RECOGNIZING & ADDRESSING IMPLICIT BIAS IN THE LEGAL PROFESSION

THURSDAY, JUNE 3, 2021

3:30 - 5:00 P.M.

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AGENDA

June 3, 2021 | 3:30 pm - 5:00 pm

Recognizing & Addressing Implicit Bias in the Legal Profession

3:30 p.m. – 5:00 p.m.

Introduction:
Hon. Megan E. Goldish
Circuit Judge, Circuit Court of Cook County

Panelists:
Debjani D. Desai
General Counsel, Illinois Office of Comptroller

Sharon Hwang
Shareholder, McAndrews, Held & Malloy

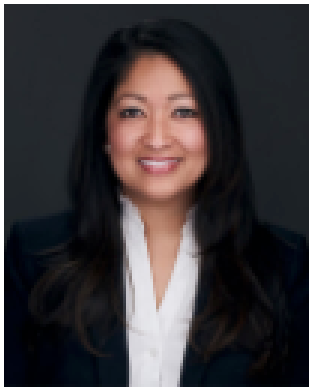
Erica Kirkwood
Vice President and General Counsel,
GMA Construction Group

Hon. Jesse G. Reyes
Illinois Appellate Court, First District,
Fourth Division

Adam Zebelian
Associate, Schiller DuCanto & Fleck

SPEAKER BIOS

DEBJANI D. DESAI



Debjani D. Desai
General Counsel, Illinois Office of Comptroller

Debjani D. Desai is the General Counsel for the Illinois Office of Comptroller. She leads a team of lawyers in Chicago and Springfield to provide legal counsel on state comptroller mandates, such as ordering payments through the Treasury, managing the state's fiscal accounts, and conducting audits and reports on the state's fiscal health. She advises the office on litigation, legislation, finance, operations, compliance, and labor and employment matters. Her legal assistance focuses on making government more efficient and effective, advancing transparency, and saving taxpayers money. Debjani is currently the President of the South Asian Bar Association Foundation, a member of the SABA Advisory Council and has previously served as SABA Chicago President, VP of Programming, and General Director. She serves on several boards and committees focused on public service and diversity.

SHARON HWANG

Sharon Hwang is a member of the Executive Committee and a Shareholder at McAndrews. She practices in all areas of intellectual property law with particular emphasis on patent litigation. She helps her clients maximize the value of their intellectual property and protect their investments in research and development. She has extensive experience in a range of technologies, including medical devices, electronics, and cellular telephony.

Sharon Hwang
Shareholder, McAndrews, Held & Malloy

First, and foremost, Sharon is a hands-on courtroom advocate who has tried and litigated dozens of cases and has briefed and argued numerous appeals. For more than twenty-five years, she has successfully represented parties in high-stakes patent litigation in federal district courts, the Federal Circuit Court of Appeals, and the United States Supreme Court. Sharon has also successfully briefed and argued numerous inter partes reviews before the Patent Trial and Appeal Board.

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SPEAKER BIOS

ERICA KIRKWOOD

Erica Kirkwood is Vice President and General Counsel at GMA Construction Group. GMA is a veteran and minority owned, national, commercial general contracting firm that focuses on building facilities in the healthcare, education and affordable housing industries. Erica provides legal and business counsel on business development, real estate development, mergers & acquisitions, corporate transactions, contracts, litigation, Human Resources, risk management and compliance. Erica negotiates notable multi-million-dollar construction contracts and joint venture agreements like the Pullman National Monument, Cook County Hospital Harrison Square project, Terminal A expansion at Midway Airport, the 95M Chicago Police and Fire Training Facility, University of Chicago Student Wellness center and the Northwestern University Blackhouse project. She is leading legal and business development efforts to expand GMA's operations to East Africa. Erica also coordinates summer internships at GMA for high school and college students from disadvantaged communities.

Erica Kirkwood
Vice President and General Counsel, GMA Construction Group

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HON. JESSE G. REYES

Jesse G. Reyes is currently a Justice on the Illinois Appellate Court, First District. He previously served as the Presiding Justice of the Fifth Division, as the former chair of the First District's Settlement Conference Committee, and a former member of the Executive Committee. He has been a member of the judiciary since December, 1997, having previously served as both an associate judge and elected judge of the Circuit Court of Cook County. His previous judicial assignments have included the Chancery Division's Mortgage Foreclosure/Mechanics Lien Section, Domestic Violence court and the Sixth Municipal District. Justice Reyes, while assigned to the First Municipal Division, assisted in the production of the Circuit Court's educational DUI Video "Que Precio Tiene La Vida." He also served on a number of Circuit Court committees during his tenure on the trial court.

Hon. Jesse G. Reyes
Illinois Appellate Court, First District, Fourth Division

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SPEAKER BIOS

ADAM ZEBELIAN

Adam Zebelian
Associate, Schiller DuCanto & Fleck

Adam Miel Zebelian joined Schiller DuCanto & Fleck after 7 years as an Assistant State's Attorney litigating countless criminal and civil matters. As a prosecutor, Adam made charging decisions, conducted in-depth investigations, handled pre-trial hearings and motions and conducted over a hundred trials, including both bench and jury trials. Adam's extensive trial experience, including financial crimes cases, gives him the ability to try complex matters, as well as the ability and creativity to achieve out-of-court resolutions.

Adam began as a prosecutor in the Criminal Appeals Division, where he litigated cases before the Illinois Appellate Court. Adam also served in the Domestic Violence Division, where he prosecuted intrafamily violent crime. Adam then advanced to the Special Prosecutions Bureau of the Cook County State's Attorney's Office, where he handled matters involving complicated thefts, public corruption, gun crimes and gang involved murders. Adam also served in the Civil Actions Bureau of the State's Attorney's Office, defending the county in both state and federal court.

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Program Materials
Recognizing & Addressing Implicit Bias in the Legal Profession

Another Step Toward Equal Justice: Identifying Implicit Bias

By Chief Justice Lloyd A. Karmeier

November 29, 2017

Traditionally, efforts to ensure that all persons are treated equally under the law have focused on what are often perceived to be objective criteria: making sure that meaningful access to judicial resources is available to all who need them when they need them, that everyone who comes to court is subject to the same rules and protected by the same rights, that everyone will be held equally accountable if they break the law, and that everyone will receive a full and fair hearing without regard to their race, gender, religion, age, economic circumstances or social standing. When we speak of justice being blind, this is what we mean, and we have enacted elaborate rules, regulations, and other measures to help make it so.

In recent years, however, there has been increased recognition that no matter what formal safeguards we put into place, stereotyping and unconscious attitudes can have significant negative effects on the fairness of legal proceedings. In a signal article written for the *Illinois Bar Journal* in 2014, Illinois Appellate Justice Michael Hyman, drew on growing academic research to explain how the automatic and unconscious prejudices to which we are all subject can adversely affect prosecutorial decision-making, result in disparate arrest and conviction rates for minorities, skew jury selection, cloud juror deliberations and infect decision making by judges and mediators. Hyman, *Implicit Bias in the Courts,* 102 Ill. B.J. 40 (January 2014). So pressing is the issue that when Vincent Cornelius assumed the presidency of the Illinois State Bar Association in 2016, he commenced his term by opening a dialogue on confronting and addressing how implicit bias adversely affects efforts to achieve social progress and impede justice. Cornelius, *Understanding Implicit Bias*, 104 Ill.B.J. 10 (August 2016). This past year, the DuPage County Bar Association likewise made the problem of implicit bias a centerpiece of its educational programing (Donner, *Implicit Bias in the Law: An Important Focus for 2017,* 29 DCBA Brief 5 (January 2017), and Justice Hyman was motivated to do a follow up to his 2014 article, this time offering strategies for legal professionals to recognize and address the unconscious negative biases that affect their judgment and behavior. Hyman, *Reining in Implicit Bias,* 105 Ill.B.J. 26 (July 2017).

The Illinois Supreme Court shares these concerns over implicit bias. Indeed, as part of its commitment to improving equality and fairness in the administration of justice, the Court has been at the forefront of efforts to systematically assess the extent and impact of implicit bias on judicial decision making. Shortly after the Court established its Committee on Equality in 2015, we

approved a proposal by the Committee to undertake a statewide study of how judges make their decisions and of the considerations that may influence the decisions they reach, including adverse working conditions, race, gender, poverty and legal representation in criminal, civil and family law cases. This ground-breaking study, which was developed and guided by American Bar Foundation researchers Dr. Andrea Miller and Dr. Robert Nelson, and undertaken with the cooperation of the Conference of Chief Judges and the assistance of the Administrative Office of the Illinois Courts, was the first of its kind in the nation. All circuit and associate circuit judges in Illinois were invited to participate in the study survey, which was administered online. In the end, 619, a majority of our trial court bench, did so.

Results of the study were formally submitted to the Supreme Court by Chief Judge Joseph McGraw of the Seventeenth Judicial Circuit, who serves as chairperson of our Committee on Equality, this past August. At the beginning of this month, following review by the Supreme Court, a summary of the study's results was distributed to the Appellate Court Administrative Committee, the Supreme Court Commission on Access to Justice, the Conference of Chief Judges, the Illinois Judicial Conference Strategic Planning Committee and the Illinois Judicial College Board of Trustees. Those results, which were based on hypotheticals submitted to survey participants, found that implicit biases are in fact present among members of our judiciary and that those biases may affect outcomes depending on the race, gender, and poverty of the parties and on whether or not the parties have lawyers to represent them. Additional factors, including adverse working conditions, were also found to have potential effects on judges' ability to make consistent, unbiased decisions.

Completion of the study is not the end of our inquiry. It is merely the beginning of an ongoing process. With survey results in hand, the Committee on Equality will now solicit feedback from the various other committees, commissions and boards noted above in order to formulate and coordinate ongoing educational programs that will assist judges throughout the state in recognizing the implicit biases that may affect the outcome of the cases they hear and in developing strategies that will enable them to avoid acting in ways that are unknowingly and unintentionally unfair. This is where the real work begins. Experience has shown, however, that the members of today's judiciary are deeply committed to achieving a court system as free of bias as is humanly possible. I am therefore very optimistic about our ability to make real and sustained progress.

On behalf of the entire Court, thanks to everyone who has helped so far. Thanks as well to everyone who will be helping in the future as we move forward together. And one more thing. If you did not participate in the survey and do not think that you, yourself, suffer from any implicit bias, here's another set of tests you can take:
https://implicit.harvard.edu/implicit/.
I bet you're wrong.

RAMONA SULLIVAN, GUEST BLOGGER | LEGAL ETHICS | JANUARY 10, 2017

Can We Recognize And Acknowledge Our Own Bias?

Reflecting on our reaction to Donald Trump's words and behavior throughout the election of 2016 provides an opportunity to examine our conscious and unconscious bias.

Our life experiences affect our beliefs, even if we aren't aware that it is happening. We learn from our past experiences, and they help us predict and prepare for future experiences. Another way to describe that learning process is to say that we develop conscious and unconscious bias.

Bias doesn't just affect how we vote in an election. It affects every choice we make. Sometimes, we are aware of the bias. Sometimes, we are not.

An Example Of Bias

I am aware of many of the biases that have developed during my life. One example I will share is that there is virtually no chance that I would ever become a vegan. I grew up on a family farm with livestock. We cared for living things, including chickens, turkeys, geese, rabbits, sheep, goats, cattle, and hogs. We loved them, we played with them, we kept them safe and healthy and comfortable. Until it was time to eat them.

Some of my earliest memories involve slaughtering poultry. To be clear: they are fond memories. I treasure that time with my parents and siblings, making pillows from goose feathers, making noodles from egg yolks that were still inside the chickens, making and freezing rabbit casseroles that would be available to feed our family or to take to a neighbor who experienced a death in the family. I have a conscious bias that favors steak and despises tofu. When people "judge" me for eating meat, I feel that they are "judging" my parents, my family, and my values. And I am defensive about my parents, my family, and my values.

Bias Determines Decisions

Bias comes from deeply held beliefs, and bias always affects how we interpret information. It isn't just about race or gender or sexual orientation. It is about every observation that we make.

Each of us has biases that largely determined our feelings about Donald Trump, and those feelings largely determined our decisions about Donald Trump.

Did you vote for or against Donald Trump? Do you know why you voted the way you voted?

Are you proud to live in a country that elected Donald Trump as President? Are you ashamed? Are you optimistic? Are you devastated? Are you relieved? Are you frightened? Do you know why you feel the way you feel?

Each of us had access to all of the same facts and data to inform us. We could see the Twitter and Facebook messages. We could watch the republican debates and convention. We could watch the presidential debates. We could watch or read or listen to unlimited sources of news and entertainment about the candidates. We could investigate and find answers to any factual questions about the candidates.

Approximately half of the voters picked Donald Trump to be the 45th President of the United States of America, to the profound shock and disappointment of the other half.

Something led us to choose certain sources of information. Something caused our impression of Donald Trump to be favorable or unfavorable. It was our pre-existing bias.

How did we, individually, interpret what we saw and heard? Why did we interpret it that way? It was our pre-existing bias.

My Story My Bias My Vote

I was born in rural, central Illinois. I attended the same small, all-white public school from kindergarten through my high school graduation. My parents are devout Catholics who stayed married. They never miss Mass, they pray the rosary every day, and they put all five kids through the University of Illinois. I've never been arrested, or homeless, or hungry. I've never been diagnosed with a serious mental or physical impairment. I have never been addicted to drugs or alcohol. I have never been pregnant out-of-wedlock, and I value life from conception until death. The boxes I have recently checked include: white, female, English-speaking, married, home owner.

Based on what you know so far, you're thinking I voted for Trump. I sound pretty privileged and pretty conservative, right? More than half of white women, particularly rural, Christian women, voted for Trump. But you don't know all of my life experiences.

I did very well in school. I graduated from the University of Illinois College of Law and have been a legal aid attorney for 20 years. While I have never struggled with healthcare or housing or transportation and I have never been in danger of bankruptcy, I have worked with thousands of people who haven't been as fortunate. I am aware of the reality of poverty, and I am empathetic to people who are suffering.

Now you're thinking I probably voted against Trump. I sound pretty liberal, right? Graduate degree, concerned about the poor? But you still don't know all of my life experiences.

My first husband died young, while I was 9 months pregnant, leaving me to raise two bi-racial kids as a widowed mother when I was just 29 years old. I lived the life of a single parent for 10 years. When I changed jobs several years ago, I tried to buy health insurance for my family during the waiting period before we could get added to the new employer's group plan. Both kids were denied coverage because of the "family history" of Marfan Syndrome, the genetic condition that killed their father, even though neither of them had been diagnosed at the time. My daughter was eventually diagnosed, and will have this pre-existing condition for the rest of her life. Did I mention that the majority of my legal career involves the civil and criminal response to violence against women?

Now you're thinking I definitely voted against Trump, and that it had nothing to do with "politics." You're thinking that almost everything I saw and heard during Donald Trump's campaign triggered real life concerns for me based on my real life experience.

My impression was largely determined by deeply held beliefs about racial justice, sexual violence, access to healthcare, and safety nets. I have a conscious bias in favor of civility and compassion. I have a conscious bias against greed and cruelty. What determined your impression?

Finding Common Ground

I am still in the process of uncovering my unconscious biases. I hope that others will join me in the quest to better understand ourselves and each other so that we can find common ground as we move past this divisive election.

ERIKA KUBIK | DIVERSITY | NOVEMBER 20, 2017

Committee on Equality Uncovers Implicit Bias in Illinois Courts

As humans, we all fall victim to implicit bias. Our life experiences affect our beliefs, and those beliefs often play into our decision-making, whether we are aware of them or not.

Unfortunately, these unconscious biases can become increasingly problematic, especially when they begin to dictate our deliberate choices and reasonings. Luckily though, implicit bias does not have to dictate how we lead our lives. They can be addressed, and the Illinois judiciary is doing just that.

Earlier this month, the Illinois Supreme Court Committee on Equality reported their efforts to improve implicit bias in Illinois courts. In fact, this time last year, the Committee began surveying Illinois judges to get a better understanding of their decision-making processes.

The confidential questionnaire developed by the American Bar Foundation with support from researchers Dr. Andrea Miller and Dr. Robert Nelson used hypothetical court cases in different areas of the law to gauge each participant's rational for decision-making. The survey also examined the considerations that influence the outcomes of those decisions, including race, gender, poverty, and legal representation in criminal, civil and family law cases.

The results of the survey are not public at this time. According to the Court press release, at a later date, the Committee on Equality will solicit feedback on the results. In the meantime, we can expect to see a more ongoing judicial education around the state that incorporates tactics and procedures to curb implicit bias in judicial decision-making.

Illinois Supreme Court Chief Justice Lloyd A. Karmeier believes this study of the Illinois judiciary will improve public confidence in the legal system.

"This ground-breaking study provides critical insights into these issues. Recognizing that implicit biases influence everyday life decisions by the general population, the study helps us see our own. The conclusions it reaches will be invaluable in guiding the Court's continued efforts to improve public confidence in the judicial branch and insure that everyone who seeks the protections of our judicial system will receive equal justice under the law without regard to race, gender, economic status, or ability to retain counsel."

Implicit biases cannot be completely eradicated, but they can be mitigated. As officers of the Court, the judiciary and all legal professionals bear the responsibility to improve their deliberate decision-making. Let the implicit bias education commence.

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Comment

JUDICIARY

Federal judge tossed from case for 'immovable' views, suggestion that US lawyers are lazy and arrogant

BY DEBRA CASSENS WEISS (HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/4/)

MAY 10, 2021, 10:25 AM CDT

Image from Shutterstock.

A controversial federal judge in Houston has been booted from a case once again by the 5th U.S. Circuit Court of Appeals at New Orleans.

In a May 6 opinion (https://www.courthousenews.com/wp-content/uploads/2021/05/us-khan-ca5.pdf), the federal appeals court said U.S. District Judge Lynn Hughes of the Southern District of Texas had a "fixed and inflexible view of the case" and had made anti-government remarks. In one instance, he called government lawyers "blue-suited thugs." In another, he referred to government lawyers as "retarded" and then said he takes back the comment because "retarded people have a justification."

Hughes "packed the record with hostile remarks against the government and its attorneys," the 5th Circuit said in its opinion by Judge E. Grady Jolly. "He repeatedly indicated that government attorneys, especially those from Washington, are lazy, useless, unintelligent or arrogant."

The Houston Chronicle (https://www.houstonchronicle.com/news/houston-texas/houston/article/Appeals-court-yanks-ISIS-terrorism-sentencing-16157863.php), Law360 (https://www.law360.com/legalethics/articles/1382559/5th-circ-rips-texas-judge-for-hostility-toward-doj-attys) and Courthouse News Service (https://www.courthousenews.com/fifth-circuit-removes-judge-from-terrorism-case-for-anti-government-bias/) have coverage of the decision involving a criminal prosecution for providing material support to the Islamic State group.

Hughes was removed from two other cases since 2018, one involving a discrimination case and the other a fraud charge.

U.S. District Judge Lynn Hughes of Houston. Photo from Wikimedia Commons.

The latest case involved Asher Abid Khan, a 26-year-old former ISIS supporter and recent engineering graduate of the University of Houston. Khan had helped connect a friend to ISIS who apparently died in overseas fighting for the group. Khan planned to accompany his friend but returned home when his family lied, telling him that his mother had a heart attack and he had to return immediately.

Khan pleaded guilty to providing material support to a terrorist organization in December 2017 and was sentenced—twice—to 18 months in prison. The government had sought a 15-year sentence.

After the first sentence, the 5th Circuit said Hughes had wrongly concluded that Khan's sentence did not deserve an upward enhancement for terrorism. On resentencing, Hughes said the enhancement did apply but Khan still deserved an 18-month sentence for several reasons, including his lack of a criminal record, his studies, his age and his volunteer work educating others about the dangers of radical jihadism.

The 5th Circuit ordered Khan to be resentenced by a different judge.

"The sentencing judge seems immovable from his views of the sentence he imposed," the 5th Circuit said. Khan "played an active role in pushing [the friend] along a path that ended in his death," yet Hughes downplayed Khan's role and the seriousness of the offense, the 5th Circuit said.

The 5th Circuit cited these remarks made by Hughes:

• "I could write a whole book with nothing but governmental abuse. Not all of it is the Justice Department. EPA and the Securities and Exchange Commission have their blue-suited thugs, too."

• “Ordinary routine stuff does not get done because we’re spending all our resources with people like [then-U.S. Attorney General] Eric Holder at a podium holding press conferences on people he’s going to crush. … Those people ought to go get a shovel or a hoe and report to the nearest national park and start cleaning up paths.”

• “There are too many self-important retarded—I take that back; retarded people have a justification—who like nothing better than a headline that they can announce they’re going to get somebody, whether they … have a case or not.”

• “The phrase ‘public integrity’ in connection with the Justice Department is a contradiction.”

• Government attorneys in Washington “are back from lunch now. It is 1:00 in Washington, and they are only going to work until about 3:30.”

• “I know you all are useless government bureaucrats.”

Hughes is a 79-year-old judge who was appointed by former President Ronald Reagan. Jolly is also a Reagan appointee. Other judges on the panel were Judge Carl Stewart, an appointee of former President Bill Clinton; and Judge Andrew Oldham, an appointee of former President Donald Trump.

The 5th Circuit removed Hughes from a discrimination case in February (https://www.abajournal.com/news/article/federal-judge-who-said-he-would-crush-plaintiffs-cases-prejudged-her-bias-claims-5th-circuit-says) after he said he would “crush” the case. In 2018 (https://www.abajournal.com/news/article/5th_circuit_criticizes_federal_judge_for_alleged_sexist_remark_about_simple), the appeals court removed Hughes from a fraud case because of remarks that appeared to be about a female prosecutor.

“It was lot simpler when you guys wore dark suits, white shirts and navy ties,” Hughes had said. “We didn’t let girls do it in the old days.”

Hughes was also in the news in 2016 when he issued an “order on ineptitude” (https://www.abajournal.com/news/article/federal_judge_issues_order_on_ineptitude_in_prosecutor_benchslap) to express his displeasure with Department of Justice prosecutors.

The latest case is *United States v. Khan.*

GENDER BIAS IN THE COURTROOM: COMBATING IMPLICIT BIAS AGAINST WOMEN TRIAL ATTORNEYS AND LITIGATORS

CONNIE LEE*

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INTRODUCTION

Over the last several decades, women have made significant strides in the legal profession. Today, women account for nearly half of law student enrollment and occupy more leadership roles than in past years. While increasing numbers of women are attending law schools and entering law practice, women have not advanced to the highest levels of the legal profession at the same rate as men. Specifically, women account for only 34% of attorneys in private practice,[1] only 20.2% of partners,[2] 17% of equity partners,[3] 4% of managing partners at the 200 largest law firms,[4] and even a smaller percentage of lead counsel and first-chair trial attorneys.[5] Moreover, gender biases continue to pervade the courtroom and the legal profession, creating obstacles for women who wish to advance in their legal careers. This article explores the various gender biases that female attorneys confront in the legal profession that help explain the disproportionately small number of women trial attorneys and litigators.

Part I of this article will examine the history and trajectory of women's advancement in the legal profession, tracing accounts of the first women litigators through currently practicing litigators. Part II will discuss the empirical data that demonstrate the lack of fair treatment of women trial attorneys in the courtroom by judges and jurors. This Part concludes that both explicit, but mostly implicit, biases against women trial attorneys continue to pervade the courtroom despite the significant progress women attorneys have made in the last few decades. Part III will address the perils of implicit bias in the legal profession. This Part explains that gender bias undermines our legal system by jeopardizing fairness and equity. In other words, if female attorneys are discriminated by judges, jurors, and other attorneys, so are those attorneys' clients. Consequently, gender biases against female attorneys not only undermine the attorneys' credibility, but also affect their clients' opportunity to actually be heard and have a fair court proceeding.

Part III of this article recommends strategies to counter gender biases from the moment students start law school and throughout their legal careers. This Part concludes that with higher awareness about the gender biases that pervade the legal

* Connie Lee graduated *cum laude* from the University of Maryland Francis King Carey School of Law in May 2015.

[1] COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2014), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf.

[2] STEPHANIE A. SCHARF ET AL., NAT'L ASS'N OF WOMEN LAWYERS, REPORT OF THE EIGHTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 4 (2014) (reporting that in spite of a decades-old pipeline of women law school graduates, a disproportionately low number of women advance into the highest ranks of large firms).

[3] COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW, *supra* note 1, at 2.

[4] *Id.*

[5] Stephanie A. Scharf & Roberta D. Liebenberg, *First Chairs at Trial More Women Need Seats at the Table*, 24 PERSPECTIVES 1, 13 (2015) (finding that in civil cases, men are three times more likely to appear in lead roles than women, and that this gender gap is greatest in AmLaw 200 firms).

profession, active recruitment of women attorneys in traditionally male positions, and better mentoring and first-chair opportunities for women in the legal workplace, women litigators and trial attorneys can achieve greater gender equality inside and outside of the courtroom.

I. THE HISTORY OF GENDER BIAS IN THE LEGAL PROFESSION

The American legal profession has a long history of discrimination against women. For many years, law schools refused to admit women law students,[6] while those women who made it through law school were denied admittance to the bar.[7] Though educational barriers were gradually removed, well-qualified female attorneys continued to find it difficult, and sometimes impossible, to obtain attorney positions in law firms.[8] For example, Justice Sandra Day O'Connor of the Supreme Court graduated third in her Stanford Law School class in 1953, was a member of the Stanford Law Review and was elected Order of the Coif, yet her only job offer was from a law firm that wanted to hire her as a legal secretary.[9] Similarly, Justice Ruth Bader Ginsburg of the Supreme Court tied for first in her law school class at Columbia Law School in 1959 (after transferring from Harvard Law), and despite her outstanding credentials, not a single New York law firm offered her a position.[10] In fact, legendary jurist Felix Frankfurter refused to hire Ginsburg as a law clerk because of her gender.[11]

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[6] CYNTHIA F. EPSTEIN, WOMEN IN LAW 49 (1981) (ebook). The St. Louis Law School admitted women in 1869 and was the first law school in the United States to do so. *Id.* However, women were repeatedly denied admission to law schools and even those schools that formally opened their doors to women—Michigan in 1870, Yale in 1886, New York University in 1891, and Stanford in 1895—remained inhospitable to women students. *Id.* at 49-50. Moreover, even after every state bar agreed to admit women, it remained difficult for women to gain entrance to law schools. *Id.* at 51. *See generally* RONALD CHESTER, UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA (1985) (detailing personal accounts of women who attended law school in the 1920s and 1930s).

[7] KAREN B. MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 12 (1986). In 1869, Arabella "Belle" Mansfield became the first woman in the United States to be formally admitted to the bar. *Id. See also* WOMEN IN AMERICAN LAW: FROM COLONIAL TIMES TO THE NEW DEAL 218 (Marlene Stein Wortman ed., 1985). Nevertheless, in 1873, the United States Supreme Court refused to overturn Illinois' prohibition against women practicing law. Bradwell v. Illinois, 83 U.S. 130 (1873). As a result, women were forced to engage in a state-by-state struggle for admission to the individual state bars. MORELLO, *supra*, at 22.

[8] MORELLO, *supra* note 7, at 12; WOMEN IN AMERICAN LAW, *supra* note 7, at 194.

[9] Laurence Bodine, *Sandra Day O'Connor*, 69 A.B.A. J. 1394, 1396 (1983). Ironically, one of the partners at the firm who offered Justice O'Connor the legal secretary position was former United States Attorney General William French Smith. *Id.*

[10] DEBORAH G. FELDER & DIANA ROSEN, *Ruth Bader Ginsburg*, *in* FIFTY JEWISH WOMEN WHO CHANGED THE WORLD 264, 267 (2003). Ginsburg explained: "In the fifties, the traditional law firms were just beginning to turn around on hiring Jews. . . . But to be a woman, a Jew, and a mother to boot, that combination was a bit much." *Id.* Ginsburg applied to large numbers of law firms in New York, only to be rejected by every single one. DAWN BRADLEY BERRY, THE 50 MOST INFLUENTIAL WOMEN IN AMERICAN LAW 215 (1996). Ginsburg instead took a job teaching at Rutgers Law School and became involved in doing work for the American Civil Liberties Union ("ACLU") in New Jersey. *Id.* at 217-18. Ultimately, as director of the ACLU's Women's Rights Project, Ginsburg litigated many of the major cases that developed the law of sex equality in the 1970s. *Id.*

[11] FELDER & ROSEN, *supra* note 10, at 267.

Throughout the 1950s and 1960s, other highly qualified, well-educated women were denied professional opportunities solely based on their gender. Their experiences were amply captured in a headline in the Harvard Law Record in December 1963, six months before their graduation: "Women Unwanted."[12] The article described a survey of law firms that asked what characteristics were most desirable in applicants for law firm jobs on a scale from minus ten to plus ten; being a woman was rated at minus 4.9, lower than being in the lower half of the class or being African American.[13] Law firms' justifications for their negative ratings of female candidates included: "'Women can't keep up the pace'; 'bad relationship with the courts'; 'responsibility is in the home'; [and] 'afraid of emotional outbursts.'"[14]

Bias against female lawyers practicing in the courtroom has existed since women were admitted to the bar.[15] In 1918, the district attorney of San Francisco attempted to discredit Clara Shortridge Foltz, the first woman attorney in California, by stating in his closing argument to the jury: "She is a WOMAN, she cannot be expected to reason; God Almighty decreed her limitations . . . this young woman will lead you by her sympathetic presentation of this case to violate your oaths and let a guilty man go free."[16] Similarly, in an autobiographical article discussing what it was like to be a female lawyer in 1917, Mary Siegel described her first courtroom proceeding as follows:

> When my case was called, and I walked to the appropriate table a bailiff rushed over to direct me to where he said I belonged—the spectator's bench. . . . Just before the hearing got underway, the presiding judge . . . asked the attorneys to approach the bench. As I walked toward him, I was reproached by the judge who virtually sneered when he repeated that he wanted to confer with the legal representatives, not an office stenographer. After I informed him that I filled that role, the astonished gentleman asked, "My God! What do I call you? Do you prefer 'she' lawyer, 'woman' lawyer, or 'female' lawyer?" I suggested that 'counselor' would be appropriate.[17]

Fortunately, through the courts and the political process, women made

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[12] JUDITH RICHARDS HOPE, PINSTRIPES & PEARLS: THE WOMEN OF THE HARVARD LAW SCHOOL CLASS OF '64 WHO FORGED AN OLD-GIRL NETWORK AND PAVED THE WAY FOR FUTURE GENERATIONS 151 (2003).

[13] *Id.*

[14] *Id.*

[15] Arabella Mansfield was the first woman admitted to the legal profession in the United States. She was admitted to the Iowa bar in 1869. *Arabella Mansfield*, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/biography/Arabella-Mansfield (last updated Mar. 4, 2016).

[16] Mortimer D. Schwartz et al., *Clara Shortridge Foltz: Pioneer in the Law*, 27 Hastings L.J. 545, 545 (1976) (quoting Clara Shortridge Foltz, *Struggles and Triumphs of a Woman Lawyer*, NEW AM. WOMAN 4, 10 (1918)).

[17] Mary G. Siegel, "*Crossing the Bar": A "She" Lawyer in 1917*, 7 WOMEN'S RTS. L. REP. 357, 360 (1982). *See generally* TIERRA FARROW, LAWYER IN PETTICOATS (1953) (containing the memoirs of Kansas City lawyer Tierra Farrow in the early 1900s). Farrow was the first female lawyer in Missouri and the third in the United States. *Id.*

substantial advances toward legal and personal equality.[18] As a result of the reawakening of the women's movement in the 1960s, other political activism toward dismantling workplace inequality, related lawsuits, and anti-discrimination lawmaking of the 1970s and 1980s,[19] women entered the legal profession in increasing numbers.[20] Today, women are entering law school and the legal profession in substantial numbers compared to past years.[21] Still, women comprise only 34% of practicing attorneys[22] and have not advanced to the highest leadership roles at nearly the same rate as men.[23] In private practice, women account for only 20.2% of partners,[24] 17% of equity partners,[25] and 4% of managing partners at the 200 largest law firms.[26] The number of women attorneys in lead counsel and trial attorney roles is even more strikingly small.[27]

Research indicates that significant gender bias exists in the courtroom among

[18] *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (holding that men and women have equal rights and responsibilities to pay or receive alimony); Roe v. Wade, 410 U.S. 113 (1973) (recognizing a woman's right to control reproduction); Reed v. Reed, 404 U.S. 71 (1971) (holding that the Equal Protection Clause of the Fourteenth Amendment forbids legislation giving a mandatory preference to members of one sex). *See also* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2012)) (prohibiting sex-based wage discrimination between substantially equal jobs); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2012)); Equal Credit Opportunity Act, Pub. L. No. 90-321, 88 Stat. 1521 (codified as amended at 15 U.S.C. §§ 1691-1691f (2012)) (prohibiting discrimination on the basis of sex or marital status in any credit transaction); Title IX of the Education Amendment Act of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681-1688 (2012)) (prohibiting discrimination on the grounds of sex (and blindness) in all public undergraduate institutions, and in most private and public graduate and vocational schools receiving federal monies); Fair Housing Act, Pub. L. No. 92-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (2012)) (prohibiting discrimination on the basis of sex in the sale, financing, and rental of housing).

[19] For a description of the interplay between feminist theory, feminist lawmaking, and women in the legal profession during this period, see Cynthia G. Bowman & Elizabeth M. Schneider, Symposium, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249 (1998).

[20] *See* ALBIE SACHS & JOAN HOFF WILSON, SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES 195 (1978) (describing that the number of women attending accredited law schools jumped dramatically from 2,600 in 1966 to 26,000 in 1975).

[21] COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW, *supra* note 1, at 4, (citing female law school enrollment statistics from 1963 to 2012). In 2013, 47.3% of law school graduates were women. *Id.* at 4. *See also* Section of Legal Education and Admissions to the Bar, *Enrollment and Degrees Awarded, 1963-2013 Academic Years*, AM. BAR ASS'N (2013), www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.pdf.

[22] COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW, *supra* note 1, at 2.

[23] Scharf & Liebenberg, *supra* note 5, at 13 (concluding that men are three times more likely to appear in lead counsel roles than women, and that the gender gap is greatest in AmLaw 200 firms).

[24] *Id.* SCHARF ET AL., *supra* note 2 (reporting that in spite of a decades-old pipeline of women law school graduates, a disproportionately low number of women advance into the highest ranks of large firms).

[25] COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW, *supra* note 1, at 2.

[26] *Id.*

[27] Scharf & Liebenberg, *supra* note 5, at 9 (finding that in civil cases, women appear less often than men and are far less likely to designate their role as lead counsel or trial attorney).

women who are practicing litigators.[28] A Defense Research Institute ("DRI") survey found that 70.4% of the participants have experienced gender bias in the courtroom.[29] Additionally, 54% of women attorneys in California surveyed by the State Bar of California Center for Access and Fairness in 2005 reported experiencing gender bias in the courtroom.[30] Furthermore, nine out of ten women surveyed by the Texas State Bar in 2004 reported "being the target of at least one incident of gender discrimination in the courtroom."[31] Kat Macfarlane, an assistant law professor at LSU Law Center, stated: "Women in the public sphere, who argue cases in federal court and vote on bills in state legislatures, already find themselves 'sitting at the table'. . . . But once they've taken their seats, they still aren't recognized as legitimate speakers . . . ."[32]

While gender discrimination today is not always blatant or overt, various studies show that unconscious and subtle acts of gender bias continue to pervade the justice system. Women attorneys have reported experiencing gender bias from judges, jurors, and opposing counsel, including:

1. being mistaken for a secretary or paralegal;
2. being called a term of endearment (honey, sweetheart);
3. being critiqued for their voice sounding shrill or too high (this perception was echoed by judges who commented that a woman raising her voice in court was a problem because she sounds shrill, whereas a man sounds aggressive);
4. being treated differently (ignored, bullied, treated in a condescending manner); and

[28] DEF. RESEARCH INST., A CAREER IN THE COURTROOM: A DIFFERENT MODEL FOR THE SUCCESS OF WOMEN WHO TRY CASES 9 (2004) (citing statistic that majority of surveyed women have experienced gender bias in the courtroom, and that "[e]ven among women attorneys who have been successful in law firms, battles are still being fought on the front lines of firms to promote women into the ranks of first chair trial lawyers, rainmakers, and senior law firm managers").

[29] *Id.*

[30] Bibianne Fell, *Gender in the Courtroom Part 1—Is Lady Justice at a Disadvantage in the Courtroom?*, NAT'L INST. FOR TRIAL ADVOC.: THE LEGAL ADVOCATE (Mar. 19, 2013), http://blog.nita.org/2013/03/gender-in-the-courtroom-part-1-is-lady-justice-at-a-disadvantage-in-the-courtroom/.

[31] *Id.*

[32] Kat Macfarlane, *Motion to Dismiss: From Catcalls to Kisses, Gender Bias in the Courtroom*, OBSERVER (July 10, 2013, 11:09 AM), http://observer.com/2013/07/women-lawyers-sexism-nyc/#ixzz3Yzsq73Lp. *See also* Sheryl Sandberg, Chief Operating Officer, Facebook, Address at TEDWomen 2010: Why We Have Too Few Women Leaders (Dec. 2010), http://www.ted.com/talks/sheryl_sandberg_why_we_have_too_few_women_leaders?language=en. Sandberg told a story of four women from former Treasury Secretary Tim Geithner's staff who attended a meeting at Facebook and sat off to the side of the room instead of around the large conference table. *Id.* Sandberg observed that because of their seating choice, they seemed like spectators instead of participants. *Id.* Sandberg urged not to expect getting a corner office by sitting on the sidelines. *See id.* Though she acknowledged the double standard for "assertive" women, who are too often perceived as "aggressive" or even a word that begins with "b." *Id.*

5. having clients express a preference for male lead trial counsel (although judges reported that they often found women litigators better prepared and more likely to follow courtroom rules).[33]

The implications of these gender biases can be explained by empirical studies.

II. EMPIRICAL DATA DEMONSTRATE THE IMPACT OF GENDER BIAS IN THE COURTROOM

Jury simulations, surveys, and new forms of social science experimentation conducted in various jurisdictions have revealed that juries and judges treat women differently than their male counterparts.[34] Over the past two decades, cognitive psychologists have shed light on the types of biases female attorneys experience in the courtroom through new and different ways to measure the existence and impact of hidden or implicit biases.[35] Implicit bias concerns attitudes or stereotypes that affect people's understanding, decision-making, and behavior, without them realizing it.[36] For example, someone might believe that women and men should be equally associated with science, but that person's automatic associations could show that he or she (like many others) associate men with science more than he or she associates women with science.[37] Explicit bias, in contrast, concerns stereotypes and attitudes that a person is aware of and expressly self-reports in surveys.[38] Gender bias is often outside the person's conscious awareness and implicit in that it can occur without realization, in contrast to someone's consciously held or explicit beliefs.[39] Scholars Mahzarin Banaji and Anthony Greenwald[40] posited that social behavior is not completely under our conscious control; rather, it is driven by learned stereotypes that operate automatically or unconsciously when we interact with other people.[41] Using experimental methods

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126-29 (2012).

[37] *Educatio*n, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/education.html (last visited Mar. 18, 2016).

[38] JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR STATE COURTS 3 (2009). For example, if someone has an explicitly positive attitude toward chocolate, then that person has a positive attitude, knows about having a positive attitude and consciously endorses and celebrates that preference. *Id.* at 7. Implicit stereotypes, on the other hand, "are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects." Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 8 (1995). Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection. *See* Kang et al., *supra*, at 36.

[39] *See* Greenwald & Banaji, *supra* note 38.

[40] Mahzarin Banaji is one of the chief developers of Implicit Association Tests and Anthony Greenwald is the researcher who created the test in 1994. *About Us*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/aboutus.html (last visited Mar. 18, 2016). Various Implicit Association Tests can be accessed at https://implicit.harvard.edu/implicit/.

[41] Greenwald & Banaji, *supra* note 38.

in laboratory and field studies, researchers have provided ample evidence that implicit biases are pervasive and have real-world effects in the courtroom.[42]

A. Scientists Use the Implicit Association Test to Measure Gender Biases in the Legal Profession

In the 1990s, scholars Banaji, Greenwald, and their colleagues developed the Implicit Association Test ("IAT") and have since been using the test to conduct social cognition research on implicit bias.[43] The 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.[44] Specifically, the IAT pairs an attitude object (such as a racial group) with an evaluative dimension (good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes.[45] For example, in the first part of the IAT, the participant is told to sort words relating to concepts (e.g., African-American, European-American) into categories.[46] Hence, if the category "African-American" is on the left, and a picture of an African-American person appeared on the screen, the participant would press the "e" key.[47] In the second part of the IAT, the participant sorts words relating to the evaluation (e.g., pleasant, unpleasant).[48] Thus, if the category "unpleasant" is on the left, and an unpleasant word appeared on the screen, the participant would press the "e" key.[49] In the third part of the IAT, the categories are combined and the participant is asked to sort both concept and evaluation words.[50] As a result, the categories on the left side would be "African-American/Unpleasant" and the categories on the right side would be "European-American/Pleasant."[51] In the fourth part of the IAT, the placement of the concepts switches.[52] If the category "African-American" was

[42] *See, e.g.*, Roberta Liebenberg, *Has Women Lawyers Progress Stalled?*, LEGAL INTELLIGENCER, May 28, 2013, at 3-4. Ms. Liebenberg posits that, "[a]s a result of these implicit biases, women often have to demonstrate greater levels of competence and proficiency and are held to higher standards than their male colleagues." *Id.*

[43] *Id.* at 4. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998).

[44] Kang et al., *supra* note 36, at 1130. *See also* Greenwald et al., *supra* note 43, at 1464-66 (introducing the IAT). For more information on the IAT, see Brian A. Nosek et al., *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).

[45] Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 355 (2007) (citing Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117, 123 (Henry L. Roediger, III et al. eds., 2001)).

[46] *Blindspot's IAT Race Test*, HARVARD UNIV., https://implicit.harvard.edu/implicit/user/agg/blindspot/indexrk.htm (last visited Mar. 19, 2016).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

previously on the left, now it would be on the right.[53] In the final part of the IAT, the categories are combined in a way that is opposite what they were before.[54] If the category on the left was previously "African-American/Unpleasant," it would now be "European-American/Unpleasant."[55] The IAT score is based on how long it takes a person, on average, to sort the words in the third part of the IAT versus the fifth part of the IAT.[56] The strength of the attitude or stereotype is determined by the speed at which the participant pairs the words.[57] IAT data can predict behavior in the real world, including in the courtroom.[58]

In fact, implicit bias evidence in the context of the legal profession, as measured by IAT studies, shows that implicit biases formulate at an early stage.[59] For example, one study tested whether law students hold implicit gender biases about women in the legal profession, and further tested whether these implicit biases predict discriminatory decision-making.[60] First, based on the stereotype of male leaders and women clerical workers, the researchers created and conducted the "Judge/Gender IAT" to test whether people hold implicit associations between men and judges and women and paralegals.[61] Next, based on the stereotype of men as professionals and women as homemakers, the researchers conducted an IAT to test whether people associate men with the workplace and women with the home and family.[62] In addition to testing for implicit gender bias in the legal setting, the researchers tested whether gender stereotypes predict biased decision-making.[63]

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*; *see also* KANG, *supra* note 38, at 4; Anthony G. Greenwald & Linda Hamilton Krieger, Symposium, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954 (2006) ("[M]any studies that have used an IAT attitude measure have also included a measure of one or more social behaviors that are theoretically expected to be related to attitude or stereotype measures.").

[58] *See* KANG, *supra* note 38, at 4 ("There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world—in ways that can have real effects on real lives."); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 436 (2007) (noting that implicit bias predicts discriminatory behaviors in individuals); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 753 (2001) (revealing that implicit bias predicts more negative evaluations of agentic, i.e., confident, aggressive, ambitious women in certain hiring conditions). *See also* DAN-OLOF ROOTH, INST. FOR THE STUDY OF LABOR, IMPLICIT DISCRIMINATION IN HIRING: REAL WORLD EVIDENCE 5 (2007), http://ftp.iza.org/dp2764.pdf (reporting that implicit bias predicts the rate of callback interviews based on an implicit stereotype in Sweden that Arabs are lazy).

[59] Justin Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 1 (2010) (finding that implicit biases have already formulated by law school, well before these students enter the legal profession).

[60] *Id.*

[61] *Id.* at 3.

[62] *Id.* at 4.

[63] *Id.* In order to test whether gender stereotypes predict biased decision-making, the researchers included three additional gender-based measures in the study: a law firm hiring measure (participants were asked to select a candidate to hire); a judicial appointments measure (participants were asked to rank the desirability of masculine and feminine traits in appellate judges); and a law student organization budget cut measure (participants were asked to reallocate funds in response to budget cuts). *Id.* at 3.

The results supported the conclusion that law students implicitly associate men with judges, and women with paralegals, and therefore harbor an "implicit male leader prototype" in the legal setting.[64] Contextualized within legal scholarship on gender stereotypes, these results confirmed that law students associate men with career and women with home and family, as well as hold implicit male prototypes for the position of judge.[65] In sum, the study found that implicit biases were pervasive. Most importantly, this study demonstrated that individuals form their implicit associations as early as law school,[66] if not earlier.

B. The Challenge of the Double Bind: Studies of Juries Reveal Unconscious Gender Biases Against Female Trial Attorneys

Implicit gender bias undoubtedly exists and has real-world consequences that have negative impact on achieving fairness in trials, which are supposed to be a search for the truth regardless of the attorney's gender. After centuries of men dominating most professions, masculinity has been associated with aggression, competitiveness, lack of sentimentality, and emotional control.[67] Femininity, on the other hand, has been associated with passivity, fragility, sensitivity, and nurturance.[68] If a woman acts the same way as a man, she may be viewed as abrasive, bossy, and combative.[69] According to scholars Barbara Kellerman and Deborah L. Rhode, these traditional gender stereotypes continue to force women into "a double standard and a double bind."[70] In other words, "what is assertive in a man seems abrasive in a woman, and female leaders risk seeming too feminine or not feminine enough."[71] According to Rhode and Kellerman, women face tradeoffs that men do not—"[a]spiring female leaders can be liked but not respected, or respected but not liked, in settings that may require individuals to be both in order to succeed."[72] Consequently, men continue to be rated higher than women on most of the qualities associated with leadership.[73]

Women attorneys might encounter these biases when developing their courtroom style and persona.[74] A female trial attorney must tread lightly between societal stereotypes regarding feminine and masculine traits in order to be

64 *Id.* at 28.

65 *Id.* at 32.

66 *Id.* at 1.

67 *See* Judith M. Bardwick & Elizabeth Douvan, *Ambivalence: The Socialization of Women*, *in* WOMAN IN SEXIST SOCIETY 225, 225 (Vivian Gornick & Barbara K. Moran eds., 1971).

68 *See id.*

69 *Id.*

70 Deborah L. Rhode & Barbara Kellerman, *Women and Leadership: The State of Play*, *in* WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 1, 7 (Deborah L. Rhode & Barbara Kellerman eds., 2006).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

perceived favorably in the courtroom. If she is soft-spoken and compassionate ("feminine" traits), she risks being perceived as too weak.[75] On the other hand, if a female attorney is aggressive or forceful ("masculine" traits), she risks being perceived as too abrasive.[76] Consequently, female attorneys struggle to maintain a style and persona somewhere between these stereotyped extremes.

Several studies have examined whether jurors react differently to male and female attorneys in the courtroom.[77] One such study examined the effects of a defense attorney's presentation style and gender on jurors' verdicts and evaluation of the attorney.[78] The methodology involved 135 undergraduate college students who read a brief summary of an assault-and-robbery case and watched a videotape of either a passive or aggressive male or female attorney interrogating a witness.[79] The research subjects then rendered a verdict and rated the witness and attorney on characteristics such as competency, credibility, and assertiveness.[80] The purpose of the study was to examine the effects of aggressive versus passive speech, and to see how those effects were moderated by the gender of the attorney and the gender of the juror.[81]

The results revealed that an aggressive attorney style is an advantage in the courtroom: "aggressive attorneys were found to be more successful than passive attorneys."[82] In particular, male (but not female) participants were more influenced when a female, or especially a male, attorney was aggressive than when that attorney was passive.[83] Both attorneys' gender and presentation style had some corresponding effects on the participants' perceptions of the attorneys, although not on their overall ratings of competence.[84] Most importantly, the jurors did not view aggressiveness in men in the same light as aggressiveness in women.[85] Women in the study did not gain the same advantages from an aggressive style, in terms of causing the crime to be considered less serious and receiving fewer guilty verdicts, as men did.[86] Consequently, female attorneys were less successful than male attorneys in obtaining a "not guilty" verdict for their client.[87] This study suggests that female attorneys who seek to emulate male aggressiveness will not be as

[75] *Id.* at 36. *See generally* EPSTEIN, *supra* note 6, at 279 (describing the ways in which women attorneys are treated by their colleagues and their families, the kinds of pressures and forms of discrimination, and the new and old ways they have dealt with their problems).

[76] *See id.*

[77] Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533, 535 (1996).

[78] *Id.* at 536.

[79] *Id.* at 540.

[80] *Id.* at 533.

[81] *Id.*

[82] *Id.* at 548.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 549.

[86] *Id.*

[87] *Id.*

successful as a man in the courtroom.

A more recent study sought to examine the effects of gender stereotypes of emotional expression on jurors' perceptions of an attorney's competence.[88] The participants—170 undergraduate students—watched a video of a closing statement of a male or female attorney expressing either anger or neutral emotions and were asked to render a verdict and rate the attorney's competence.[89] The participants rated an angry male attorney highest in competence; by contrast, an angry female attorney was rated lowest in competence.[90] The results also showed that the participants attributed the female attorney's anger to her emotional disposition, while the male attorney's anger was attributed to his situation.[91] These research findings further support the proposition that jurors perceive anger and aggression differently depending on the gender of the advocate.[92]

In a third study, Decision Quest ("DQ"), a jury consulting firm, conducted a survey and collected data from several hundred jurors throughout the country about women in the courtroom.[93] Though the DQ survey did not reveal either the presence or absence of unconscious or implicit bias,[94] one participant stated: "I don't think [female attorneys] are any less qualified than males, but I would prefer a male attorney because, sadly, there are sexists in juries and they're most likely going to favor male lawyers."[95] Another survey participant felt that female attorneys are "equally competent, but possibly less respected by the average person in society."[96] Thus, while the survey data may not have revealed statistically significant gender biases, some participants expressed preferences for male trial

[88] Christian B. May, *Anger in the Courtroom: The Effects of Attorney Gender and Emotion on Juror Perceptions*, Paper 29, at 1 (2014) (B.S. thesis, Univ. Honors Program Theses, Georgia Southern University), http://digitalcommons.georgiasouthern.edu/honors-theses/29/.

[89] *Id.* at 12-13. Participants read a trial summary concerning a civil case adapted from social scientists and professors Dr. Valerie Hans and Dr. M. David Ermann (1989). *Id.* at 12. In this case, five employees sued their corporate employee for personal injuries sustained while working on the job. The corporation agreed to pay for the workers' medical bills but not for the workers' pain and suffering. *Id.* Participants then watched a video of an actor portraying an attorney delivering his or her closing arguments to the general direction of the camera, which was placed about where a jury would sit. *Id.* Each of the actors recorded an angry closing statement and an emotionally neutral closing statement. *Id.* The angry closing statement and the emotionally neutral closing statement were identically worded. *Id.* at 13. The study found that the angry male attorney was perceived as more competent than the angry female attorney. *Id.* at 21.

[90] May, *supra* note 88, at 10.

[91] *Id.*

[92] *Id.* at 19.

[93] Victoria Pynchon, *Juror Attitudes to Women in the Courtroom*, FORBES: FORBESWOMAN (Feb. 15, 2012, 11:11 AM), http://www.forbes.com/sites/shenegotiates/2012/02/15/juror-attitudes-to-women-in-the-courtroom/.

[94] With respect to stereotypes that male attorneys are viewed as "assertive," while female attorneys are viewed as "aggressive," 95% of respondents believed that male attorneys are aggressive, while 91% felt that female attorneys are aggressive. *Id.* However, this was considered a statistically insignificant difference. *See id.*

[95] *Id.*

[96] *Id.*

lawyers over female trial lawyers based on their awareness of others' biases.[97]

C. Judges and Arbitrators Also Have Unconscious Biases Against Female Attorneys

How judges and arbitrators make decisions is important since not all cases are tried before juries. On the one hand, judges have taken an oath to impartially uphold the law,[98] are trained legal minds, and thus are presumably more objective decision-makers than are jurors. However, the decision-making process for judges, arbitrators, and mediators is not much different from juror decision-making.[99] Judges, like everyone else, make decisions based on their own set of biases—their decisions might be informed by their own race,[100] ethnic background, socioeconomic status,[101] gender,[102] sexual orientation, religion, ideology, or general upbringing.[103]

One behavioral study examined the effects of cognitive biases on judicial

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[97] *Id.* (citing Alison Wong & Blaine McElroy, *Gender in the Courtroom: Myth vs. Reality*, DECISION QUEST (2014), http://www.decisionquest.com/utility/showArticle/?objectID=1317#Article).

[98] *See* 28 U.S.C. § 453 (2012) ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.'").

[99] Ann T. Greeley, *Gender and Racial Bias in the Courtroom*, AM. BAR ASS'N SECTION OF LITIG. 2012, SECTION ANN. CONF.: TRIAL TACTICS IN A DIVERSE WORLD, Apr. 18-20, 2012, at 3-4, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/37-1_gender_racial_bias_in_the_courtroom.authcheckdam.pdf. For example, a number of older male attorneys, clients, and judges—including some female judges—do not believe women should wear pants in the courtroom, and that may be an issue with juries as well. *See* DEF. RESEARCH INST., *supra* note 28, at 11. "Judges still sometimes call women attorneys 'dear' and 'honey' and comment on the way they dress . . . . Several women have reported sexist or inappropriate comments by male judges or inappropriate behavior by opposing counsel that was not addressed by judges." *Id.*

[100] Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1161–63 (2009) (finding that black judges and white judges perceive racial harassment differently, which means that the decision-making process is not completely objective: judges bring their personal experiences, or lack of experience, to bear when deciding cases).

[101] *See* Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 141 (2013) ("Because judges are more economically privileged than the average individual litigant appearing before them, they may be unaware of the gaps between their own experiences and realities and those of poor people. These gaps have contributed to patterns of judicial decisionmaking that appear to be biased against poor people as compared to others.").

[102] Neil A. Lewis, *Debate on Whether Female Judges Decide Cases Differently*, N.Y. TIMES, June 3, 2009, at A16 (analyzing Justice Ginsburg's arguments in *Safford Unified School District v. Redding*, 557 U.S. 364 (2009), which involved the appropriateness of the strip search of a thirteen-year-old girl by school authorities). Justice Ginsburg's experience as a female may have influenced her interpretation of the issues and brought a new perspective that would not have been expressed in her absence. *Id. See also* Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 4 AKRON L. REV. 693 (2014) (reviewing the factors influencing judges intuitive thought processes and decisions).

[103] *See* Mark W. Bennett, *Essay: From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 706 (2013) (warning that judges have their own biases).

decision-making using data based on a survey of 167 federal magistrate judges.[104] The results showed that judges are just as susceptible to certain cognitive errors as were jurors.[105] In another study, several judges conveyed that raising one's voice in court was a problem for women because they came across as shrill, but not for men who were simply seen as being aggressive.[106] Interestingly, the male judges cited that one of their biggest challenges was dealing with entrenched biases against women when they act aggressively.[107]

The double-bind dilemma—or "Damned if You Do, Doomed if You Don't" phenomenon[108]—also dictates the way in which female attorneys respond to gender bias in the courtroom. When offensive conduct occurs, a female attorney is conflicted between the need to confront the situation and nullify its demeaning effect, and a fear that any response will hurt her client's case.[109] As one female attorney described the dilemma:

> [W]e feel torn. To assert our own struggle even minimally is not what we are in court for . . . we know that what we say or don't say as lawyers vitally affects the [client's] chances for "justice." If we question the treatment we are receiving, the judge, D.A. or whoever will think that we have a chip on our shoulders and will not look kindly on us or our [client]. If we don't question the treatment, it will pass unnoticed, but so, we fear, will our legal arguments.[110]

Indeed, the burden usually rests on the female attorney to decide whether to call attention to the gender-biased conduct, which is a difficult choice when a client's interests are at stake.[111] Therefore, it is crucial for judges to refrain from

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[104] Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001).

[105] *Id.* at 788. State courts all over the country have also created committees on gender equality to explore the hidden biases in the court system. *See, e.g.*, SELECT COMM. ON GENDER EQUALITY, RETROSPECTIVE REPORT SELECT COMMITTEE ON GENDER EQUALITY 122-57 (2001), http://www.mdcourts.gov/publications/pdfs/genderequalityreport2001.pdf.

[106] DEF. RESEARCH INST., *supra* note 28, at 10-11.

[107] *Id.* The good news is that these researchers also found that sufficient motivation to suppress racial bias produces fairer and more just outcomes. *Id.*

[108] CATALYST, THE DOUBLE-BIND DILEMMA FOR WOMEN IN LEADERSHIP: DAMNED IF YOU DO, DOOMED IF YOU DON'T 1, 7 (2007), http://www.catalyst.org/knowledge/double-bind-dilemma-women-leadership-damned-if-you-do-doomed-if-you-dont-0).

[109] *See, e.g.*, Nancy Blodgett, *I Don't Think Ladies Should Be Lawyers*, 72 A.B.A. J. 48 (1986) (describing that a female attorney whose husband was asked about his opinion about his wife being a lawyer said that his wife was torn between her desire to say something and fear of hurting her client's interests); Cheryl Frank, *Sex Bias in Courts: Women Suffer, N.J. Panel Finds*, 70 A.B.A. J. 36 (1984) (describing that directly confronting remarks from the bench may put a client's case in jeopardy).

[110] Beth Levezey & Joan Andersson, *Trials of a Woman Lawyer*, 1 WOMEN'S RTS. L. REP. 38, 40 (1974).

[111] *See* Lynn Hecht Schafran, *Women as Litigators: Abilities vs. Assumptions*, 19 TRIAL 36, 39 (1983) (listing commonplace sexual bias problems in the courtroom). Women also report biased comments from opposing counsel—in one example, a male attorney demanded that his female opponent not interrupt him any further, stating that "women attorneys have a hard time keeping their mouths shut." Charisse R. Lillie, *Multicultural Women and Leader Opportunities: Meeting the Challenges of Diversity in the American Legal Profession*, *in* THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP 105 (Deborah L. Rhode ed., 2003). *See also* Fred Imbert, *Panels On Sexism in Tech Get*

such biased conduct and to voluntarily intervene when it occurs so as to prevent this unfair treatment.[112] Moreover, there is a robust body of research that suggests female attorneys of color are at a distinct disadvantage inside and outside the courtroom.[113]

D. The Intersectionality Between Race and Gender in the Legal Profession

A female attorney of color faces a unique set of circumstances in the legal profession and what some have termed "the double bind of gender and race."[114] In an American Bar Association study on gender and race in the legal profession, most of the surveyed women of color found it stressful to negotiate their gender and racial identities in a predominantly white, male environment.[115] Nearly half (49%) reported having been subjected to demeaning comments or other types of harassment while working at a private law firm, as did 47% of white women, 34% of men of color, and only 2% of white men.[116]

An Asian attorney recalled:

> I had a managing partner call me into his office when I was a fourth year [associate]. He introduced me to the client, who was Korean, and he tells him that I'm Korean too. He says, "She eats kim chee just like you." He said to me, "Talk to him." I looked at the client and said, "It's a pleasure to meet you. I'm sure you speak English better than I speak Korean." The client's face was so red. Then the partner left a message on my internal message system and he was speaking gibberish, trying to sound like an Asian speaker. I called every partner on my floor and said, "You need to come and listen to this." I played that message ten times. Ten times.[117]

A Native American attorney said:

> You have to have an incredibly tough skin. . . . I had people make comments like, "Oh, you're Indian. Where's your tomahawk? Are you going to scalp me?" Or, "Can I call you Pocahontas?" . . . When I was

Awkward At SXSW, CNBC (Mar. 19, 2015, 4:13 PM), http://www.cnbc.com/id/102519949 (expounding on the idea of "manterruptions," where problematic gender dynamics emerged out of a high-profile shushing perpetrated by a male Google Executive Chairman, who repeatedly talked over former Google colleague Megan Smith, whose discussion ironically focused on problems with racial and gender diversity in the technology industry).

112 *See* UNIFIED COURT SYS. OFFICE OF COURT ADMIN. N.Y. TASK FORCE, ON WOMEN IN THE COURTS APPENDIX A 224 (1986) (noting that survey respondents remarked that a few judges do intervene and describing the salutary effects when they did).

113 Alexis A. Robinson, *Effects of Race and Gender of Attorneys on Trial Outcomes*, 23 JURY EXPERT 1, 4-5 (2011), http://www.thejuryexpert.com/2011/05/the-effects-of-race-and-gender-of-attorneys-on-trial-outcomes/.

114 Scharf & Liebenberg, *supra* note 5, at 15.

115 JANET E. GANS EPNER, COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 10 (2006), http://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility.authcheckdam.pdf.

116 *Id.*

117 *Id.*

> called "chief" and brought it to people's attention I was told, "Oh, you're spoiling [our work] environment here." So I had to leave.[118]

Several women of color described how others caricatured them based on both gender and race, such as the African-American attorney who heard herself described as "an angry Black woman" or the Asian attorney who heard herself described as a "dragon lady."[119]

While few studies have evaluated implicit biases about minority female attorneys, there is data suggesting that the risk of conviction may be especially prominent when the attorney is a "double minority."[120] In another study, Jerry Kang and his colleagues created an IAT to test whether jurors rely on implicit ethnic biases when evaluating the performance of litigators.[121] Specifically, the researchers were interested in learning how mock jurors evaluate Asian American male litigators as compared to white male litigators.[122] The study examined whether explicit and implicit biases in favor of whites and against Asian Americans would alter a juror's evaluation of a litigator's disposition.[123] The researchers hypothesized that participants would associate white males with traits commonly associated with successful litigators (for example, eloquent, charismatic, and verbal) relative to Asian American males, who would be more likely associated with traits commonly assigned to successful scientists.[124] The results confirmed the researchers' hypothesis—the participants did in fact implicitly associate white

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118 *Id.*

119 *Id.* Other available research on gender and race shows the more difficult road women attorneys of color experience. *See, e.g.*, SCHARF ET AL., *supra* note 2, at 6 ; NAT'L ASS'N OF WOMEN LAWYERS & NAWL FOUND., REPORT OF THE NINTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 6 (2015), http://www.nawl.org/p/cm/ld/fid=wu82#surveys; EPNER, *supra* note 115, at 10-13. *See also* Greeley, *supra* note 99, at 2.

120 Robinson, *supra* note 113.

121 Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 886-88 (2010).

122 *Id.* at 893 (explaining that the researchers intentionally did not examine ethnicity effects for women attorneys). "Our strategy was not to ignore gender, but to control for it, based on past evidence showing that lawyers are expected to be men rather than women . . . . As such, we expected that implicit and explicit stereotypes about ideal lawyers would activate thoughts of White men more than Asian men, but would not much activate thoughts of women of either race." *Id.* (internal citations omitted). I am aware of no such study examining the explicit and implicit biases in favor of Asian female litigators compared to white female litigators.

123 *Id.* at 896-97. The participants heard two depositions from two unrelated cases. *Id.* At the beginning of each deposition, the researchers showed the participants a picture of the litigator on a computer screen accompanied by his name for five seconds. *Id.* The researchers manipulated the race of the litigator by varying his name and photograph to be prototypically White ("William Cole") or Asian ("Sung Chang"). *Id.* Participants then listened to the deposition through headphones and, at the same time, read the script of the deposition presented on a computer screen. *Id.* The transcript identified who was speaking, which meant that participants saw labels such as "Attorney Cole" or "Attorney Chang." *Id.* At the end of the deposition, participants were asked to evaluate the litigator's competence, warmth, and their willingness to hire him or recommend him to family and friends. *Id.* Next, participants saw a picture of the second litigator, then listened to the second deposition and evaluated the second litigator on the same dimensions. *Id.* at 897-98.

124 *Id.*

males with traits commonly assigned to successful litigators.[125] That is, participants with higher levels of implicit bias were more likely to favor the white litigators' performances.[126] The study demonstrates that stereotypes about litigators and Whiteness alter how people evaluate identical lawyering, simply because of the race of the litigator.[127] Though race was only primed by a five-second picture and the last name of the lawyer shown on the transcript, the study was sufficiently salient to predict different evaluations of the litigator's performance—implicit stereotypes predicted pro-White favoritism and explicit stereotypes predicted anti-Asian derogation.[128]

While there is recourse available with respect to explicitly biased jurors, the same is not true for those jurors with implicit biases. In *Turner v. Stime*,[129] the court found that the jury had committed misconduct for making explicitly biased comments against the Asian American attorney, entitling the parties to a retrial.[130] In *Turner*,[131] Darlene and Bill Turner sued Dr. Nathan Stime and the medical clinic at which he worked for medical malpractice resulting in the amputation of Mrs. Turner's foot.[132] Mark Kamitomo, an Asian-American attorney of Japanese ancestry, represented the Turners, and a white male attorney represented Dr. Stime.[133] The jury returned a verdict for Dr. Stime, and it later became known that during deliberations several jurors referred to the Turners' attorney as "Mr. Kamikaze," "Mr. Miyashi," "Mr. Miyagi," or "Mr. Havacoma."[134] One juror also reportedly stated that the defense verdict was "almost appropriate" given that it was delivered on December 7—a reference to the day in 1941 when the Japanese attacked Pearl Harbor.[135]

The trial court found that the jury engaged in misconduct that affected the verdict and subsequently granted the Turners' motion for a new trial.[136] The Court of Appeals for the State of Washington affirmed.[137] This case shows that while there is recourse through the court system for explicitly biased conduct, recourse

125 *Id.* at 902.

126 *Id.*

127 *Id.* at 912.

128 *Id.*

129 Turner v. Stime, 153 Wash. App. 581 (Wash. Ct. App. 2009).

130 *Id.*

131 *Id.* at 584.

132 *Id.* at 585.

133 *Id.*

134 *Id.* at 586.

135 *Id.*

136 *Id.* at 589. For jury misconduct to occur during deliberations, jurors would have to make racially derogatory remarks of a factual nature that reveal racial bias against a party's attorney and other jurors would have to respond to the remarks by chuckling and smirking. *Id.* Such misconduct does not inhere in the verdict and can be a ground for granting a new trial. *Id.* A party is entitled to a new trial on the basis of juror misconduct if "there was sufficient misconduct to establish a reasonable doubt that the party was denied a fair trial." *Id*. at 593 (citing Gardner v. Malone, 60 Wash. 2d 836 (1962), *amended by* 60 Wash. 2d 836 (1963)).

137 *Id.* at 594.

for implicitly biased conduct is not as easily obtainable given the opaqueness of unconscious biases.

III. COMBATING GENDER BIASES AGAINST WOMEN TRIAL ATTORNEYS AND LITIGATORS

The perils of implicit bias in the legal profession are manifold. Judgments about female attorneys based on their gender not only undermine the attorneys' credibility, but also affect their clients' access to fair court proceedings. Recognizing implicit bias and ways to debias one's approach to decision-making are thus critical to ensuring equal access to justice.[138] The Model Rules of Professional Conduct prohibit attorneys from exhibiting bias or prejudice "based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, . . . when such actions are prejudicial to the administration of justice."[139] To that end, attorneys must understand and acknowledge their own biases, which may manifest themselves as unconscious racism, sexism, ageism, or homophobia,[140] in pursuit of ethical and effective client representation, and gender parity.[141]

Countering juror bias is somewhat more difficult. Current tools to filter out biased jurors include juror questionnaires, directly questioning jurors during jury selection, as well as the lawyer's exercise of peremptory challenges.[142] Besides instructing the members of the jury that their decisions must be made impartially, there are few tools to combat jurors' implicit biases since jurors themselves might not be aware of the ways in which they evaluate attorneys, the attorneys' clients, or anyone else in the courtroom. Gender bias in the legal profession can be reduced through other means, however.

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138 *What Is Implicit or Unconscious Bias?*, AM. BAR ASS'N, http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/what-is-implicit-bias.html (last visited Nov. 20, 2015).

139 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2011). *See* Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1578 n.60 (2013) (reiterating that ethical rules preclude lawyers from discriminatory manifestations).

140 *See* Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 769 (2004) (noting the potential for implicit bias to negatively affect the attorney-client relationship, and urging lawyers to acknowledge those biases in order to work toward overcoming them); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 407-08 (2002) (calling for lawyers "to confront their own cultural identity, including the biases and prejudices that accompany that identity . . .").

141 *See* Tremblay, *supra* note 140, at 415-16 (advocating that attorneys examine and confront their own implicit biases).

142 *See* Fed. R. Civ. P. 47.

A. Remedies to Combat Gender Bias Starting in Law School and Continuing Throughout the Hiring Stages

Given how early biases form, law schools should find ways to reduce gender bias as early as possible. First, the American Bar Association as well as law schools can implement a series of bias reduction courses from the first year of law school and throughout law graduates' careers. These training programs can be woven into student orientations or other required courses that include a training element. Law schools across the country can also implement programs like the Women, Leadership and Equality Program at the University of Maryland Francis King Carey School of Law.[143] The Women, Leadership and Equality Program combines teaching, experiential learning, and scholarship about women in the legal profession to equip law students with tools to combat engendered norms.[144] The program's goal is "to foster scholarship on the gendered nature of law and the legal profession" by grounding the students in theory, and subsequently applying that theory during a workshop in the following semester.[145] Students learn about implicit bias and take the IAT, learn about the history of women in the legal profession, and how to combat stereotypes and biases in the law firm, courtroom, corporate boardroom, or anywhere the student might pursue his or her career.[146] By promoting awareness in law school about gender biases that pervade the legal profession, these future professionals are better equipped to combat bias in the real world.

Second, the American Bar Association, the Association of American Law Schools, and law schools themselves can encourage law firms and other agencies to commit to hiring more women in counter-stereotypical (implicitly male prototype) roles. An implicit gender bias reduction study, conducted by social psychologists Nilanjana Dasgupta and Shaki Asgari, tested whether exposing female college student participants to women in counter-stereotypic roles would reduce the students' implicit gender biases.[147] The researchers tested their hypothesis by

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143 The Women, Leadership and Equality Program at the University of Maryland Francis King Carey School of Law was created by Professor Paula Monopoli in 2003. "The Program helps students develop the professional skills necessary for success and leadership positions in law, business, government, the nonprofit sector, and the judiciary through its Rose Zetzer Fellowship Program. Named for the first woman admitted to the Maryland Bar Association, the Women, Leadership and Equality Program provides training in professional skills, including communication, organizational dynamics, leadership, and personal negotiation through externships and other practice-based learning." *Women, Leadership and Equality Program*, U. MD. FRANCIS KING CAREY SCH. LAW, https://www.law.umaryland.edu/programs/wle/ (last visited Nov. 20, 2015).

144 *Id.*

145 Lori Romer, *Raising a Gavel for Women's Equality*, *in* UNIVERSITY OF MARYLAND BALTIMORE: 2009 RESEARCH AND SCHOLARSHIP 18 (2009), https://www.law.umaryland.edu/programs/wle/documents/Raising_a_Gavel.pdf.

146 Connie Lee was a student in Professor Monopoli's Gender and the Legal Profession seminar. The professor taught and administered the IAT, and invited numerous guest speakers to the course to discuss biases in the legal profession.

147 *See generally* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender*

studying the effect of counter-stereotypic exemplars on both short-term and long-term bias reduction.[148]

Specifically, the researchers examined whether teaching female college students about female leaders would reduce their gender stereotypes of women as supporting figures—rather than leaders.[149] To do this, the researchers asked the participants to review photos and short biographies of women in counter-stereotypic roles, including Justice Ruth Bader Ginsburg.[150] The researchers then conducted a stereotype-gender IAT in which participants had to group together male and female names with attributes of leaders and supporters.[151] The study found that participants who had learned about the women leaders displayed less implicit gender bias than members of the control group;[152] on the IAT, these participants were able to group together women with leadership attributes more quickly than their IAT counterparts.[153] Similarly, initiatives to promote and hire more women for lead trial attorney and litigator positions can reduce the gender schema that only white males hold these positions. The more exposure attorneys, judges, jurors, and the public have to women trial lawyers, the less likely they will continue to operate under the assumption that men predominantly occupy lead counsel positions or first-chair trials.

B. Remedies to Combat Gender Biases After the Hiring Stages

In order to achieve equality in the legal profession and level the playing field, gender biases must be combated even after hiring. Survey and interview results shed light on the reasons why women continue to experience so little progress in climbing the legal career ranks.[154] Women attorneys have recounted the lack of effective mentoring at all levels in the legal profession,[155] as well as limited opportunities for client development, as barriers to career advancement.[156]

1. Women Attorneys Need More Opportunities for Client Development and More Opportunities to First-Chair Trials

One problem that women litigators have identified is that their employers fail

Stereotyping, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004) (finding that certain types of exposure to female role models temporarily reduced implicit bias).

148 *Id.* at 642.

149 *Id.* at 645.

150 *Id.* at 645-46 (noting that other counter-stereotypic leaders included business leaders, scientists, and politicians).

151 *Id.* at 646.

152 *Id.* Members of the control group saw photos of flowers and read descriptions of those flowers. *Id.* at 646-47.

153 *Id.* at 647. The researchers' summary stated, "[s]ituations that familiarize [women] with ingroup members who have succeeded in atypical leadership domains can have a strong impact on their automatic beliefs." *Id.* at 648.

154 *See* DEF. RESEARCH INST., *supra* note 28.

155 *Id.*

156 *Id.*

to provide them with the opportunity to work on an entire case and instead ask them to complete only discrete assignments within a case.[157] Limiting an associate's involvement to discrete aspects of the case reduces the opportunity for the developing lawyer to understand how her assignment affects the overall lawsuit.[158] Without this perspective, attorneys do not learn how to evaluate the litigation as a whole, and consequently, are rendered unsuitable for promotion to the partnership ranks.[159]

Strategies to remedy this gap in the learning process include ensuring that female litigators get opportunities to participate in client development, such as by interfacing with clients and receiving appropriate credit for their work.[160] Additionally, allowing female trial attorneys to fill lead counsel roles or first-chair cases, both large and small, will help advance the work and exposure of women attorneys. The more exposure women gain in leadership roles within the trial advocacy arena, the more accustomed judges, jurors and the general public will become to women trial attorneys.

2. Women Attorneys Need Improved and Increased Mentoring

Many women litigators lack effective mentoring relationships that help foster self-marketing and honing one's skillset.[161] An attorney who participated in the DRI survey commented that, "the absence of female role models causes insecurity among men and women."[162] In short, women would like to have more female role models, but do not have them.[163]

To that end, law firms and other corporate legal practices should encourage upper-level employees to take "female clerk[s], associate[s], and equity partner[s] to lunch on a regular basis to explore not only the legal issues of a specific case, but also other aspects of the practice of law that lead to professional success."[164] In the trial advocacy context, women trial attorneys need more trial attorney mentors to help them develop and improve their trial advocacy skills. Through effective mentoring, the female trial attorney will be well equipped when facing the gender biases she might experience in the courtroom.

3. Contending with the Demands of Work and Family Life

At some point in her career, a female attorney might decide to balance her heavy workload and unpredictable hours with the demands of raising or caring for a

157 *Id.* at 13.
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.* at 12.
162 *Id.*
163 *Id.*
164 DEF. RESEARCH INST., WOMEN IN THE COURTROOM: BEST PRACTICES GUIDE 5 (2007).

family. In law firms, women attorneys have to meet the demands of their firm's billable hours requirements, as well as the demands of clients that expect their attorney to be readily available to handle their needs.[165] Women attorneys simultaneously are expected to handle the day-to-day domestic responsibilities that come with raising children or other family duties, such as caring for elderly parents.[166] Shifting to family life can be challenging, particularly for attorneys who aspire to advance through the ranks of a law firm.

Among the lawyers surveyed in the DRI study, 52% responded that the practice of law influenced their personal decision on the timing of motherhood.[167] Several stated they postponed having children until after advancing to partnership so that they could meet the demands required for partnership, as they perceived these demands to be in conflict with child rearing.[168] Others who made the decision to have children, and attempted to return to the partnership track, eventually decided to cut back their hours and get off the track because they could not meet the demands of their practice without negatively impacting their family.[169]

Law firms can alleviate these ongoing challenges by implementing flexible work schedules, telecommuting, and job sharing. Law firms should openly communicate these policies, encourage their use, and examine ways to enforce these policies that actually improve the work-life balance. Additionally, law firms should create and support women's initiatives to address the institutional barriers in law firms.[170]

4. Additional Tools for Success for Women Trial Attorneys and Litigators

While research shows that women who act aggressively face a double bind dilemma, the same research also shows that women do not necessarily have to act aggressively to be effective in the courtroom.[171] Attorneys command the courtroom using different styles, and women have certainly found different methods to assert themselves and successfully advocate on behalf of their clients.[172]

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165 *Id.*

166 *Id.* at 13. *See also* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 37 (2005).

167 DEF. RESEARCH INST., *supra* note 28, at 15.

168 *Id.*

169 *Id.*

170 Noam Scheiber, *A Woman-Led Law Firm that Lets Partners Be Parents*, N.Y. TIMES (May 1, 2015), http://www.nytimes.com/2015/05/03/business/a-woman-led-law-firm-that-lets-partners-be-parents.html?smid=pl-share&_r=1. One women-led law firm, named the Geller Law Group, has dedicated its mission "to show that parents can nurture their professional ambitions" to practice law "while being fully present in their children's lives." *Id.*

171 *See* Larry Bodine, *Slides for NTL Webinar: How to Overcome Challenges Facing Female Attorneys*, NAT'L TRIAL LAWYERS (Nov. 19, 2014), http://www.thenationaltriallawyers.org/2014/11/female-attorneys/.

172 *See, e.g.*, Lynn Bratcher, *Women Trial Lawyers—As Good or Better than Men*, UNCOMMON COURAGE (2009), http://uncommoncourage.blogspot.com/2009/11/women-trial-lawyers-as-good-or-

In fact, women trial attorneys nationwide have developed teaching tools to guide women into trial work, including strategies on "how to be heard and acknowledged" and "how to effectively persuade and/or advocate."[173] The techniques, based on common linguistic and behavioral concepts, are designed to debias people's perceptions about women.[174] These techniques equip women attorneys with different methods to command the courtroom, including the purposeful use of body language, strategies to maximize use of her voice, and ways to develop her own courtroom presence and style.[175]

CONCLUSION

The lack of women as lead counsel is not due to lack of talent. Women lawyers all over the country and world are successful trial lawyers and litigators and have undoubtedly made significant strides in the legal profession. Nevertheless, more progress must be achieved to address and eliminate bias against them. Leveling the playing field requires acknowledging gender biases and recognizing ways to combat them.

Attorneys in all practices should learn about implicit bias and how such biases can influence their decision-making processes. Equipped with the knowledge that the dynamics of unconscious biases may affect the decision-making processes of judges, jurors, and even opposing counsel, women trial attorneys and litigators can further advance through the ranks of the legal profession. Moreover, with better support from professional management at law firms and other corporate legal practices, more women can flourish in the legal profession. As more women enter law school and the legal profession, these strategies can help facilitate broader cultural change and combat existing gender biases in the legal profession.

better.html; Jan Nielsen Little, *Ten Reasons why Women Make Great Trial Lawyers*, DAILY J., June 1, 2006, at 1-2, http://www.kvn.com/Templates/media/files/pdfs/Jan_Column_June2006.pdf.

[173] Shaana A. Rahman, *Wanted: Women Trial Lawyers*, PLAINTIFF MAG., Feb. 2013, at 2, http://www.rahmanlawsf.com/wp-content/uploads/Rahman_Wanted_Women-trial-lawyers.pdf.

[174] *Id.*

[175] *See id.* Shaana A. Rahman, an experienced civil trial attorney, recommend communications skills that women trial attorneys can utilize in the courtroom. *Id.* Another program based in Washington State—The Female Trial Advocacy Program—focuses on the woman trial attorney's voice, persona, and "feminine mystique" to hone trial advocacy skills. *Female Trial Advocacy Program*, KAREN KOEHLER, http://www.karenkoehler.com/ftap.html (last visited Nov. 20, 2015).

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The Evolving Science on Implicit Bias

An Updated Resource for the State Court Community

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Executive Summary

The judiciary is regarded by the public as a legitimate authority largely because of the perception of independence and impartiality. That perception is under threat. During the past turbulent year, public trust in government declined across the globe. As public trust declines, the ability of the judiciary to skillfully and effectively demonstrate the ideals of fairness and impartiality under law becomes ever more critical. In recognition of the need for leadership during such times, on July 30, 2020, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) passed a resolution "in support of racial equality and justice for all." The resolution noted, in part, that "courts in many states, with the encouragement, support, and guidance of CCJ and COSCA, have initiated efforts… to identify and address unconscious bias, and facilitate the uncomfortable conversations that arise from the recognition of such bias."

The terms *unconscious bias* and *implicit bias* emerged from research in the psychological and brain sciences. In everyday vernacular, they serve as shorthand labels for the notion widely supported by research evidence that social discrimination is like a virus: It can be easily and rapidly "caught" by a person from the social environment. This infection triggers an immune response: It influences the person's thinking and behavior in that environment to reinforce existing patterns of social discrimination, often in ways the person does not fully appreciate or understand. Implicit bias both results from and reinforces different forms of inequality at multiple levels of society. Research on implicit biases addresses how they can arise in individual information processing, decision-making, and behavior in ways that reproduce, reinforce, and are reinforced by dynamics that are historical, cultural, institutional, and interpersonal in nature. A comprehensive and successful approach to implicit bias intervention must be one that considers the importance of this broader social context and addresses the full array of forces that contribute to observed inequities.

The present report defines commonly used terms originating from the science of implicit bias; explains how the concept of implicit bias fits into broader conversations underway across the country about equity and fairness; and summarizes what is currently known from research in the psychological and brain sciences, including implicit bias strategies generally found to be effective and ineffective. This report concludes with some implications of this knowledge for state court leaders and other court practitioners who seek to better understand and address the reproduction and perpetuation of systemic biases through this lens.

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Preface

An independent and impartial judiciary is a cornerstone of government in the United States. Judicial officers are duty-bound to uphold these ideals of fairness. The American Bar Association has promulgated a model Code of Judicial Conduct to provide guidance on these matters, which most states have adopted in some form.[1] Specific ethics rules address issues of fairness, such as Rule 2.2, which explicitly instructs judges to "perform all duties of judicial office fairly and impartially." Rule 2.3 (A) calls for judges to perform these duties "without bias or prejudice." Rule 2.3 (B) reads: "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so." Judges are also required to hold attorneys in proceedings accountable for conduct that does not meet this ethical standard.

Moreover, the judiciary is regarded by the public as a legitimate authority largely because of the perception of independence and impartiality. That perception is under threat. There is a growing distrust of government and one another in the United States, and this distrust makes problem-solving in the public interest harder.[2]

In 2020, civic life was fundamentally altered by the global COVID-19 pandemic, its impact on the economy, and a cultural awakening to systemic racism. This further challenged traditional assumptions about fairness in criminal justice and healthcare systems, employment, housing, and other social institutions, buoyed by a steady stream of inequities laid bare by and exacerbated during the public health crisis.[3] During this turbulent year, public trust in government declined across the globe.[4] At a time when citizens and governments are called upon to cooperate and mobilize coordinated responses to a variety of global challenges, an erosion of trust risks devastating consequences.[5] As public trust declines, the ability of the judiciary to skillfully and effectively demonstrate the ideals of fairness and impartiality under law becomes ever more critical.

In recognition of the need for leadership during such times, on July 30, 2020, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) passed a resolution "in support of racial equality and justice for all."[6] This resolution came in the wake of dozens of official statements by state courts in response to the deaths of Breonna Taylor, Ahmaud Arbery, and George Floyd.[7] The resolution urged those organizations "to continue and to intensify efforts to combat racial prejudice within the justice system, both explicit and implicit, and to recommit to examine what systemic change is needed to make equality under the law an enduring reality for all". It acknowledged that "current events have underscored the persistence in our society of institutional and structural racism resulting in policies and practices that disproportionately impact persons of color." The resolution further noted that "courts in many states, with the encouragement, support, and guidance of CCJ and COSCA, have initiated efforts… to identify and address unconscious bias, and facilitate the uncomfortable conversations that arise from the recognition of such bias."

This report was written to update previous work on implicit bias and assist the state courts in responding to this national call to action.

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Introduction

By 2009, the terms *implicit bias* and *unconscious bias* were emerging from the psychological and brain sciences, entering the public conversation about how social and cultural biases can subtly influence the everyday behavior of individuals. The National Center for State Courts (NCSC) considered whether this information on subtle forms of bias would be of interest to the court community as part of the *Helping Courts Address Implicit Bias* pilot project, conducted in 2009-2012 with support from the State Justice Institute and the Open Society Foundations. Of the 108 justice system professionals participating in one of three state judicial education pilot programs conducted during the project, approximately 90% expressed satisfaction with their implicit bias program and believed it applicable to their work. Participants used words like "valuable," "relevant," "informative," "worthwhile," and "eye-opening" to describe their reactions to their respective programs.[8] Participants demonstrated knowledge gains as measured using pre- and post-training surveys. The report called for further research to evaluate educational programs designed around this material to determine their efficacy in achieving their varied goals and understand the conditions under which this type of content may be effectively delivered to court community audiences.

Much has transpired since the original NCSC (2012) report was published, underscoring the need to update the court community on the current state of the science and practice related to unconscious or implicit biases. The present report aims to:

a. equip court practitioners with current definitions of commonly used terms;
b. explain how the concept of implicit biases fits into broader conversations underway across the country about equity and fairness;
c. summarize what is currently known from implicit social cognition research in the psychological and brain sciences, including implicit bias strategies generally found to be effective and ineffective; and
d. identify some implications of this knowledge for state court leaders and other court practitioners who seek to better understand and address the reproduction and perpetuation of systemic biases through this lens.

Key Terms & Definitions

Reflecting how ubiquitous the term *implicit bias* has become, many who use this language in public discourse today do not define it. Among those who do define it, many rely on imprecise definitions that are difficult to understand or that vary from one another. To communicate clearly about the state of the science of implicit bias, it is useful to first define several key terms as understood by scientists today. These terms are also listed in the ***Glossary of Terms*** (Appendix A of this report).

- ***Bias:*** The unintended influence of factors that are not meant to be considered on a final decision or result.[9] Bias can occur either when relevant information does not influence the decision or when irrelevant information influences the decision. The particular situation or legal context surrounding a decision determines which factors are considered relevant or irrelevant.
- ***Conscious:*** Mental processes involving both awareness and volition.[10]
- ***Unconscious:*** Mental processes that lack either full awareness or full volition.[11]
- ***Explicit bias:*** A bias that is measured using an explicit, or direct, measure.[12] ***Explicit measures*** require participants to self-report their responses. They rely on the assumption that individuals are aware of their responses and are willing to express them.[13]
- ***Implicit bias:*** A bias that is measured using an implicit, or indirect, measure.[14] ***Implicit measures*** capture participants' responses in ways that do not rely on individuals' awareness or willingness to respond, such as by measuring reaction time to different groups of stimuli.[15] The scientific field of study that uses these implicit or indirect measures in research on attitudes, stereotypes, and self-esteem is classified as ***implicit social cognition.***[16]

In contrast to current prevailing scientific definitions, the term *implicit bias* is rarely used in public discourse to refer to a specific measurement of bias. Instead, *implicit bias* and *unconscious bias* are often used synonymously to refer to an attitude, stereotype, or prejudice that a person is unaware of possessing but which may operate automatically to influence thinking or behavior. (Similarly, the term *explicit bias* is sometimes used to refer to a biased attitude, stereotype, or prejudice that a person is consciously aware of.) This can create confusion because researchers have concluded that there is "no evidence that people are unaware of the mental contents underlying their implicit biases."[17] In fact, when asked, people are able to predict the pattern of their implicit biases "to a high degree of accuracy."[18]

Although people appear to be generally aware of their personal beliefs and cultural stereotypes (referred to as *content awareness*), they may not be aware of or fully understand how they developed this knowledge (referred to as *source awareness*), or how and to what extent that knowledge influences their everyday thinking and behavior (referred to as *impact awareness*).[19] Researchers are still working to fully test relevant hypotheses and to develop a precise scientific understanding of the differences between biases documented using indirect versus direct measures.

In the meantime, the public (including the media and educators) continues to find *implicit bias* and *unconscious bias* useful terms.[20] They serve as shorthand labels for the notion widely supported by research evidence that social discrimination is like a virus: It can be easily and rapidly "caught" by a person from the social

environment. This infection triggers an immune response: It influences the person's thinking and behavior in that environment to reinforce existing patterns of social discrimination, often in ways the person does not fully appreciate or understand. For consistency with public understanding and clarity in this report, the term *implicit bias* will be used hereafter to refer to this shorthand label, rather than the more restrictive technical definition focused on its scientific measurement.

Understanding Implicit Bias

Foundations

We all accumulate a unique set of experiences in our lives that shape our perspectives about the world around us. But we are each limited in the information available to us about our world. Science tells us that what we experience is not what objectively exists, but what we are able to interpret based on the information we collect through our bodily senses. We do not have direct access to information about what others are feeling or thinking, but we use our observations about their facial expressions, tone of voice, choice of words, mannerisms, and other behavioral information to deduce what we can about them – and decide whether and how to interact with them. So when the human brain processes information, it is making predictions about, or a best guess at, what is going on in our external reality so we can decide how to act within it.[21] These predictions are far from perfect, but they help us survive.

In addition to the subjective point of view that we cultivate through our experiences, our cognitive capacity to observe, think, and act is a finite resource. But research in the psychological and brain sciences paints a picture of a cognitive system with astonishing efficiencies built in. As we interact with the world, our mental machinery is designed to quickly search for patterns (e.g., certain types of small, spherical objects are *apples*) and make associations (e.g., *apples* are red, sweet, juicy, and are edible). Our brains do this between groups of people (e.g., older adults) and characteristics (e.g., slow, frail) as well. These associations occur, to some degree, automatically. Unlike ***controlled*** mental processes, which require at least some intention, effort, or conscious awareness to be enacted, ***automatic*** associations are formed without apparent mental effort; we may not be consciously aware of or intend to make these associations.[22] This automaticity in the human mind frees up our limited cognitive resources to perform other tasks. Because of this, we are generally not always fully aware of all the activity our minds are undertaking to help us detect, process, and act on information.

Although automatic associations make navigating the world possible, they are sometimes incorrect or even harmful. The problem is that when the brain automatically associates certain characteristics with specific groups, the association is not accurate for all members of the group. Following the above examples, not all apples are red; not all older adults are slow. Kang (2009) describes the problem this presents for the justice system:

> Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense?[23]

Our minds are constantly classifying incoming information into categories that have meaning to us. These categories may be meaningful because they are categories that society has defined for us or that we have learned from others over time. Embedded in the architecture of our daily lives, many of these associations can be, or have become, invisible to us. We may not endorse these associations, but they can nevertheless contaminate our choices and leak out through our behavior to impact others in ways that we do not intend.

Is it Implicit Bias?

Automaticity and control occur on a continuum. There are many forms of bias that may not fit neatly into a category of purely automatic or purely controlled. For example, ***microaggressions*** are brief, everyday exchanges that send denigrating messages to certain individuals because of their membership in certain groups.[24] Microaggressions can be subtle, as they include verbal speech, non-verbal cues, and outward behaviors, but they can do substantial harm to their targets.[25] Because microaggressions are defined by how they are *experienced by the receiver*, as opposed to being defined by the *intentions of the actor*, they vary widely in the extent to which they involve any intent or knowledge on the part of *the actor* that he or she may be manifesting a bias. In other words, an individual can engage in a microaggression with full knowledge and intent to harm the receiver, or with a complete lack of awareness of the harm being done, or with some level of intent and knowledge that falls between these two extremes. Depending on these factors, a microaggression may or may not be an instance of *implicit bias*.

Researchers use several scientific methods to measure implicit bias.[26] For more information about various implicit measures used in research and educational settings, see **Appendix B** of this report.

Origins

Researchers believe that implicit biases have a few common origins, including the following.

1. **Ingroup favoritism: We favor the familiar.**

People tend to demonstrate preferences for their *ingroup*, or members of the groups to which they belong.[27] Favoritism can benefit, for example, the decision-maker's family members and friends, those who share the same political or religious ideology, or fans of the same sports teams. Although we tend to favor those who we think share our values, favoritism can result from any perceived similarity between the decision-maker and the person being judged – even when the similarity is superficial or coincidental. Why?

Scientists believe this occurs because we tend to like things that are familiar, and nothing is more familiar to us than ourselves.[28] People demonstrate consistent and strongly positive attitudes toward themselves, and this positive attitude can transfer easily to other things, people, and groups when they bear a resemblance to those attributes.[29] For example, when choosing between products, people tend to prefer brands that resemble their own names.[30] Similarly, ingroup favoritism is often observed even among strangers in artificial research settings, based on seemingly random similarities (e.g., the person being judged was randomly assigned a code number that matched the decision-maker's birthdate, or was assigned to wear the same color shirt as the decision-maker in the research study).[31] Bottom line: People categorize others very easily and quickly to determine how to interact with them – that is, whether they are "in" or "out."

2. **Social learning: We are taught, but also "catch," biases from others.**

Implicit biases can develop and strengthen over time with the accumulation of personal experience. Personal experiences include

not only direct learning experiences between ourselves and the object, person, or group (i.e., classical conditioning), but also by observing the behavior of parents, friends, bosses, coworkers, and other influential people in our lives (i.e., social learning).[32] For example, children observing the behavior of adults interacting with one another will (a) indicate a preference for the adult who received positive treatment from the main speaker vs. the adult who received negative treatment; (b) choose to share resources (i.e., a teddy bear) with adults who received the positive treatment; (c) systematically imitate the adults who received positive treatment and shun those who received negative treatment from the main speaker; and (d) generalize these approach-avoid preferences to similar-looking others, illustrating the rapid and unintentional intergenerational transmission of social group bias.[33] Implicit biases in children are positively correlated with the implicit biases of their parents; however, consistent with social learning theory, this is found only among children who have a positive attachment relationship with their parents.[34] Implicit biases can develop relatively quickly through such experiences and have been found in children as young as 5 years old.[35]

3. **Cultural knowledge: Our beliefs are shaped by our environment.**

Cultural preferences and expectations, including stereotypes, are communicated in a variety of ways. They are embedded in a society's laws; upheld by government leaders; highlighted in the news; and reproduced in entertainment media such as movies, television, and video games. Society is structured around these cultural beliefs and values, which are baked into the formal and informal rules, social scripts, language, and symbols that people encounter, follow, or use every day. As a result, people develop a shared understanding of the social norms and stereotypes that are pervasive in their culture, and this cultural knowledge can foster the development of automatic associations.[36] Even if the attitudes we personally endorse differ or change over time, the implicit biases that arise from cultural knowledge can be resistant to change if those cultural stereotypes continue to be reproduced and reinforced throughout our social environment.[37] So long as representations of cultural stereotypes persist in our environment, people will have implicit biases reflecting those communicated preferences.

Pervasiveness and Impact

Implicit biases can influence a number of judgments and actions in professional settings, where they have significant impacts on people's lives.[38] In the legal domain, for example, researchers have demonstrated correlations between judges' implicit biases and their sentencing decisions,[39] as well as between labor arbitrators' implicit biases and their decision, in real arbitration cases.[40] Police officers' implicit biases correspond to their decisions to shoot criminal suspects of different races.[41] In medicine, researchers have found correlations between medical providers' implicit biases toward their patients and the quality of care that patients receive,[42] as well as between nurses' implicit biases and their likelihood of remaining in their jobs.[43] Employers' implicit biases correspond to their hiring decisions.[44]

In addition to professional decision-making, implicit associations correspond to a variety of behaviors outside of the laboratory that affect people's experiences, behaviors, and life outcomes. For example, implicit biases have been linked to self-reported racially hostile behavior, such as the use of verbal slurs and

physical harm against people of color.[45] Voters' implicit attitudes about electoral candidates have been shown to predict election outcomes.[46] Scores on implicit measures can distinguish between adolescents who are likely to engage in suicide ideation or suicide attempts and those who are not,[47] and between sex offenders who commit crimes against children and those who commit crimes against adults.[48] Implicit associations have also been shown to correspond to substance use among those with addictions to drugs or alcohol.[49]

Finally, there is a large body of research demonstrating other less-than-intentional biases and disparities in professional decision-making. These studies do not use implicit measures of bias, but they use experimental methods to identify disparities in decision-making that participants most likely are either not fully aware of or do not fully intend. For example, trial court judges in one research study decided a series of hypothetical cases; the facts of the cases were identical for all participants, except the social categories (e.g., gender, race) of the litigants involved.[50] Although most judges in the sample stated that they were confident in their abilities to make case decisions free from gendered and racial biases, these litigant characteristics had significant effects on case outcomes. A wide variety of social and cognitive decision-making biases have been demonstrated using similar methods in other studies of judges,[51] as well as in studies of professionals in other fields.[52]

Situational Triggers

People are more likely to act in biased ways under certain conditions. Although a comprehensive review is beyond the scope of this report, a few common examples follow.

1. **Situational incentives encourage speed over fairness and accuracy.**

The performance that organizational leaders pay attention to and reward has an influence on what employees prioritize in their work. Some organizations do not provide employees with any meaningful feedback on their performance. In absence of feedback, people are less likely to remain vigilant for possible biases in their decision-making processes over time.[53]

Many organizations provide some performance feedback to employees, but this is limited to what can be easily measured. What is easily measured (e.g., productivity) may not be what matters most to the organization or the

community it serves (e.g., quality). For example, organizations that emphasize efficiency measures over quality measures are motivating their employees to work faster, potentially at the expense of at least some degree of accuracy and fairness. People can process information faster, and produce more decisions, when they rely more on automatic associations and stereotypes. In these instances, the decision-maker develops inferences and expectations about the person or people being judged earlier on in the information-gathering process. However, those expectations bias the decision-maker's attention and memory in favor of stereotype-confirming evidence.[54] Moreover, biased expectations can influence how the decision-maker interacts with the person or people being judged, creating a self-fulfilling prophecy. That is, the decision-maker may then act in ways that elicit from others the very behaviors that would confirm his or her own biased expectations.[55]

2. **Clear criteria for making a good decision are absent.**

Decision-making environments vary in the extent to which they provide structure and clarity for the person making the decision. When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws; decisions for which there is not a clear decision-making process laid out in advance), biased judgments are more likely. Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever information is most easily accessible—including stereotypes.[56]

3. **Decisions are made in a distracting or otherwise stressful environment.**

Tiring (e.g., long hours, fatigue), stressful (e.g., heavy, backlogged, or very diverse caseloads; loud construction noise; threats to physical safety; popular or political pressure about a particular decision; emergency or crisis situations), or otherwise distracting circumstances can adversely affect judicial performance.[57] Specifically, situations that involve time pressure, that force a decision maker to form complex judgments relatively quickly, or in which the decision maker is distracted and cannot fully attend to incoming information all limit the ability to fully process information.[58] Decision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes – recalling facts in ways biased by stereotypes and making more stereotypic judgments – than decision makers whose cognitive capacities are not similarly constrained.

The Role of Implicit Bias in Understanding Inequality

Implicit biases are measured at the level of the individual person, so implicit bias education and interventions often focus on the individual. However, this phenomenon exists in a rich social and historical context. Implicit associations are both formed and expressed within that context, so taking context into account is crucial for the development of interventions. This section describes the different levels of inequality within which implicit biases operate.

1. Systemic inequality

Bias and inequality generally operate in ways that permeate multiple facets of society in multiple ways, and they tend to reinforce and re-create themselves over time.[59] The concept of systemic inequality captures this dynamic. ***Systemic inequality*** is the combination of a diverse array of discriminatory and inequitable practices in society, including the unjustly gained economic and political power of some groups over others, ongoing resource inequalities, ideologies and attitudes that regard some groups as superior to others, and the set of institutions that preserve the advantages of some groups over others.[60]

2. Cultural inequality

Within a society, certain social groups have the power to define the culture's value system.[61] ***Cultural inequality*** is the inequality that is "built into our literature, art, music, language, morals, customs, beliefs, and ideology" to such an extent that it defines "a generally agreed-upon way of life."[62] Dominant culture dictates what is regarded as "good, bad, just, natural, desirable, and possible,"[63] while being presumed to be neutral and inclusive.[64] For example, the people who appear in movies, television shows, and advertisements in the United States are disproportionately slim, White, able-bodied people with Eurocentric facial features. The fact that this is the agreed-upon standard of beauty in our culture is an example of cultural inequality.[65] Another example of cultural inequality is that Black men are over-represented as violent criminals in works of fiction, such as movies and television shows.

3. Institutional inequality

Institutional inequality refers to the network of institutional structures, policies and practices that create advantages and benefits for some groups over others.[66] Institutions can be defined broadly to include any collective body that influences social norms and the allocation of resources to individuals and social groups. Institutions can include the justice system, schools, media, banks, business, health care, governmental bodies, family units, religious organizations, and civic groups.[67] Institutional inequality can be intentional or unintentional; it often occurs as a result of decisions that are neutral on their face but have disparate impact with regard to race, gender, and other categories. Whether institutional inequality occurs in subtle ways or as a result of overt practices that limit the rights, mobility, or access of certain groups, the actions that lead to the disparity are sanctioned by the institution.[68] One example of institutional inequality in criminal justice is the use of different punishments for crack and powder cocaine, which are chemically similar but disproportionately used by different racial groups. This policy appears race-neutral on its face, but it results in African Americans receiving more severe punishments than White Americans for, effectively, the same drug use behavior.

4. Organizational inequality

Organizational inequality exists when

the practices, rules and policies of formal organizations (such as corporations or government agencies) result in different outcomes for different groups.[69] Like institutional inequality, organizational inequality can occur as a result of intentional decisions designed to produce different outcomes for different groups or as a result of policies and practices that appear neutral on their face.[70] For example, a retail corporation might have a policy that requires newly promoted supervisors to relocate to a new branch. Because women bear a disproportionate amount of housekeeping and caregiving duties and experience significant wage inequality compared to men, they are less likely to be able to relocate their families for their jobs. This policy appears gender-neutral on its face, but it results in greater promotion potential for men than for women, and it exacerbates the gender wage gap.

5. Interpersonal inequality

Interpersonal inequality exists when inequality manifests at the individual, person-to-person level. The term "bias" gets used in ways that conflate what are actually different psychological processes: stereotypes, prejudice, and discrimination. Any of these three processes can exist on a continuum from highly automatic (generally measured with implicit measures) to highly controlled (generally measured with explicit measures).

- ***Stereotypes*** are beliefs and opinions about the characteristics, attributes, and behaviors of members of a group (e.g., "soccer moms are energetic").[71] In other words, stereotyping is cognitive in nature. When one engages in the act of stereotyping, one assumes that because an individual belongs to a particular social group, the individual must share the characteristics of the group. When an individual automatically associates a particular trait with a particular social group in long-term memory (largely outside of conscious awareness), we can measure this association with an implicit measure, and we refer to this association as an implicit stereotype.

- ***Prejudice*** is the emotion, attitude, or evaluation that a person feels about members of a particular social group (e.g., "I don't like soccer moms").[72] In other words, prejudice is affective, or emotional, in nature. When an individual automatically associates a particular attitude or evaluation with a particular social group in long-term memory (largely outside of conscious awareness), we can measure this association with an implicit measure, and we refer to this association as implicit prejudice.

- ***Discrimination*** consists of treating people differently from others, based on their membership in a particular social group (e.g., "soccer moms cannot attend my party").[73] In other words, whereas stereotyping is *cognitive* and prejudice is *affective*, discrimination is *behavioral* in nature. This differential treatment can range from fully intentional, controlled behavior, to fully automatic, unconscious behavior. It can occur as a result of stereotypes about the other group, prejudicial attitudes about the other group, or both.

Bringing It All Together

The different levels of inequality, from systemic inequality at the societal level to interpersonal inequality at the individual level, are closely intertwined. Although we conceptualize these levels separately for the purpose of defining them, the boundaries between these levels are not always clear-cut. Furthermore, many forms of bias operate across multiple levels. For example, microaggressions, described above, can take the form of verbal speech by an individual person (e.g., telling an Asian American who was born and raised in the U.S. that they speak English so well), or they can take the form of environmental conditions created by an organization (e.g., adorning the walls of a courthouse with portraits of influential figures from history who are exclusively White men).[74]

Although court professionals are often taught to think about implicit bias as an individual, interpersonal phenomenon, implicit bias exists in the broader context of inequality and discrimination at multiple levels in society. Implicit associations form as a result of repeated exposure to certain stereotypes and attitudes about different social groups. In other words, implicit biases at the individual level are shaped by the history and culture of the society in which the person lives and the experiences and social interactions that the person has as a result of that culture and history. For example, most White Americans hold automatic associations in memory between the concept of Black men and the concept of violent crime. The widespread existence of this automatic association is not a coincidence; it stems from the fact that Americans grow up in a society characterized by racial inequality at systemic, cultural, institutional and organizational levels, and in which popular media disproportionately depict Black men as violent criminals.

Thus, although implicit bias is typically measured at the level of the individual person, it is important to consider how it both results from and reinforces different forms of inequality at multiple levels of society. The field of implicit social cognition addresses how biases can arise in individual information processing, decision-making, and behavior in ways that reproduce and reinforce, and are reinforced by, dynamics that are historical, cultural, institutional, and interpersonal in nature. A comprehensive and successful approach to implicit bias intervention must be one that takes into account the importance of this broader social context and addresses the full array of forces that contribute to observed inequities.

The Multiple Levels of Inequality: Privilege

Privilege is a lens through which people view the world they live in, and it operates at multiple levels of inequality. ***Privilege*** is an unearned favored state conferred simply because of one's group membership.[75] Everyone has privilege in at least some domains of life, but some people experience privilege on more dimensions of their group identities than others (e.g., race, gender, sexual orientation, class, ability, nationality). When a person experiences privilege in a certain identity dimension (e.g., ability and disability), it does not mean that the person has not worked hard, has not suffered, or does not deserve what he or she has. It simply means that any hardships the person experiences are not exacerbated by a particular form of oppression (e.g., ableism).

Privilege is, by its nature, largely invisible to the people who hold it. Essentially, privilege is the collection of the things a person doesn't have to think about, that others do, simply because of their group identities. When individuals belong to a dominant group in society, their experiences and actions are regarded as normal and natural and are taken for granted. Their experiences are more likely to be reflected in popular culture and more likely to be represented in government and other seats of power. They are less likely to think about their group identity throughout their day-to-day lives, because their group identity does not create barriers and difficulties for them on an ongoing basis. For this reason, privilege has also been defined as the "luxury of obliviousness."[76] Privilege operates at multiple levels of inequality: it originates in the overarching group disparities that are characterized by systemic inequality; it is reflected, reinforced, and reproduced at the levels of culture, institutions, and organizations; and it forms the lens through which individuals view their world and their interpersonal interactions.

The State of the Science on Bias Interventions

Psychologists have made significant strides over the last 10 years toward understanding which intervention strategies are effective in reducing the expression of biases. The section that follows summarizes what was learned from recent implicit social cognition research and from consideration of relevant ideas drawn from the relevant broader research literature on prejudice and discrimination.

General Interventions to Reduce Prejudice and Discrimination

Over the course of several decades, psychology research has produced evidence to clearly support the effectiveness of some general interventions in reducing prejudice or discrimination at the interpersonal level. These interventions are not necessarily targeted at implicit bias, but they offer important insights regarding the factors that are likely to make an *implicit* bias intervention more successful.

1. Intergroup Contact

Intergroup contact is one of the most thoroughly researched prejudice interventions in social psychology. Originally articulated as a research hypothesis in 1954,[77] the contact hypothesis received support over several decades and hundreds of research studies.[78] The findings show that when members of different social groups interact with each other, reductions in prejudice and discrimination follow.[79]

In this regard, researchers have also shown that not all intergroup contact is equally effective in reducing explicit prejudice. Contact situations that include all four of the following features have the greatest impact: 1) the groups are working toward a common goal, 2) the groups have equal status within the contact situation, 3) the situation allows individuals to get to know each other on an individual basis, and 4) the contact situation receives institutional support or support from the relevant authority figures.[80] Contact situations that include two or three of these factors also tend to reduce prejudice, but to a lesser degree. Research suggests that intergroup contact is effective because it increases a person's knowledge of the outgroup, decreases the level of anxiety that a person feels about interacting with members of the outgroup, and increases a person's empathy for members of the outgroup.

Researchers have begun to examine the effects of intergroup contact on *implicit* bias, but this area of research is relatively young. Findings suggest that intergroup contact may also be effective for reducing implicit prejudice.[81] For example, one recent study showed that among non-Black physicians, the extent of interracial contact over several years in medical school predicted lower anti-Black prejudice (measured both explicitly and implicitly), while the number of hours spent in diversity training did not.[82] In contrast to explicit prejudice, which is influenced by the *quality* of intergroup contact, implicit prejudice seems to be influenced only by the *quantity* of intergroup contact.[83]

The Jigsaw Classroom

One specific intervention aimed at providing meaningful intergroup contact that has received significant attention from researchers in psychology is the "Jigsaw Classroom." It has primarily been studied in educational settings but it can be implemented in any situation involving collaborative group work. In a Jigsaw Classroom set-up, students are divided into groups to complete a project, and each student is responsible for a particular portion of the final product.[84] In the first phase of the project, students work independently on their own portion of the project. In the second phase, students gather together with each of the students from the *other* groups who are assigned to the same portion of the project (these are called "expert groups"). Finally, in the third stage, students report their progress back to their own group, sharing their new-found expertise. The group then works together to finish the final product.

The Jigsaw Classroom is a particular type of intergroup contact that emphasizes some of the factors that are known to make intergroup contact more effective. Specifically, it puts students in a situation where they are working toward a common goal. It also puts each student on equal footing with the others, allowing each individual to serve as an "expert" in a particular portion of the project and requiring students to be interdependent on one another.[85] Research suggests that, in addition to providing some educational benefits, the Jigsaw Classroom increases individuals' evaluations of outgroup members and decreases the extent to which individuals engage in the stereotyping of outgroup members.[86]

2. Structure versus Discretion

A second major area of research on bias interventions has focused on the context in which individuals are acting and making decisions. A substantial body of research in social cognition shows that individual decision-making discretion makes room for bias and prejudice to manifest as discrimination and inequality.[87] Specifically, when individuals make decisions under conditions of limited structure, ambiguous decision-making procedures, or subjective criteria, they are more likely to make decisions that manifest their biases.[88] These effects can include changing the relative weights of the decision criteria (depending on the social group membership of the people targeted by the decision),[89] applying available options differently to members of different groups,[90] holding members of different groups to different standards,[91] or changing the decision-making procedures from one decision to the next.[92]

The major implication of this research for bias interventions is that one way to reduce group disparities in decision-making is to limit individual discretion as much as possible.[93] Embedding structure in the decision-making process, specifying decision-making procedures as clearly as possible, and relying more extensively on criteria that can be measured objectively may limit the extent to which an individual's biases can leak out into the final decision outcome.[94]

Implicit Bias Interventions

In addition to these more general bias interventions, researchers have developed several interventions aimed specifically at *implicit* bias. Implicit bias interventions tend to fall into one of two categories, which this

section will discuss in turn. The first category includes interventions that attempt to retrain the underlying implicit association in memory. The interventions in this group tend to be impractical for most purposes outside of the laboratory, and they have demonstrated limited success. The second category includes interventions that leave the underlying association in memory intact but attempt to interrupt its outward expression (in other words, limit the extent to which the implicit association can leak out into the individual's decisions or behavior). The interventions in this group vary in the extent to which they are practical to implement outside the lab, and they show more promise in their effectiveness.

1. Interventions that Attempt to Change Associations in Memory

Some implicit bias interventions attempt to retrain the brain by changing the implicit association that exists in the individual's long-term memory. For example, if an individual automatically associates members of a particular racial group (e.g., Black) with a negative evaluation (e.g., bad, lazy) in memory, the intervention would attempt to re-write this automatic association as a relationship between the racial group and an opposing, positive evaluation (e.g., good, hardworking). From this body of research on *change* interventions, three main lessons have been learned.

Lesson #1: Some *change* strategies may slightly reduce the strength of negative implicit associations.

Researchers have examined several different approaches to re-writing the automatic associations in long-term memory. It is possible to reduce the strength of a negative implicit association, but the effectiveness of this strategy is inconsistent.

For example, evaluative conditioning is a procedure that involves repeated exposure to a new idea that runs counter to the person's automatic association. It teaches people to automatically link concepts together in memory that were not linked together previously. For example, one study placed participants in front of a computer screen and showed them a series of images of Black faces paired with positive words, as well as White faces paired with negative words.[95] The idea is that prior to the study, many participants had a pre-existing automatic association between Black faces and negative evaluations (and, conversely, White faces and positive evaluations). Having these participants repeatedly view images presenting the opposite idea might lead their pre-existing associations to weaken, or, with enough exposure, become negated. In some, but not all, studies, researchers have found that participants' negative implicit associations with the social group in question decreased in strength after an evaluative conditioning activity.[96]

Other methods for re-writing a negative automatic association in memory include exposing research participants to positive, counter-stereotypical exemplars (i.e., example members of the social group in question),[97] asking participants to imagine the perspective of members of the other group (imagined perspective-taking),[98] or inducing a positive emotion while participants consider members of the other group (emotion induction).[99]

Meta-analyses (i.e., research studies that measure the effects of many research studies combined) of these intervention strategies have generally found that evaluative conditioning and counter-stereotypical exemplars are sometimes effective in reducing the strength of implicit racial biases to a small degree; in contrast, imagined perspective-taking, emotion induction, and other strategies are generally not effective.[100]

Lesson #2: Reductions in implicit bias resulting from *change* interventions typically don't last long.

Even when researchers successfully reduce the strength of a person's negative implicit associations in memory, these changes typically do not last long enough to have an effect outside

the lab. Over the past few years, researchers have devoted more attention to measuring how long changes in implicit associations last after a single experimental intervention. Unfortunately, meta-analyses reveal that most reductions in negative implicit associations following these discrete interventions do not last longer than one or two days.[101] There are a few notable exceptions to this time limit, but in each of these exceptions, the intervention itself took place over the course of weeks or months, rather than in a single experimental session.[102]

Lesson #3: With *change* interventions, reductions in implicit bias typically don't alter downstream behavior.

Even when researchers are able to reduce the strength of a person's negative implicit associations in memory, this change typically does not affect downstream thoughts or behaviors. In order for implicit bias interventions to have a meaningful effect outside the lab, they must cause changes in the individual's decisions about, or behaviors toward, members of the social group in question. Unfortunately, meta-analyses of implicit bias intervention studies find that very few studies measure the impact of changes in implicit associations on downstream behaviors; those that do measure the impact of interventions after a delay tend to find no effects.[103] Recent research suggests that because implicit bias is intertwined with the culture and environment within which individuals are acting, the stability of our social environments makes it unlikely that small reductions in implicit associations in memory will manifest as noticeable reductions in prejudice and discrimination.[104]

2. Interventions that Affect the Expression of Implicit Bias

Another broad class of implicit bias interventions are ones that attempt to bypass or disrupt the *expression* of the implicit association. Unlike the first type of strategy discussed above, this class of expression interventions leaves the underlying implicit association in memory intact. Instead of re-writing the association, the goal is to limit the extent to which it can leak out in decisions and behaviors. For example, bypassing interventions may teach people how to prevent implicit associations from getting activated in the first place; disruption interventions may teach people how to override their automatic gut reactions or decisions with a more egalitarian response. Researchers have examined several different interventions that address the expression of implicit bias.[105] Generally, this class of interventions shows more promise than interventions that try to retrain the brain.

a) Bypassing interventions

One well-known bypassing intervention is commonly referred to as a *blinding* procedure. Blinding procedures are structural practices that block the transmission of information that would trigger decision-makers' implicit biases. This is the principle behind now-commonplace practices such as blind auditions, blind peer-review, and double-blind clinical studies.[106] Blinding procedures are already used at other decision points in the justice system process. For example, as part of the National Research Council's recommended best practices for conducting eyewitness identification lineups, the administering police officer should not know the identity of the suspect in the lineup.[107] Jurisdictions are already experimenting with race-blinding procedures as a technique to reduce disparate treatment in prosecutorial charging decisions.[108] Blinding procedures can be helpful, but it can sometimes be difficult or impractical to blind for all factors that may activate implicit bias.

b) Disruption interventions: harnessing intrinsic motivation

One approach to disrupting the influence of implicit associations involves activating the individual's egalitarian goals. Researchers have shown, for example, that people who are *intrinsically* motivated to avoid prejudiced responding are more successful at overriding their implicit biases in favor of more egalitarian responses.[109] An intrinsic motivation, as opposed to an *extrinsic* motivation, is one that

comes from within the person, as part of his or her personality or sense of self. Reminding these individuals of their intrinsic motivation to promote equality in the moment can help them override their implicit associations. However, this strategy is risky and can backfire. If the intervention produces an extrinsic motivation to promote equality (i.e., a motivation that is guided by the chance to earn external rewards, such as social approval, prestige, or financial/material gains), it can result in greater implicit bias.

c) Disruption interventions: harnessing interpersonal motives

A second approach to teaching people strategies for overriding their automatic associations involves interpersonal motives. Research suggests that people adapt their thoughts and behaviors in subtle ways to fit into the context they are in. In the domain of implicit bias, this can mean that the mere presence of people who belong to other social groups or who support egalitarian norms can result in less implicit bias and more egalitarian behavior.[111] For example, participants in one study either interacted with a Black experimenter or a White experimenter before completing a measure of implicit racial prejudice; those who interacted with the Black experimenter exhibited lower implicit bias.[112] Similar effects have been shown in research studies that did not measure implicit associations directly. A study of jury decision-making, for example, found that juries composed of White and Black jurors engaged in higher-quality deliberations and made more egalitarian verdict decisions than juries composed of only White members.[113] Importantly, these effects were not limited to the Black jurors; White jurors engaged in better decision-making when they were in the presence of Black jurors.

d) Disruption interventions: forming new decision-making habits

A third approach to teaching people to override their automatic associations involves breaking the "habit" of a person's automatic response. Treating implicit bias like a bad habit that can be broken involves the same kinds of strategies a person would use to break any other bad habit (such as smoking or biting one's fingernails).[114] There are two types of strategies that researchers have found to be effective in breaking the habit of automatic biases. First, researchers have developed long-term educational experiences (often weeks or months long) that teach people to become aware of situations when they are most vulnerable to implicit biases, replace their automatic responses with a more egalitarian response, and practice the new egalitarian response until it becomes habit. Several versions of this approach have demonstrated effectiveness, often resulting in behavioral changes months or years after the intervention has ended.[115]

The second type of habit-breaking intervention involves getting individuals to establish a behavioral plan for deciding or responding in a future situation in which they may be prone to bias. *Implementation intentions* have shown promise in this context. An implementation intention is an "if-then" statement that lays out contingencies between a situation and a response (e.g., "If situation X is encountered, then I will initiate egalitarian response Y").[116] Researchers have found that participants who commit to an implementation intention in advance (for example, a plan to think "good" after seeing a Black face) are more likely to be able to override their automatic responses in favor of a more egalitarian response.[117] Reasons why this strategy is effective include that it increases the individual's commitment to the response,[118] makes the response more accessible in the individual's mind,[119] makes the response more automatic and less effortful,[120] and helps shield the individual from the intrusion of unwanted thoughts.[121]

Conclusions and Takeaways

Meta-analyses of these intervention strategies suggest they show promise as tools for reducing the influence of implicit associations on decisions and behavior.[122] Interventions that prevent the activation of implicit associations, leverage individuals' intrinsic egalitarian motivations, create diverse decision-making contexts with shared norms of equality, and help people break the habit of their automatic, biased responses have been shown to reduce disparities in subsequent decisions and behaviors, even when they are not meant to change the underlying implicit association in memory.

Although psychological research on bias interventions is still in a state of rapid change and advancement, it points to three key takeaways that have practical implications for courts and their communities.

Key Takeaway #1: General interventions that attempt to reduce prejudice and discrimination through positive, meaningful intergroup contact and by structuring discretionary decisions are still some of the most effective strategies for courts. Intergroup contact has been widely studied as a bias reduction strategy for over half a century. Engagement activities that include the following features have the greatest impact: 1) different groups are working toward a common goal, 2) the groups have equal status in the activity, 3) the activity allows individuals to get to know each other on an individual basis, and 4) the activity receives institutional support or support from the relevant authority figures. In addition, researchers and practitioners have long known that greater structure in decision-making processes can limit opportunities for bias to infect decision outcomes.

Key Takeaway #2: Implicit bias interventions that attempt to change implicit associations in memory are not consistently effective. Although some *change* interventions can reduce the strength of implicit associations in some contexts, they are difficult to implement outside the lab, have inconsistent effects that do not last longer than a few days, and tend not to change subsequent decisions and behaviors.

Key Takeaway #3: Implicit bias interventions that bypass or disrupt biased responding show more promise. Specifically, there is evidence to support *expression* interventions that prevent the activation of implicit associations, leverage individuals' intrinsic egalitarian motivations, create diverse decision-making contexts with shared norms of equality, and give people tools to break the habit of their automatic, biased responses.

Implications for Courts and Their Communities

Recent developments in the science of implicit bias have implications for the state courts and their communities, where court leaders and other practitioners seek to better understand and address the reproduction and perpetuation of systemic biases through this lens. Four interrelated implications are discussed below.

1. **Lead by example – and know where you're headed.**

The science of implicit bias highlights the influence of the social environment on our thinking, decisions, and behavior. The court is a specific type of social environment, with a unique institutional culture, formal rules, and informal social norms that create expectations about appropriate behavior. Interpersonal influences, such as the conduct of leadership, play an important role in constructing that social environment.[123] Attitudes, preferences, and behavior may be readily learned or "caught" by observing the conduct of respected authorities and peers. And, as previously noted, strategies (such as intergroup contact) may be more effective at reducing prejudice and discrimination when implemented under certain conditions. One of those conditions is clear institutional support or support from relevant authority figures.[124]

Court leaders can influence the social environment of the court in a variety of ways. In the wake of the killing of George Floyd, one of the most common ways organizational leaders across the country responded was by issuing a public statement to demonstrate social accountability. Dozens of state court leaders also issued public statements, reaffirming commitments to identifying and addressing systemic injustices.[125] Over the years, the Conference of Chief Justices and the Conference of State Court Administrators have passed numerous policy resolutions on issues pertaining to equal justice.[126] States have established leadership teams and task forces charged with overseeing such activities.[127] Some states have created centralized Diversity, Equity, & Inclusion (DE&I) offices to, for example, create DE&I goals and implementation plans, coordinate activities and programs, establish metrics for measuring progress, and monitor DE&I goals.[128] Such leadership efforts can be valuable first steps for establishing a court culture that supports DE&I initiatives and produces concrete reforms that materially improve the lives of court users who have not historically been equally served.

A State Supreme Court Speaks with One Voice

"As members of the judicial branch, we are cautious – always careful not to prejudge situations. But we cannot ignore the risks that African Americans, Blacks, and other people of color face as each day dawns. The urgency for action has long been upon us, but the immediacy of the need is even more apparent today. We must ensure that the lives of African Americans, Blacks, and people of color are valued and respected and that the color of peoples' skin does not affect their rights to justice or the treatment they are afforded by our system of justice... Our courts are an integral part of the justice system and have an essential role to play in ensuring justice for all. We must stand firm against racism and oppression. We must be intentional in our efforts to move in a different direction. We must examine our individual thoughts and beliefs, as well as our professional approaches, processes, and environments to address the impact of our own biases. We must examine, anew, what we are doing, or failing to do, to root out conscious and unconscious bias in our legal system."

Oregon Supreme Court, June 5, 2020[129]

Ultimately, judicial leadership must determine the goals of institutional efforts to address systemic and implicit biases. Terms such as diversity, inclusion, equality, and equity are often used interchangeably, but these terms represent different goals that implicate different strategies.

- ***Diversity*** refers to the presence of individuals who represent a variety of groups or perspectives. It captures the quantitative representation of different groups, but it does not capture how much each group is heard or how much influence each group has.[130]

- ***Inclusion*** refers to the meaningful involvement of people from different groups, or the extent to which diverse perspectives are incorporated into systems, processes, and decisions.[131] In contrast to diversity, which reflects the quantity of representation, inclusion reflects the quality of representation.

- ***Equality*** refers to the equal treatment of different individuals or groups; it occurs when people receive the same treatment or distribution of resources, regardless of their needs or starting positions.[132] An equality mindset assumes that everyone will benefit from the same supports to meet their needs.[133]

- ***Equity*** refers to the state that exists when we cannot predict outcomes based on a person's group membership, and outcomes for all groups are improved. Equity often involves the differential treatment of different individuals, based on their needs and starting positions, with the goal that everyone will arrive at the same outcome.[134]

Keeping in mind these different end goal states, court leaders will need to articulate objectives using appropriate terminology. Depending on the nature of the problem and the stated needs of the people who are most affected by the problem, the court might strive to achieve diversity, inclusion, equality, or equity. In recent years, members of the public, justice partners, and stakeholders are increasingly pushing to achieve equity.[135]

2. **Educate not just to raise awareness, but to build capacity for change.**

As succinctly noted by Ivuoma Onyeador and colleagues, "No one-size-fits-all solution addresses organizational diversity. Although implicit bias trainings can help address diversity, equity, and inclusion, they are not sufficient. Organizations must also change structures and improve climate."[136] On their own, implicit bias educational sessions can realistically achieve only so much. They can add value when used to raise awareness and educate staff about bias and inequality, and train staff on specific individual and organizational strategies to be implemented in pursuit of organizational goals.

Much ink has been spilled over the efficacy of corporate diversity training efforts in recent years. As these trainings have proliferated, researchers have studied various programs for evidence of effectiveness. Historically, quality field research on diversity training has been relatively scarce. Research on educational interventions can be challenging to conduct for a variety of reasons, limiting conclusions researchers can draw about them collectively (e.g., substantial differences in program design, including program goals, featured content, methods, trainers used, type of audience, and more, make comparisons difficult; barriers in data collection, such as the inability to locate participants for follow-up evaluations, can preclude meaningful evaluations; other intervening factors can complicate interpretation of results). The evidence to date suggests that most corporate diversity training programs, including various implicit bias programs, are generally ineffective at reducing bias and inconsistent at changing behavior.[137] Part of this is because diversity training is often offered as a single, standalone training session or workshop. Experts suggest the efficacy of diversity trainings can be improved by incorporating training into a broader comprehensive strategy aimed at building capacity for change.[138] Specific recommendations include: tailoring training programs to match institutional goals, linking content to desired outcomes; preparing trainers to manage participant discomfort as part of the learning process, rather than trying to avoid discomfort; training attendees on how to use a limited number of concrete strategies for managing bias (i.e., 2-3 specific strategies) that are most relevant to their work; and, importantly, developing a plan for evaluating the efficacy of the training.[139]

Although it is unlikely that an implicit bias educational program will change attendees' implicit biases, it may offer other benefits.[140] For example, as a result of participation, people may become more aware of, concerned about, and motivated to address discrimination, become more sensitive to the biases of others and more likely to label biases as wrong, and have more confidence in their ability to effectively engage in equity-promoting behaviors. Studies of one educational curriculum designed by academic researchers at the University of Wisconsin-Madison have found that participants, when contacted several weeks after completing a version of the course, expressed greater concern about discrimination and reported feeling more comfortable discussing the issues. Two years after their seminars, those who completed the program were better able to identify biased behavior in others or were more likely to publicly object to others' expressions of bias. Such changes may be valuable to those seeking to motivate and engage professional staff in DE&I efforts to advance specific organizational goals.

3. **Gather information to understand what is really happening in your court and community.**

Disparities in the justice system vary by jurisdiction and decision point. Because of meaningful variations in the social environment (such as the composition of local communities, local history and politics, and other factors), it is important to collect data that can shed light on the specific types, direction, and magnitude of disparities - and their root causes - in a particular jurisdiction.[141]

Understanding the nature of the problem is crucial for determining which types of interventions are needed and which are likely to be successful. The more the court can use data to inform its strategy, the better positioned it will be to channel resources toward the interventions with the biggest impact. The following are some broad questions court personnel might consider when defining the problem:

1. What is the specific disparity or hardship we are trying to address?
2. Do we have enough information about the size and scope of the problem, or do we need more information?
3. What kinds of data are needed (e.g., case processing or case outcome data, employment data, anonymous surveys of the affected populations, town halls or targeted listening sessions with the affected populations)?
4. At which points in the justice process does this disparity or hardship emerge? Which components of the problem are under the direct control of the court, which components could the courts influence through its role as a convener of important social institutions, and which components are outside the control of the court?
5. Who are the people most affected by this disparity or hardship?
6. What do the people in this group say they need?

After considering these questions, the court should determine whether the problem is one of internal organizational culture, public outreach and communication, individual decision-making, or policy. Often, more than one of these domains will be in play simultaneously. Depending on the nature of the problem, an implicit bias intervention may or may not offer the best possible solution.

Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

On January 20, 2021, President Joseph Biden signed an executive order establishing that the "Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality." In the executive order, the President acknowledged that "[b]ecause advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies [...] must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity." The executive order continued, calling on all federal agencies to "assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups. Such assessments will better equip agencies to develop policies and programs that deliver resources and benefits equitably for all."[142]

Examining data is an essential step in uncovering disparities and bias, but many courts face challenges when seeking to document disparities in the justice system. This typically involves the lack of quality data and the fragmented nature of data systems. Common reported barriers to court collection of race and ethnicity data, for example, include the lack of staff time, limitations in technology systems, confusion about race and ethnicity categories, and concerns about data being misused or misinterpreted.[143] However, courts have undertaken significant efforts in this area.

Court leaders in some states have conducted or commissioned disparity analyses using administrative data. For example, the late Massachusetts Supreme Court Chief Justice Ralph Gants recently commissioned a report from researchers at Harvard Law School focused on documenting racial disparities in the state criminal court process using administrative data from multiple state agencies and survey data from the U.S. Census Bureau.[144] Other states have commissioned other types of reviews. For example, the New York State Courts recently charged an independent commission with comprehensively examining and documenting institutional racism in the state court system to inform and guide current improvement efforts. [145] This commission adopted a multimethod approach involving document reviews of institutional policies, programs, and practices and historical reports on issues of racial bias; reviews of employment statistics; engagement with various court and community stakeholders through numerous interviews and solicitation of written submissions; in-person court observations; and more to generate recommendations for improvement. Finally, scientists have started using the audit method to conduct large scale field experiments to document discrimination. This method has been widely used to provide the bulk of the evidence of discrimination in housing, employment, healthcare, education, and the delivery of other public services.[146] This may be another useful method to consider.

It is important to note that bias can also influence how data are interpreted and how decisions are made based on those interpretations. Some justice system leaders have sought to address this challenge by engaging diverse perspectives, including the voices of directly impacted communities, in collaborative efforts to determine what information to collect, identify disparities and understand their root causes, brainstorm potential solutions, and decide how best to address problems and allocate resources to promising strategies.[147]

4. **Experiment: Design interventions based on the evidence and evaluate interventions for efficacy.**

Once the court identifies specific disparities that may benefit from a bias intervention, interventions should be customized to address the problem at the targeted decision point. The custom intervention should be pilot tested and evaluated to determine its effectiveness.

On the Importance of Evaluation: An Illustration

In a recent book, former Google data scientist Seth Stephens-Davidowitz summarized some of his research on what Google searches reveal about our stereotypes and biases:[148]

> Consider what happened shortly after the mass shooting in San Bernardino, California, on December 2, 2015. That morning, Rizwan Farook and Tashfeen Malik entered a meeting of Farook's coworkers armed with semiautomatic pistols and semiautomatic rifles and murdered fourteen people. That evening, literally minutes after the media first reported one of the shooters' Muslim-sounding name, a disturbing number of Californians had decided what they wanted to do with Muslims: kill them.
>
> The top Google search in California with the word "Muslims" in it at the time was "kill Muslims." And overall, Americans searched for the phrase "kill Muslims" with about the same frequency that they searched for "martini recipe," "migraine symptoms," and "Cowboys roster." In the days following the San Bernardino attack, for every American concerned with "Islamophobia," another was searching for "kill Muslims." [...]
>
> Four days after the shooting, then-president Obama gave a prime-time address to the country. He wanted to reassure Americans that the government could both stop terrorism and, perhaps more important, quiet this dangerous Islamophobia.
>
> Obama appealed to our better angels, speaking of the importance of inclusion and tolerance. The rhetoric was powerful and moving. The Los Angeles Times praised Obama for "[warning] against allowing fear to cloud our judgment." The New York Times called the speech both "tough" and "calming." The website ThinkProgress praised it as "a necessary tool of good governance, geared towards saving the lives of Muslim Americans." Obama's speech, in other words, was judged a major success. But was it?
>
> Google search data suggests otherwise. [...] In his speech, the president said, "It is the responsibility of all Americans – of every faith – to reject discrimination." But searches calling Muslims "terrorists," "bad," "violent," and "evil" doubled during and shortly after the speech [and] searches for "kill Muslims" tripled [...]. In fact, just about every negative search we could think of to test regarding Muslims shot up during and after Obama's speech, and just about every positive search we could think of to test declined.
>
> In other words, Obama seemed to say all the right things. All the traditional media congratulated Obama on his healing words. But new data from the internet [...] suggested that the speech actually backfired in its main goal. Instead of calming the angry mob, as everybody thought he was doing, the internet data tells us that Obama actually inflamed it. Things that we think are working can have the exact opposite effect from the one we expect. Sometimes we need [...] data to correct our instinct to pat ourselves on the back.

Depending on the nature of the problem, one or more implicit bias intervention strategies may be appropriate. Approaches may include the following.

- Redesign the decision-making environment to **remove or minimize situational triggers** of implicit bias and create conditions for success.

- **Structure decision-making processes** to bypass or disrupt the expression of implicit biases, such as by establishing clear decision-making criteria before evidence is presented and a decision is made or incorporating blinding procedures.

- Cultivate opportunities for staff to **engage in positive, meaningful intergroup contact**. In addition to the discrimination-reduction benefits of these activities, under certain conditions, the sharing of diverse perspectives can produce other performance-enhancing benefits in the form of greater creativity, more innovation, and better decisions.[149] Intergroup contact may be increased, for example, by:
  - » being intentional about the composition of program committees, task forces, and other decision-making bodies;
  - » fostering workforce diversity by improving recruitment, hiring, retention, and promotion processes; and
  - » building staff communication skills to navigate crucial conversations and prepare them to conduct community outreach and engagement work.[150]

- Equip individuals with the tools for improved decision making, such as by training them to develop **new decision-making habits,** such as stereotype replacement, implementation intentions, or other techniques.[151]

Counterstereotypes and Fostering Curiosity about Others: An Illustration

Seth Stephens-Davidowitz (2017) writes:[152]

> Let's return to Obama's speech about Islamophobia. Recall that every time Obama argued that people should respect Muslims more, the very people he was trying to reach became more enraged.
>
> Google searches, however, reveal that there was one line that did trigger the type of response then-president Obama might have wanted. He said, 'Muslim Americans are our friends and neighbors, our coworkers, our sports heroes and, yes, they are our men and women in uniform, who are willing to die in defense of our country.'
>
> After this line, for the first time in more than a year, the top Googled noun after 'Muslim' was not 'terrorists,' 'extremists,' or 'refugees.' It was 'athletes,' followed by 'soldiers.' And, in fact, 'athletes' kept the top spot for a full day afterward.
>
> When we lecture angry people, the search data implies that their fury can grow. But subtly provoking people's curiosity, giving new information, and offering new images of the group that is stoking their rage may turn their thoughts in different, more positive directions.

Conclusion

The science on implicit bias is still evolving, and researchers and practitioners continue to assess its implications for broader efforts aimed at reducing prejudice and discrimination and improving equality, equity, diversity, and inclusion. As observed by neuroscientist and psychologist Lisa Feldman Barrett:[153]

> And now we get to the toughest issue of all: what it means to control your behavior and therefore be responsible for your actions. The law (like much of psychology) usually considers responsibility in two parts: actions caused by you, where you have more responsibility, and actions caused by the situation, where you have less.
>
> [But] the concepts in your head are not purely a matter of personal choice. [...] They are forged by the social reality you live in. [...] You learn from the environment like any other animal. Nevertheless, all animals shape their own environment. So as a human being, you have the ability to shape your environment to modify your conceptual system, which means that you are ultimately responsible for the concepts that you accept and reject.

In the meantime, courts leaders forge ahead, continuing to make the best decisions they can with the knowledge we have today. On June 9, 2020, days after the death of George Floyd, Connecticut Chief Justice Richard A. Robinson wrote:[154]

> The existing imperfections in our justice systems have profound and lasting effects on all of us, but it is more severe on those of us who are the most vulnerable. There is a need for real and immediate improvement. America can - and must - do a better job of providing "equal justice under law," the very words that are engraved on the front of the United States Supreme Court Building in Washington, D.C. [...]
>
> Many of you have heard me talk about race, implicit bias and my own life experiences facing these issues. Many of you have attended Judicial Branch training and programs that were designed to help us deal with these issues in our own lives and in order to fulfill the mission of the Branch to serve the interests of justice and the public by resolving matters brought before it in a fair, timely, efficient and open manner.
>
> I am proud of the work that we have started, but there is so much more to do. I know that I am asking a lot of you. I know that you are tired, you are weary and maybe even rightfully disillusioned, but this is a battle for the nation's soul. We must double and even triple our efforts to provide equal justice for all those whom we serve. We have but two choices: to keep working hard and succeed; or to quit and fail. As for me, the latter is not an option.

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Appendix A: Glossary of Terms

Automatic: one end of a spectrum that captures the nature of a psychological process. Fully automatic processes do not require intention, effort, or conscious awareness in order to be enacted.

Bias: the unintended influence of factors that are not meant to be considered on a final decision or result. Bias can occur either when relevant information does not influence the decision or when irrelevant information influences the decision. The particular situation or legal context surrounding a decision determines which factors are considered relevant or irrelevant.

Conscious: mental processes involving both awareness and volition.

Controlled: one end of a spectrum that captures the nature of a psychological process. Controlled processes require at least some intention, effort, or conscious awareness in order to be enacted.

Cultural inequality: the inequality that is built into our literature, art, music, language, morals, customs, beliefs, and ideology to such an extent that it defines a generally agreed-upon way of life.

Discrimination: differential treatment of, or outcomes for, different people, based on their membership in a particular social group.

Diversity: the presence of individuals who represent a variety of groups or perspectives.

Equality: equal treatment or distribution of resources, regardless of people's needs or starting positions.

Equity: the state that exists when we cannot predict outcomes based on a person's group membership, and outcomes for all groups are improved. Equity often involves the differential treatment of different individuals, based on their needs and starting positions, with the goal that everyone will arrive at the same outcome.

Explicit bias: bias that is measured using an explicit, or direct, measure.

Explicit measures: measures of cognition, affect, and behavior that require participants to self-report their responses. These rely on the assumption that individuals are aware of their responses and are willing to express them.

Implicit bias: bias that is measured using an implicit, or indirect, measure. This technical definition is used by many research scientists today, but it differs from how the term is used in common vernacular. In common vernacular, *implicit bias* and *unconscious bias* are often used synonymously to refer to an attitude, stereotype, or prejudice that a person is unaware of possessing but which may operate automatically to influence thinking or behavior.

Implicit measures: measures of cognition, affect, and behavior that capture participants' responses in ways that do not rely on individuals' awareness or willingness to respond, such as by measuring reaction time to different groups of stimuli.

Implicit social cognition: the scientific field of study that uses implicit or indirect measures in research on attitudes, stereotypes, and self-esteem.

Inclusion: the meaningful involvement of people from different groups, or the extent to which diverse perspectives are incorporated into systems, processes, and decisions.

Institutional inequality: the network of institutional structures, policies and practices that create advantages and benefits for some groups over others. Institutions can include the justice system, schools, media, banks, business, health care, governmental bodies, family units, religious organizations, and civic groups.

Interpersonal inequality: a situation in which inequality manifests at the individual, person-to-person level.

Microaggressions: brief, everyday exchanges that send denigrating messages to certain individual because of their membership in certain groups.

Organizational inequality: the practices, rules and policies of formal organizations (such as corporations or government agencies) that result in different outcomes for different groups.

Prejudice: the emotion, attitude, or evaluation that a person feels about members of a particular social group.

Privilege: an unearned favored state conferred simply because of one's group membership.

Stereotype: beliefs and opinions about the characteristics, attributes, and behaviors of members of a group. When one engages in the act of stereotyping, one assumes that because an individual belongs to a particular social group, the individual must share the characteristics of the group.

Systemic inequality: the combination of a diverse array of discriminatory and inequitable practices in society, including the unjustly gained economic and political power of some groups over others, ongoing resource inequalities, ideologies and attitudes that regard some groups as superior to others, and the set of institutions that preserve the advantages of some groups over others.

Unconscious: mental processes that lack either full awareness or full volition.

Appendix B: Implicit Measures

Researchers use several scientific methods to measure implicit bias.[i] Some of these measures are used as demonstrations of implicit bias in educational settings. There is no implicit measure that is appropriate for use as a diagnostic assessment in professional settings.

Implicit measures rely on the assumption that automatic associations between two concepts (e.g., race and valence) will influence behavior in a measurable way (e.g., reaction time, sweat). Two of the most common classes of implicit measures are (1) the Implicit Association Test (IAT) and other response competition procedures and (2) sequential priming procedures. Each are described in turn.

1. The Implicit Association Test (IAT) and Other Response Competition Procedures

The Implicit Association Test (IAT) is one of the best known implicit measures.[ii] The IAT is considered a *response competition procedure*, an implicit measure that emerged from research on interference effects. Specifically, when a stimulus has multiple different interpretations (e.g., the word "red" is written in green font), the different meanings can lead to competing reactions in a given task (e.g., identifying the color of the word) that can interfere with the respondent's performance on the task.[iii] Response competition procedures take advantage of interference effects by presenting two competing categorization tasks in a single procedure and measuring the disparities in reaction time.[iv]

In the classic IAT, respondents are asked to categorize a sequence of images (e.g., a Black or White face) and words (e.g., good or bad) by pressing one of two pre-labeled buttons on a computer. For example, respondents may be instructed to press the left button whenever they see a Black face or whenever a negative word appears on the computer screen, and to press the right button whenever they see a White face or a positive word. The program systematically varies how the faces, words, and buttons are matched. Because of interference effects, individuals who associate "Black" with "bad," for example, will respond more slowly when "Black" and "good" share the same response button.

The structure of the IAT has also been modified to accommodate a variety of research needs, including a short version (Brief IAT) and comparing a single category of stimuli (Single Category IAT).[v] Other response competition procedures have also gained popularity, including the Go/No-Go Association Task (GNAT) and the Extrinsic Affective Simon Task (EAST).[vi]

Despite its many positive attributes, the creators of the IAT have emphasized that the IAT should not be used as a diagnostic assessment.[vii] This means that an IAT score should not be used to make predictions about an individual's behavior, for example, to inform hiring decisions about that individual or as part of a jury selection process. Part of the reason for this is because the IAT does not meet the scientific standards for predictive validity and test-retest reliability that is required of diagnostic assessments.[viii]

The IAT is primarily used in research studies, but the measure is often completed in educational settings as an interactive exercise intended to illustrate implicit bias. The most common implementation of the IAT requires the use of a computer and a strong internet connection. A variety of IATs (e.g., on gender, sexuality, race, religion, weight, skin tone, age, disability, and more) are available for free at

https://implicit.harvard.edu/implicit/selectatest.html. If participants do not have access to computers, there are several other options for practitioners. Manual adaptations of the IAT can be printed out ahead of time and only require the use of a pencil.[ix] For presentation purposes, the IAT can also be demonstrated as a group exercise, with participants raising either their left or right hand in response to words or photographs presented to the class.

A Note on Educational Uses of the IAT

The Implicit Association Test (IAT) is popular among researchers, educators, and the media, with over 17 million IATs taken on the Project Implicit website between its launch in 1998 and 2015.[x] Because of the popularity of the IAT and free public access to an array of computerized versions of the test, many educators have used it as an interactive demonstration of implicit bias, and many educational participants may be curious about the instrument.

When used in educational sessions, course organizers may ask participants to take the IAT before facilitating a discussion about their experiences taking the test, including what they found surprising and whether the results changed their perspective about the nature of bias.[xi] In this way, the IAT can act as an icebreaker to get participants comfortable thinking and talking about implicit bias and provides them with an example of how automatic associations can alter measurable behavior.

Although most people who take the IAT report having a positive learning experience, some of those who demonstrate implicit bias on the test may not respond as favorably.[xii] Facilitators should frame the taking of an IAT within a broader conversation about individual and systemic biases and discrimination, emphasizing how a person may express implicit bias even if they endorse egalitarian values. Clarifying the science of implicit bias can help overcome some of the barriers caused by mistaken beliefs that one's values and behaviors are always aligned, that the lack of intent absolves a person of responsibility for their actions, and about the role of individual free will vs. the power of the situation.

2. Sequential Priming Procedures

Sequential priming procedures are based on evidence demonstrating that when two concepts are associated in a person's memory, the presentation of one of those concepts facilitates the recall or recognition of the other.[xiii] For example, when people are presented with one concept (e.g., a picture of an apple), they are faster at identifying the next concept (e.g., a picture of a banana) when they associate the two concepts in memory (e.g., as fruits). Evidence suggests priming procedures work even if the primes are flashed on a screen so quickly that they are not consciously detected by the respondent.

One popular procedure for measuring this phenomenon is the evaluative priming task (also referred to as the *bona-fide pipeline*).[xiv] In this task, respondents are briefly presented with a Black or White face immediately before a positive or negative target word appears on the screen. They must then identify, as quickly as possible, the meaning of the presented word as "good" or "bad." In the standard paradigm,

respondents with racial bias more quickly identify negative words as "bad" and more slowly identify positive words as "good" when that word appears immediately after the presentation of a Black face.[xv]

A similar priming procedure, called the Affect Misattribution Procedure (AMP), briefly presents respondents with the prime of a Black or White face before viewing a neutral Chinese character.[xvi] The respondents are asked to evaluate the character as more or less visually pleasant than the average Chinese character. Researchers found that individuals' racial attitudes affected their evaluations of the Chinese characters, with White respondents reporting more favorable ratings for the characters that appeared after White primes compared to Black primes. This effect emerged even when respondents received a forewarning about the influence of the racial primes on subsequent evaluations.

Another priming procedure is the Weapon Identification Task.[xvii] In this task, participants are primed with a photograph of ether a Black or White face and then asked to determine if a photographed object is either a weapon or a tool. In an updated version of this procedure referred to as a "shooter task," respondents are shown images of Black and White targets either holding a weapon or a non-weapon (e.g., a cellphone, a drill). The respondent must quickly decide whether to "shoot" the target by pressing a computer key. Implicit bias is measured by disparities in reaction time and the number of mistakes made by respondents. In comparison to White targets, responders are faster to shoot an armed Black target and slower to not shoot an unarmed Black target.[xviii]

Like the IAT, sequential priming tasks have relatively low predictive validity and test-retest reliability and should not be used as diagnostic assessments.[xix] Many priming procedures require the use of a computer and an internet connection. Some sequential priming procedures like the AMP may be more easily adapted to a paper and pencil format than the IAT because the procedure does not involve measurement of response time.[xx] There are a host of simple priming demonstrations that can be done as icebreakers in educational sessions, such as the Word Fragment Completion (WFC) task, in which people are presented with fragments of words (e.g., POLI_E) and are asked to fill in the missing letters. These word fragments, however, can be completed in stereotypic or non-stereotypic ways (e.g., POLITE, POLICE), and the number of stereotypic word completions in the WFC task has been used as a measure of implicit bias.[xxi] Other priming procedures are more complex, such as experiments that use virtual reality headsets that place the participant in the body of someone of a different race and measure how the participants respond to the virtual world differently in different bodies.[xxii]

A Note on the Use of Technology

As noted above, standard versions of both the IAT and sequential priming procedures require modest resources (e.g., a computer and an internet connection). However, implementation options range from high-tech (e.g., using physiological measurements or a virtual reality headset) to low-tech (using only a paper and pencil).

High-tech implicit measures include physiological and neuropsychological techniques. Physiological measures have been used by researchers to better understand the underpinnings of implicit bias.[xxiii] The physiological study of implicit bias has focused

on autonomic nervous system responses such as the amount of sweat produced, heart rate, and even small facial muscle movements that are nearly imperceptible to the untrained human eye.[xxiv] Some of these physiological measures (e.g., sweat production and heart rate) indicate only when a stimulus (e.g., a photograph of a person) provokes a heightened response; they do not differentiate between positive and negative responses. Other techniques, like facial electromyography, provide a measure of the valence of a reaction because certain bodily responses (e.g., cheek activity associated with smiling or frowning movements) are associated with positive and negative emotions. More recently, neuroscientists have attempted to understand the neural underpinnings of implicit bias by using fMRI machines to measure blood flow in the brain. There is a correlation between the degree of activation in the amygdala region of the brain (which is linked to affective information processing), as measured by fMRI, and scores on the IAT.[xxvi] These techniques are useful for advancing scientific understanding of the physiology of implicit bias, but are not intended for diagnostic assessment.

More recently, researchers have begun using virtual reality technology to measure implicit bias.[xxvii] In these tasks, participants are given virtual avatars from different races and asked to interact with one another in a virtual world. Participants tend to demonstrate reduced bias for outgroup members when using a virtual avatar from another race (as measured by how much the participant imitated the behaviors of outgroup and ingroup members in the virtual reality world). White respondents who take the IAT after playing a virtual reality game with a Black avatar show reduced bias.[xxviii] This suggests there may be some promise in perspective-shifting experiences that allow one to literally (or virtually) walk in another's shoes.

Low-tech implicit measures are often useful as demonstrations of implicit bias in educational settings. While the IAT and sequential priming tasks have paper and pencil versions (as described in the preceding section), there are other implicit measures that are specifically designed to only require paper and pencil. Several of these measures assess attribution processing styles, which show how a respondent uses associations in memory to infer a cause for an observed behavior. One such example is the Stereotypic Explanatory Bias (SEB), which is the tendency to ascribe the stereotype-consistent behavior of minorities to factors intrinsic to the individual (e.g., trait or dispositional attributions like hard work or talent), but stereotype-inconsistent behavior to extrinsic, situational factors (e.g., the weather, luck).[xxix] Similarly, the Linguistic Intergroup Bias is the tendency to describe stereotypic behavior using abstract language (e.g., by ascribing the behavior to a global trait) but non-stereotypic behavior using concrete language (e.g., by describing the behavior as a specific event).[xxx] By carefully examining the respondent's choice of language or agreement with particular summaries of a behavioral event, researchers have used these tendencies as indicators of implicit bias.[xxxi]

Endnotes

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