingly will be on the systemic and institutional, rather than delivering direct programming. Pursuant to its Strategic Plan objectives the State Bar intends to:

- Serve as a data repository, research institution, and technical assistance provider on topics such as trends in attorney demographics, cross-sector employment data, and meta-analysis of diversity and inclusion studies;
- Convene stakeholders to discuss emerging issues, best practices, and data collection; and
- Recommend, incubate and/or pilot promising programs that are based on data and have the potential to scale throughout the state.

The State Bar has recently begun implementing its own internal diversity initiative, "Built In, Not Bolted On," in which the important work of diversity and inclusion is not limited to a single Office, but rather is an undercurrent of all that the State Bar does. The State Bar provided

implicit bias training to all staff, and will be delivering it to the volunteers on all of the State Bar's subentities.

The State Bar is investing in improving Bar exam passage rates, especially for historically under-represented groups through the Productive Mindset Intervention Study (now known as the California Bar Exam Strategies and Stories Program) which has had promising initial results. In addition, the State Bar is examining whether implicit bias affects decisions about how a matter proceeds through the discipline system, including the level of discipline ultimately meted out. The State Bar also expanded its demographic data collection efforts, seeking to develop more granular data on the makeup of the profession, the makeup of various practice areas, and issues affecting career advancement and satisfaction.

During the next two years we will focus on establishing baseline data, identifying and developing specific interventions, and implementing diversity and inclusion principles. We will be taking action where the State Bar can have the greatest impact, including: examining the disproportionate attrition rate of diverse students in law school; eliminating unintended bias in the Bar exam; collecting and analyzing statewide data to identify systemic issues that need to be addressed, and developing programs to address them; and supporting judicial diversity. The objectives adopted by the Board of Trustees expand on work already in progress and direct the State Bar to do the following:

Pipeline to the Profession

- Develop enhanced demographic reporting requirements for California Accredited and Registered Schools to gather better information on dropout rate of law students from diverse backgrounds. This data is currently collected and available for American Bar Association (ABA) Law schools.
- Identify effective law school retention programs, support them, and help to promulgate statewide.
- Review Bar exam questions and grading processes with diversity and inclusion principles in mind to eliminate unintended negative outcomes for those from diverse backgrounds.
- Expand implementation of the California Bar Exam Strategies and Stories Program and revise the criteria for determining if an individual possesses the requisite moral character to be admitted to the State Bar, to ensure greater transparency, impartiality and consistency, and address any implicit bias that may be embedded in the determination process.

Statewide Leadership

- Analyze and expand demographic data to identify particular obstacles to diverse attorneys' entry into specific areas of practice/employment, retention, and advancement in the legal profession.
- Produce an annual report card on diversity in California's legal profession.
- Develop a communications and outreach strategy including calls to action.

Retention and Advancement

- Based on data, develop and deploy initiatives to address survey results and share with regional and affinity bars to advance these strategies statewide.
- Explore modifying the elimination of bias continuing education requirement through additional hours and/or developing online modules to help support retention, advancement, and creating a more inclusive, culturally sensitive environment.

Judicial Diversity

- Partner with the Judicial Council to update the Judicial Diversity Toolkit, which contains sample outreach and education programs to be deployed by local courts and bar associations, designed to encourage diverse attorneys to apply for judicial appointment.
- Provide support to the Judicial Council and the courts in Toolkit implementation efforts.

INTRODUCTION

Increasing diversity and inclusion in the legal profession is a core objective of the work of the State Bar. In May 2017, the Board of Trustees adopted a new mission statement specifically emphasizing access and inclusion:

> The State Bar of California's mission is to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and support for greater access to, and inclusion in, the legal system.

Effective January 1, 2019, the State Bar's statutory mission statement was amended to also reflect the same concept, providing that protection of the public includes support for greater access to, and inclusion in, the legal system.[1] To implement these mission statements, in January 2019, the State Bar adopted nine concrete diversity and inclusion objectives in its Five-Year Strategic Plan (Strategic Plan),[2] designed to make demonstrable progress towards increasing diversity in the profession and building a diverse and inclusive legal profession that will produce a fair and equitable justice system for all Californians.

This report outlines some of the historical efforts led by the State Bar, current State Bar activities to promote diversity and inclusion throughout and amongst its licensees, and the Board adopted strategic plan goals and objectives guiding the future work of the State Bar in this area.

[1] Business & Professions Code § 6001.1, as amended by AB 3249 (Stats. 2018, ch. 659 Eff. Jan. 1, 2019).
[2] *California State Bar's Updated Strategic Plan* at http://www.calbar.ca.gov/Portals/0/documents/bog/Updated%202017-2022%20Strategic%20Plan.pdf.

SECTION I: HISTORY

In 2006, the Board of Trustees created the Council on Access and Fairness (COAF) to advise the Board on strategies to develop a diverse pipeline into the legal profession and promote individuals from diverse backgrounds to enter and advance in the legal profession.

The original charge of COAF was focused on producing institutional and attitudinal change to create a culture of inclusion within the legal profession and the judiciary that fostered diversity, primarily through outreach, education, mentorship, and workshops. Through COAF, the State Bar developed, distributed, and promoted materials on the need for diversity, and presented trainings about elimination of bias in the legal profession. COAF has also regularly conducted the elimination of bias training as part of the annual orientation for new members of the Commission on Judicial Nominees Evaluation (JNE).[3] COAF's major accomplishments are summarized below.

PIPELINE TO LAW

COAF was instrumental in the creation of the California Law Academies in 2010, part of the Department of Education's California Partnership Academy. These academies are three-year high school programs in the public school system. They are focused on specific career themes for students who are at high risk of dropping out of school. These focused academies integrate academics, business partnerships, mentoring, and internships. All the Partnership Academies are funded, supported, and monitored by the California Department of Education, in partnership with school districts, schools, industry, and post-secondary institutions.

Following its success in getting the California Law Academies off the ground, COAF worked to develop the Community College Pathway to Law program (also known as the 2+2+3 program) to guide students from community colleges to universities and to law school. In 2016, the State Bar supported a new nonprofit entity, California LAW, Inc. to coordinate these pipeline efforts to the legal profession.

These Academies and Pathway programs have been popular and have increased the visibility of, and opportunities in, the legal profession for many young people, illustrated by the number of students participating in the programs. For example, there were 96 students in the 2014 school year (when the 2+2+3 program was first launched) and in 2018 there were 963 students in these programs. While anecdotal feedback regarding the value of both programs is positive, data has not been systematically collected in a manner that would allow for an effectiveness or outcomes evaluation of either effort. For example, the State Bar is not able to report on the extent to which students have progressed from the Academies to the Pathway to Law, and then on to law school. California LAW, Inc. has expressed interest in this type of data collection and analysis. This would not be an insignificant task, however, as the Partnership Academy data is

[3] This training satisfied the requirements of Government Code section 12011.5 (b), addressing fairness and bias in the judicial appointments process, but also endeavored to ensure the JNE commissioners had a clear understanding of the impact of the lack of judicial diversity on Californians.

held by the California Department of Education and individual participating schools hold the Pathways data.

The State Bar has transitioned leadership for these pipeline programs to California LAW, Inc. but continues to provide limited administrative support for the Pathways Annual Conference, promoting volunteer recruitment for its programs and some materials and resources.

ELIMINATION OF BIAS TRAINING

In 2014, COAF produced an elimination of bias video with companion materials called "Walk the Walk," created by award-winning filmmaker Abby Ginzberg and scriptwriter AJ Kutchins. The video included real-life experiences shared by people of color, women, lesbian, gay, bisexual, transgender and transsexual attorneys and legal workers at law firms, corporations and in academia. The companion materials include notes, tips, discussion questions, and resources to provide a framework for more inclusive environments. The video has been used and distributed to law firms, local bar entities, and national bar associations.

JUDICIAL DIVERSITY SUMMITS AND OUTREACH

COAF convened Judicial Summits in 2006, 2011, and 2016 in conjunction with the Judicial Council and the California Judges Association to evaluate the state of diversity on the bench and increase awareness as to judicial diversity issues. Final reports and/or recommendations were produced following both the 2006 and 2011 summits. Each year COAF also convenes several judicial appointment workshops for those interested in becoming a judge, but who may not possess the role models to help them understand how to navigate the system. Often, a representative from Commission on Judicial Nominees Evaluation, judicial officers and a member of the Governor's appointments team is in attendance as well. Individual COAF members also provide mentoring for interested applicants.

SECTION II: CURRENT STATE BAR DIVERSITY AND INCLUSION INITIATIVES

In addition to the activities performed by COAF, the State Bar has been looking systematically at how to advance diversity, inclusion, and accessibility internally and as a regulatory agency. The State Bar has re-focused its efforts so that its diversity and inclusion work is "Built In, Not Bolted On." To understand the gaps, needs, and opportunities, the State Bar has been collecting and examining data and engaging in various diversity and inclusion initiatives.

DATA COLLECTION AND ANALYSIS TO SUPPORT ACCURATE AND COMPREHENSIVE ATTORNEY DEMOGRAPHIC REPORTING

The State Bar has been working to generate a comprehensive demographic snapshot of the state's attorney population. Recent efforts include a 2017 licensee survey, a modification to private attorney profile pages on the State Bar's website to encourage attorneys to provide demographic data at log in, and a new survey launched concurrent with the 2019 billing cycle, which seeks information about an expansive set of demographic and career-advancement

issues. In addition, the State Bar has folded in demographic data from the Office of Admissions to develop a more robust data set.

These myriad efforts have enabled the State Bar to report on the demographics of the profession in ways not previously possible. At the highest level, California lawyers are much less diverse than the state as a whole. Comparing the attorney population to data on Californians over the age of 18 shows that 77 percent of attorneys are white, while only 41 percent of the state's adult population is white. Similarly, while a slight majority of Californians over 18 are women, only 42 percent of the profession is made up of women.

Figure 1. California Attorneys are Less Racially Diverse than State's Overall Population[4]

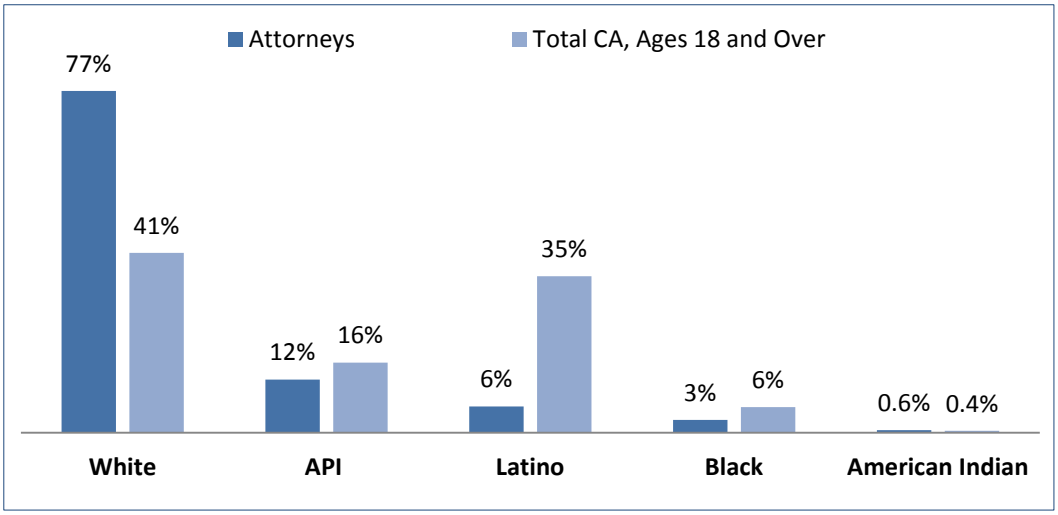
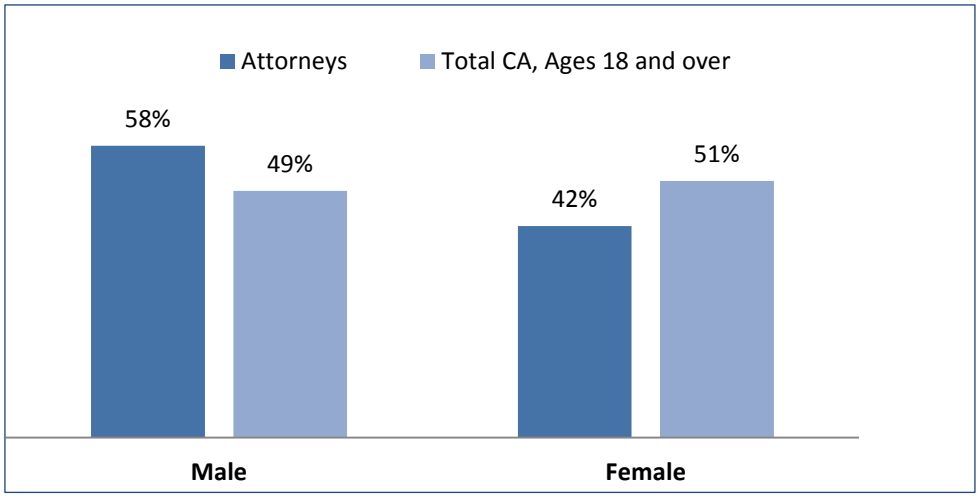


Figure 2. California Attorneys are Less Diverse than State's Overall Population by Binary Gender[5]

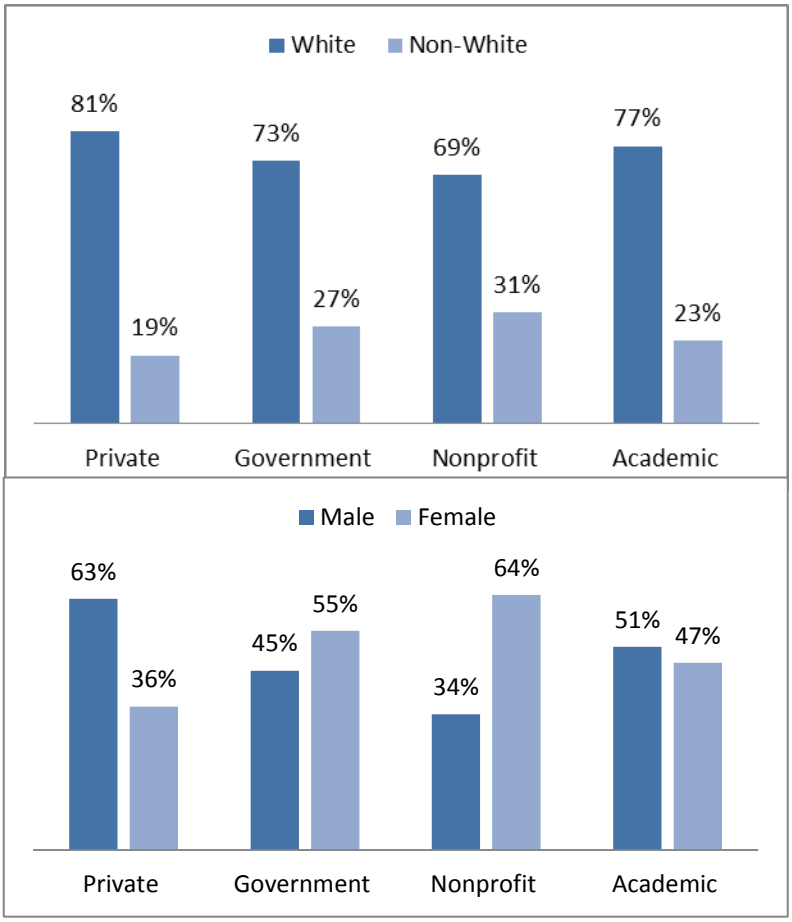


[4] State Bar of California, Offices of Admissions, California State Bar Survey, 2017 and California population—U.S. Census Bureau Estimates, 2017

[5] State Bar of California, Office of Admissions, California State Bar Survey, 2017 and California population—U.S. Census Bureau Estimates, 2017

In addition, looking at the demographic make-up of attorneys in different sectors shows that the diversity of the profession varies depending on type of employment. The private sector is the least diverse in terms of the racial/ethnic and gender composition of the attorney population, while the non-profit sector is the most diverse on both of these dimensions.

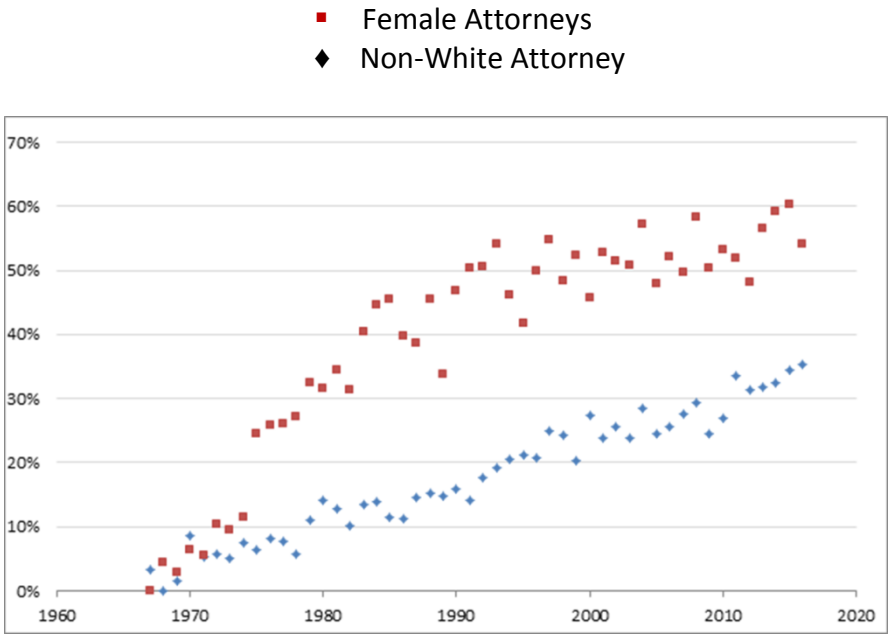
Figure 3. Women and Non-White CA Attorneys Underrepresented in the Private Sector[6]



Trends over time, as opposed to a point in time snapshot, indicate that while the attorney population as a whole continues to be non-diverse, the demographics of the profession are changing. Figure 4 shows the demographic composition of attorneys by year of admission to the State Bar. The graph demonstrates a clear trend that attorneys who were admitted most recently to the State Bar are a much more diverse group than those admitted in the past.

[6] State Bar of California, Office of Admissions, California State Bar Survey, 2017 and California population—U.S. Census Bureau Estimates, 2017

Figure 4. Change in California's Attorney Population Over Time[7]



Our early review of the 2019 demographic survey results, with over 66,000 responses tallied, shows that if not for the predominance of men among whites, the profession would be majority female. The profession is already majority female among Asian, Blacks, Middle Eastern/North Africans, and Native Hawaiian/Pacific Islanders. Latino attorneys are evenly split between men and women. About 2 percent of the profession does not identify as either male or female.

BUILDING A CULTURE OF DIVERSITY- INVESTING IN TRAINING ALL STAFF ON IMPLICIT BIAS

The State Bar recognizes that in order to focus on diversity and inclusion of the attorney population, these principles and values must be fully integrated throughout the organization. The State Bar has thus adopted a "Built In, Not Bolted On" strategy. In other words, diversity and inclusion issues, efforts and interventions, which had previously been laser focused with a single staff person and committee, will be the responsibility of all State Bar Offices in various ways.

In the fall of 2018, the State Bar invested in training all of its employees on implicit bias, providing more intensive and focused training for those staff who make decisions about an applicant's fitness to be admitted to the State Bar, or about disciplinary matters. Implicit bias refers to the attitudes or stereotypes that affect an individual's understanding, actions, and decisions in an unconscious manner. Understanding the importance of this issue, the State Bar engaged a nationally recognized expert to design and execute trainings specifically for the State Bar staff.

[7] State Bar of California, Office of Admissions, California State Bar Survey, 2017

Nearly 178 staff who are involved in the moral character determination or attorney discipline process engaged in an in-person six hour training on the Neuroscience of Decision-Making in the Attorney Discipline System. Another 249 staff underwent a three-hour training on the Neuroscience of Decision-Making in the State Bar.

Moving forward, the State Bar will train all new employees on implicit bias and reinforce unconscious bias training with staff and managers regularly. In addition, pursuant to the Board of Trustees' recently completed review of State Bar committees, councils, commissions, and boards (collectively the "subentities"), beginning this year all State Bar volunteers, regardless of which subentity they serve on, will receive a standardized elimination of bias training.

ENSURING BAR EXAM QUESTIONS ARE INCLUSIVE

Essay questions for the California Bar Examination and the First-Year Law Students' Examination are solicited from law professors and other qualified drafters and edited by the Examination Development and Grading (EDG) Team under the supervision of the Office of Admissions. The Office of Admissions considers diversity in the recruitment of EDG and Performance Test Drafting Team members. Performance Test questions are drafted and edited by a team of practitioners and academics, in collaboration with a member of the EDG Team, also under the supervision of the Office of Admissions. All questions selected for the Bar exam are pretested to find potential problems of bias, ambiguity, etc., and then further edited, if necessary, prior to administration. The review and development process also involves assessing selected questions to ensure that proper names, gender, roles, etc. are not biased and represent the diverse population reflected in our state to the greatest extent practicable.

IMPROVING BAR EXAM PASSAGE

Another important and innovative initiative undertaken by the State Bar to increase diversity in the legal profession is the California Bar Exam Strategies and Stories Program (Strategies and Stories Program). Designed by a team of professors of law and psychology from Indiana University Law School, the University of Southern California Gould School of Law, and Stanford University, the Strategies and Stories Program seeks to improve outcomes on the Bar exam for all test takers, but with a focus that may be especially helpful to historically under-represented groups.

The Strategies and Stories Program is designed to mitigate the harmful effects of "psychological friction" – test takers' concerns about ability, potential, and belonging that can prevent them from performing up to their actual skill level on an exam. The intervention was developed with the support of the State Bar of California beginning in 2017 and builds on a growing body of research exploring the social-psychological factors that influence student achievement.[8]

[8] See generally Gregory M. Walton & Timothy D. Wilson, Wise Interventions: Psychological Remedies for Social and Personal Problems, 125 PSYCH REV. 617 (2018).

Researchers spent the fall and winter of 2017 conducting surveys and focus groups of recent law school graduates in California to better understand the experiences, challenges, and concerns of students who had recently taken the Bar exam. These data were then used to create intervention materials: short videos, audio stories, Bar exam study strategies, and a short writing exercise, all designed to help test takers interpret the obstacles and challenges associated with taking the Bar exam in a productive way.

While these psychological factors can produce mental friction in all test takers, these challenges may be greater for recent graduates who are the first in their families to attend college, or who come from lower socio-economic families, or from groups who have not, historically, been represented among the ranks of the legal profession.

The preliminary findings, based on the outcomes of students who took the 2018 Bar exam, are extremely promising. Looking exclusively at first-time test takers from US law schools, the Strategies and Stories Program appeared to improve the likelihood of passing the Bar exam by 18 percent compared to a control group. Because this finding is based on a relatively small sample and is focused exclusively on a subset of all exam takers, the State Bar plans to continue working with the research team to expand the availability of the Strategies and Stories Program and evaluate the impact of the intervention on all exam takers.[9] A memo outlining the details of these preliminary findings is included in this report as Attachment A.

EXAMINING RACIAL AND ETHNIC DISPARITIES IN THE DISCIPLINE SYSTEM

In addition to examining diversity and inclusion within the legal profession, the State Bar has committed to evaluating the attorney discipline system to determine if there is disproportionality in the imposition of discipline on attorneys by race or gender. This study will also address the question of whether or not solo and small firm practitioners are disciplined disproportionately.

To evaluate the question of disproportionality in the attorney discipline system, the State Bar contracted with the University of California, Irvine, to conduct a systematic, statistical analysis of data on attorney discipline. The analysis will examine outcomes in the discipline system in a manner similar to the way in which researchers conduct parallel disparity analyses in the criminal justice setting. Just as a criminal case proceeds through phases corresponding to progressively more serious consequences – from arrest, through charging, to conviction – so a case in the discipline system also has phases – initial complaint, investigation, prosecution, and the imposition of discipline. The study will determine whether there are statistically significant variances in the likelihood that different racial/ethnic groups (and attorneys by firm size) proceed along this continuum in the discipline system. This study will control for a wide range of factors including the length of time that attorneys have practiced, attorney age, law school attended, score on the Bar exam, and county in which the attorney practices.

The results of the study are expected in April 2019.

[9] http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Exam-Strategies-and-Stories-Program. Bar exam applicants interested in participating need to sign up via the applicant portal.

DATA COLLECTION: LICENSEE SURVEY ADDRESSING EXPANDED DEMOGRAPHIC INFORMATION AND CAREER SATISFACTION

In 2019, the State Bar expanded data collection to better understand the demographics of the profession. To accomplish this, the State Bar launched a survey concurrent with the 2019 licensee billing process. The questions on race and ethnicity align with categories used by the U.S. Census; the survey also includes questions on gender identification, sexual orientation, veteran status, age, and disability. Responders are asked about the sector of the legal profession in which they work, their rank within their firms, and their level of job satisfaction.

The State Bar designed the survey following an examination of research and surveys conducted by the American Bar Association and other entities focusing on addressing disparities in the profession based on race, ethnicity and gender.[10] The survey was further improved with the assistance of a group of participants from the State Bar's Diversity Summit.[11] As of mid-March, 2019, the State Bar has collected over 66,000 responses that will help inform statewide strategies to increase diversity and create a more inclusive profession. Data collection continues, including various outreach efforts to get even greater participation.

SECTION III: THE STATE BAR'S FUTURE DIVERSITY AND INCLUSION OBJECTIVES

In developing the State Bar's plan to increase diversity and inclusion in the legal profession, the Board of Trustees focused on where the State Bar is uniquely positioned to effectuate the most change. The Board also sought to identify measurable initiatives, so we can determine the extent to which efforts in a particular area have been effective, and whether continuation or expansion is warranted. In its Strategic Plan, the State Bar focused on a data driven approach, establishing baseline data to identify specific opportunities for interventions and inform how to pilot or expand innovative strategies.

The State Bar has five strategic goals in its 2017-2022 Strategic Plan; the fourth goal specifically addresses access to justice for all California residents. Under this goal, the Board of Trustees adopted the following diversity and inclusion Strategic Plan objectives:

[10] *See e.g.,* L. Hughes, Jennifer & Camden, Abigail & Yangchen, Tenzin, *Rethinking and Updating Demographic Questions: Guidance to Improve Descriptions of Research Samples* (2016) Psi Chi Journal of Psychological Research. 21. 138-151. 10.24839/2164-8204.JN21.3.138. and *Interrupting Racial & Gender Bias in the Legal Profession at* https://www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf.

[11] In August 2018, the State Bar convened approximately 25 members of Statewide, Regional, and Local Affinity Bars to brainstorm how the State Bar could be most impactful in the diversity and inclusion space. Several attendees volunteered to assist with the development of this survey.

Pipeline to the Profession

- Work with the California Accredited Law Schools and registered schools to develop enhanced demographic reporting requirements by December 31, 2019.
- Identify means of supporting existing law school programs to improve retention by December 31, 2019.
- No later than December 31, 2019, identify ways that diversity and inclusion principles can be institutionalized in Bar exam development and grading analyses and implement these practices no later than December 31, 2020.
- Assuming positive results from the Productive Mindset Intervention (Strategies and Studies Program), expand implementation by February 2020.

Statewide Leadership

- Continue development and implementation of initiative to collect demographic data about licensed attorneys through all stages of their career through 2019.
- Develop and publish an annual report card on the state of the profession by January 31, 2020, and annually thereafter.

Retention and Advancement

- No later than December 31, 2019, analyze available data to identify the particular obstacles to diverse attorneys' entry into, retention, and advancement in the legal profession.
- By December 31, 2020, modify the elimination of bias curriculum contained in the Minimum Continuing Legal Education requirements to consider the creation of sub-topics, and expanding the number of required hours.

Judicial Diversity

- Partner with the Judicial Council to complete the Judicial Diversity Toolkit.

PIPELINE TO THE PROFESSION

At its January 2019 planning session the Board of Trustees grappled with the question of where the State Bar can be most impactful with respect to the goal of increasing the diversity of the attorney population. The Board of Trustees decided to focus on areas where the State Bar is uniquely situated to make the most impact as a regulatory agency and where the data identifies actionable disparities.

With that lens, the Board of Trustees adopted the above strategic objectives to identify interventions and policies to support diverse law students, Bar exam test takers, and State Bar applicants to join the legal profession.

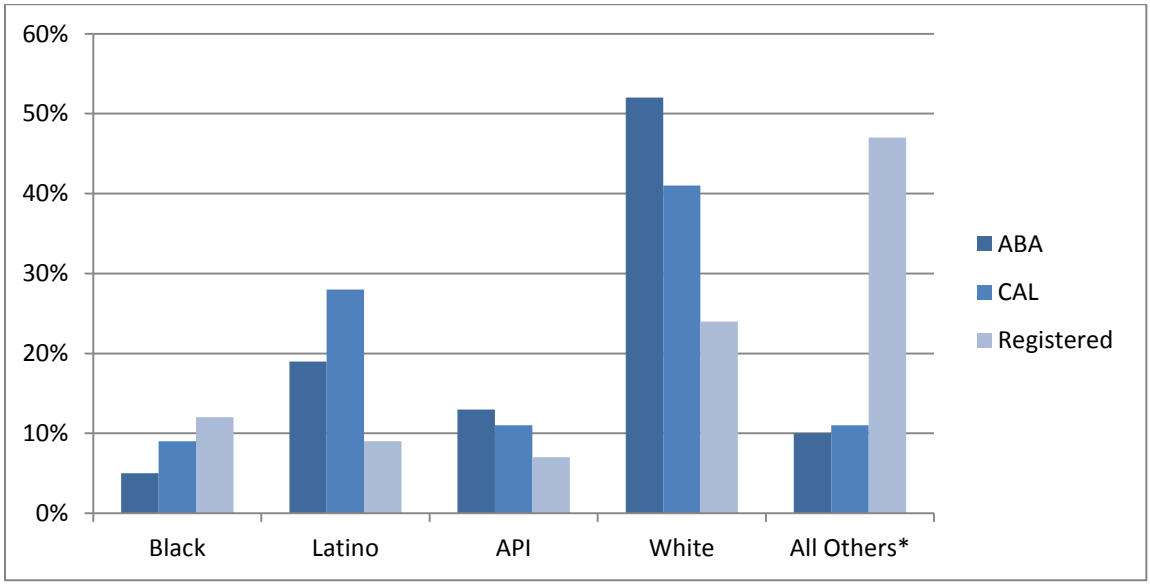
Law School Data Analysis, Attrition Data and Attrition Interventions

While there is consensus in the literature that career pipeline work should begin early, many other local organizations are engaged in that space with respect to the pipeline to law. As a

result, and taking advantage of the State Bar's statewide purview, the Board has determined that the most appropriate point of intervention for the State Bar is in law schools. This decision was animated by an extensive data review which identified a growing diversity gap between law school matriculation and law school graduation in ABA schools; corresponding data is not available for non-ABA schools at this time. Pursuant to newly adopted Strategic Plan objectives however, this year the State Bar will work with California Accredited Law Schools and Registered schools to develop enhanced demographic reporting requirements.

Figures 5 below reflects the demographics of California law students, amounting to nearly 15,660 law students at American Bar Association (ABA), California Accredited, and Registered law schools. As shown, non-ABA schools tend to have more racially and ethnically diverse students. Non-ABA schools generally have lower graduation rates and bar passage rates but they play an important role in shaping California's legal profession. They can offer less expensive law school options which allow for part-time attendance for non-traditional students working full time, they can offer online education, and are more prevalent in rural areas of California where there may not be any ABA law schools.

Figure 5. California Law School Student Population by Race and Ethnicity by Type of School in 2018[12]

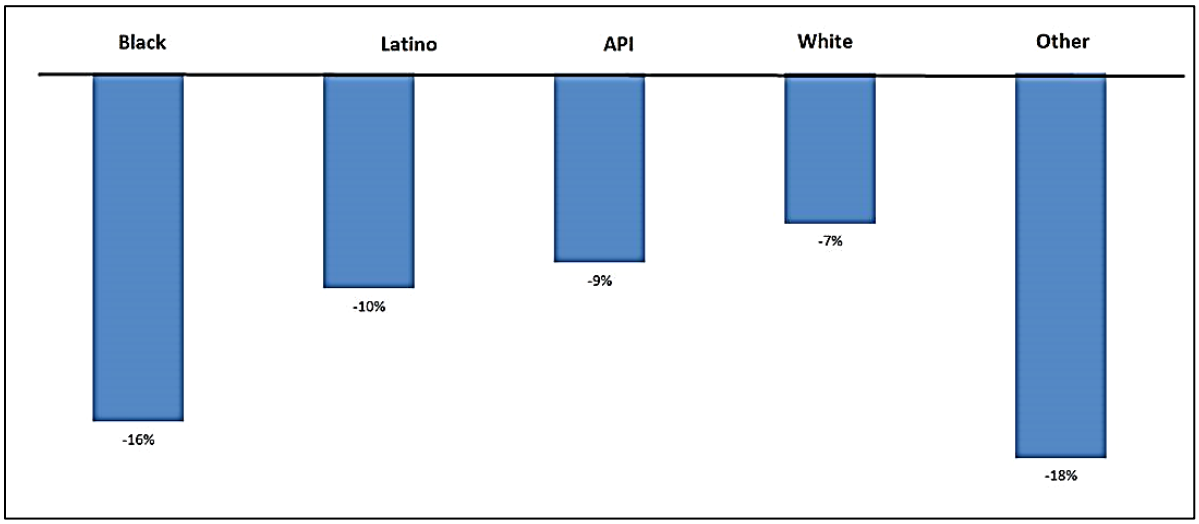


* Am. Indian/Alaskan and race unknown.

Figure 6 illustrates the disparity gap for students of color who leave law school before graduation.

[12] Admissions to the Bar of the American Bar Association, Council of the Section of Legal Education and Admissions, Standard 509 Information Report - JD Enrollment and Ethnicity

Figure 6. Estimated California ABA Law School Dropout Rate[13]
(Percent Change) 2015 Matriculates vs. 2018 Law School Graduates



As noted above, detailed attrition data is not currently available for California Accredited or Registered Law schools. Staff will work with the California Accredited Law Schools and Registered Law schools to develop enhanced demographic reporting requirements by December 31, 2019. This information will enable similar graduation rate analyses to be generated for non-ABA schools, and ultimately will inform ways in which the State Bar's regulation of these entities may need to be modified to address this result.

Decreasing Law School Attrition for Students of Color

Currently there is no California repository of law school retention programs. Further, data about the efficacy of these, as well as similar efforts employed in other jurisdictions, is almost entirely unavailable. Most of the existing programs are isolated and generally coordinated with informal partnerships. For the few programs that have been evaluated, the findings are not widely shared, and best practices are not readily available. As a result, little is known about the extent to which these programs are successful.

This year, the State Bar will use its annual Law School Assembly – to which deans of all California law schools are invited – to begin a dialogue about promising retention programs. The State Bar will also explore programs at schools across the country for ideas about successful and replicable programs. Pursuant to the State Bar's new Strategic Plan objectives, by December 31, 2019, the State Bar will work with law schools to support existing programs or deploy and evaluate new programs to improve retention. Supporting these types of programs could directly help nearly 6,000 students of color *currently* enrolled in law schools in California persist to succeed in and graduate from law school.

[13] ABA Section of Legal Education 509 Required Disclosures, Compilation—All School Data, JD Enrollment and Ethnicity 2015- 2018 Report, First Year Class 2015-2018 Report

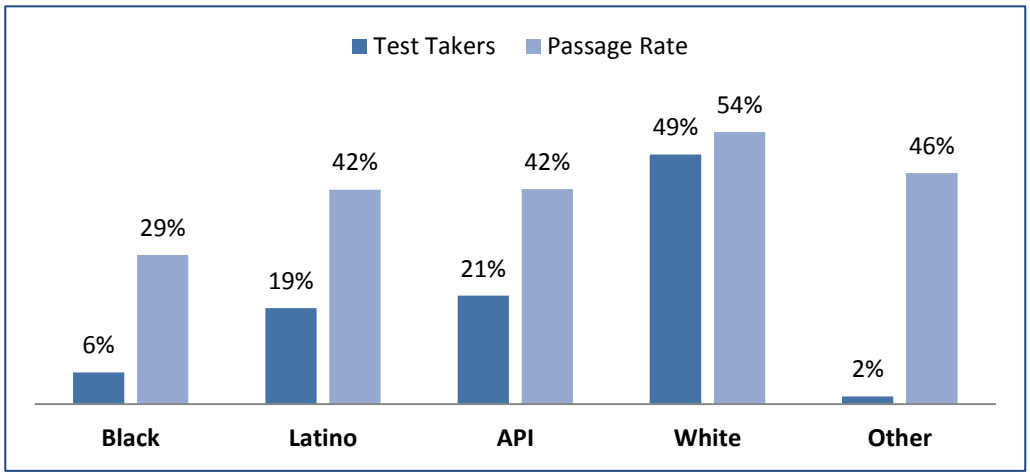
Bar Exam Questions from an Inclusion Perspective

The State Bar will review California Bar exam questions and grading from a diversity and inclusion perspective to help protect against unintended negative outcomes for people of diverse backgrounds. This includes ensuring those who test or grade exam questions have been trained in implicit bias. By the end of this year, the State Bar will identify ways that diversity and inclusion principles can be institutionalized in Bar exam development and grading analyses, and implement these practices no later than December 31, 2020. We anticipate this will include memorializing important question development and grading procedures in the State Bar rules, so they are not forgotten over time.

Increasing Bar Exam Passage Rates

Figure 7 below reflects Bar examination passage rates by race and ethnicity.

Figure 7. California ABA Law School Bar Exam Passage Rate by Race and Ethnicity, 2018[14]



As mentioned in Section II, the State Bar has already began exploring how to improve outcomes on the Bar exam for all test takers, with a focus that may be especially helpful to historically under-represented groups. The Strategies and Stories Program is specifically designed to mitigate the harmful effects of "psychological friction" – test takers' concerns about ability, potential, and belonging that can prevent them from performing up to their ability on an exam. These challenges may be greater for diverse populations who have not historically been represented among the ranks of the legal profession, graduates who are the first in their families to attend college, or who come from lower socio-economic backgrounds.

The preliminary findings of the Strategies and Stories Program from the July 2018 Bar exam are extremely promising. The State Bar will extend the program to July 2019 test takers to allow for greater participation. This additional expansion will provide more robust data on its impact on diverse populations, to inform future efforts to deliver this intervention and develop additional

[14] State Bar of California, Office of Admissions

strategies to improve passage rates such has additional interventions for non-first time test testers.

Admissions Process: Moral Character

This year, the Office of Admissions will lead an effort to review the factors considered in the moral character determination process to determine if an applicant possesses the requisite moral character to be certified for admission to the State Bar. The review will include establishing more formal guidelines to ensure consistency, as appropriate, and provide accountability and transparency into the process. The review will include an evaluation of how an applicant's rehabilitation following past criminal convictions should be taken into account.

To protect the public, and pursuant to rules governing admission to practice law in California, applicants with significant issues in their backgrounds that may inhibit their ability to practice law are invited to participate in informal conferences to discuss these issues. Under the present scheme, applicants attend informal interviews and are questioned by a panel comprised of members of the Committee of Bar Examiners' Subcommittee on Moral Character. The panel then recommends a positive, negative, or other outcome to the full Committee of Bar Examiners (CBE), which makes the final determination.

To address issues raised concerning the consistency of recommendations made by panels of fluctuating members of the CBE, and to properly house this administrative function with staff, the Board of Trustees has directed that the responsibility for handling informal conferences and making initial moral character determinations be delegated to staff. Under the new scheme to ensure more standardization and consistency, the CBE will transition to a role of an administrative appellate body.

STATEWIDE LEADERSHIP

The State Bar is uniquely situated to be a data repository, to help identify trends in attorney demographics, cross-sector employment data, and to conduct meta-analyses of diversity and inclusion studies. With that in mind, the Board of Trustees adopted a Strategic Plan objective to analyze available data, no later than December 31, 2019, to identify the particular obstacles to diverse attorneys' entry into, retention, and advancement in the legal profession. These enhanced data collection efforts will enable the State Bar to produce an annual report card on the state of the profession beginning in 2020.

Licensee Survey Addressing Expanded Demographic Information and Career Satisfaction

As mentioned in Section II, the State Bar expanded its demographic data collection with a survey[15] in 2019 to include race and ethnicity as well as gender identification, sexual orientation, veteran status, age, and disability. Responders are asked questions including about the type of legal job they hold, the level of the position they hold, and their job satisfaction. Analysis of the data is still very early and, with additional time, the State Bar will be able to

[15] Attached as Attachment B.

provide more in-depth demographic information about the attorney population in California, including data regarding career satisfaction by race and ethnicity, gender, and practice area. This is the most robust data set about the attorney population ever collected in California, and will be used to inform diversity and inclusion strategies moving forward.

Preliminary Analysis of 2019 Survey

With regard to career satisfaction, attorneys of all backgrounds were consistently the most dissatisfied with their salaries, with between 24 percent and 30 percent of respondents indicating dissatisfaction with this metric. Attorneys appeared to be the most satisfied with the respect and prestige associated with the profession, and with working on challenging assignments.

Despite the consistency in the rankings that attorneys gave to these issues within each of the racial/ethnic groupings, levels of dissatisfaction are modestly higher among attorneys of color.

Rankings of attorneys are much less consistent across racial/ethnic groups in the area of evaluating the workplace (including factors such as relationship with co-workers, relationship with leadership, diverse work environment, inclusive work environment, performance evaluations, and application of the sexual harassment/discrimination policy). Not a single one of the questions in this category rose above the average level of dissatisfaction for White or Asian attorneys, but Black attorneys assessed half of the items in this category negatively. Latinx attorneys and attorneys who indicated that they belong to a racial/ethnic group other than these or belonged to more than one race, indicated a relatively high level of dissatisfaction with performance evaluations.

The other issues that Black attorneys rated negatively in this category were the diversity of the workplace and the inclusivity of the workplace.

Finally, we see slightly higher levels of dissatisfaction among Latinx and Asian attorneys when we look at issues of work/life balance (number of hours worked, flexibility in the work schedule, maternity and paternity leaves, family medical leave, and child-friendly work environment), and the highest levels of dissatisfaction in this category among attorneys of a race other than the four that we focus on here - Asian, Black, Latinx, White. Attorneys of another race or more than one race, indicate higher than average levels of dissatisfaction on every single item in this category, while Asian and Latinx attorneys report moderately higher levels than average of dissatisfaction on four of the six categories (hours worked, maternity and paternity leave, and a child-friendly workplace). White and Black attorneys indicate the least dissatisfaction with work/life balance issues.

Career Satisfaction and Gender Preliminary

There is significantly more divergence between men and women on the different elements of career satisfaction than across racial or ethnic groups.

Under individual career orientation questions as a whole (which includes advancement opportunities, career development support, mentoring, challenging responsibilities/job assignments, respect and prestige, and salary), almost one in five women attorneys (18 percent) report dissatisfaction. This overall dissatisfaction with issues related to individual career orientation is driven by the highest levels of dissatisfaction with salary (30 percent), and also high levels of dissatisfaction with opportunities for career advancement and mentorship. It should be noted that women have similar levels of satisfaction as men (low levels of dissatisfaction) with the challenges of the career.

Looking at the collective workplace orientation questions (relationship with co-workers, relationship with leadership, diverse work environment, inclusive work environment, performance evaluations, and application of the sexual harassment/discrimination policy), women report levels of dissatisfaction that are almost double the levels of their male counterparts. The higher levels of dissatisfaction on issues related to the collective workplace experience are most salient on the issues of performance evaluation and workplace diversity.

Finally, looking at the ratings of satisfaction related to work/life balance, women again rate this aspect of their career as less satisfying at almost double the rate that men rate it as dissatisfying. Specific issues under this heading that women rate especially low include maternity leave (almost one in four women indicated dissatisfaction with this aspect of their careers), paternity leave (over one in five women indicated dissatisfaction), child friendly workplace, and number of hours worked (both with almost one in five women rating it as dissatisfying).

This brief overview reflects preliminary highlights from the State Bar's most recent licensee survey. The State Bar has yet to analyze survey results based on types of employment and job level, or to delve into what the data reveals about career advancement among different populations. Additional analyses will occur over the next several months, concurrent with efforts to encourage even more attorneys to complete the survey. After completion of the first round of comprehensive data review and analysis, the State Bar will partner with affinity bars and other organizations working in this space to identify trends and ways in which this data set can support their efforts. For example, this data can inform what areas of emphasis are needed in elimination of bias trainings or areas where there are opportunities for other organizations to provide specific programming for specific types of workplaces and/or populations.

RETENTION

The licensee survey and analysis will help the State Bar identify themes and trends in the profession, and better understand potential challenges. The State Bar also plans to collect information from attorneys when they go inactive, to see if that gives us further insight about the reasons people of different genders, gender identity, race, ethnicity, etc. leave the profession and whether those from diverse backgrounds leave at greater rates. The State Bar will use this data to support the development and evaluation of retention initiatives.

California specific data will inform how the State Bar should develop initiatives to address specific issues that may be identified. For example, the State Bar may learn that key times for

attorney attrition – and therefore crucial times to provide support to prevent attrition – are when attorneys have young children or when they lack advancement opportunities after several years in practice. Such findings may result in the State Bar partnering with regional or local bar associations to provide data, develop best practices, or support deployment of interventions.

Enhanced Continuing Legal Education

With the exception of those who are statutorily exempt, active attorneys in California must take 25 hours of MCLE every three years. Of the 25 hours, currently only one hour is required in the area called Recognition and Elimination of Bias in the Legal Profession and Society.

The Board of Trustees adopted a Strategic Plan objective indicating that by December 31, 2020, the State Bar will modify the elimination of bias curriculum contained in the Minimum Continuing Legal Education (MCLE) requirements and will specifically consider the creation of sub-topics and expanding the number of required hours.

New modules may be delivered in an interactive online modality and could be designed to support retention, advancement, and creating a more inclusive, culturally sensitive environment in the legal system. The State Bar will explore how specific curricula can be delivered to educate, train, and scale best practices through an enhanced MCLE requirement.

JUDICIAL DIVERSITY

Lastly, the Board of Trustees adopted a Strategic Plan objective that the State Bar partner with the Judicial Council to complete the Judicial Diversity Toolkit.

The Judicial Council is the policy making body of the California courts and is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice. Judicial officers are attorneys licensed in the State of California who are either appointed by the Governor or run for elected office. To support and advance a diverse bench, the Judicial Council and the State Bar have initiated a partnership to update the Judicial Council's Judicial Diversity Toolkit, which contains model programs designed to encourage diverse attorneys to apply for judicial appointment, as well as model pipeline programs to acquaint middle and high school students with the justice system and encourage them to consider a future legal or judicial career.

The Judicial Council has expressed an intention to assume a leadership role working to ensure a diverse bench. The State Bar will provide support to the Judicial Council and the courts in these efforts, including exploring the Judicial Council's interest in conducting regional workshops to provide information and support to licensees who are exploring their interest in becoming judicial officers, but do not have role models to assist them in these endeavors.

SECTION IV: FUNDING HISTORY AND NEEDS

Funding for diversity and inclusion comes primarily from attorney licensee fees. Annual fees include an opt-out for the Elimination of Bias Fund, allowing licensees who do not wish to support these activities to subtract this amount from their payment. In 2018, the opt-out was $2 per active licensee.[16] In prior years, the opt-out supported both elimination of bias activities and the Office of Bar Relations, which was eliminated in 2017. When it supported both, the opt-out amount was $5. From 2001 through 2018, in total, licensees contributed $12.8 million through this combined opt-out. Approximately $7.3 million of that amount was used to support diversity and inclusion efforts. During that period, annual funding for diversity and inclusion initiatives fluctuated from $93,000 to roughly $440,000, and traditionally supported COAF and two State Bar staff members. More recently, opt-out funding supports staff engaged in diversity and inclusion efforts, COAF administration, and the various initiatives currently underway as described above.

For the next report, the State Bar will be in a better position to identify the costs of specific projects, programs, and interventions that will directly improve diversity and inclusion in the legal profession.

[16] In 2017, in the absence of authorizing legislation for the annual licensing fee, the State Bar converted the elimination of bias opt-out to an opt-in voluntary contribution. That year, $93,000 was collected. Licensing fees for 2018 were once again collected pursuant to authorizing legislation. Asa result, the State Bar converted the elimination of bias payment back to an opt-out, resulting in collections of approximately $320,000.

To: State Bar of California
From: Professor Victor D. Quintanilla, Dr. Sam Erman, Dr. Mary C. Murphy, Dr. Greg Walton
Re: Designing Productive Mindset Interventions that Promote Excellence on the Bar Exam
Date: February 20, 2019

Status Update: Designing and Evaluating the Productive Mindset Intervention to Promote Excellence on California's Bar Exam

This memorandum provides an update on research and design activities relating to the development of a productive mindset intervention for the State Bar of California (SBC) that improved performance on the July 2019 bar exam among U.S. law school graduates taking the bar exam for the first time. The memorandum provides a project overview and describes four developments since our December 2017 update to the Committee of Bar Examiners.

Briefly, these developments are:

1. First, we designed a productive mindset intervention for the July 2018 bar exam, which we refer to as the *California Bar Exam Strategies and Stories Program* (the program). The productive mindset intervention is an online program that incorporates an introductory film, audio and written stories from prior test takers, and a module in which participants write letters to future test takers about how to use the insights and strategies shared. The productive mindset intervention was designed for U.S. law school students taking the California July bar exam for the first time.

2. Second, the program was made available to all registrants of the July 2018 California bar exam. In March 2018, the program was discussed on the SBC's website, where an enrollment link appeared. The SBC also sent emails to everyone registered for the bar exam. These emails introduced the program and invited applicants to enroll. In May 2018, we provided enrollees a weblink to the program. Most enrollees who followed the link and participated in the program did so shortly thereafter, in late May or early June.

3. Third, we worked closely with the State Bar of California in mid-December 2018 to conduct initial analyses and examine results. These preliminary inquiries are promising. Given the relatively small sample size and inherent uncertainties, however, it is essential to evaluate the program further. Only then can we accurately ascertain potential benefits to future test takers. Thus, we recommend that the State Bar of California continue to implement the program for the purpose of evaluation in the July 2019 administration. Because the positive effects of the program were observed for many kinds of first-time test takers from U.S. law schools, our goal is to replicate the evaluation with a larger sample of test takers to further inform program effectiveness. We look forward to working with the State Bar to streamline the recruitment and delivery of the program for the July 2019 bar exam.

4. Fourth, we are designing a modified version of the program for test takers from U.S. law schools repeating the bar exam in July 2019.

The Challenge and the Opportunity

The July 2016 California bar exam pass rate was forty-three percent—the lowest in three decades. Passage rates by group continue to reveal wide racial and ethnic disparities. These troubling outcomes suggest a need for research into (1) the factors that shape bar exam performance and (2) interventions to improve exam performance for all bar exam takers, including racial and ethnic minorities. This challenge creates opportunity. Greater bar passage will motivate prospective law school applicants, thereby increasing access to the legal profession. It will also fulfill a promise to law students who expend considerable effort and resources to join the profession, expanding the value of legal education.

Psychological Friction: A Root Cause

In addition to a high-quality legal education and adequate financial aid, productive mindsets may be important for success in law school and during bar exam preparation. Worries about ability, potential, and belonging can occur for all students during the transition into law school, within law school classes, and while studying for the bar exam. These worries can create psychological friction that prevents students from achieving what they are capable of (e.g., Murphy et al., 2007). One concerning result is the drain on students' executive functioning and cognitive resources, which lowers persistence and performance (e.g., Kamins & Dweck, 1999, Walton & Cohen, 2007; 2011).

Productive Mindset Interventions: A Way to Reduce Psychological Friction

Productive mindset interventions mitigate the harms associated with concerns about potential, belonging, and stress and spur motivation and performance. The *California Bar Exam Strategies and Stories Program* was developed to help test takers find productive ways to interpret the challenges, obstacles, and negative psychological experiences associated with preparing for the bar exam so as to improve the test taking experiences and exam performance.

Design of the Intervention (Summer 2017 – Spring 2018)

In collaboration with the State Bar of California, we engaged in a user-centered iterative design process to create a well-tailored, optimized productive mindset intervention for law school graduates taking the California bar exam for the first time.

> Spring 2017: We presented research on the potential benefits of a productive mindset intervention to the State Bar of California and the Committee of Bar Examiners.
>
> Summer 2017: We conducted an online survey that elicited the thoughts, feelings, and behaviors of recent law school graduates studying for the July 2017 bar exam.
>
> Fall 2017: We conducted follow-up online surveys to learn about the challenges, concerns, and experiences of students who took the 2017 bar exam and completed focus groups with recent law school graduates who took the July 2017 bar exam in the Los Angeles area. Results of these focus groups are described below.

Winter 2017: We used information collected from the surveys and focus group to create intervention materials. We adapted, improved, and revised the intervention materials in an iterative process with focus groups. These focus groups (a) provided additional insights into law school graduates' psychological experiences and behaviors; (b) provided additional preliminary measures of the effectiveness of the draft materials; and (c) allowed for further refinement.

Spring 2018: In early Spring 2018, we finalized the materials. With the assistance of a film production studio, we produced the films, audio stories, and materials that form the basis of the productive mindset intervention. Beginning on March 1, 2018, participants were enrolled into the program.

Summer 2018: In May 2018, the program was made available to registrants for the July 2018 bar exam.

Findings of Focus Groups Conducted with Test-Takers Who Took the July 2017 Bar Exam

In December 2017, we conducted focus groups at the University of Southern California (USC) with recent law school graduates who sat for the July 2017 bar exam. These focus groups brought the following important themes to light:

Related to overall performance, test-takers of the July 2017 bar exam experienced stress and anxiety when preparing for the bar exam. They described a fear of failure, a perceived lack of time, and concern about learning a new subject they had not studied in law school, among others:

- *Fear of Failure:* Several test-takers mentioned frequently ruminating on failing the exam. This was particularly the case for students who were in the lower-middle or low quartile of their law school classes–students who did not perform well in law school. Students mentioned attempting to handle the stress of studying for the exam on top of feeling the stress of potential failure.
- *Time*: Many students felt like they did not have enough time and were constantly stressed about the lack of time leading to the exam. Two to three months to master the material did not seem like enough time, and panic set in when thinking about the lack of time and studying simultaneously.
- *Attention span:* Many students indicated that they were stressed because they had difficulty focusing for the many hours required to study each day on the exam.
- *Confidence*. Students took practice tests and yet many still struggled. Many of the students compared themselves against others studying for the bar and became very stressed when they were either covering less material than their peers or performing more poorly than their peers on practice exams. Often the negative feedback received when studying for the bar created negative expectations and reduced their confidence, rather than motivating and spotlighting areas for learning.
- *Not learning subjects during law school*: Some graduates were unnerved by trying to learn a new subject because they did not learn subjects in law school. The volume of

information was stressful for many taking the exam. Some students compounded this by skipping too many of the subjects early when preparing for the exam in the summer and then becoming overwhelmed during bar study.

- *Lack of feedback:* Students reported feeling that feedback from bar review courses was not timely (the courses take days or weeks to return work) and was not frequent enough. Students did not trust their self-assessments, which created stress during the study period, and often relied on the limited grading done by bar review courses.
- *Bar review courses:* Students reported that some of the review courses have practices that are not helpful, such as assigning remedial work when students show weakness. While identifying weak areas is helpful, assigning extra "homework" on top of a 10 to 12-hour study day created additional stress. Moreover, many students reported believing that their review courses intentionally provided them low scores on practice problems to motivate further study, and that this practice seemed like a "mind game," which created additional stress and anxiety.

Students in the focus groups also reported personal stressors ranging from balancing family commitments to self-care.

- *Financial concerns:* Many students were not working when studying for the bar exam, or if they were they cut back on hours as the bar exam approached.
- *Relationships*: Some students were parents who had personal obligations and had to take care of small children while preparing for the bar exam. These students were particularly stressed not only because they had to parent and study simultaneously, but also because of the stress that they felt like they were being neither "good parents" nor "good students." Moreover, family obligations added to their financial burdens.
- *Jobs:* Some students did not have a job offer. They continued their job search during the summer, which took time away from studying. Others abandoned their job search to focus on the bar. Either way, it was a source of stress and anxiety.
- *Unexpected crisis:* These tended to be the more difficult to deal with than performance issues because these are out of their control. For some students, this was detrimental to their personal wellbeing.
- *Isolation*: For some students, studying for the bar exam was quite lonely and isolating, and many expressed this concern. Students experienced stress in not being able to see family members or loved ones as much as they were accustomed to. Moreover, students experienced stress in not being able to talk with family and friends who have not taken the bar exam. Often the kinds of familial support they received (e.g., "You are smart, you have nothing to worry about.") was counterproductive and increased anxiety about failing the exam.
- *Self-care:* Many students reported having self-care challenges in early July. Students reported sleeping poorly, having anxiety attacks, eating junk food, drinking alcohol, cutting back on time with loved ones, and being unable to exercise. Relations with family and friends were impacted in this period, which reduced wellbeing and the ability to mitigate stress and anxiety.

Delivery of the Productive Mindset Intervention (Summer 2018)

The *California Bar Exam Strategies and Stories Program* was delivered online in partnership with the State Bar of California. First, beginning in mid-March 2018, test takers registering for the bar exam had the opportunity to opt in to the program. In so doing, they consented to participate in the program and permitted the researchers to analyze their bar exam results. Those who opted-in received a link to the online program in May 2018.

The *California Bar Exam Strategies and Stories Program* incorporated an introductory film, audio and written stories from prior test takers, and a module in which participants wrote letters to future test takers about how to use the stories' insights and strategies.

The program was designed as a randomized control trial (RCT). Randomized controlled trials are the gold standard for examining efficacy of interventions. Random assignment of test takers ensures the random dispersal of student traits (e.g., GPA, demographic details) between conditions. When possible, moreover, block random assignment (also known as stratified random assignment) is recommended. Here, blocks were designed to ensure that equal proportions of men/women, racial and ethnic groups, U.S. law students, first-time/repeat takers were randomly assigned into the treatment and control condition. Moreover, a statistical package was applied which ensured that average prior performance scores (i.e., LSAT and law school GPA) were equal within the treatment and control condition. Every participating test taker was then randomly assigned into either (1) the active control condition where they learned bar exam study strategies or (2) the treatment condition where they received the productive mindset intervention as well as bar exam study strategies. This left the intervention treatment as the only systematic difference between the conditions.

Measurement of the Intervention (November 2018 – April 2019)

The primary outcome of interest was bar passage. This is because an increase in bar exam passage rates in the intervention condition would provide evidence that the productive mindset intervention was effective. We also assessed psychological and behavioral outcomes, including whether participants adopted more adaptive mindsets or productive studying behaviors.

Bar exam performance data become available in November 2018. The research team conducted an onsite visit with the State Bar of California in December 2018. We worked closely with the SBC's internal researchers to examine the effect of the intervention and validate a publicly available bar passage list.

This executive summary provides our initial findings. We anticipate that the remaining primary analyses of the *California Bar Exam Strategies and Stories Program* will be complete in May 2019.

Results of the Productive Mindset Intervention

A. Predictors of Performance on the Bar Exam

We turn first to the predictors of bar passage among first-time test takers who were U.S. law school students.

GPA performance in law school and performance on the LSAT both correlated moderately with passing the July 2018 bar exam. When registering for the program in March 2018, participants self-reported their LSAT scores and cumulative law school GPAs. Most current U.S. law school students registered for the July bar exam in the final semester of their third year of law school; therefore, their law school GPA corresponded with the previous five semesters in law school. For these U.S. law school students, law school GPAs (r = .496) and LSAT scores (r = .422) both correlated moderately with passing the bar exam.

Regarding situational factors, initial results revealed that summer employment (including full time or part time employment) negatively correlate with passing the bar exam (r = -.310) as did responsibility for caring for dependents (such as children or aging parents) over the summer while preparing for the exam (r = -.164).

Finally, we extended this correlational analysis to the full dataset of participants in the program, regardless of whether the program was designed for them. We observed that test takers who previously failed the exam and had repeated the bar exam in July 2018 were less likely to pass than those taking the exam for the first time (r = -.308). Moreover, test takers from law schools outside the U.S. were less likely to pass (r = -.194).

B. Enrollment and Participation in the Program

The *California Bar Exam Strategies and Stories Program* was delivered online in partnership with the State Bar of California.

The program was designed for applicants who timely registered for the July 2018 bar exam. This enrollment window extended from March 1, 2018 until several days after April 1, 2018. When recruiting participants, the State Bar of California made a enrollment link available on its website and sent emails to test takers who had registered for the bar exam. Within the timely registration window, 1,638 test takers enrolled in the program and consented to permit the researchers to analyze the impact of the program.[1]

In May 2018, we sent test takers who enrolled in the program a link to participate in the program, along with a series of reminder emails. Of these 1,638 test takers who enrolled in the program,

[1] In April 2018, the SBC asked the researchers to open a second enrollment window allowing test takers who did not timely register for the bar exam to participate in the program. This second enrollment window was primarily designed for repeat test takers who failed the February 2018 bar exam and learned these bar results after the timely registration deadline. This second enrollment window extended from mid-April 2018 until May 15, 2018. Within this second enrollment window, 781 applicants enrolled in the program.

830 (50.67%) clicked on this link and participated in the program. Of these participants, 661 (79.6%) were first time takers, whereas 169 (20.4%) were repeat test takers; 674 (81.2%) were applicants from U.S. law schools, whereas 146 (17.6%) were applicants from non-U.S. law schools. Ultimately, 438 (52.77%) of these participants were U.S. law school students taking the bar exam for the first time.

C. Analyzing the Effects of the Productive Mindset Intervention

We then turned to analyzing the results of the *California Bar Exam Strategies and Stories Program*.

1. Do initial analyses suggest that the program may be effective among U.S. law students who were first-time test takers?

We first conducted an intent-to-treat (ITT) analysis, which researchers often consider to be a conservative test of the efficacy of interventions. The ITT analysis examined the effect of the *California Bar Exam Strategies and Stories Program* regardless of whether participants actually began or completed the program. Instead, the ITT analysis compared test takers assigned to the treatment or control condition who received the link to begin the online program, regardless of whether they clicked on the link to begin.

This ITT analysis included all test takers who timely registered for the July 2018 bar exam even those for whom the program was not specifically designed: repeat test takers, graduates of foreign law schools, and out-of-state attorneys. As is recommended, we controlled for participants' prior exam performance, LSAT, to ascertain the effects of the program. Controlling for LSAT, this initial examination of bar passage rates was promising. The estimated probability of passing the bar exam was 7.4 percent higher in the treatment than the control condition.

We then examined the average-treatment effect of the *California Bar Exam Strategies and Stories Program* among U.S. law graduates taking the July bar exam for the first time. In so doing, we applied a program completion rule: we analyzed the effect of the intervention among test takers who completed the program. That is, this program completion rule included only those participants who completed all video and written modules of the program, watched the introductory films, listened to the audio, read the written stories from prior test takers, and wrote a letter to a future test taker about how to use the insights and strategies shared. We focused our analysis on U.S. law students taking the bar exam for the first time who completed the program (N = 193). Again, we controlled for participants' prior exam performance, LSAT, to ascertain the effects of the program. The estimated probability of passing the bar exam was 18.2 percent higher in the treatment than the control condition. The results of this initial examination were promising. The sample size was, however, small. Therefore, replication with a larger sample will be essential to reduce uncertainty about the replicability and magnitude of any effect. It is essential to evaluate the program in another independent trial, ideally with a larger sample of test-takers, to address these questions.

2. Did the program benefit all demographic groups equally?

Next, we analyzed whether the effect of the program was stronger for some groups as compared to others. Our initial analysis, among graduates of U.S. law students taking the bar exam for the first time, the *California Bar Exam Strategies and Stories Program* revealed no differential impact across demographic groups (e.g. men and women, participants from majority and minority racial and ethnic groups).

At this time, we have two theories why no significant differences emerged in the effectiveness of the program between groups. First, we theorize that most test takers experience the psychological friction that the program was designed to address. As such, most test takers benefited from the productive mindset intervention. Second, the sample size among participants of racial and ethnic groups was likely too small to detect significant differences between conditions. In this regard, the table below indicates group memberships that these U.S. law students selected when enrolling in the program.

U.S. law student initial test takers who completed the program	
Gender	Men, $n = 77$ Women, $n = 115$
White	$n = 123$
Black	$n = 18$
Hispanic	$n = 34$
Middle Eastern	$n = 5$
Pacific Islander	$n = 3$
East Asian	$n = 17$
South East Asian	$n = 9$
Indiana Subcontinent	$n = 6$
Native American	$n = 5$

Given the promising initial results, we recommend that the State Bar of California streamline recruitment and enrollment into the program for the July 2019 bar exam administration, thereby increasing the number of U.S. law students who participate in the program.

3. Why did the program have this beneficial effect?

How could the *California Bar Exam Strategies and stories Program* have promising effects on bar passage rates? Our initial analyses point to a variety of potential psychological benefits, including improved confidence in handling stress, more adaptive mindsets about making mistakes when studying for the exam, and more adaptive mindsets about handling stress.

These benefits are consistent with the effects of other well-designed psychological interventions. *See generally* Gregory M. Walton & Timothy D. Wilson, *Wise Interventions: Psychological Remedies for Social and Personal Problems*, 125 PSYCH REV. 617 (2018).

Future analyses will further explore both effectiveness and underlying mechanisms.

Conclusion

The research and design team is grateful to have this opportunity to update the State Bar of California on this project and for the chance to collaborate with the SBC on the goal of designing and implementing productive mindset interventions to improve performance on the bar exam.

Research Team Qualifications

The research team is highly qualified to conduct the project. The team is comprised of members of the College Transition Collaborative (http://collegetransitioncollaborative.org) — a partnership between researchers and institutions of higher education aimed at improving student success in college. The investigators are leaders in the field of creating, implementing, and evaluating large-scale productive mindset interventions that reduce achievement gaps and boost retention among undergraduate and graduate students (e.g., Walton & Cohen, 2011; Murphy et. al., in prep.; Walton, Logel, et. al., 2015).

Principal Investigator, Victor D. Quintanilla is an Associate Professor of Law at the Indiana University Maurer School of Law, Adjunct Professor of the IU Department of Psychological and Brain Sciences, and the Director of the IU Center for Law, Society & Culture. Quintanilla's research investigates legal education, access-to-justice, and civil justice by drawing on theory and methods within the field of psychological science, including experiments conducted with judges, lawyers, law students, and members of the public. He is currently serving as a Principal Investigator for a research line that seeks to design interventions to nourish the value of access-to-justice, collaborative problem solving, and service among law students. A second research line seeks to design interventions to promote diversity and excellence in the legal profession. His work appears in leading law reviews and peer-reviewed journals. He has been awarded several grants to support his projects and in 2015-2016 he was a Fellow in Residence at the Center for Advanced Study in the Behavioral Sciences at Stanford University.

Co-Principal Investigator, Dr. Sam Erman is an Associate Professor of Law at the USC Gould School of Law. Dr. Erman conducts policy-relevant research concerning the relationship of law to belonging, the relationship of psychology to antidiscrimination law, the spread and maturation of ideas within legal communities, and the strategies and impacts of outsiders on legal thought and practice. His work has appeared in leading law reviews and peer-reviewed journals and is forthcoming as a book with Cambridge University Press. Before joining the law school, Erman served as a Latino Studies Fellow at the Smithsonian Institution National Museum of American History; the Raoul Berger-Mark DeWolfe Howe Legal History Fellow at Harvard Law School; a law clerk to Supreme Court Justices Anthony Kennedy and John Paul Stevens; and a law clerk to Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit.

Co-Principal Investigator, Dr. Mary Murphy is an Associate Professor of Psychology at Indiana University. Her research focuses on developing and testing theories about how people's social identities—such as their gender, race, and social class—interact with academic and professional contexts to affect their thoughts, feelings, motivation, and performance. She develops, implements, and evaluates social psychological interventions that reduce threat and sustain motivation, persistence, and performance. Her research has been funded by the National Science Foundation, the Spencer Foundation, the Ford Foundation, the Society for Experimental Social Psychology, and the Society for the Psychological Study of Social Issues, and has appeared in the most selective journals in psychology and education.

Co-Principal Investigator, Dr. Gregory Walton is an Associate Professor of Psychology at Stanford University. Dr. Walton designed and evaluated the original social-belonging

intervention (Walton & Cohen, 2007, 2011) and is, more broadly, a leading scholar of social psychological theory and its intersection with societal issues, including theory-based interventions to address social problems. His research has been published in the most selective journals in psychology, education, and science (e.g., J. Educational Psychology, J. Personality and Social Psychology, Proceedings of the National Academy of Sciences, Psychological Science, Review of Ed. Research, and Science). He has received numerous honors and awards from various societies, including the American Psychological Society, the Society for Experimental Social Psychology, the American Psychological Association, and the American Education Research Association.

The State Bar *of California*

Step 1: Log in

ATTACHMENT B

Please participate in the State Bar's *new* Demographic Survey! After entering your login you will be directed to the survey. The data you provide will allow the State Bar to understand changes in the attorney population, career trajectories, and experience working in the legal profession.

This provision information will assist the Bar in complying with California Rule of Court rule 9.9 and California Business & Professions Code sections 6002.1 and 6009.5. This survey is voluntary. If you have questions regarding the collection or use of this data, contact surveydata@calbar.ca.gov or visit MSBP Survey Frequently Asked Questions.

Returning Users

Enter your State Bar Licensee number or MJP number, then enter your password:

State Bar Number

Password

(**Reminder:** Your password is at least 7 characters long, including at least 1 number.)

Log In

Forgot password?

New Users

If you have not used *My State Bar Profile* before, you will need to register before you can access the system. Enter your State Bar Licensee number or MJP number below to get started.

State Bar Number

Register

Law students and exam applicants log in

Frequently Asked Questions about Account Lockout

Step 2: Survey Instructions

Welcome to My State Bar Profile

Please participate in a short survey before accessing your profile.

Business and Professions Code Section 6001.1 was amended in 2018 to clarify that protection of the public, the highest priority for the State Bar, "includes support for greater access to, and inclusion in, the legal system." To fulfill this mandate and ensure the legal profession continues to thrive, the Bar is seeking more accurate and comprehensive information about attorneys licensed in California.

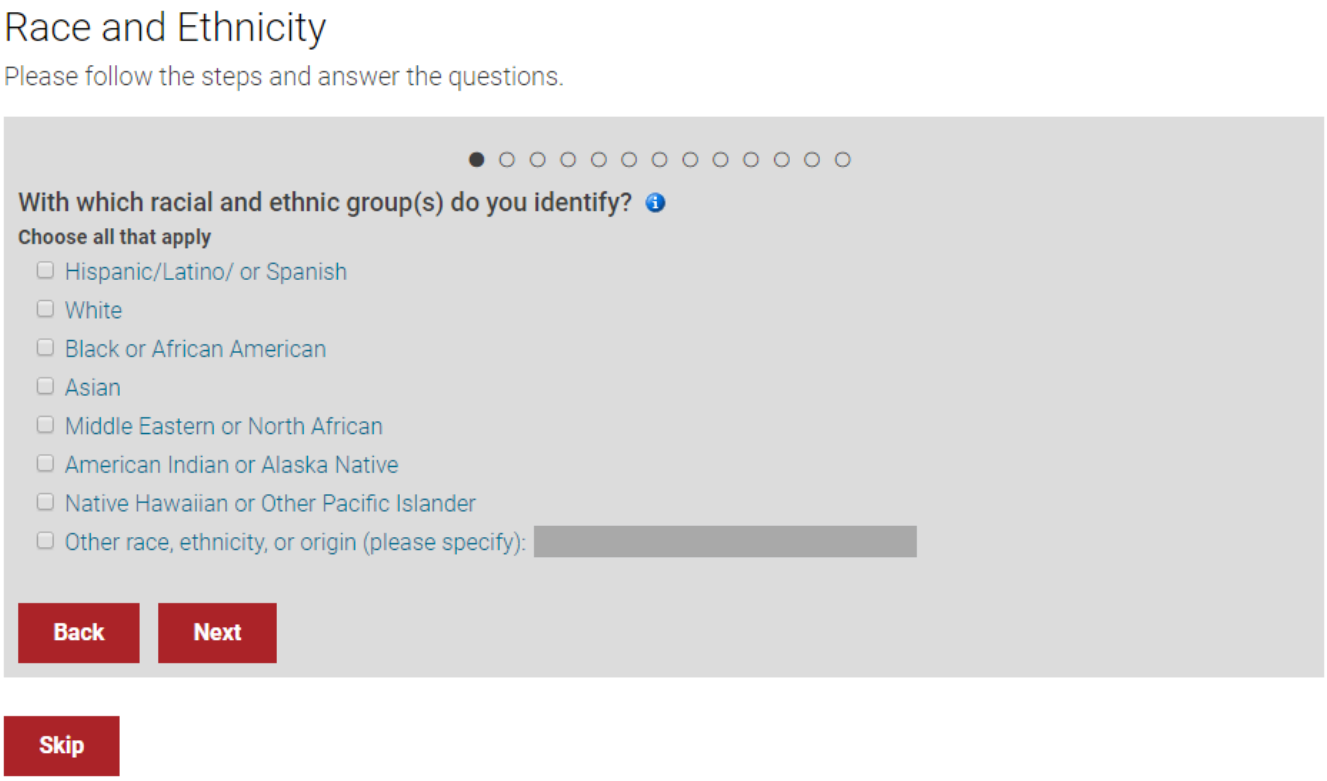
Your participation in this survey will allow the Bar to collect and analyze a rich dataset representing one of the largest and most diverse State Bars in the nation. In addition, the provision of demographic and employment information will assist the Bar in complying with the following: California Rule of Court rule 9.9 and California Business & Professions Code sections 6002.1 and 6009.5.

The survey is voluntary. Please skip through any responses you choose not to answer. Any information you provide is confidential. No personally identifiable information will be reported or shared outside of the Bar. If you have questions regarding the collection or use of this data, contact surveydata@calbar.ca.gov or visit MSBP Survey Frequently Asked Questions.

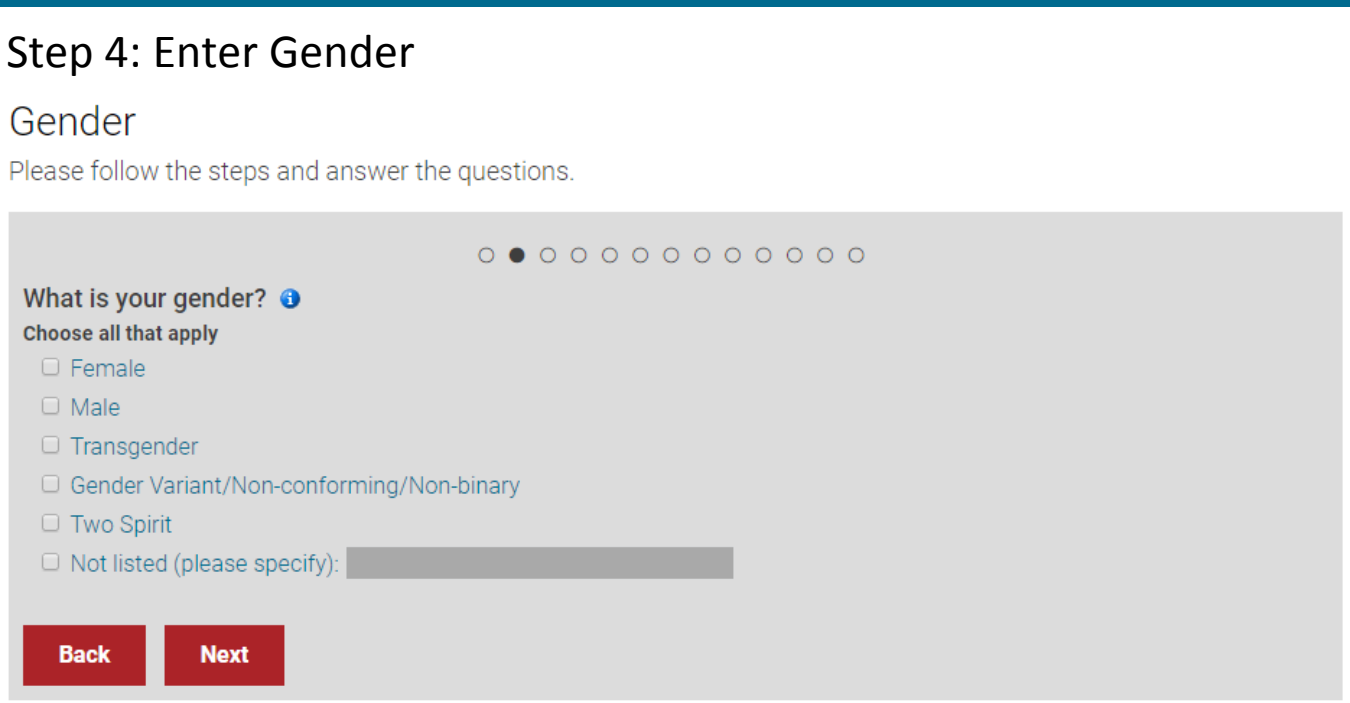
The State Bar thanks you for your participation! The survey will begin on the next screen.

Next

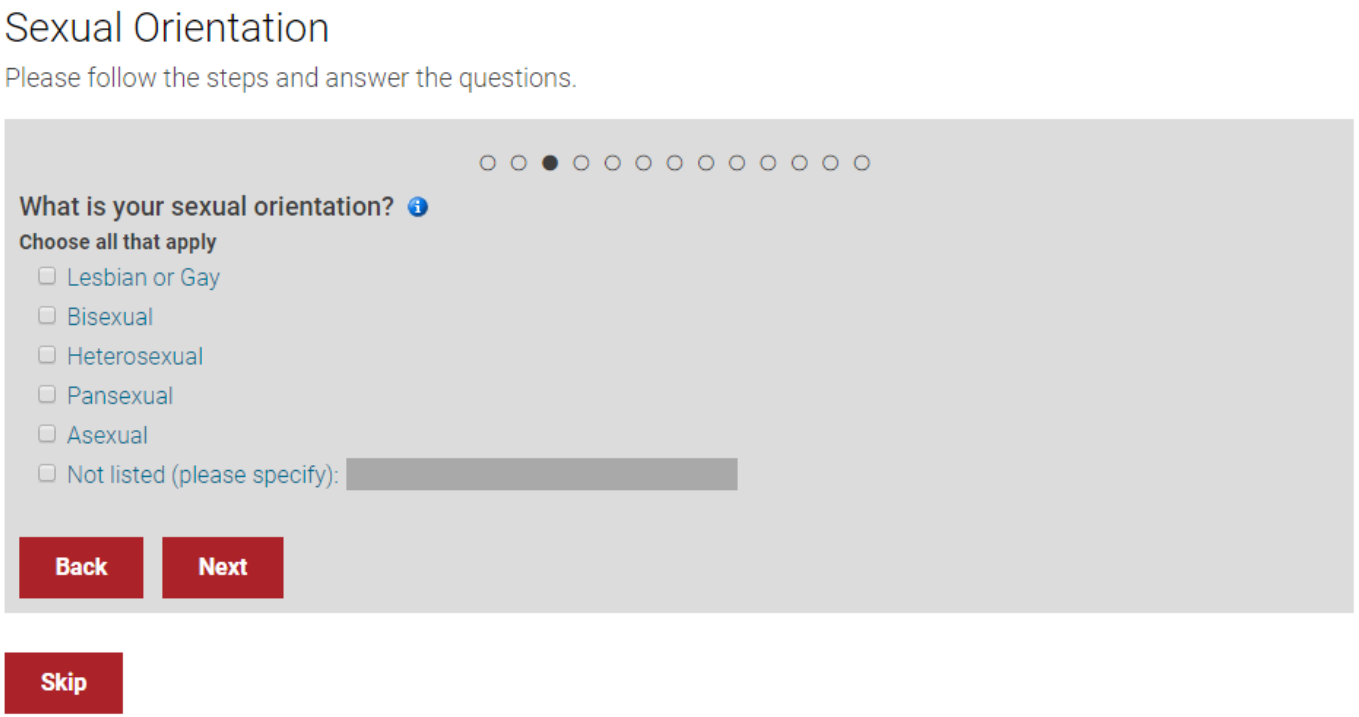
Step 3: Enter Race and Ethnicity



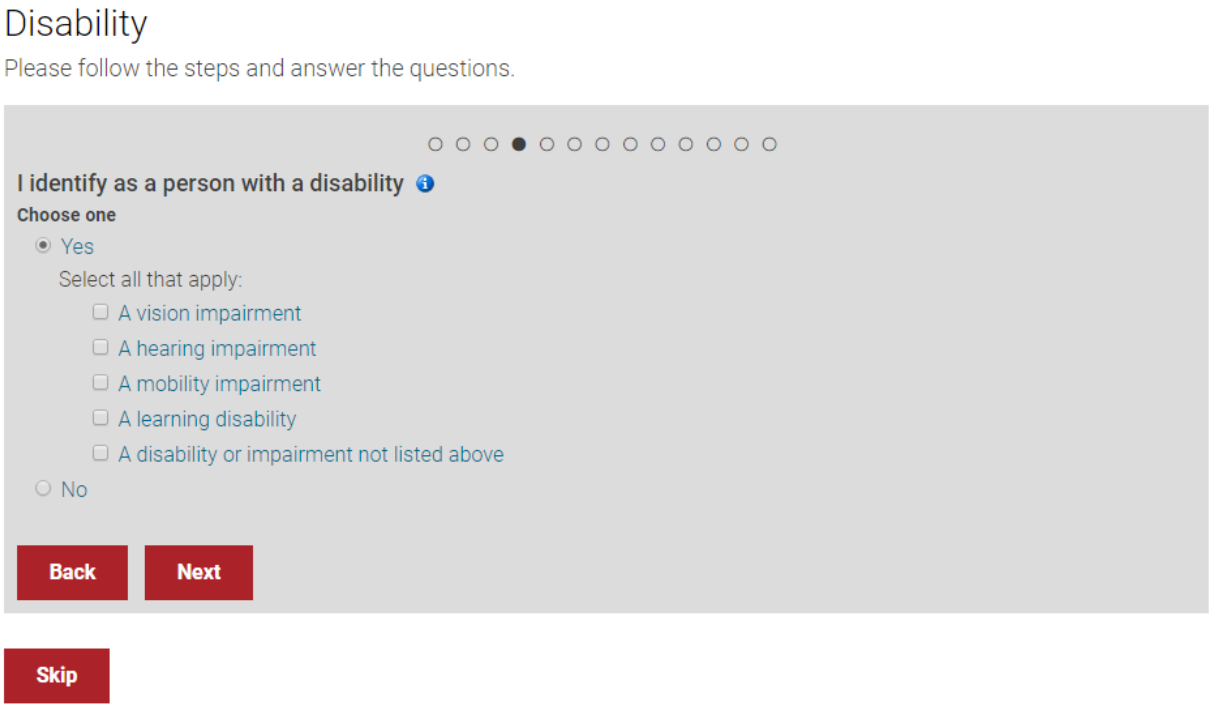
Step 4: Enter Gender



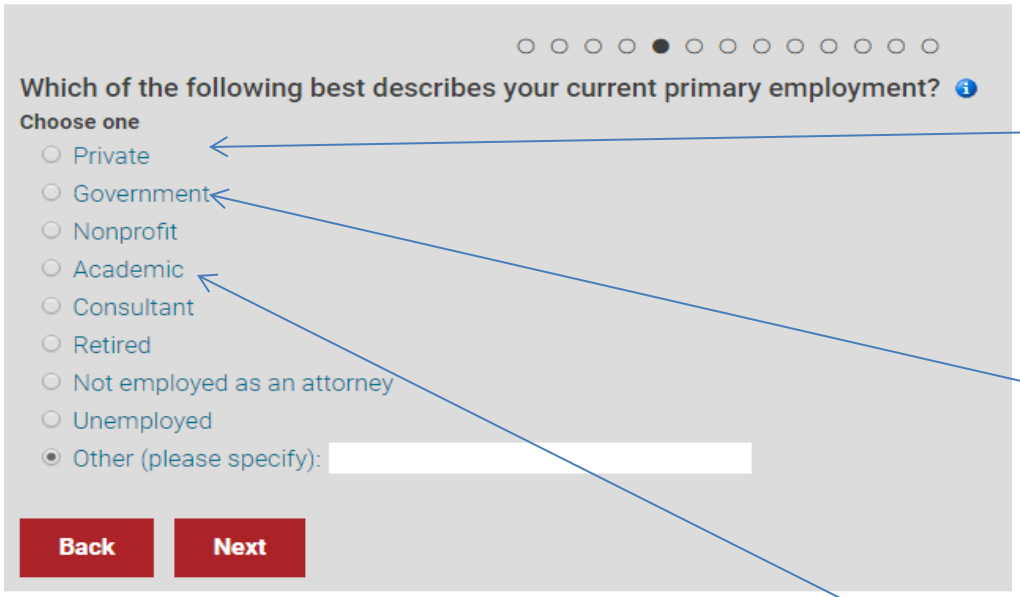
Step 5: Enter Sexual Orientation

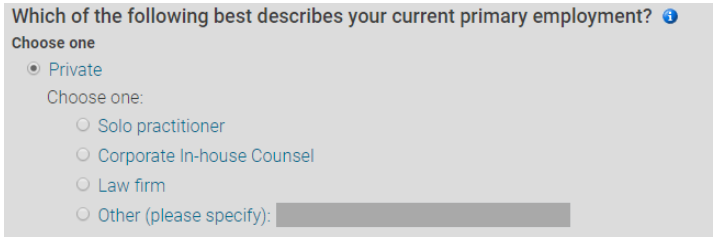


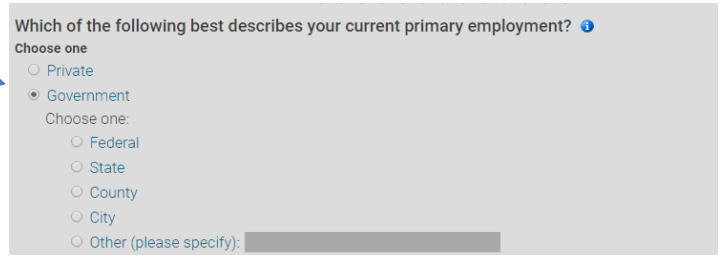
Step 6: Enter Disability



Step 7a: Enter Employment







Skip

Step 7b

Which of the following best describes your current primary employment?

Choose one

- (•) Private
  - Choose one:
    - ( ) Solo practitioner
    - ( ) Corporate In-house Counsel
    - ( ) Law firm
    - ( ) Other (please specify):

Which of the following best describes your current primary employment?

Choose one

- (•) Private
  - Choose one:
    - ( ) Solo practitioner
    - ( ) Corporate In-house Counsel
    - (•) Law firm
      - Firm size:
        - ( ) 2 - 5
        - (•) 6 - 10
        - ( ) 11 - 25
        - ( ) 26 - 50
        - ( ) 51 - 100
        - ( ) 101 - 200
        - ( ) 200+
        - ( ) Do not know
    - ( ) Other (please specify):

What is your current job level?

Choose one

- ( ) Partner (please specify):
- ( ) Counsel (please specify):
- ( ) Associate (please specify):
- ( ) Staff Attorney (please specify):
- ( ) Law Clerk
- ( ) Manager/Administrator
- (•) Non-Attorney Position
- ( ) Other (please specify):

Pro Bono service

Choose one for each

How many hours per month do you provided reduced cost/low bono work?

- ( ) 1 - 5
- ( ) 6 - 10
- ( ) 11 - 25
- ( ) 26 - 50
- ( ) 51 or more
- ( ) I do not provide reduced cost/low bono services

How many hours per month do you provide pro bono work?

- ( ) 1 - 5
- ( ) 6 - 10
- ( ) 11 - 25
- ( ) 26 - 50
- ( ) 51 or more
- ( ) I do not provide pro bono services

Step 7c

Malpractice Insurance

Please follow the steps and answer the questions.

Do you have malpractice insurance?

Choose one

- (•) Yes
- ( ) No
- ( ) Not sure

Do you have malpractice insurance?

Choose one

- ( ) Yes
- (•) No

  Why don't you have malpractice insurance?

  - ( ) It's too expensive/I can't afford it
  - (•) It is not required for my area of practice
  - ( ) I don't believe I will be sued
  - ( ) My assets are protected from a malpractice judgment
  - ( ) I don't practice enough to make it worthwhile
  - ( ) I am retired
  - ( ) I am unable to obtain coverage
  - ( ) Other (please specify):
- ( ) Not sure

Step 8: Enter Job Level

Employment

Please follow the steps and answer the questions.

What is your current job level?

Choose one

- Executive Management
- Middle Management
- Staff Attorney
- Other (please specify):

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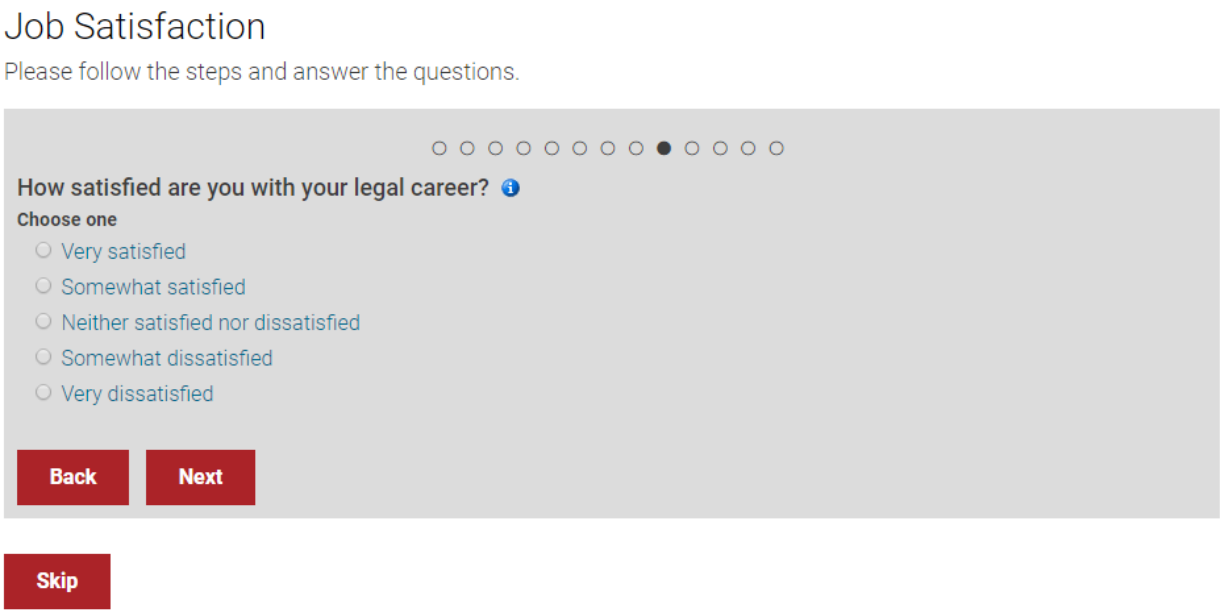
Step 9: Enter Job Satisfaction



Step 10: Job Satisfaction

Job Satisfaction

Please follow the steps and answer the questions.

What would make your legal career more satisfying?

Choose all that apply

- [ ] Ability to work for yourself
- [ ] Alternative work schedule/flexible hours
- [ ] Potential for advancement
- [ ] Better salary and benefits
- [ ] Diverse work environment
- [ ] Inclusive work environment
- [ ] Job training
- [ ] Mentoring support
- [ ] More responsive and supportive employer
- [ ] Feeling like you are making a difference
- [ ] Opportunities to build networks

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Step 11: Job Satisfaction

How satisfied are you with each of the following aspects of your current legal position?

Choose all that apply

Category	Satisfied	Neutral	Dissatisfied	Not Applicable
Advancement opportunities	○	○	○	○
Career development support (i.e., training)	○	○	○	○
Mentoring	○	○	○	○
Challenging responsibilities/job assignments	○	○	○	○
Number of hours worked	○	○	○	○
Flexibility in work schedule	○	○	○	○
Relationships with co-workers	○	○	○	○
Relationships with leadership	○	○	○	○
Respect and prestige	○	○	○	○
Salary	○	○	○	○
Maternity leave	○	○	○	○
Paternity leave	○	○	○	○
Family medical leave	○	○	○	○
Child-friendly work environment	○	○	○	○
Diverse work environment	○	○	○	○
Inclusive work environment	○	○	○	○
Performance evaluations	○	○	○	○
Application of sexual harassment/discrimination policy	○	○	○	○

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Step 12: Your Responses

Review

Please follow the steps and answer the questions.

Your Responses

Review your responses. To change a response use the Back button to navigate to that page. Confirm your responses by clicking next.

1. With which racial and ethnic group(s) do you identify?

Step 13: Your Responses

Demographic Information

Please follow the steps and answer the questions.

Thank You

You have completed all of the questions.

Click Next to return to My State Bar Profile.

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ABA Diversity and Inclusion 360 Commission Toolkit Introduction

Dear User,

The information provided in this Toolkit is designed to help you recognize some of the biases that we all have, including, specifically, the implicit biases of judges, prosecutors, and public defenders. The goals of this toolkit are to:

1. Explain the social science term *implicit bias*;
2. Provide some examples of where implicit biases live and thrive;
3. Explain how they exist;
4. Raise consciousness about the power of these unknown "mind bugs," as some have called them, and their ability to negatively impact decision-making;
5. Help you identify some of your own implicit biases;
6. Examine how implicit biases might show up in the performance of your job;
7. Provide some tools to help you catch and correct snap decision-making that may be linked to harmful implicit biases; and
8. Provide you with the knowledge that will allow you to help others catch decision-making that might be based on implicit biases.

We all have biases. Every one of us. This is not a finger-pointing expedition. Rather, we are sharing with you the evidence of this science, offering strategies for you to find the implicit biases hidden within you to help you reduce their harmful effects. As you learn more about how these biases work in society and in your life, you will not only become more mindful and deliberate in your decision-making but also be able to help others in the profession with whom you interact regularly: court personnel, including law clerks, officers of the court, other lawyers, parties to litigation, witnesses, and jurors.

Implicit biases are unwitting and unconscious cognitions that include stereotypes, beliefs, attitudes, intuitions, gut feelings, and related intangibles that we categorize in our brains—without conscious effort—every fraction of a second.[1] For instance, if we think that a particular category of human beings is frail—the IAT (Implicit Association Test) indicates that many of us categorize the elderly in this way[2] —we will not raise our guard around them. That is a stereotype in action. If we identify someone as having graduated from our beloved alma mater, we will feel more at ease—that is an attitude in action.

Your ever-efficient brain automatically organizes all of the information it receives and places the information into cognitive boxes, shorthands, or schemas, if you will. A more colloquial way to think of a schema is the aforementioned "stereotype," though the two terms are not entirely interchangeable. Consider some of the data collected about what many people think when they see an Asian male. The data shows that many people believe Asians and Asian-Americans are extremely smart, excellent students, excellent in mathematics, and pretty good at some martial art; play, *really well*, some musical instrument; and are also really polite, kind, and shy—in other words, the model minority.[3] These labels have

1.) JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS 1 (Aug. 2009), available at http://jerrykang.net/research/2009-implicit-bias-primer-for-courts/.

2.) You will learn much, if you have not already, by taking an "implicit association test," or "IAT" as it is commonly known. The IAT is explained in other parts of your Toolkit. One of the IATs deals with how people implicitly view the elderly. The fragile and the elderly are always paired together. For more about this result in particular or the IAT generally, visit https://implicit.harvard.edu/implicit/.

3.) https://www.bing.com/videos/search?q=jerry+kang+ted+talk&view=detail&mid= C199BFAA2157E6F0C7FBC199BFAA2157E6F0C7FB&FORM=VIRE; see also Bernadette Lim, "Model Minority" Seems Like a Compliment, but It Does Great Harm, N.Y. TIMES (Oct. 16, 2015), http://www.nytimes.com/roomfordebate/2015/10/16/the-effects-of-seeing-asian-americans-as-a-model-minority/model-minority-seems-like-a-compliment-but-it-does-great-harm.

implicit origins. Based on information that we are fed in society through television, movies, the media, work, and social exposures, our mind quickly creates schemas and puts these associations into one box. These social schemas form based on everything that we've ever consciously and unconsciously seen and heard. So when we see an Asian male, we immediately think of many of the characteristics and adjectives referenced above even though we do not know *that* individual. These judgments, assumptions, and attitudes require no contemplative, deliberate thought. It just happens.

Social scientists categorize our dual ways of thinking into two systems: System 1 and System 2. System 1 is the unconscious mode, which helps us make snap judgments and is where our schemas live. System 2 is our deliberative mind, i.e., the conscious mode that is active in explicit biases. The focus of this Toolkit is to get you more conscious of System 1, that place where, as it turns out, 90 percent of your mind operates.

In a similar vein, we also must think about coded words and microaggressions. Take coded language, for example. It is not uncommon for women to be referred to as aggressive or bossy, characteristics viewed positively with male employees but considered negatively with female employees.[4] Is the woman "opinionated" or "sassy"? Why? And why are men not ever similarly categorized?[5] Consider some race-related terms and words. *Inner city* and *urban education* are terms most quickly associated with predominantly black, brown, and poor areas.[6] *Thugs* is a word almost exclusively used in connection with black men.[7]

Microaggression is another type of behavior the ABA is hopeful that this Toolkit will help reduce and ideally eliminate. Microaggressions are "commonplace daily indignities, whether intentional or unintentional, that communicate racial slights and insults towards [minorities]."[8] Studies have shown that the recipients of microaggressions experience greater degrees of loneliness, anger, depression, and anxiety.[9] There are many examples of microaggressions in daily life, some of which include assuming that a black student in an elite school is there because of affirmative action, confusing black attorneys for court staff, telling an LGBT person that s/he does not "look like" an LGBT person, telling a black person that s/he is "articulate," touching someone else's hair without permission, asking people of color where they are from, and assuming that all Asian-Americans are Chinese and/or speak an Asian language.[10] An attempt to be aware of microaggressions and taking a thoughtful approach to language when speaking with minority groups are part of this process of consciousness raising, education, and correction.

This program is designed to help with all of these areas. It includes a PowerPoint presentation that focuses on the aforementioned goals. It includes a video, too—just a short 10 to 12 minutes, designed to allow you to hear from experts and others who perform the very same role that you do in the judicial system. Implicit biases are analyzed in the video; and others, whether judge, prosecutor, or public defender, share their own implicit biases and strategies for how they work to be continually mindful of them in order to interrupt them. Finally, this Toolkit contains a comprehensive bibliography and resource list, including a large category of books, articles, and websites that focus on implicit bias generally for those who want to learn more about this fascinating social science; material specifically addressed to judges; material specifically addressed to prosecutors; and material specifically addressed to defenders.

Whether you are a judge, a prosecutor, or a defender, we hope that you find this Toolkit useful. This is fascinating yet challenging work. It is not rocket science, but because biases are in our DNA, it will require great determination and conscious effort to catch assumptions that are made and applied automatically. The Toolkit will reveal the benefits of deliberation, i.e., slowing down to take a few extra moments to focus on the person in front of you before making decisions that will or might affect that person.

We are confident that you will not only learn about that stranger that lives within you but also actually enjoy the materials contained herein and this journey.

Thank you

4.) See Claire Cain Miller, Is the Professor Bossy or Brilliant? Much Depends on Gender, N.Y. TIMES (Feb. 6, 2015), available at http://www.nytimes.com/2015/02/07/upshot/is-the-professor-bossy-or-brilliant-much-depends-on-gender.html.

5.) See Caroline Turner, Women in the Workplace 2015: Is Gender Bias Part of the Story?, HUFFINGTON POST (Oct. 7, 2015), http://www.huffingtonpost.com/caroline-turner/women-in-the-workplace-20_b_8255008.html.

6.) Is the System Racially Biased?, PBS FRONTLINE (2014), available at http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/bench/race.html; see also Jenee Desmond-Harris, 8 Sneaky Code Words and Why Politicians Love Them, ROOT (Mar. 15, 2014), http://www.theroot.com/articles/politics/2014/03/_racial_code_words_8_term_politicians_love.html.

7.) Id.

8.) Microaggressions: Be Careful What You Say, NATIONAL PUBLIC RADIO (Apr. 4, 2014, 10:23AM), available at http://www.npr.org/2014/04/03/298736678/microaggressions-be-careful-what-you-say.

9.) Id.

10.) See Tanzina Vega, Students See Many Slights as Racial "Microaggressions," N.Y. TIMES (Mar. 21, 2014), http://www.nytimes.com/2014/03/22/us/as-diversity-increases-slights-get-subtler-but-still-sting.html; Heben Nigatu, 21 Racial Microaggressions You Hear on a Daily Basis, BUZZFEED (Dec. 9, 2013, 10:27AM), http://www.buzzfeed.com/hnigatu/racial-microagressions-you-hear-on-a-daily-basis#.ouAPDQo8L.

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C.) UCLA LAW PROFESSOR JERRY KANG'S WEBSITE

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https://www.bing.com/videos/search?q=jerry+kang+ted+talk&view=detail&mid=C199BFAA2157E6F0C7FBC199BFAA2157E6F0C7FB&FORM=VIRE.

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D.) THE NATIONAL CENTER FOR STATE COURTS WEBSITE

Contains a lot of information on working with implicit bias: http://www.ncsc.org/Search.aspx?q=implicit%20bias. A particular work of interest is 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/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx.

E.) MATERIALS SPECIFIC TO JUDGES, PROSECUTORS, AND DEFENSE COUNSEL

Judges:

Videos produced by the ABA Diversity and Inclusion 360 Commission: Video for Judges; Video for Prosecutors; Videos for Public Defenders. Please visit: www.ambar.org/360commission to access the videos.

Prosecutors:

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F.) COGNITIVE REFLECTIONS TEST (CRT) WEBSITE

The CRT is designed to assess an individual's ability to suppress an intuitive and spontaneous wrong answer in favor of a reflective and deliberative answer. The test is available at http://www.sjdm.org/dmidi/Cognitive_Reflection_Test.html#
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G.) PERCEPTION INSTITUTE WEBSITE

http://perception.org/.

H.) KIRWAN INSTITUTE WEBSITE

Shared research from researchers, grassroots advocates, policy makers, and community leaders: http://kirwaninstitute.osu.edu/.

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UCLA LAW REVIEW

Implicit Bias in the Courtroom

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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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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]

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

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, *Preconsciously 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 β=0.25 (p<0.05); the implicit attitude β=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

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.I (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]

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.

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Implicit Bias and the Illusion of Mediator Neutrality

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Implicit Bias and the Illusion of Mediator Neutrality

Carol Izumi*

INTRODUCTION

Plaintiff (P), the owner/operator of a carpet cleaning business, sued the defendant-homeowners for $500 in a breach of contract action for the unpaid balance of a $1,000 carpet cleaning agreement. Defendants (Ds or Mr. and Mrs. D) counterclaimed for the return of the $500 deposit they paid before work began. Ds hired P to dry out and clean the soaked carpet in their basement, which had flooded during a storm. Ds refused to pay the balance because the carpet had not dried out as P promised. Under the small claims court mediation program, the parties were required to attempt mediation before a trial date was set.

P was a middle-aged white male who attended the mediation in work clothes. Ds were an equally mature married couple of Asian descent who spoke with noticeable accents. They were dressed in what might be called "business casual" attire. The mediation was conducted around a large conference table by two white co-mediators: a male who looked to be in his forties and a younger female. The mediators conducted a "caucus model" facilitative-style mediation. P presented the case as a simple breach of contract: the agreement between the parties required the homeowners to make two

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$500 payments and the second payment had not been made. Mr. D complained that the business owner was trying to cheat him by charging him for work that was unsatisfactory. During the mediation, P and Mr. D had markedly different demeanors. P was matter-of-fact and even-tempered. Mr. D was angry and agitated. Mrs. D sat quietly behind and to the right of her husband during the mediation. She spoke once and was quickly shushed by her husband.

In the joint session, P described the business transaction and his actions placing large fans in the basement to dry out the carpet. He stated that he had stressed to the homeowners the importance of keeping the upstairs door to the basement open for air to circulate. However, when he went to the house the following day, he found the door shut. P argued that the carpet did not dry as he expected because Ds did not keep the door open as instructed. The mediators asked P a number of questions about the contract, his interaction with Ds, and his professional cleaning techniques. When it was his turn to speak, Mr. D argued that P failed to complete the work as promised and that P's work was unsatisfactory. He asserted that the door was kept open as instructed; P saw it closed because Ds were preparing food and had temporarily shut the basement door in the kitchen because of the musty odor downstairs. During their co-mediator caucus after the joint session, the mediators commented that Ds failed to keep the door open.

In the individual sessions with the disputants, the mediators gathered and clarified information and explored options. P reiterated his position that he was entitled to the contract price since Ds' failure to keep the door open protracted the carpet drying process. In their individual session, Ds pressed that they were not satisfied with P's work because the carpet did not dry out in the promised time frame. Mr. D said he entered into the transaction cautiously because he was aware that American businesses sometimes take advantage of customers. After these two individual sessions, the mediators caucused and decided that the parties had reached an impasse. They brought the parties back together, conducted a bit more discussion, and concluded the session. The mediation was terminated in less than an hour without an agreement, and the matter was scheduled for trial. With more cases awaiting mediation, the mediators were quickly assigned another small claims case.

The preceding description is based on a small claims case mediation that I witnessed as a requirement for civil mediator certification in Michigan.[1] As an observer, I wondered why the mediator team decided that Ds failed to keep the door open despite their consistent assertions to the contrary. What judgments did the mediators make to reach such a determination? I was curious as to why the mediators failed to explore the door open/door closed issue in the individual sessions with the parties since it seemed significant. What factors and phenomena might have influenced the mediators' thought processes, judgment, and decision-making? I immediately thought about the possibility that racial dynamics played a role. None of the other observers I asked imagined that racial issues were at play. Being the sole non-white observer, perhaps I was more sensitive to potential racial aspects in the mediation.

One could view this mediation in a number of ways. When I presented this scenario to a group of mediation academics, one colleague opined that it was simply an example of bad mediation. In his view, the mediators seemed poorly skilled and their process lacked a systematic exploration of party interests, goals, priorities, and options. To him, the mediators were guilty of incompetence, nothing more. Another colleague supposed that the mediators were pressured by time limits and a waiting room full of parties in other cases. To this colleague, it was merely an example of "speed mediation." A third professor reasoned that the mediators made a credibility determination and decided that P was more believable. She allowed that mediators make credibility calls all the time and acknowledged that race could play a role in determining credibility. For all three mediation experts, nothing in the scenario raised concerns about mediator neutrality. I offer this mediation scenario as an opportunity to explore the nuances of mediator neutrality, consider the pervasiveness of unconscious bias, and provoke new dialogue.

This Article probes the complex challenges of a mediator's ethical duty to mediate disputes in a neutral manner against the behavioral

1. Observation of two mediations was required as part of the Michigan civil mediator certification process. MEDIATOR TRAINING STANDARDS AND PROCEDURES § 5.2.3 (Office of Dispute Resolution, Mich. Supreme Court 2005), *available at* http://courts.michigan.gov/scao/resources/standards/odr/TrainingStandards2005.pdf.

realities of mediator thought processes, actions, motivations, and decisions. Part I begins with a dissection of the elements of mediator neutrality. Part II introduces the science of implicit social cognition and its application to various legal contexts, turning to the mediation process as a focal point. In Part III, using one particular racial category (Asian Americans), I tease out ways in which implicit bias might affect the mediators' conclusions and actions in a particular situation.[2] Ending with Part IV, I present ideas that may help us get closer to the ideal of attaining "freedom from bias and prejudice" in mediation. I conclude that the reduction of bias and prejudice demands more attention and effort than mediators currently devote to it. We must have the intention and motivation to undertake deliberate actions to reduce unconscious bias. Bias mitigation also requires proactive steps and a more robust curriculum than what is offered in many mediation trainings, programs, and classrooms.

I. THE ESSENTIALITIES OF NEUTRALITY

Mediator neutrality is universally understood to be a vital attribute of the mediation process. The traditional definition of mediation from the 2005 revised Model Standards of Conduct for Mediations ("Model Standards"), originally approved in 1994 by the American Arbitration Association, the American Bar Association Section of Dispute Resolution, and the Association for Conflict Resolution, states, "Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."[3] Textbook definitions of the mediation process invariably use language about the involvement of a "neutral" or "impartial" third party. A sample of dispute resolution casebooks reveals similar descriptions of mediation as:

2. I chose Asian Americans as the focal group because of the Ds' ethnicity. Although I frame the discussion around this discrete group, I would suggest that many issues and ideas presented could be extrapolated to apply to other groups as well.

3. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Preamble (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

- "[A]n informal process in which an *impartial* third party helps others resolve a dispute or plan a transaction but does not impose a solution."[4]
- "[A] process of assisted negotiation in which a *neutral* person helps people reach agreement."[5]
- "[A] process in which a *disinterested* third party (or *'neutral'*) assists the disputants in reaching a voluntary settlement of their differences through an agreement that defines their future behavior."[6]
- "[A] process in which an *impartial* third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship."[7]
- "[A] process in which a *neutral* intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and, based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns."[8]

Neutrality is a core concept of mediation.[9] Within the profession, there is widespread consensus about the vital importance of neutrality.[10] Neutrality, along with consensuality, gives the mediation process legitimacy.[11] "The essential ingredients of classical mediation

4. LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 16 (4th ed. 2009) (emphasis added).

5. DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 95 (2006) (emphasis added).

6. JOHN W. COOLEY, THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION 2 (2000) (emphasis added).

7. CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 266 (2005).

8. JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 1 (2d ed. 2006) (emphasis added).

9. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 211 (3d ed. 2004).

10. KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 33, 41 (2000).

11. Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part I*, 11

are: (1) its voluntariness—a party can reject the process or its outcomes without repercussions; and (2) the mediator's neutrality, or total lack of interest in the outcome."[12] As a principle "central to the theory and practice of mediation," neutrality serves "as the antidote against bias, . . . [which] functions to preserve a communication context in which grievances can be voiced, claims to justice made, and agreements mutually constructed."[13]

Mediator neutrality is foundational to the mediation process. Other essential values, such as confidentiality and party self-determination, rest upon the parties' perception of the mediator as an unaligned participant. Mediator neutrality legitimizes the mediation process because the parties, rather than the mediator, are in control of decision-making.[14] To encourage the parties to share information freely and candidly with the mediator, the mediator promises not to take sides with the other party or use the information to advance the opponent's interests. Mediator neutrality makes it possible for parties to discuss issues of their choosing, negotiate with opponents, and design their own agreements.[15] Moreover, the parties' expectation of mediator neutrality is the basis upon which a relationship of trust is built.

> Trust is attained and maintained when the mediator is perceived by the disputants as an individual who understands and cares about the parties and their disputes, has the skills to guide them to a negotiated settlement, treats them impartially, is honest, will protect each party from being hurt during mediation by the other's aggressiveness or their own perceived

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AUSTRALASIAN DISP. RESOL. J. 73, 73 (2000).

12. COOLEY, *supra* note 6, at 2.

13. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 35 (1991).

14. Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part II*, 11 AUSTRALASIAN DISP. RESOL. J. 145, 146 (2000).

15. *See* Leah Wing, *Whither Neutrality?: Mediation in the Twenty-First Century*, *in* RE-CENTERING: CULTURE AND KNOWLEDGE IN CONFLICT RESOLUTION PRACTICE 93, 94 (Mary Adams Trujillo et al. eds., 2008); *see also* Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 256 (2003) ("[N]eutrality is considered fundamental to the self-determination for which mediation strives. To the extent that a mediator is biased towards one party, the mediator may undermine the parties' ability to craft their own solution to their problem.").

> inadequacies, and has no interests that conflict with helping to bring about a resolution which is in the parties' best interest. Only when trust has been established can the parties be expected to be candid with the mediator, disclose their real interests and value the mediator's reactions . . . .[16]

Neutrality is critical to the role of the mediator.[17] Mediators must meticulously avoid even the appearance of partiality or prejudice throughout the mediation process.[18] One mediation scholar has cautioned:

> Whether there is such a thing as pure neutrality or not, we know, and our clients know, that when we commit to being neutral, we are committing to not intentionally promoting one party's interests at the expense of another. When we choose to play that role, we must truly honor it, and the fact that we have a choice and decision to make about whether to put ourselves forward as a third-party neutral should only emphasize how important that commitment is.[19]

While the importance of mediator neutrality is undisputed, what actually constitutes neutrality is less clear. Neutrality is discussed, practiced, and researched rhetorically, but there are no empirical studies demonstrating exactly what neutrality means.[20] The mediator's function is nebulous due to the difficulty in defining neutrality.[21] Despite its importance, mediation literature offers slim guidance on how to achieve neutrality.[22] "Neutrality is a hard concept to nail down. It has different meanings in different cultural contexts. In some contexts, the term *neutral* is associated with being inactive,

16. NANCY ROGERS & RICHARD SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 7–39 (1987), *as reprinted in* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 113 (4th ed. 2003).

17. KOVACH, *supra* note 9, at 211.

18. COOLEY, *supra* note 6, at 28.

19. BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 242 (2004).

20. Cobb & Rifkin, *supra* note 13, at 36–37.

21. MAYER, *supra* note 19, at 83.

22. Peppet, *supra* note 15, at 253–54.

ineffective, or even cowardly. In others, it is viewed as a sine qua non for third parties to establish respect."[23]

Comprehension of mediator neutrality is complicated by the lack of consistency in definitions. The dispute resolution lexicon is imprecise. "One reason that the theoretical concepts seem divorced from practice is that we do not yet have a shared vocabulary in our field. Although neutrality has aspects similar to fairness, justice, and appropriateness, as well as impartiality and lack of bias, it is not the same as those concepts."[24]

There is no consensus within the dispute resolution community that neutrality and impartiality are terms of art or synonyms in the vernacular.[25] Commentators and guidelines employ neutrality and impartiality circularly, asserting, for example, that "mediators shall at all times remain impartial,"[26] or "a mediator needs to remain impartial to be able to fulfill her role."[27] Neutrality and impartiality are often used synonymously when discussing a mediator's ethical duty. One reason for this is because distinctions between the terms may appear synthetic or arbitrary.[28] In their studies, Sara Cobb and Janet Rifkin found that fourteen out of fifteen mediators defined neutrality by using the word "impartiality."[29]

Other commentators and guidelines apply "neutrality" to the outcome or the elements of any resolution and "impartiality" to engagement with the parties.[30] Douglas Frenkel and James Stark propose:

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23. MAYER, *supra* note 19, at 83.

24. Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 MEDIATION Q. 215, 217 (1997).

25. KOVACH, *supra* note 9, at 212 ("Neutrality is often used interchangeably with a variety of other words and phrases: *impartiality*; *free from prejudice or bias*; *not having a stake in the outcome*; and *free from conflict of interest*. Other synonyms include *unbiased*, *indifferent* and *independent*. There is dissention within the mediation community about whether all of these terms define neutrality, and somewhat surprisingly, whether all, or any, are appropriate characteristics for mediators.").

26. *Id.*

27. Peppet, *supra* note 15, at 264 ("I agree with the classical conception of neutrality to the extent that it recognizes the importance of impartiality.").

28. William Lucy, *The Possibility of Impartiality*, 25 OXFORD J. LEGAL STUD. 3, 13 (2005).

29. Cobb & Rifkin, *supra* note 13, at 42.

30. KOVACH, *supra* note 9, at 212–14.

> "Impartiality," as we define the term, means that the mediator does not favor any one party in a mediation over any other party. Favoritism might be caused by a prior relationship or alliance with a mediation participant or by a personal bias for or against a participant based on that person's background, position, personality or bargaining style. Impartiality thus means a freedom from bias regarding the mediation *participants*.[31]

They define neutrality as meaning "that the mediator has no personal preference that the dispute be resolved in one way rather than another. The mediator is there to help the parties identify solutions that *they* find acceptable, not to direct or steer the parties toward results he favors."[32] Stated another way, neutrality is "a mediator's ability to be objective while facilitating communication among negotiating parties,"[33] and impartiality is "freedom from favoritism and bias in word, action and appearance."[34]

Despite this lack of clarity in the field, four key elements of neutrality are discernable: no conflict of interest; process equality; outcome-neutrality; and lack of bias, prejudice, or favoritism toward any party.[35] At a minimum, mediator neutrality is understood to mean

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31. DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT 83–84 (2008).

32. *Id.* at 84; *see also* Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 802 (2000). Oberman defines impartiality as "the ability of the mediator to maintain non-preferential attitudes and behaviors towards all parties in dispute; it is the ethical responsibility of the mediator to withdraw if she or he has lost the ability to remain impartial." *Id.* She defines neutrality as the "alleged ability of the mediator to remain uninvested in the outcome of a dispute, to be aware of any contamination of neutrality, and to withdraw if he or she has lost it." *Id.*

33. Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 580 (2008) (citing JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 12 (2001)).

34. *Id.* at 581 (quoting DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 68 (Phyllis Bernard & Bryant Garth eds., 2002)).

35. *See* Susan Douglas, *Questions of Mediator Neutrality and Researcher Objectivity: Examining Reflexivity as a Response*, 20 AUSTRALASIAN DISP. RESOL. J. 56, 57 (2009). This study found that mediators are aware of three themes regarding neutrality and per these themes, neutrality "is understood as impartiality, even-handedness and as central to the distinction between the process and content or outcome of a dispute." *Id.* A fourth theme is also important to understanding neutrality: "'value neutrality' or the absence of a situated perspective on experience." *Id.*

that the mediator has no pecuniary interest in the subject matter, no undisclosed relationship to the parties, and no possibility of personal gain.[36] Avoiding any actual or apparent conflict of interest is subsumed in the concept of neutrality. The Uniform Mediation Act states that:

> [B]efore accepting a mediation, an individual who is requested to serve as a mediator shall: (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and (2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.[37]

The Model Standards contain a similar prescription on conflicts:

> [A] mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.[38]

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36. *See, e.g.*, ETHICAL GUIDELINES FOR THE PRACTICE OF MEDIATION § 4.2 (Wis. Ass'n of Mediators 1997), *available at* http://wamediators.org/pubs/ethicalquidelines.html ("As WAM members, we disclose to the parties any dealing or relationship that might reasonably raise a question about our impartiality. If the parties agree to participate in the mediation process after being informed of the circumstances, we proceed unless the conflict of interest casts serious doubt on the integrity of the process, in which case we withdraw."); *see also* COLORADO MODEL STANDARDS OF CONDUCT FOR MEDIATORS § II.A (2000), *available at* http://dola.colorado.gov/dlg/osg/docs/adrmodelstandards.pdf ("The mediator shall advise all parties of any prior or existing relationships or other circumstances giving the appearance of or creating a possible bias, prejudice, or partiality.").

37. UNIF. MEDIATION ACT §§ 9(a)(1)-(2) (2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf.

38. MODEL STANDARDS OF CONDUCT FOR MEDIATORS III(A) (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_apn12007.

The source of the mediator's fees may compromise neutrality. A mediator must disclose any "monetary, psychological, emotional, associational, or authoritative affiliations" with any of the parties that might arguably cause a conflict of interest.[39] This aspect of neutrality has special consequences for attorney-mediators:

> One major issue for lawyers who alternate between the roles of advocate and neutral is the potential for conflicts of interest—the possibility that a party in a mediated case will be a past or future legal client of the mediator-lawyer. This is a particular concern in large law firms, where a lawyer-neutral's partners may be concerned that a single modestly compensated mediation will disqualify the entire firm from representing the party in a much more lucrative matter. Standards for neutrals call for disclosure in such situations.[40]

A second facet of neutrality is process-based or procedural, requiring that the mediator conduct the mediation process in a manner that is even-handed.[41] The Model Standards require a mediator to conduct a mediation in a manner that promotes party participation and procedural fairness.[42] "The mediator's task is to control the process of the mediation, providing a procedural framework within which the parties can decide what their dispute is about and how they wish to resolve it."[43] Process symmetry may be manifested by maneuvers such as ensuring an equal number of caucuses with the disputants or spending roughly the same amount of time with each party. It also means enforcing stated guidelines in a

39. KOVACH, *supra* note 9, at 213.

40. JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 447 (2005).

41. MODEL STANDARDS OF CONDUCT FOR MEDIATORS VI.A (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf ("Quality of the Process: A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.").

42. *Id.*

43. Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16 SOC. & LEGAL STUD. 221, 223 (2007); *see also* Wing, *supra* note 15, at 94 ("[M]ediators are seen as only interested in the *process*, in ensuring that it is fair and that parties to the dispute are the decision-masters on any mutually acceptable agreement formulated.").

fair manner. For example, if the mediator sets a deadline for the submission of written statements or enforces behavioral guidelines, the parties expect enforcement to be equal. "One feature of procedural impartiality is that the rules constitutive of some decision-making process must, at a minimum, favour neither party to the dispute-cum-competition or favour or inhibit both equally."[44]

Expectations of mediator neutrality encompass both procedural and outcome impartiality.[45] Neutrality in mediation is widely understood to mean that the mediator does not influence the content or outcome of the mediation. The mediator's ethical duty to be impartial throughout the process applies to her interaction with the parties and to the substance of the dispute.[46] Content-neutrality is closely linked to consensual decision-making by the disputants; it constrains mediators from usurping party control over choices and judgments.[47] Outcome neutrality requires the mediator to refrain from promoting either party's interests.[48] This component of neutrality also means the mediator should not press the parties to reach a resolution at all. "Some would draw a line at content-neutrality, however, when the result would be unfair to one of the parties or have detrimental effects on individuals with interests that are not represented at the table."[49]

A mediator's ethical duty and ability to be outcome-neutral have inspired significant debate within the profession.[50] For years, scholars

44. Lucy, *supra* note 28, at 11.

45. *Id.* at 8.

46. COOLEY, *supra* note 6, at 23.

47. Taylor, *supra* note 24, at 218 ("[T]he mediator is not to determine the outcome, but allow a process where decisions are made by the participants.").

48. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 52 (2d ed. 1996) ("What impartiality and neutrality do signify is that mediators can separate their personal opinions about the outcome of the dispute from the performance of their duties and focus on ways to help the parties make their own decisions without unduly favoring one of them.").

49. EDWARD BRUNET ET AL., ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 200 (3d ed. 2006). In certain contexts, mediators have duties that extend beyond the immediate parties. In environmental disputes, international conflicts, and family law matters, for example, strict neutrality yields to normative consensus and standards to protect outside interests.

50. *See, e.g.*, Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 46–47 (1981) (asserting that environmental mediators ought to accept responsibility for ensuring that agreements are as fair and stable as possible, even though

and practitioners have questioned whether a mediator should be a mere facilitator of party-initiated outcomes or should assertively prevent agreements that are unfair or favor more powerful parties.[51] From one perspective, neutral mediators are viewed as being interested solely in ensuring a fair process, leaving the disputants to determine any mutually agreeable resolution.[52] An alternative philosophy is that mediators may or must interact with the parties unequally to account for differences such as resources, power, educational level, and financial sophistication.[53] This debate is less about how we define neutrality and more about how neutrality meshes with equally valued norms of fairness and justice, process legitimacy and quality, and party self-determination.[54] While it is important for mediators to engage in that colloquy, it is not the focus of this Article.

The final element of neutrality, and the one I want to emphasize, is the mediator's duty to "avoid bias or the appearance of bias."[55] "Impartiality between the parties and neutrality regarding the outcome are only two forms of bias. The sum total of the life experience of the mediator, the subjective self, enters into each mediation and impacts the process and outcome."[56] The Model Standards capture this in Standard II, which states in pertinent part:

"such intervention may make it difficult to retain the appearance of neutrality and the trust of the active parties"); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86 (1981) ("It is precisely a mediator's commitment to neutrality which ensures responsible actions on the part of the mediator and permits mediation to be an effective, principled dispute settlement procedure."); *see also* Evan M. Rock, *Mindfulness Meditation, the Cultivation of Awareness, Mediator Neutrality and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 355 (2005) (citing Peppett, *supra* note 15, at 255); Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 MEDIATION Q. 61, 66 (1984).

51. *See* Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, 11 ALTERNATIVES TO HIGH COST LITIG. 129 (1993).

52. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARVARD NEGOT. L. REV. 71 (1998); Wing, *supra* note 15, at 94.

53. Bernard et al., *supra* note 50, at 66–67.

54. For example, family mediators must remain neutral as to outcome and impartial toward the parties but protect the best interest of children. *See* Kimberly A. Smoron, *Conflicting Roles in Child Custody Mediation: Impartiality/Neutrality and the Best Interests of the Child*, 36 FAM. & CONCILIATION CTS. REV. 258, 261 (1998).

55. Astor, *supra* note 11, at 77.

56. Oberman, *supra* note 32, at 819–20 (citing Deborah M. Kolb & Jeffrey Z. Rubin, *Mediation Through a Disciplinary Prism*, *in* RESEARCH ON NEGOTIATION IN ORGANIZATIONS

> A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
>
> B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
>
> 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.[57]

As of 2007, over a dozen states have implemented standards in which neutrality is defined as "freedom from favoritism or bias either by word or action, and a commitment to serve all parties as opposed to a single party."[58] Favoritism might be caused by a personal bias for or against a participant based on that person's background, position, personality or bargaining style; as such, impartiality means a freedom from bias towards the mediation participants.[59] For the disputants in mediation, a paramount concern is that the mediator has no prejudice against them on any level.[60]

To maintain neutrality, mediators must be aware of their assumptions, biases, and judgments about the participants in the process, particularly in cases where they have strong reactions to one of the parties.[61] Achieving impartiality requires mediators to have "insight into their own perspectives and experiences and [to understand] the impact that these have on their relationship with the parties in mediation."[62] "There remains the concern that the mediator's ideas and approaches to a problem will intrude and affect

231, 240 (Max H. Bazerman et al. eds., 3d ed. 1991)).

57. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (2005), *available at* http://abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

58. Exon, *supra* note 33, at 585 (quoting MINN. R. GEN. PRAC. 114 app. I cmt. 1, *available at* http://www.mncourts.gov/rules/general/GRtitleII.htm; STANDARDS OF PRACTICE: ETHICAL GUIDELINES FOR FULL MEMBERS 4 (Mont. Mediation Ass'n 1998), *available at* http://mtmediation.org/doc/Full%Ethics%20and%20Quals.pdf).

59. FRENKEL & STARK, *supra* note 31, at 83–84.

60. COOLEY, *supra* note 6, at 28.

61. Taylor, *supra* note 24, at 226.

62. Astor, *supra* note 11, at 77.

the direction of the process of mediation and its outcomes, as well as the difficulty of monitoring unconscious bias."[63]

This Article highlights the impartiality dimension of mediator neutrality in order to examine the imposing challenge presented by one form of bias,[64] i.e., implicit or unconscious bias. The next Part begins with a condensed review of the science of implicit social cognition and the phenomenon of implicit bias. It introduces the work of "behavioral realists" who import scientific research into legal analysis, and concludes with the application of these concepts to the mediation process.

II. IMPLICIT BIAS, BEHAVIORAL REALISM, AND APPLICATION TO MEDIATION

An impressive body of social science research produced over the past decades illuminates in new ways how our minds work. Advances in experimental psychology provide a deeper understanding of human perception, attention, memory, judgment, and decision-making. Cognitive social psychology studies persuasively show[65] that

63. *Id.*

64. There are many ways that "bias" operates in dispute resolution. *See, e.g.*, Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683 (2005) (arguing that cognitive biases often associated with availability and representative and anchoring heuristics can be helpful, but can lead to stereotyping of large numbers of people based on limited past experiences; also argues that egocentric bias can affect one's perception of fairness); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (contending that by understanding the positive and negative aspects of heuristics and biases, one can improve one's judgments and decisions when faced with uncertainty); John Livingood, *Addressing Bias in Conflict and Dispute Resolution Settings*, DISP. RESOL. J., Nov. 2007–Jan. 2008, at 53, 54–59 (asserting that judgment in conflict situations can be affected by four core biases: learned, incident-driven, process-driven and attributional); Joel Lee, *Overcoming Attribution Bias in Mediation: An NLP Perspective*, 15 AUSTRALASIAN DISP. RESOL. J. 48 (2004) (arguing that neuro-linguistic programming (NLP) can be useful to a mediator in helping parties understand and deal with attribution biases). A discussion of these forms of bias in mediation and negotiation is beyond the scope of this Article.

65. This research has critics and defenders. Some argue that implicit association test data do not support the conclusion that implicit bias leads to discriminatory behavior. *See* Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 985 (2008) (contending that it is not "proper to equate unconsciously biased mental associations with the tendency to engage in unlawful discrimination"); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1187–88 (2006) (asserting that the Implicit Association Test (IAT) is not significantly

unconsciously held attitudes and stereotypes can affect our interaction with others and may predict behavior.[66] This rich reservoir of scientific material deserves a more expansive presentation than I am able to offer here. What follows is a selective summary of some of the fascinating, and often startling, experimental discoveries about the insidious operation of unconscious bias. In the interest of space, I omit detailed descriptions of experimental design and administration and refer readers to the sources for explanations of methodologies and statistical analyses.

Following this summary of implicit bias research, I present the work of "behavioral realists." These legal academics and social scientists use social cognition research to measure how legal doctrines and institutional processes address discriminatory behavior. In contexts such as peremptory challenges, judicial decision-making, employment, and jury selection, scholars argue that current procedural and substantive legal protections fail to account for the

correlated to discriminatory behavior because subtle behaviors such as eye contact, speech errors, and body language do not constitute discriminatory action); Philip E. Tetlock, *Cognitive Biases and Organizational Correctives: Do Both Disease and Cure Depend on the Politics of the Beholder?*, 45 ADMIN. SCI. Q. 293 (2000) (arguing that studies should not focus on judgmental shortcomings but on the fact that everyone cannot fit in a particular category, and that an ideological bias on the part of researchers does not always translate to a "real-world" setting); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (claiming that implicit bias research is invalid and should not be used in developing antidiscrimination law). There are rebuttals to this criticism. *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007) (discrediting critics such as Mitchell and Tetlock for dismissing research unscientifically and subjectively, and further arguing that sufficient evidence exists to show that implicit biases lead to discrimination, and that antidiscrimination laws should be used to counter implicit bias effects); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1389–99, 1426–29 (2007) (arguing that expert testimony regarding research on implicit bias should be admissible in Title VII discrimination cases as a general background of implicit bias to give triers of fact understanding and context because "studies using a variety of measures and techniques have demonstrated the effects of implicit bias on judgments and behavior, creating a broad research base that spans several social scientific disciplines including psychology, sociology, and organizational behavior"; therefore "it is a mistake to conflate the existence of implicit bias with any one measure such as the IAT," or Implicit Association Test, and "it is a mistake to assume that critiques of one particular measure such as the IAT undermine the entire body of evidence showing the existence of implicit stereotypes and bias and their impact on judgments and behavior in the workplace").

66. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954–55 (2006).

operation of unconscious biases. With evidence that implicit attitude measures reveal much more bias favoring advantaged groups than do explicit measures, adherents of behavioral realism advocate legal reform to adequately address prejudiced behavior. I examine the mediation process through a behavioral realism lens and suggest that mediators regularly fail to act in unbiased ways.

A. Implicit Bias Research

Implicit social cognition is "a broad theoretical category that integrates and reinterprets established research findings, guides searches for new empirical phenomena, prompts attention to presently undeveloped research methods, and suggests applications in various practical settings."[67] Implicit social cognitionists posit that we can learn more about stereotypes and prejudice when we examine their unconscious operations. For example, experiments examining the causal relationship between unconscious stereotypes and biases in perception and memory have shined new light on social interactions and led theorists to recommend corrective actions to counteract the pervasiveness of unconscious biases.[68] Mental processes such as implicit memory, implicit attitudes, implicit self-esteem, implicit perception, and implicit stereotypes operate outside conscious attention and thereby unconsciously influence judgment.[69] "The term *implicit*, contrasted with *explicit*, is used to capture a distinction variously labeled as unconscious versus conscious, unaware versus aware, and indirect versus direct."[70] The most commonly used techniques for studying implicit social cognition are priming tasks with rapid response time measures and the Implicit Association Test (IAT), which is described below.[71]

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67. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995).

68. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice, in* 7 THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 55, 56 (Mark P. Zanna & James M. Olson eds., 1994).

69. Greenwald & Krieger, *supra* note 66, at 947.

70. Mahzarin R. Banaji, Curtis Hardin & Alexander J. Rothman, *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272 n.1 (1993).

71. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 428, 431 (2007).

Implicit bias refers to:

> [A]n aspect of the new science of unconscious mental processes that has substantial bearing on discrimination law. Theories of implicit bias contrast with the "naïve" psychological conception of social behavior, which views human actors as being guided solely by explicit beliefs and their conscious intentions to act. A belief is *explicit* if it is consciously endorsed. An intention to act is *conscious* if the actor is aware of taking an action for a particular reason. . . . In contrast, the science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.[72]

An overview of implicit social cognition research draws four main conclusions about the collective findings: (1) there is a variance, sometimes wide, between implicit and explicit cognition; (2) there is a discernable, pervasive and strong favoritism for one's own group, as well as for socially valued groups; (3) implicit cognitions, often more accurately than explicit, predict behavior; (4) implicit social cognitions are not impervious to change.[73]

Two concepts are key to the study of implicit social cognition: attitude (or preference) and stereotype (or belief).[74] Attitudes can be defined as dispositions toward things, such as people, places, and policies.[75] Stated another way, "an *attitude* [is] an evaluative disposition—that is, the tendency to like or dislike, or to act favorably or unfavorably toward, someone or something."[76] Explicit attitude expression can come in the form of action, such as selecting something we like or rejecting something we dislike.[77] Implicit attitudes are "introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable

72. Greenwald & Krieger, *supra* note 66, at 946.
73. Lane, Kang & Banaji, *supra* note 71, at 431–38.
74. *Id.* at 429.
75. Greenwald & Banaji, *supra* note 67, at 7.
76. Greenwald & Krieger, *supra* note 66, at 948.
77. *Id.*

feeling, thought, or action toward social objects."[78] For example, "[a]n implicit attitude toward B may be indirectly indicated by a (direct) measure of evaluation of A, when A and B have some relation that predisposes the implicit influence."[79] "Halo effect" research provides another example: physically attractive men and women "are judged to be kinder, more interesting, more sociable, happier, stronger, of better character, and more likely to hold prestigious jobs" by operation of an "objectively irrelevant attribute [physical attractiveness] that influences evaluative judgment on various other dimensions."[80]

A stereotype "is a mental association between a social group or category and a trait."[81] Stereotyping is "the application of beliefs about the attributes of a group to judge an individual member of that group."[82] A person's attitude toward someone or something is a consistent positive or negative response to an object.[83] On the other hand,

> a stereotype may encompass beliefs with widely diverging evaluative implications. For example, the stereotype of members of a certain group (e.g., cheerleaders) may

78. Greenwald & Banaji, *supra* note 67, at 8.

79. *Id.*

80. *Id.* at 9 (citing Karen Dion, Ellen Berscheid & Elaine Walster, *What is Beautiful is Good*, 24 J. PERSONALITY & SOC. PSYCHOL. 207 (1972)). The act of voting presents another example of implicit attitude. Voting for Obama because you know you like his beliefs and policies would be an explicit attitude expression. However, "a vote might function as an *implicit attitude indicator*—that is, an action that indicates favor or disfavor toward some object but is not understood by the actor as expressing that attitude. For example, a voter may vote for a particular candidate even though the voter knows nothing other than the candidate's name shares initial letters with the voter's name. In such a case, the vote can be understood, at least in part, as an implicit expression of the voter's self-favorable attitude." Greenwald & Krieger, *supra* note 66, at 948. Reliable research finds that most people have a positive attitude about themselves. Thus, "an expectable form of implicit attitude effect is that novel objects that are invested with an association to self should be positively evaluated." Greenwald & Banaji, *supra* note 67, at 10. Continuing with the voting example, even if you know nothing about Obama's sister, you might like his sibling. "This favorable attitude is an *implicit indicator* of attitude toward the candidate. Here, the 'implicit' designation indicates that the attitude expressed toward the candidate determined the attitude toward the relative, even though the liking or disliking for the relative may be experienced as an independent attitude." Greenwald & Krieger, *supra* note 66, at 948–49.

81. Greenwald & Krieger, *supra* note 66, at 949.

82. Banaji & Greenwald, *supra* note 68, at 58.

83. Greenwald & Banaji, *supra* note 67, at 7.

> simultaneously include the traits of being physically attractive (positive) and unintelligent (negative). Stereotypes guide judgment and action to the extent that a person acts toward another as if the other possesses traits included in the stereotype.[84]

Stereotypes are activated automatically, generally leading to the presumption that "the operation of the stereotype or prejudice [is] unintended by the research participants (i.e., not deliberate), either because they are unaware of certain critical aspects of the procedure or because they are operating under conditions that make it difficult to deliberately base responses on specific beliefs or evaluations."[85] For example, a 1983 experiment conducted by Samuel Gaertner and John McLaughlin provided one illustration of stereotype activation, demonstrating that subjects more quickly identified word pairs if they were consistent rather than inconsistent with African American stereotypes (e.g., Blacks-lazy vs. Blacks-ambitious).[86]

More recently, Mahzarin Banaji and Curtis Hardin conducted two priming task experiments on gender stereotyping.[87] Subjects saw gender-related primes (e.g., mother, father) or neutral primes (e.g., parent, student) followed by target words. Subjects in the first experiment were asked to respond as to whether the following target pronoun, either gender-related (e.g., he, she) or neutral (e.g., it, me), was male or female. Participants were able to respond faster to pronouns that were consistent with the gender stereotype of the prime; this result occurred independently of explicit beliefs about gender stereotypes.[88] The second experiment asked participants only to identify whether the target word was a pronoun or not a pronoun, but still resulted in similar effects of gender stereotyping.[89] These

84. *Id.* at 14.

85. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 243 (2002).

86. *Id.* at 242 (citing Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23 (1983)).

87. *See* Mahzarin R. Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 7 PSYCHOL. SCI. 136 (1996).

88. *Id.* at 136–39.

89. *Id.* at 139–40.

experiments "demonstrated that judgments of targets that follow[ed] gender-congruent primes are made faster than judgments of targets that follow[ed] gender-incongruent primes," showing that gender information imparted by words can automatically influence judgment, even in unrelated tasks.[90] Other studies bolster the finding that "[p]eople may often not be aware of what they are doing, they might even intend to be doing something else; perhaps worst of all, the operation of stereotypes and prejudice may be outside of their control."[91]

Automatic activation of stereotypes "provides the basis for implicit stereotyping."[92] "*Implicit stereotypes* are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category."[93] In one study, Mahzarin Banaji and Anthony Greenwald examined the relationship between implicit stereotypes and gender.[94] When testing participants' recognition of famous names, participants were more likely to falsely identify a male name as famous than they were to falsely identify a female name as famous. The false-fame effect was substantial when the names were male but weaker when the names were female, demonstrating an implicit indicator of the stereotype that associates maleness with fame (and achievement).[95] Researchers observe that stereotypes are often expressed implicitly in the behavior of people who expressly disavow the stereotype. Because race and gender stereotypes have been studied more often, they provide the "most persuasive evidence for implicit stereotyping."[96]

"*Implicit biases* are discriminatory biases based on implicit attitudes or implicit stereotypes. Implicit biases are especially

90. *Id.* at 140. In another experiment, researchers discovered that by activating abstract knowledge about beliefs associated with men and women, such as dependence and aggressiveness, subjects judged male and female targets more harshly when the targets' group membership stereotypically matched (e.g., after the subject's exposure to dependence primes, the subject will judge the female target to be more dependent). Banaji, Hardin & Rothman, *supra* note 70, at 272.

91. Blair, *supra* note 85, at 242.

92. Greenwald & Banaji, *supra* note 67, at 15.

93. *Id.*

94. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181 (1995).

95. *Id.*

96. Greenwald & Banaji, *supra* note 67, at 15.

intriguing, and also especially problematic, because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles."[97] The existence of stereotypes and biases does not mean that a person necessarily holds consciously prejudicial beliefs. Stereotypes and prejudices unconsciously and naturally form "through ordinary biases rooted in memory" to simplify cognitive processes.[98] To a varying degree, all of us are subject to the operation of implicit stereotyping and prejudice.[99] "The best of intentions do not and cannot override the unfolding of unconscious processes, for the triggers of automatic thought, feeling, and behavior live and breathe outside conscious awareness and control."[100]

In large part, implicit social cognition research has advanced because of the development and accessibility of the Implicit Association Test (IAT), an instrument that produces an implicit-attitude measure based on response speeds in two four-category tasks.[101] Since 1998, self-administered IAT demonstrations have been available online.[102] The most widely used version is the "Race IAT" which measures implicit attitudes toward African Americans (AA) relative to European Americans (EA).[103]

Using the IAT, social scientists have found that most Americans exhibit a "strong and automatic positive evaluation of White

97. Greenwald & Krieger, *supra* note 66, at 951.

98. Mahzarin R. Banaji & R. Bhaskar, *Implicit Stereotypes and Memory: The Bounded Rationality of Social Beliefs, in* MEMORY, BRAIN, AND BELIEF 139, 167 (Daniel L. Schacter & Elaine Scarry eds., 2000).

99. *Id.* at 143.

100. *Id.* at 142–43.

101. *See* Anthony G. Greenwald, Mahzarin R. Banaji & Brian A. Nosek, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

102. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/ (last visited Nov. 6, 2010).

103. The IAT works as follows: "[R]espondents first practice distinguishing AA from EA faces by responding to faces from one of these two categories with the press of a computer key on the left side of the keyboard and to those of the other category on the right side of the keyboard. Respondents next practice distinguishing pleasant-meaning from unpleasant-meaning words in a similar manner. The next two tasks, given in a randomly determined order, use all four categories (AA faces, EF faces, pleasant-meaning words, and unpleasant-meaning words). In one of these two tasks, the IAT calls for one response (say, pressing a left-side key) when the respondent sees AA faces or pleasant words, whereas EA faces and unpleasant words call for the other response (right-side key). In the remaining task, EA faces share a response with pleasant words and AA faces with unpleasant words." Greenwald & Krieger, *supra* note 66, at 952–53.

Americans and a relatively negative evaluation of African Americans."[104]

An analysis of data archived from many years of web-accessed IAT interactive demonstrations compared the level of favoritism toward advantaged versus disadvantaged groups revealed by implicit and explicit measures. Over two million people have taken the IAT; 90 percent have been American.[105] Eighty-eight percent of white test takers have manifested implicit bias in favor of Whites and against Blacks.[106] Over 80 percent of heterosexuals manifested implicit bias in favor of straights over gays and lesbians.[107] Non-Arab and non-Muslim test takers manifested strong implicit bias against Muslims.[108] These results are in sharp contrast to self-reported attitudes.[109] The following generalizations are apparent as to these self-selected users: explicit measures show much greater evidence for attitudinal impartiality or neutrality, and the IAT measures revealed greater bias in favor of the advantaged group. Implicit attitude measures reveal far more bias favoring advantaged groups than do explicit measures.[110] Interestingly, only African Americans failed to show substantial pro-EA race bias on the Race IAT.[111] From this, one can draw the conclusion that "*any* non-African American subgroup of the United States population will reveal high proportions of persons showing statistically noticeable implicit race bias in favor of EA relative to AA."[112]

Becca Levy and Mahzarin Banaji surveyed research that utilized the IAT and implicit priming to measure automatic attitudes and stereotypes related to age.[113] Based on 68,144 tests that included people along a wide spectrum of ages, Levy and Banaji offered three

104. Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 316 (2000).
105. Shankar Vedantam, *See No Bias*, WASH. POST MAG., Jan. 23, 2005, at 12, 15.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. Greenwald & Krieger, *supra* note 66, at 955.
111. *Id.* at 956.
112. *Id.*
113. Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 51–52 (Todd D. Nelson ed., 2002).

key findings.[114] First, ageism, defined as "an alteration in feeling, belief, or behavior in response to an individual's or group's perceived chronological age[,] . . . can operate without conscious awareness, control, or intention to harm."[115] Levy and Banaji found implicit ageism to be among the largest negative implicit attitudes observed, even larger than the anti-black attitude among white Americans.[116] Second, explicit age attitudes toward the elderly are negative, but implicit age attitudes are far more negative overall.[117] Third, a peculiar feature of implicit ageism is that it does not appear to vary as a function of age, since both older and younger subjects tend to have negative implicit attitudes toward the old and positive implicit attitudes toward the young.[118] The authors argue that ageism occurs implicitly and that all people are implicated in it. "Once age stereotypes have been acquired, they are likely to be automatically triggered by the presence of an elderly person."[119]

When implicit and explicit attitudes toward the same object vary, the discrepancy between the two is referred to as dissociation. This is often seen in attitudes toward stigmatized groups defined by age, race, sexual orientation, and disability.[120] Experiments show that implicit expressions of beliefs and attitudes are unrelated to explicit versions of the same. Two studies explored the use of the IAT "to chart the emergence of implicit attitudes in early and middle childhood."[121] The first study examined white American children's attitudes of blacks and Japanese.[122] The second also tested for explicit and implicit race biases but used a sample from a rural Japanese town where participants had little exposure to out-groups.[123] Generally, implicit and explicit biases existed at the earliest ages tested, but dissociation began around age ten or middle childhood as

114. *Id.* at 54.
115. *Id.* at 50.
116. *Id.* at 54–55.
117. *Id.* at 55.
118. *Id.*
119. *Id.* at 64.
120. Greenwald & Krieger, *supra* note 66, at 949.
121. Yarrow Dunham et al., *From American City to Japanese Village: A Cross-Cultural Investigation of Implicit Race Attitudes*, 77 CHILD DEV. 1268, 1270 (2006).
122. *Id.* at 1270–71.
123. *Id.* at 1274.

participants' explicit bias began to dissipate.[124] Researchers consistently observed dissociation between conscious and unconscious social judgment.[125]

Significantly, implicit bias predicts individually discriminatory behaviors.[126] Studies substantiate that "implicit measures of bias have relatively greater predictive validity than explicit measures in situations that are socially sensitive, like racial interactions, where impression-management processes might inhibit people from expressing negative attitudes or unattractive stereotypes."[127] An experiment featuring doctors making patient assessments provides an example of discriminatory behavior predicted by implicit bias measures.[128] Physicians with stronger implicit anti-black attitudes and stereotypes were not as likely to prescribe a medical procedure for African Americans compared to white Americans with the same medical profiles.[129] In addition, implicit measures are relatively better predictors of "spontaneous behaviors such as eye contact, seating distance, and other such actions that communicate social warmth or discomfort."[130] "Those who possess stronger negative attitudes toward a stigmatized group tend to exhibit more negative behaviors (e.g., blinking) and less positive behaviors (e.g., smiling) when interacting with a member of that group."[131]

Researchers conclude:

> The exposure of stereotyped knowledge in these studies represents an experimental analog of the countless ways in everyday life by which stereotyped information is continuously made available. . . . [I]mplicit stereotyping effects undermine the current belief about the role of consciousness in guaranteeing equality in the treatment of individuals irrespective of sex, class, color, and national origin. . . . Implicit stereotyping critically compromises the efficacy of

124. *Id.* at 1270, 1274–76.
125. Banaji & Bhaskar, *supra* note 98, at 146.
126. Lane, Kang & Banaji, *supra* note 71, at 436.
127. Greenwald & Krieger, *supra* note 66, at 954–55.
128. Lane, Kang & Banaji, *supra* note 71, at 430.
129. *Id.*
130. Greenwald & Krieger, *supra* note 66, at 955.
131. Lane, Kang & Banaji, *supra* note 71, at 436.

> "good intention" in avoiding stereotyping and points to the importance of efforts to change the material conditions within which (psychological) stereotyping processes emerge and thrive.[132]

B. Behavioral Realism

With so much laboratory evidence to support findings in implicit social cognition, many commentators have argued that we should consider the legal implications of this new science.[133] Over twenty years ago legal scholar Charles Lawrence called attention to the effects of unconscious racism in an oft-cited law review article, noting that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."[134] Social science research has spawned a new generation of academics who question whether existing legal doctrines realistically account for the operation of implicit social cognition on human actors.[135]

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132. Banaji, Hardin & Rothman, *supra* note 70, at 280.

133. Several authors have surveyed research and experiments on metacognitive processes to show how awareness, control, and intentionality (features of consciousness) relate to the formation of beliefs, attitudes, and behaviors. They argue that research on implicit social processes, particularly data on influences outside conscious awareness, control, and intention, may drive re-conceptualization of the legal notion of intention as it relates to discrimination. *See, e.g.*, Lane, Kang & Banaji, *supra* note 71; Banaji & Bhaskar, *supra* note 98; Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Mahzarin R. Banaji & Nilanjana Dasgupta, *The Consciousness of Social Beliefs: A Program of Research on Stereotyping and Prejudice*, *in* METACOGNITION: COGNITIVE AND SOCIAL DIMENSIONS 157, 167 (Vincent Y. Yzerbyt et al. eds., 1998).

134. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

135. *See generally* Jennifer S. Hunt, *Implicit Bias and Hate Crimes: A Psychological Framework and Critical Race Theory Analysis*, *in* SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 247, 255 (Richard L. Wiener et al. eds., 2007) (arguing that implicit stereotypes and prejudice may "tip the scale" in triggering hate crimes by causing hostile interpretations, increasing the likelihood of categorizing an individual as a member of a stigmatized group, activating aggressive behavioral tendencies, and/or lowering the decision threshold for aggressive behavior); Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 U. ILL. L. REV. 237 (arguing that rules regarding director independence are flawed because they do not account for sources of bias, especially unconscious bias); Sara R. Benson, *Reviving the Disparate Impact Doctrine to Combat Unconscious Discrimination: A Study of* Chin v. Runnels, 31 T. MARSHALL L. REV. 43, 58–59 (2005) (arguing that the intent doctrine should be struck and the disparate impact doctrine should be reinstated in Equal Protection cases to combat implicit discrimination).

In *Trojan Horses of Race*, an exposition on selected findings in social cognition research, Jerry Kang describes "'racial mechanics'—the ways in which race alters intrapersonal, interpersonal, and intergroup interactions."[136] With an emphasis on implicit bias material, Kang urges that "it is time for a new 'behavioral realist' approach, which draws on the traditions of legal realism and behavioral science."[137] The term "behavioral realism" was coined by a collection of academics to identify a collaboration of legal scholars and social cognitionists that "seeks to apply the best model of human behavior that science has made available to questions of law and policy."[138] The idea of behavioral realism is that law and jurisprudence should be consistent with accepted interpretations of behavioral science.[139] One example of this type of collaboration is Kang and Banaji's proposal to apply implicit social cognition research to create a new framework for affirmative action, using a methodology that "forces the law to confront an increasingly accurate description of human decision making and behavior, as provided by the social, biological, and physical sciences."[140] Kang and Banaji contend, "[b]ehavioral realism identifies naïve theories of human behavior . . . [and] juxtaposes these theories against the best scientific knowledge available to expose gaps between assumptions embedded in law and reality described by science. When behavioral realism identifies a substantial gap, the law should be changed to comport with science."[141]

A number of scholars have employed a behavioral realist approach to evaluate legal doctrines that require a showing of explicit

136. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 (2005).

137. *Id.* at 1494 n.21.

138. *Id.*

139. *See, e.g.*, Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 476, 484–87 (2008) (citing a study that found "[p]reference for people without disabilities compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains," and concluding that amendments to the Americans with Disabilities Act, which would reinstate a broader definition of a key element of actionable discrimination, are an important step forward in protecting against disability discrimination resulting from implicit bias).

140. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064–65 (2006).

141. *Id.* at 1065.

bias and conscious racial motivation. In the area of employment discrimination law, Linda Krieger and Susan Fiske assert that requirements based on intentionality and consciously discriminatory motivations are out of sync with empirical data from psychological science.[142] Relying on studies showing commonly held gender stereotypes and research indicating that implicit stereotypes remain in people who expressly hold egalitarian views, David Faigman, Nilanjana Dasgupta, and Cecilia Ridgeway argue that employment discrimination law requires new interpretations relying on more than explicit motivations.[143]

In articles addressing juror and judicial decision-making, authors present scientific research to show that implicit bias affects courtroom proceedings, suggesting that judges who prohibit references to race or other social characteristics during the proceedings are actually allowing discrimination to continue rather than helping to stop it.[144] Judges who strive to create a prejudice-free courtroom face an additional quandary. Studies confirm that unconscious bias may explain, at least in part, disparities in judicial decision-making, such as with convictions and sentencing.[145] Concerned with the impact of implicit bias in the process of creating a fair cross-section of jurors, one judge recognized that racial dynamics played out in jury deliberations, but she was frustrated in her attempts to remove prejudiced jurors from the pool.[146] Looking at

142. Krieger & Fiske, *supra* note 133, at 1061–62.

143. Faigman et al., *supra* note 65, at 1434 (concluding that expert testimony regarding research on implicit bias should be admissible in Title VII discrimination cases to provide a general background of implicit bias and give triers of fact understanding and context, but not for testimony that implicit bias influenced an employment decision in a specific case).

144. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, *in* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 11 (Gregory S. Parks et al. eds., 2008).

145. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1202 (2009). The authors found that the white judges in their study may have been compensating for unconscious racial biases in their decision-making, at least when the defendant's race was clearly identified. *Id.* at 1223. However, the black judges in the study had a greater propensity to convict the African American defendant, perhaps, as the authors speculate, because "[b]lack judges . . . might have been less concerned with appearing to favor the black defendant than the white judges." *Id.* at 1224.

146. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008) ("The harsh reality for judges conducting voir dire aimed at seating only fair and impartial jurors is that the jurors themselves may not be able to assist."); *see also* Turner v.

peremptory challenges, Anthony Page argues that the current three-step *Batson* approach[147] is inadequate to address the phenomenon of racially motivated challenges in jury selection.[148] The *Batson* approach requires that the challenging lawyer actually be conscious of her reason for striking, but research shows that unconscious bias can easily alter our perceptions of others.[149] Page's piece, along with other social science articles, was cited by Justice Breyer in *Miller-El v. Dretke*, a case in which the Supreme Court concluded that a prosecutor's use of peremptory challenges to strike several black jurors constituted purposeful discrimination.[150] Justice Breyer commented that "[s]ubtle forms of bias are automatic, unconscious, and unintentional,"[151] operating outside the knowledge of the person acting in a biased manner.

C. Application to Mediation

Unlike judges, mediators lack the authority to render binding judgments. Nevertheless, they may have significant influence on individual lives. A mediator's actions, judgments, strategic choices, and interactions with the disputants have an undeniable impact on the substance of the mediation and the results of the mediation process. In her book on mediator behavior, Deborah Kolb described her

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Stime, 222 P.3d 1243 (Wash. 2009) (holding that the jurors' racially biased conduct in regards to a Japanese lawyer supported grounds for a new trial); Martha Neil, *New Trial Sought After Jurors Mock Lawyer's Heritage*, ABA JOURNAL (Jan. 15, 2008, 4:34 PM), http://www.abajournal.com/news/new_trial_sought_after_jurors_mock_lawyers_heritage (Washington lawyer sought new trial after jurors mocked his Japanese heritage during deliberations).

147. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court provided a three step approach for constitutional claims regarding the use of peremptory challenges. The first step requires the defendant to raise the inference that the prosecutor used peremptory challenges to exclude possible jurors based on race. *Id.* at 96. In the second step, the prosecution has the burden of producing a race-neutral explanation for the exclusion of the jurors. *Id.* at 97. In the third step, the trial court must determine if the defendant has proven purposeful discrimination. *Id.* at 98.

148. Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

149. "[T]he problem with *Batson* is its inability to address the honest, well-intentioned lawyer who nevertheless still discriminates." *Id.* at 179 (emphasis added). The lawyer's lack of self-awareness may lead to peremptory challenges being exercised in a discriminatory manner even though the lawyer states, and believes, she has a non-discriminatory reason. *Id.* at 234–35.

150. Miller-El v. Dretke, 545 U.S. 231, 265–66 (2005).

151. *Id.* at 268 (Breyer, J., concurring) (internal quotations omitted).

observations of labor mediators during several mediations.[152] She observed two contrasting types of mediator behavior, leading her to classify mediators as either "orchestrators" or "dealmakers".[153] Orchestrators tended to require that the parties take more responsibility for negotiating, designing settlement proposals, and convincing their colleagues to accept a given settlement.[154] Dealmakers, on the other hand, saw themselves as responsible for creating, pushing, and "selling" an ultimate settlement to the parties.[155] Mediators in Kolb's study admitted to "manipulat[ing]" the parties to certain outcomes.[156] Kolb observed mediators using "direct persuasion . . . resulting in a deal that bears the imprint of the mediator as much as it does the parties."[157]

This spectrum of mediator behavior has been described in various ways. Leonard Riskin's well-known grid situates mediators within a "facilitative-evaluative/broad-narrow" framework.[158] Ellen Waldman uses "Norm-Generating," "Norm-Educating," and "Norm-Advocating" terminology.[159] Hilary Astor compares a "robust" approach, in which the mediator is "assertive, active, and interventionist," to a "minimalist" approach that entails convening, stimulating information flow, and identifying options.[160] For every mediator who argues that a facilitative model is the better or "correct" approach, another advocates a more directive approach in fulfilling duties.[161] By analyzing mediators in practice, observers

152. DEBORAH M. KOLB, THE MEDIATORS (1983).
153. *Id.* at 25.
154. *Id.* at 34–41, 42–43.
155. *Id.* at 34–42.
156. *Id.* at 41.
157. *Id.* at 42.
158. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 16–35 (1996); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and The New New Grid System*, 79 NOTRE DAME L. REV. 1, 12–13 (2003) (proposing substituting "directive" and "elicitive" for "evaluative" and "facilitative").
159. Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 728–43 (1996).
160. Astor, *supra* note 11, at 75–76.
161. *Compare* Kimberlee K. Kovach & Lela P. Love, "*Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996) ("An essential characteristic of mediation is facilitated negotiation. . . . 'Evaluative' mediation is an oxymoron. It jeopardizes neutrality because a mediator's assessment invariably favors one side over the other."), *with*

have concluded that evaluative mediators cross the neutrality line in ways that facilitative practitioners do not.[162] It is when mediators move from "educative" and "rational-analytic" roles to "therapeutic" and "normative-evaluative" roles "that an ethics dilemma regarding neutrality and impartiality may arise."[163]

Exoneration of facilitative mediators from neutrality breaches, however, may be too generous. Under the assumption that "mediators themselves routinely and unabashedly engage in manipulation and deception to foster settlements," James Coben argues that "[t]his is not simply a matter of mediator style—the [much-discussed] distinction between facilitative and evaluative approaches."[164] Despite neutrality constraints, Coben asserts that mediators "*are directly involved in influencing disputants toward settlement*."[165]

Mediator partiality is manifested in subtle ways.[166] Two studies reveal a significant disconnect between the articulated practice goal of neutrality and the actual techniques and strategies of mediators. In the first study, empirical research into community mediation in neighbor disputes showed that mediators (paid staff and trained volunteers) found it difficult to ignore "personal bias and evaluations of the worthiness of particular claims and disputants."[167] Mediators confessed to being so angry or frustrated with a disputant that on occasion "they felt they could not even make a pretence at remaining neutral."[168] Instead of being a rare occurrence, mediators stated their

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Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 504 (1997) ("When consistent with the parties' expectations and the mediator's qualifications, activist intervention by the mediator should be encouraged rather than condemned.").

162. Linda Mulcahy, *The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Partiality?*, 10 SOC. & LEGAL STUD. 505, 510–11 (2001).

163. Taylor, *supra* note 24, at 221.

164. James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 ALTERNATIVE DISP. RESOL. EMP. 4 (2004).

165. *Id.* at 5 (citing CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 327 (2d ed. 1996)); *see also* Astor, *supra* note 11, at 74 ("Significant attacks on mediator neutrality have come from academics who have pointed out, trenchantly and repeatedly, that mediators are not neutral. Research has clearly demonstrated that mediators do inject their own values into mediation.").

166. Mulcahy, *supra* note 162, at 511.

167. *Id.* at 516.

168. *Id.* at 516–17.

reactions were common.[169] Their mediation training "assumed that they could keep such negative evaluations of the disputants at bay."[170] However, the mediators felt constrained by an expectation of neutrality, as the expectation "was impossible to achieve" and "made them feel as though they were constantly doomed to failure."[171]

A second study showed that mediators influence the content and outcome of mediations by instigating party engagement at certain times in the process to make certain outcomes more likely.[172] This study looked at divorce mediations, analyzing data from forty-five mediation sessions which covered fifteen cases handled by three mediators.[173] Researchers found that mediators directed the process towards the outcomes they favored.[174] "The pressure that the mediator exerts toward the favored and against the disfavored outcome is largely managed by differentially creating opportunities to talk through the favored option rather than, for example, repeatedly producing evaluative statements about the positions of the two clients or the options open to them."[175] The authors label this technique "selective facilitation"[176] and admonish that it should be "introduced with sufficient clarity for clients to be able to recognize it and choose whether to go along with it."[177]

An additional layer should be explored to address concerns of partiality in actual mediator behavior: the danger of unconscious bias against a party. As previously described, research shows the

169. *Id.* at 517.
170. *Id.*
171. *Id.*
172. David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989).
173. *Id*. at 617.
174. *Id.* at 618. Information from the sessions "demonstrates that the mediator is working with notions of what kind of settlement would be desirable (a favored outcome) and what kind of settlement would be undesirable (a disfavored outcome), and seeks to guide the interaction accordingly." *Id*.
175. *Id.* at 636. "More commonly, mediators seem to proceed not by using the negative power of a veto but through the positive power of encouraging discussion in specific directions." *Id*. at 617.
176. *Id*. at 618.
177. *Id.* at 639. "Mediator influence becomes a problem only when formal and substantive neutrality are confused so that the pressure becomes invisible or when the choice of goals remains a purely personal matter rather than one for which the practitioner may be socially accountable." *Id.*

influence of implicit bias on our evaluation of others, judgments, and behavior, which is often inconsistent with express statements. "[E]x ante exhortation not to be intentionally unfair will do little to counter implicit cognitive processes, which take place outside our awareness yet influence our behavior."[178] In their introductory comments to the parties, mediators generally state that they will act in a neutral and impartial manner. Ethical and professional standards impose on mediators a moral imperative to avoid discrimination in their mediations. It is up to the parties to prove discriminatory treatment, even though people often do not perceive discrimination. "A behavioral realist analysis has demonstrated that such a model of explicit discrimination is not up to the task of responding to implicit bias, which is pervasive but diffuse, consequential but unintended, ubiquitous but invisible."[179]

Decades ago, critics cautioned that the mediation process may be particularly ill-suited to identify and confront discriminatory behavior.[180] As Richard Delgado and his colleagues warned, "ADR might foster racial or ethnic bias in dispute resolution."[181] Because formal adjudication explicitly manifests "societal norms of fairness and even-handedness" through symbols (flag, black robe), ritual, and rules, the adversarial process counteracts bias among legal decision makers and disputants.[182] These commentators conclude that members of the majority are most likely to show prejudicial behavior in informal ADR settings.[183] They argue that

> ADR is most apt to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power. In such situations, the party of high status is more likely than in other situations to attempt to call up prejudiced responses; at the same time, the individual of low status is less

178. Kang & Banaji, *supra* note 140, at 1079.

179. *Id.* at 1079–80 (citing Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006)) ("Recognition of the pervasiveness of implicit bias lends support to a structural approach to antidiscrimination law.").

180. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

181. *Id.* at 1367.

182. *Id.* at 1387–88.

183. *Id.* at 1391.

> likely to press his or her claim energetically. The dangers increase when the mediator or other third party is a member of the superior group or class.[184]

To test the "informality hypothesis" that the effects of gender and ethnicity will be greater in mediated rather than adjudicated small claims cases, Gary LaFree and Christine Rack examined ethnicity and gender among participants and mediators in Bernalillo County, New Mexico ("MetroCourt study").[185] These researchers compared the impact of disputants' ethnicity and gender on monetary outcomes in 312 adjudicated and 154 mediated civil cases.[186] They found support for the informality hypothesis (i.e., disparities between Anglo males and others will be particularly significant in mediation) in contrasts between minority and Anglo claimants.[187] "The strongest support for the informality hypothesis is for minority male claimants, who received significantly lower MORs [monetary outcome ratios] in mediation, even when case variables are controlled for."[188] The study found no evidence that minorities or women were "especially disadvantaged as respondents in mediation."[189] The researchers concluded there was some support for an informality hypothesis, i.e., "that ethnic and gender disparities are greater in mediation than in adjudication."[190]

LaFree and Rack also sought to test the "disparity hypothesis" that minority and female disputants will achieve less favorable outcomes than majority and male parties whether their cases are adjudicated or mediated, and they found "considerable support" for it.[191] Data for mediated outcomes showed that minority men and women received significantly lower MORs as claimants, and minority men paid

184. *Id.* at 1402–03. For a response to Delgado's criticisms, see Sara Kristine Trenary, *Rethinking Neutrality: Race and ADR*, 54 DISP. RESOL. J. 40, 44 (1999).

185. *See generally* Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767 (1996).

186. *Id.* at 771.

187. *Id.* at 778.

188. *Id.* at 780.

189. *Id.* at 778.

190. *Id.* at 789.

191. *Id.* at 788.

significantly more as respondents.[192] The study's overall results showed

> the strongest evidence of ethnic and gender disparity in the treatment of minority claimants in mediation. In the analysis including product terms, both minority male and female claimants received significantly lower MORs – even when we included the nine case-specific and repeat-player variables. Of greatest concern is the fact that this disparity was only present in cases mediated by at least one Anglo mediator. Cases mediated by two minorities resulted in lower MORs, regardless of claimant ethnicity.[193]

Rack conducted a second MetroCourt study involving a full data set of 603 small claims cases, of which 323 were adjudicated and 280 were mediated.[194] The study looked at a subset of 138 mediated cases which resulted in monetary agreements.[195] Rack compared party negotiations before the mediation with negotiation movement during the session to assess how the mediation process itself affected disputants.[196] She organized data to view cases as status relationships between claimants and the respondents, using five status dimensions: race-ethnicity, gender, socio-economic, corporate, and legal representation.[197] She found that ethnic minority claimants settled for less than Anglo claimants in mediation.[198] Compared to Anglo counterparts, minority respondents admitted higher liability at the outset and reported similar pre-mediation concessions; however, during the mediation sessions minority respondents conceded proportionally more than Anglo respondents to Anglo claimants.[199]

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192. *Id.* at 780.

193. *Id.* at 789.

194. Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 212 (1999).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 217. In the total sample, those coded as "minority claimants" were: 182 Hispanics (30.4%), 11 African-Americans (1.8%), 4 Asians (0.7%), 7 Native Americans (1.2%), and 5 "others" (0.8%). Those coded as minority respondents were: 216 Hispanics (36.1%), 22 African-Americans (3.7%), 11 Asians (1.8%), 5 Native Americans (0.8%), and 14 "others" (2.3%). *Id.* at 238.

199. *Id.* at 249.

"In sum, patterns shown here reflected firm bargaining by higher structural status claimants (high initial demands, concession resistance, undermatching, and little end stage concession-making). At the opposite pole, minority claimants were the softest bargainers."[200] Interestingly, "claimant ethnicity was the significant factor differentiating respondent concession-making; Anglos and men were more willing to pay Anglo than minority claimants."[201] According to Rack, the study showed that "Anglos and women [are] more likely to show insider bias."[202]

Mediators in Rack's study exhibited "Anglo-protective bias."[203] "Especially when the respondent was Anglo, mediators' status deference and ethic of 'neutrality' became a means through which the mediation environment served to support exploitation of soft bargaining."[204] Rack observed that "[o]vert prejudice was rarely acknowledged by disputants or recognized by mediators although the effects were apparent in the outcomes."[205] Noting that "[n]on-dominant groups may hold different fairness values, hold unequal power in negotiations with more dominant parties, and accept disadvantaged outcomes," Rack concluded that "those who are traditionally perceived as less competent continue to be perceived that way persistently so that hierarchies are recreated through a process of self-fulfilling prophecy. Attempts to break free of others' expectations are often negatively misperceived and actively discouraged until less privileged actors retreat from trying."[206]

Rack's MetroCourt study raises concerns that "insider bias" and "Anglo-protective" behavior on the part of mediators, along with settlement pressure to avoid perceived risks of adjudication, put minority parties at a significant disadvantage. Her case studies "suggest what appeared to be primary mediator patterns in these cases; Anglo mediators leaned on external status characteristics to

200. *Id.* at 253.
201. *Id.* at 258.
202. *Id.* at 289.
203. *Id.* at 273.
204. *Id.* at 262.
205. *Id.* at 276.
206. *Id.* at 230–31 (citing Cecilia L. Ridgeway, *Interaction and the Conservation of Gender Inequality: Considering Employment*, 62 AM. SOC. REV. 218, 218–35 (1997)).

grant legitimacy in the absence of cultural understanding, a pattern that apparently reinforced a pattern of hierarchy acceptance within the minority culture."[207] Rack noted, "The interest-based negotiation process and the mediators' often unexamined and unintended influence (or lack thereof), offered various opportunities for betrayals of justice. . . . Minority disputants, not Anglo women, manifested bargaining patterns that implied socialization patterns that could be and were substantively exploited by more dominant parties."[208] Rack concluded that "data suggested that the most imbalanced outcomes resulted from settlement pressure through constructing non-monetary substitutes for monetary claims, and by invoking, perhaps misrepresenting, evidentiary rules to discourage disputants from adjudication."[209]

Unique conditions of the mediation process may contribute to discriminatory mediator action (or inaction) in another way. In *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, Lu-in Wang examines the influence of situational context on discriminatory behavior in social interactions.[210] Wang argues that race functions as a proxy for negative characteristics associated with skin color, such as "laziness, incompetence, and hostility . . . lack of patriotism or disloyalty to the United States . . . susceptibility to some diseases . . . [and] criminality and deviance."[211] Wang contends that "fewer individuals than in the past are likely to be motivated by discriminatory animus. . . . Most of us are afflicted instead with unconscious cognitive and motivational biases that lead us to reflexively categorize, perceive, interpret the behavior of, remember, and interact with people of different races differently."[212]

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207. *Id.* at 263. The minorities involved were Latinos. Rack expressly stated that the same patterns may not be found in research with other minority groups. *Id.*

208. *Id.* at 294–95. "Disparate outcomes were created by apparently soft bargaining that was leveraged by mediators and exploited by opportunistic respondents into greater concessions. Minority claimants were vulnerable to suggestions that they could not expect much from their judicial alternative." *Id.* at 286.

209. *Id.* at 296.

210. Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013 (2004).

211. *Id.* at 1013–14. Proxy captures the unconscious and habitual "'default' manner in which race often influences decision-making." *Id*. at 1015.

212. *Id.* at 1017.

Wang advocates an examination of "social constraints" as powerful unseen influences on discriminatory behavior.[213] Contextual circumstances and "external factors" work to create "channel factors" which direct behavior by (1) determining how an individual defines a situation, and (2) channeling her behavior by indicating the appropriate conduct for that situation, "essentially opening or closing pathways for action."[214] Wang cites studies that show that "situations that include clear indications of right and wrong behavior [] tend to lessen the likelihood of discrimination."[215] Normative ambiguity tends to promote discrimination and "the power of ambiguity to channel discrimination goes hand-in-hand with its ability to mask it."[216] Normative ambiguity can arise where appropriate behavior in a particular context is not clearly identified and where clearly negative behavior can be justified on a basis other than race.[217] Stated another way, "normative clarity discouraged racial bias, but normative ambiguity channeled it."[218]

Could normative ambiguity in the mediation process channel biased mediator behavior as Wang posits? Mediators lack the surety of clearly defined rules of intervention. Among mediation professionals, there is little normative consensus regarding appropriate actions and behavior. The mediator's judgments about the parties, her decision to intervene or remain passive at any given time, and her use of various techniques to encourage agreement may be rationalized as "neutral," thus masking bias. An individual "is likely to discriminate in ambiguous situations despite her egalitarian values and lack of prejudice, because she may not be aware of the need to monitor her response and because racial stereotypes are

213. *Id.* at 1025.

214. *Id.* at 1026 (citing LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 10 (1991)).

215. *Id.* at 1038.

216. *Id.*

217. *Id.* at 1038–39. Citing juror studies, Wang notes that subjects were more likely to engage in discriminatory behavior when they could point to a non-discriminatory reason to rationalize their actions. For example, subjects might rationalize that verdicts were motivated by a desire to not let a guilty person go free rather than by racial bias. *Id*. at 1043.

218. *Id.* at 1039.

always accessible and automatically activated, and will lead her to discriminate despite her best intentions."[219]

Against this backdrop of implicit bias research and the operation of mediator partiality in actual practice, the next Part returns to the case scenario as a vehicle to contemplate subtle dynamics that might operate within a discrete mediation context.

IV. APPLICATION TO ASIAN AMERICANS[220] IN MEDIATION

Turning back to the Michigan small claims mediation described in the Introduction, I hope to stimulate a fresh inquiry into mediator actions. What influence, if any, might implicit bias have had on the mediators' perception and judgment of the parties? Is it possible that the mediators unintentionally favored the business owner in the mediation? As in the MetroCourt study, did the mediators demonstrate "insider bias" or in-group protectionism? Could the mediators' attitudes toward the homeowners have been colored by Asian stereotypes? In what ways could unconsciously held stereotypic views of a group operate in a seemingly simple non-racialized dispute? "[S]tereotypes about ethnic groups appear as part of the social heritage of society. They are transmitted across generations as a component of the accumulated knowledge of a society. They are as true as tradition, and as pervasive as folklore. No person can grow up in a society without having learned the stereotypes assigned to the major ethnic groups."[221] At the outset, let me state that I believe the mediators conducted the process earnestly and without indication of explicit negative or positive attitudes toward either party. They showed no outright bias, favoritism, or prejudice during the mediation. They employed a facilitative style of

219. *Id.* at 1045 (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 15–16 (1989)).

220. The United States Census Bureau defines Asian-American as "[a] person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam. It includes 'Asian Indian,' 'Chinese,' 'Filipino,' 'Korean,' 'Japanese,' 'Vietnamese,' and 'Other Asian.'" U.S. Census Bureau, *State & County QuickFacts*, CENSUS.GOV, http://quickfacts.census.gov/qfd/meta/long_RHI425200.htm (last visited Nov. 30, 2010).

221. HOWARD J. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 35 (1973).

mediation as taught in the required forty-hour Michigan Civil Mediation Training.[222] I suggest that the likelihood that implicit bias operated is as great as, or even greater than, the likelihood it did not.

A. Evolution of Asian American Stereotypes

Asian American stereotypes have notably evolved over the past century. Chinese in the United States in the late 1800s were characterized as opium-smoking, morally deficient sub-humans.[223] Fearing the "yellow peril" at the turn of the nineteenth century, Americans portrayed Chinese as military, cultural, or economic enemies and unfair competitors.[224] Courts and legislatures have a long history of discrimination against Asian Americans.[225] In *People v. Hall*,[226] Chinese were described as people

> whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and

222. This assumes the training they underwent was similar to the one I completed in order to mediate small claims cases.

223. Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087 (Hyung-Chan Kim ed., 1992); RONALD T. TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 99–112 (rev. ed. 1998); Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 18–23 (1996); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 12–15 (1994).

224. TAKAKI, *supra* note 223, at 81; *see also* Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 72 (1997).

225. For example, the Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, barred Chinese immigration and "caused untold suffering and hardship, separating families, creating a society of single men, and institutionalizing hostility, prejudice against and isolation of Chinese immigrants and Chinese Americans." City & Cnty. of S.F. Bd. Res. 363–09 (San Francisco, Cal. Sept. 15, 2009). Resolution No. 363-09 of the San Francisco Board of Supervisors "acknowledg[es] the regrettable role that San Francisco has played in advancing the policies of the Chinese Exclusion Act of 1882, the first federal law to discriminate against a specific group solely on the basis of race or nationality." *Id.*

226. 4 Cal. 399 (1854).

> physical conformation; between whom and ourselves nature has placed an impassable difference.[227]

The Supreme Court upheld the denial of citizenship to Japanese and Hindus from India, concluding that the forefathers intended to exclude "Asiatics" from naturalization and citizenship.[228] "Alien Land Laws" denied Americans of Japanese ancestry the right to own property.[229] Fervent anti-Japanese sentiment and suspicion ultimately led to the incarceration of 120,000 Japanese American citizens and legal permanent residents during World War II.[230]

The next forty years witnessed a shift in the way Asian Americans were perceived. As time passed, Asian Americans went from being a "bad" minority to a "good" minority. They were viewed as smart, industrious, and unassuming.[231] William Peterson first coined the term "model minority" in a 1966 *New York Times Magazine* article about Japanese Americans.[232] Asian Americans were held up as examples of minority success through hard work, sacrifice, following rules, keeping their noses to the grindstone, and minding their own business. Asian Americans, in short, achieved the American Dream. Americans have embraced the model minority perception as the contemporary Asian American stereotype.[233]

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227. *Id.* at 405. The court found that section 13 of the Act of April 16, 1850, prohibited Chinese people from testifying in favor of or against white men. *Id.* The court thus reversed the conviction of a white man who was found guilty of murder based on the testimony of Chinese witnesses. *Id.*

228. Ozawa v. United States, 260 U.S. 178, 195–96 (1922). In *Ozawa*, the Court found that section 2169 of the Revised Statutes, which limited naturalization to aliens who were "free white persons" and to aliens of African descent, applied to the Naturalization Act of June 29, 1906, ch. 3592, secs. 355–353, § 1, 34 Stat. 596 (1906). *Ozawa*, 260 U.S. at 194. This made the Japanese appellant ineligible for naturalization because he was not a free white person. *Id.* at 198; *see also* United States v. Thind, 261 U.S. 204 (1923) (determining that the term "free white persons" was to be interpreted as a common man would understand it; that the term was found to be synonymous with the word "Caucasian"; and that a high caste Hindu of full Indian blood was not included in that term).

229. Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 38 (l998).

230. ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 4 (2001).

231. Saito, *supra* note 224, at 71.

232. Chew, *supra* note 223, at 24 (citing William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES MAG., Jan. 9, 1966, at 20–21, 33, 36, 40–41, 43).

233. *Id.* at 24.

The model minority stereotype, like all stereotypes, is inaccurate. Lumping all Americans of Asian descent into one homogeneous category ignores vast differences among the many ethnicities. Dozens of different ethnic groups fall under the "Asian American" umbrella.[234] In fact, the pan-Asian identity reflected in the term did not develop until the 1960s.[235] Three main factors complicate any assumption of Asian Americans as a monolithic group: country of ancestry, length of residence in the United States, and gender.[236]

The model minority myth also has a negative side. Quiet, high achieving, workaholic go-getters may also be seen as cut-throat, inscrutable, and sneaky.[237] Asian Americans are viewed as skilled in scientific, technical, and quantitative fields, but lacking in verbal, social, and interpersonal skills.[238] This positive/negative duality of the stereotype is "akin to the paradoxical topology of a mobieus strip. If pressed, the so-called 'good' attributes . . . easily transform into the 'bad' attributes . . . and vice versa."[239]

The model minority myth masks challenges faced by Asian Americans who are over-credited with ascension on the ladder of success. The poverty rate for Asian Americans is almost twice that of white Americans.[240] Family income comparisons fail to recognize that Asian families typically have more workers per family than families with higher individual incomes.[241] Perceptions of Asian

234. *Id.* at 25.

235. YAMAMOTO ET AL., *supra* note 230, at 269–70.

236. Chew, *supra* note 223, at 26. For example, a fourth-generation Japanese American in California has very little in common with a recent Hmong immigrant in Minnesota, and Native Hawaiians have a vastly different set of experiences and perspectives than mainland Asian Americans.

237. Saito, *supra* note 224, at 72; Chew, *supra* note 223, at 38.

238. The "Asians are good at math" stereotype is so strong that it is even internalized by Asian Americans. The Math Test study by Margaret Shih showed that by unconsciously activating a particular identity (Asian) in Asian American female undergraduates, performance on a difficult math test was improved. Conversely, when female identity was unconsciously activated, the students' performance was depressed downward. Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80 (1999).

239. Aoki, *supra* note 223, at 35–36.

240. Saito, *supra* note 224, at 90 (citing William R. Tamayo, *When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 15 n.97 (1995)).

241. TAKAKI, *supra* note 223, at 475.

Americans include the belief that they are not the targets of racial discrimination[242] and that they are represented throughout the ranks of industries and professions.[243] Discussing Asian Americans, one scholar commented that "[a]lthough they are often needy and disadvantaged, they are not perceived as facing any obvious barriers greater than those of previous immigrant groups. . . . For example, there is less concern about [them] than about blacks, and they are less negatively stereotyped."[244] The model minority myth sends a message that Asian American claims of discrimination are not to be taken seriously.[245]

The stereotype that Asian Americans are deferential and unassertive hurts their potential to advance in various professional fields. Asian Americans are under-represented at the top levels of corporate, legal, and commercial management.[246] "[B]eliefs about Asian Americans as individually passive, obedient, hardworking, and socially inept encourage employers to hire them, but not promote them to upper levels of management. The combined effect of these racial beliefs produces a glass ceiling."[247] Stereotyping of this nature is evident in a recent case involving the exclusion of Asian Americans as grand jury forepersons.[248] In *Chin v. Runnels*, a

242. Gotanda, *supra* note 223, at 1091. One study found that nearly 40 percent of whites thought that with regard to job and housing discrimination, Asian Americans experience "little" or "none." Chew, *supra* note 223, at 8 (citing Michael McQueen, *Voters' Responses to Poll Discloses Huge Chasm Between Social Attitudes of Blacks and Whites*, WALL ST. J., May 17, 1991, at A16). In contrast, another study indicated that 49 percent of Asian Americans stated they had experienced discrimination. *Id.* at 8 (citing *Study Says Asians Feel Bias More Than Hispanics*, L.A. DAILY J., Dec. 12, 1985, at 1).

243. Chew, *supra* note 223, at 46.

244. David O. Sears, *Racism and Politics in the United States*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 76, 95 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

245. Gotanda, *supra* note 223, at 1089.

246. Chew, *supra* note 223, at 47–49.

247. Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice: A Social Psychological Equation for Racial Oppression*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 33, 52 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

248. *See* Darren Seiji Teshima, *A "Hardy Handshake Sort of Guy": The Model Minority and Implicit Bias About Asian Americans in* Chin v. Runnels, 11 ASIAN PAC. AM. L.J. 122 (2006) (arguing that court officials, implicitly biased because of the model minority stereotype, believed that Asian Americans were not good forepersons because they were not good leaders); *see also* Benson, *supra* note 135, at 47 (hypothesizing that a judge who accepted prejudiced stereotypes of Asian Americans as "introverted and timid" would not select a Chinese American foreperson).

Chinese-American defendant claimed that exclusion of Chinese-Americans, Hispanic-Americans, and Filipino-Americans as grand jury forepersons violated his right to equal protection under the Fourteenth Amendment.[249] Petitioner established a prima facie case of discrimination in the selection of jury forepersons under a process in which the judge and others identified "leadership capabilities."[250] The court expressly entertained the claim that unconscious biases may have contributed to this forty year exclusion, concluding that there may be "a sizeable risk that perceptions and decisions made here may have been affected by unconscious bias."[251]

The second pervasive stereotype of Asian Americans is known as the "perpetual foreigner syndrome."[252] This element of "foreignness" is rooted in the racial categorization of Asians as the "Mongolian or yellow race," as distinguished from the "white or Caucasian race."[253] Even Asian Americans who are native-born citizens have historically been viewed as foreigners.[254] Foreignness became linked with political disloyalty.[255] The imprisonment of Japanese Americans, many of whom were U.S. citizens, during World War II presents a glaring example of this conflation of native-born Asian American citizens with a foreign enemy.[256] Similarly, the foreignness-disloyalty connection has been applied to Korean Americans and Vietnamese Americans during conflicts with Asian countries.[257] The imagery of

249. Chin v. Runnels, 343 F. Supp. 2d 891, 892 (N.D. Cal. 2004).

250. *Id.* at 896–97, 901. Statistical evidence showed that between 1960 and 1996, not one Chinese American, Filipino American, or Hispanic American served as jury foreperson, and that the statistical likelihood of this occurring was 0.0003%. *Id.* at 895.

251. *Id.* at 908. The court denied petitioner's habeas claim but intimated that under de novo review, petitioner likely would have been granted relief. *Id*. at 905–08.

252. FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 79–129 (2002); Saito, *supra* note 224, at 76; Gotanda, *supra* note 223, at 1097; Chew, *supra* note 223, at 34.

253. *See* Saito, *supra* note 224, at 78 (citing *In re* Ah Yup, 1 F. Cas. 223 (D. Cal. 1878)); *see also* Aoki, *supra* note 223, at 9–10.

254. Saito, *supra* note 224, at 75–76; *see also* Chew, *supra* note 223, at 35.

255. Saito, *supra* note 224, at 82.

256. YAMAMOTO, *supra* note 230, at 4; Saito, *supra* note 224, at 81–83. General John L. DeWitt, leader of the Western Defense Command who favored internment of West Coast Japanese Americans, famously said, "A Jap's a Jap. . . . It makes no difference whether he is an American citizen, [theoretically,] he is still a Japanese." YAMAMOTO ET AL., *supra* note 230, at 99.

257. Saito, *supra* note 224, at 84.

Asian Americans as the enemy persists through economic competition and American trade protectionism, from the 1980s "Japan bashing" caused by automotive competition to imposition of tariffs on cheaper tires imported from China in 2009.[258]

Social cognition research by Thierry Devos and Mahzarin Banaji in 2005 substantiated the perpetual foreigner syndrome. Their study revealed that Asian Americans are perceived as being less American than both Whites and African Americans.[259] Experimental subjects linked American-ness more with white Europeans (e.g., Hugh Grant) than with famous Asian Americans (e.g., Connie Chung).[260] "The conclusion that can be drawn on the basis of the six studies presented here is unambiguous. To be American is to be White."[261] The model minority myth and perpetual foreigner syndrome were confirmed by scientific method in 2009. A survey conducted by Harris Interactive in January 2009 using a computer-assisted telephone interviewing system ("C100 Survey") assessed current attitudes toward Chinese

258. WU, *supra* note 252, at 70, 88–89; Peter Whoriskey & Anne Kornblut, *U.S. to Impose Tariff on Tires From China*, WASH. POST, Sept. 12, 2009, at A1.

259. Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 463 (2005). Readers may recall MSNBC's gaffe in 1998, running the headline "American Beats Out Kwan" on a story about Tara Lipinski's defeat of her favored U.S. teammate, Michelle Kwan. *See* Steve Mirsky, *Birth of a Notion: Implicit Social Cognition and the 'Birther' Movement*, SCI. AM., Oct. 2009, at 100.

260. Devos & Banaji, *supra* note 259, at 456–57.

261. *Id.* at 463. Devos conducted a more recent study that found that the participants more closely associated Hillary Clinton with American sentiments than they did Barack Obama. This was true regardless of whether race, gender, or personal identity were emphasized, though it was more pronounced when race was emphasized. Thierry Devos, Debbie S. Ma & Travis Gaffud, *Is Barack Obama American Enough to Be the Next President?: The Role of Ethnicity and National Identity in American Politics*, http://www.rohan.sdsu.edu/~tdevos/thd/Devos_spsp2008.pdf. The researchers concluded, "A Black candidate is implicitly conceived of as being less American than a White candidate when perceivers focus on the targets' ethnicity." *Id.*; s*ee also* Gregory S. Parks, Jeffrey J. Rachlinksi & Richard A. Epstein, Debate: *Implicit Bias and the 2008 Presidential Election: Much Ado about Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210 (2009), *available at* http://www.pennumbra.com/debates/pdfs/Implicit Bias.pdf. Parks, Rachlinski, and Epstein argue that while Obama's election represents a monumental stride forward for race relations, any announcement of a post-racial America is premature because of the race-tinged aspects of the election, including perceptions of Obama as insufficiently patriotic or American. Citing implicit bias, they caution that "[m]odern racism no longer produces an overt smoking gun marking its influence; one has to look fairly carefully to find its influence. It operates not as an absolute barrier, but as a kind of tax on members of racial minorities. It facilitates certain negative assumptions through an invisible influence." *Id.* at 214.

and Asian Americans.[262] The survey covered issues such as "race relations, social equality, immigration, and factors influencing public attitudes."[263] It compared responses from the general population sample and responses from the Chinese American sample. Related to the model minority myth, "[o]ver half of both the general population and Chinese Americans believe Asian Americans achieve a higher degree of overall success often or always in comparison to other Americans."[264] Reflecting perpetual foreigner status, 74 percent of the general population sample overestimated the proportion of the U.S. population that is made up of Asian Americans; contemporaneously, 51 percent underestimated the population of Asians born in the United States.[265] Judging loyalty, three-quarters of the Chinese American over-sample said that Chinese Americans "would support the U.S. in military or economic conflicts between the U.S. and China," but only about half of the general population "believe Chinese Americans would support the U.S. in such conflicts."[266] On racial profiling, only two-fifths of the general population think the FBI might prematurely arrest an Asian American;[267] more than half of the Chinese American respondents believe the FBI would arrest an Asian American without sufficient evidence.[268]

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262. COMMITTEE OF 100 & HARRIS INTERACTIVE, STILL THE "OTHER?": PUBLIC ATTITUDES TOWARD CHINESE AND ASIAN AMERICANS (2009), *available at* http://www.survey.committee100.org/2009/files/FullReportfinal.pdf. The survey followed up on a 2001 study "to gauge shifts in attitudes" and to "explore factors that help formulate perceptions and the reasoning behind attitude changes." *Id*. at 8. The survey used "split samples to compare attitudes toward Chinese Americans, Asian Americans, and other racial or religious groups. In addition to the general population sample, an over-sample of Chinese Americans was conducted." *Id*.

263. *Id.*

264. *Id.* at 42.

265. *Id.* at 40.

266. *Id.* at 43.

267. *Id.* at 45.

268. *Id.* at 44. For a discussion of the Wen Ho Lee case as a recent example of Asian American racial profiling, see Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1692–94 (2000).

B. Revisiting the Small Claims Case

Returning to the small claims mediation, let us reexamine the mediators' conclusion that the door was closed. Presumably, the mediator team was aware of the importance of mediator neutrality to their role and to the sustention of a legitimate process.[269] The Michigan Standards of Conduct for Mediators require the mediators to "remain impartial."[270] Studies find that implicit bias is so pervasive, it is likely most of us are affected.[271] Also, IAT data show unconscious racial bias among European American test takers toward disadvantaged groups.[272] Dissociation between implicit and explicit attitudes is common, so these mediators may hold explicit anti-discrimination attitudes and espouse egalitarian views but still have implicit racial biases.[273]

> At a very early age, young Americans learn the stereotypes associated with the various major social groups. These stereotypes generally have a long history of repeated activation, and are apt to be highly accessible, whether or not they are believed. . . . [O]ne can be "nonprejudiced" as a matter of conscious belief and yet remain vulnerable to the subtle cognitive and behavioral effects of implicit stereotypes.[274]

Also, implicit attitudes are better predictors of some behaviors than explicit attitudes.[275] It is conceivable that the mediators interacted

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269. With regard to impartiality, the Standards of Conduct for Mediators put forward by the State Court Administrative Office of the Michigan Supreme Court state:

> A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

STANDARDS OF CONDUCT FOR MEDIATORS (State Court Admin. Office, Mich. Supreme Court 2001), *available at* http://www.courts.michigan.gov/scao/resources/standards/ odr/conduct.pdf.

270. *Id.*

271. Lane, Kang & Banaji, *supra* note 71, at 433–37.

272. Greenwald & Krieger, *supra* note 66, at 955–58.

273. *Id.* at 955–56.

274. Krieger & Fiske, *supra* note 133, at 1033.

275. Lane, Kang & Banaji, *supra* note 71, at 435–37.

with the parties in a way that was unconsciously more favorable toward the business owner and less favorable toward the homeowners. We learned that group membership implicitly affects a person's identity formation and unconscious expressions of feeling and thought, and that in-group favoritism is strong.[276] "A person may have a view of herself as egalitarian but find herself unable to control prejudicial thoughts about members of a group, perhaps including groups of which she is a member."[277] A person's membership in a group implicitly affects that person's identity formation and "ingroup bias occurs automatically or unconsciously under minimal conditions."[278]

Considering potential mediator bias and favoritism in light of the science of implicit social cognition, it is conceivable that Asian American stereotypes were automatically activated when the mediators met the homeowners. "[M]erely encountering a member of a stereotyped group primes the trait constructs associated with and, in a sense, constituting, the stereotype. Once activated, these constructs can function as implicit expectancies, spontaneously shaping the perceiver's perception, characterization, memory, and judgment of the stereotyped target."[279] Clearly, race alters interpersonal, intrapersonal, and intergroup interactions.[280]

With activation of the stereotype that Asians are untrustworthy, the mediators may have unconsciously viewed the homeowners as less credible or as giving a less reliable account of the rug cleaning situation. They may have implicitly favored the story put forward by the carpet cleaner (in-group) and discredited the version offered by the homeowners (devalued out-group). Perceiving the homeowners as

276. Thierry Devos & Mahzarin R. Banaji, *Implicit Self and Identity*, *in* HANDBOOK OF SELF AND IDENTITY 153, 154–58 (M.R. Leary & J.P. Tangney eds., 2003), *reprinted in* 1001 ANNALS N.Y. ACAD. SCI. 177, 179–85 (2003).

277. *Id.* at 179.

278. *Id.* at 185.

279. Krieger & Fiske, *supra* note 133, at 1033.

280. Kang, *supra* note 136, at 1493; *see also* Kang & Banaji, *supra* note 140, at 1085 ("An individual (target) is mapped into a social category in accordance with prevailing legal and cultural mapping rules. Once mapped, the category activates various meanings, which include cognitive and affective associations that may be partly hard-wired but are mostly culturally-conditioned. These activated meanings then alter interaction between perceiver and target. These [racial] mechanics occur automatically, without effort or conscious awareness on the part of the perceiver.").

foreign may have activated mental links associating them as an "enemy." The mediators may have unconsciously judged the homeowners as less deserving of relief because of the model minority myth and their "success" in relation to the carpet cleaner.

Mediator memory may have played a role here. Experiments reveal a causal relationship between unconscious stereotypes and biases in perception and memory.[281] Memory errors may occur "because of the human mind's heavy reliance on stereotypes during the encoding and recall of information."[282] Justin Levinson conducted a study testing the effect of implicit racial bias on juror memory.[283] After reading a story about an incident (a fight or employment termination) and performing a distraction task, 153 students of diverse backgrounds[284] answered a questionnaire about the story. The race of the actors in the story was a variable (black/white/Hawaiian).[285] Overall, participants misremembered information in a racially biased way against blacks, less so for Hawaiians.[286] Participants recalled aggressiveness of blacks more easily and generated false memories of their aggression, whereas false memory toward the white actor was positive (receiving an award).[287] Recall is more accurate and false memory generation occurs more with stereotype-consistent information.[288] In addition, "cognitive confirmation effect" has been verified experimentally.[289] Once a social schema (e.g., race, gender) has been activated, a person will often actively search for information that supports that schema

281. *See* Banaji & Greenwald, *supra* note 94.

282. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 376 (2007).

283. *Id.* at 345.

284. *Id.* at 390–91. The study consisted of 71.2 percent women. Approximately 20 percent of the participants were Japanese American, 20 percent were white, 50 percent were of mixed ethnicity, 2 percent were Hawaiian, 4 percent identified as Other, and there were no African Americans. *Id.*

285. *Id.* at 394.

286. *Id.* at 398.

287. *Id.* at 398–99.

288. *Id.* at 400–01.

289. Page, *supra* note 149, at 216–17 (citing John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 20 (1983)).

rather than information that is inconsistent, a process that occurs unconsciously.[290]

Discrimination on the basis of the Asian homeowners' accent is another possible influence on the mediators. Mari Matsuda cautions that "discrimination against accent is the functional equivalent of discrimination against foreign origin."[291] Accent discrimination is triggered by "the collective xenophobic unconscious" bias that operates when a different voice is devalued.[292] A prejudiced listener will attach "a cultural meaning, typically a racist cultural meaning, to the accent."[293] Matsuda suggests that awareness that accent discrimination is a potential problem can help listeners avoid unconscious negative reaction to the accents.[294] Interestingly, not all accents evoke negative reactions. Writing about university tenure decisions, an academic observed that accent is usually a factor in tenure decisions when the professor is a member of an Asian, Indian, African, or Middle Eastern culture; it rarely arises in the case of native speakers of European languages.[295] In the Michigan case, the homeowners' accents, coupled with negative Asian stereotypes, may have caused the mediators to devalue their statements which contradicted the carpet cleaner.

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290. *Id.*

291. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1349 (1991). Observing that speech can position people socially, Matsuda claims that "certain dialects and accents are associated with wealth and power. Others are low-status with negative associations." *Id.* at 1352 (citing Marc Fisher, *At GWU, Accent is on English for Foreign Instructors: Student Complaints About Teaching Assistants Lead to Testing Program*, WASH. POST, Nov. 29, 1986, at B1); *see also* Beatrice Bich-Dao Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 1 ASIAN L.J. 117, 122 (1994); Kristina D. Curkovic, *Accent and the University: Accent as Pretext for National Origin Discrimination in Tenure Decisions*, 26 J.C. & U.L. 727 (2000); Mary E. Mullin, Comment, *Title VII: Help or Hindrance to the Accent Plaintiff*, 19 W. ST. U. L. REV. 561, 571 (1992); Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1275 (2004).

292. Matsuda, *supra* note 291, at 1372 (citing ROBERT TAKAKI, FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA (1987)) (asserting that accent discrimination involves "a set of ingrained assumptions that are inevitably lodged in the process of evaluation and in the ways in which we assign values").

293. *Id.* at 1378.

294. *Id.* at 1373.

295. Curkovic, *supra* note 291, at 742–43.

The previous sections of this Article are intended to provoke, not proselytize. The purpose of presenting the small claims scenario is to raise the issue of implicit bias, not to resolve it definitively. As instructors and providers of mediation services, we should understand that mere good intentions to act impartially are insufficient to counter unconscious biases.

> Mediation, despite its image as a neutral procedure in which all values are honored equally and all parties are free to express their points of view, can often be skewed by bias. Mediators often make quick judgments and proffer strong statements infused with their biases, which, though not legally binding, can powerfully impact the outcome of a settlement. . . . Moreover, bias on the part of any mediator can creep into the process in even more subtle ways, such as in the subjective matters of how questioning occurs and how and whether private caucuses are conducted.
>
> Compounding the problem, it is nearly impossible to accurately observe or address issues of bias in the informal consensus-building environment of mediation, especially because there is an unspoken taboo against acknowledging it.[296]

IV. WHAT DO WE DO?

The prospect of mitigating mediator bias is daunting, but myriad acts and practices within the control of mediators may help address the problem. As a first step, mediation professionals must be realistic and frank about the vast range of mediator behavior and the maneuvers mediators employ to meet the ethical standard of neutrality. We should accept that mediator neutrality is elusive and shape-shifting; it is neither a condition nor characteristic that one possesses or lacks. It is a complex, multi-layered relationship and a system of interaction with the parties that requires constant vigilance. A mediator does not enter a mediation as a "neutral" entity, free from

296. Frederick Hertz, *Bias in Mediation and Arbitration*, CAL. LAW., Nov. 2003, at 37–38.

judgments, values, ideologies, attitudes, and pre-conceived perceptions. Like other human beings, mediators bring prejudices and preferences into the sessions. We should envision neutrality as an unending search, not a state of being.

Realistically, pure impartiality cannot exist in a mediation setting. That said, we should not abandon neutrality as a goal. Rather, mediation practitioners and academics must seek greater understanding and candor about what is done in these confidential, closed-door encounters.

> Neutrality is not an attribute that mediators do, or do not, possess but it is an issue which must be attended to throughout a mediation and which requires constant process of evaluation and decision-making. . . . If we view neutrality through a binary lens, so that it is either present or absent, the research demonstrates as it must, that mediators are not neutral."[297]

As mediators, we should increase our efforts to use the best practices to conduct the process in a way that integrates all aspects of neutrality, i.e., no compromising interests held by the mediator, procedural even-handedness, outcome neutrality, and without bias, prejudice or favoritism toward any party.[298]

To fulfill our commitment to act in a nondiscriminatory manner, it is productive to conceive of mediator neutrality as having both external and internal components.[299] External neutrality consists of conduct and statements to show freedom from bias or favoritism in the way the mediation is conducted. Internal neutrality is the state of being aware of the operation of biases toward the disputants and working to minimize it. I separate bias reduction ideas into these two distinct categories, but I recognize that they coalesce in certain instances. In addition to collecting views from a wide variety of observers, I offer experiences from my law school mediation programs as examples of potentially constructive approaches.

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297. Astor, *supra* note 11, at 79–80.

298. *See supra* Part I.

299. Rock, *supra* note 50, at 355 ("Internal neutrality refers to the absence of emotions, values or agendas from the mind of the mediator. External neutrality refers to the absence of emotions, values or agendas from the words, actions, and appearance of the mediator.").

A. External Neutrality

The external aspect of neutrality demands paying attention to process attributes, nuances of language and narrative, and the physicality of mediator actions. As practitioners, we are trained to attend to process management and procedures. We strive for external neutrality by conducting an outwardly even process, eliminating conflicts of interest that may arise from proprietary, monetary, relational, and other interests, and abstaining from advocating or pressing for a particular outcome. We seek to ensure our external neutrality through "process policing" techniques: how we engage the parties, manage their interaction, and orchestrate the sessions.[300] A large part of the mediator's job is "maintaining the orderly character of talking and listening, including such matters as organizing the opening and the closing of the session, keeping the parties focused on the current topic, and managing the changes from one topic to another."[301] Management of the agenda goes to the process of interaction, and therefore "can be thought of as being executed in ways that are both formally and substantively neutral."[302]

1. Process Management and Mediator Communication

Mediators manifest external neutrality by being deliberate in planning and conducting each mediation to "place and keep the power of self-determination with the parties, while protecting all parties' abilities to present issues and concerns equally in the mediation session."[303] Practitioners should be mindful of the difference between even-handed process management and "selective facilitation," or maneuvers that are designed to influence and favor certain outcomes. These maneuvers include inhibiting discussion of a

300. External neutrality techniques would include the "*agenda management* that goes on in any orchestrated encounter. . . . Orchestration is one of the means by which speech exchange is ordered in multi-party encounters." Greatbatch & Dingwall, *supra* note 172, at 636 (citation omitted).

301. *Id.* at 637.

302. *Id.*

303. Rock, *supra* note 50, at 356.

disfavored option or moving to close a session without systematic exploration of both parties' preferences.[304]

External neutrality should be assessed through all stages of the process, from pre-mediation preparation through post-mediation evaluation and debriefing. Rather than routinizing procedures for assembly line mediation, mediators should "customize" the sessions for the special dynamics involved.[305] Departure from procedural defaults may be more appropriate under the circumstances. The Michigan mediators followed the general rule for small claims mediation: they asked the party who initiated the matter to make his presentation first. The mediator team may have considered this to be a neutral selection, but it could be perceived as favoring the businessman and disadvantaging the homeowners. After inviting the business owner to speak first, the Michigan mediators posed more inquiries to the business owner than to the homeowners in the joint session and individual sessions. They may have devoted more time to the carpet cleaner and interacted less with the homeowners for various reasons (such as Mr. D's anger, the Ds' accents, or their "foreignness").

External neutrality efforts include consideration of table arrangements and seating arrangements. In the Michigan scenario, the white male mediator sat closer to the business owner. Such an arrangement could create a more intimate conversational dynamic between the two men and give the impression they are "chummy" or in alignment. Both homeowners were seated farther from the mediators than the business owner, making them seem like more remote "outsiders." Both homeowners should have been placed literally "at the table," rather than letting Mrs. D sit behind her husband. If one party is harder to comprehend (perhaps because of accent, soft voice, or looking down), the mediators could alter the arrangement and form a tight circle with no table. Mediators should be careful about chair placement and body positioning so as not to turn their backs toward one disputant more than the other. Special

304. Greatbatch & Dingwall, *supra* note 172, at 637–38.

305. ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING MEDIATION QUALITY FINAL REPORT 12–13 (2008), *available at* http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf.

challenges may be presented when language interpreters or other third parties are in attendance, as this may make the unassisted party feel outmanned. Interpreters (of American sign language, for example) may need to be seated to accommodate the need to communicate adequately with their clients. Physical limitations of the participants should be considered with external neutrality in mind.[306]

All subtleties of a mediator's mode of communication, including tone of voice, speed of speech, demeanor, eye contact, facial expressions, body language, and physical signals and gestures, are important for attending to external neutrality.[307] Mediators who are fast talkers may disfavor or alienate parties who speak more slowly or who are less fluent in English. We need to be patient with parties who are less articulate or direct than ourselves, and refrain from interrupting, completing sentences, and filling space with words. Regional differences in speech patterns might create mediator affinity with one party over another.[308] Unevenness in eye contact, body placement and movement (sitting forward or leaning back), and attentiveness (looking down while taking notes) may send signals of mediator approval or friendliness, or a lack thereof. When mediating with parties who have physical, cognitive, or intellectual disabilities, we must monitor habits that may inadvertently slight or alienate them. Mediators must be attuned to unintended differential or compensatory treatment (e.g., speaking in a loud voice to a party for whom English is a second language) that may be regarded as treating one participant more positively or negatively than the other. We should be aware of the inadequacy of our usual mannerisms with certain parties; for example, muted visual cues may disadvantage deaf parties who focus more on visual cues and facial expressions.

306. For instance, with my limited range of neck motion due to arthritis, as a mediator I must be seated so that I can make eye contact with and view all parties equally.

307. Rock, *supra* note 50, at 358.

308. For example, the East Coast students in my mediation clinic who talk as fast as a "New York minute" often get impatient with parties who speak slowly.

2. Language, Narratives, and Cultural Myths

The importance of language in mediation cannot be overstated. Sarah Burns recommends that mediators be cognizant of the impact of metaphors.[309] Common metaphors may be thought of as mere figures of speech, but they "can have the effect of alienating, excluding, or seeming to disregard certain groups."[310] Burns uses the example of metaphors in which black is a negative referent, which may be awkward or offensive to African Americans.[311] Mediators should be sensitive to terms that may seem innocent but have a hurtful impact on others. An example from my own perspective is the acronym for "Jewish American Princess," "JAP." As a person of Japanese ancestry, I view that abbreviation as a homonym for a racial epithet. Stock phrases in mediation, such as "I hear what you're saying," may come across as insensitive to a hearing-impaired party. Dale Bagshaw observes that "[l]anguage is laden with social values and both carries ideas and shapes ideas."[312] Dominant discourses in Western societies tend to be Anglo-centric, as well as "agist, racist, heterosexist and homophobic."[313] Moreover, "throughout recorded history such discourses have been used by legal and social science professionals to justify categorising people as '(un)deserving,' '(ab)normal,' '(dys)functional,' '(in)competent,' '(mal)adjusted,'

309. Sarah E. Burns, *Thinking About Fairness & Achieving Balance in Mediation*, 35 FORDHAM URB. L.J. 39, 54 (2008). Burns' "Practice Recommendations" are associated with five general aspects of cognition: categorization (naming our world), attribution (explaining our world), metaphor (orienting our world), normative (prescribing behaviors), and framing. *Id.* at 43.

310. *Id.* at 54.

311. *Id.* (e.g., "these were dark times" or "he was one of the guys in a black hat").

312. Dale Bagshaw, *Language, Power and Mediation*, 14 AUSTRALASIAN DISP. RESOL. J. 130, 136 (2003) (citing BENJAMIN LEE WHORF, LANGUAGE, THOUGHT, AND REALITY (John B. Carroll ed., 1956)).

> Dominant dispute resolution discourses in Western cultures have tended to favour adversarial approaches to conflict and rules of law applied in formal law courts are seen as the paramount 'truths'. However, 'law' can be seen as a dominant discourse, elevated by a dominant group in a particular culture at a particular point in time, and as such can marginalise and ignore the 'truths' or ways of knowing of minority cultural groups.

Id. at 132.

313. *Id.*

'subversive,' 'delinquent' or 'deviant.'"[314] When analyzing discourses, Bagshaw notes that "[i]t is therefore crucial to identify the relationship between *what is said* and *who said it*."[315] With this understanding, discourse analysis may reveal sexist or racist assumptions. "Language influences our attitudes and behaviour and can be used to reinforce harmful or hurtful stereotypes, such as those that are agist, sexist, racist and so forth."[316]

Bagshaw cautions mediators "to be careful in the choice of language, interpretations and the meanings they ascribe to a person's identity. Essentialism can contribute to mediators categorising and labelling clients and their problems in a way that impedes opportunities for client-centered practice and reifies and reinforces the power/knowledge of the mediator."[317] To allow parties to "supply the interpretive context for determining the meanings of events, the nature of a presenting problem, intervention and treatment,"[318] Bagshaw urges a "*reflexive* approach to [mediation] practice."[319] "In self-reflexive mediation practice it is recognised that it is impossible to be 'neutral' and the influences of characteristics such as gender, race, class, age, and sexuality on the mediator's relationship with the participants are critically examined."[320] Reflexivity demands awareness and control of the mediator's own personal and cultural biases "in order to understand the standpoint of the 'other.'"[321]

Sara Cobb and Janet Rifkin also emphasize discourse and reflexivity in their critique of mediator neutrality. They view neutrality "as a practice in discourse"[322] and assert that "existing rhetoric about neutrality does not promote reflective critical examination of discursive processes."[323] In their observations of

314. *Id.*
315. *Id.* at 136.
316. *Id.* at 137.
317. *Id.* at 139 ("Traits such as those linked to ethnicity, age, sexuality, ability or gender, should not be automatically assigned to a person's self-image as any one of those factors may not be seen by the person as relevant or important, depending on the context.").
318. *Id.*
319. *Id.*
320. *Id.* at 140.
321. *Id.* at 141.
322. Cobb & Rifkin, *supra* note 13, at 36.
323. *Id.* at 50.

mediators, they noted that mediators "participate politically by asking questions and making summaries. Their questions bring the focus to one particular event sequence (plot), or particular story logic (theme), and/or adopt the character positions advanced by one disputant *about* another (character)."[324] In addition to mediator actions, "the structure of the mediation session itself contributes to allowing one story to set the semantic and moral grounds on which discussion and dialogue can take place."[325]

Cobb and Rifkin contend that in an effort to reduce adversarialness, mediators explore emotions, interests, fears, hopes, and needs which "obscure[] the role of discourse in the session; the mediators cannot witness their own role in the creation of alternative stories, nor can they address the colonization of one story by another."[326] The end result is that mediators contribute "to the marginalization and delegitimization of disputants."[327] For Cobb and Rifkin,

> [n]eutrality becomes a practice in *discourse*, specifically, the management of persons' positions in stories, the intervention in the associated interactional patterns between stories, and the construction of alternative stories. These processes require that mediators participate by shaping problems in ways that provide all speakers not only an opportunity to tell their story but a discursive opportunity to tell a story that does not contribute to their own delegitimization or marginalization (as is necessarily the case whenever one party disputes or contests a story in which the person is negatively positioned).[328]

Drawing on the work of Cobb and Rifkin, Isabelle Gunning describes mediation as the interaction of narratives in which the parties compete over definitions, moral positioning, and descriptions

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324. *Id.* at 54.
325. *Id.* at 56.
326. *Id.* at 59–60. Cobb and Rifkin "recast ideology in mediation to encompass those discursive practices that privilege one story over another, that legitimize one speaker over another, that reduce any speaker's access to the storytelling process." *Id.* at 51 (citing Stuart Hall, *Signification, Representation, Ideology*: *Althusser and the Post-Structuralist Debates*, 2 CRITICAL STUD. IN MASS COMM. 91 (1985)).
327. *Id.* at 60.
328. *Id.* at 62.

of social relations.[329] "[T]he process of story-telling or narratives, while it has its positive aspects, may also be at the heart of the problem of bias in mediation."[330] Conversational practice is such that the first, or "primary," narrative sets the sequential and interpretive framework, and subsequent narratives are constructed in relation to that primary narrative.[331] Gunning cautions that speakers draw from the history and norms of the larger society, and when they draw on "bits and pieces of larger cultural myths" during the mediation process, "they must choose some relevant socially constructed category for themselves and others."[332] "[T]he cultural myths surrounding identity groups involving disadvantaged group members are often both negative and purely based upon derogatory conjecture and assumptions about group members."[333]

To heed these caveats about discursive practices, mediators should be extremely careful about making broad assumptions regarding a party's "culture"; "the problem with identifying 'cultural competence' as a form of neutrality is that it downplays the very real choice that mediators make in identifying 'culture.'"[334] In domestic mediations involving persons of color, generalizations about a disputant's cultural orientation based on race, ethnicity, or national origin may reflect stereotypical thinking, be over-inclusive, and be insulting to the party.[335] Cynthia Savage argues that "the common approach of defining 'culture' as being synonymous with one facet of

329. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 68.

330. *Id.*

331. *Id.* at 68–69.

332. *Id.* at 70.

333. *Id.* at 72.

334. Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1757 (1997) (commenting on a mediation involving a Vietnamese couple and Canadian mediators where "the problematic and unspoken assumption about 'neutrality' and 'cultural competence' is that the only relevant culture is Vietnamese culture").

335. For example, a statement that "blacks might respond to the mediation context by being more expressive, using intense language as a means of communicating sincerity, or remaining fairly distant from the [white] mediator, which may increase the level of biased information coming from the disputing [black] couple" fails to account for vast differences among African Americans as individuals. *See* William A. Donohue, *Ethnicity and Mediation*, *in* COMMUNICATION, CULTURE, AND ORGANIZATIONAL PROCESSES 134, 147 (William B. Gudykunst et al. eds., 1985).

cultural identity, such as race, ethnicity, or gender, is a red herring which diverts attention from the search for a more accurate and constructive approach to exploring the impact of cultural diversity on mediation."[336] Conflating culture with ethnicity may perpetuate stereotypes and ignore subcultures that contribute to an individual's cultural identity.[337]

References to culture are particularly tricky when it comes to Asian Americans who are often mistakenly thought of as natives of Asian countries instead of U.S.-born citizens. Mia Tuan's study of the "Asian ethnic experience" indicates that third- and fourth-generation Asian Americans are generally highly assimilated to white, middle-class American mainstream cultural styles and values and do not retain Chinese or Japanese cultural traditions except for commemorative events.[338] Despite this, "Asian ethnics face societal expectations to *be ethnic* since others assume they should be closer to their ethnic roots than to their American ones."[339]

Gunning exhorts us to explore cultural myths regarding disadvantaged group members in mediation through techniques such as "race-switching," or changing the races of the parties in a case study.[340] In one example, she changes the race of one character from white to Asian. In so doing, she challenges us to contend with "parts of the pre-existing narrative legitimized by the larger society, the myth that they are the 'model minority'."[341] To prevent these cultural myths from contributing to or bolstering the primary narrative, Gunning contends that mediators must "recognize that some of the cultural myths at work in the mediation process are drawn from negative taboos relating to disadvantaged groups."[342] Gunning

336. Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 271 (1996) (proposing a "value orientation" framework as a useful way to explore cultural diversity in mediation).

337. *Id.* at 273.

338. MIA TUAN, FOREVER FOREIGNERS OR HONORARY WHITES?: THE ASIAN ETHNIC EXPERIENCE TODAY 155 (1998).

339. *Id*. at 156.

340. Gunning, *supra* note 329, at 74.

341. *Id.* at 75. Gunning observes, "Specifically, Asian-Americans of various national origins face the cultural myth of immutable foreignness . . . . There is always the question with 'foreigners' that they don't really understand 'our ways.'" *Id*.

342. *Id.* at 80.

prescribes intervention to combat negative cultural myths. Her focus on mediator intervention is a situation in which the parties interject cultural myths, urging that the mediator "may also need to flag for the parties that that is what is occurring."[343] Turning the mirror around, I urge constant vigilance and self-correction for instances when the mediator is drawing on cultural myths.

When we re-examine the Michigan mediation, we see a discursive example that disfavored and marginalized the homeowners. After the business owner presented his opening remarks and framed the dispute as a breach of contract case, the mediators questioned him in a way that reinforced his narrative. The homeowners tried to defend themselves by countering the allegation that they failed to comprehend or follow his instructions by shutting the basement door. By asking for the return of the first payment, the homeowners appeared unreasonable. If the mediators had invited the homeowners to go first in the joint session or had refrained from bolstering the carpet cleaner's narrative, the matter may have been framed as a contractor overselling his abilities and overcharging the customers.

We can imagine how the Asian American negative cultural myth of "immutable foreignness" may have bled into the Michigan mediation. In the mediators' encounter with the homeowners, the "simultaneous operation of excitatory and inhibitory cognitive processes" may have determined one category to be more dominant, and the other more suppressed.[344] If the mediators perceive the homeowners' racial category as dominant, xenophobic and race-based biases may have operated against the couple.

3. Reflexivity and Role-Playing

Bagshaw, Cobb, and Rifkin, among others, advocate reflexivity in mediation practice as a check on prejudiced subjectivity. Susan Douglas urges mediators to abandon attempts at objectivity and to instead examine one's own experiences within the mediation.[345]

343. *Id.*

344. C. Neil Macrae et al., *The Dissection of Selection in Person Perception: Inhibitory Processes in Social Stereotyping*, 69 J. PERSONALITY & SOC. PSYCHOL. 397, 404 (1995).

345. Douglas, *supra* note 35, at 62.

Douglas endorses reflexivity as "a useful means of conceptualising both the impact of mediator predispositions and the co-construction of meaning within the encounter."[346] Viewed this way, "reflexivity represents a rejection of mediator neutrality (in any absolute sense), an acknowledgement of the impact of mediator subjectivity and a means of addressing that subjectivity in practice."[347]

Echoing these views, Linda Mulcahy claims that her study of community mediation validates a reflexive approach in mediation.[348] Her empirical research examined one of the largest community organizations in the United Kingdom.[349] The mediators in her study admitted to having difficulty ignoring personal bias and their subjective evaluations of the merit of particular claims and parties.[350] Acknowledging these feelings, the co-mediators had debriefing sessions to discuss how their personal assessments impacted option development and process management.[351]

The Michigan mediators should have adopted reflexivity as an anti-bias method of self-assessment throughout the session. After reading the file in the small claims case, the mediators could have discussed initial reactions, assumptions, and potential issues of bias during their preparatory caucus. After the joint session, the mediators would have benefitted from a co-mediator caucus to exchange views about the parties and their respective demands. They could have made appropriate adjustments in the individual sessions to counter non-neutral thoughts and behavior. Similarly, a reflexive co-mediator discussion after each individual session may have enabled the pair to steer the mediation in a direction that was more beneficial for the parties. Even if the parties ultimately reached an impasse, they may have gained a fuller understanding of the situation and of one another's perspectives and principles. By diluting the homeowners'

346. *Id.* at 63 ("Reflexivity as mutual collaboration highlights the active role of the mediator in mutually reflexive dialogue . . . . Unavoidably, the mediator, rather than being a neutral facilitator of conversations, is an active coauthor in the construction of dispute narratives.").

347. *Id.* at 65.

348. Mulcahy, *supra* note 162, at 517.

349. *Id.* at 515.

350. *Id.* at 516.

351. *Id.* at 517.

narrative and failing to explore a range of options, the mediators legitimized the business owner's version of entitlement.

Through the use of various practices, we attempt to incorporate discursive and reflective theories in a law school mediation clinic. As Cobb, Rifkin, and Gunning make apparent, the party who speaks first has the advantage of painting a subjective picture of the circumstances underlying the dispute.[352] Student-mediators are eager to ask a litany of "fact-gathering" questions (to the point of interrogation) to the first speaker before listening to the second speaker's narrative. By doing so, students add their own "spin" and make assumptions that may be tainted by their own experiences and expectations. Thus, they may re-characterize or validate the first speaker's presentation through their own additions. Rather than presenting her own "story," the second speaker is reduced to opposing a pre-determined version embellished by the mediators. This can frustrate and incite defensiveness in the second speaker who has been asked to wait her turn and not interrupt.

Recognizing this dynamic, students are directed to refrain from asking questions until both parties have had the opportunity to supply their narratives in their own words and styles. In what may be an atypical practice, we refrain from summarizing and reframing the first person's statements before the second person speaks. While there is always some perceived favoritism that one party goes first, withholding questions and postponing summarizing or reframing lessens the likelihood that the second speaker's narrative will be molded by others.

It is also important to model lack of bias in selecting the party who speaks first. Asking the parties who would like to go first may be perceived as rewarding one party over the other (the more assertive party or the one closest to the mediator, for example). Mediators evidence external neutrality by being transparent in decision-making. Parties should be told why and how the mediators determined the order of presentations (for example, a random method of selection, such as by alphabetical order or coin toss).

352. Gunning, *supra* note 329, at 68–70.

Reflective learning has been described as "an intentional social process, where context and experience are acknowledged, in which learners are active individuals, wholly present, engaging with others, open to challenge, and the outcome involves transformation as well as improvement for both individuals and their environment."[353] Like many clinical legal educators, I have included role-playing exercises as a reflective teaching opportunity in the mediation clinic for decades.[354] Role-plays contain the essential elements of learning and reflection: (1) "a genuine situation of experience"; (2) a "genuine problem in that situation"; (3) "information and observation about the situation"; (4) "suggested solutions for which the student [is] responsible"; and (5) "opportunity . . . to test ideas by application."[355] By practicing in an academic setting, students will (hopefully) transfer the lessons to their actual cases.

My mediation clinic students participate in five increasingly difficult two-hour role-plays as parties, co-mediators, and observers.[356] In addition to helping the students to improve their mediation skills, the role-plays enable the students to develop empathy and view the process from the perspective of the disputants. Students are encouraged to experiment and put ideas into action. During the role-plays, mediators explore their decision-making processes, assess progress, and consider their reactions to options. Mediators are asked to express how their thoughts and feelings motivated them and evaluate to what extent they pushed options.[357] During class discussion, we deconstruct the mediation role-play and

353. Samantha Hardy, *Teaching Mediation as Reflective Practice*, 25 NEGOTIATION J. 385, 389 (2009) (quoting ANNE BROCKBANK & IAN MCGILL, FACILITATING REFLECTIVE LEARNING IN HIGHER EDUCATION 36 (2d ed. 2007)).

354. For a critique of role-plays as a learning activity, see Nadja Alexander & Michelle LaBaron, *Death of the Role-Play*, *in* RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 179, 179–97 (Christopher Honeyman et al. eds., 2009).

355. Hardy, *supra* note 353, at 390 (citing BROCKBANK & MCGILL, *supra* note 353, at 23).

356. By this time, they have also viewed a small claims mediation at the courthouse, observed an in-class mock mediation demonstration by experienced mediators, and engaged in skills development exercises.

357. Hardy, *supra* note 353, at 397 (quoting MICHAEL D. LANG & ALISON TAYLOR, THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE 54 (2000)) ("Elicitive questioning" presses "mediators to uncover for themselves what was successful or unsuccessful, and to identify the reasoning behind their strategies and approaches, and . . . consider the impact of their interventions on the disputants.").

all students offer oral comments. Both the students and the instructors also complete written critiques.[358] The purpose of feedback is not merely to give mediators a "360 degree" evaluation but also to allow the students and instructors to engage in collective problem-solving and to examine assumptions and reactions.[359] We record the role-plays and make them available for students to view on their laptops. By watching their performances and the reactions of the parties, student mediators can see or contest the validity of the feedback that was offered. They can also see if they were guilty of behavior that reflected bias or favoritism, such as facial expressions, body language, or blinking.

Mediation teachers and trainers should answer Gunning's call for more deliberate confrontation of racial stereotypes and assumptions in training.[360] With that goal in mind, I designed a role-play simulation based on community tensions in Washington, D.C., for use in my mediation course.[361] It is a composite of disputes arising out of years of ongoing tension between Korean American shopkeepers and African American customers.[362] I have varied my approach over time. I initially played the shopkeeper and later opted to recruit volunteers from student groups to play the disputants. For

358. Students complete evaluations as mediators, parties, and observers.

359. Hardy, *supra* note 353, at 393 (quoting BROCKBANK & MCGILL, *supra* note 353, at 5). In this way, "learners and teacher engage and work together so that they jointly construct meaning and knowledge from the material." *Id.*

360. Gunning, *supra* note 329, at 86–88.

361. In fact, as a participant at a conference hosted by the UCLA Center for Study and Resolution of Interracial/Interethnic Conflict, March 28–30, 1996, Professor Gunning offered constructive comments to refine the role-play. For an analysis of Black-Korean tension, see Kyeyoung Park, *Use and Abuse of Race and Culture: Black-Korean Tension in America*, *in* THE CONFLICT AND CULTURE READER 152, 152–62 (Pat K. Chew ed., 2001).

362. *See, e.g.*, Michael A. Fletcher, *Asian-Owned Carryout is Focus of Rally: Small Group Protests Nonblack Business*, WASH. POST, Oct. 19, 1996, at D4 (reporting on African American protestors engaged in a protest rally outside of an Asian-American restaurant in D.C.); *see also Mayor's Proposed Fiscal Year 2010 Budget: Before the Committee on Aging and Community Affairs*, Apr. 24, 2009 (statement of Francey Youngberg, Chair, DC Fair Access Coalition) ("According to the *Washington Post*, two-thirds of all business licenses are owned by Asian Pacific Americans in the District. D.C. agencies estimate that 60% of corner groceries and 57% of lotteries are sold through Asian-owned stores.") (copy on file with author). According to the 2000 U.S. Census, roughly 60 percent of D.C. residents are black. *District of Columbia-DP-1. Profile of General Demographic Characteristics: 2000*, CENSUS.GOV, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US11&-qr_name=DEC_2000_SF1_U_DP1&ds_name (last visited Nov. 8, 2010).

the past few years, I have shown a videotape demonstration; this technique has the advantage of making the discussion about process dynamics and co-mediator choices easier. The demonstration allows students to discuss stereotypes, prejudice, and bias in a controlled and confidential setting. We also use other role-plays and scenarios that involve racial or gender dynamics.

4. Co-Mediation and Race-Matching

Co-mediation offers a number of advantages for advancing external neutrality.[363] We use a co-mediation model exclusively in our community program.[364] Having "two heads" allows the co-mediator team to engage in an explicit discussion of how "neutrally" they are operating within a particular mediation context.[365] In co-mediator caucuses, the team can engage in active reflection to assess the discursive dialogues, interactions with and between disputants, and inclinations to favor or disfavor options. Rather than rushing to an agreement on approach and actions, co-mediators can play "devil's advocate" to affirmatively critique their behavior and choices. A co-mediator provides the eyes and ears for peer evaluation. Although mediators may be reluctant to offer constructive criticism (since it is not anonymous), a mutual co-mediator evaluation can incorporate elements of debriefing, reflection, positive feedback, and suggestions for future improvement. These co-mediator assessments would provide a useful supplement to party evaluations, which are employed by most mediation programs. Peer evaluation of mediators could be accomplished in other ways. For example, the D.C. Superior Court Multi-Door Dispute Resolution Branch uses a one-way mirror so evaluators can observe mediations without being seen by the participants.

363. Gunning, *supra* note 329, at 88–89 (citing the benefits of using mediator teams to combat negative cultural myths).

364. Students in my Consumer Mediation Clinic are sole mediators of consumer-business disputes, whereas students in my Community Dispute Resolution Center Project co-mediate adult misdemeanor, juvenile delinquency, and police-civilian disputes.

365. For good suggestions on making the most of co-mediation, see Lela P. Love & Joseph B. Stulberg, *Practice Guidelines for Co-Mediation: Making Certain That "Two Heads Are Better Than One*," 13 MEDIATION Q. 179 (1996).

Co-mediation also leverages differences in perspectives and experiences when you have mediators of different ethnicities, genders, or abilities.[366] This can provide a check on biased and discriminatory mediator actions. For example, a female mediator might help her male partner avoid gendered comments and assumptions. In some mediation contexts, pairing mediators is done deliberately and strategically to create complementary duos.[367] Advocates of "race-matching" co-mediator teams to mirror the racial or ethnic distribution of the parties cite several benefits: symbolic fairness, increased likelihood that mediators and parties will have shared experiences, modeling equality, and broader interpretive frameworks.[368]

Clark Freshman points out several dangers of matching parties with mediators based on common traits or affiliations.[369] "First, psychologists have found it notoriously difficult to predict precisely how individuals, be they mediators or not, will see some as 'we' and others as 'they.'"[370] Second, there may be biases within individual communities. "Leading psychologists of discrimination suggest that, as much as we think we know how others see themselves, individuals may divide the world in many different ways."[371] He adds that "[a] reciprocal problem may arise when some who identify strongly with a community have negative views of those who they feel have betrayed their 'true' identity by trying to assimilate or fit some other community instead."[372] Another problem with matching mediators is that the practice may exacerbate discrimination outside the community.[373] This operates in two ways: positive contact with

366. Gunning, *supra* note 329, at 88–89.

367. For example, in emotional family disputes, a team containing a lawyer and therapeutic counselor might be beneficial. In a heterosexual divorce, a male and female mediator team might be used. *Id.* at 88.

368. *Id.* at 89.

369. Clark Freshman, *The Promise and Perils of "Our" Justice: Psychological, Critical and Economic Perspectives on Communities and Prejudices in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 1, 10–11 (2004).

370. *Id.* at 10.

371. *Id.* at 11. Freshman uses the example of relatively assimilated Jews who "may often express more negative views about those not assimilated than even the most inside group." *Id.* at 12.

372. *Id.*

373. *Id.*

dissimilar persons often reduces prejudice, and unconscious bias against the group may become less prevalent.[374]

Furthermore, race-matching risks essentialism and reflects reductionist assumptions about individuals.[375] Amartya Sen describes a kind of reductionism that he refers to as "singular affiliation."[376] This reductionism "takes the form of assuming that any person preeminently belongs, for all practical purposes, to one collectivity only—no more and no less. Of course, we do know in fact that any real human being belongs to many groups, through birth, associations, and alliances."[377] Individuals should be able to choose which affiliations are more relevant or important in any social context and not have others impose that on them; political affiliation or religion, for example, may trump race.[378] Race-matching the mediators for parties of Asian descent ignores ethnic, national, regional, political, religious, socio-economic, and other differences that may be more relevant or important in a given situation than shared racial category.[379]

Finally, a study of race-matching revealed that "[w]ith regard to mediation outcomes . . . it is not so clear that creating racial matches between mediation participants and mediators is as important as we have thought in the past."[380] A multiyear research project in Maryland community mediation centers determined that

> when the mediator is not of the same race as either participant, participants believe that they have been heard by the mediator. In contrast, when the mediator's race matches that of the opposing party, the participant is less likely to feel that the

374. *Id.* at 12–13. Freshman also notes that matching could "trigger the unconscious stereotype that 'they' are clannish." *Id.* at 13. Moreover, "even if one adopts the less separatist notion of teaching cultural 'sensitivity' to mediators . . . the 'sensitivity' may harden the way mediators automatically divide the world into group terms." *Id*.

375. *See* Bagshaw, *supra* note 312, at 139 (discussing the dangers of essentialism and assigning possibly irrelevant traits to a person's self-image).

376. AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY 20 (2006).

377. *Id.*

378. *Id.* at 29–32.

379. Bagshaw, *supra* note 312, at 139.

380. Lorig Charkoudian & Ellen Kabcenell Wayne, *Does It Matter If My Mediator Looks Like Me? The Impact of Racially Matching Participants and Mediators*, DISP. RESOL. MAG., Spring 2009, at 22, 24.

> mediator listened to her. A similar negative effect occurs with regard to participants' sense of control over the conflict situation. This sense of control does not change when the mediators' race is different from both participants, but decreases from the beginning to the end of the mediation when the mediator's race matches only that of the opposing party. Again, it appears less important to have a mediator who 'looks like me' than it is to avoid having a mediator who 'looks like' the other participant and no mediator who 'looks like me.'[381]

The researchers suggest that their finding supports "the value of co-mediation, which creates more options for addressing racial balance amongst participants and mediators."[382]

5. Transformative Mediation and Procedural Justice

Transformative mediation and procedural justice theories suggest that external neutrality would be improved through a process that ensures a high degree of control for the disputants. Joseph Folger and Robert Baruch Bush postulate that neutrality is unachievable because the mediator's interests become part of the problem-solving endeavor; they propose that their transformative model ensures party self-determination.[383] They contend that a problem-solving mediation, which focuses on reaching agreement, "leads mediators to be directive in shaping both the problems and the solutions, and they wind up influencing the outcome of mediations in favor of settlement generally and in favor of terms of settlement that comport with their views of fairness, optimality, and so forth."[384] In transformative mediation, "[n]eutrality means that the mediator's only interest is the interest in using his or her influence to make sure that *the parties maintain control* of decisions about outcomes."[385]

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381. *Id.* at 24.

382. *Id.*

383. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 22–26, 105 (rev. ed. 2005).

384. *Id.* at 104.

385. *Id.* at 105. Astor also endorses an approach that emphasizes self-determination, party empowerment, and collaboration between the parties. Astor, *supra* note 11, at 78.

Mary Beth Howe and Robert Fiala analyzed randomly assigned small claims court mediation cases in New Mexico to evaluate factors affecting disputant satisfaction with mediation.[386] Data from the study show that certain factors in the mediator's control are strongly associated with party satisfaction. For example, party satisfaction increases when "the mediator appears neutral, is in control of the mediation, and allows participants to feel they are able to tell their story. Greater participant integration, less anger and hostility, and greater power in mediation are also linked to satisfaction."[387] Structural factors associated with social class, gender, and ethnicity showed "few and inconsistent links to satisfaction."[388]

In her exegesis of procedural justice literature, Rebecca Hollander-Blumoff identifies four dominant factors in assessments of process fairness: "opportunity for voice, courteous and respectful treatment, trustworthiness of the decision-maker, and neutrality of the decision-maker."[389] Procedural justice legitimizes the mediation process and increases the likelihood that the outcome will be accepted by the participants. In their well-known compilation of studies of dispute resolution systems, John Thibaut and Laurens Walker concluded that "the maintenance of a high degree of control . . . by disputants and, at the same time, . . . a high degree of regulated contentiousness between the disputants themselves" are important properties for a just procedure.[390] Their research revealed "that a procedure that limits third-party control, thus allocating the preponderance of control to the disputants, constitutes a just procedure."[391]

In short, we can draw upon multiple lessons to check external neutrality. Neutrality is promoted by managing the mediation process to maintain even-handed, respectful treatment of disputants and by

386. Mary Beth Howe & Robert Fiala, *Process Matters: Disputant Satisfaction in Mediated Civil Cases*, 29 JUST. SYS. J. 85 (2008).

387. *Id.* at 93.

388. *Id*. at 94.

389. Rebecca Hollander-Blumoff, The Theoretical and Empirical Case for Procedural Justice in Negotiation 9 (Sept. 9, 2009) (unpublished manuscript) (on file with author).

390. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 119 (1975).

391. *Id*. at 118.

maximizing party control. In addition, mediators can attend to external neutrality concerns by: being sensitive to language usage; valuing individual party narratives; ensuring that disputants "tell their stories" in their own words and style; self-policing for essentialist assumptions; and monitoring for biased party interventions. Finally, adopting a reflexive approach that is deliberatively self-conscious; using co-mediator teams that leverage differences and similarities; and employing instructional methods that require mediators to grapple with racial and other difficult issues would further reduce the potential for mediator partiality and bias.

B. Internal Neutrality

Having identified steps a mediator may undertake to address external neutrality issues, we now look inward to consider what mediators can do to minimize the operation of biased mental processes that are automatic and not a part of our conscious awareness. Research shows that suppression of stereotyped associations and engagement of non-prejudiced responses requires "intention, attention, and effort."[392] Fortunately, mediators have the power and ability to improve internal neutrality measures to reduce bias and favoritism in mediation. Practical suggestions include setting goals, planning deliberate actions to reduce biased responses, increasing diversity of mediator contacts, applying mindfulness techniques, and developing a habit of practices that remove bias.

1. Awareness, Motivation, and Action

Awareness of bias is critical for mental decontamination success.[393] As one may expect, the first step toward internal neutrality is to acknowledge the existence of unconscious mediator biases and

392. Armour, *supra* note 144, at 24 (quoting Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 16 (1989)).

393. Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 866 (2001) (citing Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, PSYCHOL. BULL. 117, 117–42 (1994)).

prejudices. "[I]n order to counter otherwise automatic behavior, one must accept the existence of the problem in the first place. . . . We must be both aware of the bias and motivated to counter it. If we instead trust our own explicit self-reports about bias—namely, that we have none—we will have no motivation to self-correct."[394] Requiring mediators to take the IAT for an implicit bias "reality check" could potentially open their eyes to their own egalitarian shortcomings. I ask my students to do such an exercise early in the semester.[395] Although it is voluntary, I request that they take one of the implicit association tests and complete a questionnaire anonymously.[396] During the semester, we reflect on and refer back to the experience as it relates to actual cases.

When confronted with their own implicit attitudes and stereotypes, mediators can work to counter the operation of bias. With increased awareness of implicit bias and the goals and motivation to self-correct, mediators can begin to tackle the problem of unintentional unequal treatment of parties. Researchers found that merely knowing one's prejudice level was not sufficient to respond in a less prejudiced manner.[397] People who are externally motivated (wanting to appear non-prejudiced to other people) to reduce prejudice-related reactions are more likely to adjust a prejudiced act based on the social context they are in, while those who are only internally motivated (appearing non-prejudiced to oneself) may not be so affected by social pressures.[398] It is possible "that external motivation precedes internal motivation and that to initiate change, the social climate must discourage expressions of prejudice."[399] The

394. Kang, *supra* note 136, at 1529.

395. I got this idea from Gary Blasi, who posted an e-mail on the clinical list serve on August 1, 2007, in response to Gail Silverstein's inquiry about incorporating the IAT in clinic courses. Blasi explained that he has used the IAT, but he always used it in conjunction with reading and discussion of the science behind the IAT and the implication for lawyers." E-Mail from Gary Blasi, Professor of Law, UCLA Sch. of Law, to Gail Silverstein, Clinical Att'y, Civil Justice Ctr., Univ. of Cal. Hastings Coll. of Law (Aug. 1, 2007, 12:21:53 PST) (on file with author).

396. The simple questionnaire asks for their reactions and reflections on the test experience and their "scores."

397. E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 826 (1998).

398. *Id.* at 825.

399. *Id.* at 827.

researchers observed that "although discouraging overtly prejudiced responses may be desirable, it appears that internal motivation may be necessary to sustain efforts to respond without prejudice over time, particularly when no immediate external standards are salient."[400]

Recent studies show that while stereotypes may be automatically *activated*, as conscious actors we may be able to affect the *application* of those stereotypes in our interactions, judgments, and decisions. Irene Blair and Mahzarin Banaji conducted a series of four experiments to observe the automatic activation of gender stereotypes and to assess conditions under which stereotype priming may be moderated.[401] They distinguish between stereotype activation (categorization) and stereotype application as sequential steps in the process. They believe that stereotype activation is an automatic process, whereas stereotype application is a controlled, or at least a controllable, process.[402] Their experiments revealed that even with the "strong and ubiquitous nature of stereotype priming, . . . such effects may be moderated under particular conditions. . . . [s]tereotype priming can be eliminated when perceivers have an intention to process counterstereotypic information and sufficient cognitive resources are available."[403]

In another experiment on reducing the application of stereotypes, Margo Monteith observed that low prejudiced individuals experienced prejudice-related discrepancies (i.e., a prejudiced response such as feeling uncomfortable sitting next to a gay male on a bus) even though they believed the response was inappropriate.[404] She investigated whether people can inhibit prejudiced responses and

400. *Id.* (citing David P. Ausubel, *Relationships Between Shame and Guilt in the Socializing Process*, 62 PSYCHOL. REV. 378, 378–90 (1955)). Later studies determined the importance of internal motivation, finding that the measure of implicit bias was lowest among individuals with high levels of internal motivation and low level of external motivation. *See* Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835 (2002).

401. Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142 (1996).

402. *Id.* at 1143.

403. *Id.* at 1159.

404. Margo J. Monteith, *Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts*, 65 J. PERSONALITY & SOC. PSYCHOL. 469, 469 (1993).

respond on the basis of personal non-prejudiced beliefs.[405] She found that the discrepancy experience produced a negative self-directed effect which increased motivation for discrepancy reduction.[406] Increased attention to discrepancy-relevant information and personal discrepancy experiences may help low prejudiced individuals exert control over their biased responses.[407] Importantly, she found that "prejudice-related discrepancy experience enabled the low prejudiced subjects to be more effective at inhibiting prejudiced responses at a later time."[408]

In addition to recognizing implicit bias and having adequate motivation to reduce it, mediators must call upon cognitive control processes. Blair and Banaji's experiments examined the automatic processes underlying stereotyping and the role of intention and cognitive resources in moderating the influence of such processes on one's judgment.[409] The results suggest that people can control or eliminate the effect of stereotypes on their judgments if they have the intention to do so and their cognitive resources are not over-constrained.[410] After reviewing numerous studies, Blair discovered that automatic stereotypes are influenced by social and self-motives, specific strategies, the perceiver's focus of attention, and the configuration of stimulus cues.[411] In a study by Bruce Bartholow and colleagues, participants drinking alcohol showed significantly impaired regulative cognitive control and diminished ability to inhibit race-biased responses, suggesting that controlling racial bias can be a function of implementing cognitive control processes.[412]

With the requisite motivation and cognitive resources to draw upon, mediators are ready to operationalize a bias reduction plan. Gollwitzer, Sayer, and McCulloch propose "implementation-

405. *Id.* at 472.
406. *Id.* at 477.
407. *Id.* (citing JEFFREY A. GRAY, THE NEUROPSYCHOLOGY OF ANXIETY: AN ENQUIRY INTO THE FUNCTIONS OF THE SEPTOHIPPOCAMPAL SYSTEM (1982)).
408. *Id.* at 482.
409. Blair & Banaji, *supra* note 401, at 1142.
410. *Id.* at 1159.
411. Blair, *supra* note 85, at 242.
412. Bruce D. Bartholow et al., *Stereotype Activation and Control of Race Bias: Cognitive Control of Inhibition and Its Impairment by Alcohol*, 90 J. PERSONALITY & SOC. PSYCHOL. 272 (2006).

intention" as an approach to situations that may trigger implicit bias responses.[413] Goal-intention is expressed as "I intend to reach X goal."[414] Goal-directed behavior is important, but might not become part of everyday routine. "As a substitute, people can resort to forming implementation-intentions that strategically place the intended goal-directed behavior under direct situational control."[415] Implementation-intention is expressed as "if X, then I will do Y."[416] Implementation intentions are expressed as plans to reach the goal.[417] Implementation intention studies have shown promising results: participants were generally more likely to attain their goals, were more resistant to distracters, and showed less stereotype activation.[418]

Applying these strategies to mediation clinics and programs, instructors and administrators should articulate explicit program goals and guidelines about expected mediator non-prejudiced behavior and incentivize actions to meet those goals. In one example of an interesting innovation, the American Bar Association (ABA) has offered a continuing legal education program on "Creating a Culture of Inclusion" and made available "Elimination of Bias Credit."[419] In lieu of the typical pro forma "diversity" segment in mediation trainings, teachers and trainers should consider a more robust anti-prejudice curriculum. Gunning advocates inclusion of "misperceptions of different identity groups as part of the mediation training. These discussions and explorations would and should be a

413. Peter M. Gollwitzer et al., *The Control of the Unwanted*, *in* THE NEW UNCONSCIOUS 485, 486–87 (Ran R. Hassin et al. eds., 2005).

414. *Id.* at 487.

415. *Id.* at 486.

416. *Id.* at 486–87.

417. Gollwitzer and his colleagues use this example:

> When participants had furnished their goal intentions of judging the elderly in a nonstereotypical manner with the respective implementation intention ("If I see an old person, then I will tell myself: Don't stereotype!"), the typical automatic activation of stereotypical beliefs . . . was even reversed. Similarly, when participants had the goal intention to judge female job applicants in a nonstereotypical manner and furnished an implementation intention to ignore a certain applicant's gender, no automatic activation of stereotypical beliefs about the female was observed.

Id. at 495.

418. *Id.* at 496.

419. Am. Bar Ass'n Ctr. for Continuing Legal Educ., *Creating a Culture of Inclusion*, AM. BAR ASS'N, http://www.abanet.org/cle/programs/t10cci1.html (last visited Nov. 8, 2010).

part of the basic mediation training not relegated as they so often are to some advanced form of training on 'cross-cultural mediation' or 'how to deal with power-imbalances'."[420] Mandatory continuing mediation education for mediators practicing in particular programs or jurisdictions could include "elimination of bias" credits and certification of anti-bias coursework.

In addition to the normative (external) incentive, mediators must set their own personal (internal) goals of egalitarianism. A general aspiration to be "neutral" is insufficiently specific. To achieve more fairness in mediation, Burns recommends that mediators affirm that their goal is to be fair and non-discriminatory.[421] She also urges mediators to monitor how they make distinctions and to assume they are biased in favor of members of their own group and against persons in other groups.[422] Internally motivated mediators should develop their own "intention-implementation plans" for goal attainment and tailor them for specific mediation settings. As part of pre-mediation preparation, mediators should consider potential bias pitfalls that might arise in interracial disputes and develop reaction plans to avoid or escape the traps.

2. Salience, Exposure, and Practice

Racially discriminatory behavior may be reduced more effectively when racial issues are made salient rather than ignored or obscured.[423] Research shows that focusing attention on the source of a possible implicit effect that interferes with judgment reduces or eliminates (or even reverses) the interference.[424] For example, the false fame effect was reduced when sufficient attention was focused on the initial list of non-famous names so the subjects would recognize non-famous names as having been encountered earlier in

420. Gunning, *supra* note 329, at 87.

421. Burns, *supra* note 309, at 44.

422. *Id.* at 45. "[E]ven if one somehow has been consciously oblivious to the presence of key social differences, failing to consider the effects of social difference is the strategy most likely to perpetuate historic patterns of bias." *Id*. at 50.

423. Wang, *supra* note 210, at 1038 (citing 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, 220–21 (2001)).

424. Greenwald & Banaji, *supra* note 67, at 18.

the experiment.[425] "Drawing social category information into conscious awareness allows mental (cognitive and motivational) resources to overrule the consciously unwanted but unconsciously operative response."[426]

Taking a similar view, Jody Armour agrees that decision-makers would be more likely to become aware of their implicit biases, confront them, and hopefully counteract their effects when such references are explicitly made.[427] Citing the distinction between a habit (an automatic process done many times) and a decision (a conscious action), Armour proposes that "for a person who rejects the stereotype to avoid stereotype-congruent [behavior] responses to blacks (i.e, to avoid falling into a bad habit), she must intentionally inhibit the automatically activated stereotype and activate her newer personal belief structure."[428] Since people may act on stereotypes automatically and without knowledge, they must actively monitor and inhibit the automatic stereotype and replace it with a personal egalitarian belief.[429] "[U]nless a low-prejudiced person consciously

425. *Id.* (citing Larry L. Jacoby et. al., *Becoming Famous Overnight: Limits on the Ability to Avoid Unconscious Influences of the Past*, 56 J. PERSONALITY & SOC. PSYCHOL. 326 (1989)).

426. Banaji & Greenwald, *supra* note 68, at 70. Some studies, however, imply that stereotypes are more difficult to suppress through controlled processes. In an experiment that required subjects to make a judgment of criminality using names that vary racially (black, white, Asian), researchers found race bias was difficult to remove even when subjects were alerted that racist individuals are more likely to identify black compared to white names. *See* Banaji & Dasgupta, *supra* note 133, at 162. Another study showed that participants "explicitly instructed to *avoid using race* ironically performed worse (although not in a statistically significant way) than participants told nothing at all." Kang, *supra* note 136, at 1529 (citing B. Keith Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 384, 390–91 (2002)). Researchers have also observed an effect called "stereotype rebounding." When people attempt to repress stereotypic thoughts, these thoughts may subsequently reappear with even greater insistence and be even more difficult to ignore. C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994).

Thought suppression operates by searching for a distracter to replace the unwanted thought; however, when cognitive resources are limited, the ability to search for a distracter is precluded and the unwanted thought becomes hyperaccessible. *Id.* at 809 (citing Daniel M. Wegner & Ralph Erber, *The Hyperaccessibility of Suppressed Thoughts*, 63 J. PERSONALITY & SOC. PSYCHOL. 903, 903–12 (1992)).

427. Armour, *supra* note 144, at 13.

428. *Id.* at 24.

429. *Id.* at 23–24.

monitors and inhibits the activation of a stereotype in the presence of a member (or symbolic equivalent) of a stereotyped group, she may unintentionally fall into the discrimination habit."[430] Importing this model to the mediation context, mediators must break the habit of stereotype-consistent behavior by making conscious decisions to act in accordance with their non-discriminatory beliefs.

We use mediation debriefings, case rounds, and journals to give students in the mediation clinic space within which to contemplate and comment on their reactions to situations in which prejudiced behavior and assumptions could, or did, surface. More importantly, students identify lessons they can take into future mediations. The practice of journaling, which is popular in law school clinics, is a learning device that would benefit veterans as well as new mediators. This type of written reflection could be adapted to court and community settings to encourage mediators to measure adherence to their own egalitarian goals throughout their mediations. Requiring mediators to articulate explicit plans for improvement challenges them to name their practice shortcomings and state personal performance goals and intentions. Administrators of mediation programs should embrace these activities by periodically bringing volunteers and staff together for candid conversations and brainstorming sessions on prejudice reduction strategies. Inexpensive "brown bag" lunch discussions on a regular basis would be a cost- and time-effective way to help mediators take basic steps toward bias reduction.

Implicit social cognition research indicates that bias can be reduced through exposure to individuals who are not like us.[431] This exposure can occur through interpersonal interaction and presentation of images. The "Social Contact Hypothesis" postulates that stereotypes and prejudice can be reduced when people of different social categories have face-to-face interaction under certain conditions.[432] A recent meta-analysis of studies found that intergroup contact correlates negatively with prejudice.[433] Intergroup contact

430. *Id.* at 24.
431. Kang & Banaji, *supra* note 140, at 1101.
432. *Id.*
433. *Id.* at 1102–03.

may actually reduce levels of implicit bias.[434] In one study, white subjects were asked to "take the race IAT and report the number of their close out-group friends: African-Americans in one experiment and Latinos in another. . . . The researchers found negative correlations between the number of interracial friendships and level of implicit bias."[435] Consistent with these findings, the C100 study referenced earlier revealed that "the more prejudiced respondents tend to interact less frequently with Chinese and Asian Americans."[436]

Along similar lines, implicit attitudes may be changed by exposure to positive images.[437] In one study, subjects were shown photos of Martin Luther King Jr. and Denzel Washington as positive Black images.[438] The group reduced implicit bias by more than half and the effect persisted for a full day.[439] In the same manner, counter-typical visualizations caused a decrease in implicit stereotypes in another experiment.[440] In an experiment on explicit and implicit bias against women, direct educational instruction by counter-typical exemplars (female faculty) over one year had significant decreasing effects on IAT scores.[441]

These research findings suggest that mediators may be able to reduce implicit bias through increased exposure to and encounters with positive examples of out-group members. Writing about racial

434. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 981 (2006) ("A significant body of social science evidence supports the conclusion that the presence of population diversity in an environment tends to reduce the level of implicit bias.").

435. Kang & Banaji, *supra* note 140, at 1103 (citing Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. SOC. PSYCHOL. 335, 340, 343 (2004)).

436. COMMITTEE OF 100 & HARRIS INTERACTIVE, *supra* note 262, at 68.

437. 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 (2001).

438. *Id.* at 802.

439. *Id.* at 807; *see also* Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 837 (2001); 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 (2004).

440. Kang & Banaji, *supra* note 140, at 1107 (citing Blair et al., *supra* note 439, at 828–29).

441. *Id.* (citing Dasgupta & Asgari, *supra* note 439, at 651).

issues in mediation, Howard Gadlin decries the lack of diversity in the dispute resolution field and urges greater racial and ethnic integration.[442] Homogeneity among mediator ranks has spurred efforts to increase the numbers of minorities and expand practice opportunities for mediators of color.[443] Employing counter-typical mediation trainers and teachers and enlarging mediator diversity would be rational moves toward implicit bias reduction. Because in-group favoritism makes it hard to reduce prejudice, Carwina Weng notes that mere interaction with other groups is insufficient. Contact in a setting that promotes equality and openness is critical.[444] She lists cooperation, constructive conflict resolution and internalized civic values as elements for building an egalitarian community in which non-discriminatory relationships are fostered.[445]

A diversity training experiment supports Weng's suggestion that prejudice reduction is more successful when interaction is coupled with supporting knowledge and efforts. Researchers found that students enrolled in a prejudice and conflict seminar taught by an African American male professor were able to lower their bias by the end of the semester.[446] Specific data indicated that an "[i]ncreased awareness of discrimination against African Americans and motives to overcome prejudice in oneself" was more correlated with a reduction in explicit bias, while a "positive evaluation of the professor and the prejudice and conflict seminar," making friends with out-group members, and reporting feeling less threatened by out-group members, were more correlated with a reduction in implicit prejudice and stereotyping.[447] A control group taught by an African American professor showed no reduction in prejudice and bias, leading to the conclusion that the presence of an African American

442. Howard Gadlin, *Conflict Resolution, Cultural Differences, and the Culture of Racism*, 10 NEGOTIATION J. 33, 44 (1994).

443. Marvin E. Johnson & Homer C. La Rue, *The Gated Community: Risk Aversion, Race, and the Lack of Diversity in Mediation in the Top Ranks*, DISP. RESOL. MAG., Spring 2009, at 17.

444. Carwina Weng, *Individual and Intergroup Processes to Address Racial Discrimination in Lawyering Relationships*, *in* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 64, 70 (Gregory S. Parks et al. eds., 2008).

445. *Id*. at 73.

446. Rudman et al., *supra* note 393, at 856.

447. *Id.* at 865 tbl.7.

figure in a prominent position alone had little to no effect on implicit or explicit bias.[448]

3. Mindfulness Meditation

A growing number of dispute resolution scholars tout the benefits of mindfulness meditation for practicing lawyers, particularly in negotiation.[449] They contend that by adopting a non-judgmental perspective, mindfulness devotees "respond more appropriately to situations—and the thoughts, feelings, and bodily sensations that the situations elicit in us—rather than reacting in habitual ways."[450] Enthusiasts contend that Buddhist principles underlying mindfulness meditation and specific practice techniques can bring clarity of purpose and enhanced attention,[451] greater awareness and cognitive flexibility,[452] and the ability to make better choices.[453]

448. *Id.*

449. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002). Riskin claims that mindfulness practice could make lawyers and law students "feel better and perform better at virtually any task" by reducing stress and improving the ability to concentrate. *Id.* at 46. He maintains that mindfulness meditation can help develop five emotional and social competencies of "emotional intelligence": self-awareness, self-regulation, motivation, empathy, and social skills. *Id.* at 47 (citing DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (1995)); *see also* Darshan Brach, *A Logic for the Magic of Mindful Negotiation*, 24 NEGOTIATION J. 25 (2008); Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002) [hereinafter Freshman et al., *Adapting Mediation*]; Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511 [hereinafter Freshman, *After Basic Mindfulness Mediation*].

450. Riskin, *supra* note 449, at 29.

451. Brach, *supra* note 449, at 27–28.

452. Freshman et al., *Adapting Mediation*, *supra* note 449, at 74. Freshman et al. identify empirical support for professed benefits of mindfulness, citing psychological studies. *Id.* at 72–77. Research "neatly shows that both regular concentration and mindfulness meditation are associated with greater awareness." *Id.* at 74. Importantly, awareness is essential to changing behavior. *Id.* at 74 (citing John D. Teasdale et al., *Metacognitive Awareness and Prevention of Relapse in Depression: Empirical Evidence*, 70 J. CONSULTING & CLINICAL PSYCHOL. 275 (2002)). "Social science research also suggests another promising object for mindful negotiators involves emotions." *Id.* at 79. Freshman et al. observe that mindfulness of emotions can improve "mood awareness," allowing negotiators to understand what objects and thoughts induce positive mood and better negotiation results. *Id.* at 80.

453. Riskin, *supra* note 449, at 66.

Mindfulness meditation may help mediators attain greater bias reduction competency.[454] If the ability to listen is the mediator's stock in trade and mindfulness helps lawyers surmount barriers to careful listening, mindful mediators would be free from "distracting thoughts and emotions, 'personal agendas,' and bias and prejudice based on the speaker's appearance, ethnicity, gender, speech or manner."[455] Mediators trained in mindfulness would be more conscious of bias and stereotypes seeping into their thoughts and judgments. With that heightened awareness, they could call upon improved concentration to make better choices in the way they conduct their mediations.[456]

In summary, mediators have the ability to enhance internal neutrality by adopting explicit plans to reduce the application of stereotypes activated through encounters with parties and by replacing biased thoughts and reactions with non-prejudiced ones. Mediators must be aware of and acknowledge unconscious biases in order to garner the motivation to self-correct. A mediator's de-biasing action plan should include external and internal motivation to intervene with disputants in an egalitarian manner, attentiveness to prejudice-related discrepancies, and application of cognitive resources to reduce biased judgments and actions. By adopting individual "implementation intention" goals and strategies, mediators can attenuate bias. To encourage and facilitate these efforts, mediation programs should incorporate bias-reduction teaching techniques, make bias and prejudice reduction a robust part of the curriculum, and develop protocols that stress self-awareness, self-monitoring, and self-correction. Practices that sharpen a mediator's awareness, listening skills, and concentration (such as mindfulness meditation) may help mediators attain freedom from bias and prejudice.

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454. *See* Rock, *supra* note 50.

455. Riskin, *supra* note 449, at 50.

456. *See* Brach, *supra* note 449, at 28 (arguing that mindfulness techniques may enhance "capacity to focus and sustain our attention consciously so that we can make the choices that serve our truest purposes").

CONCLUSION

Extensive research and analysis related to mediator behavior, the dynamics of the mediation process, and the science of implicit social cognition reveal a huge gap between the vision of mediator neutrality and the realities of biased mediator thoughts and actions. Well-meaning mediators who espouse egalitarian views need more than a "wish and a prayer" to actualize non-biased feelings, behaviors, and judgments. When confronted with scientific findings and empirical evidence, mediation professionals must concede that the requirements for eliminating racial, gender, and other types of bias in mediation have not been met.

I present the small claims mediation scenario as an example of a situation in which no one refers to race but "race [is] speaking *sotto voce*."[457] These types of cases are can be instructive because they "reveal how profoundly issues of difference have permeated the unconscious as well as the consciousness of people in our society."[458] Reflecting on such a case, Gadlin muses, "At times I feel so conscious of the way my response to peoples' stories and interventions in their conflicts is infiltrated by my own racial/ethnic/gender identity."[459] Mediation practice would be substantially improved if all mediators attained an equally critical self-consciousness.[460]

My goal in writing this Article is to challenge mediation teachers, trainers, and practitioners to admit to impartiality shortcomings and undertake concrete measures to alter the way we think and act. Defining what it means to be racially unbiased also presents difficulties. Many people think that being unbiased means they do not "see" race, gender, or ethnicity. People claim to be "color-blind," viewing this as the achievement of a non-prejudiced state of mind. "According to the most straightforward account, to be racially unbiased would require one to accord race no more significance than,

457. Gadlin, *supra* note 442, at 34.
458. *Id.*
459. *Id.*
460. *Id.*

say, eye or hair color, and to act as though one does not notice race."[461] But

> social practices and legal rules permit, indeed encourage, some species of race consciousness that virtually no one views as morally objectionable. Identifying racial bias, then, must entail deciding that some forms of race consciousness are more, or less, morally objectionable than others, a determination with respect to which reasonable minds may differ.[462]

Race has been such a pervasive and salient feature in our history and current society that everyone is subject to race consciousness.[463] The pervasiveness of implicit bias opens a new route to discussions of bias prevention and mitigation. The existence of unconscious bias does not necessarily mean that people with egalitarian beliefs are racists or liars.[464] Having discriminatory thoughts does not mean a low-prejudiced person endorses the belief; rather, it is an indication of the vigor of well-learned cultural stereotypes.[465]

Along the same lines, the operation of stereotypes need not be illustrative of a person's "moral failure." Gary Blasi points out that moralizing strategies are ineffective in combating stereotypes and prejudice.[466] He contends that "the science [of implicit social cognition] demonstrates in many ways that there is unlikely to be such a thing as a *non*racialized setting in the United States, if we include the various ways in which race operates indirectly."[467] He urges legal scholars and advocates to become knowledgeable about research on cognitive science and social psychology so they may overcome their own biases.[468] I call on mediators to do the same, lest

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461. R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1171 (2006) (examining race consciousness in the criminal justice system).

462. *Id.*

463. *Id*. at 1184.

464. Armour, *supra* note 144, at 18–21.

465. *Id*. at 20.

466. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1271 (2002).

467. *Id.* at 1273.

468. *Id.*

we be well-meaning but ineffective actors in the struggle to eliminate bias in mediation.

In a study of interracial tension, Patricia Devine and Kristin Vasquez considered the problem that the good intentions of low-prejudiced people

> are useful only if they are accurately interpreted by the target of those intentions. Intentions cannot be seen and must be inferred from behavior. This could be a problem if, for example, minority group members rely on the types of nonverbal behaviors that do not distinguish between anxiety and hostility.[469]

The authors note the potential for miscommunication that could escalate rather than alleviate tension.[470] They suggest that "the single most important problem facing us over time is that we are afraid to communicate."[471] They provoke with questions:

> What if we gave up the pretense that we 'should know what to do'? What if we admitted ignorance when it exists and confessed our desire to learn and understand? . . . But this approach may be a better starting point for alleviating tension than trying to fake it through the interaction and worrying the whole time about what we're doing wrong.[472]

The veneer of neutrality is stripped away by research findings that show convincingly that mediators fall far short of the ethical duty to treat parties impartially and without bias. Under current conditions, we are failing to meet our articulated goals and the expectations of the parties. Surely, it is naïve to think we can completely eliminate bias in mediation. It is equally certain that nondiscrimination in mediation is attainable only with more deliberate, informed, and self-conscious practices by mediators.

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469. Patricia G. Devine & Kristin A. Vasquez, *The Rocky Road to Positive Intergroup Relations*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE, *supra* note 244, at 234, 261.

470. *Id*.

471. *Id.* at 262.

472. *Id.*

"Breaking the Cycle: Implicit Bias, Racial Anxiety, and Stereotype Threat,"

by Rachel D. Godsil January/February 2015 issue of **Poverty & Race**

Our country is in the midst of a racial cataclysm. Deaths of black men and boys at the hands of police, combined with grand juries' failure to indict, have spurred grief, rage and protest across the country. The reactions to the events are not uniform, however. A deep polarization along racial lines has emerged that contributes to the feeling among many people of color that black lives don't matter.

Neither these tragedies nor the racial disconnect that followed occur in isolation. People of color experience obstacles rooted in racial or ethnic difference with alarming frequency. And yet most Americans espouse values of racial fairness. How can we make sense of these seeming contradictions? And how can we work to change the conditions that set the stage for daily challenges and tragic endings that are linked to race?

In November 2014, the Perception Institute, along with the Haas Institute for a Fair and Inclusive Society, and the Center for Police Equity, issued the first in a series of reports entitled, *The Science of Equality: Addressing Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Health Care*, co-authored by Rachel Godsil, Linda Tropp, Phillip Atiba Goff and john powell. The goal of this series of reports is to synthesize and make accessible the advances in neuroscience, social psychology and other "mind sciences" that have provided insight into otherwise confounding contradictions between our country's stated commitment to fairness and the behaviors that lead both to tragic outcomes and day-to-day indignities linked to race.

Our report includes a lengthy discussion of social psychological research focusing on "implicit bias"— the automatic association of stereotypes or attitudes with particular social groups. We place particular emphasis on new research on reducing bias or, as Patricia Devine and colleagues describe, "Breaking the Prejudice Habit" (Devine 2014) and research identifying best practices to prevent implicit bias from affecting decision-making and behavior.

Understanding implicit bias can help explain why a black criminal defendant charged with the same crime as a white defendant may receive a more draconian sentence, or why a resume from someone named Emily will receive more callbacks than an otherwise identical resume from someone named Lakeisha. This work confirms that people of color whose experiences of the world make abundantly clear that "race matters" are not simply oversensitive, while also explaining how whites who consider themselves non-racist may be sincere, even if their behavior sometimes suggests otherwise.

This is not meant to suggest that racialized outcomes are only a result of individual actions; cumulative racial advantages for whites as a group have been embedded into society's structures and institutions. However, as john powell and I argued in these pages in 2011 ("Implicit Bias Insights as Preconditions to Structural Change," *P&R*, Sept./Oct. 2011), there are two key reasons why structural racism cannot be successfully challenged without an understanding of how race operates psychologically. First, public policy choices are often affected by implicit bias or other racialized phenomena that operate implicitly. As a result, the changes in policy necessary to address institutional structures are dependent upon successfully addressing implicit biases that can affect political choices. Second, institutional operations invariably involve human behavior and interaction: Any policies to address racial inequities in schools, workplaces, police departments, courthouses, government offices and the like will only be successful if the people implementing the policy changes comply with them (Crosby & Monin, 2007).

Although implicit phenomena have the potential to impede successful institutional change, implicit racial bias is not the only psychological phenomenon that blocks society from achieving racial equality. We risk being myopic if we focus only on people's cognitive processing, and we also risk unintended consequences if we focus our interventions only on addressing implicit bias. Our experiences, motivations and emotions are also integral to how we navigate racial interactions. These can translate into racial anxiety and stereotype threat which, independent of bias, can create obstacles for institutions and individuals seeking to adhere to antiracist practices. Indeed, research suggests that some forms of anti-bias education may have detrimental effects, if they increase *bias awareness* without also providing skills for managing anxiety.

Racial anxiety refers to discomfort about the experience and potential consequences of inter-racial interactions. It is important to distinguish this definition of racial anxiety from what social scientists refer to as "racial threat," which includes the anger, frustration, uncertainty, feelings of deprivation and other emotions associated with concern over loss of resources or dominance. People of color may experience racial anxiety that they will be the target of discrimination and hostile treatment. White people tend to experience anxiety that they will be assumed to be racist and will be met with distrust or hostility. Whites experiencing racial anxiety can seem awkward and maintain less eye contact with people of color, and ultimately these interactions tend to be shorter than those without anxiety. If two people are both anxious that an interaction will be negative, it often is. So racial anxiety can result in a negative feedback loop in which both parties' fears seem to be confirmed by the behavior of the other.

Stereotype threat refers to the pressure people feel when they fear that their performance may confirm a negative stereotype about their group (Steele, 2010). This pressure is experienced as a distraction that

interferes with intellectual functioning. Although stereotype threat can affect anyone, it has been most discussed in the context of academic achievement among students of color, and among girls in science, technology, engineering and math (STEM) fields. Less commonly explored is the idea that whites can suffer stereotype threat when concerned that they may be perceived as racist. In the former context, the threat prevents students from performing as well as they ought, and so they themselves suffer the consequences of this phenomenon. Stereotype threat among whites, by contrast, often causes behavior that harms others—usually the very people they are worried about. Concern about being perceived as racist explains, for example, why some white teachers, professors and supervisors give less critical feedback to black students and employees than to white ones (Harber et al., 2012) and why white peer advisors may fail to warn a black student but will warn a white or Asian student that a certain course load is unmanageable (Crosby & Monin, 2007).

In other words, cognitive depletion or interference caused by stereotype threat can affect how one's own *capacity*, such as the ability to achieve academically, will be judged; this causes first-party harm to the individual whose performance suffers. However, as is explored in more detail below, stereotype threat about how one's *character* will be judged (i.e., being labeled a racist) can cause third-party harms when suffered by an individual in a position of power.

Implicit bias, racial anxiety and stereotype threat have effects in virtually every important area of our lives. In the first report, we illustrate the inter-related implications of the three phenomena in the domains of education and healthcare. Education and healthcare are of critical importance for obvious reasons, and an abundance of research has highlighted the role race plays in unequal outcomes in both domains.

The report also emphasizes the interventions that are emerging in the research that institutions can begin to use to prevent continuing racialized obstacles. Ideally, this work will happen at the structural and institutional level—but many of us don't want to wait, and the social science research shows that we are not wholly without agency or tools. The interventions described below can, even in absence of wide-scale institutional change, help individual teachers or medical providers begin at least to ameliorate implicit bias, racial anxiety and stereotype threat.

"Debiasing" and Preventing Effects of Implicit Bias

While the research on debiasing is fairly new, recent studies by Patricia Devine and colleagues have found success in reducing implicit racial bias, increasing concern about discrimination and awareness of personal bias by combining multiple interventions to "break the prejudice habit." The strategies quoted below (thoughtfully utilizing findings from research by Nilanjana Dasgupta and others) included:

- *Stereotype replacement*: Recognizing that a response is based on stereotypes, labeling the response as stereotypical and reflecting on why the response occurred creates a process to consider how the biased response could be avoided in the future and replaces it with an unbiased response.
- *Counter-stereotypic imaging*: Imagining counter-stereotypic others in detail makes positive exemplars salient and accessible when challenging a stereotype's validity.
- *Individuation*: Obtaining specific information about group members prevents stereotypic inferences.
- *Perspective-taking*: Imagining oneself to be a member of a stereotyped group increases psychological closeness to the stereotyped group, which ameliorates automatic group-based evaluations.
- *Increasing opportunities for contact*: Increased contact between groups can ameliorate implicit bias through a wide variety of mechanisms, including altering their images of the group or by directly improving evaluations of the group.

The data showing reduced bias from Devine and colleagues "provide the first evidence that a controlled, randomized intervention can produce enduring reductions in implicit bias" (Devine et al. 2012). The findings have been replicated by Devine and colleagues, and further studies will be in print in 2015.

Preventing Implicit Bias from Affecting Behavior

To the extent that debiasing is an uphill challenge in light of the tenacity of negative stereotypes and attitudes about race, institutions can also establish practices to prevent these biases from seeping into decision-making. Jerry Kang and a group of researchers (Kang et al. 2012) developed the following list of interventions that have been found to be constructive:
Doubt Objectivity: Presuming oneself to be objective actually tends to increase the role of implicit bias; teaching people about non-conscious thought processes will lead people to be skeptical of their own objectivity and better able to guard against biased evaluations.

Increase Motivation to be Fair: Internal motivations to be fair rather than fear of external judgments tend to decrease biased actions.

Improve Conditions of Decision-making: Implicit biases are a function of automaticity (Daniel Kahneman's "thinking fast"—Kahneman, 2013). Thinking slow by engaging in mindful, deliberate processing and not in the throes of emotions prevents our implicit biases from kicking in and determining our behaviors.

Count: Implicitly biased behavior is best detected by using data to determine whether patterns of behavior are leading to racially disparate outcomes. Once one is aware that decisions or behavior are having disparate outcomes, it is then possible to consider whether the outcomes are linked to bias.

Interventions to Reduce Racial Anxiety

The mechanisms to reduce racial anxiety are related to the reduction of implicit bias—but are not identical. In our view, combining interventions that target both implicit bias and racial anxiety will be vastly more successful than either in isolation.

Direct Inter-group Contact: Direct interaction between members of different racial and ethnic groups can alleviate inter-group anxiety, reduce bias, and promote more positive inter-group attitudes and expectations for future contact.

Indirect Forms of Inter-group Contact: When people observe positive interactions between members of their own group and another group (vicarious contact) or become aware that members of their group have friends in another group (extended contact), they report lower bias and anxiety, and more positive inter-group attitudes.

Stereotype Threat Interventions

Most of these interventions were developed in the context of the threat experienced by people of color and women linked to stereotypes of academic capacity and performance, but may also be translatable to whites (Erman & Walton, in press) who fear confirming the stereotype that they are racist.

Social Belonging Intervention: Providing students with survey results showing that upper-year students of all races felt out of place when they began but that the feeling abated over time has the effect of protecting students of color from assuming that they do not belong on campus due to their race and helped them develop resilience in the face of adversity.

Wise Criticism: Giving feedback that communicates both high expectations and a confidence that an individual can meet those expectations minimizes uncertainty about whether criticism is a result of racial bias or favor (attributional ambiguity). If the feedback is merely critical, it may be the product of bias; if feedback is merely positive, it may be the product of racial condescension.

Behavioral Scripts: Setting set forth clear norms of behavior and terms of discussion can reduce racial anxiety and prevent stereotype threat from being triggered.

Growth Mindset: Teaching people that abilities, including the ability to be racially sensitive, are learnable/incremental rather than fixed has been useful in the stereotype threat context because it can prevent any particular performance from serving as "stereotype confirming evidence."

Value-Affirmation: Encouraging students to recall their values and reasons for engaging in a task helps students maintain or increase their resilience in the face of threat.

Remove Triggers of Stereotype Threat on Standardized Tests: Removing questions about race or gender before a test, and moving them to after a test, has been shown to decrease threat and increase test scores for members of stereotyped groups.

Interventions in Context

The fundamental premise of this report is that institutions seeking to alter racially disparate outcomes must be aware of the array of psychological phenomena that may be contributing to those outcomes. We seek to contribute to that work by summarizing important research on implicit bias that employs strategies of debiasing and preventing bias from affecting behavior. We also seek to encourage institutions to look beyond implicit bias alone, and recognize that *racial anxiety* and *stereotype threat* are also often obstacles to racially equal outcomes. We recommend that institutions work with social scientists to evaluate and determine where in the institution's operations race may be coming into play.

The empirically documented effects of implicit bias and race as an emotional trigger allow us to talk about race without accusing people of "being racist," when they genuinely believe they are egalitarian. The social science described in this report helps people understand why inter-racial dynamics can be so complicated and challenging for people despite their best intentions. The interventions suggested by the research can be of value to institutions and individuals seeking to align their behavior with their ideals. Yet for lasting change to occur, the broader culture and ultimately our opportunity structures also need to change for our society to meet its aspirations of fairness and equal opportunity regardless of race and ethnicity.

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[15051]

Going "All-In" on Diversity and Inclusion

BY KATHLEEN NALTY

"Kathleen Nalty's article about leadership buy-in as a requisite to move beyond cosmetic diversity and inclusion in the legal profession is a must-read. Kathleen presented critical information reflecting this theme and shared action steps during the CMBA Diversity and Inclusion Committee's workshop in March 2014 held at the Aloft Hotel. This article will be a blueprint for all legal leadership and those interested in action steps necessary to affect measurable change in this area."

Sonali B. Wilson, *CMBA Vice President for Diversity and Inclusion* and Diane Citrino, *Co-Chair, CMBA 2014 Diversity and Inclusion Workshop*

For years, law firms invested in traditional diversity programs and many have recently added inclusiveness to the mix. Yet law firms consistently experience higher attrition rates for attorneys in underrepresented groups. Lack of results has caused a great deal of frustration, especially since leaders believe their firms have been doing all of the "right things" (and some are winning awards for their programs).

The missing piece, it turns out, is leaders themselves. Law firms may have added inclusiveness to their diversity efforts but leaders continue to do what they have always done — treated the diversity and inclusion initiative as a separate, stand-alone program to be managed by others in the firm. Leaders have not understood that inclusion underlies every aspect of the firm and, as with any other change initiative, active leadership is required to achieve meaningful results.

Forward-thinking leaders now know that a focus on recruiting and hiring is only half of the equation; law firms must also work to retain, develop, and advance attorneys in underrepresented groups in order to produce sustainable diversity. Since retention, development, and advancement efforts implicate all systems and procedures in the organization, active involvement by leaders is essential and responsibility can't be delegated.

Knowledgeable law firm leaders are also changing their view of diversity — from a "problem" to be managed to an *opportunity* that can be leveraged for better business outcomes and client service. Maximizing human capital assets to make the firm more financially productive is only one optimal outcome. Leveraging everyone's strengths to be more innovative — not only in solving serious post-recession business challenges, but also to provide better client service — can be a deciding factor in gaining a competitive advantage in today's economy.

Uncovering the reasons for higher attrition among underrepresented groups is at the core of any inclusiveness initiative. According to several national research studies,[1] there are hidden barriers to success for female, LGBTQ, disabled, and racially/ethnically diverse attorneys in most legal organizations. These groups are disproportionately excluded from opportunities that are often intangible but critically important in any lawyer's career development. Hard work and technical skill are the foundation of career progress, but without these intangible opportunities, attorneys simply cannot advance in their firms.

According to the research studies, these opportunities are shared unevenly by people in positions of power and influence, often without realizing that certain groups are disproportionately excluded, which causes them to remain on the margins in the firm. Specifically, the research reveals that female, LGBTQ, disabled, and racially/ethnically diverse attorneys have less access to:

- Networking — informal and formal
- Internal information or intelligence
- Access to 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, discrimination still exists and contributes to this dynamic. But it turns out that a specific kind of unconscious bias plays the biggest role. Affinity bias, which is a bias for others who are more like you, causes people to develop deeper work relationships with those who have similar identities, interests, and backgrounds. When senior attorneys gravitate toward and share opportunities with others who are like themselves, they (mostly unwittingly) leave female, LGBTQ, disabled, and racially/ethnically diverse attorneys out.

Unlike traditional diversity efforts, inclusiveness initiatives require firm leaders to go "All-In," meaning a full commitment plus action to examine and address all aspects of the firm to uncover hidden barriers to success for attorneys, especially those in underrepresented groups.

The process begins with leadership taking personal responsibility for leading the firm on D+I. If leaders (including firm/office management and practice group leaders) are not fully committed to making the necessary structural, cultural, and behavioral changes, an inclusiveness initiative will never have any meaningful impact.

Once leaders understand and invest in the change initiative ("My-In"), they can foster buy-in throughout the firm by modeling inclusive behaviors, adopting diversity- and inclusiveness-related competencies, and empowering individuals, departments, and teams to address hidden barriers through D+I action plans ("Buy-In").

The ultimate goal is to make systemic, organizational changes that embed diversity and inclusion throughout every aspect of the firm ("Tie-In") and make it part of the DNA of the organization.

Leader commitment and verbal support of change efforts is not enough. As with any change initiative, law firms need the full engagement of senior leaders to shape and execute diversity and inclusion strategies. While all leaders must be actively involved, since white men still hold a majority of senior leadership positions in law firms, it is particularly important for white male leaders to step up as allies and champions to create inclusive work environments.

Inclusive behaviors, endorsed and modeled by law firm leaders, "unlock" the diversity in the organization, allowing the full potential of the firm and its diverse composition to be brought to bear on driving greater levels of organizational performance. Going "all-in" is the only way to achieve genuine success in diversity and inclusion efforts.

Kathleen Nalty is an expert in diversity and inclusiveness in the legal industry, speaking across the country. Kathleen presented workshops on diversity and inclusion for the Cleveland Metropolitan Bar Association in 2012 and 2014. She is currently writing a book entitled "Going All-In on Diversity & Inclusion: The Law Firm Leader's Playbook." She is President of her own consulting group — Kathleen Nalty Consulting — and can be reached at kathleen@kathleennaltyconsulting.com or (303) 770-2563.

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Resource List for Unconscious/Conscious Bias

Online Tests/Exercises:

- Project Implicit: http://bit.ly/1b9JX9x - test your own unconscious bias with this free online test sponsored by Harvard University and taken by millions of people in the past 15 years.
- Mind Lab: http://bit.ly/1NqcXKW – discover the surprising limitations of your brain's ability to perceive through online interactive demonstrations.

Other Resource Lists:

- American Bar Association, Section of Litigation, Task Force on Implicit Bias, http://bit.ly/1LD4wh9.
- "Helping Courts Address Implicit Bias: Resources for Education," National Center for State Courts (2012), http://bit.ly/1fZyl9e.
- "State of the Science: Implicit Bias Review," Kirwan Institute for the Study of Race and Ethnicity, Ohio State University (2015), http://bit.ly/1LQM6Xr.

Educational Videos:

- "Continuing the Dialogue – The Neuroscience and Psychology of Decision-making, Part 1 - A New Way of Learning," Judicial Council of California (October 28, 2009), http://bit.ly/1Noskne.
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- Fine, C. A Mind of Its Own: How Your Brain Distorts and Deceives (2006).
- Vedantam, V. The Hidden Brain: How Our Unconscious Minds Elect Presidents, Control Markets, Wage Wars, and Save Our Lives (2010).
- Ross, H. Everyday Bias: Identifying and Navigating Unconscious Judgments in Our Daily Lives (2014).
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Television Productions

- "The Brain with David Eagleman" – PBS Series – http://www.pbs.org/the-brain-with-david-eagleman/home/.
- ""Brains on Trial" - PBS Series hosted by Alan Alda, http://brainsontrial.com/.
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IMPLICIT BIAS: HOW TO RECOGNIZE AND ADDRESS IT—AND NEW MODEL RULE 8.4(G)

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This publication accompanies the audio program entitled "Implicit Bias: How to Recognize and Address It—and New Model Rule 8.4(g)" broadcast on October 6, 2016 (event code: CE1610IMP).

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Strategies for Confronting Unconscious Bias

by Kathleen Nalty
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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 unconsciously 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 disproportionately 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/1DZYgYa; 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 Individual Achieve Their True Potential and How You can Achieve Yours* (Greenleaf Group Book Press, 2012) and website, www.positiveintelligence.com.

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